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 CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are Church-State Scholars with substantial expertise in the Religion Clauses. They submit this brief to explain how Petitioner's conduct—and his arguments here—offend settled precedent concerning religious liberty, freedom of conscience, and religious equality in public schools. A full list of *amici* is attached as an appendix to this brief.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

Although the parties join issue on many fronts, a single fundamental question underlies their disagreements: whether the Court will hold true to precedents "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

Petitioner deploys a series of startling maneuvers to diminish and defeat those precedents. He first presses a restrictive reading of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), while failing to address overwhelming evidence that he and everyone else understood his post-game prayers with students to fall within his duties as a high school football coach. Next, Petitioner treats as virtually irrelevant the balancing-of-interests test required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), instead moving directly

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund its preparation and submission. All parties have consented to the filing of this brief. *See* Rule 37.2.

to strict scrutiny. Finally, throughout these arguments, Petitioner seeks to characterize Respondent's concern for the religious freedom and equality of its students as nothing more than hostility to his own religious practice—a move that turns on its head decades of well-reasoned school prayer jurisprudence.

At bottom, Petitioner's argument amounts to a direct assault on the line of cases originating with *Engel v. Vitale*, 370 U.S. 421 (1962), and continuing most recently through the Court's ruling in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). "As every high-school athlete knows, taking a knee around your coach at the end of the game is both team ritual and instruction." Resp. Br. at 23. If Petitioner can hold habitual, audible, public prayer on the football field with students right after games—making overt sectarian religious declarations to a circle of kneeling students while performing his official duties as a coach in full view of the school community—then disturbingly little remains of this Court's precedents. That is especially true given the unrebutted testimony that students *in fact* experienced religious compulsion.

In this brief, we identify the core constitutional principles undergirding this Court's school prayer jurisprudence; we show that those principles are directly applicable here and would be badly undermined if the Court held that Respondent were forbidden to address Petitioner's conduct; and we explain how Petitioner's arguments would turn settled precedent on its head in a manner that offends the right of religious equality.

As relevant, this Court's cases teach three fundamental lessons. *First*, to protect students' freedom of conscience and religious liberty, the Constitution prohibits even subtle religious compulsion by school officials—and it firmly rejects the notion that students should be forced to suffer and sacrifice to resist such compulsion. *Second*, this understanding is reinforced by the Constitution's commitment to a norm of religious equality, which exists to avoid religious discord and discrimination, and which is violated when public school employees put students to a divisive choice between conformance and exclusion. *Finally*, in applying these principles, the Court has recognized the need for enhanced vigilance at public schools, given the special role that schools play in shaping the citizenry and given that children are uniquely vulnerable to religious pressure by officials, teachers, and coaches.

Here, an accurate understanding of Petitioner's conduct confirms that it squarely implicates every one of these concerns. Holding that Respondent was prohibited from addressing it—and that a balanced effort to protect religious equality for students was instead discrimination against Petitioner—would invert precedent and offend the Constitution. So, too, would Petitioner's alternative suggestion that he be allowed to engage in conduct that undeniably results in religious coercion and endorsement, since the school could issue a press release disavowing support for that result.

The Constitution promises all students rights of religious liberty, freedom of conscience, and religious equality. Petitioner's conduct imperiled those precious rights. The decision below should be affirmed.

ARGUMENT

Petitioner is a public school football coach. He asserts that his public employer is constitutionally forbidden to prohibit him from holding audible, public prayer on the fifty-yard line with students immediately after games. During these post-game prayers, the coach makes repeated, overt, and sectarian religious declarations to a circle of kneeling students, and clutches helmets from the competing student teams. In Petitioner's view, it does not matter that he stands on that field clothed in the power and influence of his public position. He deems it irrelevant that post-game engagement with players is part of his job, and that his conduct had concrete and direct implications for schoolchildren at a school event. It makes no difference to him that students felt coerced to join his prayers because they might otherwise lose opportunities to play. And the school's repeated, good faith efforts to accommodate his beliefs are wholly beside the point.

Petitioner is wrong. Respondent capably shows that neither the facts nor the law justify reversal of the Ninth Circuit's careful, narrow decision.

More fundamentally, Petitioner's position cannot be squared with this Court's school prayer precedents. Those cases define core protections for religious liberty, freedom of conscience, and religious equality in the unique public school setting. The constitutional concerns at the heart of those cases are fully present here—and would be grievously undermined if Petitioner's position were accepted. Those decisions also clarify the basic error in Petitioner's position: it does

not reflect religious hostility, but instead vindicates religious equality, for a school to require that its employees avoid coercing or compelling students (even subtly) to adopt favored religious beliefs or practices. Because that is exactly what Petitioner did here in his capacity as football coach, his claim should be rejected.

I. Protecting Religious Liberty and Freedom of Conscience in Schools

One cold winter morning in 1942, a teacher at a tiny schoolhouse in West Virginia noticed that two students—Marie and Gathie Barnette—were not reciting the Pledge of Allegiance along with their classmates. School policy required all students to recite the pledge. But the Barnette girls (both of whom were Jehovah's Witnesses) believed that pledging allegiance to a flag was tantamount to worshipping a graven image. So they refused to do it. The school responded by expelling them until they changed their minds.

Two years earlier, in a wartime ruling referred to as the "Fall of France" opinion, this Court had upheld compulsory flag salutes in public schools. *See Minersville School District v. Gobitis*, 310 U.S. 586 (1940). Almost immediately, however, several Justices noted unease with that decision. *See Jones v. City of Opelika*, 316 U.S. 584, 623-24 (1942) (Opinion of Black, Douglas, Murphy, JJ.). When *Barnette* arrived in 1943, it afforded a chance to set things straight.

In a deservedly famous opinion, Justice Jackson did exactly that: "We think the action of the local authorities in compelling the flag salute and pledge

transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Speaking to the ultimate issue, and in words that still echo, Justice Jackson added a ringing defense of freedom of conscience: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.*

Barnette has been widely celebrated for its defense of free thought and religious liberty. In powerful terms, it repudiates the tyrannical idea that government can seek to control our minds by scripting our speech. While *Barnette* involved coercion in a most apparent form—a school mandate that students pledge allegiance on pain of expulsion—it spoke more broadly to the perils of state-sponsored compulsion on matters of belief. *See id.* at 641 ("As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be."). In this respect, *Barnette* stands against the varied means by which school officials might improperly induce students to bend their minds or faiths to a favored orthodoxy.

But the story doesn't end there. What followed next brings us to a divergence between pledges and prayers—between political and religious speech—that

illuminates the basis for the Court's heighted vigilance against religious coercion in public schools.

After concluding that the West Virginia Board of Education had violated the Constitution, the *Barnette* Court faced a question of remedy. Unlike in the school prayer cases that followed two decades later, it did not prohibit the offending government speech. Instead, the remedy in *Barnette* was narrow and individualized: Marie and Gathie Barnette (and any other students with an objection to reciting the pledge) were free to exclude themselves from that daily ritual. Put differently, *Barnette* recognized only a right to opt out, or to exclude oneself, from the pledge of allegiance. It did not prohibit teachers from leading their students in a recital of the pledge at the start of the school day.

That remedy was no aberration. Opt-out rights are a common remedy in free exercise cases, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 410 (1963), and in many free speech cases challenging governmental efforts to compel expression, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). This is also true—subject to important limits—when the state seeks to induce adherence to a preferred belief by making it a condition of government benefits. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

By their nature, opt-out rights come at a price: they require thick skin and a willingness to sacrifice. Any child seeking to take advantage of the right recognized in *Barnette* would have to publicly single herself out—risking ostracism if not outright condemnation or bullying. Not every dissenter wants to be a

poster child for the cause. To exercise an opt-out right in a classroom (or on the football field) is to announce oneself as an outsider. That means giving up privacy, anonymity, and social standing. It might also mean alienating teachers—or even fellow students—who control access to educational, academic, and extracurricular opportunities. Putting children to that choice in a school setting, with all its pressures, makes them pay a high price to realize *Barnette*'s lofty promise.

In *Barnette* itself, that price was deemed acceptable: constitutional freedoms aren't always free. So, too, in most cases involving government speech, where rights of refusal are standard fare. This rule reflects the basic orientation of the Free Speech Clause, which contemplates a robust, wide-open marketplace of ideas, and which provides for a system in which government and governed engage in a continuous and sometimes contentious exchange of political views. *See Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.").

But a core premise of this Court's precedents is that the "fundamental dynamic of the Constitution" is different for religion: indeed, "the method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse." *Id.* at 591. Whereas the government is expected to be actively engaged with political discourse, "in religious debate or expression the government is not a prime participant,

for the Framers deemed religious establishment antithetical to the freedom of all." *Id.* Because the government cannot take sides or press an agenda on matters of religion, the presumption tilts against it when school personnel engage students in religious activity (such as prayer) while performing their duties.

This is one major reason why an opt-out right is good enough when the government compels a pledge but isn't good enough when it induces prayer. The structural safeguards of the Establishment Clause prohibit government *ab initio* from taking sides on matters of faith or acting in furtherance of sectarian aims. *See Lee*, 505 U.S. at 591-92 ("[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce"); *School District of Abington Twp. v. Schempp*, 374 U.S. 203, 288 (1963) (Brennan, J., concurring) ("[T]he availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day."). As Respondent accurately observes, "Parents should not have to fear that the messages their children receive in Sunday school will be undermined by competing religious messages Monday morning in English class—or Friday night on the football field." Resp. Br. at 34 (citation omitted).

In school prayer cases, the Court thus prohibits the constitutionally offensive government speech in the first place. This rule avoids subjecting students to

a "cruel dilemma" by "requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity." *Schempp*, 373 U.S. at 289-90. If students were put to that choice, "even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request." *Id.* at 290; *see Lee*, 505 U.S. at 593 (refusing to place "objectors in the dilemma of participating, with all that implies, or protesting"); *Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

These precedents vindicate *Barnette*'s central teaching about the risks of government compulsion in school. When public school personnel engage students in religious activity while on duty, they threaten those students' rights of conscience and religious freedom. Students whose own faiths may still be developing are forced to out themselves with stark displays of disbelief or religious nonconformity—an action that may skew the evolution of their own religious self-consciousness and may come at a heavy educational, social, developmental, and even material price. While these burdens of an opt-out approach are tolerated when the government presses a political message in schools, they exact too great a toll in this setting, where the design of the Constitution presumes against

government participation in religious practice.[2] *See* Resp. Br. at 35 ("Kennedy's practice of incorporating core religious activity into the postgame rituals also burdened students' religious exercise by putting them to the choice between curtailing their participation in a formative high-school activity and joining a religious practice inconsistent with their beliefs.").

Barnette and the principles it secures are thus vital to this Court's school prayer jurisprudence—and to the sensitivity this Court has displayed to shielding freedoms of faith and conscience from the many forms of government compulsion that may occur in schools.

II. Protecting Religious Equality and Equal Citizenship in Schools

The Court's approach to school prayer has also been shaped by the norm of religious equality: "The breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian." *Town of Greece v. Galloway*, 572 U.S. 565, 616 (2014) (Kagan, J., dissenting). This norm has deep roots in our constitutional traditions of equal citizenship. It has played an important role in defining constitutional protections for religious equality. And it further explains why an opt-out right (or, as Petitioner proposes here, the possibility of separate government disclaimers) fails to address the discrimination inherent in religious compulsion by school officials. *See* J. Madison,

[2] When *Barnette* was decided, the pledge of allegiance did not contain "under God," and so it did not involve any potential compelled religious expression by the government.

Memorial and Remonstrance Against Religious Assessments (1785), in 5 *The Founders' Constitution*, at 83 (warning against religious establishment by the state because "[i]t degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority").

Just as *Barnette* crystallized judicial protection for freedom of conscience, so did *Brown v. Board of Education* foreground equal citizenship. In identifying the core evil of segregating children on the basis of race, *Brown* emphasized that it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 494 (1954). *Brown* thus turned on an understanding of the "social meaning of segregation"—the message segregation conveyed to Black students (and to many others) that they were inferior, unequal citizens. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 426-27 (1960); *see also* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 Minn. L. Rev. 1, 10 (2000) ("The state may not adopt policies that express a message of unequal worth; this is what the Equal Protection Clause prohibits.").

Since *Brown*, this Court has repeatedly held that government cannot deny full and equal citizenship based on constitutionally protected characteristics. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015) ("As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that

gays and lesbians are unequal in important respects."); *United States v. Virginia*, 518 U.S. 515, 532 (1996) (holding that excluding women from a publicly funded military college served to "den[y] to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding that laws banning interracial marriages served to "maintain White Supremacy").

That same principle of equal citizenship also grounds Establishment Clause jurisprudence. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) ("[G]overnment speakers are bound by . . . the Establishment and Equal Protection Clauses"); Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 Ariz. L. Rev. 46 (2021).

In the realm of religious belief, "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *see also Bd. of Educ. of Kiryas Joel School District v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."). This follows from the rule that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also id.* at 245 (observing that true religious freedom for all "can be guaranteed only

when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations").

Consistent with that precept, the constitutional norm of religious equality is violated when officials exercise power with the intent to subordinate a particular religious group. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting) (warning that the Court's ruling "tells members of minority religions in our country that they are outsiders, not full members of the political community" (cleaned up)).

As Justice Kagan has explained, however, the norm of religious equality extends beyond a prohibition on sectarian discrimination. It arises from a broad promise that all who live here "may worship in their own way, without fear of penalty or danger." *Town of Greece*, 572 U.S. at 615 (Kagan, J., dissenting). And the Constitution "makes a commitment still more remarkable—that however those individuals worship, they will count as *full and equal American citizens*." *Id.* (emphasis added). "A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government." *Id.* In this respect, the First Amendment guarantees that "every citizen, irrespective of her religion, owns an equal share in her government." *Id.* at 616.

No less than *Barnette*'s vision of religious liberty and freedom of conscience, the norm of religious equality is central to this Court's school prayer cases.

When public school employees involve students in religious activity—whether in the classroom, the auditorium, or on a football field—they "tend[] to destroy the equality of the pupils which the constitution seeks to establish and protect." *Schempp*, 374 U.S. at 292 (Brennan, J., concurring). An on-duty coach who gathers groups of students to pray in the middle of the football field sends a very clear message—understood by every student—about religious belief and what it takes to belong. Students who decide not to join may fear being seen (and treated) as second-class citizens, a dilemma that no public employee is entitled to force on schoolchildren. *See Santa Fe Indep. School District v. Doe*, 530 U.S. 290, 312 (2000) ("[T]he school may not force this difficult choice upon these students[,] for it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." (cleaned up)).

This concern is rooted in lived experience and constitutional principle. Prayer is "a big deal." *Town of Greece*, 572 U.S. at 636 (Kagan, J., dissenting). "A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world." *Id.* Because prayers "express beliefs that are fundamental to some, foreign to others," they "carry the ever-present potential to both exclude and divide." *Id.* When public school officials involve students in prayer, they put everyone involved to a choice between conformance and exclusion—a choice that is itself unavoidably destructive of equal citizenship and

offensive in ways that strike to a person's very identity. *See* Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 Iowa L. Rev. 347, 387 (2012).

Of course, this unwelcome dilemma imposes special burdens on a student who does not share the majority's faith: to avoid blasphemy and preserve her own religious freedom, she must "make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the [school officials] responsible for the invocations." *Town of Greece*, 572 U.S. at 621 (Kagan, J., dissenting). Such tortured choices bring "religious differences to the fore." *Id.* They also transform schools into an "instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government." *Id.*[3]

Avoiding such religious disunion is a prime directive of the Religion Clauses. "[A]nguish, hardship

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[3] *See also Herold v. Par. Bd. of School Dirs.*, 136 La. 1034, 1050 (1915) ("The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done."); *Weiss v. Dist. Bd. of School District No. 8*, 44 N.W. 967, 975 (Wis. 1890) ("When . . . a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult.").

and bitter strife . . . occur when the government weighs in on one side of religious debate." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting) (cleaned up). To avoid those ends, the Constitution prohibits their beginnings: the government "common to all" cannot become "embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 228 (1948) (Frankfurter, J., concurring). In the school prayer context, the Court has effectuated that principle—and secured religious equality—by prohibiting even subtle compulsion.

From *Engel* and *Schempp* through *Lee* and *Santa Fe*, the Court has defined principles essential to preserving religious equality. Departing from those precedents would allow public employees to force upon religious minorities "that most crippling of thoughts: 'I do not belong here.'" *Schuette v. BAMN*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting). That message, in turn, risks inflaming religious discord in the minds of the next generation. *See* Steven K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine* (2012).

III. The Need for Enhanced Protections in Public School Settings

It is no coincidence that *Barnette* and *Brown* both arose from public schools. Children spend half of their waking hours in school, developing their identity—their very sense of *self*—within that public institution and the social and educational community it

provides. Public schools are thus among our society's principal institutions for inculcating civic values and shaping tomorrow's citizens. *See McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."). But with power comes responsibility: children are impressionable and ill-equipped to resist compulsion, whether overt or indirect, especially when school personnel misuse their authority in ways that signal favor for certain religious practices (and that necessarily disfavor those who do not embrace them). This Court's school prayer jurisprudence rests on a frank, clear-eyed recognition of these educational realities—and a commitment to avoiding a betrayal of the trust we place in public schools to shape the next generation.

"Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people[.]" *Lee*, 505 U.S. at 598. While education on matters of faith and spirit is reserved for other spheres, including family and religious community, public schools are not value-free zones. Indeed, because they are the "primary vehicle for transmitting the values on which our society rests," *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (cleaned up), they are a "vital civic institution for the preservation of a democratic system of government," *Schempp*, 374 U.S. at 230 (Brennan, J., concurring). A healthy democracy must instill constitutional values in its youth; children who internalize such values become citizens who embody them. Of course, those constitutional values include religious equality and freedom of conscience.

Public school employees are therefore charged to take special care in conveying messages—including through their own conduct while on duty—about good citizenship in a pluralistic society. As Justice Jackson explained in *Barnette*: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S. at 637. Simply stated, "[s]chools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe v. Renfrow*, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of petition for a writ of certiorari); *see also* Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* 5, 12 (2018).

Those principles include valuing independent thought and rejecting spiritual or ideological indoctrination of our youth. *See Tinker v. Des Moines Indep. Cmty. School District*, 393 U.S. 503, 514 (1969). As this Court has explained, "the Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up); *see also Morse v. Frederick*, 551 U.S. 393, 445 (2007) (Stevens, J., dissenting) (affirming the "constitutional imperative to permit unfettered debate, even among high school stu-

dents"). By exposing today's students to diverse opinions and practices, schools ensure that tomorrow's citizens grasp that being American does not require adherence to any single favored orthodoxy. *See Lee*, 505 U.S. at 591-92; *Engel*, 370 U.S. at 430-31; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (state lacks power to "standardize its children"); *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (state is forbidden to "foster a homogeneous people").

In this light, if public school officials convey the message that some students are inferior to others based on a core aspect of individual identity (such as religious belief or lack thereof), they risk doing lasting damage to everyone present—and to democracy itself. Students who share the official's beliefs, and happily join in his religious practice at school, may learn that their religion is favored and that it's okay for the state to subordinate or disrespect other faiths. Students who do not share the official's beliefs may come to fear (reasonably) that they live in a society where their religious freedom and equality of citizenship are forever in doubt. And other school officials may come to think that they can bring their own religious practices into student life, sowing further religious division and bringing governmental power that much closer to defining students' spiritual and religious development. All of these beliefs are corrosive to the foundations of our democratic society: students absorb important values at school, and "[t]he values they learn there, they take with them in life." *New Jersey v. T.L.O.*, 469 U.S. 325, 386 (1985) (Stevens, J., concurring in part).

The importance of holding true to constitutional precepts of religious freedom and equality in schools is magnified by schoolchildren's susceptibility to subtle coercive pressure. As this Court has recognized, when school officials engage in conduct that signals second-class citizenship and outsider status, the ensuing (and very real) pressures may overbear a child's will. This is true even in the absence of a threat of formal penalty, because of the inherent power of school officials over students. And even if a specific child does not succumb to pressure by changing activity, they deserve protection from being improperly pressured in the first place. *See* Alan Brownstein, *Constitutional Myopia: The Supreme Court's Blindness to Religious Liberty and Religious Equality Values in* Town of Greece v. Galloway, 48 Loy. of L.A. L. Rev. 371, 404-07 (2014).

That understanding is not unique to Establishment Clause jurisprudence. Time and again, the Court has interpreted the Constitution with an understanding that children are different. This reality has shaped sentencing and capital punishment doctrines, which recognize that children "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *see also Miller v. Alabama*, 567 U.S. 460, 472-73 (2012); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). It has also affected application of Fourth and Fifth Amendment rights. When authorities interrogate a child, age must be accounted for in assessing whether the child is in "custody," since "children are most susceptible to influence and outside pressures." *J.D.B. v. North Carolina*, 564 U.S. 261,

275 (2011) (cleaned up). When authorities subject children to strip searches, youth is also relevant to the analysis: "adolescent vulnerability intensifies the patent intrusiveness of the exposure." *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 375 (2009).

So too here: "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592 (collecting cases).

The facts of this case exemplify the point. "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'" *Santa Fe*, 530 U.S. at 311 (citation omitted). "High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause." *Id.* at 312. For this reason, many students feel a strong desire (or a social obligation) to attend. *See id.* (noting that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention"). In fact, some students—"such as cheerleaders, members of the band, and, of course, the team members themselves"—may be *required* to attend home football games in order to receive school credit. *Id.* at 311.

Accordingly, the pressure for students to attend football games is immense. And no figure is more important at those games than the coach—especially to the football players themselves, for whom the coach is a powerful and influential figure who often controls not only sought-after playing time, but also access to scholarships and job opportunities that can define a student's future. *See* Resp. Br. at 43 ("The public official who mattered to students was not sitting in District headquarters; he was kneeling at midfield.").

Petitioner was well aware of this. As his lawyer remarked below, "The young men on the team are looking up to the coach." JA368. Petitioner described himself as a "mentor and role model," JA323, and agreed that his behavior at football games was "always setting some kind of example to the kids," JA327.

So imagine the pressure that every student felt when the coach decided to transform the immediate post-game moment into a sectarian religious prayer ceremony—one in which he did not pray privately, but rather convened a circle of kneeling students on the fifty-yard line and delivered audible religious exhortations to them (mixing thanks to god with motivational guidance) in full view of the assembled school crowd. Would any student honestly believe the point that Petitioner and his lawyers press here—namely, that he was acting in a "private" capacity, rather than an as on-duty coach engaging with his players right after a game? Would any student doubt that their participation or lack thereof could count against their future playing opportunities and team standing? Would any student wonder if the school—which had hired the

coach and vested him with the authority by sole virtue of which he was present on the field—was willing to endorse or at least allow this religious pressure?

In answering such questions, precedent secures religious equality and upholds religious freedom by instructing that we "reach[] past formalism." *Lee*, 505 U.S. at 595. Guided by common sense, it is readily apparent that Petitioner's conduct was neither private nor inoffensive, but rather coercively put students to the very religious dilemma that the Constitution rightly forbids. *See id.* at 592 ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."). Any doubt on that score is dispelled by the evidence that parents complained about *precisely* such religious compulsion.

"America's public schools are the nurseries of democracy." *Mahanoy Area School District v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2046 (2021). For good reasons, including the health of our pluralistic society, the Court has stood vigilant against religious coercion of children in that government-controlled setting. But Petitioner invites the Court to stray from that path. He would forbid schools from acting where their employees engage in conduct that fully implicates every concern at the heart of the Court's school prayer precedents. That request should be rejected: it rests on a rejection of precedent, a distortion of the facts, and an openness to majoritarian religious pressure in public schools that this Court has decisively repudiated.

* * * * *

Petitioner frames this case as a vindication of religious liberty. It is anything but that. He has every right to engage in genuinely private, personal prayer at school. But he has no right to convene an audible, public prayer circle with students in the middle of the football field—and in full view of still more students—while performing his official duties as coach immediately after games. A football coach's traditional duties squarely encompass post-game exhortations; they do not encompass proselytizing or praying with students, some of whom may not share the coach's faith or his desire to pray in that specific manner or moment. This conduct puts students to a cruel dilemma, splitting them along religious lines and burdening their rights to religious liberty and equality while at school. Under the Constitution, a student who considers joining the football team should not have to weigh their willingness to engage in the coach's favored religious practices as the continued price of full participation.

If accepted, Petitioner's position would sharply undermine this Court's precedents. His narrow view of *Garcetti* is at odds with the record in this case and the language of that opinion. *See* Resp. Br. at 21-27. His disregard of *Pickering* risks confusion and uncertainty for government employers nationwide. *See id.* at 44-47. His insistence that a proper concern for the Establishment Clause is tantamount to religious hostility would turn the Court's jurisprudence upside down. His claim that schools must allow coaches (and teachers) to engage in audible, sectarian, public prayer with students on school grounds during school

events—and that schools can respond only with generic statements disavowing an intent to coerce or endorse—defies the logic and holding of every leading case on this subject. And the novel position he urges here would endanger the rights of students nationwide while sowing religious conflict and anger.

The Court should not subject its own precedent to such rough treatment, particularly where a party so vigorously distorts the record of their own conduct and presses a rule at odds with core constitutional values.

CONCLUSION

Amici respectfully submit that this Court should affirm the judgment below.

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APPENDIX

APPENDIX

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