The Future of the Establishment Clause

Implications of *Kennedy v. Bremerton School District*

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BYU generally, and the Law School specifically, have been key to planting the seeds for my views on the religion clauses of the First Amendment, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] It was in this room 26 years ago—perhaps to the day—that Professor Richard Wilkins introduced me to the landmark Supreme Court case interpreting the Establishment Clause, *Lemon v. Kurtzman*,[2] in my first semester of law school. I am blessed to have had the opportunity to study constitutional law from the unique perspective that BYU Law offers. Nowhere else in the world can we learn constitutional law not just from a legal perspective, but we get to pressure test those views against eternal principles that we understand from the gospel of Jesus Christ.

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LINE UPON LINE

As a young man, I learned from the Lord that I would grow to "have the capacity to influence the writing of law." It was a specific direction. But the full import of that direction came to me only over time. For several years, I did not fully appreciate the specifics of my journey to fulfilling it. A textualist even in my youth, I spent several years believing that I would not necessarily become a lawyer but a legislator. After all, the specific command about "the writing of law" seemed more consistent with an Article I responsibility than with an Article III responsibility. I have learned over the years that the Lord tends to reveal His plans for us "line upon line, precept upon precept."[3]

And so when I came to BYU campus back in 1991 as a freshman, I did not have the specific intent of studying the law. But in 1994, President Rex E. Lee spoke at the welcome devotional at the Marriott Center and shared his personal reflections on how important law school had been for him and how it had impacted his life.[4] President Lee's comments hit me directly. I left the Marriott Center that afternoon with the conviction that law school would be my next step. And once that was clear to me, I was all in.

It was at BYU Law School that I recall first forming the desire to become a judge—and a federal circuit judge specifically. Twenty years later, I found myself nominated by the president of the United States to the current lifetime appointment that I hold today. That process was unsure at times. I am grateful for the spiritual impressions I had in my youth, confirmed and refined at this great institution, that reassured me that a higher power was ultimately guiding me through that process.

Some say that becoming a federal judge is like getting struck by lightning—but in a good way. You can stand in particular places to increase your chances, but ultimately the opportunity is beyond your control. Aspects of that analogy are true. Yet as President George Washington wisely noted, "The Liberties of America are the object of divine Protection."[5] And with the courts being "faithful guardians of the constitution," an independent judiciary is "an indispensable ingredient" to the protection of liberty and "the citadel of the public justice."[6] As such, my path—and likely the paths of most of the other federal appellate judges in this country—was guided less by luck and more by a gracious Providence intent that America remains a fixed light of justice to the world. I am honored and humbled to play my small role in that process.

THE *LEMON* SPECTER

As I mentioned, I was first exposed to *Lemon v. Kurtzman* in this very room 26 years ago. I discussed the case with my study partners, Rich Benson and Alan Bell, and came to understand even back then that the legal foundation of the "*Lemon* test" was not necessarily constitutionally sound. I was guided in my thoughts by one of the greatest legal minds in the country: the late Supreme Court Justice Antonin Scalia.

Justice Scalia was as known for his lively writing as for his sharp mind and originalist method. He vividly criticized his colleagues' legal reasoning as "argle-bargle," "jiggery-pokery," and "[p]ure applesauce."[7] But perhaps his most memorable critique was reserved for the Supreme Court's Establishment Clause decision *Lemon v. Kurtzman*. *Lemon* set forth a three-part framework, called "the *Lemon* test," to evaluate whether the purpose and effect of a challenged government action are religious and to weigh the risk of government entanglement with religion. The Court later elaborated that the test's "effects" prong looked to whether a "reasonable observer" would conclude that the action was an "endorsement" of religion.[8]

During this time the *Lemon* ghoul had increasingly devoured religious expression in the public square.

But the so-called *Lemon* test was often criticized as having no grounding in the clause's traditional understanding and

as being infamously hard to apply.[9] So the Supreme Court often ignored it. Yet the Court would, from time to time, invoke *Lemon* seemingly at random and with little justification. As a result, Justice Scalia memorably commented on one such invocation of *Lemon* by the Court: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening . . . little children and school attorneys[.]"[10]

I joined the Ninth Circuit 25 years after Justice Scalia's comments, and during this time the *Lemon* ghoul had increasingly devoured religious expression in the public square. In my first writing as a judge, I noted that recent Supreme Court cases provided "good reason to question whether, or at least to what extent, *Lemon* ha[d] been replaced."[11] Not long after, I dissented (with eight judges joining) from the denial of rehearing en banc in a First Amendment ministerial exception case, questioning "the continuing value of the legal test in *Lemon*" and noting that several current Supreme Court Justices had expressed doubts about its validity.[12]

I think that Justice Scalia would be happy to hear that the old ghoul appears to be back in the grave, and this time for good. Last term, the justice who filled the vacancy left by Justice Scalia—Justice Neil Gorsuch—authored *Kennedy v. Bremerton School District*, which strongly suggests that *Lemon* has finally been rejected.[13] Today, I want to make a few observations about the effect of *Kennedy* on the Establishment Clause going forward.

KENNEDY AND THE DEMISE OF *LEMON*

Let's start with a review of the facts in *Kennedy*. In 2008, Joseph Kennedy began coaching football at Bremerton High School in Washington state. The football team already had a tradition of saying a prayer in the locker room before games. After games, when the teams were done shaking hands, Coach Kennedy took a knee on the 50-yard line and offered a quiet and short prayer of thanks to God. At first he prayed alone, but later some players asked if they could pray alongside him. Kennedy let them, telling them, "This is a free country."[14] Much of the team eventually joined him. Sometimes Kennedy would incorporate a short motivational speech with religious content during this time of prayer. This continued for over seven years without complaint.

In September 2015, an opposing team's coach complimented the school district for allowing Kennedy to pray on the field. This was the first time the school district learned about Kennedy's prayers, and district administrators wrote a letter to Kennedy identifying his "problematic" practices. The district explained that Kennedy's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."[15] It then instructed that any religious activity Kennedy conducted must be "physically separate from any student activity" and that "such activity should either be non-demonstrative . . . if students [were] also engaged in religious conduct, or it should occur while students [were] not engaging in such conduct."[16]

Kennedy ended the pregame locker room prayer and removed the religious content from his postgame speech. Driving home after a game, however, Kennedy felt upset that he had "broken [his] commitment to God" by not offering his prayer, so he turned his car around and prayed on the field after everyone had left.[17]

The dispute soon gained the attention of the media. After the next game, a large group of players and coaches from the opposing team as well as members of the public rushed the field in a show of support for Kennedy. The district gave Kennedy an ultimatum that forbade him from engaging

in "any overt actions" that could "appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach."[18] Still, Kennedy briefly prayed again on the 50-yard line at the next two games, and the district suspended him.[19]

Kennedy sued under section 1983, alleging violations of his First Amendment rights under the Free Exercise and Free Speech Clauses and under Title VII of the Civil Rights Act. The district court first denied his request for a preliminary injunction. The Ninth Circuit affirmed, and the Supreme Court denied cert. Four Justices, however, took the unusual step of issuing a statement regarding denial of cert; they emphasized that the underdeveloped record justified the denial but that the Ninth Circuit decision was "troubling" in its treatment of Kennedy's rights.[20]

The lower courts didn't heed the warning. On remand, the district court granted summary judgment for the district, concluding that Kennedy's postgame prayers were made in his capacity as a public employee and violated the Establishment Clause, which justified a restriction of Kennedy's free speech and free exercise rights.[21] The Ninth Circuit panel affirmed, claiming a reasonable observer would have perceived the district's allowance of Kennedy's prayers as an endorsement of religion.[22]

The panel's decision was called en banc by a judge on the Ninth Circuit, but the vote failed. Yet the Ninth Circuit still had much to say about the case, and the order denying rehearing included six separate statements. First, the author of the panel opinion wrote a concurrence to explain his decision, as did the two other panel judges. Four other judges—me included—wrote substantive dissents from the denial of rehearing en banc. In the end, there were 92 pages of opinions just addressing whether the case should have been reheard by a full en banc panel.[23]

Kennedy filed another cert petition, but this time the Supreme Court took the case and reversed the Ninth Circuit by a vote of 6 to 3.[24] The Court began by evaluating Kennedy's free speech and free exercise claims and explaining that those clauses work in tandem. The Free Exercise Clause protects religious exercise, which is often communicative. And the Free Speech Clause protects expressive activity, which is often religious. Here, the Court concluded that both sets of rights had been burdened.

First, the Court held that there was no dispute that the district's discipline was neither neutral nor generally applicable. The district admitted that it sought to restrict Kennedy's actions because of their religious character. Nor were the district policies applied in an even-handed way. Other coaching staff were permitted to briefly engage in personal conduct, such as visiting friends or taking personal calls. Kennedy was disciplined only because his personal conduct was religious.

The district also burdened Kennedy's free speech rights. Of course, the speech of government employees can be subject to government control if it is part of the employees' official duties. But neither students nor teachers shed their freedom of speech at the schoolhouse gates, and so not everything teachers say or do in the workplace is subject to government control. If that were the case, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian staff member from praying quietly before lunch in the cafeteria. Here, Kennedy offered his prayers in his capacity as a private citizen at a time when he and other employees were free to engage in all manner of private speech. That Kennedy chose to use this time to pray did not transform his speech into government speech.

Having concluded that Kennedy's free exercise and free speech rights were burdened, the Court looked to whether the district's interest justified that burden. Typically, in considering each of these claims, a government entity must satisfy "strict scrutiny," meaning that restrictions on protected rights must serve a compelling interest and be narrowly tailored to that interest. There was some dispute about whether an easier-to-satisfy standard for government speech cases applied to Kennedy's free speech claim. But the Court ultimately concluded that the district could not justify disciplining Kennedy's private prayers under any standard.

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The district claimed that Kennedy's rights were necessarily burdened to avoid violating the Establishment Clause. But that argument hinged on an analysis flowing from Justice Scalia's old ghoul, the *Lemon* test. The Court explained that it had "long ago abandoned *Lemon*."[25] And in *Town of Greece v. Galloway*[26] and *American Legion v. American Humanist Association*,[27] the Court had explained that the Establishment Clause must be analyzed in a different way: by reference to historical practices and the clause's original understanding. There was little doubt that Kennedy's personal prayers did not constitute "establishment of religion" as that concept was historically understood.

In the end, *Lemon*'s replacement meant that Coach Kennedy won his free exercise and free speech claims. Kennedy's fundamental rights were burdened, and the district could not justify those burdens based solely on a faulty Establishment Clause concern. Disciplining Kennedy for his private prayers was thus unlawful, and the Ninth Circuit was reversed.

LOOKING AHEAD

With that overview in mind, I offer a few observations about this case and its potential implications going forward.

Observation number one: The Court in *Kennedy* did not expressly overrule *Lemon* in its traditional manner. Rather, it announced that the Court had already "abandoned" the test—even though the Court had not formally overruled *Lemon*.

That's not the usual way the Supreme Court rejects a precedent. Take the Court's well-known decision from last term *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.[28] The majority undertook a long analysis of the traditional stare decisis factors, evaluating those precedents' correctness, their workability, and the ensuing reliance interests. That discussion concluded with a definitive announcement that "[w]e therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people."[29]

The Court in *Kennedy*, by contrast, reached its conclusion about *Lemon* after merely two paragraphs and a footnote. It didn't mention stare decisis, and the Court declined to say the magic words: "*Lemon* is overruled." Why not? I argued in my dissent from the denial of rehearing en banc that much of the work of overruling *Lemon* was already done in prior cases such as the 2019 *American Legion* decision.[30] In that case, a majority of Justices declined to apply the *Lemon* framework, and a plurality opinion discussed *Lemon*'s "shortcomings" at length and noted the Court's repeated choice not to apply it. But without an express overruling, lower courts like mine had an excuse to keep using the *Lemon* test.

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Not so anymore. I suspect that *Lemon* has finally been put to rest. Justice Sonia Sotomayor's dissent in *Kennedy* begrudgingly acknowledges that the majority opinion "overrules" *Lemon*. And while the overruling of *Lemon* is implicit, instruction from *Kennedy* is clear as day: evaluate the Establishment Clause based on history and original understanding. *Lemon*'s ahistorical framework simply cannot coexist with that admonition. And lower courts appear to have finally gotten the memo.

For example, when *Kennedy* was issued, the Eleventh Circuit was considering an Establishment Clause case. An atheist group sued after members of the city police participated in a prayer vigil for children injured in a shooting spree. The district court granted summary judgment to the plaintiffs under *Lemon*. But after *Kennedy*, the Eleventh Circuit vacated the judgment because "the Supreme Court has definitively decided that *Lemon* is dead," and remanded the case with direction "to apply in the first instance the historical practices and understandings standard endorsed" in *Kennedy*.[31] Though only time will tell, I predict that this analysis is likely correct.

Observation number two: *Kennedy* confirms that the Establishment Clause does not contradict the other clauses of the First Amendment. The district's case turned on the faulty notion that Coach Kennedy's free exercise and free speech rights conflicted with the district's need to uphold the Establishment Clause.

To be fair, this notion of contradiction has been widely held. *Kennedy* was one of three cases from the last Supreme Court term in which the government argued that the Establishment Clause demanded a restriction of religious or speech rights. In *Shurtleff v. City of Boston*, the city refused to fly a private organization's flag over city hall because it featured a cross.[32] And in *Carson v. Makin*, Maine barred religious schools from a state program that offered tuition reimbursement to private schools.[33] In each of those cases, however, the Establishment Clause arguments were rejected.

It should be clear now that the Establishment Clause does not offer an affirmative defense to other First Amendment claims. *Kennedy* states explicitly that "there is no conflict between the constitutional commands" of the First Amendment and thus they should not be viewed as warring with one another. The lack of conflict between these provisions shouldn't be a surprise. The Establishment, Free Exercise, and Free Speech Clauses are in the same sentence in the same amendment. We would expect them to have compatible, not contradictory, purposes.

For example, as I explained in my dissent in *Kennedy*, both religion clauses protect religious liberty, but they do so from different directions.[34] The Free Exercise Clause forbids the government from prohibiting religious exercise. But it sets a floor, allowing room for Congress and the states to provide additional protections for religious exercise, such as federal and state Religious Freedom Restoration Act laws. The Establishment Clause, by contrast, sets more of a ceiling and is chiefly concerned with preventing interference with religious exercise. For example, James Madison, the First Amendment's primary architect, explained that the clause was meant to prevent one or two religious sects from "obtain[ing] a pre-eminence" and "establish[ing] a religion to which *they would compel others to conform*."[35]

Thus, the two clauses work together to ensure the free exercise of religion. It makes no sense, then, for the Establishment Clause to be used to justify the infringement of a citizen's free exercise rights. There is no conflict; there has merely been the appearance of conflict brought on by a misconstruction of the Establishment Clause, thanks in large part to *Lemon*. Now that the Court has rejected *Lemon*, however, courts and litigants should be disabused of the notion that these complementary provisions are in unavoidable tension.

Observation number three: *Kennedy* illustrates the Supreme Court's ongoing project of realigning the Court's constitutional doctrine with the document's original public meaning. In my view, sticking to the Constitution's original meaning is especially important in the context of the Establishment Clause.

For one, thus far, Establishment Clause jurisprudence has been plagued by inconsistency and manipulability. Several courts and commentators have noted that *Lemon* left courts to reach almost any result and that strikingly similar facts have yielded contradictory outcomes.[36] Originalism, by contrast, provides judges with a powerful check against injecting our own policy preferences into the Constitution.

Furthermore, an Establishment Clause rooted in history and original understanding will curb the modern inclination to banish religion from public life. Coach Kennedy was disciplined because his personal religious conduct was in the public view. Yet the position that religious beliefs and conduct cannot be legitimately carried into public is not neutrality towards religion—it is hostility towards religion.

The historical record shows that allowing religion in the public square was never understood to be a religious establishment. Quite the opposite. It is filled with instances of the various branches of the federal government acknowledging the important role of religion in American life. George Washington's first official act as president gave "fervent supplications to that Almighty Being who rules over the Universe."[37] Just days after approving the Establishment Clause as part of the Bill of Rights for submission to the states, Congress passed legislation providing for paid chaplains for the House and Senate.[38] Overtly religious practices in public settings did not violate the Establishment Clause when it was adopted and they likewise do not do so now.

And finally, observation number four: Courts clearly should no longer rely on *Lemon*. But the *Lemon* ghoul wandered about for 50 years, and the case was cited in more than 2,000 subsequent cases. Courts thus should be wary of reliance on the many cases that reflect *Lemon*'s wrongful framework or are otherwise at odds with history.

For example, in *Kennedy*, the original Ninth Circuit panel didn't cite *Lemon*. Rather, it relied mainly on a Supreme Court decision from 2000, *Santa Fe Independent School District v. Doe*, which held that a student-led prayer before a high school football game violated the Establishment Clause because an objective observer would have concluded that the school was endorsing prayer.[39] I argued in dissent that *Santa Fe* shouldn't apply. I warned that *Santa Fe*'s analysis was rooted in the *Lemon* framework, which the Supreme Court had already effectively killed. It made little sense to kill *Lemon* but keep its progeny.[40] Ultimately, the Supreme Court agreed and reversed our court.

That's not all. At least one district court has already noted that the formal

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abandonment of *Lemon* might cast doubt on the doctrine of "offended observer" standing,[41] which was invented by lower courts in the wake of *Lemon* and its progeny.[42] These courts had reasoned that, because the Establishment Clause was purportedly violated whenever a reasonable observer viewed some government action as an endorsement of religion, the observer's offense was the sort of injury sufficient to provide standing to sue in federal court.

That standard, however, conflicts with the traditional test for Article III standing, which requires a concrete and particularized injury in fact. Indeed, the Supreme Court has held that the "observation of conduct with which one disagrees" is not a cognizable injury for purposes of Article III.[43] The only reason this doctrine exists, it seems, is because *Lemon*'s wrongful Establishment Clause test required it. But with *Lemon* now gone, courts of appeal may need to grapple with the continuing validity of "offended observer" standing.

This is not to say that every case that cited *Lemon* is bad law. When a holding or analysis captures the Establishment Clause's historical bounds, there is no need to jettison that case. But where a case seems rooted only in *Lemon*'s purpose, effects, and entanglement framework, it should be treated as suspect and examined for whether it remains good law. To do otherwise risks allowing *Lemon* back out of its grave. cm

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NOTES

1 U.S. Const. amend. I.
2 Lemon v. Kurtzman, 403 U.S. 602 (1971).
3 2 *Nephi* 28:30.
4 Rex E. Lee, President of Brigham Young University, *Overcoming Discouragement*, BYU SPEECHES (Sept. 13, 1994), *available at* speeches.byu.edu/talks/rex-e-and-janet-g-lee/overcoming-discouragement-2.
5 20 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 95 (John C. Fitzpatrick, ed., U.S. Gov't Printing Office 1931).
6 THE FEDERALIST NO. 78, at 403, 406 (Alexander Hamilton) (George W. Carey and James McClellan, eds., Liberty Fund 2001).
7 United States v. Windsor, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting); King v. Burwell, 576 U.S. 473, 506–07 (2015) (Scalia, J., dissenting).
8 County of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter, 492 U.S. 573, 593, 620 (1989).
9 *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995).
10 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).
11 Freedom from Religion Found. v. Chino Valley Unified Sch. Dist., 910 F.3d 1297, 1306 (9th Cir. 2018) (R. Nelson, J., dissenting from denial of rehearing en banc) (citing Town of Greece v. Galloway, 572 U.S. 565, 577 (2014)).
12 Biel v. St. James Sch., 926 F.3d 1238, 1250 n.8 (9th Cir. 2019) (R. Nelson, J., dissenting from denial of rehearing en banc).
13 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022).
14 *Id.* at 2416.
15 *Id.* at 2417.
16 Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 913 (9th Cir. 2021) (M. Smith, J., concurring in denial of rehearing en banc).
17 *Kennedy*, 142 S. Ct. at 2417 (alteration in original).
18 *Id.* at 2417.
19 *Id.* at 2418–19.
20 Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari).
21 Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020).
22 Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1009–10 (9th Cir. 2021).
23 Kennedy v. Bremerton Sch. Dist., 4 F.4th 910 (9th Cir. 2021).
24 *Kennedy*, 142 S. Ct. at 2407.
25 *Id.* at 2427.
26 Town of Greece v. Galloway, 572 U.S. 565, 575–577 (2014).
27 Am. Legion v. Am. Humanist Assn., 139 S. Ct. 2067, 2081–82 (2019) (plurality opinion).
28 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261–78 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992)).
29 *Id.* at 2279.
30 *Kennedy*, 4 F.4th at 950 (R. Nelson, J., dissenting from denial of rehearing en banc).
31 Rojas v. City of Ocala, 40 F.4th 1347, 1351–52 (11th Cir. 2022).
32 Shurtleff v. City of Boston, 142 S. Ct. 1583, 1588 (2022).
33 Carson v. Makin, 142 S. Ct. 1987, 1993 (2022).
34 *Kennedy*, 4 F.4th at 950 (R. Nelson, J., dissenting from denial of rehearing en banc).
35 1 Annals of Cong. 730–731 (1789) (remarks of J. Madison) (emphasis added).
36 McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119–20 (1992); *see* Am. Legion v. Am. Humanist Assn., 139 S. Ct. at 2080–81 (2019) (plurality opinion) (collecting examples).
37 George Washington, First Inaugural Address (Apr. 30, 1789), *available at* founders.archives.gov/documents/Washington/05-02-02-0130-0003.
38 *See* Lynch v. Donnelly, 465 U.S. 668, 674 (1984).
39 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).
40 *Kennedy*, 4 F.4th at 952 (R. Nelson, J., dissenting from denial of rehearing en banc).
41 Napper v. Hankison, No. 3:20-CV-764-BJB, 2022 WL 3008809, at *15 n.12 (W.D. Ky. July 28, 2022).
42 Justice Neil Gorsuch recently noted that "with the demise of *Lemon*'s reasonable observer test, 'little excuse' now remains 'for the anomaly of offended observer standing.'" City of Ocala, Florida v. Rojas, No. 22-278, 2023 WL 235728 (Mem), at *3 (U.S. March 6, 2023) (Gorsuch, J., statement respecting the denial of certiorari) (quoting *Am. Legion*, 588 U.S. at __ (Gorsuch, J., concurring in judgment)).
43 Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982). Justice Clarence Thomas recently detailed why offended observer standing conflicts with *Valley Forge*. *See* City of Ocala, Florida v. Rojas, 2023 WL 235728, at *3–4 (Thomas, J., dissenting from the denial of certiorari).