No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY, *Petitioner,*

v.

BREMERTON SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF GALEN BLACK AS AMICUS CURIAE 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.

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INTEREST OF *AMICUS*

Galen Black was a co-plaintiff in *Employment Division v. Smith*, 494 U.S. 872 (1990) ("*Smith II*"). He is also a devout believer in the Native American Church. Black credits his religious faith for his longstanding sobriety and personal convictions.

Black has a strong interest in ensuring that government employees understand their free exercise rights under the First Amendment. Nearly forty years ago, Black was fired and denied unemployment benefits because of confusion surrounding the constitutional limits on the free exercise of religion. Coach Kennedy's dismissal by Bremerton School District demonstrates that this confusion persists today. Black believes that government employees like Coach Kennedy deserve the guidance of a clear rule delineating the bounds of their free exercise rights within the limits of the Establishment Clause.

After his time in the Navy, Black battled alcohol dependency. He spent several years teetering between dependence and sobriety. Black has now been sober for nearly forty years. He credits his sustained sobriety to his religious practice in the Native American Church. Black found spiritual healing through the religious ingestion of peyote, which is central to Native American Church rituals. *Emp. Div. v.* Smith, 485 U.S. 660, 661-62, 67 (1988) ("*Smith I*"). In the Church, peyote is considered a deity. It "constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost." *Id.* at 667 n. 11. However, the ingestion of peyote—even for religious reasons—was illegal under Oregon law at the time. *Id.* at 662.

After achieving sobriety, Black became a counselor at the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"). *Id.* at 662. ADAPT had partnered with the State of Oregon as part of an initiative to provide substance abuse rehabilitation and treatment programs tailored to Native Americans. Through his work at ADAPT, Black became acquainted with Alfred Smith, who was also a counselor there. In 1984, Black and Smith were fired as counselors at ADAPT because of their religiously motivated ingestion of peyote. The State of Oregon, noting that they had committed an offense under state law, denied them unemployment benefits. *Id.* at 663-64. Black and Smith challenged this decision under the Free Exercise Clause of the First Amendment to the U.S. Constitution. *Id.* This Court denied their claim, holding that Oregon's prohibition on peyote use was neutral and generally applicable and therefore did not violate the Free Exercise Clause. *Smith II*, 494 U.S. at 878-89.

Oregon subsequently enacted an amendment to its laws and created a religious accommodation for the ingestion of peyote. Or. Rev. Stat. § 475.752(4) (2020). Oregon's decision to accommodate Black's religious practice has helped him to maintain his sobriety and live out his faith in compliance with the law. Because he too was fired for practicing his religion, Black has a strong interest in ensuring that government employees know their religious rights under the First Amendment. He believes that government employees like Coach Kennedy deserve the guidance of as clear a rule as possible regarding

the Establishment Clause so they may follow their religious convictions within the limits of the law.[1]

SUMMARY OF ARGUMENT

I. Over thirty years ago, Galen Black lost his job because employee free exercise rights were ill-defined and poorly understood. Three decades later, there is still too much confusion. For public employees seeking to live their religion, much of the confusion stems from the Court's Establishment Clause cases, which have left lower courts, public employers, and public employees confused.

This case offers the Court an opportunity to provide clarity to the chaos and set forth a straightforward rule: a public employee's private exercise of religion results in an Establishment Clause violation only if there is evidence of coercive pressure for others to participate.

The Court needs to provide guidance so public employers and employees can better understand their obligations and rights under the Establishment Clause.

A. From *Engel* to *Santa Fe*, the Court has provided at least three different tests for determining if government has violated the Establishment Clause: the coercion test, the endorsement test, and the *Lemon* test, which itself provides three ways government can violate the Establishment Clause.

The three tests and the Court's failure to indicate precisely which test applies when has left public

[1] This brief was prepared and funded entirely by amicus and his counsel. No other person contributed financially or otherwise. All parties have consented in writing to this brief.

employers, their employees, and the lower courts confused, particularly in the context of public employees privately exercising their religion.

B. The confusion was evident in both the school district's policy and the Ninth Circuit's opinion in this case. The school district adopted, and the Ninth Circuit approved, a rule that would prohibit public employee private religious exercise any time it is demonstrative and viewable by students or others. The school district adopted that standard out of fear that such religious exercise might be perceived as the school district's endorsement of the religious exercise.

But no objective observer could have mistaken Kennedy's prayers as having been endorsed by the school district, particularly because the district explicitly distanced itself from them.

The Ninth Circuit worried greatly about the attention Kennedy's prayers drew, but the vast majority of that attention came only because of the government's interference with Kennedy's religious exercise in the first instance. Government may not draw attention to someone's religious exercise, then condemn that very exercise because it is drawing too much attention.

The Ninth Circuit's rule means that many forms of private religious exercise by public employees violate the Establishment Clause. It will have the effect of excluding from public service anyone whose religion requires an outward expression of their inner faith. The resulting environment will be one in which the only adults students observe are those whose religion requires no outward display, who purport to have no religion, or who keep their religion quiet.

That fails to meet this Court's goal, stated long ago in *Everson v. Board of Education*, of achieving government neutrality between religion and nonreligion.

II. The endorsement test in the context of private religious exercise by public employees leads to absurd outcomes and confusing and conflicting results.

A. The Court need not consider the worries about the Ninth Circuit's test as a mere hypothetical parade of horribles. It can look to the Canadian province of Quebec to see the absurd results that spring from a concern about public employees endorsing religion through private religious exercise. Quebec lawmakers were so worried about endorsement that they banned from many government positions anyone who wears religious garb as part of their religious exercise. Those who wear yarmulkas, crosses, hijabs, kufis, visible undergarments, jewelry, turbans, or any other form of religious symbolism are banned from almost any government job of any significance in Quebec. That type of discrimination against members of many of the world's major religions is absurd and should fail completely under the Court's precedent.

B. The endorsement test in the context of public employee religious exercise leads to confusing results. The Ninth Circuit panel tried to distinguish between a coach kneeling in prayer after a football game and a teacher praying over her lunch in front of students, but the panel merely stated those two scenarios were different. It provided no explanation as to why. Both involve a demonstrative religious act. Both can be seen by students. Both are by government employees in the middle of their workdays. The endorsement test does not distinguish between them.

The endorsement test in this scenario will result in far more litigation and challenges than are necessary, making easy cases hard and expanding the amount of work courts must do to deal with them.

III. A modified coercion test is appropriate when evaluating whether a public employee's private religious exercise violates the Establishment Clause.

A. This case is an opportunity for the Court to provide some much-needed clarity regarding which antiestablishment test applies when. As numerous cases make clear, there certainly are situations where the endorsement test must govern, and the Court may want to keep the *Lemon* test, or at least some of its parts. It need not address those issues in this case. What it can do is clarify that a modified coercion test makes the most sense in the context of public employees privately exercising their religion.

The coercion test in this limited context is consistent with the Court's decisions in *Lee v. Weisman* and *Santa Fe*.

B. The coercion test faces many of the same criticisms as the endorsement test; namely, that anyone can argue they have been coerced, whether they have been or not. To be effective, the test requires some evidence of coercive pressure. This could include pushing religion on a captive audience, disparate treatment towards those who do not react positively towards the religious exercise, or even proselytizing in some instances.

There will certainly be hard cases, as there are with any legal rule, but a modified coercion test will reduce their number and will ensure that individuals

whose religions require an outward expression of an inner faith are not cast out from public employment.

ARGUMENT

I. The Court Needs to Provide Guidance for Public Employees, Their Employers, and Lower Courts Regarding the Establishment Clause.

A little over thirty years ago, Mr. Black was involved in one of the seminal cases touching on employee religious free exercise rights. He was the other, lesser-known plaintiff in *Smith II*, 494 U.S. 872 (1990). One of his chief concerns at the time was that employees often did not understand what protections their religious exercise enjoyed.

Three decades later, that is still the case. "The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). From there, however, this Court's cases regarding public employer Establishment Clause obligations and public employee free exercise rights have left many employers confused and too many employees fearful. There are numerous reasons for that, but this case provides the Court an opportunity to offer important clarity in at least one area of the law: what constitutes a violation of the Establishment Clause when public employees privately exercise their religion.

That question is relevant for a number of reasons. The case arose only because the school district believed Kennedy's prayers had caused it to violate the Establishment Clause. Likewise, the Ninth Circuit reached its conclusion even after assuming Kennedy was engaged in *private* speech and after recognizing the school district had burdened his

religious exercise with a non-neutral policy. App.17,23. In other words, the Ninth Circuit concluded that the endorsement test applies to Kennedy even when he exercises his religion as a private citizen. What it has left us is a confusing ruling that will lead to absurd and troubling results if left uncorrected.

Given the confusion and internal inconsistency in Establishment Clause case law, the Ninth Circuit's muddled ruling is not surprising. Similar problems will continue to arise unless the Court provides some guidance to lower courts, public employers, and public employees.

This Court has offered several opinions that provide some direction but none directly on point. The latest was decided over two decades ago, with no additional guidance despite a growing split in the circuits and evident confusion among both public employers and employees. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Lower courts and public employers have misunderstood this Court's decisions, and in this case, the Ninth Circuit misapplied them entirely.

This brief will place this case in the broader context of the Establishment Clause doctrine that has emerged from *Santa Fe* and *Lee v. Weisman* and the earlier precedents they applied. It argues that a public employee's private exercise of religion results in an Establishment Clause violation only if there is evidence of coercive pressure for others to participate.

A. This Court's Case Law Regarding the Establishment Clause in Public Schools Has Sent Mixed Signals Regarding When a Public Employee's Religious Exercise Causes a Public Employer to Violate the Establishment Clause.

1. The Early Cases. Nearly sixty years ago, the Court held in *Engel v. Vitale* that a board of education violated the Establishment Clause by mandating that school employees lead students in prayers to "Almighty God" at the beginning of every school day. 370 U.S. 421. The prayers asked students and teachers to "acknowledge" their "dependence upon" God and to "beg" God's "blessings upon" teachers, parents, students, and the country. *Id.* at 422. The law required teachers to say the prayer in front of captive students; it encouraged students to say the prayer. *Id.* at 430.

The Court reached its conclusion by focusing on coercion. *Id.* It argued, "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 431. Coercion was the Court's primary worry in that case, but it emphasized coercion was not the only way in which government might violate the Establishment Clause. The majority noted government can violate the Clause even absent a "showing of direct governmental compulsion" or laws that "operate directly to coerce nonobserving individuals." *Id.* at 430-31. It also suggested, albeit vaguely, other potential tests. *Id.* at 424, 429.

A year later, in *Abington School District v. Schempp*, the Court invalidated a Pennsylvania law that required school teachers or other public employees to read at "least ten verses from the Holy Bible . . . without comment, at the opening of each public school on each school day." 374 U.S. 203, 205 (1963). In doing so, the majority quoted the same language regarding coercion from *Engel*, suggesting it was applying the coercion test as its standard for identifying an Establishment Clause violation. *Id.* at 221.

Then, in the same opinion, the Court seemed to adopt a different standard: for a law to "withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222.

If that was not confusing enough, *Schempp* was not done. The majority continued and concluded that the "distinction between" the Free Exercise Clause and the Establishment Clause "is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.* at 223.

We can forgive public employers and lower courts for being confused. In *Schempp* alone, the Court suggested at least four distinct tests for finding an Establishment Clause violation.

2. The *Lemon* Test. Eight years later, the Court decided *Lemon v. Kurtzman*, which provided the oft-maligned three tests for determining if an Establishment Clause violation has occurred. 403 U.S. 602 (1971). *Lemon* did most of its work in the school funding cases, which are mostly irrelevant in

the public employee religious exercise context. But closer to home, the Court applied the *Lemon* test to strike down the posting of the Ten Commandments on school room walls. *Stone v. Graham*, 449 U.S. 39, 43 (1980). It applied it again in striking down quiet time in schools explicitly designed "for meditation or voluntary prayer." *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985). The Court has never applied it in cases that apply directly to public employees engaged in private religious exercise.[2]

3. The Rise of Coercion-Endorsement Confusion. Without overruling *Lemon*, the Court focused on coercion in *Lee v. Weisman*, 505 U.S. 577 (1992), which raised Establishment Clause concerns over Rhode Island permitting principals to invite members of the clergy to give invocations and benedictions at middle and high school graduation ceremonies. *Id.* at 581-83. The Court struck down the program, reasoning: "[T]he State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Id.* at 598.

After *Lee v. Weisman*, it appeared that public employers needed to apply the coercion test when determining if they were at risk of violating the Establishment Clause, although the *Lemon* test was

[2] The Court did apply *Lemon* in *Edwards v. Aguillard* to strike down a statute requiring equal treatment of evolution and "creation science." 482 U.S. 578 (1987), but that did not deal with public employee religious exercise. Other cases involved matters outside the public employee context.

still an option and the concept of endorsement was still very much alive and working in the background.

Eight years later, the Court invalidated a Texas high school's policy of commissioning student prayers at the school's football games. *Santa Fe Ind. Sch. Dist. v. Doe,* 530 U.S. 290 (2000). In that case, the Court suggested it would apply a coercion test to determine if the school district had violated the Establishment Clause: "[O]ur analysis is properly guided by the principles that we endorsed in *Lee* [*v. Weisman*.]" *Id.* at 302. And the Court did apply the coercion test, using it to invalidate the school's program. *Id.* at 316. Along the way, however, it invoked language from Justice O'Connor's plurality opinion in a different case in which she reiterated her view that an Establishment Clause violation can occur if government endorses religion. *Id.* at 302 (citing *Bd. of Ed. of Westside Comty. Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.).[3] Indeed, the Court spoke in terms of both endorsement and coercion throughout the opinion, suggesting the schools had violated both. 530 U.S. at 302, 305, 307-8, 310-12, 316-17.

The problem with all of this history is that the Court has never been clear about which test applies to what situation. What we learn is that there appear to be three tests by which a public employer may violate the Establishment Clause: endorsement, coercion, and one of the *Lemon* prongs. The Court has kept *Lemon* but has never applied it in situations involving public employee private religious exercise. Its other decisions seem to rely on coercion and

[3] Justice O'Connor first elaborated on the endorsement test in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

endorsement without clarity on which controls when. All of this leaves public employers understandably confused regarding what to do when their employees engage in private religious exercise.

B. The Ninth Circuit's and School District's Reasoning Confirms Lower Courts and Public Employers Need More Guidance.

Armed with this Court's precedent, the school district, followed by the Ninth Circuit, attempted to resolve Kennedy's case. They ignored entirely both coercion and *Lemon* and instead focused solely on endorsement. The school district enforced a rule that would allow Kennedy to engage in religious exercise as long as it "would not be perceived as District endorsement." App.223. To enforce that rule, the District informed Kennedy that while he was on duty as a coach, he could "not engage in demonstrative religious activity, readily observable to . . . students and the attending public." *Id.*

The Ninth Circuit upheld the policy, even *after* assuming Kennedy was engaged in private religious exercise and even after recognizing that the school district was burdening his religious exercise with a non-neutral policy. App.17-18. In doing so, it mentioned the concept of coercion only one time, when it acknowledged the coercive power schools enjoy. *Id.* Otherwise, its focus was exclusively on whether Kennedy's religious exercise would be perceived as an endorsement of religion by "an objective observer." App.18.

The Ninth Circuit's focus on endorsement in the context of an employee's private religious exercise only led to muddled reasoning and will lead to absurd

results. Concerns over endorsement should only matter if an employee's religious exercise is attributed to the school. Unlike *Santa Fe,* this is not a case where the school is choosing a delegate and claiming the delegate is a private speaker. Nor is it a case where speaker access is limited by viewpoint—all employees of all religious traditions have equal access. The Ninth Circuit assumed Kennedy was a private actor and still used the endorsement test to evaluate his religious exercise for an Establishment Clause violation.

The Ninth Circuit emphasized that "[c]ontext matters." App.20. Yet its focus on endorsement led to it ignoring important contextual facts. It concluded that any objective observer would decide the school district endorsed Kennedy's prayers, but it ignored the well-known fact that the school district had publicly denounced and tried to stop the prayers from happening. If context matters, anyone aware of the history of Kennedy's prayers would have known they were his alone, not the school district's.

The Ninth Circuit also relied heavily on the attention Kennedy's prayers drew, concluding the attention alone was enough to violate anti-endorsement principles. That attention came only after the school district first scrutinized his prayers, causing him to seek public support. In other words, had the law been clearer, and had the school district not believed that Kennedy's prayers were an Establishment Clause violation, the subsequent attention would have been a nonissue. Government may not draw attention to religious exercise, then use that attention to justify burdening the religious exercise.

The Ninth Circuit's test also results in nearly every type of private behavior under the sun being acceptable except employee religious exercise. Coaches could jump, sing, dance, cheer, hug, give inspirational speeches, slap hands, fall on the ground in joy, and even kneel. But the moment they offer a prayer, even a silent one, as long as they are observable by students, they violate the Establishment Clause. In all the chaos that follows a football game, such a rule not only targets religion; it is unmanageable.

Under the school district's rule, as upheld by the Ninth Circuit, public employees would be forbidden from participating in many forms of religious exercise any time students or the public might observe them. This could include praying over meals; wearing religious garb, such as turbans, yarmulkas, hijab, crosses, jewelry, or sacred garments; offering a religious greeting to a coworker; fasting during Ramadan; offering a silent Buddhist chant; pointing to heaven in gratitude after a score; and even eating kosher or halal meals if the type of meal is obvious.

Ensuring government does not violate the Establishment Clause is an important and worthy goal. The Clause is a crucial component of protecting religious freedom for all. In its first Establishment Clause decision of the modern era, the Court stated its rule in broad terms: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and nonbelievers." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Under the Ninth Circuit's reasoning, however, we see that neutrality lost. Those who pray in any demonstrative way, those who wear sacred garb, those whose

religion cannot be completely closeted away, those whose inner religious commitments are a part of their outward identity are all excluded from government service by the Ninth Circuit's rule. The attempt to avoid endorsement creates an environment in which children see only those adults who purport to have no religion, whose religious identities are completely private, or who succumb to pressure to keep their identities closeted. That harms not only the public employees but also the students, who will receive less preparation to live in a religiously diverse world.

II. The Endorsement Test for Public Employees Engaged in Private Religious Exercise Is Not Workable.

What drove both the Ninth Circuit and the school district in this case was nervousness over endorsement.

The endorsement test should govern in some circumstances. There are instances when *Lemon*, or at least some of its concepts, should be used to ensure government neutrality between religion and nonreligion. The Court need not lay out here every scenario where each test should apply. But it does need to clarify that the endorsement test should not apply when evaluating public employee private religious exercise for an Establishment Clause violation.

A. The Endorsement Test Leads to Absurd Results in the Public Employee Religious Exercise Context.

The biggest concern of applying the endorsement test to the private religious exercise of public employees is the potential for absurd results.

The endorsement test prohibits state action that has the purpose or effect of endorsing religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (stating this rule and equating the term "endorsement" with "favoritism" and "promotion"). In the context of the religious exercise of state employees, applying this test is difficult, for nearly any outward religious act by a public employee can be seen as the possible endorsement of religion. The logical end of applying the endorsement test would be to prohibit *any* displays of religion by state employees.

The Court need not consider this result in the abstract. It can look to the Canadian province of Quebec to see the absurd outcomes that stem from an obsessive worry that public employees might appear to be endorsing religion.

Similar to the concerns regarding establishment in the United States, Quebec law considers the laicity of the state to be a fundamental freedom of the Quebec people. Charter of Human Rights and Freedoms, R.S.Q., c C-12 (Can). In 2017, the Quebec legislature became fearful that allowing public officials to express their religious beliefs would be seen as an impermissible endorsement by the government of religion. In an effort to "foster adherence to State religious neutrality[,]" the legislature enacted Bill 62, which prohibited the wearing of any face coverings by public officials while performing their duties. "An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies," SQ 2017, c 19 (Can.).

This statute was highly criticized for its discriminatory effect, and numerous courts in Canada struck it down because it seemed to target only Muslims. National Council of Canadian Muslims (NCCM) c. Attorney General of Québec, 2018 QCCS 2766 (Can.). To work around those decisions, the Quebec legislature enacted Bill 21, which prohibited most public officials from wearing *any* religious symbol at any time while performing their job. An Act Respecting the Laicity of the State, S.Q. 2019, c 12, s 6 (Can.). The Bill defines a religious symbol as "any object . . . that (1) is worn in connection with a religious conviction or belief; or (2) is reasonably considered as referring to a religious affiliation." *Id.* This means that, for example, a public official cannot wear a cross, turban, yarmulke, hijab, or any head covering while on the job. As a result, any practicing member of any religion that requires the wearing of religious garb or symbols would be forbidden from seeking a career in most governmental positions. Muslims, Hindus, Christians, Sikhs, Jews, any number of other religious minorities—all are placed in the impossible position of choosing their livelihoods or their religions; in the name of anti-endorsement, they cannot have both.

It seems the only people left unscathed by the law are those whose religious beliefs require absolutely no outward expression, those who purport to have no religion at all, or those willing to abandon their religious identities.

This absurd outcome is just one example of the dangers of the endorsement test in the context of private religious exercise by public employees. The

longer it percolates in the United States, inadequately defined and misapplied, the more likely similar outcomes will arise here.

B. The Endorsement Test for Public Employee Religious Exercise Leads to Conflicting and Confusing Results.

The endorsement test seems to rely on whether an "objective observer" would believe a public employer endorsed religion in the full context of the situation. App.18. But determining who is an objective observer is difficult. The Ninth Circuit seemed to create an observer who views any religious act of an individual as government action. It also created an observer who ignores crucial facts—such as the school district's distancing itself from Kennedy's prayers—to reach a particular conclusion. A focus on endorsement will consistently lead critics to question whether courts have properly created an "objective observer" and whether that observer has considered the entire context of the case. *See* App.126-27.

Using the endorsement test, it is nearly impossible to distinguish between religious exercise that is clearly allowed and religious exercise that is not. Consider the Ninth Circuit's own example, in response to concerns expressed by Justice Alito. 139 S.Ct. at 636 (Alito, J.). The panel argued that a teacher praying over her lunch while students are in the room is quite different than a coach praying on the football field. They concluded the former "is of a wholly different character" than the latter. App.15. Tellingly, they offer no explanation as to why, in part because the endorsement test allows for no such distinction in this situation.

The endorsement test will also lead to far more litigation and conflict than is necessary. It is too enslaved to the eyes of the beholder. Any time anyone is opposed to the religious observance of a government employee, they can claim they feel government is endorsing a particular religious viewpoint. This will lead to investigations, which in turn will result in chilling of religious exercise. Trying to cabin those claims by asking how an "objective observer" might view the situation may limit how successful some of the claims are, but only after months and years of needless litigation in which both public employees and their employers are targets of the litigation.

III. A Modified Coercion Test for Public Employee Religious Exercise Is a Reasonable Method for Enforcing the Establishment Clause.

A. The Coercion Test Is Most Effective for Determining the Limits of Public Employee Private Religious Exercise.

This case provides the Court an opportunity to set the record straight. It has used a number of different terms and tests to describe when an Establishment Clause violation occurs. Now it can provide a clear test in the context of public employees privately exercising their religion. Whether *Lemon* survives or the endorsement test continues to get applied in other situations are questions the Court can leave to another day or has already answered in its previous cases.

In the context of cases involving public employees privately exercising their religious beliefs, however, the question lower courts and public employers

should be asking is whether the exercise of religion coerces third parties into engaging in the religious exercise. This is not a case of government endorsing prayer at football games or graduations, nor of teachers or administrators forcing diluted prayers or scripture study on students. It is about an individual's private choice to comply with his religious obligations.

One of the key concerns of both Religion Clauses is protecting religious volunteerism. An action by a public employee that coerces others to avoid practicing their own beliefs or to practice a belief they do not hold would violate the Establishment Clause.

The coercion test in this limited context is consistent with the Court's decisions in *Lee v. Weisman* and *Santa Fe*. It would leave intact the Court's concerns about endorsement in certain situations, but it would also make sense of the Court's worries about coercion of students, teachers, and audiences.

B. The "Coercion" Test Must Be Modified to Be Manageable.

As with the endorsement test, there is a risk with the coercion test that someone could bring a claim simply because they feel coerced. This problem will arise if the test relies too heavily on the subjective views of the person alleging coercion. The risk is that the test may cause the same chilling effect as the endorsement test.

To succeed on any claim of coercion, then, a plaintiff would need to provide some evidence of "coercive pressure." *Weisman*, 505 U.S. at 592. This is consistent with the Court's ruling in *Santa Fe* that courts must examine "the circumstances

surrounding" any alleged Establishment Clause violation. *Santa Fe*, 530 U.S. at 315. A plaintiff cannot succeed merely by claiming that they felt compelled to practice or not practice certain religious beliefs without evidence of actual benefits or burdens discriminatorily allocated based on the plaintiff's reaction to the religious exercise. *See Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (plurality opinion).

This test is not about the psychological state of those who may or may not be experiencing coercion, which some have condemned. *See Weisman*, 505 U.S. at 644 (Scalia, J. dissenting). It is about an objective analysis of evidence of coercive pressure.

This evidence may come in many forms, such as a showing that the public employee allocated benefits and burdens based on who participated with him. In this case, for example, if players could show that those who joined in the prayers consistently received more playing time over those who did not, they would have a stronger claim.

A captive audience is another example of coercive pressure. A person that is forced to attend and witness an exercise of religion is compelled to participate in that exercise even if they are not explicitly asked to participate. Such an environment creates public and peer pressure that "though subtle and indirect, can be as real as any overt compulsion." *Weisman*, 505 U.S. at 593.

Another example of coercive pressure would be a public employee proselytizing to students, or to adult third parties even after they have said no.

This is not to suggest that a modified coercion test will not face difficult cases. It will, as does any legal rule. But a modified coercion test will reduce the number of hard cases and absurd results. It will also have the effect of helping students live in a religiously diverse world while ensuring that individuals who outwardly exercise their religion are not cast out from public employment.

CONCLUSION

The Court should grant the petition for writ of certiorari, reverse the judgment below, and adopt a clearer standard for what constitutes an Establishment Clause violation in the context of public employees privately exercising their religion.

Respectfully submitted,

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