**No. 23-3030**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

---

LIBBY HILSENRATH, on behalf of her minor child, C.H.,

*Plaintiff-Appellant*,

v.

SCHOOL DISTRICT OF THE CHATHAMS, *et al.*,

*Defendants-Appellees.*

---

On Appeal from a Final Judgment of the
United States District Court for the District of New Jersey
Case No. 2:18-cv-00966, Hon. Kevin McNulty

---

# BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER SIDE

---

ALEX J. LUCHENITSER
SARAH TAITZ
Americans United for Separation
of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
*luchenitser@au.org*
*taitz@au.org*

*Counsel for* Amicus Curiae

## CORPORATE DISCLOSURE STATEMENT

*Amicus* is a nonprofit organization that has no parent corporations and that is not owned, in whole or in part, by any publicly held corporation.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Other Authorities**

## INTERESTS OF THE *AMICUS CURIAE*[1]

Americans United for Separation of Church and State is a national, nonpartisan organization that for over seventy-five years has brought together people—of all faiths and the nonreligious—who share a deep commitment to religious freedom as a shield to protect but never a sword to harm others. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated in numerous church-state cases decided by federal and state courts throughout the country. On many occasions, Americans United has brought lawsuits and filed *amicus* briefs to protect children against religious coercion, indoctrination, and proselytization in the public schools.

Recently, Americans United represented the defendants in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), and thus it has unique expertise on that case. As this Court specifically instructed the district court to consider this case in light of the Supreme Court's opinion in *Kennedy*, Americans United brings a particularly relevant point of view.

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of the brief.

## INTRODUCTION

Few Courts of Appeals have had the opportunity to revisit the role of the Establishment Clause in public education since the Supreme Court's decision in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). Americans United takes no position on the facts of this particular case, but instead writes to provide guidance as to how courts should evaluate Establishment Clause challenges to religious content in public school curricula in the post-*Kennedy* world.

In short, not much has changed. *Kennedy* abandoned the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), one of the legal standards this Court previously applied to Establishment Clause claims. The Supreme Court declared that Establishment Clause analysis should instead focus on history and the intent of our nation's founders. So the *Lemon* test is no longer good law, but many other Supreme Court Establishment Clause precedents—which employ precisely the type of historical analysis embraced in *Kennedy*—stand and remain controlling.

Three long-standing Establishment Clause principles, each of which can be traced back to the Founders, should guide the Court's resolution of this case and any other cases involving challenges to religious content in public-school curricula. First, public schools must not coerce students to express belief in a particular religion or make religious statements. *See*,

*e.g.*, *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Second, public schools must not present any religion as truth or proselytize any religion. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968). And third, public schools must not favor any religion over another or over nonreligion. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 244 (1982). While public schools can properly teach students about the histories and influences of various religions, as well as the differences between religions, any public-school lesson regarding religion that coerces, proselytizes, or expresses a religious preference violates the Establishment Clause.

Whichever way this Court decides this case, it should make clear that the constitutionality of religion in public-school curricula is governed by these principles.[2]

[2] Americans United takes no position on how these principles should be applied to the facts at bar, or whether there is any procedural ground that should keep the Court from addressing the merits.

## ARGUMENT

**Public school curricula that include lessons about religion must comply with longstanding Establishment Clause precedents prohibiting religious coercion, religious indoctrination, and religious preference.**

### A. *Kennedy* left numerous Supreme Court Establishment Clause precedents undisturbed.

In *Kennedy*, the Court ruled that the Establishment Clause did not prohibit a public-school football coach from engaging in post-game private, personal prayers on the football field. 597 U.S. at 525–27. In arriving at this holding, the Court stated that it had "abandoned" the Establishment Clause test described in *Lemon*, 403 U.S. 602, which had required "an examination of a law's purposes, effects, and potential for entanglement with religion." *Kennedy*, 597 U.S. at 534. The Court also concluded that it had "abandoned" *Lemon*'s "endorsement test offshoot," which it described as "involv[ing] estimation about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion." *Kennedy*, 597 U.S. at 534 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989)). The Court declared that, in place of the *Lemon* and endorsement tests, courts should apply "[a]n analysis focused on original meaning and history" that "'faithfully reflec[ts] the understanding of the Founding Fathers.'" *Id.* at 536 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).

While the Court repudiated the *Lemon* and endorsement tests, it did not overrule any of its other Establishment Clause holdings. The lower courts continue to be bound by those precedents because only the Supreme Court can overrule itself. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). As the Court explained in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."

Thus, the Supreme Court's many Establishment Clause rulings—other than the *Lemon* and endorsement tests—remain good law. *Kennedy* specifically discusses, and reaffirms, the continued applicability of one line of Establishment Clause precedent: the coercion test. 597 U.S. at 536–37. But *Kennedy* did not say that coercion was the only test or disavow all other lines of Establishment Clause jurisprudence. The Court merely recognized that religious coercion was one feature "*among* the foremost hallmarks of religious establishment." *Id.* at 537 (emphasis added). And, contrary to what the district court suggested (A13–14), the Court did not limit the "hallmarks of religious establishment" to the list of six features discussed by Justice Gorsuch in his concurring opinion in *Shurtleff v. City*

*of Boston*, 596 U.S. 243, 286 (2022). While the *Kennedy* majority opinion does cite Justice Gorsuch's concurrence in *Shurtleff* as an example of a discussion of hallmarks of religious establishment, it does not endorse Justice Gorsuch's opinion as the definitive list of such hallmarks. *See Kennedy*, 597 U.S. at 537 n.5.

Accordingly, in evaluating post-*Kennedy* Establishment Clause claims, courts should look not only to the coercion test but also consider whether the challenged government conduct is forbidden by another strain of Establishment Clause law. In cases involving public-school education about religion, three long-recognized hallmarks of religious establishment may be relevant: (1) coercion, (2) indoctrination or proselytization, and (3) religious preference. If a public-school lesson evinces any one of these three hallmarks, it violates the Establishment Clause. If the curriculum simply teaches about religion from a secular perspective without violating any of these principles, there is no Establishment Clause problem.

### B. The Establishment Clause prohibits all religious coercion in public schools.

#### *1. The Founders drafted the Establishment Clause to prohibit all forms of religious coercion.*

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. This well-established rule

"'faithfully reflect[s] the understanding of the Founding Fathers.'" *Kennedy*, 597 U.S. at 536 (quoting *Town of Greece*, 572 U.S. at 577).

The harms inflicted by religious coercion were front of mind for the Framers of the First Amendment's Religion Clauses. These clauses were drafted against the backdrop of an ugly history of persecution of religious minorities both in England and in the colonies. As the Supreme Court has explained,

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. . . . In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

*Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947).

Yet subsequently, in many colonies, the same abuses were repeated. *See id.* at 9–11. Religious coercion, such as compelled church attendance, was central to the "vivid mental picture of conditions and practices which [early Americans] fervently wished to stamp out in order to preserve

liberty for themselves and for their posterity." *Id.* at 8; *see also* Michael S. Paulsen, *Lemon Is Dead*, 43 Case W. Rsrv. L. Rev. 795, 828 (1993) ("[C]ompelled attendance at a religious worship service was [then] regarded as one of the defining characteristics (and most hated features) of religious establishments.").

The Founders' vision of a country free from religious persecution and coercion coincided with their embrace of the Enlightenment ideal that religion is a matter of personal conscience. *See* Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 Marq. L. Rev. 705, 748–49 (2018). John Locke, an Enlightenment thinker widely recognized as a core influence on the Founders, *see id.* at 709, wrote, "In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. . . . [W]hen all is done, they must be left to their own Consciences." John Locke, *A Letter Concerning Toleration* 38 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689). This principle was echoed in the writings of Thomas Jefferson and James Madison, who are widely regarded as the two Founders most instrumental in the drafting and ratification of the Religion Clauses. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963).

For example, Madison's highly influential *Memorial and Remonstrance Against Religious Assessments* emphasized the Lockean concept of personal religious conscience. He wrote, "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments* (ca. June 20, 1785), Nat'l Archives, https://bit.ly/3u75qBn. Madison described the personal religious conscience as an "unalienable right," because it concerned a person's "duty towards the Creator." *Id.* He thus concluded, "[r]eligion is wholly exempt from [the government's] cognizance." *Id.*

Similarly, in an oft-cited 1802 letter to the Danbury Baptist Association, Jefferson wrote, "[r]eligion is a matter which lies solely between man and his god." Thomas Jefferson, *Letter to the Danbury Baptist Association* (Jan. 1, 1802), https://bit.ly/3S9zRif. Years earlier, in recognition of the importance of each person following his own personal religious conscience, Jefferson had denounced religious coercion, explaining:

> Truth can stand by itself. Subject opinion to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature. . . . Difference of opinion is advantageous in religion. . . . What has been the effect of

> coercion? To make one half the world fools, and the other half hypocrites.

Thomas Jefferson, *Notes on the State of Virginia* 167–68 (1787), https://bit.ly/3VlKHoO.

Prohibition of religious coercion was central to the Virginia Bill for Religious Liberty, which was written by Jefferson and supported by Madison, and served as an important precursor to the Establishment Clause. *See Everson*, 330 U.S. at 12–13. The statute required "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." A Bill for Establishing Religious Freedom, H.D. 82, 1779 Gen. Assemb. (Va. 1786), Nat'l Archives, https://bit.ly/3HueJOU.

Importantly, the Founders took a broad view of what constitutes impermissible religious coercion. Jefferson was concerned not only about religious coercion sanctioned by "fine & imprisonment" but also about governmental action that could result in "some degree of proscription perhaps in public opinion." Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), https://bit.ly/31BeShI. He explained that official action amounting to "recommendation" of prayer, even without the backing of

legal force, was no "less a law of conduct for those to whom it is directed." *Id.* Similarly, Madison wrote that even a practice of governmental "recommendation[ ] only" concerning religion "naturally terminates in a conformity to the creed of the major[ity] and of a single sect, if amounting to a majority." James Madison, *Detached Memoranda* (ca. Jan. 31, 1820), https://bit.ly/3HGs2e7.

*2. Impermissible religious coercion in public schools includes subtle pressure to conform.*

Consistent with the Founders' broad concerns about religious coercion of any degree, the Establishment Clause forbids both direct coercion and "subtle coercive pressure." *See Lee*, 505 U.S. at 592; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). While the *Kennedy* Court found no religious coercion under the facts presented in that case, it left this longstanding rule undisturbed. *See* 597 U.S. at 536–42. The *Kennedy* Court cited *Lee*, 505 U.S. 577, and *Santa Fe*, 530 U.S. 290, as examples of the kinds of religious coercion that the Establishment Clause prohibits. In *Lee*, the Court "held that school officials violated the Establishment Clause by 'including [a] clerical membe[r]' who publicly recited prayers 'as part of [an] official school graduation ceremony.'" *Kennedy*, 597 U.S. at 541 (quoting *Lee*, 505 U.S. at 580). In *Santa Fe*, the Court "held that a school district violated the Establishment Clause by

broadcasting a prayer 'over the public address system' before each football game," *Kennedy*, 597 U.S. at 541 (quoting *Santa Fe*, 530 U.S. at 294), notwithstanding that the prayer would have been "student-led" and "student-initiated," *Santa Fe*, 530 U.S. at 301.

In neither *Lee* nor *Santa Fe* did the coercion involve "force of law and threat of penalty"—an alternative standard promoted by Justice Scalia and Justice Thomas. *See Lee*, 505 U.S. at 640–42 (Scalia, J., dissenting); *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring in part and concurring in the judgment). As *Kennedy* approvingly cited the majority opinions in *Lee* and *Santa Fe*, the decision cannot support any contention that the alternative "force of law and threat of penalty" standard is now the law. *See* 597 U.S. at 541. Thus, the district court erred in suggesting that the applicable standard for coercion is "force of law and threat of penalty." *See* A14, A18.

Instead, the controlling law is set forth in *Lee*, *Santa Fe*, and Justice Kennedy's plurality opinion in *Town of Greece*, which states that determining whether a government action is religiously coercive is "a fact-sensitive [inquiry] that considers both the setting . . . and the audience[.]" 572 U.S. at 587. When the Justices supporting a judgment split into a plurality and a concurrence (and there is no majority opinion), the plurality opinion is controlling if it supports the judgment on the

narrowest ground—in other words, the middle ground between the concurrence and the position rejected by the judgment. *See Marks v. United States*, 430 U.S. 188, 193 (1977). In *Town of Greece*, Justice Kennedy's plurality opinion is controlling because it took the position that legislative-prayer practices are coercive when governmental officials solicit audience participation, which was the middle ground between the position in Justice Thomas's concurrence that coercion requires legal compulsion and the position rejected by the judgment that legislative prayer is inherently coercive in the municipal context. *See Fields v. Speaker of the Pa. House of Representatives*, 251 F. Supp. 3d 772, 790 (M.D. Pa. 2017) ("We adopt Justice Kennedy's plurality opinion as the narrowest grounds on coercion."), *aff'd in relevant part and rev'd in part*, 936 F.3d 142 (3d Cir. 2019). Thus, a subtly coercive government action, such as governmental officials "solicit[ing]," "request[ing]," or "ask[ing]" members of the public to rise for prayer, is unlawful religious coercion under the Establishment Clause. *See Town of Greece*, 572 U.S. at 588 (controlling plurality opinion).

In conducting the fact-sensitive religious-coercion inquiry, the Supreme Court has repeatedly emphasized that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592; *see also Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) ("The Court has been

particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."). This Court has recognized and taken into account the importance of these concerns in Establishment Clause cases involving schools. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 281 (3d Cir. 2011) ("In the public school context, the need to protect students from coercion is of the utmost importance."); *ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996).

One important factor that renders students vulnerable to religious coercion through classroom instruction is their age. As this Court has noted, "research has confirmed the common sense observation that younger members of our society, children and teens, lack the maturity found in adults." *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 246 (3d Cir. 2010). As a result, "adolescents are often susceptible to pressure from their peers towards conformity, and . . . the influence is strongest in matters of social convention." *Lee*, 505 U.S. at 593–94 (collecting scientific literature). Thus, even in situations where "mature adults" are "'not readily susceptible to religious indoctrination or peer pressure,'" children and teenagers are vulnerable and are therefore entitled to greater Establishment Clause protection. *Town of Greece*, 572

U.S. at 590 (controlling plurality opinion) (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

A second important factor creating a heightened risk of coercion is the teacher's control and authority in the classroom. In both *Lee* and *Santa Fe*, the Supreme Court emphasized the coercive effect of the school's complete control over the event where religious content was presented. *See Lee*, 505 U.S. at 593; *Santa Fe*, 530 U.S. at 307. For example, "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." *Lee*, 505 U.S. at 597. A similar degree of control is exercised by a teacher in a classroom. Schools "exert[ ] great authority and coercive power through mandatory attendance requirements" and students can be expected to "emulat[e] . . . teachers as role models." *Edwards*, 482 U.S. at 584.

Courts should also be mindful of the particular vulnerabilities of students who practice a minority religion or no religion when faced with pressure from a teacher to conform to the majority religion in the local community. A Hindu, Jewish, Muslim, or atheist student, for example, is likely to experience a "sense of isolation and affront" if pressured by a teacher in a predominantly Christian community to express conformity with Christian religious beliefs. *See Lee*, 505 U.S. at 594 (discussing effect

of subtle religious coercion on a student holding a minority religious view). Public schools must not impose this type of pressure on students.

In addition, the Supreme Court has consistently described coercion as an objective test. *See id.* at 593 (evaluating potential coercion from the perspective of "a reasonable dissenter in this milieu"); *Santa Fe*, 530 U.S. at 311–12; *accord Black Horse Pike*, 84 F.3d at 1480. Contrary to what the district court thought (A17), whether any one individual subjectively feels coerced is not dispositive as to whether government conduct is coercive. *See Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 832 (11th Cir. 1989) ("[T]he Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual.").

Thus, to evaluate whether a public-school social-studies teacher's instruction regarding religion constitutes coercion, a court should consider whether a reasonable student would feel academic, social, or other pressure to express belief in a particular religion or make religious statements. In making that evaluation, the court should take into account the impressionable age of the audience, the inherently coercive nature of the classroom setting, the particular vulnerability of students who dissent from the majority religion in their community, and the meaning of the teacher's speech or actions in the context of the class.

While courts must be sensitive to these factors, they should also recognize that learning about religion is an indispensable and inevitable part of learning about the world. It is not the case, by any means, that every lesson plan discussing religion is religiously coercive. "[S]tudy of . . . religion, when presented objectively as part of a secular program of education," is not barred by the Establishment Clause. *Schempp*, 374 U.S. at 225; *see also Epperson*, 393 U.S. at 106. But courts should be sure to evaluate potential religious coercion in the classroom under the rule that "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Lee*, 505 U.S. at 594.

### C. The Establishment Clause prohibits all religious indoctrination and proselytization in public schools.

Any public-school instruction that indoctrinates or proselytizes religion violates the Establishment Clause. That is so regardless of whether there may be circumstances in which the indoctrination or proselytization is not properly deemed coercive.

#### *1. The Founders' intent, reflected in the Establishment Clause, was that religious education be committed to the private sphere.*

"The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that

mission." *Lee*, 505 U.S. at 589. We do not have historical statements from the Founders about the particular problem of religious indoctrination and proselytization in public schools because "free public education was virtually nonexistent in the late 18th century." *See Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring). That being said, the Founders' broad opposition to religious establishment, their respect for religious diversity, and their veneration of the personal religious conscience, *see supra* at 7–11, mean that the American tradition does not tolerate any government institution acting like a church and indoctrinating Americans in particular religious beliefs. As the Court explained in its historical analysis in *Everson*, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." 330 U.S. at 15. *Everson* noted that the prohibition on government support for religion extended to "religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.* at 16. Under this analysis, having a school perform the religious-education function of a church is a clear Establishment Clause violation.

Given the role of public schools in American society, use of those schools to advance religion is particularly egregious. As Justice Frankfurter stated in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Frankfurter, J. concurring), "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny," and so "[i]n no activity of the State is it more vital to keep out divisive forces" such as religion. Therefore, as the Supreme Court held in that case, the "state cannot consistently with the [Establishment Clause] utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Id.* at 211 (majority opinion). For "historically the First Amendment was" not "intended" to allow even "an impartial governmental assistance of all religions." *Id.*

The United States has a "long tradition" of religion flourishing in "the home, the church and the inviolable citadel of the individual heart and mind," not the public school or any other government institution. *Schempp*, 374 U.S. at 226. Thus, any form of religious indoctrination or proselytization in public school is a hallmark of impermissible establishment of religion in the context of American history and tradition.

*2. Religious indoctrination in public school violates the Establishment Clause even if there are circumstances where it is not coercive.*

Religious indoctrination in public schools, at least arguably, is inherently coercive. But even if there are circumstances in which such indoctrination is not properly deemed coercive, demonstrating coercion is not necessary to show an Establishment Clause violation. *See Schempp*, 374 U.S. at 223 ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("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. But the purposes underlying the Establishment Clause go much further than that."); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973) ("The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause."). Notably, the Free Exercise Clause also bars religious coercion, *see, e.g.*, *Schempp*, 374 U.S. at 223, so reading the Establishment Clause to bar only coercion would make it duplicative of the Free Exercise Clause. *See Lee*, 505 U.S. at 621 (Souter, J., concurring); *Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring in part and concurring in the judgment); *see also Marbury v. Madison*, 5 U.S.

(1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect[.]").

The Establishment Clause's prohibition on religious indoctrination in public schools stands independently and does not require coercion. The Supreme Court straightforwardly stated in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), "Government may not . . . undertake religious instruction." And the Court has repeatedly concluded that using public schools for any form of religious indoctrination is unconstitutional. *See Edwards*, 482 U.S. 578 (holding unconstitutional state law prohibiting teaching of evolution unless accompanied by lessons on creationism); *Wallace*, 472 U.S. 38 (holding unconstitutional state laws promoting teacher-led prayer); *Epperson*, 393 U.S. 97 (holding unconstitutional state law prohibiting teaching of evolution); *Schempp*, 374 U.S. 203 (holding unconstitutional state law requiring public schools to begin each day with prayer and Bible verses); *Engel*, 370 U.S. 421 (holding unconstitutional school district's requirement to open school day with prayers); *McCollum*, 333 U.S. 203 (invalidating public school program that allowed churches to hold elective religion classes in classrooms during regular school hours). All of these precedents, steeped in historical analysis, remain good law after *Kennedy*.

The logic of these cases does not rest solely on coercion. For example, the Court in *Engel*, in concluding that a school-prayer practice violated the Establishment Clause, did not focus on coercion, but rather on the fact that government officials composed a state prayer that students were encouraged to recite in public schools. 370 U.S. at 425. It did not matter to the Court that students were permitted to opt out of praying. *See id.* at 430. The composition and dissemination of an official public-school prayer, regardless of whether its recitation was compulsory or completely voluntary, was an Establishment Clause violation. *See id.* at 430. Similarly, the Court in *Epperson* did not rely on coercion, but rather on the principle "that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." 393 U.S. at 106. The government simply may not use public schools to "advance religious views," regardless of whether it does so through coercion or other means. *See Edwards*, 482 U.S. at 583–84.

"Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* The Establishment Clause certainly prohibits schools from coercing students to participate in

religion, but it requires much more than that. Any use of public-school instruction to advance religious views is improper under the Establishment Clause. Courts thus should not limit their review to whether or not the technical requirements of coercion are met. Instead, they should also recognize that religious indoctrination or proselytization in public schools violates the Establishment Clause even if it is received voluntarily.

### D. The Establishment Clause forbids public schools from preferring one religion over another.

#### *1. The Founders drafted the Establishment Clause to require the government to treat all religions and nonreligion equally.*

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. This rule of neutrality stems from the Founders' recognition that "whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Engel*, 370 U.S. at 431. The Founders wanted to "get completely away from th[e] sort of systematic religious persecution" that had occurred in Europe and the colonies. *Id.*; *see supra* at 7–11. They intended the Establishment Clause to "guard against the civic divisiveness

that follows when the government weighs in on one side of religious debate[.]" *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 876 (2005).

Neutrality was central to Madison's writings on religion. "Madison's vision—freedom for all religion being guaranteed by free competition between religions— . . . would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245. For this reason, government actors "are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* Governmental preference for one religion over another "degrade[s] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." Madison, *Memorial and Remonstrance*.

Thus, it is a fundamental Establishment Clause principle that, "[i]n the relationship between man and religion, the State [must be] firmly committed to a position of neutrality." *Schempp*, 374 U.S. at 226.

*2. Religious neutrality requires that public-school curricula not express a preference for one religion.*

In the context of public-school education, religious neutrality requires teachers to objectively present factual information about religion in a manner that does not prefer one religion over others or over nonreligion. This is not to say that teachers must avoid exposing children to primary

texts that advocate for one religion. To take one example, "Luther's 'Ninety-five Theses' are hardly balanced or objective, yet their pronounced and even vehement bias does not prevent their study in a history class' exploration of the Protestant Reformation, nor is Protestantism itself 'advanced' thereby." *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1540 (9th Cir. 1985) (Canby, J., concurring). Religious texts may be "integrated into the school curriculum . . . in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980). But a public-school curriculum that includes information about religion must present that content as part of a neutral, secular education. *See Schempp*, 374 U.S. at 225.

## CONCLUSION

For the foregoing reasons, *amicus* submits that this Court should decide challenges to religious education in school curricula based on the three central Establishment Clause principles discussed herein. *Amicus* takes no position on how these principles should be applied to the facts of this particular case.

Respectfully submitted,

s/ Alex J. Luchenitser
ALEX J. LUCHENITSER
SARAH TAITZ
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, D.C. 20005
(202) 466-7306
*luchenitser@au.org*
*taitz@au.org*

*Counsel for* Amicus Curiae

March 19, 2024

## CERTIFICATIONS OF COUNSEL

The undersigned counsel certifies that:

(i) **(bar membership)** he is a member of the bar of this Court;

(ii) **(word count)** this brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 5390 words;

(iii) **(typeface / type style)** this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word Office 16, set in Century Schoolbook font in a size measuring 14 points or larger;

(iv) **(identical text)** the text of the electronic brief is identical to the text in the hard paper copies of the brief;

(v) **(virus check)** a virus detection program (Windows Security Antivirus Version 1.407.521.0) has been run on this brief and no virus was detected; and

(vi) **(service)** on March 19, 2024, this brief was filed using the Court's CM/ECF system; counsel for all parties in the case are registered CM/ECF users and will be served electronically via that system.

Date: March 19, 2024 s/ Alex J. Luchenitser