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 UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court consistently looks to historical practices and understandings to define religious establishment under the Establishment Clause. History demonstrates that establishment meant government control and sponsorship of the established church or legal penalties for religious dissidents, such as jail time or fines for preaching other faiths. Coach Kennedy's actions bear no resemblance to historical practices and understandings of religious establishment, and therefore did not violate the Establishment Clause.

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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. Petitioner and Respondent have granted blanket consent to the filing of *amicus* briefs.

Respondent nonetheless claims an Establishment Clause violation based on alleged government endorsement and what Respondent calls "coercion." But the discomfort Respondent fears involves no coercion at all. Historically, as members of this Court have said, coercion involved force of law or threat of penalty. There has been no such force and no such threat here.

The endorsement standard used by the Ninth Circuit and the coercion standard urged by Respondent both suffer from an additional flaw: they penalize expression like Coach Kennedy's, even though it bears no resemblance to the types of government conduct that the Establishment Clause was designed to address. Respondent's overbroad definition of religious coercion thus impinges on the protections of the Free Speech and Free Exercise clauses. If voluntary religious speech may be treated as uniquely dangerous under the Establishment Clause, the result will be discrimination against religious viewpoints under the Free Speech Clause. Similarly, under the Free Exercise Clause, Respondent's rule would lead to non-neutral treatment of religious expression, penalizing it precisely because of its religious nature.

The versions of endorsement and coercion that have been used to justify the school district's actions here would exclude many religious people from public employment. Americans of many different faiths—including many government employees—pray during the workday, follow religious grooming requirements, or wear religious emblems. Any such activities might make someone who encounters them feel discomfort, or provide the basis for a vague notion of government endorsement. But a proper Establishment Clause

analysis, one based upon historical practices and understandings, does not lead to this result.

ARGUMENT

I. The Establishment Clause should be interpreted in accordance with historical practices and understandings.

1. This Court has often considered the meaning of the first words of our First Amendment: "Congress shall make no law respecting an establishment of religion * * * ." U.S. Const. Amend. I. In doing so, this Court has "always purported to base its Establishment Clause decisions on the original meaning of that provision." *Town of Greece* v. *Galloway*, 572 U.S. 565, 602 (2014) (Alito, J., concurring). In the first modern Establishment Clause decision, the Court emphasized that the Clause must be interpreted "in the light of its history." *Everson* v. *Board of Educ.*, 330 U.S. 1, 14 (1947). Although the substance of Justice Black's historical analysis left much to be desired, both the majority and dissent agreed that history is important: "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting).

For the next two decades, the Court repeatedly looked to history to guide its Establishment Clause decisions. In *McGowan* v. *Maryland*, which involved a challenge to Sunday closing laws, the Court began by examining "the place of Sunday Closing Laws in the First Amendment's history," noting that James Madison introduced a Sunday closing bill in Virginia in 1785—the same year Virginia enacted "A Bill for Establishing Religious Freedom." 366 U.S. 420, 437-440

(1961). Similarly, in *Walz* v. *Tax Commission*, the Court upheld church tax exemptions because they were supported by "more than a century of our history and uninterrupted practice." 397 U.S. 664, 680 (1970). And in *Torcaso* v. *Watkins*, the Court struck down a religious test oath after concluding that such oaths were one of the elements of "the formal or practical" religious "establishment[s]" that "many of the early colonists left Europe and came here hoping to" avoid. 367 U.S. 488, 490-491 (1961).

Lemon v. *Kurtzman* and the "endorsement" test were a major departure. Claiming that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," and citing just two cases decided in the previous three years, Chief Justice Burger "gleaned" the now-familiar *Lemon* test, which prohibits any government action that (1) lacks a secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) excessively entangles the government in religion. 403 U.S. 602, 612 (1971) (citing *Board of Educ.* v. *Allen*, 392 U.S. 236, 243 (1968); *Walz*, 397 U.S. at 668). A gloss on the second prong later asked—as the courts below did here—whether a "reasonable observer" (whomever that is) would view the government's action as an "endorsement" (whatever that means) of religion. *County of Allegheny* v. *ACLU*, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring).

The failings of the *Lemon*/endorsement test are as familiar as they are extensive. In short, "[t]he test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars." *American Legion* v. *American*

Humanist Ass'n, 139 S. Ct. 2067, 2081 (2019) (plurality) (footnotes omitted). Not surprisingly, then, this Court's more recent cases have returned to history as the key to understanding what constitutes an establishment of religion.

Town of Greece explained that this historical approach begins with an understanding of "historical practices and understandings" at the time of the founding. 572 U.S. at 576. "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* at 577 (quoting *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). Looking to the long tradition of prayer in public meetings and by public officials, the Court held that a town council's practice of opening each meeting with prayer did not violate the Establishment Clause. *Id.* at 575-576, 578-579.

The Court provided additional guidance on this historical approach in *American Legion*. Again looking to a national tradition of public religious expression, a plurality explained that such practices comply with the Establishment Clause if they "follow in that tradition" of "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." 139 S. Ct. at 2089; accord *id.* at 2102 (Gorsuch, J., joined by Thomas, J., concurring) (agreeing with plurality's focus on "the nation's traditions"). Our traditions welcome public expression from diverse religions, an idea which is consistent with founding-era limitations on establishment.

2. At the founding, an "establishment of religion" had a well-defined meaning. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) ("*Establishment*"). "[V]irtually every American—and certainly every educated lawyer or statesman—knew from experience what those words meant." *Id.* at 2107.

Nine of the thirteen colonies had established churches, and the Founders were familiar with the centuries-old establishment in England. *Id.* Although these establishments varied in their particulars—some, for example, narrowly established a single denomination and harshly punished dissenters, while others broadly supported multiple denominations and were more tolerant of dissent—they shared six common characteristics, *id.* at 2131-2180:

- The government exerted legal control over the doctrine and personnel of the established church.
- The government mandated attendance in the established church.
- The government financially supported the established church.
- The government punished worship in dissenting churches.
- The government restricted political participation by religious dissenters.
- The government used the state church to carry out civil functions.

In other words, establishment was about government control and sponsorship of the established church or legal penalties for religious dissidents, such as jail time or fines for preaching other faiths.

II. Respondent's view of coercion is unmoored from history and inconsistent with the best of our traditions.

This historical understanding of "an establishment of religion" provides an objective basis for interpreting the Establishment Clause. After *Town of Greece* and *American Legion*, the key question is no longer whether a "reasonable observer" would think the government is "endorsing" religion. Instead, it is whether the government is engaging in what was understood as an establishment of religion based on "historical practices and understandings" at the time of the founding. *Town of Greece*, 572 U.S. at 576-577.

The only aspect of a historical religious establishment that Respondent has attempted to assert here is government-mandated participation in religious exercise. But there is no mandatory participation here. And historically, the mere offering of prayer by a government-paid employee—no matter the audience—was not only not prohibited, but also ubiquitous. See, *e.g.*, *Marsh* v. *Chambers*, 463 U.S. 783, 786 (1983) (surveying the long "history and tradition" of opening legislative sessions with prayer, including from a paid chaplain); *Zorach* v. *Clauson*, 343 U.S. 306, 312-313 (1952) (gathering historical and modern examples of prayer and religion in public life, including in public schools). Notably absent from the historical record is any concern for what the court below deemed "endorsement" or what the Respondent describes as "coercion." To the contrary, "[t]he coercion that was a

hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis in original); *id.* at 640-641 (noting additional penalties and privileges, such as mandatory Sabbath observance). No such penalties are present here.

A. Establishment Clause coercion requires something more than a feeling of discomfort.

None of Coach Kennedy's prayers amount to force of law or threat of penalty for students who chose not to join him. The record below contains no evidence that Coach Kennedy ever required players to join a prayer under threat of penalty. To the contrary, the school district admitted that the prayers were "voluntary" and Coach Kennedy had "not actively encouraged, or required participation." JA.41. The most Respondent can point to is that some players chose to join his prayers because they "feared" they "otherwise 'wouldn't get to play as much,'" or because they didn't want to feel "separate" from the rest of the team. BIO 4-5. But neither an unsubstantiated fear of reprisal nor peer pressure amounts to the type of penalty necessary to establish the coercion that the Establishment Clause has historically prohibited.

Respondent attempts to stretch the Constitution to fit the facts. The school district claims that it must bar Coach Kennedy from praying because the Establishment Clause prohibits "coercion." See, *e.g.*, BIO 28-29, 33-34. And on Respondent's view, "coercion" exists whenever religious exercise makes someone "'not feel comfortable.'" BIO 11 (quoting JA.359). But discomfort

is not a constitutional standard, and members of this Court have bluntly rejected this argument before, holding that "[o]ffense, however, does not equate to coercion." *Town of Greece*, 572 U.S. at 589; see also *id.* at 609 (Thomas, J., concurring in part) ("there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the 'reasonable observer' feels 'subtle pressure,' or perceives governmental 'endors[ement]'" (alteration in original) (citation omitted)). If mere discomfort is not coercive, then there is no coercion here.

Whether one "feels comfortable" with religious exercise is not, as Respondent claims, a "prosaic application of the settled legal test." BIO 26. This proposed test would be an entirely novel understanding of coercion—so novel, in fact, that not even the Ninth Circuit used it. The Ninth Circuit relied on the (also ahistorical) "endorsement" test. See, *e.g.*, Pet. App. 1-2, 18-23. Respondent pivots instead to what they deem coercion, relying upon *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 301-309 (2000). But Respondent's foray into discomfort-as-coercion goes beyond even what this Court has used in the sharply divided rulings of *Santa Fe* and its predicate, *Lee*. See Pet.App.99 ("this case bears no resemblance to the kinds of institutional entanglements with religion—often described as 'coercive'—which may give rise to an Establishment Clause violation.") (statement of O'Scannlain, J.) (distinguishing *Santa Fe* and *Lee*). This Court should decline the invitation to extend those cases to cover this one. And in an appropriate case, this Court should reconsider the continued viability of *Lee* and *Santa Fe* in

light of historical practices and understandings of religious establishment.

1. Respondent's claim that mere discomfort is coercion demonstrates the failings of the Court's prior, ahistorical understanding of Establishment Clause "coercion." This understanding joins *Lemon* as an unfortunate remnant of the Court's otherwise-jettisoned Establishment Clause precedents of the 1970s, with "formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions." *Lee*, 505 U.S. at 644 (Scalia, J., dissenting). Justice Scalia's dissent in *Lee* better accords with "later cases" that "take[] a more modest approach * * * and look[] to history for guidance." *American Legion*, 139 S. Ct. at 2087. His dissent explained the danger of "expanding the concept of coercion beyond" its traditional understanding: "acts backed by threat of penalty." 505 U.S. at 642. The principal danger is that more nebulous concepts of coercion ignore history altogether. Unsurprisingly then, Respondent ignores the history of prayer at school football games. Cf. *Lee*, 505 U.S. at 635 (Scalia, J., dissenting) (explaining that the Court ignored the "general tradition of prayer at public ceremonies" and "a more specific tradition of invocations and benedictions at public school graduation exercises"). Respondent also fails to grapple with *Town of Greece*, or to explain why that reasoning is inapplicable here.

Restricting religious exercise by characterizing discomfort with religious differences as coercion is inconsistent with a historical understanding of the Establishment Clause. Justice Scalia made this point in his *Lee* dissent, and his analysis has been confirmed by subsequent scholarship. See, *e.g.*, S. Barclay, B. Earley

& A. Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 552 (2019) (explaining that "the type of coercion that seemed to be at issue in all of our relevant examples" was "by force of law and threat of penalty"). Indeed, this study's "only example" of religious establishment in the school context involved "a law that only allowed members of an established church in England to teach in schools, and prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs." *Id.* at 556 n.311. Such coercion is real, and it is prohibited by the Establishment Clause. *Supra* pp.6-7. But it bears no resemblance to Coach Kennedy's voluntary, public prayers.

The voluntary prayers here are far more akin to the leading case—*Town of Greece*—than those in *Santa Fe* and *Lee*. Here, as in *Town of Greece*, the school district "neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content." *Town of Greece*, 572 U.S. at 571. As Justice Kennedy's opinion noted, participation was voluntary, by those who "find these prayers meaningful and wish to join them," and "without denying the right to dissent by those who disagree." *Id.* at 588. By contrast, *Santa Fe* found that football game invocations were "coercing those present to participate in an act of religious worship" because they were "sponsored" by the school and delivered over the school's public address system. *Santa Fe*, 530 U.S. at 312. And still further removed from this case, *Lee* involved effectively "obligatory" student participation in a graduation ceremony where "[a] school official * * * decided that an invocation

and a benediction should be given," "chose the religious participant," and these choices were "attributable to the State." 505 U.S. at 586-587; see also *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) ("In *Lee*, however, we concluded that attendance at the graduation exercise was obligatory.").

It would therefore be a significant expansion of *Santa Fe* and *Lee* to apply them to Coach Kennedy's prayer. Here, Respondent recommended that Coach Kennedy not be rehired simply because his prayers were "observable" by students (BIO 9) and "could cause 'alienation' of 'team member[s].'" BIO 5 (quoting JA.44) (alteration in BIO). Respondent's core problem with Coach Kennedy's prayers is not that there is "government sponsorship," *Good News Club*, 533 U.S. at 116, but that others could see Coach Kennedy pray, and might infer such sponsorship. Respondent admits that it would be fine with Coach Kennedy praying as a coach, and on school property—so long as the prayers are "not outwardly discernible as religious activity." BIO 5; see also BIO 11 ("pray silently and alone" is fine). Not even the broader, dubious understanding of "coercion" articulated in *Lee* and *Santa Fe* requires Respondent's command that Coach Kennedy either pray silently and invisibly, or not at all.

2. Rather than expand *Lee* and *Santa Fe*, this Court should make clear they have no application here, and when a case squarely presenting the issue arises, reconsider the viability of that standard. The only way to escape future Establishment Clause confusion is to rely on an historically rooted standard. The Court has returned to a historically rooted standard in *Town of Greece* and *American Legion* and should apply that standard in the schoolhouse and on the football field.

The alternative is religious viewpoint discrimination, which undermines pluralism. The "aim" of the Religion Clauses is "a society in which people of all beliefs can live together harmoniously." *American Legion*, 139 S. Ct. at 2074. Public religion in American sports has a long and venerable tradition of inspiring Americans of all ages—from Sandy Koufax refusing to play America's Game on Yom Kippur, to Husain Abdullah being vindicated by the NFL after he was penalized for kneeling to pray after a touchdown,[2] to Father John O'Hara's famous quip that "Notre Dame football is a spiritual service."[3] It would be a great loss to our national traditions, not to mention the Establishment Clause's promise of pluralism, if such expressions had to be silenced anytime public school players or coaches took the field. "[N]o one should be compelled to" join in prayer together, "but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily." *Lee*, 505 U.S. at 646 (Scalia, J., dissenting). Voluntary, public prayer "foster[s] among religious believers of various faiths a toleration—no, an affection—for one another," a core protection against "civil dissension and civil strife." *Ibid.*

* * *

Respondent's view of coercion is unmoored from the Establishment Clause's history and our best traditions. It should be rejected.

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[2] Ken Belson, *Flag on Praying Muslim Player Was an Error, the N.F.L. Says*, N.Y. Times, Sept. 30, 2014, https://perma.cc/BX8W-UV72.

[3] *Official 1929 Football Review*, University of Notre Dame, at 91, https://bit.ly/343Q0AY.

B. Offense and endorsement standards can lead to discrimination against religious viewpoints.

1. At its nadir, analysis based on overbroad understandings of coercion or its cousin, endorsement, treats religious expression as uniquely dangerous. As Justice Alito's statement respecting denial noted, Coach Kennedy could chat with a spectator, or make a restaurant reservation, and it would not be considered coercive, nor would the school be seen to be endorsing his choice of restaurant. Pet. App. 209-210. But if he chooses to engage in silent prayer, the school may suddenly be deemed to have violated the Establishment Clause. Taken to this extreme, the Establishment Clause runs headlong into the Free Speech and Free Exercise Clauses.

First, vague notions of endorsement or coercion can lead to censorship of religious speech. It is a "core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2299 (2019); see also *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"). Yet this is precisely what happens when notions of coercion or endorsement are construed overbroadly: religious speech is treated as uniquely dangerous. Here, Respondent only expressed "disapproval" when it "underst[ood] that Kennedy's postgame speeches to the players were prayers." BIO 4 (citing JA.269-271). If Coach Kennedy were to kneel while the team poured Gatorade over his head, the school would deem that

activity permissible, since it expresses happiness and celebration of a victory. But if he kneels to silently thank God, it is inappropriate precisely because of the ideas it conveys: that Kennedy believes in God and believes it is right to thank God after a game.

A jurisprudence that is based upon perceptions of a speaker's message is likely to result in governmental determinations that some viewpoints are permissible ("I'm glad everyone played well and no one was injured") and other viewpoints are impermissible ("I'm thankful to God that everyone played well and no one was injured."). The point is a simple one: Whenever the government *intends* to discriminate on the basis of viewpoint, it *does* discriminate on the basis of viewpoint.

Second, such limitations on religious expression may lead to non-neutral government rules, in violation of the Free Exercise Clause. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton* v. *City of Philadelphia,* 141 S. Ct. 1868, 1877 (2021). That is precisely the problem here: the Ninth Circuit's views of endorsement would permit the government to restrict practices because of their religious nature.

In Respondent's view, Coach Kennedy can say and do a great many things on the field after a game, but if one of those is demonstrably religious, it must be censored. Otherwise, someone might mistakenly think the school endorses it. As this Court has warned, "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint." *Good News Club*, 533 U.S. at 118.

The same holds true for Respondent's arguments on coercion: in its view, Coach Kennedy's prayer is constitutionally problematic because it is religious, and someone might feel pressured to join. If his action were not religious—say, observing a moment of silence to honor those lost in the pandemic—then presumably there would be no Establishment Clause problem, no matter how uncomfortable a player might feel for not joining in. Such a rule would transform the Establishment Clause into a command to penalize expression precisely "because of [its] religious nature." *Fulton,* 141 S. Ct. at 1877.

This case illustrates that danger: because of fears over endorsement or coercion, broadly construed—*i.e.*, the perceived *risk* of constitutional violations—the school committed an *actual* constitutional violation, firing an employee for an act of personal expression based on its religious viewpoint. This not only violates the Free Speech Clause but is contrary to the purpose of the Establishment Clause, which restrains governmental penalties for praying in the wrong way. Such actions are not "neutral and would not further the ideals of respect and tolerance embodied in the First Amendment." *American Legion*, 139 S. Ct. at 2090.

2. Respondent's preferred constitutional rule is especially troubling because it would exclude those whose religions require visible, outward expression. Many religions require such visible expressions: Orthodox Jews wear yarmulkes; baptized Sikhs wear turbans and maintain *kesh* (uncut hair); certain Muslims wear beards; Catholic nuns and monks wear religious habits, while laity often wear crucifixes or carry rosaries. The same is true for those who engage in out-

ward signs of religious expression in daily life. Members of many religious groups pray visibly or audibly during the workday, often accompanied by physical acts such as ceremonially washing hands, bowing one's head, performing the *sajdah*, or making the sign of the cross. For all these groups, their routine daily observance—or even their personal appearance—would put them at risk as public employees of inadvertently conveying government endorsement of their religious practices or unknowingly "coercing" co-workers. If endorsement were taken to this extreme, government employers would be forced to favor employees whose religious expressions may be more subtle, or more likely to occur outside working hours.

Finally, a rule construing "coercion" as broadly as Respondent would poses special dangers for unpopular or poorly understood religious exercises. If a student's subjective sense of discomfort—rather than some objective penalty—is sufficient to create an Establishment Clause violation, then the Establishment Clause operates as a heckler's veto on the religious exercise of public employees. A student need only feel uncomfortable, or suggest the hypothetical threat of coercion, for a teacher or coach to be fired. In such a system, religious activities which are disfavored or poorly understood may be more likely to cause discomfort, and therefore more likely to be censored. In the end, the fear of coercion of students leads to the actual coercion of teachers and staff: give up your religious practice or lose your job. Cf. Pet. App. 95-96 (O'Scannlain, J., dissenting from denial of rehearing en banc).

C. The proper, historical standard would involve legal penalties or privileges not at issue here.

Applying the proper, historical standard to the facts here, Coach Kennedy's actions do not amount to an Establishment Clause violation. Such violations occur when government "compel[s] its citizens to engage in a religious observance." *Town of Greece,* 572 U.S. at 587. But no compulsion was present here, only vague, hypothetical fears.

Those unsubstantiated fears do not amount to religious compulsion. The record bears out that these hypothetical fears and so-called psychological pressures ultimately had no effect on either student behavior or play time. Even after Coach Kennedy's decision to resume prayer after the October 16 homecoming game received extensive media coverage and an outpouring of public support, many players chose to abstain from the prayer and "were busy singing the school's fight song at the time." Pet. App. 138. At subsequent games on October 23rd and 26th, Kennedy either "prayed alone in the middle of the field while the players headed to the stands," or prayed with "other adults" and was joined by players "[o]nce the players finished their fight song" and "after he had finished his kneeling prayer." Pet. App. 139-140. In other words, few to zero students chose to join Coach Kennedy in prayer. And as with Kennedy's pre-October 2015 prayers, there is no evidence that any of the students who did not were punished.

Penalizing an atheist quarterback, or privileging a Christian kicker, would be one thing. But courts "must distinguish between real threat and mere shadow."

American Legion, 139 S. Ct. at 2091 (Breyer, J., concurring) (cleaned up). Here, Coach Kennedy respected students' choice to join him in prayer, or not.

If evidence showed that students were penalized for failure to participate in an officially sanctioned religious exercise, that would accord with historical notions of religious establishment: penalizing citizens for failure to participate in the established church. But the record shows no penalties of any kind for students. The only penalty was on Coach Kennedy, who lost his job over hypothetical fears. Respondent's insistence that Coach Kennedy must refuse students the opportunity to join him in a voluntary act of devotion cuts in the other direction, unlawfully constraining those students' free exercise and showing a "callous indifference to religious" students and employees. *Zorach*, 343 U.S. at 314.

The solution is an objective, historically rooted test, one that considers coercion under the Establishment Clause to be force of law or threat of penalty. Such a test respects the role of religious expression by our citizens, in both private and public life. There is "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." *Zorach*, 343 U.S. at 314. To the contrary: when governments, including public schools, accommodate the voluntary religious exercise of their employees and students, they "follow[] the best of our traditions." *Ibid.* Understood in its proper historical context, the Establishment Clause raises no bar to that.

CONCLUSION

Respect for diverse religious exercise, including religious exercise by public employees, is in the best of our national traditions and ought to be celebrated, not punished. The decision below should be reversed.

Respectfully submitted.

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MARCH 2022