IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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HILO BAY MARINA, LLC and KEAUKAHA MINISTRY LLC,
Plaintiffs-Appellants,

vs.

STATE OF HAWAIʻI; BOARD OF LAND AND NATURAL RESOURCES,
STATE OF HAWAIʻI,
Defendants-Appellees.

SCAP-23-0000310

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CAAP-23-0000310; CASE NO. 3CCV-22-0000095)

SEPTEMBER 12, 2025

CONCURRING OPINION OF THE COURT BY EDDINS, J.,
WITH WHOM McKENNA AND DEVENS, JJ., JOIN

Religious liberty, secular government, and social harmony depend on an unbreakable barrier between religion and state. A wall.

Foundational to American constitutionalism, the wall that separates church and state stands tall, wide, and invincible.

Because in my view article I section 4 of the Hawai'i Constitution has a pluralistic purpose and secular spirit grander than the majority suggests, and the Department of the Attorney General urges us to interpret our constitution to match recent Supreme Court case law, I write separately.

I.

In Everson, all nine justices agreed that a "high and impregnable" wall separates church and state. Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 18 (1947); 330 U.S. at 29 (Rutledge, J., dissenting).

The justices recalled the leading roles Thomas Jefferson and James Madison played in drafting the First Amendment. Id.

Jefferson was credited with expressing the public's understanding that the Establishment Clause had erected "a wall of separation from Church and State." Id. at 16; Jefferson Letter to Danbury Baptist Association, 1802, Library of Congress, https://www.loc.gov/loc/lcib/9806/danpre.html [https://perma.cc/AN2Z-MWDU]. The all-American metaphor may have entered minds years before. Roger Williams, The Bloudy Tenent of Persecution, for Cause of Conscience, Discussed in a Conference of Truth and Peace 435 (London, J. Haddon 1848) (1644) ("wall of separation, between the garden of the church and the wilderness of the world").

The Everson justices invoked Jefferson's and Madison's writings and legislative successes as the historical and philosophical roots for total separation. "The people [in Virginia] as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." 330 U.S. at 11.

Jefferson wrote Virginia's Bill for Establishing Religious Freedom. The bill's principles set the tone for the First Amendment's "protection against governmental intrusion on religious liberty" and its prohibition against government support. Id. at 13; Lee v. Weisman, 505 U.S. 577, 615 (1992) (Souter, J., concurring) ("Condemning all establishments, however nonpreferentialist, the [Virginia] statute broadly guaranteed that 'no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever,' including his own."). The law's preamble reflected public sentiment that no funds derived from the government's taxing power could support religion. "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Everson, 330 U.S. at 13 (quoting An Act for Establishing Religious Freedom pmbl. (Va. 1785)).

The Everson justices repeated the constitutional norm. "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Id. at 16.

Madison captured the purpose and understanding of the Establishment Clause. "[R]eligion was a wholly private matter beyond the scope of civil power either to restrain or to support," and "[s]tate aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference." Id. at 39-40 (Rutledge, J., dissenting) (citing James Madison, Memorial and Remonstrance Against Religious Assessments, 1785, National Archives, https://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/586P-2C4Z]).

Virginia was not alone. Pennsylvania's 1776 Constitution expressed a separationist resolve. No person could "be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent[.]" Pa. Const. of 1776, art. 2. The revised 1790 Constitution added: "no preference shall ever be given, by law, to any religious establishments or modes of worship." Pa. Const. of 1790, art. IX, § III. Other early state constitutions functioned similarly. See, e.g., Ga.

Const., art. IV, § 5 (1789) ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own.").

The founding generation was familiar with the sectarian violence, conflict, and oppression that accompanied state-sponsored religion. As the Everson justices remembered, many early settlers of this country came here "to escape the bondage of laws which compelled them to support and attend government favored churches." Everson, 330 U.S. at 8. "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." Id. at 8-9.

Everson set the conditions for genuine religious pluralism, religious freedom, and a secular government. All justices saw the Establishment Clause in a way appreciated by 18th century America, 19th century America, 20th century America, and most of 21st century America.

The Supreme Court distilled the country's understanding into clear principles for interpreting the Establishment Clause.

No government may "set up a church." Id. at 15. No government may "aid one religion, aid all religions, or prefer one religion over another." Id. No government may force people

to believe in a religion. Id. No person may be punished for believing in a religion. Id. at 15-16. And public funds cannot support religious institutions. Id. at 16.

In our case, the majority amply quotes Everson, as it should.

The Everson dissents are worth quoting, too. They struck an even more secular tone.

The Establishment Clause's "prohibition is absolute," designed to block indirect government support of religion. Id. at 45 (Rutledge, J., dissenting). The purpose of the First Amendment, four justices believed, "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." Id. at 31-32. This helps religion. "[C]omplete separation between the state and religion is best for the state and best for religion." Id. at 59; see Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2206-07 (2003) (critiquing the Everson justices' oversimplification of founding-era establishment debates, but affirming that "one of the principal arguments against establishment was that it was harmful to religion" and noting that many observers concluded that disestablishment had the effect of advancing religion, including Alexis de Tocqueville

who "reported that religion was stronger in America than in any other country, and attributed this strength to the separation between church and state").

The main Everson dissent stressed the founders' aim to prevent *any* form of government support for religion. "The prohibition [on establishment] broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." Id. at 33. Strict separation "necessarily entails hardship" upon some, "[b]ut it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship[.]" Id. at 59. And by doing so, the state clears the way for religious freedom. "The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state." Id. at 53.

The First Amendment's structural feature goes both ways. The Establishment Clause, Justice Jackson's dissent explained, "was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state." Id. at 26-27 (Jackson, J., dissenting). "[I]t was set forth in absolute terms, and its strength is its rigidity." Id. at 26.

The year after Everson, the Court repeated the principle of total separation: "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" is forbidden because "the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State." Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty., 333 U.S. 203, 210-11 (1948). The Court reasoned that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Id. at 212.

The Everson justices understood the Establishment Clause. The delegates to the 1950 Hawaiʻi Constitutional Convention understood Everson. See Debates in Comm. of the Whole in 2 Proceedings of the Constitutional Convention of Hawaiʻi of 1950, at 5-6 (1961).

The delegates intended for Hawaiʻi's Establishment Clause to reflect Everson's separationist ideals. Id. at 5-6, 451. Separation of church and state guided the adoption of Hawaiʻi's religious clauses. See id. at 5-6. Committee reports referenced the "wall" and pointed to Everson and McCollum as the model for Hawaiʻi's approach. Standing Comm. Report No. 51 in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1950, at 200 (1960).

When Hawaiʻi became the 50th state in August 1959, the people of Hawaiʻi understood elementary American civics. A state government could not endorse, fund, or promote religion. This understanding was essential to preserving freedom in a state as culturally and religiously diverse as Hawaiʻi.

The Hawaiʻi Constitution's Preamble reflects Hawaiʻi's multi-cultural and multi-religious character. "We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, 'Ua mau ke ea o ka aina i ka pono [The life of the land is perpetuated in righteousness].'" Haw. Const. pmbl. (The first known expression of our state motto came from King Kamehameha III's address on Lā Hoʻihoʻi Ea, or Restoration Day, after political power was restored to the Kingdom of Hawaiʻi following an unlawful British occupation. See 2022 Haw. Sess. Laws Act 82, § 1 at 188-89.).

The Hawaiʻi Constitution is respectful to all faiths and philosophies. Our state's religious diversity and inclusivity, the delegates appreciated, differed from the Christian-dominated context in other parts of the country. To avoid governmental endorsement and support of any faith, the Preamble reads "Divine Guidance" – not a specific deity. Delegate W.O. Smith recapped

the Convention's sentiment: "There was great argument as to whether it should be 'our reverence to God' or there are many forms, but in Hawaii with all our different religions, we felt that the wording 'grateful for Divine Guidance' would be more proper." Debates in Comm. of the Whole in 2 Proceedings of the Constitutional Convention of Hawaiʻi of 1950, at 706 (1961).

The Hawaiʻi Constitution promises a place where all people - religious and nonreligious alike – live peacefully and equally in civil society. Hawaiʻi's counties are among the most religiously diverse. See, e.g., 2023 PRRI Census of American Religion: County-Level Data on Religious Identity and Diversity, Public Religion Research Institute, https://prri.org/research/census-2023-american-religion/ [https://perma.cc/Z8JJ-FR3H]. 41.5% of the state's population is "affiliated with a religious organization." Association of Religion Data Archives, All Religions, https://www.thearda.com/us-religion/statistics/rankings?u=2&typ=2&cod=9999 [https://perma.cc/DZ5Q-ZGTN]. In 2020, 3.8% of Hawaiʻi's population identified as Buddhists, and 1.7% as Jehovah's Witnesses - the highest percentages in the nation. Id. at Buddhism, https://www.thearda.com/us-religion/statistics/rankings?typ=2&cod=10&u=2&con=0 [https://perma.cc/62WZ-NGK2]; Id. at Jehovah's Witnesses,

https://www.thearda.com/us-religion/statistics/rankings?typ=2&cod=11&u=2&con=0 [https://perma.cc/58TH-QQQC]. And 5.2% of Hawai'i's population were affiliated with The Church of Jesus Christ of Latter-day Saints (sixth in the nation). Id. at Latter-day Saints (Mormonism), https://www.thearda.com/us-religion/statistics/rankings?typ=1&cod=100&u=2&con=0 [https://perma.cc/VP4R-VE2W].

In a colorful and tolerant place like Hawai'i, a wall protects the rights of all – the religious and the nonreligious. Minority faiths and nonreligious people are not compelled through public policy or taxation to support religious practices in Hawai'i. Article I, section 4 of the Hawai'i Constitution preserves religious freedom, individual conscience, and a pluralistic society. Haw. Const. art. I, § 4 (throughout this opinion, citations and references to the Hawai'i Constitution refer to provisions as they are currently numbered, not as they were numbered when originally enacted).

Because Everson and history's lessons taught that government support of religion threatens religious liberty, civic equality, and societal harmony, the 1950 delegates made sure no public funds would support religious activities. To complement Hawai'i's Establishment Clause and cement church-state divide, the delegates added two more constitutional provisions.

First, "[n]o grant shall be made in violation of Section 4 of Article I of this constitution." Haw. Const. art. VII, § 4. Second, the public school system shall be "free from sectarian control" and public funds shall not be appropriated to support or benefit "any sectarian or nonsectarian private educational institution." Haw. Const. art. X, § 1.

Reinforced by generations of jurisprudence, the wall stands for the principle that government neither advances nor inhibits religion. Besides Everson and McCollum, other mid-20th century opinions shared the 18th century vision that government involvement in religion undermines the secular character of civil society. See School Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 217 (1963). When government stays away, there is no message that some religious people or those with nonreligious belief systems are sub-equal members of society. See Engel v. Vitale, 370 U.S. 421, 431-32 (1962).

As jurists have long known, and as the people of Hawaiʻi who ratified our state constitution over the years understood, the promise of religious pluralism and secular government depends on a durable wall separating church and state. Without it, religion, government, and civil society suffer.

II.

The Department of the Attorney General (State) takes a crumbly wall stance. Its position overlooks federalism

principles.

Citing Koolau Baptist, the State says this court has "interpreted Haw. Const. art. I, § 4 co-extensively with the First Amendment of the United States Constitution." See Koolau Baptist Church v. Dep't of Lab. & Indus. Rels., 68 Haw. 410, 718 P.2d 267 (1986). Kennedy and its "historical practices and understandings" test control, argues the State. See Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535 (2022).

Like the majority, I disagree. But there's more to say about how the Supreme Court's recent religious clause cases offend both the First Amendment's structure and the Constitution's dual sovereignty structure, and why the State is wrong to rely on current federal law.

Koolau Baptist only interpreted the federal Establishment Clause. 68 Haw. at 412, 718 P.2d at 268. As the majority says, there was no analysis of article I, section 4.

A state high court interprets a state constitution its own way. State v. Wilson, 154 Hawaiʻi 8, 14, 543 P.3d 440, 446 (2024). This court has long understood federalism principles and operated with a no lock-stepping approach. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 499-500 (1977) (shout out to the Hawaiʻi Supreme Court). Our state constitutional provisions offer greater rights protection than federal

counterparts. See, e.g., State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967). This court may interpret Hawai'i's Establishment Clause broader than the federal Establishment Clause.

The State argues though that the "same analysis under Kennedy applies to Haw. Const. art. I, § 4."

The State's reliance on Koolau Baptist, and its position that article I, section 4's Establishment Clause demands fealty to brand-new takes on the First Amendment's Establishment Clause, dishonor the Hawai'i Constitution. "[T]his court, not the U.S. Supreme Court, drives interpretation of the Hawai'i Constitution. 'If we ignore this duty, we fail to live up to our oath' to defend Hawai'i's Constitution." Wilson, 154 Hawai'i at 14, 543 P.3d at 446.

Sure, United States Supreme Court decisions may have persuasive value. See State v. Kaluna, 55 Haw. 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974). And when it comes to article I, section 4, this court "considers" First Amendment precedent. See Oahu Publ'ns Inc. v. Ahn, 133 Hawai'i 482, 494, 331 P.3d 460, 472 (2014).

But federalism principles empower states to autonomously interpret their constitutions. "The United States Supreme Court does not have a monopoly on correct constitutional interpretation. This fact is a cornerstone of federalism,

justifying substantive disagreement by state courts." Robert F. Williams, In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S.C. L. Rev. 353, 402 (1984).

The Constitution's structure preserves state courts' ability to depart from opinions grounded in unsound methods. A state court may use different interpretive frameworks than the Supreme Court when interpreting a state constitution. See, e.g., Kaluna, 55 Haw. at 369, 520 P.2d at 58 (faulty interpretive methods untethered to "logic and a sound regard" do not merit this Court's attention); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to . . . reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); Catherine Hancock, State Court Activism and Searches Incident to Arrest, 68 Va. L. Rev. 1085, 1126 (1982) (state court departures from federal interpretive methods are "an ideal method for remedying perceived theoretical flaws in federal doctrine").

If the Supreme Court decides a case based on mission, text trickery, originalism, or imagination, then that case may have little value to a state that prefers a more principled way, or an interpretive approach that does not force "contemporary society to pledge allegiance to the founding era's culture,

realities, laws, and understanding of the Constitution." Wilson, 154 Hawaiʻi at 22, 543 P.3d at 454.

Hawaiʻi's Constitution is agile. Norms, values, and experiences change over time. A constitution adapts.

> [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

Emps.' Ret. Sys. of Haw. v. Ho, 44 Haw. 154, 170-71, 352 P.2d 861, 870 (1960) (quoting United States v. Classic, 313 U.S. 299, 316 (1941)) (emphasis added); see also Matter of Hawaiʻi Elec. Light Co., Inc., 152 Hawaiʻi 352, 359, 526 P.3d 329, 336 (2023) (right to a stable climate system conferred by broad purpose of constitutional provision, adapted to contemporary times).

The Hawaiʻi Supreme Court "values history and tradition to aid statutory and constitutional interpretation. But unlike the United States Supreme Court, we do not subscribe to an interpretive theory that nothing else matters." Wilson, 154 Hawaiʻi at 23, 543 P.3d at 455 (cleaned up). Other considerations matter to sensible judicial decision-making.

Pupils of a glitchy new methodology may not admit it, but no theory of constitutional interpretation entirely eliminates

judicial discretion. Originalism's sales pitch gaslights. See, e.g., Eric Berger, Originalism's Pretenses, 16 U. Pa. J. Const. L. 329 (2013).

This court opts for a more traditional approach. There is nothing wrong with the classic ways the nation's jurists have interpreted constitutions. We use the same apps - text and interpretive canons, purpose and consequences relative to purpose, precedent, structure and design, and historical, social, and cultural context. Our court is also inspired by the Aloha Spirit, Hawaiʻi values, respect for human dignity, and respect for nature's dignity. Hawaiʻi Revised Statutes (HRS) § 5-7.5 (2009). One more thing. This court strives for institutional competence. Cf. Trump v. United States, 603 U.S. 593 (2024).

III.

As the majority recounts, Hawaiʻi's 1968 and 1978 Constitutional Conventions left article I, section 4 alone.

Without debate, the 1968 Constitutional Convention unanimously decided to "retain the status quo." Debates in Comm. of the Whole in 2 Proceedings of the Constitutional Convention of Hawaiʻi of 1968, at 1 (1972). With little discussion, the 1978 Constitutional Convention also made no change. State Constitution in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1978, at 1148-49 (1980).

But the 1978 Constitutional Convention had a different feel. The 1970s marked a period of Native Hawaiian cultural revival and political activism, commonly referred to as the Hawaiian Renaissance. "[T]he 1978 Constitutional Convention was convened during the Hawaiian Renaissance, a time of renewed interest in Hawaiian culture following a long period in which learning about traditional Hawaiian language and history in schools was at best shallow, sporadic, and undirected and at worst discouraged or forbidden." Clarabal v. Dep't of Educ., 145 Hawaiʻi 69, 81, 446 P.3d 986, 998 (2019).

Over the years, church and state had harmed Native Hawaiian people. See, e.g., Jonathan Kamakawiwoʻole Osorio, *Hawaiian Souls – The Movement to Stop the U.S. Military Bombing of Kahoʻolawe* in A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty 137, 142 (Noelani Goodyear-Kaʻōpua, Ikaika Hussey and Erin Kahunawaikaʻala Wright eds., 2014) ("[A] tremendous injustice had been done to earlier Hawaiians by missionaries, planters, and the U.S. government[.]"); Derek H. Kauanoe and Breann Swann Nuʻuhiwa, We Are Who We Thought We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent, 13 Asian-Pac. L. & Pol'y J. 117, 153-54 (2012) (describing missionaries' role in "justify[ing] the appropriation of Native property and the denial of Native self-

governance" in Hawaiʻi); S.J. Res. 19, 103d Cong., 107 Stat. 1510, 1513 (1993) (the United Church of Christ recognized "the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893"); Clarabal, 145 Hawaiʻi at 73, 446 P.3d at 990 (discussing the history of state-sponsored suppression of ʻōlelo Hawaiʻi).

The Hawaiian Renaissance powered an awareness of historical injustices and injury to the land, people, and spiritual essence of Hawaiʻi. See Israel Kamakawiwoʻole, "Hawaiʻi ʻ78," *Facing Future* (Mountain Apple Company 1993) ("Ua mau ke ea o ka ʻāina i ka pono, o Hawaiʻi . . . Cry for the gods, cry for the people / Cry for the land that was taken away."). Troy J.H. Andrade, Hawaiʻi ʻ78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli, 24 U. Pa. J. L. Soc. Change 85, 102 (2021).

Not-so-distant history stirred discussion at the 1978 Constitutional Convention. See, e.g., S.J. Res. 19, 103d Cong., 107 Stat. 1513 (admitting to the "illegal overthrow of the Kingdom of Hawaii on January 17, 1893"). Delegate and Hawaiian Affairs Committee Chair Adelaide "Frenchy" DeSoto reflected that "[i]gnorance, apathy, callousness and neglect are keynotes of [the American] government's interaction with traditional Hawaiian religion and culture." Debates in Comm. of the Whole

in 2 Proceedings of the Constitutional Convention of Hawaiʻi of 1978, at 426 (1980).

Justice for harms to Native Hawaiian culture, language, religion, and tradition animated the 1978 Constitutional Convention. In 1978, Hawaiʻi "deeply committed to restorative justice for its indigenous people." D. Kapuaʻala Sproat, An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation, 35 Stan. Env't L.J. 157, 183 (2016). The state recognized ʻōlelo Hawaiʻi as an official state language. Haw. Const. art. XV, § 4. The State was now required to "promote the study of Hawaiian culture, history and language." Haw. Const. art. X, § 4. The Office of Hawaiian Affairs was created. Haw. Const. art. XII, § 5. And the delegates crafted a constitutional provision to protect traditional and customary Native Hawaiian rights, including *religious* practices. Haw. Const. art. XII, § 7.

Article I, section 4 stayed the same. But the spirit of our state's most recent constitutional convention reaffirmed Hawaiʻi's commitment to a strict separation of church and state.

Hawaiʻi's wall stands strong.

IV.

The federal wall cracks. The Supreme Court's recent religious clause cases wreck the relationship between free exercise and non-establishment. The Court upends an equilibrium designed to protect both religious liberty and a secular government. The "impregnable wall" prevents government from advancing or inhibiting any faith. The divide preserves our nation's pluralistic complexion.

The Roberts Court casually dismisses the lessons of American and world history, the warnings of prominent early Americans, and the judiciary's storied legal minds. Bad things happen unless government and religion are completely separated.

The Court ditches neutrality and boosts accommodation over the wall. It flirts with the true harms the framers foresaw – coercion, exclusion, and civil strife. It invites state involvement with religion. And it exposes minority faiths and nonbelievers to majoritarian impulses.

A snap of a few fingers and accommodation became a constitutional imperative. "[T]he Court leads us to a place where separation of church and state becomes a constitutional violation." Carson v. Makin, 596 U.S. 767, 810 (2022) (Sotomayor, J., dissenting).

Under the Court's redesign, the Free Exercise Clause backspaced the Constitution's first words. The Court's makeover

happened with little mention of the Establishment Clause or Everson. Plus, the Court benched its go-to interpretive method.

Suddenly, payments from the public treasury flow to religious institutions to fund religious exercise. The First Amendment had told Americans that public resources can't support religious activity. For centuries. Yet "[w]hat a difference five years makes" to a hurried Court. Id. See also Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 364 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("The Court reverses course today for one reason and one reason only: because the composition of this Court has changed.").

It's not just access to public funding that benefits religion. As the Roberts Court tears down the wall, it grants new rights and privileges to people who may cause real harm to other people. The Court reshaped the First Amendment from no promoting, no sponsoring, and no involvement with religion because of religion's distinctiveness, to extending special treatment to religion. Now, some religious people are treated differently than other religious people and nonreligious people.

The Hawaiʻi Constitution protects against denial of a person's civil rights and discrimination "because of race, religion, sex, or ancestry." Haw. Const. art. I, § 5. It also advances the dignity of each person: "All persons are free by nature and are equal in their inherent and inalienable rights.

Among these rights are the enjoyment of life, liberty and the pursuit of happiness[.]" Haw. Const. art. I, § 2.

In a pluralistic society, a constitution must protect the dignity of all – not license harms to the dignity of some. Today though, a religious point of view that may differ from other religious points of view, or nonreligious points of view – and the law – confers special benefits.

Leveraging religious belief is nothing new. But exempting some religious believers from generally applicable anti-discrimination laws is very new.

> Slavery and Jim Crow were sustained for a long time by church teachings in certain parts of the country, but when civil rights laws were passed, those who disagreed were nevertheless expected to comply and no hostility was assumed. The same with the second-class status of women in America as reflected in long-standing bans in employment, property ownership, even participation in ordinary civil functions, such as juries. When those laws were changed to give women new freedoms and a new status in society, no one felt it was hostile to expect religious conservatives operating in public agencies or public accommodations to abide by the new law.

Howard Gillman & Erwin Chemerinsky, The Religion Clauses: The Case for Separating Church and State 173 (2020). "Laws do not reflect hostility toward religion merely because a secular government purpose is inconsistent with the beliefs of certain religious people." Id. Decades ago, Justice Scalia commented that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the

contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878-79 (1990).

It's hard to see how Hawaiʻi's Constitution pardons faith-based conduct that violates laws that apply to everyone else. See, e.g., HRS § 378-2 (2015 & Supp. 2019) (Hawaiʻi's anti-discrimination employment law); HRS § 489-3 (Supp. 2018) (Hawaiʻi's law prohibiting discrimination in public accommodations).

The First Amendment and article I, section 4 were designed not to advantage religion, but to prevent government from aligning itself with, endorsing, or supporting religious activity. See Everson, 330 U.S. at 15-16. Both constitutions require the government "to be . . . neutral in its relations with groups of religious believers and non-believers." Id. at 18.

Thus, government may not treat people differently based on a religious or nonreligious worldview. Freedom means not only the right to practice any religion, but the right to be free from religion.

So what does the Hawaiʻi Supreme Court "consider" from the current Supreme Court's Establishment Clause jurisprudence?

The Roberts Court's break-the-wall project started with Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449

(2017).

Each Everson justice understood that the First Amendment was not designed to treat a religious entity and a secular counterpart equally. Everson, 330 U.S. at 15-16; 330 U.S. at 59-60 (Rutledge, J., dissenting). For its own good, religion is constitutionally distinct. Everson, 330 U.S. at 26 (Jackson, J., dissenting) (the "difference which the Constitution sets up between religion and almost every other subject matter of legislation, . . . goes to the very root of religious freedom").

Yet, in Trinity Lutheran the Court undermined religion's distinctiveness. Unless state and local governments put religious and nonreligious entities on equal footing, they discriminate. 582 U.S. at 465 n.3. The Court ruled "for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both." Id. at 472 (Sotomayor, J., dissenting).

The Court's predecessors, the nation's founders, and mostly everyone were misinformed. "Before the Court's hubristic originalists arrived, everyone got it wrong." City & Cnty. of Honolulu v. Sunoco LP, 153 Hawaiʻi 326, 362, 537 P.3d 1173, 1209 (2023) (Eddins, J., concurring).

Three years later, the Court held that excluding religious schools from a public tuition program discriminated against faith-based schools. Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020) "[O]nce a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious." Id. at 487. The Court ruled "without the slightest attention to whether the text or the original public meaning of the Free Exercise Clause (in either 1791 or 1868) supported" its work. Ira C. Lupu and Robert W. Tuttle, The Remains of the Establishment Clause, 74 Hastings L.J. 1763, 1787 (2023).

Two years after that, the Court strayed even more from our nation's pre-2017 history and tradition. "This Court continues to dismantle the wall of separation between church and state that the Framers fought to build." Carson, 596 U.S. at 806 (Sotomayor, J., dissenting).

In Carson, six justices slanted neutrality. Now the government must equally treat secular and religious entities in public funding matters. Even when taxpayer money directly supports religious indoctrination. Id. at 809 ("[T]oday's decision directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction.").

Religious protections though may depend on the faith. See Trump v. Hawaiʻi, 585 U.S. 667 (2018). And that's part of the problem.

Carson made up a right for religious institutions to access public funds. The Establishment Clause instantly became an organ for religious preference and accommodation. Religion was not so distinctive. The state now has to treat religious institutions like everyone else. Ahistoric and ill-advised on its own. But the Court's policy-making leads to state involvement with religion. When religious entities take government benefits, church and state no longer functionally operate as distinct and separate institutions.

The Court snubs the Constitution's dynamic structural feature – subnational constitutions. And it shrugs at a state's commitment to neutrality, self-governance, and interest in maintaining a secular public education system.

This year, the Court turned to creating religious public schools. See Okla. Statewide Charter Sch. Bd. v. Drummond, 605 U.S. 165 (2025) (affirming the lower court's ruling 4-4). A constitutional right to taxpayer-funded religious education defies federalism principles. Yet members of the Court seem eager to force state and local governments to pay for religious indoctrination.

The Supreme Court devalues democracy. Thirty-seven state constitutions block public funds from supporting religious entities. Richard Schragger, Micah Schwartzman & Nelson Tebbe, Reestablishing Religion, 92 U. Chi. L. Rev. 199, 211 (2025). The Court aims to federally-repeal these state constitutional provisions.

The Court's beliefs meddle with local and state governments. Forcing states to send public funds to religious entities federalizes public policy. By unprincipled fiat. See also New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (zero to superpower).

Taxpayer funds now flow to religious institutions. So, the government collects money from nonbelievers (under the threat of jail), and uses some of it to support religion. And since not all religions will receive public funds, the government forces minority faiths to support other faiths, or else.

The Court twists text, history, purpose, precedent, and public meaning to offend the First Amendment's character-of-government structure *and* the Constitution's separate sovereignty structure.

As it steamrolls both, the Court says nothing about church-state separation and federalism principles. The Court's nevermind stance to the structural features of the Constitution "has unfolded with little engagement with, and occasional

disdain for, the reasoning that underlay longstanding principles. The transformation includes an abrupt and deeply ahistorical turn away from a wide corpus of state constitutional law. By erasing Establishment Clause-based norms of religious distinctiveness, the Court has ignored history, uprooted precedent, and disregarded deep concerns of federalism." Lupu & Tuttle, supra, at 1765-66. All of a sudden, the "separation of church and state is a constitutional slogan, not a constitutional commitment." Carson, 596 U.S. at 810 (Sotomayor, J., dissenting).

Today's Court often rules not because the Constitution says so. But because partisan preferences and personal values say so.

V.

Returning to Kennedy. The State says Kennedy shapes the contours of article I, section 4. It does not.

Kennedy typifies the Roberts Court's ideology-driven jurisprudence. Pretend law and pretend facts sub for real law and real facts.

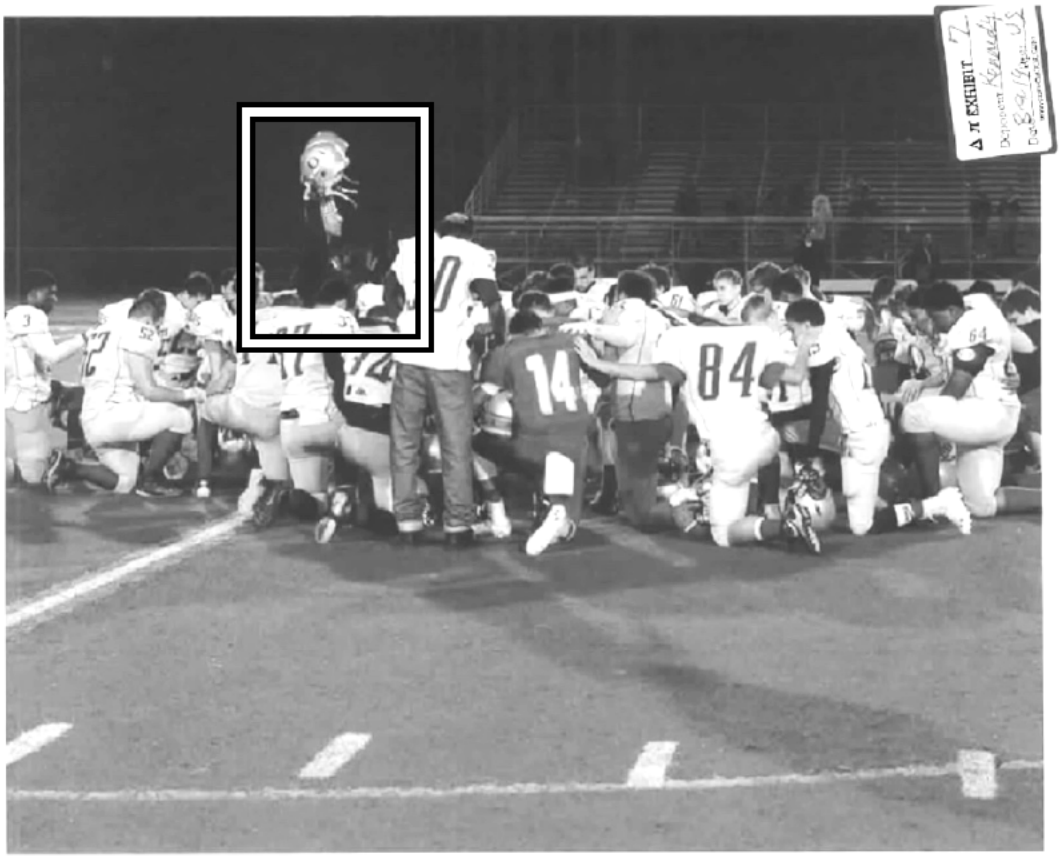
The Court told a tale about the "private" and "quiet, personal" nature of a public-school coach's prayer – not the big picture context of a public school's coercive environment and state-sponsored religious activity. Kennedy, 597 U.S. at 543.

As it often does, the Court repackaged and whitewashed facts to achieve a desired outcome. See, e.g., Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 557 (2013) (scorning the record, history, legislative branch, and a great American law, to daydream a textually-unsupported rule that Alabama's equal sovereignty prevents the federal government from enforcing federal law – a law the Chief Justice had a hunch worked too well); Rucho v. Common Cause, 588 U.S. 684, 721 (2019) (Kagan, J., dissenting) (burying wide-ranging factual findings and its head in the sand to endorse partisan gerrymandering and "[f]or the first time ever[] . . . refus[ing] to remedy a constitutional violation because it thinks the task beyond judicial capabilities").

Fudging the record is not limited to cases important to democracy. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 350 (2023) (Sotomayor, J., dissenting) (disregarding all-inclusive, comprehensive findings to "reconstruct the record and conduct its own factual analysis"); Ohio v. Env't Protection Agency, 603 U.S. 279, 307, 300 (2024) (Barrett, J., dissenting) ("putting in [public] commenters' mouths words they did not say" to block an EPA air pollution rule "based on an underdeveloped theory that is unlikely to succeed on the merits").

Even cases that concern core freedoms succumb to brazen factual misrepresentations. See Noem v. Vasquez Perdomo, 606 U.S. ----, 2025 WL 2585637 (Mem), at *6, *9 (Sep. 8, 2025) (Sotomayor, J., dissenting) (explaining - in "yet another grave misuse of [the Court's] emergency docket" - that "all Latinos, U.S. citizens or not, who work low wage jobs are fair game to be seized at any time, taken away from work, and held until they provide proof of their legal status to the agents' satisfaction," even though "[t]he Fourth Amendment . . . prohibits exactly what the Government is attempting to do here"). Winking at the Constitution, in recent days the Court has "ignore[d] the record evidence" and conjured facts that "blink[] reality." Id. at *11, *14; see id. at *14 ("Immigration agents are not conducting 'brief stops for questioning,' as the concurrence would like to believe . . . . They are seizing people using firearms, physical violence, and warehouse detentions.").

In Kennedy, a coach "lost his job," the majority wrote, for "pray[ing] quietly while his students were otherwise occupied." Kennedy, 597 U.S. at 512-14. The dissent viewed the record differently.



Photograph of J. Kennedy standing in group of kneeling players.

Id. at 549 (Sotomayor, J., dissenting) (emphasis added).

The Roberts Court's frequent misrepresentation of the factual record and its throw-judges-under-the-bus disdain for district courts, the fact-finders of the federal judiciary, harm the justice system. See, e.g., Trump v. CASA, Inc., 606 U.S. ----, 145 S. Ct. 2540, 2608 (2025) (Jackson, J., dissenting) ("[T]his Court's complicity in the creation of a culture of disdain for lower courts, their rulings, and the law (as they interpret it) will surely hasten the downfall of our governing institutions, enabling our collective demise."); Alexander v. S.C. State Conf. of the NAACP, 602 U.S. 1, 68 (2024) (Kagan, J.,

dissenting) ("The majority picks and chooses evidence to its liking; ignores or minimizes less convenient proof; disdains the [District Court] panel's judgments about witness credibility; and makes a series of mistakes about expert opinions."); President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs., --- F.Supp.3d ----, No. 25-CV-11048-ADB, 2025 WL 2528380, at *12 n.9 (D. Mass. Sep. 3, 2025) ("[I]t is unhelpful and unnecessary to criticize district courts for 'defy[ing]' the Supreme Court when they are working to find the right answer in a rapidly evolving doctrinal landscape, where they must grapple with both existing precedent and interim guidance from the Supreme Court that appears to set that precedent aside without much explanation or consensus.").

Kennedy's made-up "historical practices and understandings" test substitutes for the history and tradition of the First Amendment's wall as understood in 1789, 1868, 1950, 1978, and today. The fuzzy new approach eases the way to the Court's preferred outcome.

History is prone to misuse. The current Court shrinks, alters, and discards historical facts that don't fit. Wilson, 154 Hawaiʻi at 21, 543 P.3d at 453. It "handpicks history to make its own rules," missing the broader context of a constitutional provision's original and contemporary purposes. Id.

Espinoza is a fitting example. The Court tunes out the "historical backdrop of longstanding concern over funding ministries, including sectarian schools." Lupu & Tuttle, supra, at 1783. The Court says that state constitutional bars to financial support of religion were designed to target Catholics and, therefore, should not inform the Court's First Amendment analysis. See Espinoza, 591 U.S. at 482 ("[M]any of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. . . . It was an open secret that 'sectarian' was code for 'Catholic.' . . . The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.") (cleaned up). Contra Dobbs, 597 U.S. at 364 (no trouble relying on seventeenth-century legal authorities that were "the continuation of centuries of misogyny and oppression" to strip autonomy from half the population, see Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 983 (Pa. 2024) (Wecht, J., concurring)).

Historians are not so cavalier. "It is simply implausible to assert that anti-Catholic animus was the basis for the prohibition on compelled support for religion." Lupu & Tuttle, supra, at 1782-83 ("Proponents of common schools rejected state compelled support for 'sectarian' education well before the start of significant Roman Catholic immigration to the United

States. . . . [L]eaders of the common schools movement blocked state efforts to fund Episcopalian and Presbyterian schools."). Rather, sentiment against government appropriations to religions institutions were rooted in the nonsectarian prototype of a separated church and state. Everson, 330 U.S. at 8-16. The history and tradition of these views stretch to the founding. Id. And they are rooted in pluralistic ideals – not bigotry. As Everson reminded, Catholics – like other religious minorities - "found themselves hounded and proscribed because of their faith" in colonies with religious establishments. Id. at 10. "[A]bhorrence" at such persecution contributed to the framers' understanding that religious liberty could only flourish when church and state were separated. Id. at 11.

Historians don't know the answer before they begin. Nor do their methods flicker to arrive at a favored answer. And historians do not "choos[e] the facts on which to concentrate" to make "value-laden interpretive judgments." See Reva B. Siegel, The Levels-of-Generality Game: "History and Tradition" in the Roberts Court, 47 Harv. J.L. & Pub. Pol'y 563, 585 (2024). But dilettantish historians do. The current Court shifts between levels of generality to find the proper historical argument to fit a need. Id.

"History is messy. It's not straightforward or fair. It's not made by most." Wilson, 154 Hawaiʻi at 21, 543 P.3d at 453.

Because "[a] justice's personal values and ideas about the very old days suddenly control the lives of present and future generations," I asked: "Whose history are we talking about anyway?" See Sunoco, 153 Hawaiʻi at 361-62, 537 P.3d at 1208-09 (Eddins, J., concurring).

Women and people of color were forbidden from participation in the democratic process. So the answer was easy: "The powerful. The few white men who made laws and shaped lives during the mostly racist and misogynistic very old days." Id. at 362, 537 P.3d at 1209. Originalism revives their value judgments to federalize 21st century life.

A defining feature of Roberts Court jurisprudence is its agenda-driven methodology. See, e.g., Nat'l Institutes of Health v. Am. Pub. Health Ass'n, 606 U.S. ----, 2025 WL 2415669 (Mem), at *14 (Aug. 21, 2025) (Jackson, J., concurring and dissenting) (decrying the Court's complicity in eroding the rule of law through its "Calvinball jurisprudence with a twist. Calvinball has only one rule: There are no fixed rules. We seem to have two: that one, and this Administration always wins.") (footnote omitted).

Techniques match agenda. And it's not just selective or inconvenient originalism that nurtures views that the Court operates as a political body.

Take text. The Court tends to warp text as it snakes to its preferred outcome. "[P]ure textualism is incessantly malleable . . . and, indeed, it is certainly somehow always flexible enough to secure the majority's desired outcome." Stanley v. City of Sanford, Fla., 606 U.S. ----, 145 S. Ct. 2058, 2089 n.12 (2025) (Jackson, J., dissenting). See also Medina v. Planned Parenthood S. Atl., 606 U.S. ----, 145 S. Ct. 2219 (2025) (undermining civil rights law, tampering with the Medicaid Act's text, and contriving a sky-high bar to access justice for the poor and disabled); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 711 (2021) (Kagan, J., dissenting) (rewriting the Voting Rights Act (again) with its own "set of extra-textual restrictions"); West Virginia v. Env't Prot. Agency, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting) ("[S]pecial canons like the 'major questions doctrine' magically appear as get-out-of-text free cards."); Fischer v. United States, 603 U.S. 480, 506 (2024) (Barrett, J., dissenting) (To limit prosecution of insurrectionists, "[t]he Court . . . does textual backflips to find some way — *any* way — to narrow the reach of subsection (c)(2).").

The Court's jurisprudence often skips the text and purpose of the United States Constitution. See, e.g., Trump v. United States, 603 U.S. 593 (disabling the rule of law and enabling executive branch lawlessness with make-believe law unsupported

by text or original public meaning); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) ("sidestep[ping] text, history, and tradition to invalidate a major law on a question vital to democracy – limitless corporate money influencing elections," because corporations have free speech rights like real American voters, Sunoco, 153 Hawaiʻi at 362, 537 P.3d at 1209 (Eddins, J., concurring)); Bruen, 597 U.S. 1 (misrepresenting text, purpose, public meaning, and history to gut democratically-vetted laws designed to protect the lives of today's citizens and law enforcement officers).

Pretend law based on pretend facts and unsound methods has no place in Hawaiʻi law.

VI.

I agree that the Circuit Court erred in granting summary judgment to the State, and that summary judgment is warranted for Hilo Bay.

For the reasons stated in the well-done majority opinion, a deed restriction imposed by the State that requires a landowner to use the land for "church purposes only," or else it reverts to the State, constitutes state action that advances religion.

The State's purpose in retaining a reversionary interest is not secular. It's religious. The government does not just accommodate religious practice as a condition of property tenure, it forces faith-based use of the land. It conditions

ownership and land use on the advancement of religious activity. The State compels religious use and excludes all secular purposes. It favors religion over nonreligion.

There's also the state involvement problem that the majority discusses. This is no private agreement. Government imposed the "church purpose only" condition, must monitor compliance, and is incentivized to find a breach.

We have a classic violation of article I section 4's Establishment Clause.

VII.

The Roberts Court's off-the-wall jurisprudence reimagines the First Amendment. The Constitution creates a barrier against state support for religion and state involvement in religion. But the Court misshapes the Constitution to require government support of religion.

Two years ago, I feared the Court self-inflicted harm, eroded faith in the courts, and exposed itself to real criticisms about its legitimacy. Sunoco, 153 Hawaiʻi at 362, 537 P.3d at 1209 (Eddins, J., concurring).

Back then in the big games, the Roberts Court called balls and strikes based on the pitcher and hitter. Bad enough for the integrity of our judicial system – national and subnational. But now pitches that bounce to the plate or sail over the catcher's head are strikes. Just because the ump says so.

Pretend law is not law.

State constitutionalism makes it easy to consider Roberts Court jurisprudence white noise.

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Vladimir P. Devens