No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, ET AL.,

Petitioners,

v.

CITY OF BOSTON, MASSACHUSETTS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), provide the rule of decision on Establishment Clause questions?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation, including in multiple cases at the United States Supreme Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 578 U.S. 403 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021).

Becket has long been involved in litigation to protect the right to engage in religious speech; it has also defended religious symbols and language against Establishment Clause challenges. Becket has done so as counsel for both parties and *amici curiae*. See, *e.g.*, *Kondrat'yev* v. *City of Pensacola*, 949 F.3d 1319 (11th Cir. 2020) (cross memorial in city park); *Freedom From Religion Found., Inc.* v. *County of Lehigh*, 933 F.3d 275 (3d Cir. 2019) (county seal containing Latin cross); *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (Pledge of Allegiance); *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. Petitioners and Respondents have granted blanket consent to the filing of *amicus* briefs.

(10th Cir. 2010) (highway crosses honoring fallen state troopers); *ACLU of N.J.* v. *Schundler*, 168 F.3d 92 (3d Cir. 1999) (multi-faith religious display). In particular, Becket has long opposed application of the *Lemon* test, arguing that the Establishment Clause should instead be applied with reference to the historical question of what constituted a religious "establishment" at the time the Establishment Clause was drafted and ratified. See Br. *Amicus Curiae* of the Becket Fund for Religious Liberty, *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067 (2019).

In this case, Becket is concerned that Boston's invocation of the Establishment Clause to justify its actions—and the First Circuit's endorsement of that view—could lead to exactly the kind of religion-hostile censorship that this Court has repeatedly warned against.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Boston strayed far outside this Court's Free Speech jurisprudence. Why? As Boston's own admissions show, the problem is not primarily a disdain for free speech but a misunderstanding of another First Amendment provision: the Establishment Clause.

Over the last four decades, this Court has repeatedly protected religious speech and emphasized the importance of history in Establishment Clause analysis. Despite these developments, lower courts and government officials at many levels seem to have a shag-carpet understanding of the Establishment Clause: one that is stuck in the 1970s and has not been updated since. Under this view, allowing religious

speech on public property or in government-funded programs is constitutionally dangerous, and the safest course for local officials is to exclude it.

That mistaken view of precedent has consequences. Officials have used it to censor religious expression from public transit, exclude religious participants from generally available funding programs, and even deny relief funds to houses of worship devastated by hurricanes.

Boston made a similar error here, and the result is what the Court warned against in *American Legion*: government action that is "not * * * neutral and would not further the ideals of respect and tolerance embodied in the First Amendment." *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2090 (2019). Boston's approach to the First Amendment prioritizes secularism over religion and the 1970s over the 1770s.

The root problem in this case is not a failure to understand free speech but a continued reliance on *Lemon*. Until this Court expressly overrules *Lemon*, government officials will continue to follow it, to the detriment of both free speech and free exercise.

ARGUMENT

I. The Constitutional errors in this case stem from misunderstandings about the Establishment Clause, and Boston is not alone in making such errors.

A. Boston denied permission based on a misunderstanding of the Establishment Clause.

As Petitioners' brief explains, Boston created a public forum for private speech when it allowed private groups to hoist flags of their choice on the city's flagpole. Pet. Br. 23-30. Boston's targeted exclusion of religious flags is thus a straightforward case of viewpoint discrimination barred by the Free Speech Clause. See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

Given the clarity of the governing free-speech principles, how did Boston get it so wrong? The answer lies elsewhere in the First Amendment—the Establishment Clause. When denying Camp Constitution's application, Boston argued that the exclusion of all "non-secular flags" was "consistent with well-established First Amendment jurisprudence prohibiting a local government from 'respecting an establishment of religion.'" Pet. App. 153a-154a. Doubling down, Boston later admitted that excluding religious flags serves "no goal or purpose * * * except 'concern for the so-called separation of church and state or the constitution's [E]stablishment [C]lause.'" Pet. App. 157a. The First Circuit endorsed that action,

relying on *Lemon* to find "the City's establishment concerns are legitimate." Pet. App. 36a (citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 615 (1971)).

Petitioners have explained why these fears are misplaced. Pet. Br. 39-41. Private religious displays in a public forum are perfectly permissible under the Establishment Clause. Indeed, this Court has repeatedly rejected the argument that a government impermissibly "endorses" religion by allowing religious speech on equal terms in public forums. See *Rosenberger*, 515 U.S. at 845 ("[O]fficial censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis."); *Lamb's Chapel*, 508 U.S. at 395 ("[T]he posited fears of an Establishment Clause violation are unfounded."); *Good News Club*, 533 U.S. at 118 ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum."). Boston cannot respect the First Amendment by censoring religious speech.

B. Such misunderstandings remain widespread, even after *Town of Greece* and *American Legion*.

Boston is not alone in its misunderstanding of the Establishment Clause. Without a formal overruling of both *Lemon* and its related endorsement test in their entirety, many government officials still apply this outdated reading of the Establishment Clause. As a result, they exclude religious individuals and groups

from equal access to public forums and public funding. A few examples illustrate the breadth of the problem:

1. *Public transit advertising*. Public transit systems often sell advertising space on trains and buses. Unfortunately, some transit systems impose discriminatory bans on religious messages in the name of separating church and state. See *Archdiocese of Washington* v. *WMATA*, 140 S. Ct. 1198 (2020); *Northeastern Pa. Freethought Soc'y* v. *County of Lackawanna Transit Sys.*, 938 F.3d 424, 442 (3d Cir. 2019) (striking down "ban on speech related to religion" in public transit advertising); *Young Israel of Tampa, Inc.* v. *Hillsborough Area Reg'l Transit Auth.*, No. 8:21-cv-294 (M.D. Fla. Oct. 8, 2021), ECF 63 at 20 (public transit authority defending ban on religious advertisements to "maintain[] neutrality" on "religious issues").

As two members of the Court recently noted, the Court's "intervention" to fix the law in this area is "warranted." *Archdiocese of Washington* v. *WMATA*, 140 S. Ct. 1198, 1199 (2020) (Gorsuch, J., joined by Thomas, J., respecting the denial of certiorari). "The First Amendment requires governments to protect religious viewpoints, not single them out for silencing." *Id.* at 1200.

2. *Public facilities*. New York City allows private groups to hold events in public schools after school hours. But citing Establishment Clause concerns as its "sole reason," the city barred religious groups from using the space for worship. *Bronx Household of Faith* v. *Board of Educ.*, 750 F.3d 184, 192 (2d Cir. 2014). Even in the face of *Good News Club*, the Second Circuit concluded that the "exclusion was constitutionally permissible in light of the Board's

reasonable and good faith belief that permitting religious worship services in its schools might give rise to an appearance of endorsement in violation of the Establishment Clause, thus exposing the Board to a substantial risk of liability." *Id.* at 189.

3. *Disaster relief grants.* From at least 1998 until 2018, the Federal Emergency Management Agency barred houses of worship from receiving disaster recovery grants available to other nonprofit community organizations. FEMA has long recognized that faith groups play a critical role in disaster recovery.[2] But FEMA still denied disaster recovery funds to a synagogue in Florida damaged by Tropical Storm Faye because its community programs were "based on or teach Torah values and Jewish tradition, customs and laws."[3] After Hurricane Katrina, a historic Black church in New Orleans that provided "literacy programs, clothing distribution, food and nutrition programs," "health and wellness programs," and a "homeless shelter" fared no better.[4]

FEMA finally abandoned its discriminatory policy in 2018 after several houses of worship sued—but not until the churches petitioned this court for emergency relief and Justice Alito called for FEMA to respond. Compare *Harvest Family Church* v. *FEMA*, No. 17A649 (U.S. Dec. 21, 2017) (Alito, J.) (calling for

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[2] See, *e.g.*, FEMA Press Release, *Baptists Aim to Rebuild 1,000 homes for North Carolina Survivors of Hurricane Matthew* (Apr. 26, 2017), https://bit.ly/3CEnmkV.

[3] FEMA Appeal, Chabad of the Space Coast, Inc. (June 27, 2012), https://perma.cc/2XNV-ZGGM.

[4] FEMA Appeal, Mount Nebo Bible Baptist Church, (Mar. 13, 2014), https://perma.cc/G4HM-Q9KR.

FEMA's response by Jan. 10, 2018), with Revisions to the Public Assistance Program and Policy Guide, 83 Fed. Reg. 472, 473 (Jan. 4, 2018) (changing FEMA policy so "houses of worship will not be singled out for disfavored treatment").

4. *Historic preservation grants.* In an effort to preserve local history, some states and local governments provide grants to pay for the restoration and preservation of historically significant buildings. In return, the building owners typically must give the government an easement committing to maintain the buildings' historic appearance. But, citing anti-establishment interests, the high courts in New Jersey and Massachusetts barred houses of worship from receiving grants, regardless of their historic significance. See *Freedom From Religion Found., Inc.* v. *Morris Cnty. Bd. of Chosen Freeholders*, 181 A.3d 992 (N.J. 2018), cert. denied, 139 S. Ct. 909 (2019); *Caplan* v. *Town of Acton*, 92 N.E.3d 691 (Mass. 2018).

Justices of this Court and the state courts alike have recognized the confusion in the law and the need for this Court's clarification. *Morris Cnty.*, 139 S. Ct. at 911 (Kavanaugh, J., joined by Alito, J., and Gorsuch, J., respecting the denial of certiorari) ("At some point, this Court will need to decide whether governments that distribute historic preservation funds may deny funds to religious organizations simply because the organizations are religious."); *Caplan*, 92 N.E.3d at 712 (Kafker, J., concurring) ("Today's decision takes us into one of the most confusing and contested areas of State and Federal constitutional law."). Although these particular errors stem from state Blaine Amendments rather than the federal Establishment Clause, confusion at the federal

level compounds confusion at the state level. For example, in *Morris County*, the New Jersey Supreme Court cited *Lemon* alongside other cases to conclude that "the grant program poses questions under any articulation of the current standard." 181 A.3d at 1012. Such cases raise similar concerns over the exclusion of religious exercise and speech.

5. *School funding.* In *Hunt* v. *McNair*, this Court interpreted *Lemon*'s "effect" prong to bar state funds from flowing "to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." 413 U.S. 734, 743 (1973). For decades, so-called "pervasively sectarian" institutions were excluded from "direct state aid of any kind." *Roemer* v. *Board of Pub. Works*, 426 U.S. 736, 758 (1976). Despite the Court's later rejection of this discriminatory rule in favor of religious neutrality,[5] the "pervasively sectarian" exclusion remains, well, pervasive.

Thus, for example, when Colorado chose to fund scholarships for students at private colleges in the state, it barred them from being used at any school deemed "pervasively sectarian" in "an attempt to conform to First Amendment doctrine." *Americans United for Separation of Church & State* v. *Colorado,* 648 P.2d 1072, 1075 (Colo. 1982). This restriction remained in effect until the Tenth Circuit struck it

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[5] See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017); *Espinoza* v. *Montana Dep't of Rev.*, 140 S. Ct. 2246 (2020).

down in 2008. See *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008).

Those cases were years ago, so it might seem that the problem has been resolved. To the contrary, this standard persists in government programs. For example, this Court is currently confronting Maine's law that restricts private-school tuition vouchers to "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann. tit. 20-A, § 2951(2).1.

Nor is the problem limited to state and local governments. For example, Congress created a loan program to assist historically Black colleges and universities with capital improvement projects. Congress recognized that HBCUs "have played a prominent role in American history and have an unparalleled record of fostering the development of African American youth." 20 U.S.C. 1066(2). But, borrowing text straight from *Hunt*, Congress excluded any "institution in which a substantial portion of its functions is subsumed in a religious mission." 20 U.S.C. 1066c(c).[6] The Office of Legal Counsel recently concluded that this restriction "unconstitutionally discriminates on the basis of an institution's religious character." *Religious Restrictions on Capital Financing for Historically Black Colleges & Universities*, 43 Op. O.L.C. —, slip op. at 16 (Aug. 15, 2019).

Despite the OLC opinion, Congress continues to draft legislation using the *Hunt* standard. The "Build

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[6] The same restriction also appears in a separate grant program for institutions of higher learning. See 20 U.S.C. 10004 (c)(3).

Back Better Act" before the current Congress would provide grants for child-care providers to renovate or improve their facilities "to improve child care safety." H.R. 5376 § 132002, at 1389 ln. 21-22 (capitalization removed). Ignoring decades of developments in Religion Clauses jurisprudence, the bill clings to the bad old days and bars any child-safety grants from going to child-care facilities whose "functions * * * are subsumed in a religious mission." *Id.* at 1399 ln. 22 to 1400 ln. 3.

C. Government lawyers receive, and then give, bad Establishment Clause advice.

Another reason that municipal officials often rely on *Lemon* and its progeny are the threat letters they receive when they attempt to accommodate religious expression. These letters provide a skewed view of the Establishment Clause; they often do not even mention this Court's decisions in *Town of Greece* and *American Legion*, acting as if nothing has changed. Two examples from this year illustrate the trend.

First, Freedom From Religion Foundation wrote to the Pewamo-Westphalia School District in Michigan asking the District to take down a display including a cross.[7] The letter does not mention *Town of Greece*, *American Legion*, or more recent Sixth Circuit cases, but does rely on *Lemon* and pre-*Town of Greece* Sixth Circuit precedent. The school took down the displays in response.

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[7] See Letter from Christopher Line, Staff Attorney, Freedom From Religion Foundation, to Jeff Wright, Superintendent, Pewamo-Westphalia Community Schools (Sept. 9, 2021), https://perma.cc/HXA2-8BYT.

Similarly, a public transit authority has ended a longstanding tradition of allowing a private group to display a Christmas creche at a train station in Queens, after Americans United for Separation of Church and State sent a threat letter to the Long Island Railroad for permitting the private display. That letter, written in 2021, makes no mention of *American Legion* or *Town of Greece*, nor any of this Court's cases since 2001.[8]

The point of these examples is not to treat them as proper explanations of this Court's Establishment Clause jurisprudence—they decidedly are not—but instead to explain the popular version of this Court's Establishment Clause jurisprudence, which differs substantially from this Court's rulings over the past decade. Until this Court formally overrules *Lemon*, the threat letters citing *Lemon* and its progeny will continue to be sent, and local officials who don't know any better will continue to prohibit and tear down displays that have every right to remain.

* * *

At all levels of government—from city officials to the U.S. Congress—continued confusion about the Establishment Clause excludes religious groups and individuals from participating equally in public forums and public benefits. It does so simply because those groups and individuals are religious.

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[8] Letter from Richard B. Katskee and Ian Smith, Americans United for Separation of Church and State, to Phillip Eng, President, The Long Island Railroad (Mar. 9, 2021), https://perma.cc/H2UU-3J3J.

II. The cure for these problems is to replace *Lemon* with a standard rooted in the text, history, and tradition of the Establishment Clause.

1. As the history—both in Boston and elsewhere—makes clear, the real problem in this case is not a misunderstanding of free speech so much as it is a misunderstanding of what constitutes an establishment of religion. Boston officials reflexively prohibited a religious symbol, and the First Circuit relied upon *Lemon* to state that "the City's establishment concerns are legitimate." Pet. App. 36a (citing *Lemon*, 403 U.S. at 615). Like Justice Scalia's proverbial ghoul, *Lemon* rose once again.

Lemon's durability has led many government officials (and their lawyers) to adopt policies firmly rooted in the 1970s. Although Establishment Clause jurisprudence has evolved since then, some government officials—backed by lower courts—hold on to the notion that the safest option is to avoid religious speech. A ruling in favor of Petitioners here will send a message not only to Boston, but to others around the nation that suppression of religious speech is not the safest legal option. But absent a formal overruling, it will not solve the problem of *Lemon*.

Establishment Clause jurisprudence has never been a model of clarity; indeed, multiple justices of this Court have expressed concern.[9] To be sure, the Court's decisions in *American Legion* and *Town of Greece* have

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[9] See, *e.g.*, *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring) (collecting criticism): *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial) (collecting criticism 18 years later).

helped to clarify the law, particularly at the upper levels of the judiciary. But as long as *Lemon* and its accompanying endorsement test remain on the books, some government actors will continue to apply a 1970s approach to risk management.

The proper standard, as several members of this Court have stated, is a standard rooted in the text, history, and traditions of the First Amendment. See, *e.g.*, *Town of Greece* v. *Galloway,* 572 U.S. 565, 576 (2014) ("historical practices and understandings"); *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring). Formal adoption of that standard—and overruling *Lemon*—would clarify the law for both lower courts and government officials.

2. It bears repeating that *Lemon* was an aberration. Claiming that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," Chief Justice Burger "gleaned" the now-familiar *Lemon* test from recent precedent, not the history of the Founding. 403 U.S. at 612. *Lemon* was contrary to what has come after, but also to what came before. While pre-*Lemon* jurisprudence failed to properly account for our rich historical tradition of religious expression, it still at least purported to take history into account. The Court in *Everson* v. *Board of Education* spoke of interpreting the Clause "in the light of its history." 330 U.S. 1, 14-15 (1947). Although the dissent took issue with the Court's use of that history, it reaffirmed that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting).

As Justice Alito explained in *Town of Greece*, this Court has "always purported to base its Establishment Clause decisions on the original meaning of that provision." 572 U.S. at 602 (Alito, J., concurring). Prior to *Lemon*'s tripartite test, the Court repeatedly looked to history. In *McGowan* v. *Maryland*, which involved a challenge to Sunday closing laws, the Court began by examining "the place of Sunday Closing Laws in the First Amendment's history," noting that James Madison introduced a Sunday closing bill in Virginia in 1785—the same year Virginia enacted "A Bill for Establishing Religious Freedom." 366 U.S. 420, 438-440 (1961). Similarly, in *Walz* v. *Tax Commission*, the Court upheld church tax exemptions because they were supported by "more than a century of our history and uninterrupted practice." 397 U.S. 664, 680 (1970). And in *Torcaso* v. *Watkins*, the Court struck down a religious test oath after concluding that such oaths were one of the elements of "the formal or practical" religious "establishment[s]" that "many of the early colonists left Europe and came here hoping to" avoid. 367 U.S. 488, 490 (1961) (internal quotation marks omitted). Yet *Lemon* attempted "to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking. * * * [I]ts expectation has not been met." *American Legion*, 139 S. Ct. at 2080.

Twelve years after *Lemon*, the Court departed from *Lemon*'s anti-historical approach in a case that may, in the long run, prove more consequential—*Marsh* v. *Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court surveyed history to determine that "[f]rom colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted

with the principles of disestablishment and religious freedom." Id. at 786. In *Town of Greece*, the Court explained that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 572 U.S. at 576.

Nevertheless, *Lemon*'s hold on the lower courts, and at times this Court, has been long chronicled. See, *e.g.*, *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring) ("Like some ghoul * * * *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys"). This has remained true even as a remarkable number of decisions based on *Lemon* later had to be overruled in substantial part. See *Agostini* v. *Felton*, 521 U.S. 203 (1997) (overruling *School Dist. of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985) and *Aguilar* v. *Felton*, 473 U.S. 402 (1985)); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality) (overruling *Wolman* v. *Walter*, 433 U.S. 229 (1977) and *Meek* v. *Pittenger*, 421 U.S. 349 (1975)). Lower courts have routinely described *Lemon* as, among other things, a "morass," "indefinite," "chaotic," "unhelpful," and a form of "Establishment Clause purgatory." *Utah Highway Patrol Ass'n*, 565 U.S. at 998 & n.3 (Thomas, J., dissenting from denial of certiorari) (collecting lower court criticism). One concurrence went so far as to term it "a hot mess" and another referred to it as the

Court's "dark materials."[10] Recognizing this difficulty, the Court's more recent cases have returned to history as the key to understanding what constitutes an establishment of religion.

In *Town of Greece*, the Court emphasized that a historical analysis is not an "exception" to the *Lemon* test but is instead the norm: "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." 572 U.S. at 577. Thus, "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 576 (internal quotation marks omitted). The Court adopted a similar approach to monuments in *American Legion*, where it eschewed *Lemon* analysis to instead focus on the "historical importance" and "historical meaning" of the Bladensburg Cross. *American Legion*, 139 S. Ct. at 2089.

Since *American Legion*, at least three courts of appeals have held that *Lemon* no longer applies to public display cases. The Third Circuit explained that "We now hold that *Lemon* does not apply to 'religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies' like the seal." *Freedom From Religion Found., Inc.* v. *County of Lehigh*, 933 F.3d 275, 279 (3d Cir. 2019) (citing *American Legion*). The Seventh Circuit held "We apply the doctrine of *Marsh* and *Town of Greece*, as *American*

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[10] *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring), cert. granted, judgment vacated, 139 S. Ct. 2772 (2019); *Card* v. *City of Everett*, 520 F.3d 1009, 1023 (9th Cir. 2008) (Fernandez, J., concurring) ("heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials").

Legion instructs." *Woodring* v. *Jackson County*, 986 F.3d 979, 997 (7th Cir. 2021). The Eleventh Circuit held that "*American Legion* abrogates *Rabun*," which was binding circuit precedent, "to the extent that the latter disregarded evidence of 'historical acceptance' and instead applied *Lemon*." *Kondrat'yev* v. *City of Pensacola*, 949 F.3d 1319, 1321 (11th Cir. 2020).

Yet because this Court has never expressly overruled *Lemon*, lower courts still apply it, and litigants still rely on it, just as Boston and the First Circuit did here. See, *e.g.*, *Foothill Church* v. *Watanabe*, 854 F. App'x 174, 175 (9th Cir. 2021) (dismissing Establishment Clause challenge to abortion coverage rules because "the Churches have not otherwise alleged a violation under the three-prong test in *Lemon*"); *Smith* v. *Dunn*, 516 F. Supp. 3d 1310, 1330 (M.D. Ala. 2021) (rejecting prisoner's Establishment Clause claim under *Lemon* where "the parties agree that the constitutional standard set forth in *Lemon* v. *Kurtzman* applies to *Smith*'s Establishment Clause claim" (citation omitted)), rev'd *sub nom. Smith* v. *Commissioner, Ala. Dep't of Corr.*, 844 F. App'x 286 (11th Cir. 2021); *Muntaqim* v. *Payne*, 628 S.W.3d 629, 641 (Ark. 2021) ("The test for raising a valid Establishment Clause claim is set forth in *Lemon*"). Thus Government officials, bewildered by a jurisprudence that members of this Court have called a "long-discredited test" that "continues to cause enormous confusion in the States and the lower courts," continue to prove that statement true. *American Legion*, 139 S. Ct. at 2097 (Thomas, J., concurring). To them, exclusion of religion from the public square seems like the safest option.

In order to provide guidance for lower courts and local officials, the Court should clarify that *Lemon* is no longer good law, the Establishment Clause must be interpreted in light of history, and religious speech is welcome in the public square. Boston officials can then finally let go of the 1970s and celebrate the city's rich history of public religious expression.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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