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 *AMICUS CURIAE* OF THE AMERICAN LEGION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Congress chartered The American Legion in 1919 as a patriotic veterans organization. *See* 36 U.S.C. § 21702. Focusing on service to veterans, servicemembers, and communities, the Legion evolved from a group of war-weary World War I veterans into one of the most influential civic organizations in the United States. Today, nearly 2 million men and women are members of the Legion in more than 13,000 local posts worldwide. Among its core values, the Legion sponsors youth programs that teach the rights, privileges, and responsibilities of citizenship, advocates for upholding and defending the Constitution, and seeks to honor veterans by paying perpetual respect for all past military sacrifices to ensure they are never forgotten by new generations. The Legion promotes these values in numerous ways, including by hosting Boys State programs, organizing memorial services, and maintaining veterans monuments across the country.

Because many of these activities and memorials incorporate religious imagery and expression, the Legion frequently defends them from legal challenges. Most recently, the Legion successfully defended the Bladensburg Peace Cross from an Establishment Clause challenge in *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019). And today it chooses to defend prayer because the Legion has long

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

encouraged invocations at its programs and events—many of which are government-sponsored.

Religious expression plays an important role in our nation's longstanding traditions, acknowledging the role faith plays in the lives of many, especially those who gave the last full measure of devotion to this country. The perennial litigation against religious expression not only threatens to limit the role of religion in important traditions but also signals unlawful intolerance towards religious faith. As *amicus curiae*, the Legion maintains an interest in protecting the ability of governments to recognize the significance of its citizens' faiths and in ensuring that religious expression is not excluded from civic life.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below rests on an interpretation of the Religion Clauses that pits the Establishment Clause against the Free Exercise Clause. According to the Ninth Circuit, the former "not only permit[s]," but in fact "*require*[*s*]," government entities to suppress speech protected by the latter. Pet.App.94 (O'Scannlain, J.). Specifically, the Ninth Circuit held that the Establishment Clause precludes a government employee from uttering a prayer on school property even assuming that employee "spoke as a private citizen." Pet.App.17. In doing so, "the opinion subverts the entire thrust of the Establishment Clause, transforming a *shield* for individual religious liberty into a *sword* for governments to defeat individuals' claims to Free Exercise." Pet.App.94 (O'Scannlain, J.).

The Ninth Circuit's conflicting conception of the

Religion Clauses is unmoored from history and tradition. History teaches that in ratifying the Religion Clauses and disestablishing state churches, the Founders intended to combat coercion, not private religious expression. And traditions dating back to the Founding—and continuing to this day—show that the Religion Clauses have never been understood to be at war with one another. Rather, the Establishment Clause complements the Free Exercise Clause, with both Clauses working to ensure religious liberty.

This complementary construction of the Clauses—centered on coercion—cures the "dangerous" conflict created by the Ninth Circuit's decision. Pet.App.109 (Ikuta, J.). It realigns the Religion Clauses, leaving room for religious expression in public life while protecting the liberty of those who choose not to participate. It preserves longstanding civic traditions, including those sponsored by the American Legion. And it makes this an easy case. The Religion Clauses tolerate invocations more overt than a private post-game prayer, in settings more public than the aftermath of a high-school football game, and by government officials more powerful than a part-time assistant football coach.

ARGUMENT

I. THE COMPLEMENTARY RELIGION CLAUSES BOTH PROHIBIT COERCION

The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Although the Court has sometimes referred to an "internal tension" between the clauses, *Hosanna-Tabor Evangelical*

Lutheran Church & School v. E.E.O.C., 565 U.S. 171, 181 (2012) (quotation marks omitted), it has also recognized that "the common purpose of the Religion Clauses 'is to secure religious liberty.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). These "complementary clauses" had "the same objective and were intended to provide the same protection against governmental intrusion on religious liberty." *Everson v. Bd. of Ed.*, 330 U.S. 1, 13, 15 (1947).

In this effort to preserve religious liberty, one common concern of the Clauses is ensuring freedom from government coercion in matters of religion. For example, the Free Exercise Clause protects liberty by prohibiting "laws that suppress religious belief or practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). And the Establishment Clause protects liberty by "guarantee[ing] that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *id.* at 642 (Scalia, J. dissenting) (agreeing with majority regarding the prohibition on coercion); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

As the Legion has previously explained, this "liberty-focused" approach is consistent with "historical practices and understandings," *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014), which show that one attribute of an establishment of religion—and the primary evil the Establishment Clause was designed to address—was government coercion that, by its nature, negated religious liberty.

Br. for the Petitioner, *Am. Legion*, 139 S. Ct. 2067 (No. 17-1717); *see also* Br. of United States, at 6–7, 18, *Lee v. Weisman*, 505 U.S. 577 (No. 90-1014). It also harmonizes the guarantees of the Establishment Clause with those of the Free Exercise Clause, which requires a tangible threat to liberty before constitutional rights are implicated.

This Court's precedent is also consistent with this complementary understanding of the Religion Clauses. Indeed, recent decisions regarding legislative prayer, monuments with religious symbols, and state aid to religious schools indicate that both Religion Clauses work to ensure freedom from government coercion.

A. History and Tradition Show the Religion Clauses Were Designed to Prohibit Coercion and Promote Free Exercise

1. At the Founding, Coercion Constituted an Essential Element of Religious Establishment

The historical context in which the Religion Clauses were drafted demonstrate that they would not have been understood to prohibit invocations, let alone private invocations, by government officials. Simply put, an "establishment," whether in the Colonies or in England, coerced nonadherents to support a particular religion. *See Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishment of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."). The term would have been unrecognizable to the Framers if used to describe religious acts unaccompanied by threats of coercion.

The prohibition on the "establishment" of religion thus not only precludes the creation of a state church, but also the government coercion that was the hallmark of such institutions. For example, at the Founding, the British monarch was "the supreme head of the Church of England." Supremacy Act, 1534, 26 Hen. 8, ch. 1 (Engl.). As such, he had the authority "to repress and extirpate all errors, heresies, and other enormities and abuses," *id.*, and the power to appoint church high officials, *Hosanna-Tabor*, 565 U.S. at 182. Through the Acts of Uniformity, Parliament continually tightened its grip on religious expression, "limit[ing] service as a minister to those who formally assented to prescribed tenets and pledged to follow the mode of worship set forth in the Book of Common Prayer." *Id.* In addition to laws controlling appointments of church and civic leaders, England "prohibited unlicensed religious meetings" and "punished dissenters for engaging in religious worship." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2113–14 (2003). Together, these laws restricted religious liberty through the twin evils of compelling one form of religious expression and prohibiting others.

The religious coercion pervasive in England was also present in colonial America. *Id.* at 2115. As in England, colonial establishments of religion were essentially "coercive." *See* René Reyes, *The Mixed Blessings of (Non)Establishment*, 80 Alb. L. Rev. 405, 411 (2017). For example, the Colony of Virginia passed the Diocesan Canons of 1661, which "constitute[d] a catalog of the essential legislative ingredients for an

established church." McConnell, *Establishment*, *supra*, at 2118. These laws "compelled religious observance, provided financial support for the ministry, controlled the selection of religious personnel, dictated the content of religious teaching and worship, vested certain civil functions in church officials, and imposed sanctions for the public exercise of religion outside of the established church." *Id.* at 2119.

In New England, "establishment had the same essential elements" as Virginia but "substituted a localized establishment based on the religious convictions of majorities in the various towns." *Id.* at 2121. All were "required to support, and perhaps to attend, religious worship," though within certain limits individuals were permitted to choose which one. *Id.* at 2124.

In short, in Colonies with established churches, as in England, the government "sought to compel adherence to one religion or, in some colonies, one of several religions, and . . . sought to restrain adherence to the others." McConnell, *Coercion*, *supra*, at 939. An establishment of religion was thus understood to be "the promotion and inculcation of a common set of beliefs through governmental authority," and "can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the church." McConnell, *Establishment*, *supra*, at 2131.

The Religion Clauses "arose out of these very problems." McConnell, *Coercion*, *supra*, at 939. They are a direct response to the hallmarks of established religion. The Establishment Clause prevents the prescriptive elements of establishment (e.g., compulsory attendance and financial support). And the Free Exercise Clause prevents the proscriptive elements, like restricting the political process to members of a certain religion.

2. Disestablishment in the States Involved Removing Coercive Laws and Allowing Freedom of Conscience

In the years before enactment of the federal Constitution, several states began the process of disestablishing their official churches. Those disestablishment efforts, some of which were contemporaneous with the creation of the Federal Constitution, likewise shed light on meaning of the Religion Clauses.

For example, Virginia's disestablishment began in 1776 when it passed the Declaration of Rights, which stated expressly that "religion . . . can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Virginia Declaration of Rights § 16 (1776), *available at* https://perma.cc/N9EF-89WM. Thomas Jefferson later sought to implement this principle in his Act for Establishing Religious Freedom, which warned that imposing religion departs from "the plan of the Holy author of our religion, who being Lord both of body and mind yet chose not to propagate it by coercion on either." Act for Establishing Religious

Freedom (1785), *available at* https://perma.cc/JJX3-4RLW. Among other things, the Act sought to protect individuals from compelled attendance at religious services, religious tests for public office, and "otherwise suffer[ing] on account of [their] religious opinions or belief[s]." *Id.*

While Jefferson's Act would not pass until 1786, its passage was preceded by the proposal of Patrick Henry's "Assessment Bill," which "would have required every taxpayer to support the Christian denomination of his choice, or failing that, to direct his contribution to the general treasury for support of public education." McConnell, *Establishment*, *supra*, at 2155. Debate over Henry's Bill led to James Madison's "historic Memorial and Remonstrance," which this Court has described as "the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting).

In the Memorial and Remonstrance, Madison repeatedly condemned the Assessment Bill for its use of force, making clear that the chief evil of an establishment is coercion. *See id.* at 64–72. Madison did not address, much less repudiate, government or personal use of religious symbolism or language in a general sense; to the contrary, he concluded his argument by "earnestly praying" to "the Supreme lawgiver of the Universe" that his Remonstrance would turn the assembly "from every act which would affront his holy prerogative." *Id.* at 71–72.

Madison's Remonstrance "stirr[ed] up a storm of popular protest" and ultimately "killed the

Assessment Bill." *Everson*, 330 U.S. at 38. The very next month, Virginia passed Jefferson's Bill for Establishing Religious Freedom. *Id.* That Act, quoted above, officially achieved disestablishment in Virginia by ensuring no one would be "compelled to frequent or support" a church or "bur[d]ened" on account of his religion. Religious Freedom Act, art. II.

3. Congressional Debates Over the Religion Clauses Focused on Coercion

Although "[t]he original Constitution . . . had no provisions safeguarding individual liberties, such as freedom of speech or religion," several states "insisted on more definite guarantees" of civil liberties. *City of Boerne v. Flores*, 521 U.S. 507, 549–50 (1997) (O'Connor, J., dissenting). That insistence provided the impetus for "a declaration of religious freedom." *Wallace v. Jaffree,* 472 U.S. 38, 93 (1985) (Rehnquist, J., dissenting). Notably, the proposals submitted by Virginia, North Carolina, and Rhode Island all mirrored Virginia's Declaration of Rights, affirming that religion "can be directed only by reason and conviction, not by force or violence." 2 J. Elliot, *Debates on the Federal Constitution* 485 (1828) (Virginia); 3 *id.* at 212 (1830) (North Carolina); 4 *id.* at 223 (Rhode Island).

These concerns about coercion were at the heart of Madison's first draft of the Establishment Clause: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 ANNALS OF CONG. 433 (J. Gales

ed., 1834). That language was adjusted to read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729.

During the debate on this proposal, Madison made clear that the proposed amendment was intended to prevent government coercion, stating that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* (emphases added). Representative Benjamin Huntington of Connecticut, immediately following Madison's comments, stated he also "understood the amendment to mean what had been expressed by" Madison. *Id.* Madison further explained that the goal was to prevent a circumstance where "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." *Id.* (emphasis added).

While Representative Samuel Livermore of New Hampshire moved for modified language to be reported out of committee—"Congress shall make no laws touching religion, or infringing the rights of conscience"—unrecorded debates in the House and Senate resulted in a return to the "establishment" language before the First Amendment was accepted. *Jaffree*, 472 U.S. at 97 (Rehnquist, J., dissenting). But throughout these alterations, all parties focused on *coercive* state activity.

4. The Conduct of the Framers and Subsequent Traditions Confirm That Non-Coercive Religious Expression Does Not Raise Establishment Clause Concerns

As described above, the Framers' experience under an established church in England and several States led to laws prohibiting religious coercion and promoting freedom of conscience. Their contemporaneous actions just as strongly confirm that, where no coercion was present, religious expression by government officials did not raise any Establishment Clause concerns. Indeed, "history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). Some of these historical practices—including prayers of thanksgiving or invocations of divine aid—continue to this day and have become longstanding traditions.

The Religion Clauses were drafted at a time when public prayer by officials in all three branches of government was a common practice. Perhaps most notably, the actions of the early presidents—including Jefferson and Madison, whose anti-establishment credentials are beyond question[2]—reflect a reading of the Religion Clauses that leaves wide latitude for non-coercive religious expression by government officials.

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[2] *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2285–86 (2020) (Breyer, J., dissenting) (describing Madison's and Jefferson's roles in preventing Virginia from levying taxes to support Christian clergy); *supra* Part I.A.2.

For instance, in Jefferson's second inaugural address, he asked the nation to join him in prayer:

> I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measure that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.

1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 382 (J. Richardson ed., 1897). Jefferson's actions matched his speech; during his Presidency, Jefferson attended Sunday church services within the House of Representatives where "[p]reachers of every Protestant denomination appeared" to lead worship. *Religion and the Federal Government, Part 2: Religion and the Founding of the American Republic*, LIBR. OF CONG., https://www.loc.gov/exhibits/religion/rel06-2.html (last visited February 20, 2022).

For his part, Madison likewise included religious speech in his first inaugural address. He placed his confidence in "the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations" and "to whom [the nation was] bound to address [its] devout gratitude for the past, as well as our fervent supplications and best hopes for the

future.'" *Lee*, 505 U.S. at 634 (Scalia, J., dissenting) (quoting INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101-10, at 2 (1989)).[3]

The constitutionality of non-coercive religious expression also finds support in Founding-era presidential proclamations encouraging prayers of thanksgiving. *Lynch*, 465 U.S. at 675 n.2. For instance, Washington declared November 26, 1789 "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Id.* (quotation marks omitted). Adams, Jefferson, and Madison issued similar proclamations during their presidencies. *See id.* Jefferson's proclamation, for example, stated: "Resolved, that it be recommended to the several states to appoint THURSDAY the 9th of December next, to be a day of publick and solemn THANKSGIVING to Almighty God, for his mercies, and of PRAYER, for the continuance of his favour and protection to these United States." 3 THE PAPERS OF THOMAS JEFFERSON, 18 JUNE 1779–30 SEPTEMBER 1780, at 177–79 (Princeton University Press, Julian P. Boyd. ed., 1951).

The historical practices of the other political branches show a similar openness to prayer in public life. The First Congress encouraged Washington to

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[3] George Washington's actions during the first presidential inauguration—which took place two years before the Religion Clauses were ratified—also illustrate the close tie between civic life and religious expression at the Founding. After Washington took the oath of office, he added, "So help me God" and kissed the Bible. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 196 (J. Elliot ed., 2d ed. 1836).

recommend a day of thanksgiving and prayer. 1 ANNALS OF CONG. 949–50 (J. Gales ed., 1789). And the same week Congress adopted the Establishment Clause it enacted legislation to hire chaplains for Congress. *Lynch*, 465 U.S. at 674. Providing "for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society." *Town of Greece*, 572 U.S. at 576 (citing D. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 12–13 (1997)). The practice of opening congressional sessions with prayer "was designed to solemnize congressional meetings, unifying those in attendance as they pursued a common goal of good governance." *Am. Legion*, 139 S. Ct. at 2088.

The early Judicial Branch also welcomed religious expression. The first Chief Justice, John Jay, invited clergy to open sessions of the circuit court with prayer. Letter of John Jay to Richard Law (Mar. 10, 1790), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUSTICES ON CIRCUIT, 1789–1800, at 13–14 (M. Marcus ed., 1988). These clergymen delivered prayers during circuit court sessions, including when the Vice President attended hearings. 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUSTICES ON CIRCUIT, 1790–1794, at 276–77 (M. Marcus ed., 1988). And since the Marshall Court, "God save the United States and this Honorable Court" has opened this Court's sessions. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (1922).

These practices did not end with the Founders. Rather, there has been an unbroken tradition of prayer in public life—often by the most powerful of government officials and in the most trying of circumstances. For example, in his second inaugural address, President Abraham Lincoln spoke for the nation in "pray[ing]" "fervently . . . that this mighty scourge of war may speedily pass way." Transcript of President Abraham Lincoln's Second Inaugural Address (1865), https://www.ourdocuments.gov/doc.php?flash=false&doc=38&page=transcript. Yet at the same time he acknowledged that "if God wills that it continue, until all the wealth piled by the bondman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, . . . still it must be said 'the judgments of the Lord, are true and righteous altogether.'" *Id.*

In response to another national tragedy, the death of President James Garfield in 1881, President Chester A. Arthur issued a Proclamation declaring a day of "humiliation and mourning." Proclamation No. 250—Day of Mourning for James A. Garfield (Sept. 22, 1881), *available at* https://www.presidency.ucsb.edu/documents/proclamation-250-day-mourning-for-james-garfield. President Arthur acknowledged that "in His inscrutable wisdom it has pleased God to remove from us the illustrious head of the nation" and that the country should "manifest itself with one accord toward the throne of infinite grace" and "bow before the Almighty and seek from Him that consolation in our affliction and that sanctification of our loss which He is able and willing to vouchsafe." *Id.*

Sixty years after President Arthur's proclamation, President Franklin D. Roosevelt's address to Congress in the wake of the Pearl Harbor attacks included an appeal to God as the nation marched to war: "With confidence in our armed forces with the unbounding determination of our people we will gain the inevitable triumph so help us God." President Franklin Delano Roosevelt, Address to Cong. Asking That a State of War Be Declared Between the U.S. and Japan (Dec. 8, 1941), *available at* https://www.loc.gov/resource/afc1986022.afc1986022_ms2201/.

More recently, in the aftermath of September 11, 2001, President George W. Bush declared, "Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them. . . . In all that lies before us, may God grant us wisdom, and may He watch over the United States of America." ADDRESS TO THE JOINT SESSION OF THE 107TH CONGRESS, SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, 2001–2008, at 73. And to honor the 500,000 American lives lost to COVID-19, President Joseph R. Biden offered "prayer[s]" for "those who have lost loved ones," asking not only for God's "bless[ing]" but also that that "sooner rather than later" the day would come when their memory would "bring a smile to your lips before a tear to your eye." Remarks by President Biden on the More than 500,000 American Lives Lost to COVID-19 (Feb. 22, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/22/remarks-by-president-biden-on-the-more-than-500000-american-lives-lost-to-covid-19/.

This willingness to acknowledge the Divine is also reflected in our nation's monuments and buildings. As this Court recognized in *American Legion*, the Establishment Clause tolerates "religious symbols" that "acknowledge[] the centrality of faith to those whose lives are commemorated." *Am. Legion*, 139 S. Ct. at 2086. Notable examples include "the Martin Luther King, Jr. Civil Rights Memorial Park in Seattle, which contains a sculpture in three segments representing 'both the Christian Trinity and the union of the family,'" and the Ebenezer Baptist Church itself, which is part of the Martin Luther King, Jr. National Historical Park in Atlanta, Georgia. *Id.* The National Statuary Hall also "honors a variety of religious figures," including "Father Eusebio Kino with a crucifix around his neck and his hand raised in blessing." *Id.*

In light of these traditions, to hold now that the Establishment Clause precludes government officials and employees from non-coercive religious expression would not only fail to protect religious liberty, but would also show the sort of hostility toward religion that the Religion Clauses were intended to prevent. *Id.* at 2087. If the Establishment Clause tolerates public prayers of presidents, it must also tolerate private prayers of high school assistant football coaches. And if the Establishment Clause tolerates religious symbols honoring those who have died, it must also tolerate the religious expression of those still living. *See infra* Part II.

B. This Court's Precedent Supports This Complementary Understanding of the Religion Clauses

Modern precedent, too, supports a complementary construction of the Religion Clauses that permits non-coercive religious expression and even government aid to religion. Specifically, in *Town of Greece*, *American Legion*, and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Court looked to "historical practices and understandings" relevant to the context it was confronting to sanction legislative prayer, monuments with religious symbols, and state aid for religious schools. *Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 591–92, 670 (1989).

In *Town of Greece*, this Court held that a town council's practice of opening their sessions with prayer fit within a "tradition long followed in Congress and the state legislatures." 572 U.S. at 577. The Court recognized that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings'" and found that the town did "not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents." *Id.* at 576. 591–92 (citing *Cnty. of Allegheny*, 492 U.S. at 591–92, 670).

The Court also refused to find an Establishment Clause violation in *American Legion*, where it upheld the constitutionality of a Latin cross honoring fallen World War I soldiers, even though it was on public land. 139 S. Ct. at 2077. In reaching this conclusion, the Court looked to tradition, citing examples of

religion in civic life that illustrated "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *Id.* at 2089. The Court concluded that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional." *Id.*

Similarly, in *Espinoza*, the Court looked to history and tradition, concluding no "'historic and substantial' tradition support[ed] Montana's decision to disqualify religious schools from government aid." *See* 140 S. Ct. at 2258. In so doing, the Court rejected an approach that would have pitted the Religion Clauses against one another, explaining that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." *Id.* at 2254. Because citizens "independently [chose] to spend their scholarships at" religious schools, "[a]ny Establishment Clause objection to the scholarship programs [was] particularly unavailing." *Id.* Further, the Court held that excluding religious schools from the scholarship put coercive pressure on the schools to divorce themselves from any religious control or affiliation as a condition of state aid, which itself amounts to a Free Exercise Clause violation. *Id.* at 2256–57.

These cases and others support a complementary construction of the Religion Clauses that recognizes their common concern with prohibiting coercion in religion.

II. PRIVATE PRAYER BY GOVERNMENT EMPLOYEES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

As the history and tradition detailed above demonstrate, the Religion Clauses have always left room for non-coercive religious expression by government officials or employees. And this is all the more so when they speak as "private citizen[s]." Pet.App.17. In short, if "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate," *Town of Greece,* 572 U.S. at 590, an assistant coach does not do so by kneeling to pray at the fifty-yard line after a high school football game.

A. As various Justices have remarked, when applying the Establishment Clause, this Court must "distinguish between real threat and mere shadow." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 205, 307 (1963) (Goldberg, J., concurring)); *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) ("The Constitution deals with substance, not shadows."). And neither history nor tradition suggests that personal prayer by government employees—even when conducted on government property and in the presence of students—creates the sort of "real threat" the Framers sought to guard against. To the contrary, such conduct is protected by the Free Exercise Clause.

As an initial matter, such speech bears none of the hallmarks of traditional religious establishment (e.g., control over doctrine, financial support, requirements

for political participation). Nor could it. "[A]n Establishment Clause violation must be moored in government action." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring). And in "case after case," this Court "has determined that private religious speech on public school property does not constitute state action." Pet.App.97–99 (O'Scannlain, J.) (citing cases). As relevant here, "neither students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *cf. Santa Fe*, 530 U.S. at 313 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."). To hold otherwise would eviscerate the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.).

More fundamentally, the history and tradition detailed above demonstrate that there is a great deal of leeway for government employees to engage in religious speech. *See supra* Part I.A.4. Such leeway should not be surprising. After all, "speech is not coercive; the listener may do as he likes." *Lee*, 505 U.S. at 642 (Scalia, J., dissenting) (quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)). Of course, it is possible that a listener may disagree with or feel offended by the speech. But "[o]ffense . . . does not

equate to coercion." *Town of Greece,* 572 U.S. at 589. Thus, even "legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." *Id.* at 590. There is no reason the rule should be different with respect to the actions of a single government employee, especially when he is "sp[eaking] as a private citizen." Pet.App.17.

To be sure, such speech can become problematic "when—in connection with an acknowledgment of religion that by itself is noncoercive—an individual is *required* to participate in religious activities." U.S. Amicus Brief at 24, *Lee*, 550 U.S. 577 (No. 90-1014) (emphasis added). But where "a person is not required to witness" religious expression, he has not been coerced. *Id.* at 25. Thus, for example, this Court has upheld state "release time" programs, "which permit . . . public schools to release students during the day so that they may leave the school buildings and school grounds to go to religious centers for religious instruction or devotional exercises." *Zorach v. Clauson*, 343 U.S. 306, 308 (1952). Programs of this sort are constitutional precisely because they do not require students to participate in the religious programming. *See id.*

Ultimately, by "welcom[ing] legislative prayer and other ceremonial acknowledgements of religion, even though they were undoubtedly aware that individual legislators or others might choose to be absent during them," the Framers "set an example of common sense." U.S. Amicus Brief at 25, *Lee*, 550 U.S. 577 (No. 90-1014). This common sense understanding recognizes

that the protections afforded by the Free Exercise Clause may expose citizens "to a volley of views"—some from government employees—"that may give offense." *Id.* at 26. But as with the Free Speech Clause, the Religion Clauses presuppose that those citizens will demonstrate "some minimal degree of individual tolerance" for views that they do not share and which they are free "to ignore." *Id.* at 25–26. The government crosses the line, however, when it compels an individual to listen to religious views on pain of penalty or legal repercussions. At that point, the speech ceases to be religious expression protected by the Free Exercise Clause, and becomes government coercion prohibited by the Establishment Clause.

B. Nothing in this Court's school prayer cases is to the contrary. Those cases reflect an understandable concern for students compelled to participate in religious speech either uttered by government officials or made pursuant to official government policy. For instance, in *Engel v. Vitale*, the Court held that a New York school board violated the Establishment Clause by directing that a prayer to "Almighty God" be said aloud in each class at the beginning of the school day. 370 U.S. 421, 422, 429–30 (1962). That prayer was drafted by state officials and imposed on teachers and students as part of an official policy. *Id.* at 422–23.

Likewise, in *Lee v. Weisman*, this Court concluded that public school officials "in effect required participation in a religious exercise" by "including clerical members who offer prayers as part of [an] official school graduation ceremony." 505 U.S. at 580, 594. The Court held that this violated the Establishment Clause because of "the school district's

supervision and control" over the prayer process and because "participation in the state-sponsored religious activity [was] in a fair and real sense obligatory." *Id.* at 586. Though the school did not go so far as to dictate the exact wording of the prayer (as in *Engel*), the school's principal decided that a benediction should be given, selected a rabbi to give the benediction, and provided the rabbi with guidelines regarding the content of the invocation. *Id.* at 587–88.

Finally, in *Santa Fe*, 530 U.S. 290, this Court's decision was again premised on the notion that the prayer at issue involved compelled exposure to *government* speech. According to the Court, a prayer delivered "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech." *Id.* at 310.

C. Kennedy's religious exercise falls comfortably within the framework outlined above. Most importantly, there can be no dispute that his prayer is "properly characterized as 'private' speech." *Id.* School officials did not compose, control, or direct his prayer; rather, they purported to prohibit it. *Cf. Engel*, 370 U.S. at 422–23; *Lee*, 505 U.S. at 580; *Santa Fe*, 530 U.S. at 310. And the speech at issue involved a "brief, quiet" prayer in the aftermath of a football game, JA148–49, not an address over an intercom, at a ceremony, or in a classroom. *Cf. Santa Fe*, 530 U.S. at 310; *Lee*, 505 U.S. at 580; *Engel*, 370 U.S. at 422–23. In short, as the panel below conceded, Kennedy prayed "as a private citizen." Pet.App.17.

Moreover, the record reflects a complete absence of coercion. Kennedy's prayers were not uttered to a captive audience, but rather in the midst of a post-game scrum, when players, students, or fans were free to go about their business or ignore him entirely. *Cf. Engel*, 370 U.S. at 422–23; *Santa Fe*, 530 U.S. at 310; *Lee* 505 U.S. at 580. And Kennedy's players were never asked (let alone required) to join in or even listen to his personal religious expression. *Cf. Engel*, 370 U.S. at 422–23; *Lee*, 505 U.S. at 580; *Santa Fe*, 530 U.S. at 310.

Of course, if Kennedy had used his authority as an assistant coach to penalize students for not participating in or listening to his prayer—for example, by benching a player—he would have violated the First Amendment. In that scenario, religious conformity would have been the price of playing time. But that is not what happened here. To be sure, the record includes second-hand testimony that one student "'felt he wouldn't get to play as much if he didn't participate'" in Kennedy's prayers. Pet.App.4.[4] But there is no evidence that any such penalty was ever imposed or even remotely contemplated. Indeed, there were multiple occasions when no students joined Kennedy's personal prayer, which belies any notion that participation was a condition of playing time. *E.g.*, Pet.App.4, 10.

[4] Moreover, that complaint involved pre-game, locker-room prayers not at issue in this litigation. Pet. Br. 44–45.

III. FAILURE TO READ THE RELIGION CLAUSES TO COMPLEMENT ONE ANOTHER THREATENS IMPORTANT CIVIC TRADITIONS

Failure to "address the tension between the Free Exercise Clause and the Establishment Clause" created by the Ninth Circuit's decision could have effects well beyond the facts of this case. Pet.App.109 (Ikuta, J.). If even post-game, private prayer by "private citizen[s]" on a high-school football field is constitutionally suspect, Pet.App.17, real questions arise as to the permissibility of private prayer at other events hosted on government property or in conjunction with government officials. Those questions are of particular concern to the Legion, as it routinely participates in such events—each and every one of which begins with a prayer or invocation.

Consistent with its federal charter, the Legion seeks "to uphold and defend the Constitution" and to promote "mutual helpfulness and service to . . . country." 36 U.S.C. § 21702. A significant Legion tradition is its Boys State programs, which teach the rights, privileges, and responsibilities of citizenship to public school students selected by public school guidance counselors and other school officials. These programs take place in all but one state and often involve private prayer on public property. In Iowa, for example, Boys State is held at Camp Dodge Joint Maneuver Training Center, which serves as the headquarters for the Iowa National Guard. The training day begins with an invocation and ends with a benediction. And, in Virginia, Boys State is now held at a public university. Each morning includes a twenty-minute, non-denominational religious service,

and state officials, including the governor, lieutenant governor, attorney general, and other cabinet level officials and judges have been in attendance.

The Legion also seeks "to preserve the memories and incidents of the 2 World Wars and the other great hostilities fought to uphold democracy" and "to consecrate the efforts of its members to mutual helpfulness and service to their country." 36 U.S.C. § 21702. To fulfill these charges, the Legion hosts myriad events each year. Some of these events are national in scale. Others are local. But for over a hundred years, all have included invocations—often on public property, and often with government officials present.[5]

The Ninth Circuit's holding threatens these traditions, because it "weaponizes the Establishment Clause to defeat the Free Exercise claim[s] of [individuals] who pray[] 'as . . . private citizen[s].'" Pet.App.78–79 (O'Scannlain, J.). If the Establishment Clause bars private, post-game prayer on a high-school football field, it could also be read to preclude invocations at the Legion's Boys State programs or the memorial ceremonies described above. To be sure, those invocations are given by private citizens. But under the Ninth Circuit's logic, it could be "reasonable" for government officials to fear that permitting these prayers might give rise to "liability

[5] For example, at the 1939 Armistice Day remembrance at Arlington National Cemetery, a pastor opened the Legion-led ceremony with a prayer. And in June 1992, the Legion helped guide ceremonies to dedicate the Korean War Veterans Memorial on the National Mall, where the event began with an invocation and ended with the singing of "God Bless America."

for . . . Establishment Clause violation[s]." Pet. App.109 (Ikuta, J.). There is thus a real "risk" that such officials "will feel compelled (or encouraged)" to "squelch" the "publicly observable religious activity" that forms an integral part of the Legion's mission. *Id.*

CONCLUSION

The decision below should be reversed.

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Respectfully submitted,

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