No. 21-418

In The Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN CORNERSTONE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The American Cornerstone Institute is a non-partisan, not-for-profit organization founded by world-renowned pediatric neurosurgeon and 17th Secretary of the Department of Housing and Urban Development Dr. Benjamin S. Carson. The Institute's mission is to educate the public on the importance of Faith, Liberty, Community, and Life to the continued success of the United States of America. The protection of religious liberty is a central tenet of the American Cornerstone Institute.

In furtherance of this mission, the American Cornerstone Institute submits this brief in support of the Petitioners.

[1] Pursuant to Supreme Court Rule 37, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. On January 21, 2022, both the Petitioner and the Respondent filed blanket consents to the filing of all amicus briefs.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Yet again, this Court must decide whether the government may tell a person of faith to keep his worship to himself,[2] punish him for his adherence to a religious tenet,[3] or treat him as a pariah when it is otherwise constitutionally obligated to treat similarly situated individuals equally.[4] The frequency with which these cases have arisen is matched only by the cleverness in some instances, and the brazenness in others, of the state entities that have decided to wield their authority to squelch, or at least to minimize, the ability of religious adherents to live out the principles to which they are covenanted. This case is no exception.

According to the Ninth Circuit, Coach Joseph Kennedy's role as a coach, a mentor, and role model to young athletes constricts his otherwise fundamental right to observe the covenant he made with his Creator. So, too, does the broader public's recognition that he is a man of faith who—win, lose, or draw—opts to give thanks at the end of each well-

[2] *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1009 (9th Cir. 2021), *reh'g en banc denied* 4 F.4th 910 (9th Cir. 2021), *cert. granted* 142 S. Ct. 857 (2022).

[3] *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1172 (10th Cir. 2021), *cert. granted* No. 21-476, 2022 U.S. LEXIS 840, at *1 (Feb. 22, 2022).

[4] *See, e.g.*, *Shurtleff v. City of Boston*, 928 F.3d 166, 170 (1st Cir. 2019), *cert. granted* 142 S. Ct. 55 (2021).

fought gridiron contest. In the Ninth Circuit's view, these two facts mean that he may not bow his head and take a knee for thirty-seconds in the presence of any person who might observe him doing so, lest the public somehow confuse his silent and personal prayer with state endorsement of religion.

To state the Ninth Circuit's interpretation of the First Amendment is to perceive the risibility of it. Indeed, the notion that religious liberty decreases as mentorship and public awareness of faith increases is irrational and antithetical to the Constitution. So too is the principle that the further Coach Kennedy's religious-liberty rights shrink the more severe the consequences that the government may impose for his exercise of such rights, including exile from his cherished role as a coach.

In isolation, the lower court's holding makes little sense. But placed in the long and contemptible context of state-based religious-liberty interference, the utility of such a rule becomes more evident. Lamentably, this case is the latest in a very long series in which the faithful have been treated with far less dignity than their secular neighbors by government bodies that exist, as a matter of first principles, to protect preexisting rights, including the right to worship in accord with one's beliefs.

Aggravating the religious-liberty infraction here is the additional contusion inflicted by the Bremerton School District on Coach Kennedy's desire to live out his vocation. That Coach Kennedy has been forced to choose between his covenant with God and his calling as a coach amplifies the dignitary harm that he has experienced. It also

accentuates the extent to which government officials and agencies have opportunity to exploit ambiguities in the Court's First Amendment jurisprudence to repress the exercise of religious faith.

That this Court cannot countenance the Ninth Circuit's broad interpretation of the government-speech doctrine is obvious, and well explained already by Coach Kennedy. Pet'r's Br. 41–47. The Ninth Circuit's error, however, provides an opportunity that this Court should not let slip away. Specifically, it is time for the Court to emphasize the preeminent nature of the First Amendment's Free Exercise Clause, to clarify that government entities and the judiciary may no longer err on the side of suppression of religious exercise in the name of enforcing the Establishment Clause, and to rebuke those who have found crafty ways to skirt the first principles of liberty. Refraining from doing so will perpetuate the ever-lengthening assembly line of religion-restriction cases that this Court is asked to consider every term.

ARGUMENT

I. THE TIME HAS COME FOR THIS COURT TO END OVERT GOVERNMENT HOSTILITY TO RELIGION.

James Madison, long recognized by this Court as "'the leading architect of the Religion Clause of the First Amendment,'" believed that "[b]efore any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe." James Madison, *Memorial and Remonstrance* § 1 (1785), *reprinted in Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947). Accordingly, "every

man who becomes a member of any particular Civil Society" must "do it with a saving of his allegiance to the Universal Sovereign." *Id.* (citation omitted). In other words, "[t]he Religion . . . of every man must be left to the conviction and conscience of every man," and it is not only "the right of every man to exercise it as these may dictate" but also "the duty of every man to render to the Creator such homage, and such only, as he believes is acceptable to him." *Id.* (citation omitted).

Times have changed. Once considered the preeminent natural right by the Founding Generation, free exercise of religion has experienced ever escalating hostility from the individuals to whom consent has been given for governance. The faithful, in turn, have been ostracized, first from the public square, and now, from their livelihoods.

Although this situation provides cause for alarm, it also offers a reason for hope. The idea that thirty-seconds (at most) of silent prayer would cost an otherwise exemplary high-school football coach and mentor his job, solely because his prayer happened to be observed by the public, is chilling. But these bad facts can result in good law. Doing so will require a robust and unequivocal statement from the Court that opponents of the free exercise of religious faith must lay down their arms after a prolonged offensive. Without such a statement, the sordid past described below will remain prologue for future cases.

A. Government decisionmakers throughout the Nation are inflicting wounds on religious liberty at an ever-increasing rate.

For all that the Founders got right about the nature of humanity and the best way to order a Nation, perhaps they mistakenly took for granted the extent to which the plain text of the First Amendment's Religion Clauses would provide a bulwark against religious-liberty opponents. For at least the last fifty years, this Court has recognized that "[g]overnments have not always been tolerant of religious activity." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970). To acknowledge that "hostility toward religion [can] take[] many shapes and forms—economic, political, and sometimes harshly oppressive," *id.*—is perhaps an understatement. Officials who remain hawkish toward religion have fought this war overtly by, *e.g.*, singling out the religious for disfavored treatment.[5] They have fought it indirectly by, *e.g.*, creating and enforcing facially neutral regulations in ways that force religious adherents to act contrary to their firmly held religious beliefs.[6] And they have fought it asymmetrically by, *e.g.*, attempting to regulate and

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[5] *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017).

[6] *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

limit the internal governance of churches and other places of worship.[7]

Simply put, the cases on this Court's free-exercise docket are legion. A brief overview demonstrates both the quantity and antagonistic quality of state-driven religious discrimination.

1. Sometimes government disapproval of religion is unmistakably apparent. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for instance, a Florida municipality achieved what few others have—enactment of a "facially neutral" law so obviously tailored to eradicate disfavored religious practices that this Court dispensed with its typical presumption of good faith for lawmakers. 508 U.S. 520, 533 (1993). The ordinance at issue broadly "punish[ed] whoever . . . unnecessarily . . . kills any animal." *Id.* at 537 (internal quotation marks omitted). State and local officials, however, interpreted the ordinance to ban only animal sacrifices conducted as a part of Santeria religious ceremonies, while allowing secular activities such as hunting, food-based butchering, and using live rabbits to train greyhounds. *Id.* at 537–38.

Context confirmed that the creators of the animal-cruelty ordinance intended that it would only prohibit Santeria religious practices. For example, the ordinance was not adopted until the Santeria church made preparations and publicly announced

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[7] *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

its intention to establish a house of worship, a school, a cultural center, and a museum in the municipality. *Id.* at 525–26. Statements made during city council meetings, moreover, evidenced "significant hostility . . . by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice." *Id.* at 541. Indeed, one councilman declared that devotees of Santeria were "in violation of everything this country stands for," while another noted that in prerevolution Cuba "people were put in jail for practicing this religion." *Id.* This statement triggered applause. *Id.*

The ordinance's selective application, and the hostile context surrounding its enactment, placed beyond peradventure that the ordinance's authors and supporters "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Id.* at 537–38. This, in turn, meant that religiously motivated activity was "singled out for discriminatory treatment." *Id.* at 538. And that, in turn, violated the First Amendment.

While *Church of the Lukumi Babalu* addressed lawmaker-driven religious hostility, more recent jurisprudence has shown how executive-branch agencies charged with enforcing the law can similarly discriminate. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, provides an example of this pernicious practice. 138 S. Ct. 1719 (2018). In that case, the Colorado Civil Rights Commission issued a cease-and-desist order to a baker who declined to bake a wedding cake for a same-sex wedding due to his Christian beliefs. *Id.* at

1726. The Commission did so even though the bakery's proprietor had provided his services without discrimination to any person seeking them, so long as he was not asked to participate in a wedding that his firmly and sincerely held religious beliefs would not allow him to endorse. *Id.* And the Commission did so even though the proprietor was happy to recommend other bake shops that would participate in same-sex weddings.

Echoing the lawmakers in *Church of the Lukumi Babalu*, the Colorado Civil Rights Commission repeatedly excoriated religion, the faithful, and religious liberty. Members of the Commission "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain," which "impl[ied] that religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.* at 1729. They also suggested that people "cannot act on [their] religious beliefs if they decide[] to do business in the state." *Id.* (internal quotation marks omitted). Doubling down on their attack, the Commissioners publicly blamed "discrimination throughout history," slavery, and even the Holocaust on "[f]reedom of religion *and religion*" itself, eventually dismissing religious liberty as a "despicable piece[] of rhetoric." *Id.* (emphasis added).

2. In other instances, state hindrance of religious freedom comes in the garb of a neutrally applicable law that offers no carve-out for instances in which the law infringes upon firmly held religious dogma. Despite their long and unblemished history of offering charitable service to people of all religious and non-religious backgrounds, the Little Sisters of

the Poor experienced a "protracted campaign" designed to force them to provide free contraceptive health care to their employees. *See* The Federalist Society, *Address by U.S. Supreme Court Justice Samuel Alito*, YOUTUBE (Nov. 12, 2020), https://tinyurl.com/2e8ruum7; *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020). The government's relentless insistence that the Little Sisters pay for their employees to "avoid[] reproduction through medical means," a practice the Sisters considered "immoral," *Little Sisters of the Poor*, 140 S. Ct. at 2376 (internal quotation marks omitted), resulted in a costly legal battle that stretched the better part of a decade.

Not to be outdone by the federal government, the City of Philadelphia chose to preclude Catholic Social Services from participating in the City's foster care program due to a purportedly neutral policy of non-discrimination based on sexual orientation. *Fulton*, 141 S. Ct. at 1875–76. Because CSS was unwilling to certify same-sex couples as foster parents, and even though CSS was entirely willing to recommend foster-care services that would certify same-sex couples, *id*. at 1874–75, the City foreclosed CSS from participating in the foster-care system at all, even though the Catholic Church had served the orphaned and neglected children of the City for more than two centuries. At a time when Philadelphia (indeed, the Nation) needed more, not fewer, participants in the foster-care system, the City refused to allow a Catholic charity to participate, even though accepting its help would not result in any fewer same-sex foster couples whatsoever.

3. Finally, in some cases, state-based religious hostility strikes in the form of meddling with a house of worship's structure and governance. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, for instance, the Equal Employment Opportunity Commission brought suit against an Evangelical Lutheran Church and School who sought to terminate a teacher/minister who had threatened to sue the Church, thereby violating the Church's belief that "Christians should resolve their disputes internally." 565 U.S. at 180. In other words, the Agency decided to commandeer the responsibility of determining which Church employees qualified as ministers. *Id*. at 176–78.

B. Courts throughout the Nation are letting these constitutional wounds fester.

Even more disconcerting than the anti-religious sentiment conveyed by lawmakers and enforcers is the imprimatur lent by the federal courts for this species of discrimination. Although this Court decides on the merits approximately one percent of the petitions for certiorari that it considers every year, the last few terms have seen far too many cases in which the actions of circuit courts have provoked the Court's review.

Despite the ministerial-exception principle this Court recognized in *Hosanna-Tabor*, (discussed *supra* at 11), the Ninth Circuit twice declined to apply it, which prompted the Court to reiterate the ministerial-exception's importance in *Our Lady of Guadalupe School v. Morrissey-Berru*. 140 S. Ct. 2049, 2055 (2020). In the two cases resolved by *Our*

Lady of Guadalupe School, teachers at Catholic schools were tasked with, *e.g.*, "the faith formation of the students in their charge each day," *id.* at 2057 (internal quotation marks omitted), and the "integrat[ion]" of "Catholic thought and principles into secular subjects," *id.* at 2059 (internal quotation marks omitted). In one case, however, the Ninth Circuit declined to apply the ministerial exception because, among other reasons, the teacher "did not have the formal title of 'minister,'" lacked formal training, and held herself out to the public as a teacher, not a "religious leader." *Id.* at 2058 (internal quotation marks omitted). In the other, the Ninth Circuit reasoned that the teacher lacked "credentials, training, [and] ministerial background." *Id.* at 2059 (internal quotation marks omitted). In both, the Ninth Circuit bestowed upon itself "warrant to second-guess" the religious school's judgment" and "to impose [its] own credentialing requirements." *Id.* at 2068; *accord id.* at 2069 (Thomas, J., concurring).

Earlier this term, the Court heard oral argument in *Carson v. Makin*, a case in which the First Circuit allowed Maine to foreclose "sectarian" schools from its otherwise generally available tuition-assistance program. 979 F.3d 21, 25 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 2883 (2021). In Maine, high school students who live in districts without a secondary school may attend the public or private school of their parents' choosing, whether inside or outside of Maine. If they choose a private school, these students may receive tuition assistance up to a certain amount. They may choose a school run by a faith-based organization, so long as the school refrains from actually providing any faith-based

instruction. Categorically exiled are schools that are *too* religious—*i.e.*, those that provide *some* instruction regarding tenants of faith.

Stated differently, Maine discriminates *among* religious schools in a way that obligates state officials to quantify how much religion is too much religion. Despite the irrationality of forcing state entanglement with religion in the name of avoiding state entanglement with religion, the First Circuit upheld Maine's discriminatory policy. In the lower court's view, a school's religious status raises no constitutional concerns, while its religious activities convert it into an educational outcast. *Id.* at 32–46. The First Circuit's hair-splitting evidences the extent to which some courts will reach to keep religious liberty at a nadir, even though the Free Exercise Clause "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly, but also the right to *act* on those beliefs outwardly and publicly." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring).

Similarly, the First Circuit recently upheld Boston's denial of a Christian civic organization's request to use a flagpole designated as a public forum to celebrate the civic contributions of Boston's Christian community. *See Shurtleff*, 986 F. 3d at 84. Before the request to fly a Christian flag, Boston had approved each of the 284 applications that came before it. Those allowed included the flags of foreign sovereigns (*e.g.*, Albania, Brazil, Cuba, Ethiopia, Italy, Mexico, Panama, the People's Republic of China, Peru, and Portugal) as well as flags for numerous social and political movements (*e.g.*, the Chinese Progressive Association's flag, the LGBT

rainbow flag, the transgender rights flag, the Juneteenth flag, and the Bunker Hill Association's flag). *Id*. at 83–84.

In other words, Boston chose one out of roughly three-hundred organizations to receive pariah status, and the one outcast happened to be a Christian organization. Despite the facial implausibility of Boston's post-hoc reasons for discriminating against a religious organization, the First Circuit allowed it. *Id.* at 98. Doing so caught this Court's attention, and the case was argued earlier this year.

Finally, after several jurisdictions fallaciously concluded that religious observances would unreasonably aggravate the spread of COVID-19, but that continued operation of liquor stores, bus depots, and acupuncturist offices (among other places) would not, the Second and Ninth Circuits did not hesitate to dole out their respective seals of approval for these discriminatory practices. That, in turn, prompted a series of rebukes from this Court in several memorable cases. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (per curiam). It also provoked an array of lamentations from individuals Justices in cases in which the full Court stayed its hand. *See, e.g.*, *Doe v. Mills*, 142 S. Ct. 17, 18–19 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of application for injunctive relief).

* * *

Court-watchers of faith have been pleased with the frequency in which the Court has corrected some particularly egregious religious-liberty violations blessed by the lower courts.[8] But this Court cannot catch them all. Indeed, many, by virtue of this Court's discretionary certiorari docket, remain entrenched.[9]

II. GOVERNMENT ANIMOSITY TO RELIGION IS ESPECIALLY NOXIOUS WHERE, AS HERE, IT ARISES IN THE EMPLOYMENT CONTEXT.

A. Employees should never have to choose between the dignity of work and the dignity of religious liberty.

As the above discussion illustrates, the mine run of state-imposed religious-liberty restrictions, standing alone, is quite pernicious. The state-action giving rise to this case, however, takes the typical religious-liberty affront and appends an additional dignitary harm. Specifically, when the State forces an employee to choose between his right to worship

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[8] *See, e.g.*, *303 Creative*, 6 F.4th at 1172, *cert. granted* No. 21-476, 2022 U.S. LEXIS 840, at *1 (granting certiorari as to the question "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment").

[9] *See, e.g.*, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209 (2019), *cert. denied, Arlene's Flowers, Inc. v. Washington*, 141 S. Ct. 2884 (2021); *see also, e.g.*, *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060, 1073 (2021) (Yu, J., concurring) (suggesting that attorneys "cannot qualify for the ministerial exception as a matter of law"), *petition for cert. filed* (U.S. Aug. 2, 2021) (No. 21-144).

in accordance with his convictions and the dignity of his work, the injury proliferates.

In this case, for instance, Coach Kennedy's employer, the Bremerton School District, clenched the opportunity to exploit tension that often arises in the government-versus-private-speech divide. As a result, Coach Kennedy, first, received a diktat from the District. Under no circumstances was he to pray after the end of a football game where *any* member of the public could see him and figure out that he was praying—even though it strains credulity to suggest that anyone would construe his silent conversation with God as government endorsement of religion. Unsatisfied with the religious-liberty infraction it had already doled out, the District then informed Coach Kennedy that his kind—those who prioritize a ritual observance of thirty-seconds of gratitude to God—are not welcome among the Bremerton School District workforce.

The vocational disruption experienced by Coach Kennedy bears emphasizing. Work, especially the sort that involves mentoring young adults, bestows dignity on the worker. Loss of work, particularly that which results from a constitutional violation, eradicates this dignity. Echoes of this self-evident maxim, in turn, arise throughout blackletter employment law, particularly those that bar unconstitutional discrimination.

As an initial matter, "[p]rohibitions against employment discrimination reflect a . . . recognition that [certain] principles are threatened by an unequal allocation of power between employer and employee." *Thoreson v. Penthouse Int'l*, 563 N.Y.S.2d

968, 975–76 (N.Y. Sup. Ct. 1990) (citing *Plyler v. Doe*, 457 U.S. 202 (1982)). In other words, by relying on another to provide your livelihood, you place yourself in a bargaining imbalance that can lead to unreasonable (and unconstitutional) orders and demands. "[T]he loss of work experience, training, the continued denial of the ability to earn a living and support a family," as well as "the simple loss of human dignity which results from deprivation of employment because of discrimination" all justify the workplace protections that many people take for granted. *See I. M. A. G. E. v. Bailar*, 518 F. Supp. 800, 810 (N.D. Cal. 1981) (citing *Manhart v. City of L.A.*, 387 F. Supp. 980, 984 (C.D. Cal. 1975)). Indeed, many state workers'-rights provisions and civil-rights acts spotlight the importance of employment that fosters dignity and diminishes the worry of discrimination, particularly on the basis of religious adherence.[10]

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[10] *See, e.g.,* Louisiana Commission on Human Rights, LA. REV. STAT. § 51:2231 *et seq.* ("It is the purpose and intent of the legislature by this enactment . . . to safeguard all individuals within the state from discrimination because of race, creed, color, *religion*, sex, age, disability, or national origin in connection with employment and in connection with public accommodations; *to protect their interest in personal dignity and freedom from humiliation*") (emphases added); Texas Workforce Commission, TEX. LAB. CODE ANN. § 21.001 ("The general purposes of this Act are: . . . to secure for persons within the state, including disabled persons, freedom from discrimination in certain transactions concerning employment, and thereby to *protect the personal dignity* of persons within the state") (emphasis added); Idaho Commission on Human Rights, IDAHO CODE § 67-5901 (stated purpose of Act is "[t]o secure for all individuals within the state freedom from discrimination

Why should the dignity of employment be held in such high regard in most instances, but not when religious liberty is on the line? Here, the excuse offered by the District was the specter of Establishment Clause liability if anyone witnessed Coach Kennedy, on his own and silently, thanking God for the lessons his young athletes had just acquired on the field of competition. This distortion of the fine calibration between the First Amendment's twin religion clauses makes little sense and should never have been endorsed by any court, let alone the Nation's largest appellate circuit. When an employee is forced to refrain from personal worship—unmistakably his own and without any conceivable risk or interruption to his duties—the dignitary harm aggravates, rather than dissipates.

The Ninth Circuit's contrary conclusion cannot be squared either with blackletter First Amendment jurisprudence or with rudimentary employment-law tenets. Contravention of both culminates in the facially unsound result arrived at by the court below. Employees should never be forced to choose between losing their job or losing their freedom to worship as their faith compels them to do so, and this Court should take the opportunity before it to make that principle crystal clear.

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because of . . . *religion* . . . in connection with employment . . . and thereby to protect their interest in personal dignity") (emphasis added); Kentucky Commission on Human Rights, KY. REV. STAT. ANN. § 344.020(1)(b) (Act "extends protection to individuals for *personal dignity and freedom from humiliation* from discriminatory acts by employers") (emphasis added).

B. Misuse of the government-speech doctrine creates a cudgel for religious-liberty opponents.

It bears noting, moreover, that the Ninth Circuit's aberrant conclusion not only increases the risk of incidental religious-liberty violations when government employers with good intentions nonetheless overstep their employees' respective First Amendment rights. It also provides another opportunity for exploitation. As described above, *see supra* at 6–14, hindrance of religious liberty arises in many forms, and some are quite creative. Enemies of religious liberty will surely capitalize on a standard (created by the District and endorsed by the Ninth Circuit) that *any* prayer by a government employee is transmogrified into government endorsement of religion if *any* member of the public witnesses it occurring during work hours.

This Court appreciates that risk. Indeed, it recently observed that the government-speech doctrine is "susceptible to dangerous misuse" of precisely the sort experienced by Coach Kennedy. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). By recasting private speech as government speech, the state gives itself license to "silence or muffle the expression of disfavored viewpoints." *Id.* For that reason, the Court generally exercises "great caution before extending [its] government-speech precedents." *Id.* This caution must increase, rather than decrease, when the protected conduct at issue is religious expression. Notwithstanding the Establishment Clause, it makes little sense for the speech that generally receives the apex of this Court's protection to be the speech most likely

attributable to a government employer. Doing so does, however, provide an additional arrow in the quiver for state-driven repression of religious liberty. *See, e.g., supra* at 6–14.

III. ADMONITIONS FROM THE COURT HAVE ASSUAGED THESE WOUNDS, BUT STRONGER MEDICINE IS NECESSARY.

As discussed above, *supra* at 8–9, this Court recognized the obvious and unconstitutional animosity towards religion when the Colorado Civil Rights Commission described religious objection to same-sex-wedding participation as "one of the most despicable pieces of rhetoric that people can use" *Masterpiece Cakeshop,* 138 S. Ct. at 1729. This Court rightly concluded that the Commission's actions violated the First Amendment. *Id*. at 1729–31. It then remanded the case for resolution in accordance with its opinion. The Court remanded to the Commission because Mr. Phillips' was entitled to a neutral decisionmaker. *Id*. at 1732.

Despite this Court's ruling, the Colorado Civil Rights Commission doubled down. Eighteen days after the Court's *Masterpiece Cakeshop* opinion, the Commission met again. At that meeting, a separate member of the Commission publicly expressed her agreement that religious objection constitutes a "despicable" piece of rhetoric and her disagreement with this Court's resolution. *See* Colo. Human Rights

Commission, Tr. 10:5-9 (Jun. 22, 2018).[11] A third Commissioner went further, stating that she "very much stand[s] behind" the first Commissioner's vitriol and that it made her "proud." *Id.* at 30:2-6.

As of the date of this filing, a separate case remains pending before a Colorado State Appellate Court that involves the same baker. *See Scardina v. Masterpiece Cakeshop Inc.*, No. 2021CA1142 (Colo. App.). That case involves a discrimination claim against the baker arising from his refusal to prepare a gender-transition cake. Despite his win before this Court, the Colorado trial court ruled against him.

Attacks on religious liberty are metastasizing at an ever-increasing rate, even though this Court has consistently (and thankfully) sided with the faithful. Despite *Masterpiece Cakeshop*,[12] *Arlene's Flowers*[13] and *303 Creative*[14] arose. Despite *Hosanna-Tabor*,[15] *Our Lady of Guadalupe School*[16] occurred. Despite *Espinoza*,[17] the Court must decide now decide

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[11] *Available at* https://adfmedialegalfiles.blob.core.windows.net/files/CCRC_PublicSessionTranscript_20180622.pdf (last visited Feb. 28, 2022).

[12] 138 S. Ct. at 1726.

[13] 441 P.3d at 1209.

[14] 6 F.4th at 1172.

[15] 565 U.S. at 180.

[16] 140 S. Ct. at 2055.

[17] 140 S. Ct. at 2276.

Carson.[18] And despite *Matal*,[19] Coach Kennedy is here before the Court.[20]

Although the medicine of this Court's free exercise jurisprudence is strong, the persistent appearance of these cases on this Court's docket, and the spread of those that the Court never sees, suggest that jurisprudential inoculation is now warranted. Without a Court-ordered cease fire, governmental officials, high and petty, will continue to stifle religion, confining religious expression to within the four walls of the church. For that reason, *Amici* implores the Court not only to decide this case in favor of Coach Kennedy, but also to do so in a way that makes crystal clear that religious liberty must be given its preeminent place in our society by all state actors.

Ending where we started, it bears reiterating that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man," and it is not only "the right of every man to exercise it as these may dictate" but also "the duty of every man to

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[18] 979 F.3d at 25, *cert. granted*, 141 S. Ct. at 2883.

[19] 137 S. Ct. at 1758.

[20] *See also Fulton*, 141 S. Ct. at 1875–76; *Roman Catholic Diocese*, 141 S. Ct. at 69; *Tandon*, 141 S. Ct. at 1296; *Little Sisters of the Poor*, 140 S. Ct. at 2376; *Klein v. Or. Bureau of Lab. and Indus.*, 139 S. Ct. 2713 (2019) (vacating Oregon judgment and remanding for consideration under *Masterpiece Cakeshop* where Oregon agency upheld a $135,000 penalty because a family-owned bakery objected on religious grounds to baking a cake for a same-sex wedding); *Hobby Lobby,* 573 U.S. at 702–03.

render to the Creator such homage, and such only, as he believes is acceptable to him." James Madison, *Memorial and Remonstrance* § 1, *reprinted in Everson*, 330 U.S. at 64. At the founding, the Framers purposefully chose to protect the free *exercise* of religion.[21] This Court must be vigilant against governmental officials who would rather a person's freedom of religion be confined within their conscience and no further. This case provides an opportunity for the Court to emphasize that the Founders meant what they said when they did so.

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[21] So, too, did nearly every Founding-era State Constitution. *See, e.g.*, N.Y. CONST. of 1777, art XXXVIII; N.H. CONST. of 1784, pt. 1, art. V; GA. CONST. of 1777, art. LVI; DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RIGHTS of 1776 §§ 2, 3; MD. DECLARATION OF RIGHTS of 1776, art. XXXIII; MASS. CONST. of 1780, art. II; N.C. CONST. of 1776, art. XIX; PA. CONST. of 1776, art. II; R.I. CHARTER of 1663; S.C. CONST. of 1790, art. VIII, § I; VA. DECLARATION OF RIGHTS of 1776, § 16.

CONCLUSION

For the foregoing reasons, the Court should reverse the opinion of the Ninth Circuit.

Respectfully submitted,

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