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 *AMICI CURIAE* OF ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, BILLY GRAHAM EVANGELISTIC ASSOCIATION, NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, CONGRESSIONAL PRAYER CAUCUS FOUNDATION, SAMARITAN'S PURSE, ANGLICAN CHURCH IN NORTH AMERICA, LUTHERAN CHURCH—MISSOURI SYNOD, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, THE NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, AND VETERANS IN DEFENSE OF LIBERTY,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. Teachers, Like Students, Do Not Shed All Their Constitutional Rights at the Schoolhouse Door 8

II. A Teacher's Speech and Free Exercise Rights Cannot Be Abridged Because Students and Others Voluntarily Exercise Their Own Rights Alongside Him 13

III. Free Exercise and Assembly Rights Cannot Be Vetoed by a Third Party Experiencing an Unsubstantiated Fear of Repercussion for His Nonparticipation 15

IV. The Ninth Circuit Improperly Pitted the Establishment Clause Against the Free Exercise Clause 16

A. On This Record, No Objective, Reasonable Observer Could Believe the School Endorsed the Coach's Religious Exercise 16

B. The "Endorsement" Test May Not Properly Be Used to Disallow a Neutral Accommodation of the Free Exercise of Religion 19

1. The Text of the Establishment Clause Allows Laws About Religion, Just Not Those About "an *Establishment* of Religion" 20

2. The Founders Passed Laws Encouraging and Endorsing Religion .. 22

3. Ample Precedent Supports That the Establishment Clause Does Not Conflict with the Free Exercise Clause When the Government Acts Neutrally 24

CONCLUSION..... 27

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Am. Legion v. Am. Humanists Soc'y,
139 S. Ct. 2067 (2019) 20

Bd. of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990)..... 12, 16-17, 19, 27

Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989).... 20

Cox v. La., 379 U.S. 536 (1965) 15

DeJonge v. Ore., 299 U.S. 353 (1937) 15

EEOC v. Abercrombie & Fitch Stores, Inc.,
575 U.S. 768 (2015) 18

Engel v. Vitale, 370 U.S. 421 (1962)..... 9

Epperson v. Ark., 393 U.S. 97 (1968) 26

Espinoza v. Mont. Dept. of Rev.,
140 S. Ct. 2246 (2020) 17-18, 22, 25

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 25

Garcetti v. Ceballos, 547 U.S. 410 (2006)..... 9, 27

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) 27

Gregory v. Chicago, 394 U.S. 111 (1969)..... 15

Hague v. CIO, 307 U.S. 496 (1939) 15

Ill. ex rel. McCollum v. Bd. of Educ.,
333 U.S. 203 (1948) 26

Kennedy v. Bremerton Sch. Dist.,
139 S. Ct. 634 (2019) 11, 14, 18

Kennedy v. Bremerton Sch. Dist.,
991 F.3d 1004 (9th Cir. 2021) .....*passim*

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Lane v. Franks, 573 U.S. 228 (2014)..... 9, 14, 27

Lynch v. Donnelly, 465 U.S. 668 (1984) 26

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Matal v. Tam, 137 S. Ct. 1744 (2017) 15

Mitchell v. Helms, 530 U.S. 793 (2000)..... 25

Pickering v. Bd. of Educ. of Twnshp. High Sch. Dist., 391 U.S. 563 (1968) 14

Presiding Bishop v. Amos, 483 U.S. 327 (1987)..... 26

Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) 17

Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819 (1995)..... 19

Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 9

Sch. Dist. of Abington Twnshp. v. Schempp, 374 U.S. 203 (1963) 9

Tandon v. Newsom, 141 S. Ct. 1294 (2021) 17

Tex. v. Johnson, 491 U.S. 397 (1989) 15

Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503 (1969) 9, 12, 15, 27

Town of Greece v. Galloway, 572 U.S. 565 (2014) 15, 20, 22

Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017) 18

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Widmar v. Vincent, 454 U.S. 263 (1981) 19

Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986) 25

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 25

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 25

Zorach v. Clauson, 343 U.S. 306 (1952) 14, 26

Constitutional Provisions

U.S. Const.

amend. I 21

art. I, § 3, cl. 6 21

art. II, § 1, cl. 8 21

art. VI, cl. 3 21

Statutes

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Col. 3:17, NIV 10

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INTERESTS OF THE *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **Billy Graham Evangelistic Association** (BGEA) was founded by Billy Graham in 1950, and continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. Thus, it is concerned whenever government acts to restrict and inhibit the free expression of the Christian faith those activities represent.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday American women whose views are not represented by the powerful elite.

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

The **Anglican Church in North America** (ACNA) unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally. With God's help, the ACNA is determined to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given, inalienable human right to free exercise of religion.

The **Lutheran Church—Missouri Synod** (Synod) is an international Lutheran denomination headquartered in St. Louis, Missouri. It has more than 6,000 member congregations, 22,000 ordained and commissioned ministers, and nearly 2 million baptized members throughout the United States. Additionally, the Synod has numerous Synodwide related entities, two seminaries, six universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country. The Synod has a keen interest in religious liberty and the preservation of all First Amendment protections and fully supports safeguarding the free exercise of religion for all.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen

advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Washington, seek to ensure that First Amendment freedoms are protected in all places.

The **Pacific Justice Institute** (PJI) is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other

organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

Veterans in Defense of Liberty is a national advocacy group of veterans dedicated to restoring and sustaining the original moral and constitutional principles of our Republic. Members continue to serve with the same passion and dedication to our country as we did in combat; we continue to honor our sacred oath to support and defend the Constitution of the United States; and we act with a heightened sense of continued duty to ensure that the sacrifices of our brethren who did not come home were not made in vain. We did not "solemnly swear," 10 U.S.C. § 502—a life-long pledge which still ends with, "So help me God"—merely to defend a piece of paper enshrined in our collective history; we also pledged to defend the society and culture it has established and guided for over two centuries. Religious liberty, like national security, is a veterans' issues.

SUMMARY OF ARGUMENT

A simple thought experiment demonstrates the inherent bias against religion shown by the Ninth Circuit in this case. Consider whether an objective, reasonable observer would understand a coach to be expressing his own or the school's speech in the following two situations: (1) the coach during the playing of the national anthem is the only one to take a knee; and (2) the coach after the game stands astride the 50-yard line with his head bowed and lifts his

right arm with a clenched fist. Reasonable observers would see these events as purely personal expressions, and, hopefully, a public school would accommodate a coach's right to make these individual, *political* statements. Coach Kennedy's conduct here of kneeling and bowing his head at the 50-yard line after a game is of the same ilk—except that his speech and conduct were *religious*, rather than political. The school's punishment of the coach because his symbolic speech was *religious* should not be countenanced.

The Establishment Clause does not override or excuse this discrimination. The Ninth Circuit rather remarkably asserts that the school's censorship of the coach's speech and religious exercise is permissible because he generated publicity and some in the community, including a few sympathetic students, protested the school's action by joining him on the field. According to the Ninth Circuit, the Establishment Clause required the school to stop the coach's practice and punish him for continuing to exercise his rights because, to do otherwise, it would have "endorsed" his religious exercise.[2]

This cancelling of the Free Exercise and Free Speech Clauses by means of the Establishment Clause doesn't work. Instead, it dramatizes a wrongheaded view of the Establishment Clause that this Court should correct. Coach Kennedy's genuflection at the 50-yard line was private conduct, and others joining the coach voluntarily and without school encouragement did not convert it into action attributable to the school. In such situations, the Free

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[2] *See Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1016-19 (9th Cir. 2021) ("*Kennedy III*").

Exercise and Establishment Clauses do not conflict; they do not leave to judges an unguided discretion to decide which constitutional clause trumps the other.

ARGUMENT

The Ninth Circuit's decision sets a precedent that strikes at teachers' fundamental freedoms of speech, religious exercise, and assembly. It should not be allowed to generate further confusion in our public schools.

I. Teachers, Like Students, Do Not Shed All Their Constitutional Rights at the Schoolhouse Door

This case began because the school objected to the coach kneeling with head bowed at the 50-yard line after a game. He could not be heard, but observers, including school officials, assumed he was doing something motivated by his religion, which he later confirmed.

As an initial matter, it is patent that religious discrimination is *the* prime motivator in this case. If the coach had taken a knee when standing with his student players on the sideline during the national anthem, or if he had walked to midfield after a game, bowed his head, and raised his fist in the air, his speech would have been understood as political, and it beggars the imagination to think that the school's reaction would have been to censor it.

The religious speech involved here is very different than speech found to be properly attributable to the

government in *Garcetti v. Ceballos*,[3] on which the Ninth Circuit principally relied.[4] In particular, Kennedy's action was not required by any of his official coaching duties, and it was not something the school had requested him to do. Thus, the Ninth Circuit, instead of faithfully applying *Garcetti* and similar cases, misused them.[5] This Court has repeatedly admonished that a government employee does not shed all his First Amendment rights just because he is "on the government clock."[6] The Ninth Circuit essentially held the opposite.[7]

The decision below assumes a religious person may toggle his faith on and off at will. Under this view, there is little burden when one is compelled to wholly internalize religious beliefs and practices when in a secular workplace.[8] But that is not an accurate view of either the human psyche or religious demands: Jews wear a yarmulke in public, Muslim women

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[3] 547 U.S. 410, 421-22 (2006).

[4] *Kennedy III*, 991 F.3d at 1015-16.

[5] The fact that this was private, not government-sponsored, action, also distinguishes this case from *Engel v. Vitale*, 370 U.S. 421 (1962) (dealing with school-sponsored prayer to be said in class by students); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (dealing with devotional Bible reading required by the state in classrooms); and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (dealing with school-sponsored prayer before football games over PA system).

[6] *See, e.g., Lane v. Franks*, 573 U.S. 228, 236-37 (2014); *Garcetti,* 547 U.S. at 417-19; *Tinker v. Des Moines Ind. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969).

[7] *See Kennedy III*, 991 F.3d at 1014-16.

[8] *See id.* at 1016 (criticizing Coach Kennedy for making his grievance known publicly).

similarly wear a hijab, and the New Testament enjoins Christians to do "*all* in the name of the Lord Jesus, giving thanks to God the Father through him."[9] The circuit's dualistic view not only is antithetical to the First Amendment's protection of the free exercise of religion, of speech, and of assembly;[10] it is also contrary to the common practices and teachings of many religions.

For a teacher, actions exhibiting the free exercise of religion may include wearing an armband protesting the death penalty for theological reasons, wearing a necklace with a crucifix, having a Bible at one's desk, silently reading the Qur'an while proctoring a test, having a bumper sticker depicting church affiliation on one's car in the school parking lot, bowing one's head to say grace in the cafeteria, hanging a favorite scripture verse on one's office wall, attending a student-led religious club, and explaining one's personal religious viewpoint on a curriculum-relevant subject matter when asked.[11] Despite claims

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[9] Col. 3:17, NIV (emphasis added).

[10] *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 930 (9th Cir. 2021) ("*Kennedy IV*") (O'Scannlain, J., statement on denial of *en banc* rehearing).

[11] *See Kennedy v. Bremerton Sch. Dist.,* 139 S. Ct. 634, 636-37 ("*Kennedy II*") (Alito, J., statement re denial of pet. for cert.). Both the Clinton and Trump administrations approved some of these teacher expressions of religious belief in guidelines for federal workers. *See* Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, § l(A) (Aug. 14, 1997), https://clintonwhitehouse4.archives.gov/WH/New/html/19970819-3275.html (last visited Feb. 15, 2022), *cited and approved in* 10/6/17 DOJ Mem. for All Exec. Agencies, https://www.justice.gov/opa/press-release/file/1001891/download at 6-7, 10a-11a

to the contrary,[12] the Ninth Circuit's rationale makes unconstitutional all these commonplace behaviors when done by teachers, some of which have been expressly protected by congressional statute or

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(listing examples from the Clinton Guidelines of keeping a Bible or Qur'an on her private desk and reading it during breaks and displaying religious messages on clothing or wearing religious medallions visible to others) (last visited Feb. 15, 2022). *See also* U.S. Dept. of Educ., Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools, https://www2.ed.gov/policy/gen/guide/religionandschools/prayer_guidance.html (Jan. 16, 2020) (last visited Jan. 29, 2022). This guidance, issued pursuant to § 8524(a) of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. § 7904(a)), and various executive orders, states with respect to teachers as follows:

> When acting in their official capacities as representatives of the State, teachers, school administrators, and other school employees are prohibited by the First Amendment from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers, however, may take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Teachers also may take part in religious activities such as prayer even during their workday at a time when it is permissible to engage in other private conduct such as making a personal telephone call. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies or similar events.

[12] *See Kennedy III*, 991 F.3d at 1015-16.

specifically held to be constitutional by this Court.[13] For example, in *Board of Education of Westside Community Schools v. Mergens*,[14] this Court upheld provisions of the Equal Access Act[15] that require religious clubs to have the same privileges as other student clubs in public secondary schools, along with teacher supervision of the gathered students. Coach Kennedy's conduct is even more attenuated from official work duties than these examples, in that he acted after a game, without directing his speech or conduct toward any particular audience, without anyone in compulsory attendance, without his inviting anyone, and on an outdoor field open to the entire public (not just students and other school employees).

The Ninth Circuit reasoned that, because the coach *could have* required students to attend a post-game motivational talk, his silent prayer was government speech.[16] If that were the test, it would effectively sweep away all speech rights of teachers when they are "on the clock," as they presumably can always require obedience from students during official school activities. But that is contrary to this Court's rulings that, even during normal school hours and in the classroom, teachers retain their free speech rights to a significant degree.[17]

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[13] *See Kennedy IV*, 4 F.4th at 940 (O'Scannlain, J.).
[14] 496 U.S. 226 (1990).
[15] 20 U.S.C. §§ 4071-74.
[16] *Kennedy III*, 991 F.3d at 1015-16.
[17] *See, e.g.*, *Tinker*, 393 U.S. at 506 (secondary school setting); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (university setting).

II. A Teacher's Speech and Free Exercise Rights Cannot Be Abridged Because Students and Others Voluntarily Exercise Their Own Rights Alongside Him

The Ninth Circuit justified the school's retaliation against the coach's religious exercise by pointing out that, after it became known that the school was trying to shut down the coach's post-game prayer, several players from both teams, and later some members of the public, joined him on the field.[18] This does not alter the character of the coach's private exercise of religion. Moreover, the Ninth Circuit ignored the force of the Assembly and Speech Clauses.

That others began to join the coach did not somehow turn this private event into "state action." All who joined did so voluntarily, without any request or encouragement by the school.[19] Indeed, it was the very fact that the school was attempting to prohibit the coach's action that attracted others, who joined the coach to show their solidarity with him and their opposition to the school trying to shut him down. The rule simply cannot be that others, by exercising their own First Amendment rights of speech and assembly to show their support for another individual's exercise of his rights, somehow convert that person's initial expression from licit to illicit. This was a private gathering of like-minded individuals, and that gathering was itself shielded by the First Amendment protections of religion, speech, and assembly.

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[18] *Kennedy III*, 991 F.3d at 1017-18.
[19] *Id.* at 1110.

The Ninth Circuit ignored those complementary constitutional rights and turned to another First Amendment provision, finding a prohibited "establishment" of religion. But in doing so it contradicted *Zorach v. Clauson.*[20] In *Zorach*, this Court rebuffed an Establishment Clause attack on a public school program releasing students for voluntary, off-campus religious instruction. This Court held that the school did not violate the Establishment Clause by merely publicizing the opportunity and supervising the release of the students who elected to participate; only evidence of teachers actively persuading or forcing students to take the offered religion classes would suffice to show state action.[21] The present case exhibits no active persuasion or force by any state actor. Those who joined the coach did so voluntarily and, to put it mildly, without any encouragement of the school itself.

The school authorities may have been irritated with the coach because he publicized his grievance and his cause drew empathy. But Kennedy's expression of his grievance was itself protected speech, no matter whether he was right or wrong about the lawfulness of the school's action. It only adds salt to the wound that his grievance was well founded.[22]

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[20] 343 U.S. 306 (1952).

[21] *Id.* at 311.

[22] *See Lane*, 572 U.S. at 242; *Pickering v. Bd. of Educ. of Twnshp. High Sch. Dist.,* 391 U.S. 563 (1968); *see also Kennedy II*, 139 S. Ct. at 636-37 (Alito, J., statement regarding denial of pet. for cert.).

III. Free Exercise and Assembly Rights Cannot Be Vetoed by a Third Party Experiencing an Unsubstantiated Fear of Repercussion for His Nonparticipation

The Ninth Circuit also relied on testimony by one student member of the team who feared that, if he did not join others gathering around the coach, he might lose playing time.[23] Relying on such unsubstantiated fears is the functional equivalent of allowing a heckler's veto, something long prohibited by this Court.[24] The government may terminate neither speech, nor religious practice, nor assembly just because others find it threatening or objectionable.[25] As this Court stated in *Tinker*, a generalized "fear or apprehension" of others "is not enough to overcome the right to freedom of expression."[26] The fact that the expression is religious does not alter that calculus one whit; it reinforces it.[27]

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[23] *Kennedy III*, 991 F.3d at 1011, 1018.

[24] *See, e.g.*, *Gregory v. Chicago*, 394 U.S. 111 (1969); *Cox v. La.*, 379 U.S. 536, 551-52 (1965).

[25] *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (Alito, J.) (speech); *Town of Greece v. Galloway*, 572 U.S. 565, 609 (2014) (Thomas, J., concurring) (religion); *Tex. v. Johnson*, 491 U.S. 397 (1989) (speech); *Cox*, 379 U.S. at 538-42 (speech, assembly, and protest); *Hague v. CIO*, 307 U.S. 496, 516 (1939) (speech and assembly); *DeJonge v. Ore.*, 299 U.S. 353, 364-65 (1937) (assembly).

[26] 393 U.S. at 508.

[27] *See Kennedy IV*, 4 F.4th at 954 (R. Nelson, J., dissenting from denial of *en banc* rehearing).

IV. The Ninth Circuit Improperly Pitted the Establishment Clause Against the Free Exercise Clause

The Ninth Circuit also erred when it held that the school's Free Exercise Clause violation can be excused by concerns about an Establishment Clause infraction.[28] This fails both factually and legally, as it is inconsistent with both the text and history of the Establishment Clause and with applicable precedent.

A. On This Record, No Objective, Reasonable Observer Could Believe the School Endorsed the Coach's Religious Exercise

As a factual matter, the idea that the prototypical objective, reasonable observer would think the school was sponsoring the coach's prayer is absurd. The school made it clear, on numerous occasions, that it opposed his prayers after football games; he also made it clear that the school did not endorse, encourage, or otherwise sponsor his on-field kneeling when he complained to the press that the school district was trying to rein him in. However one defines "available information" acquired by a "reasonable observer," it is clear on this record that Kennedy's prayers at midfield could not be understood as school-sponsored.

This Court observed in *Mergens*, "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

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[28] *Kennedy III*, 991 F.3d at 1016-21.

nondiscriminatory basis."[29] Here, the audience included adults as well as high school students and the symbolic speech was by a teacher, rather than by a student, as in *Mergens*, but the same conclusion is certainly true in these circumstances. All observers of Kennedy were "mature enough" to "likely . . . understand" that the school district did not "endorse or support" his speech merely because it permitted it "on a nondiscriminatory basis."[30]

This again brings to the fore that religious speech may not be given less protection than other types of speech seen in sporting venues, such as coaches and players "taking the knee" with bowed head when the national anthem is played, by which they communicate a political message. Obviously, the school would not have acted if Kennedy had just stood at midfield for a few seconds, which dramatizes that it was because the school district understood the coach's activity to be *religious* that it acted adversely to him.[31] Such targeted discrimination against religious exercise has been repeatedly repudiated by this Court.[32] Moreover, it would turn the Constitution

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[29] 496 U.S. at 250.

[30] *Id.*

[31] Indeed, the uncertainty on this score, which led to denial of Kennedy's petition for certiorari on the denial of his motion for preliminary injunction, *see Kennedy II*, 139 S. Ct. at 635-36 (statement of Alito, J.), was clarified on remand as the sole reason for the school's adverse action. *See Kennedy III*, 991 F.3d at 1014.

[32] *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (striking down limits on religious gatherings that were more stringent than those imposed on comparable secular gatherings); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (same); *Espinoza v. Mont. Dept. of Rev.*,

on its head to suggest that teachers may practice spoken or symbolic speech only as long as it does not involve prayer or other religious observance; the First Amendment text goes the extra mile to protect "the free *exercise*" of religion.[33]

Obviously, a public school teacher wears two hats—that of a private citizen and that of a government worker. No one is confused by that. It is so with all government employees. Thus, action taken by a teacher, even on school grounds and during school hours, that is personal in nature has the protection of the Free Exercise, Speech, and Assembly Clauses. And those rights are not somehow negated by the Establishment Clause in situations such as this, where the coach waited until the game was well over and acted alone. That he was exercising his religion was no more obvious, and no more "endorsed" by the school, than when a Muslim teacher wears a hijab, and much less so than when she wears it in the classroom.[34] The Ninth Circuit stretched the "endorsement" precedent of this Court well beyond its

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140 S. Ct. 2246 (2020) (repudiating the state's discrimination against religious schools that otherwise qualified for student scholarships via state income tax credits); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (striking down state's refusal to supply a school with playground resurfacing solely because it was religious).

[33] *See Kennedy IV*, 4 F.4th at 941-42 (O'Scannlain, J.); *id.* at 944-45 (Ikuta, J., dissenting from denial of *en banc* rehearing).

[34] *Cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (recognizing, in Title VII context, that wearing a hijab is understood by a reasonable observer as a religious exercise).

factual boundaries and, for that reason alone, must be reversed.

B. The "Endorsement" Test May Not Properly Be Used to Disallow a Neutral Accommodation of the Free Exercise of Religion

At a more basic level, the Ninth Circuit erred by holding that the Establishment Clause may ever override the requirement that state actors may not discriminate against the free exercise of religion the state neutrally accommodates. In such situations, it is not "endorsing" the private exercise of religion, and the clauses are not in conflict. Each clause in its own way is designed to secure religious liberty, "not purge it from the public square."[35] Reversing the Ninth Circuit's use of "endorsement" here will align with this Court's forum cases, in which it has consistently held that, once a forum is available to the public on a neutral basis, the state may not discriminate against religious exercise and the Establishment Clause is simply not at issue.[36]

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[35] *Kennedy IV*, 4 F.4th at 946 (R. Nelson, J.); *see* Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 Federalist Soc'y Rev. 26, 37-38 (2021) (hereinafter, "Esbeck, *The Establishment Clause*") (explaining how the Religion Clauses work in harmony).

[36] *See, e.g.*, *Rosenberger v Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 843-44 (1995) (citing *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); and *Mergens*, 496 U.S. at 250).

In the *Bladensburg Cross Case*[37] and *Town of Greece v. Galloway*,[38] this Court determined the proper scope of the Establishment Clause by looking to the historical practices that it was designed to address.[39] Both that history and the text of the clause shows that the endorsement theory cannot properly be used to cabin a nonpreferential accommodation of the free exercise of religion.

1. The Text of the Establishment Clause Allows Laws About Religion, Just Not Those About "an *Establishment* of Religion"

The Ninth Circuit reasoned as if the Establishment Clause read that "Congress shall make no law respecting [ ] religion," period. Thus, it found that even the school's *inaction* in allowing private, *religious* speech was presumptively improper because the speech dealt with *religion* and the government may not endorse or favor religion.

Of course, the clause does not read that way. It states that "Congress shall make no law respecting *an*

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[37] *Am. Legion v. Am. Humanists Soc'y*, 139 S. Ct. 2067 (2019).

[38] 572 U.S. 565 (2014).

[39] *Am. Legion*, 139 S. Ct. at 2086-89 (plurality op.); *id.* at 2095-97 (Thomas, J., concurring); *Town of Greece*, 572 U.S. at 575-77; *see also Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (finding that the Establishment Clause must be interpreted "by reference to historical practices and understandings" (quoted with approval in *Town of Greece*, 572 U.S. at 576)).

establishment of religion."[40] It obviously does not prohibit any governmental action about or allowing religion.[41] If it did, the Constitution would be at war with itself. Indeed, the very next phrase of the First Amendment protects the "free exercise" of religion, an obvious endorsement of religious observance by affirmatively protecting it.[42] The Establishment Clause, by forbidding the *government* to establish religion, has the effect of reinforcing the *private* exercise of religion. The restraint on "an establishment" does not trump or supersede the belief or practice of religion. "Government does not establish religion by leaving its private exercise alone."[43]

The First Amendment is pro-freedom of speech, pro-freedom of press, and pro-freedom of assembly. It accomplishes those purposes by providing that "Congress shall make no law . . . abridging" those

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[40] U.S. Const. amend. I (emphasis added).

[41] *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 593-96 (hereinafter, "Esbeck, *Uses and Abuses*"); Steven W. Fitschen, *Religion in the Public Schools After* Santa Fe Independent School District v. Doe: *Time for a New Strategy,* 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001) (noting that the Framers distinguished between acknowledgment, accommodation, encouragement, and establishment of religion and only the last was forbidden).

[42] The Constitution also legislates concerning religion and supports free exercise when it prohibits a religious test for officeholders, U.S. Const. art. VI, cl. 3, and thrice allows affirmation instead of oaths to accommodate Quakers and others who had religious objections to oaths. *Id.* art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, cl. 3.

[43] Esbeck, *The Establishment Clause* at 37.

freedoms. Similarly, the First Amendment is pro-religious observance, not hostile to it in one clause and in favor of it in another. And while the operation of the clauses may overlap,[44] by their very nature and purpose they do not contradict each other when, as here, the state does not initiate, and acts neutrally in accommodating, the private exercise of religion.[45]

2. The Founders Passed Laws Encouraging and Endorsing Religion

The Founders showed by their conduct that they did not understand the Establishment Clause to prohibit them from enacting laws that generally encouraged religion and promoted its free exercise by private individuals and organizations.[46] For example,

- as noted by the Supreme Court in *Marsh v. Chambers*[47] and *Town of Greece*,[48] the First

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[44] Professor Esbeck gives the example of a public elementary school teacher requiring recitation of the Lord's Prayer. A Muslim student has a cause of action under the Free Exercise Clause, and her remedy under that clause is to opt out. She also may sue under the Establishment Clause, with her remedy being discontinuation of the teacher's practice. Esbeck, *The Establishment Clause* at 38.

[45] A recent articulation of the improperly manufactured "tension" between the Religion Clauses is found in Justice Breyer's dissent in *Espinoza*, 140 S. Ct. at 2281-82, 2290 (Breyer, J., dissenting).

[46] *See generally* Esbeck, *Uses and Abuses* at 615-20; Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 23-24, 53-55 (1982).

[47] 463 U.S. 783, 787-88 (1983).

[48] 572 U.S. at 575.

Congress paid for a chaplain, a tradition that has continued uninterrupted to this day;

- the First Congress, on the very day it approved the Establishment Clause, reenacted the Northwest Ordinance of 1787, which proclaimed, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, . . . shall forever be encouraged";[49] and

- Congress approved use of the Capitol building for regular church services.[50]

Why would the Founders enact these laws to support the practice of religion by themselves and other citizens? The simple answer is that the Founders understood that religious beliefs and ethical principles provided a foundation for, and helped the preservation of, the type of government that they had set up in the Constitution. In this way, these enactments served a critical, *secular* purpose. Many of the Founders articulated this,[51] perhaps most

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[49] 1 Stat. 50.

[50] 1 Debates and Proceedings 797, 6th Cong., 1st Sess. (Dec. 4, 1800). *See generally* James A. Davids, *Putting Faith in Prison Programs, and Its Constitutionality Under Thomas Jefferson's Faith-Based Initiative*, 6 Ave Maria L. Rev. 341 (2008) (discussing faith-based initiatives to support and rehabilitate prisoners and analogous historical examples).

[51] *See generally* Esbeck, *Uses and Abuses* at 615; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early Am. Republic*, 2004 BYU L. Rev. 1385, 1431-32; Michael W. McConnell, *Establishment and*

famously President Washington in his Farewell Address, when he said, "Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports."[52]

The positive influence of religion on society and our system of government, as noted repeatedly by the Founders in both their legislative enactments and their remarks, is reflected and protected in *both* Religion Clauses. The historical record supports a proper textual reading that both clauses are pro-religion and complement, rather than conflict with, each other.

3. Ample Precedent Supports That the Establishment Clause Does Not Conflict with the Free Exercise Clause When the Government Acts Neutrally

While some cling to a "strict separationist" view that finds an "establishment" when the state includes those engaging in religious practice as beneficiaries of indirect aid that is generally available on non-

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Disestablishment at the Founding, 44 Wm. & Mary L. Rev. 2105 (2003).

[52] https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf at 16 (last visited Feb. 15, 2022); *see also* John Adams, Address to Mass. Militia in 1798, https://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited Feb. 15, 2022); *Van Orden v. Perry,* 545 U.S. 677, 727-28 n.29 (2005) (Stevens, J., dissenting, quoting Justice Story: "Christianity is indispensable to the true interests and solid foundations of all free governments.").

sectarian grounds,[53] this Court has long moved past that improper perspective. For example in *Mitchell v. Helms*,[54] this Court in 2000 upheld a federal program that provided funds for purchasing computers and educational materials but required a portion of these funds to be directed to private schools, including religious schools; in *Zelman v. Simmons-Harris*,[55] this Court in 2002 validated a government voucher program that parents could use for education in sectarian schools; in *Zobrest v. Catalina Foothills School District*,[56] this Court in 1993 directed a public school receiving federal funds to pay for a sign interpreter for a deaf student attending a Catholic school; and in *Witters v. Washington Department of Services for the Blind*,[57] this Court in 1986 validated government funding of assistance services for a blind student at theological school. Most recently, this Court summarized in *Espinoza*, "We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."[58]

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[53] The springboard for this view was found in *Everson v. Board of Education*, 330 U.S. 1 (1947), which in a rhetorical flourish states that the Establishment Clause prohibits "laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15. The "aids all religions" language in *Everson* was overbroad and *dicta*, as the Court in that case upheld New Jersey's providing direct aid for transporting students to private religious schools. *Id.* at 17-18.

[54] 530 U.S. 793 (2000).

[55] 536 U.S. 639 (2002).

[56] 509 U.S. 1 (1993).

[57] 474 U.S. 481 (1986).

[58] 140 S. Ct. at 2254.

This Court has made clear in these and other decisions that the Establishment Clause does not dictate hostility to religion or religion's place in our common life and does not conflict with, but rather supports, an individual's free exercise of religion.[59] Justice Scalia concurred in *Lamb's Chapel*: "indifference to 'religion in general' is not what our cases, both old and recent, demand."[60] And in *Corporation of the Presiding Bishop v. Amos*,[61] this Court held that the Establishment Clause does *not* require government to be hostile, or even indifferent, to religion, but only stops the government from acting "with the intent of promoting a particular point of view in religious matters."[62] The Ninth Circuit's wielding of "endorsement" here to invalidate free exercise protections when the school was passive and neutral is at odds with this proper understanding of the Establishment Clause and improperly puts the Religion Clauses at cross-purposes.

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[59] *See also Zorach*, 343 U.S. at 313-14 ("we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence"); *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948) ("A manifestation of [governmental hostility to religion or religious teachings] would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."); *Epperson v. Ark.*, 393 U.S. 97, 103-04 (1968).

[60] 508 U.S. at 400 (Scalia, J., concurring); *see also Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (noting "an unbroken history of official acknowledgment . . . of the role of religion in American life").

[61] 483 U.S. 327 (1987).

[62] *Id.* at 335.

In summary, this Court's decisions recognize that the Establishment Clause is in harmony with, rather than antagonistic to, the free exercise of religion. This is consistent with both the text and the history of the Establishment Clause. The Establishment Clause, as properly interpreted, does not override the government's duty to accommodate the free exercise of religion on a nondiscriminatory basis.

CONCLUSION

The school here should have allowed the exercise of the constitutional freedoms to speak, pray, and assemble. It cannot convert its improper halting of such practices into a legal virtue by resort to the Establishment Clause,[63] as that clause certainly did not proscribe the unassisted, privately initiated exercise of religion by Coach Kennedy.

The Establishment Clause does not require public schools to be policed as religion-free zones,[64] and a reasonable, objective person understands that teachers can act in private capacities, even while on school grounds and even during school hours.[65] When teachers do so, their freedoms are not to be curtailed, and they are not to be punished.[66]

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[63] *See Good News Club v. Milford Cent. Sch.,* 533 U.S 98, 120-21 (2001) (Scalia, J., concurring); *Kennedy IV*, 4 F.4th at 949-54 (R. Nelson, J.).

[64] *See Tinker,* 393 U.S at 506.

[65] *See Mergens,* 496 U.S. at 250.

[66] *See Lane,* 573 U.S. at 236-37; *Garcetti*, 547 U.S. at 417-19; *Tinker,* 393 U.S. at 506.

This Court should reverse, on multiple grounds. It should reaffirm that a state actor does not "endorse" religion contrary to the Establishment Clause when it accommodates its private exercise in a general, neutral way.

Respectfully submitted
this 2nd day of March 2022,

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