No. 21-418

In The

Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN CONSTITUTIONAL RIGHTS UNION IN SUPPORT OF PETITIONER

JOHN J. PARK, JR.
Counsel for Amicus Curiae
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioner Joseph Kennedy lost his job as a football coach at a public high school because he knelt and said a quiet prayer by himself at midfield after the game ended. After considering an interlocutory petition in which Kennedy sought review of the lower courts' refusal to grant him a preliminary injunction, four members of this Court observed that "the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future," but concluded that this Court should stay its hand until the lower courts definitively determined the reason for Kennedy's termination. The statement also noted that Kennedy had a then-unaddressed claim under the Free Exercise Clause.

On remand, the lower courts found – and the school district ultimately agreed – that Kennedy lost his job solely because of his religious expression. Yet the Ninth Circuit nevertheless ruled against him again. The court not only doubled down on its "troubling" free-speech reasoning, which transforms virtually all speech by public-school employees into government speech lacking any First Amendment protection, but reached the remarkable conclusion that, even if Kennedy's prayer was *private* expression protected by the Free Speech and Free Exercise Clauses (which it undoubtedly was), the Establishment Clause nevertheless *required* its suppression. The court denied *en banc* review over the objection of 11 judges.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious exercise is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

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INTEREST OF *AMICUS CURIAE*[1]

The American Constitutional Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the First Amendment's protection of the free exercise of religion. Its mission is grounded in the understanding that the first Amendment's Free Exercise clause protects religious expression for people of all faiths. The ACRU has defended the religious expression inherent in the Bladensburg Cross in *American Legion v. American*

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[1] All parties have consented to the filing of this brief by blanket consent. *See* Sup. R. 37.3(a). Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6.

Humanist Ass'n, 139 S. Ct. 2067 (2019).In addition, it wrote in support of a church objecting to the imposition of COVID-19 related limits on its ability to worship. *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-569, cert. denied, 141 S. Ct. 1753 (Mem.) (U.S. Mar. 29, 2021).

SUMMARY OF ARGUMENT

"Courts often confront cases in which statutes and principles point in different directions." *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009). This case is one such case, and it presents this Court with an opportunity to reiterate the guidance that it has previously given when confronted with competing claims under the Free Exercise and Establishment Clause of the First Amendment. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Central Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 296 (1990); *Widmar v. Vincent*, 454 U.S. 363 (1981).That guidance not only distinguishes between the actions of private parties and those of government action. In addition, government must act in a neutral manner, without hostility toward religious exercise because of its religious character.

In a different context, the Court has confronted the tension between the constitutional demand for equal treatment and race-based action and demanded that a "strong basis in evidence" be shown to justify

governmental action. *See*, *e.g*., *Ricci*, 557 U.S. at 563. This Court should subject the Ninth Circuit's analysis of the competing Establishment Clause and Free Exercise Clause claims to review under the "strong basis in evidence standard", and having done so, find the Ninth Circuit's analysis lacking.

ARGUMENT

A. Introduction.

In pertinent part, the First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl.1. The Establishment Clause and the Free Exercise Clause "forbid two quite different kinds of government encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). "The Establishment Clause was designed to keep government out of personal religious exercise, not purge religion from the public square." *Kennedy v. City of Bremerton*, 4 F. 4th 910, 953 (9th Cir. 2021) (Mem.) (R. Nelson, J., dissenting). As Judge O'Scannlain wrote in dissent, "[T]he most basic lesson of the Supreme Court's Free Exercise jurisprudence teaches that when government actions 'target the religious for "special disabilities" based on their 'religious status,' they trigger 'the strictest scrutiny.'" *Id.*, 4 F. 4th at 939 (O'Scannlain, J., dissenting) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

B. The Court has repeatedly allowed room for the Free Exercise Clause to work without interfering with interests protected by the Establishment Clause.

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, the Court held that the University violated a student group's right to free speech when it denied funding because the group had a religious viewpoint. In so doing, the Court rejected the contention that providing public funding to a religious group created an Establishment Clause problem. It explained that the program was "neutral toward religion[,]" noting, "[t]here is no suggestion that the University created [the program] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause." *Id*., 515 U.S. at 840. That neutrality distinguished the University's program from "a tax levied for the direct support of a church or group of churches." *Id*.

More significantly in the context of this case, the program's neutral stance "respect[ed] the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Causes protect.'" *Id*. at 841 (quoting *Bd. of Educ of Westside Cmty. Schools v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)). In fact, "[t]he University has taken pains to disassociate itself from the private speech involved in this case." *Id*. And, any concern that the student group's religious orientation might be attributed to the university was dismissed as "not a plausible fear, and there is no real

likelihood that the speech in question is being either endorsed or coerced by the State." *Id*. at 241-42.

The *Rosenberger* Court built on the Court's 1993 decision in *Lamb's Chapel v. Center Moriches Union Free School Dist*. There, the Court held that the school district violated the free speech rights of an evangelical church and its pastor when it denied them access to its facilities because they had a religious purpose. Again, the Court rejected the contention that granting the church access would violate the Establishment Clause deeming the contention "unfounded." *Id*., 508 U.S. at 395. The Court explained, "The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." *Id*. Thus, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Id*.

The *Lamb's Chapel* Court drew support from the test for Establishment Clause claims set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). That three-part test considers whether the government's policy (1) has a secular purpose; (2) its principal effect cannot be to "advance[] or inhibit[] religion"; and (3) it must not foster "an excessive government entanglement with religion." *Id*. at 612-13. So, too, did the Court in *Mergens* and in *Widmar*. *See* 496 U.S. at 248; 454 U.S. at 271, respectively. The *Rosenberger* Court did not use the *Lemon* test, however, leaving the question how much of

that test remains in effect unanswered. *Cf. American Legion v. American Humanist Ass'n*, 139 S. Ct. at 2080 ("In many cases, this Court has declined to apply the [*Lemon*] test or has simply ignored it.").[2]

In the same way, the Court rejected the contention that the Establishment Clause supported the refusal of a high school to recognize a Christian Club. *Bd. of Educ. of Westside Cmty. Schools v. Mergens*, *supra*. Writing for a plurality of the Court, Justice O'Connor reasoned that the federal Equal Access Act, 20 U.S.C. §§ 4071(a) and (b), created a policy of neutrality, not endorsement. *Id*. 496 U.S. at 248. Drawing on the Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), Justice O'Connor explained that the Act had a secular purpose: "Because the Act on its face grants equal access to both religious and secular speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion." *Id*. at 249 (internal quotation omitted).

While some expenditures of public funds for parochial purposes are invalid, allowing the student

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[2] The only citations to *Lemon* in *Rosenberger* come in Justice Souter's dissent. *See* 515 U.S. at 882 (Souter, J., dissenting) (citing opinions of Brennan, J. and of White, J.); 899 (majority opinion of Burger, C.J.). Neither citation applies the three-part test of *Lemon*. This silence suggests that Judge R. Nelson's assertion that the Court has "effectively killed *Lemon*," has merit and counsels against extending *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). *Kennedy*, 4 F. 4th at 946 (R. Nelson, dissenting) (*Santa Fe* should not be extended as it stems from *Lemon v. Kurtzman* – an ahistorical, atextual, and failed attempt to define Establishment Clause violations) (internal citation omitted).

religious group to use the school facilities did not advance religion. As noted above, the plurality agreed that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech, which the Free Speech and Free Exercise Clauses protect." *Id*. at 250 (plurality op.) (emphasis in original). Justice O'Connor explained, "The proposition that schools do not endorse everything they fail to censor is not complicated." *Id*. Moreover, the school controlled the impression that its actions gave to students because it could make clear that it did not endorse the religious club's activities. *Id*. at 251. The range of nonreligious and religious student groups that use the school's facilities spoke against an endorsement of religion. *Id*. at 252. Finally, there was no risk of excessive entanglement because the role of faculty members was limited. *Id*. at 253.

Justice Kennedy, joined by Justice Scalia, concurred in part and concurred in the judgment. With respect to the Establishment Clause, Justice Kennedy pointed to the lack of any direct benefit to religion. *Id.* at 260 (Kennedy, J., concurring in part and concurring in the judgment). "Any incidental benefits that accompany recognition of a religious club . . . do not lead to the establishment of religion" under the direct benefit test. *Id*. Second, there was no coercion of any student to participate. *Id*. at 261.

In *Widmar v. Vincent*, the Court held that the University of Missouri at Kansas City's refusal to allow a previously registered student religious group to use its facilities. It concluded that the University violated the

student group's First Amendment rights to free speech and association. In addition, applying the three-part test of *Lemon v. Kurtzman*, the Court found that the Establishment Clause did not provide the University with a defense. It explained that the secular purpose and non-endorsement prong were "clearly met." 454 U.S. at 271. As for the effect of allowing the student group to participate, any benefit to religion would be incidental. *Id*. at 273. That conclusion flowed from the open nature of the forum the University created and the variety of nonreligious and religious groups that took advantage of it. *Id*. at 274.

These cases demonstrate that the Free Exercise Clause can allow religious activity without running afoul of the Establishment Clause. Put simply, the governmental actor must act in a neutral fashion, which the Respondent City did not. And, any invocation of the Establishment Clause as a defense should be subject to rigorous and strict scrutiny. *See Trinity Lutheran*, 137 S. Ct. at 2019.

C. In another context, the Court has required an actor to set forth a strong basis in evidence for putting one principle or part of a statute ahead of another one of equal importance.

The Court has reconciled competing constitutional or statutory commands in another context. That context has required reaching a balance between the Fourteenth Amendment's guarantee of equal treatment

and other interest. In that case, the Court has required that parties like Respondent show a "strong basis in evidence" that it had to put one part of a statute or one principle ahead of another.

In *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989), the Court confronted the tension between the equal treatment demands of the Fourteenth Amendment and "the use of race-based measures to ameliorate the past effects of discrimination on the opportunities enjoyed by members of minority groups in our society." *Id.* at 476-77. It held that a racial set-aside program for subcontractors on City projects was not a constitutional remedy for past discrimination. The City's plan required that 30% of the dollar amount of construction contracts awarded by the City be awarded in turn to minority subcontractors. That plan defined minority group members to include "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *See id*. at 478.

Drawing on the plurality opinion in *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267 (1986), the Court pointed to ways in which the generalized claim of past discrimination in the construction industry failed to justify the City's set-aside. First, given the plan's focus on past discrimination in an entire industry, the City's plan "has no logical stopping point." *Id*. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality op.)). Moreover, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id*. at 499. And, "[t]he 30% quota cannot be tied to any injury suffered by anyone." *Id*.

The Court next found that the factual findings of the district court failed to provide a "'strong basis in evidence'" for its conclusion that remedial action was necessary. *Id*. (quoting *Wygant*, 476 U.S. at 277) (plurality op.). Indeed, "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." *Id*. at 500 (emphasis in original). The Court explained that the invocation of a benign or remedial purpose was to no effect given the "suspect" nature of "racial classifications." *Id*. The plan's extension of the benefits of the set-aside to Spanish-speaking, Oriental, Indian, Eskimo and Aleut subcontractors was supported by "*absolutely no evidence*." *Id*. at 506 (emphasis in original). Finally, the Court observed that if the 30% set-aside was designed to help African-American contractors, "one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?" *Id.*

In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Court returned to the strong basis in evidence standard and elaborated on it in holding that the City of New Haven, CT, violated Title VII of the Civil Rights Act of 1964 when it discarded the test results in an unsuccessful effort to avoid disparate-impact liability. The City's effort failed because it could not "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Id*., at 563. In so doing, the Court had to reconcile competing claims under two prongs of Title VII.

As amended, Title VII prohibits both an employer's actions that result in disparate treatment and those that result in disparate impact. In the underlying case, the "City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory, but whether the City has a lawful justification for its race-based action." *Id*. at 580.

The Court explained that, when statutory provisions or principles conflict, its job was to "provide guidance for situations when these two prohibitions [*i.e*., those against disparate treatment and disparate impact] could be in conflict absent a rule to reconcile them." *Id*. It first rejected the contention of Petitioners that disparate treatment always prevailed, reasoning that Congress prohibited both practices.[3] The Court next rejected the contention that the employer "in fact

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[3] Petitioners' contention has merit insofar as disparate impact, standing alone, is not unconstitutional. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp*., 429 U.S. 252 (1977); There, it noted, "our decision last term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id*. at 264-65. In his concurring opinion in *Ricci*, Justice Scalia explained the conundrum, "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). He concluded, "[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to be thinking about how – and on what terms – to make peace between them." *Id*. at 595-96 (Scalia, J., concurring).

must be in violation of the disparate-impact provision before it can use compliance as a defense in a disparate-treatment suit." *Id*. at 580-81. It observed, "Forbidding employers to act unless they know, with certainty, that a practice violates the disparate-impact provision would bring compliance efforts to a complete standstill." *Id*. at 581.

The contrary suggestion, that an employer's good-faith belief that it had to act to avoid disparate-impact liability was sufficient to "justify race-conscious conduct," was no more appealing. *Id*. at 581. The Court noted, "Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate-impact liability. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination." *Id*. A "de facto quota system" could be the result of a good-faith standard. *Id*.

The Court fastened on the "strong basis in evidence" standard as the one to be met before race-based action might survive scrutiny. *Id*. at 582 (citing *Croson*, 488 U.S. at 500). It explained that such a standard left "ample room" for the operation of both parts of Title VII, "allowing violations of one in compliance with the other only in certain, narrow circumstances." *Id*. at 583. "If an employer cannot rescore a test based on a candidate's race, . . . then it follows *a fortiori* that it may not take the greater step of discarding the test

altogether to achieve a more desirable racial distribution of promotion-eligible candidates – absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision." *Id*. at 584.

The Court concluded that the City lacked "an objective, strong basis in evidence" for acting as it did. *Id*. at 585. Indeed, even if the City could make out a prima facie case for disparate-impact liability, such a "threshold showing of a significant statistical disparity, . . . and nothing more – is far from a strong basis in evidence." *Id*. at 587. Likewise, "a few stray (and contradictory) statements in the record" are not enough to create a strong basis in evidence. *Id*. at 591.

The "strong basis in evidence" test guards against governmental overreach. It is consistent with Justice Powell's injunction that when governmental bodies are balancing competing principles or statutory provisions, they must "act with extraordinary care." *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267, 278 (1986) (plurality op.). It should guide this Court's analysis of the competing claims in this case.

D. The Ninth Circuit's concern that allowing Petitioner's private prayers will give rise to an Establishment Clause violation fails these tests.

The Ninth Circuit's analysis of the competing constitutional claims is flawed. There is no strong basis in evidence to support the notion that, by refraining from

suspending Petitioner, Respondent would have violated the Establishment Clause.

At the outset, reliance on *Santa Fe* is misplaced. There, the pregame invocative prayer was the product of a formal District policy. As the Court noted, "These invocations are authorized by a government policy and take place on government property at government sponsored school-related events." *Id*., 530 U.S. at 302. It is that government policy that causes the Establishment Clause problem.

Moreover, the Free Exercise and Free Speech at issue are plainly the actions of a private party, not a governmental body. There is no basis for attributing Petitioner's actions to the City. Indeed, the City could have issued a disclaimer that, by allowing Petitioner's actions, the City "evince[d] neutrality toward, rather than endorsement of, religious speech." *See Mergens*, 496 U.S. at 251. Indeed, it is "[o]nly by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's" prayer. *Kennedy*, 4 F. 4th at 942 (O'Scannlain, dissenting). Given that the City neither fostered nor endorsed Kennedy's prayer, "the mere possibility of such a mistake does not turn private speech into endorsement." *Id*.

There is little basis for a finding of endorsement or entanglement. As Judge Ikuta noted, "BSD took 'pains to disassociate itself from the private speech involved in this case.'" *Kennedy*, 4 F. 4th at 944 (Ikuta, J., dissenting) (quoting *Rosenberger*, 515 U.S. at 841). And, to

the extent that the view of a putatively objective observer is at issue, that reasonable observer "would know that Kennedy's prayer was not 'stamped with [BSD's] seal of approval.'" *Id*. (quoting *Santa Fe*, 530 U.S. at 308). Moreover, high school students should not be underestimated: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250 (plurality op.).

CONCLUSION

For the reasons stated in the briefs of the Petitioner and this amicus brief, this Court should reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOHN J. PARK, JR.
Counsel of Record for Amicus Curiae
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com