No. 21-418

In the
Supreme Court of the United States

JOSEPH A. KENNEDY
Petitioner,
v.
BREMERTON SCHOOL DISTRICT
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY INITIATIVE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE*.....1

INTRODUCTION AND SUMMARY OF ARGUMENT.....2

ARGUMENT.....5

I. The Endorsement Test's Unworkability Has Resulted In Disarray And Confusion.....5

II. The Endorsement Test Perversely Singles Out Religion For Disfavored Treatment 10

III. The Endorsement Test Should Be Replaced By A Clear Rule That History And Tradition Are The Proper Guideposts.....17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Adler v. Duval Cnty. Sch. Bd.,
250 F.3d 1330 (11th Cir. 2001)..... 7

Am. Atheists, Inc. v. Davenport,
637 F.3d 1095 (10th Cir. 2010)..... 19

Am. Legion v. Am. Humanist Ass'n,
139 S. Ct. 2067 (2019)..... 19

Bannon v. Sch. Dist. of Palm Beach Cnty.,
387 F.3d 1208 (11th Cir. 2004)..... 10

Bronx Household of Faith v. Bd. of Educ.,
650 F.3d 30 (2d Cir. 2011)..... 8

Brown v. Woodland Joint Unified Sch. Dist.,
27 F.3d 1373 (9th Cir. 1994)..... 8

Busch v. Marple Newtown Sch. Dist.,
No. 05-CV-2094, 2007 WL 1589507
(E.D. Pa. May 31, 2007)..... 7

Capitol Square Rev. & Advisory Bd. v. Pinette,
515 U.S. 753 (1995)..... 17, 18

Ceniceros ex rel. Risser v. Bd. of Trs.,
106 F.3d 878 (9th Cir. 1997)..... 8

Corder v. Lewis Palmer Sch. Dist. No. 38,
568 F. Supp. 2d 1237(D. Colo. 2008), *aff'd*,
566 F.3d 1219 (10th Cir. 2009)..... 7

County of Allegheny v. ACLU,
492 U.S. 573 (1989)..... 17, 18, 19

Curry ex rel. Curry v. Hensiner,
513 F.3d 570 (6th Cir. 2008)..... 6

Demmon v. Loudoun Cnty. Pub. Schs.,
342 F. Supp. 2d 474 (E.D. Va. 2004)..... 10

Doe v. Duncanville Indep. Sch. Dist.,
70 F.3d 402 (5th Cir. 1995) 9

Doe ex rel. Doe v. Elmbrook Sch. Dist.,
687 F.3d 840 (7th Cir. 2012) (en banc) 10

Eklund v. Byron Union Sch. Dist.,
No. 02-CV-3004, 2003 U.S. Dist. LEXIS 27152
(N.D. Cal. Dec. 5, 2003), *aff'd*, 154 F. App'x 648
(9th Cir. 2005) 8

Espinoza v. Mont. Dep't of Revenue,
140 S. Ct. 2246 (2020) 18

Freiler v. Tangipahoa Par. Bd. of Educ.,
185 F.3d 337 (5th Cir. 1999) 8

Granzeier v. Middleton,
173 F.3d 568 (6th Cir. 1999) 9

Green v. Haskell Cnty. Bd. of Comm'rs,
574 F.3d 1235 (10th Cir. 2009) 18

J.S. ex rel. Smith v. Holly Area Schs.,
749 F. Supp. 2d 614 (E.D. Mich. 2010) 6

Kitzmiller v. Dover Area Sch. Dist.,
400 F. Supp. 2d 707 (M.D. Pa. 2005) 8

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 17

Lassonde v. Pleasanton Unified Sch. Dist.,
320 F.3d 979 (9th Cir. 2003) 7

McCreary County v. ACLU,
545 U.S. 844 (2005) 18

Metzl v. Leininger,
850 F. Supp. 740 (N.D. Ill. 1994) 8, 9

Morgan v. Swanson,
659 F.3d 359 (5th Cir. 2011) (en banc) 5, 6

Morgan v. Swanson,
755 F.3d 757 (5th Cir. 2014)..... 11

Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.,
426 F.3d 617 (2d Cir. 2005) 7

Peck v. Baldwinsville Cent. Sch. Dist.,
No. 22-CV-1947, 2008 WL 4527598 (N.D.N.Y. Sept. 30, 2008), *vacated as moot by* 351 F. App'x 477 ..... 6, 7

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155 F.3d 274, 288 (4th Cir. 1998)..... 6

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730 F. Supp. 2d 636 (S.D. Tex. 2010)..... 7

Roark v. S. Iron R-1 Sch. Dist.,
573 F.3d 556 (8th Cir. 2009)..... 6

Rowan County v. Lund,
138 S. Ct. 2564 (2018)..... 20

S. Pac. Co. v. Jensen,
244 U.S. 205 (1917)..... 18

Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs,
788 F.3d 580 (6th Cir. 2015)..... 10

Stratechuk v. Bd. of Educ.,
587 F.3d 597 (3d Cir. 2009) 9

Utah Highway Patrol Ass'n v. Am. Atheists, Inc.,
565 U.S. 994 (2011)..... 18, 19

Van Orden v. Perry,
545 U.S. 677 (2005)..... 17, 18

Wallace v. Jaffree,
472 U.S. 38 (1985)..... 19

Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ., 342 F.3d 271 (3d Cir. 2003)..... 6

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Michelle Bandur, *Elkhorn Elementary Principal Put on Leave for Banning Santa, Candy Canes, and Other Christmas Decorations*, KETV (Omaha) (Dec. 6, 2018), https://perma.cc/U3NB-V8KX 15

George Brown*, Student Told He Could Not Read Bible During School Free Time,* WREG (Memphis) (Jan. 6, 2015), https://perma.cc/7WQ2-ZYAD 14

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Business' Logo at High School Football Field Causes Controversy, Legal Action, KSLA (Shreveport) (Sept. 7, 2018), https://perma.cc/PM8X-Q8A9.....13

Crystal Cranmore, *Family Says Daughter's 2nd Grade Teacher Ripped Hijab off Her Head in NJ School*, WABC (N.Y.) (Oct. 9, 2021), https://perma.cc/4A2P-WJYL 16

Charles Eichacker, *Augusta Ed Tech Says School Department Discriminated Against Her for Telling Colleague 'I Will Pray for You',* CENTRALMAINE (May 17, 2017), https://perma.cc/L24B-4C5B 13

Alaa Elassar, *A Muslim Athlete Was Disqualified from Her High School Volleyball Match for Wearing a Hijab*, CNN (Sept. 27, 2020), https://perma.cc/T3WD-TDSJ 16

Chris Fuchs, *Officials Say Sikh Student's Soccer Ban Was Miscommunication*, NBC NEWS (Sept. 29, 2017), https://perma.cc/7TQX-Y4PN 16

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Karen Herzog, *Valentines with Bible Verses at Heart of Free Speech Lawsuit Student Filed Against College,* MILWAUKEE JOURNAL SENTINEL (Sept. 5, 2018), https://perma.cc/RER5-XU6J 12

Wesley Juhl, *Bible Verse in Charter School Sixth Grader's Assignment Stirs Controversy*, LAS VEGAS REVIEW JOURNAL. (May 21, 2015), https://perma.cc/C4YK-YH76 12

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Memorandum from Assistant Special Education Director of Cony School to Toni Richardson (Sept. 19, 2016), https://perma.cc/29RY-B46V) 13

Rodney Page, *Cambridge Christian Tackles Public Prayer Before Games*, TAMPA BAY TIMES (Jan. 26, 2016), https://perma.cc/5PVD-KM52.....14

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INTEREST OF *AMICUS CURIAE*[1]

The Notre Dame Law School Religious Liberty Initiative promotes and defends religious freedom for people of all faiths through scholarship, events, and the Law School's Religious Liberty Clinic. The Religious Liberty Initiative protects not only the freedom for individuals to hold religious beliefs but also their right to exercise and express those beliefs and to live according to them. It has represented individuals and organizations from an array of faith traditions to defend the right to religious worship, to preserve sacred lands from destruction, to promote the freedom to select religious ministers, and to prevent discrimination against religious schools and families.

In addition to defending religious exercise wherever it is curtailed, the Religious Liberty Initiative advances and advocates for the critical presence of religious expression, religious institutions, and religious believers in public life. It therefore seeks to ensure that government actors, like Bremerton School District, do not silence or penalize private religious expression.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. All parties filed blanket consents to the filing of amicus briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case offers the Court a much-needed opportunity to resolve the longstanding confusion caused by its conflicting and erroneous interpretations of the Establishment Clause. Although recent decisions clarify that the government may not suppress private religious expression, the Court has yet to clear away an undergrowth of older precedents that are often read to suggest the opposite. Rather than permit those outdated decisions to persist and perpetuate confusion, the Court should bring the doctrine in line with the text and original understanding of the First Amendment.

Here, the Court should finally jettison the so-called "Endorsement Test." The Endorsement Test seeks to draw a line between permissible private religious expression and impermissible government religious expression by asking whether a "reasonable observer" would think that the government is "endorsing" a religious message. In reality, it is impossible to know what a supposed "reasonable observer" would think about Coach Kennedy's prayer at the fifty-yard line or any other relevant religious exercise. Instead, decades of experience demonstrate that the reasonable observer, who is a hypothetical person with hypothetical opinions, more often serves as a vessel to be filled by the perceptions and misperceptions of judges and local officials. As a result, the Endorsement Test often leads to the suppression of private religious voices, either by well-meaning

government officials seeking to avoid the reasonable observer's gaze, or by others who are hostile to or unfamiliar with the religious practices.

As a matter of constitutional interpretation, the Endorsement Test is untethered from the text of the First Amendment and antithetical to our nation's history and tradition. It is also unworkable and has sown disarray, confusion, and discrimination against protected religious speech and conduct. Especially in public schools, teachers and administrators exhibit an extreme risk aversion, born of this Court's precedents, in which their fear of appearing to endorse religion leads them instead to single out religious exercise for disfavored treatment. Even well-meaning school officials lack any unifying guidance from lower courts applying the Endorsement Test.

Bremerton School District's suppression of Coach Joseph Kennedy's practice of praying after football games is a case in point. Bremerton's actions, first prohibiting Coach Kennedy from praying, and then firing him when he continued to do so, resulted from its desire to avoid "endorsing" religion. But Bremerton's discrimination against religious exercise, not Coach Kennedy's response to the situation, created the constitutional error before the Court. And the lower courts' circular analysis—which suggested that a reasonable observer would view student and parent support of Coach Kennedy in the face of religious discrimination as evidence that the school had endorsed his religious expression—is but one example of the Endorsement Test's unworkability. The Endorsement Test has resulted in confusion, both

in the courts and, perhaps even more importantly, in the public schools that educate the majority of American children. Students can express religious views in their class assignments—except when they cannot. Candy canes and Christmas carols are permitted at school events—except when they are not. Private Bibles are allowed in school classrooms and on playgrounds—except when they are not.

Worse yet, the Endorsement Test encourages government officials to be hostile to religion by suggesting that the hypothetical feelings of an imagined observer must trump the religious exercise of actual human beings. In objection to Bremerton's efforts to suppress Coach Kennedy's religious speech, members of the opposing team and the public decided to join him on the field for a post-game prayer. App.220. Various media captured the event. *Id.* Then Bremerton claimed that this public support amplified its religious endorsement concerns, and it further restricted Kennedy's prayer. In other words, Bremerton's ham-handed attempt to suppress Coach Kennedy's religious exercise was itself the catalyst of the very situation that Bremerton later claimed risked creating an endorsement. No legal doctrine should encourage such a perverse result.

The Court should make clear in this case that the Endorsement Test is not the standard for interpreting the Establishment Clause. Time and time again, members of this Court have denounced the Endorsement Test, but the Court has not yet explicitly repudiated it. As a result, teachers and school administrators find themselves in the impossible position of navigating the amorphous line between

protecting private religious exercise and "avoid[ing] the perception of endorsement." App.6. Rather than allow that confusion and the resulting hostility to religious expression to persist, the Court should jettison the Endorsement Test in favor of the original public meaning of the First Amendment, consistent with our nation's history and tradition.

ARGUMENT

I. The Endorsement Test's Unworkability Has Resulted In Disarray And Confusion.

The Endorsement Test has thrown the lower courts into doctrinal confusion. In the public-school context, lower courts cannot agree on what students may say and do, what schools may permit, and what they must prohibit. Students' right to engage in religious exercise is beholden, first, to the whims of risk-averse school officials, and, second, to lower courts' subjective views on endorsement. Courts applying the Endorsement Test have come to conflicting conclusions about a number of issues, including: private religious expression; public schools' curricula, calendars, and events; religious images on school property; and school use of off-campus religious facilities.

Private Religious Expression: Remarkably, courts cannot even come to a consensus on whether the Endorsement Test permits students to distribute *candy canes* with religious messages attached to them in school. The Fifth Circuit has held that a student may pass out candy canes with religious messages attached at a "winter break" party without raising endorsement concerns. *Morgan v. Swanson*, 659 F.3d

359, 410 (5th Cir. 2011) (en banc) (Elrod, J., majority op.). Similarly, in Massachusetts, a district court determined that a school wrongly suspended students for giving out candy canes with religious messages between classes. *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 106, 120 (D. Mass. 2003). In contrast, the Third Circuit has held that endorsement concerns justified a New Jersey elementary school's decision to block a student from distributing candy canes with religious messages attached. *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.,* 342 F.3d 271, 279–80 (3d Cir. 2003). Similarly, the Sixth Circuit upheld a school's decision to prohibit a Fifth Grader from "selling" candy cane ornaments with religious messages as part of a model business project for class. *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 575–76, 580 (6th Cir. 2008).[2]

Even a child's homework is not safe from allegations of endorsement. One court held that endorsement concerns justified a New York school's decision to fold the corners of a kindergarten student's environmental protection poster to hide the picture of Jesus that the child had pasted on it. *Peck v.*

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[2] Other examples abound. The Fourth Circuit held that school clubs may make Bibles available to interested students, but the Eighth Circuit held that the distribution of Bibles is an endorsement of religion. *Compare Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 (4th Cir. 1998), *with Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 561 (8th Cir. 2009). However, a district court in the Sixth Circuit also held that the First Amendment protects a student's right to proselytize directly by giving his classmates letters inviting them to attend his church's summer camp. *J.S. ex rel. Smith v. Holly Area Schs.*, 749 F. Supp. 2d 614, 625 (E.D. Mich. 2010).

Baldwinsville Cent. Sch. Dist., No. 22-CV-1947, 2008 WL 4527598, at *13 (N.D.N.Y. Sept. 30, 2008)*, vacated as moot by* 351 F. App'x 477.[3] In another case, a court held that the Endorsement Test justified a teacher's decision to block a parent from reading from her child's favorite book—the Bible—at an "all about me" day. *Busch v. Marple Newtown Sch. Dist.*, No. 05-CV-2094, 2007 WL 1589507, at *10 (E.D. Pa. May 31, 2007). Yet, when a Texas school blacked out a contractor's religious message on a fundraising form sent home with students, a federal court found the conduct to be unconstitutional viewpoint discrimination. *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 659–60 (S.D. Tex. 2010).

Lower courts also are divided on whether a school must censor religious expression in student graduation speeches. Students may include religious language in their commencement speeches in the Eleventh Circuit, *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1331–32 (11th Cir. 2001), but schools in the Ninth Circuit are apparently required to strip religious language from student speeches, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003). One district court held that a school may even deprive a student of her diploma until she publicly apologizes for religious content in a graduation speech. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 568 F. Supp. 2d 1237, 1245 (D. Colo. 2008), *aff'd*, 566 F.3d 1219 (10th Cir. 2009).

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[3] *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005) (remanding endorsement question at earlier stage in the case).

Courts also are confused about whether private religious conduct and expression on school property is an impermissible endorsement of religion. The Ninth Circuit required a school to allow student religious clubs to meet at school during the lunch hour. *Ceniceros ex rel. Risser v. Bd. of Trs.*, 106 F.3d 878, 881 (9th Cir. 1997). But the Second Circuit held that a school could prohibit the use of school facilities for religious worship (but not religious activities), even when the worship occurred after school. *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 45–46 (2d Cir. 2011).

Curriculum, calendars, and events: There also is no clear standard governing endorsement in curricula, on school calendars, and as a part of school events. Some federal courts have held that schools that provided disclaimers before teaching evolution, by telling students to form their own opinions, were endorsing religion. *See Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765–66 (M.D. Pa. 2005). However, other courts have held that schools that required students to role-play as witches or "become Muslims" for an eight-week unit on Islam were not endorsing religion. *See Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1383 (9th Cir. 1994); *Eklund v. Byron Union Sch. Dist.*, No. 02-CV-3004, 2003 U.S. Dist. LEXIS 27152, at *12 (N.D. Cal. Dec. 5, 2003), *aff'd*, 154 F. App'x 648 (9th Cir. 2005).

Similarly, school calendars listing religious holidays may or may not survive the Endorsement Test. In Illinois, a teacher successfully sued her school for listing Good Friday as a school holiday. *Metzl v.*

Leininger, 850 F. Supp. 740, 750 (N.D. Ill. 1994) (finding that holiday conveyed an "impermissible message that Christianity is a favored religion"). In Kentucky, by contrast, the Sixth Circuit approved schools' closures for Yom Kippur and Rosh Hashanah, observing that this was not done "to establish the Jewish religion, but rather as a secular recognition of the practicalities" of school attendance. *Granzeier v. Middleton*, 173 F.3d 568, 575–76 (6th Cir. 1999).

Nor can courts agree on whether the Endorsement Test prohibits the performance of religious music at school events. The Third Circuit upheld a New Jersey school's policy prohibiting students from performing "Silent Night" at the school's concert, which had the effect of barring the school's gospel choir from the recital. *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 601, 610 (3d Cir. 2009). In Texas, however, when a student challenged using hymns—"Go Ye Now in Peace" and "The Lord Bless You and Keep You"—as the school choir's theme songs, the Fifth Circuit declared that prohibiting religious music would exhibit "hostility, not neutrality, toward religion." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404, 407–08 (5th Cir. 1995).

Religious Images on School Property: Lower courts also disagree about the appropriateness of religious images (including student-created images) in public schools. When a Florida school invited students to paint murals on temporary plywood boards that were part of a renovation project, but then required a student to paint over the word "God" and "Jesus" in her mural, the Eleventh Circuit held that endorsement concerns justified the school's actions.

Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1211, 1216 (11th Cir. 2004). But the Eastern District of Virginia held that a reasonable observer would not interpret crosses engraved in brick that were part of a "walkway of fame" in a "prominent area . . . near the main entrance" of the school as an endorsement of Christianity. *Demmon v. Loudoun Cnty. Pub. Schs.*, 342 F. Supp. 2d 474, 477, 493 (E.D. Va. 2004).

Use of Off-Campus Facilities: Finally, courts have reached conflicting conclusions about when a school can use off-campus religious facilities for school purposes. For instance, the Seventh Circuit rejected as unconstitutional the vote of Wisconsin high school seniors to hold graduation in a roomy, air-conditioned church rather than their school's cramped gym, reasoning that the "sheer religiosity of the space" created a likelihood of endorsement. *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 853 (7th Cir. 2012) (en banc). However, the Sixth Circuit held that the Endorsement Test did not preclude a school district in Tennessee from sending students to a partnered Christian "alternative school" that provided a secular education but required students to attend events in the chapel, which contained religious imagery. *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 583–84, 593 (6th Cir. 2015).

II. The Endorsement Test Perversely Singles Out Religion For Disfavored Treatment.

Courts' confusion over the Endorsement Test has resulted in a troubling dynamic in which religious exercise is singled out for disfavored treatment. Around the country, public-school administrators have sterilized public schools of all things religious,

ousting religious messages, conduct, and symbols—even if wholly private—from public schools, in the name of avoiding any perceived endorsement of religion. This perverse result only further demonstrates the unworkability of the Endorsement Test.

Each of the stories below reveals how the fear of endorsement inevitably causes uncertainty for public-school officials. When courts—the legal experts—are themselves so confused about what constitutes endorsement, it is "unrealistic to expect that an educator might somehow divine her constitutional obligations." *Morgan v. Swanson*, 755 F.3d 757, 764 (5th Cir. 2014) (Benavides, J., specially concurring). In erring on the side of caution, these officials all-too-often decide to silence private religious speech in order to avoid endorsing it.

Take, for example, the story of Erin Shead, a ten-year-old public-school student who was forbidden from selecting God as her "idol" for an assignment. She had written that she looked up to God "because he put me on this earth" and "[h]e will make me be the best that I can be." When her teacher told her to "start over and pick another idol," Shead chose Michael Jackson instead. Candace McCowan, *School Says No to God for Project; Mother Furious*, WREG (Memphis) (Sept. 11, 2013), https://perma.cc/WE5A-D2L7.[4] Similarly,

[4] Or, consider Mackenzie Frasier, a sixth-grade public-school student, who was told she could not include a slide with the Bible verse John 3:16 in her "All About Me" assignment. According to the assistant principal, Frasier's presentation would subject a "captive audience"—her classmates—to her religious beliefs, and

on Valentine's Day, Donald and Ellen Abramo's son brought cards that described the life of St. Valentine and reminded his classmates that "God loves you!!!!" Although other students also brought cards, the public-school teacher confiscated only Abramo's cards. *Parents Sue Nazareth Area School District Over Son's Valentine's Day Card for Classmates*, WFMZ (Allentown, Pa.) (Apr. 9, 2014), https://perma.cc/A6DZ-K545.[5]

Other students have faced discipline for seeking to bring religious messages into public-school classrooms. Kendra Turner, a high school student, was punished for saying "bless you" after a fellow classmate sneezed. Her teacher allegedly stated that she was "not going to have godly speaking in her class" and sent Turner to in-school suspension. *Student Reportedly Suspended After Saying 'Bless You'*, WMC ACTION NEWS 5 (Memphis) (Aug. 20, 2014), https://perma.cc/3HF3-F3WL.

Fear of endorsing religion also leads to the suppression of private religious exercise by public-school teachers and administrators. Toni Richardson, a special education teacher, was sent a "coaching

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her teacher had "appropriately followed school law expectations." Wesley Juhl, *Bible Verse in Charter School Sixth Grader's Assignment Stirs Controversy*, LAS VEGAS REVIEW-JOURNAL (May 21, 2015), https://perma.cc/C4YK-YH76.

[5] Polly Olson, a technical college student, was likewise banned from distributing her homemade Valentine's Day cards, which contained religious messages. Karen Herzog, *Valentines with Bible Verses at Heart of Free Speech Lawsuit Student Filed Against College,* MILWAUKEE JOURNAL SENTINEL (Sept. 5, 2018), https://perma.cc/RER5-XU6J.

memorandum" and interrogated after telling a co-worker and fellow church-goer that she would pray for him. Referencing the "separation between church and state," and this Court's Establishment Clause precedents, the memorandum condemned references to "spiritual or religious beliefs" as well as phrases that "integrate public and private belief systems when in the public schools." *Memorandum from Assistant Special Education Director of Cony School to Toni Richardson* (Sept. 19, 2016) (available at https://perma.cc/29RY-B46V). Fearing future discipline or termination, Richardson gave up using religious language and wearing religious jewelry at school. Charles Eichacker, *Augusta Ed Tech Says School Department Discriminated Against Her for Telling Colleague 'I Will Pray for You',* CENTRALMAINE (May 17, 2017), https://perma.cc/L24B-4C5B. While some, like Coach Kennedy, may fight back when commanded to suppress religious practice, many, like Richardson, have no choice but to acquiesce for fear of losing their livelihoods.

Or, consider Billy Weatherall, a local business owner who signed a $3,500 contract to have the logo of his business, Christ Fit Gym, painted in the endzone of Benton High School's football field. The logo included a cross and biblical reference. Just days later, the booster club ordered students to paint over the advertisement because of a pending lawsuit alleging improper endorsement. *Business' Logo at High School Football Field Causes Controversy, Legal Action*, KSLA (Shreveport) (Sept. 7, 2018), https://perma.cc/PM8X-Q8A9.

As with religious messages, public-school administrators also suppress religious conduct. On multiple occasions, teachers have banned students from reading their personal Bibles during free time. Giovanni Rubeo's teacher, for instance, left a voicemail message for his parents, reminding them that he was "not permitted to read those [religious] books in [her] classroom." George Brown, *Teacher on Bible: 'He's Not Permitted to Read Those Books in My Classroom'*, WREG (Memphis) (May 6, 2014), https://perma.cc/62ST-KDR6.[6] Similarly, citing the "separation of church and state," public-school officials banned Chase Windebank and his classmates from meeting in an unoccupied choir classroom during their "open periods" to pray and sing Christian songs. Daniel Wallis, *Colorado High School Sued Over Ban on Student Prayer Group*, REUTERS (Nov. 10, 2014), https://perma.cc/7X36-J9VD.[7]

Even objects and practices that bear a strong secular tradition fall victim to public-school officials' misguided efforts to avoid religious endorsement. An elementary-school principal, for example, distributed a list of unacceptable holiday items, which included

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[6] *See also* George Brown, *Student Told He Could Not Read Bible During School Free Time,* WREG (Memphis) (Jan. 6, 2015), https://perma.cc/7WQ2-ZYAD.

[7] The Endorsement Test also has been used to suppress the religious conduct of *private* religious schools: When two Christian football teams advanced to the state championship, the Florida High School Athletic Association denied their joint request to begin the game with a prayer over the loudspeaker. Rodney Page, *Cambridge Christian Tackles Public Prayer Before Games*, TAMPA BAY TIMES (Jan. 26, 2016), https://perma.cc/5PVD-KM52.

candy canes, reindeer, and red and green items. Michelle Bandur, *Elkhorn Elementary Principal Put on Leave for Banning Santa, Candy Canes, and Other Christmas Decorations*, KETV (Omaha) (Dec. 6, 2018), https://perma.cc/U3NB-V8KX. Santa Claus himself landed on the naughty list in the Hillsboro School District, near Portland, Oregon. Keaton Thomas, *Should Santa Claus Be Allowed in Schools?*, KATU (Portland) (Nov. 29, 2016), https://perma.cc/QGE9-T5Z9. The South Orange/Maplewood School District in New Jersey similarly banned all Christmas music from its "winter" concerts. Peter Appleborn, *It's Beginning to Sound a Lot Like Yesteryear*, N.Y. TIMES (Dec. 15, 2004), https://perma.cc/MXQ2-QLXV.

This confusion causes other administrative headaches. When teachers are unsure about whether student religious expression is permissible in their classrooms, they quickly turn to their principals, who are not lawyers, for a second opinion. *See, e.g.*, *Parents Sue Nazareth Area School District Over Son's Valentine's Day Card for Classmates*, WFMZ (Allentown, Pa.) (Apr. 9, 2014), https://perma.cc/A6DZ-K545. If the resulting guidance is egregiously wrong, school districts place the responsible officials on administrative leave to conduct formal investigations. Michelle Bandur, *Elkhorn Elementary Principal Put on Leave for Banning Santa, Candy Canes, and Other Christmas Decorations*, KETV (Omaha) (Dec. 6, 2018), https://perma.cc/U3NB-V8KX. These battles waste school resources, burden already overtaxed teachers, and distract from students' education.

And while the Endorsement Test can cause well-meaning public-school administrators to reach peculiar and absurd results, some government officials appear to exploit the fear of endorsing religion to mask religious ignorance or hostility. Second-grader Sumayyah Wyatt was a first-hand victim of this hostility. Her teacher told her to remove her hijab, which she had worn to school every day for months. When she resisted, the teacher "yanked it off in front of the class" and told Wyatt that her "hair is beautiful." Crystal Cranmore, *Family Says Daughter's 2nd Grade Teacher Ripped Hijab off Her Head in NJ School*, WABC (N.Y.) (Oct. 9, 2021), https://perma.cc/4A2P-WJYL. When high schoolers Fatmata Mansaray and Hajah Bah sought to wear hijabs beneath their caps at graduation, school administrators ordered that they obtain parental permission slips to "prove they were Muslim." Moriah Balingit, '*Why Do I Need a Note for My Religion?' Students Are Told to Get Permission Slips to Wear Hijabs*, WASH. POST (June 9, 2017), https://perma.cc/GSX9-SVNV.[8] Nine-year-old William McLeod was required to wash off an Ash Wednesday cross from his forehead. His elementary school teacher called the mark "inappropriate" and later claimed she did not know it was a religious symbol, even though McLeod twice explained the cross's

[8] High school students have also been barred from participating in sports because of their religious head coverings. Chris Fuchs, *Officials Say Sikh Student's Soccer Ban Was Miscommunication*, NBC NEWS (Sept. 29, 2017), https://perma.cc/7TQX-Y4PN; Alaa Elassar, *A Muslim Athlete Was Disqualified from Her High School Volleyball Match for Wearing a Hijab*, CNN (Sept. 27, 2020), https://perma.cc/T3WD-TDSJ.

significance. Joseph Gedeon & Lindsay Whitehurst, *Utah Teacher Apologizes for Ash Wednesday Cross Incident*, ASSOCIATED PRESS (Mar. 11, 2019), https://perma.cc/3YAW-AGTP.

All these public schools are shielded by the Endorsement Test's vague criteria. This suppression of private religious speech will continue until the Court is "willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges," including the Endorsement Test. *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring).

III. The Endorsement Test Should Be Replaced By A Clear Rule That History And Tradition Are The Proper Guideposts.

Members of this Court have sharply criticized the Endorsement Test from the moment that it was first adopted in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[9] And, in the 33 years since, many justices have added their voices to these criticisms. As Parts I and II show, the concerns animating those criticisms have unfortunately been borne out over decades of experience. This Court should thus finally discard this doctrine—which is unmoored from the constitutional text, inconsistent with the country's history and tradition, and unworkable in practice.

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[9] *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397–401 (1993) (Kennedy & Scalia, JJ., concurring) (calling the use of the Endorsement Test "unsettling" and "a strange notion"); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768–69, 800 (1995); *Van Orden*, 545 U.S. at 692–98 (Thomas, J., concurring).

Lower courts' widely disparate opinions applying the Endorsement Test show that the doctrine was ill-conceived from the start.[10] From the day it was articulated, Justice Kennedy cautioned that it "is flawed in its fundamentals and unworkable in practice." *Id*. at 669 (Kennedy, J., dissenting). And the confusion he predicted has only been exacerbated by this Court's own inconsistent use of the test. Without explanation, this Court has intermittently relied on the doctrine, or ignored it completely. *Compare McCreary County v. ACLU*, 545 U.S. 844, 859–66 (2005), *with Van Orden*, 545 U.S. at 692; *see also Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 995–98 (2011) (Thomas, J., dissenting from denial of cert.).[11]

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[10] "The State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995). "[T]he modern understanding of the Establishment Clause is a 'brooding omnipresence,' . . . ever ready to be used to justify the government's infringement on religious freedom." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

[11] Lower courts are well aware of the cause of their confusion. "Whether *Lemon v. Kurtzman* and its progeny actually create discernible 'tests,' rather than a mere ad hoc patchwork, is debatable." *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of reh'g en banc) (internal citations omitted).

At the heart of the confusion is the test's reliance on the "reasonable observer." Sometimes, this imaginary citizen does not appear merely reasonable, but instead resembles "the ideal human" and "a well-schooled jurist," a conception "singularly out of place in the Establishment Clause context." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting). Sometimes, the reasonable observer is the exact opposite: "[b]iased, selective, vision impaired, and a bit of a hot-rodder." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1109 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of reh'g en banc); *see also Utah Highway Patrol*, 565 U.S. at 997 (Thomas, J. dissenting from denial of cert.) (describing the arbitrariness of the reasonable observer). Courts looking through the reasonable observer's eyes have developed "a jurisprudence of minutiae . . . using little more than intuition and a tape measure." *County of Allegheny*, 492 U.S. at 674–75 (Kennedy, J., concurring in part and dissenting in part). Moreover, the Endorsement Test's reliance on the reasonable observer is "irreconcilable with the imperative of applying neutral principles in constitutional adjudication." *Id.* at 676. Indeed, it is "difficult to imagine an area of the law more in need of clarity." *Utah Highway Patrol*, 565 U.S. at 1007 (Thomas, J. dissenting from denial of cert.).

Rather than rely on the imagined perceptions of a hypothetical observer, the Court's Establishment Clause doctrine should instead rest on "principles based on history, tradition, and precedent." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring); *see also Wallace v. Jaffree*, 472 U.S. 38, 113–14 (1985) (Rehnquist, J.,

dissenting). Not only would those principles help remedy the confusion wrought by the Endorsement Test, but they have the added benefit of being consistent with the both the Constitution's original understanding and other areas of the Court's First Amendment doctrine, such as its "precedents on legislative prayer." *Rowan County v. Lund*, 138 S. Ct. 2564, 2564–65 (2018) (Thomas, J., dissenting from denial of cert.). The Court should take this opportunity to make clear that they are the proper guideposts for interpreting the Establishment Clause in both our courts and our public institutions.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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