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 OF *AMICUS CURIAE* THE AMERICAN LEGION IN SUPPORT OF PETITIONERS

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
LEA E. PATTERSON
CHRISTINE K. PRATT
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, Texas 75075
[redacted]

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE

Congress chartered The American Legion ("the Legion") in 1919 as a patriotic veterans organization.[1] Focusing on service to veterans, servicemembers, and communities, the Legion evolved from a group of war-weary veterans of World War I into one of the most influential nonprofit groups in the United States. Today, nearly 2 million men and women are members of the Legion in more than 13,000 local posts worldwide. Among its core values, the Legion seeks to "honor those who came before us" by "pay[ing] perpetual respect for all past military sacrifices to ensure they are never forgotten by new generations."[2] One of the ways the Legion does this is by organizing memorial services and maintaining veterans memorials across the country.

Because many of these memorial services and veterans memorials incorporate religious imagery, the Legion frequently defends these memorials from legal challenges. Most recently, the Legion successfully defended the Bladensburg Peace Cross from an Establishment Clause challenge in *American Legion v. American Humanist Association*, 139 S. Ct. 2067

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[1] Both parties filed blanket consents to amici in this matter. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person, other than amicus curiae, its members, or its counsel contributed money intended to fund preparation or submission of this brief.

[2] American Legion, *Mission, Vision, and Values*, WWW.LEGION.ORG, https://www.legion.org/mission.

(2019). Whether in war memorials, holiday decorations, flags, or government seals, public displays with religious imagery are commonplace and part of our Nation's history. Coming from many different faith traditions, they testify to America's longstanding recognition of the role faith plays in the lives of many, especially those who gave the last full measure of devotion to this country. The perennial litigation against such displays not only threatens to destroy current or future displays, it also signals unlawful intolerance towards religious faith. As *amicus curiae*, the Legion maintains an interest in protecting the ability of governments to recognize the significance of its citizens' faiths and in ensuring that religious symbols are not obliterated from our Nation's public displays.

SUMMARY OF THE ARGUMENT

The First Circuit's opinion contains two critical errors. First, the court failed to properly apply *American Legion* and instead opted to apply the dead letter *Lemon* test. Second, the court erroneously concluded that the City of Boston complied with the Establishment Clause in rejecting Shurtleff's flag display request. Had the First Circuit correctly applied *American Legion*—as nearly every other federal circuit has done—the court would have concluded that Boston's actions were religious gerrymandering and a clear violation of the First Amendment. The Court should reverse the judgment of the First Circuit and hold that Boston violated the First Amendment.

ARGUMENT

I. The First Circuit Erred by Analyzing Shurtleff's Flag Display under *Lemon's* Endorsement Test

This Court's precedent makes clear that *Lemon* is dead. Jurists and scholars have been announcing *Lemon's* death for some time,[3] but whatever the precise timing of *Lemon's* demise, we know after *American Legion* that when courts confront religious references or imagery in public monuments, symbols, mottos, displays, flags, and ceremonies, they do not scrutinize the activity under the *Lemon* test but under *American Legion*'s historical approach.

The First Circuit, however, exhumed *Lemon's* corpse, placed sunglasses over its eyes, and insisted to the rest of the world that *Lemon* is alive and well and ready to party.[4] But the First Circuit's efforts to revive

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[3] *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398 (1993) (Observing that the *Lemon* test haunts Establishment Clause jurisprudence "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.") (Scalia, J., concurring).

[4] *See* Internet Movie Database, *Weekend at Bernie's*, WWW.IMDB.COM, https://www.imdb.com/title/tt0098627/ (Two young men seeking to climb the corporate ladder travel at the invitation of their boss (Bernie) to his beach house in the Hamptons. When they arrive, they unexpectedly find their boss dead from poisoning. To enable them to keep their social plans for that weekend, the young men pretend their boss is still alive by placing sunglasses over his eyes and bringing his corpse around with them as they drive his speed boat and party with his neighbors).

Lemon and its endorsement test fall flat in light of *American Legion*.

The court of appeals began its analysis under *Lemon* by narrating what onlookers would see if Boston were to agree to fly Shurtleff's flag: "[M]embers of the audience would watch," the court said with dismay, as "the Christian Flag joins the flags of the United States and Massachusetts in front of the entrance of city hall." *Shurtleff v. City of Boston*, 986 F.3d 78, 96 (1st Cir. 2021). The court omitted that Boston had already permitted third parties to fly approximately 284 different flags of various nations, cultures, and ideologies in front of city hall over the past twelve years alongside the United States and Massachusetts flags. Pet. for Writ of Cert. at 8 (hereafter "Pet."). Instead of acknowledging the reality of the diverse and open forum Boston created by flying all these flags, the First Circuit hypothesized that onlookers might see Shurtleff's flag on the flagpole and assume that Boston endorsed a religion. *Shurtleff*, 986 F.3d at 96. For Boston to fly such a flag, the court said, "would be an endorsement of the flag's message," especially since, in the court's view, Boston's flag flying constituted government speech. *Id.* Flying that flag would constitute a "purely religious" "endorsement" that is "widely visible and accessible" to onlookers due to the flag pole's location in front of the city hall. *Id.* Worse still, the court said, if Boston were to allow Shurtleff's religious flag to fly in this instance, "the City could run the risk of repeatedly coordinating the use of

government property with hierarchs of all religions."[5] *Id.* Thus, the court concluded that Boston's choice to reject Shurtleff's flag request "comports with the City's constitutional obligations" under the Establishment Clause. *Id.* at 96–97. To support all of this, the court approvingly cited *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Id.* at 96.

The court acknowledged this Court's holding in *American Legion*, but only very briefly and only to distinguish it. Because Shurtleff's flag is not a "long-standing" monument like the one discussed in *American Legion*, the First Circuit concluded that *American Legion* offered Shurtleff's flag no presumption of constitutionality. *Id.* at 96. In place of this presumption, the court erroneously applied *Lemon's* endorsement test.

A. In *American Legion*, Six Justices Held that *Lemon* No Longer Governs Religious References or Imagery in Public Monuments, Symbols, Mottos, Displays, and Ceremonies.

Six Supreme Court justices agreed in *American Legion* that *Lemon* is not good law. Justice Alito's plurality opinion, joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, explained that in cases involving religious references or imagery in public monuments, symbols, mottos, displays, and

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[5] It is not clear why coordinating flag display with religious individuals or even clergy (though clergy are not at issue here) would impose a more onerous administrative burden than other flag display requests.

ceremonies, the Court employs an "approach that focuses on the particular issue at hand and looks to history for guidance." *Am. Legion*, 139 S. Ct. at 2087 (opinion of the Court).

Two justices concurred to condemn *Lemon* even more strongly. Justice Thomas's concurrence explained that the plurality was right to reject the "long-discredited" *Lemon* test. *Id.* at 2097 (Thomas, J., concurring in the judgment). Justice Gorsuch wrote separately to emphasize that the "now shelved" *Lemon* test was a "misadventure." *Id.* at 2101–02 (Gorsuch, J., concurring in the judgment). And, given the plurality's reasoning, Justice Gorsuch explained, "the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*."[6] *Id.* at 2102.

Finally, in addition to joining the plurality, Justice Kavanagh wrote separately to note that the Court has employed history and tradition instead of *Lemon* for some time to interpret and apply the Establishment Clause. *See id.* at 2092–93 (Kavanaugh, J., concurring) (citing *Marsh v. Chambers*, 463 U.S. 783, 787–92, 795 (1983); *Van Orden v. Perry*, 545 U.S. 677, 686–90 (2005) (plurality); *Town of Greece*, 572 U.S. at 575–78). Even Justice Kagan's concurrence looked to the memorial's historical context rather than applying the *Lemon* framework. *Id.* at 2094 (Kagan, J., concurring).

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[6] In *Town of Greece v. Galloway*, 572 U.S. 565, 575–85 (2014), the Court applied the history and tradition analysis later adopted in *American Legion* to uphold solemnizing prayers before town board meetings.

Justice Ginsburg's dissent, which Justice Sotomayor joined, failed to mention *Lemon* at all. *Id.* at 2103–13 (Ginsburg, J., dissenting).

All told, six justices unequivocally agree that *Lemon* no longer controls Establishment Clause analysis. The remaining three justices simply ignored *Lemon*. As a result, *Lemon* is no longer good law, and the First Circuit erred in applying it.

B. *American Legion* Dismantled the Endorsement Test When It Abrogated *Lemon*

When *American Legion* disposed of *Lemon*, it necessarily also disposed of the endorsement test. The Court created the endorsement test from *Lemon*'s purpose and effect prongs and repeatedly used the endorsement test alongside, or in place of, *Lemon*'s purpose and effect prongs.

Lemon's three-prong test asks whether the government's practice: 1) has a secular purpose, 2) has a principal or primary effect that neither advances nor inhibits religion, and 3) does not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612–13. Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), created the endorsement test from the second "effects" prong. *Id.* at 690–92. A majority of the Court later adopted the endorsement test as a part of the *Lemon* analysis in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989). The endorsement test asks whether a reasonable observer, who "must be deemed aware of the history and context

of the community and forum in which the religious display appears," *Capitol Square Rev. & Advisory Bd. v. Pinette,* 515 U.S. 753, 780 (1995) (O'Connor, J., concurring), would understand a government action to communicate the government's endorsement of a religion or a particular religious belief. *See Wallace v. Jaffree,* 472 U.S. 38, 70 (1985) ("The endorsement test . . . preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.") (O'Connor, J., concurring). If the answer is yes, then the government action in question was considered to have violated the Establishment Clause.

But the First Circuit failed to follow recent precedent of this Court that abandoned its former *Lemon*-based, endorsement methodology in favor of a different approach. When evaluating potential Establishment Clause claims, recent Court opinions ask whether a specific government practice fits within a recognized historical tradition. Under this approach, the Court does not attempt to discern "the precise boundary of the Establishment Clause"—a *Lemon* sort of inquiry—if "history shows that the specific practice is permitted." *Town of Greece,* 572 U.S. at 577 (discussing *Marsh v. Chambers*, 463 U.S. 783 (1983)). Accordingly, the Court upheld religious prayers that began legislative sessions and town board meetings. *Marsh,* 463 U.S. at 791; *Town of Greece*, 572 U.S. at 591. A plurality of the Court left standing a passive Ten Commandments display on the grounds of the Texas State Capitol. *See Van Orden*, 545 U.S. at 690 (plurality) (emphasizing the "undeniable historical meaning" of the Ten Commandments). And finally, a

plurality of the Court upheld the constitutionality of a massive cross-shaped World War I memorial, noting that, even though the cross is a "preeminent Christian symbol," such displays can comport with the Establishment Clause when they are viewed in their historical contexts. *Am. Legion*, 139 S. Ct. at 2074, 2090 ("The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent."). Many of these outcomes would have been different were *Lemon* still relevant. *See, e.g.*, *Marsh,* 463 U.S. at 796–801 (noting that the legislative prayers upheld in *Marsh* would clearly violate the *Lemon* test) (Brennan, J., dissenting).

Thus, the endorsement test, as an offshoot of *Lemon*, died with *Lemon*. After *Marsh, Town of Greece, Van Orden,* and *American Legion,* it is no longer appropriate to ask whether an onlooker would perceive a religious display to be a government endorsement of religion. The proper inquiry now is to look to the historical context of the religious display.

C. Nearly All Circuit Court Decisions Addressing the Establishment Clause after *American Legion* Recognize that *Lemon* and its Endorsement Test Are Dead.

The First Circuit's attempt to resuscitate *Lemon* after *American Legion* makes it an outlier among its peers. Nearly all federal circuit court decisions acknowledge that *American Legion* jettisoned *Lemon* for cases involving religious references or imagery in public monuments, symbols, mottos, displays, and

ceremonies[7] *See Freedom From Religion Found., Inc., v. Cnty. of Lehigh,* 933 F.3d 275, 279, 281 (3d Cir. 2019) (upholding a county seal displaying a Latin cross by noting that "*Lemon* does not apply" to religious displays); *Fields v. Speaker of Pa. House of Representatives,* 936 F.3d 142, 149–54 (3d Cir. 2019) (upholding practice of legislative prayer and applying a history and tradition test under *American Legion* and related cases); *Perrier-Bilbo v. U.S.,* 954 F.3d 413, 424 (1st Cir. 2020) (upholding the government's use of the phrase "so help me God" and observing that *American Legion* "explicitly rejected" *Lemon*); *Kondrat'yev v. City of Pensacola,* 949 F.3d 1319, 1326 (11th Cir. 2020) (allowing a large cross display to remain standing because "*Lemon* is dead . . . with respect to cases involving religious displays and monuments—including crosses. We count six clear votes for this proposition."); *Freedom from Religion Found., Inc. v. Mack,* 4 F.4th 306, 315 (5th Cir. 2021) (upholding a justice of the peace's practice of allowing volunteer chaplains to perform brief, optional, interfaith prayers before court

[7] Aside from the First Circuit in *Shurtleff*, only one other federal circuit court applied *Lemon* after the Supreme Court decided *American Legion*. *See Ca. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010 (9th Cir. 2020) (upholding the constitutionality of a public-school textbook's characterization of Hinduism). Judge Bress, however, concurred separately to observe, first, that the panel erred in applying *Lemon,* and second, that the court nevertheless reached the correct result: "[W]hether under a *Lemon*-based test or an Establishment Clause analysis more appropriately grounded in the history and traditions of this country . . . there was no Establishment of religion here." *Id.* at 1022 (Bress, J., concurring).

sessions and noting that "the Supreme Court no longer applies the old test articulated in *Lemon*.").

Even where religious displays are newer and a court determines that they do not qualify for a presumption of constitutionality, history controls the analysis instead of *Lemon*'s reasonable observer. *See Woodring v. Jackson Cnty.,* 986 F.3d 979, 994–95 (7th Cir. 2021) (upholding the constitutionality of a 15-year-old nativity scene). In *Woodring*, the Seventh Circuit did not afford *American Legion's* presumption of constitutionality to a nativity scene because it was "rather young." *Id.* at 994. But "[t]his is not to say," the court noted, "that *Lemon* applies." *Id.* at 995. The court found that because at least six justices in *American Legion* rejected *Lemon*, "the endorsement and purpose tests are no longer the appropriate framework" for religious display cases. *Id.* at 993. Although "*Lemon* is a durable creature, . . . we do not think that it springs back to life just because the presumption of constitutionality does not apply." *Id.* at 995. Instead, the court concluded that "*American Legion* requires us" to analyze the nativity scene under the historical approach from *Marsh* and *Town of Greece*. *Id.*

In sum, the consensus emerging in the lower courts is that *American Legion* buried *Lemon*. It is no longer good law, and the First Circuit's Establishment Clause analysis is fatally flawed as a result.

II. Boston Cannot Use the Establishment Clause to Justify Religious Discrimination.

Boston's flag display program approved flags to celebrate numerous nations and cultures, as well as flags celebrating private clubs, political and cultural beliefs, and historical events, such as the flag of the Chinese Progressive Association, National Juneteenth Observance Foundation, Bunker Hill Association, and Boston Pride. Pet. at 9.[8] A community may display a monument or symbol "for the sake of their historical significance or their place in a common cultural heritage." *Am. Legion,* 139 S. Ct. at 2083.

Displaying a symbol for its "historical significance" and "place in common cultural heritage," are precisely the reasons why the Petitioner sought to fly his flag during his Camp Constitution event. Pet. at 2–3. Allowing the religious to participate in such a program along with the rest of the community fits well within the Establishment Clause's bounds. *See Town of Greece*, 572 U.S. at 591–92 (upholding a town's eleven-year practice of opening town board meetings with a legislative prayer performed by volunteer clergy of various religions); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019–21 (2017) (holding state had no Establishment Clause interest in excluding religious applicants from

[8] The Petitioner's stated purpose in requesting to fly the Christian flag as part of the Camp Constitution event was "to commemorate the historical civic and social contributions of *the Christian community* to the City of Boston, the Commonwealth of Massachusetts, religious tolerance, the Rule of Law, and the U.S. Constitution." Pet. at 2–3 (emphasis added).

playground grant program); *see Zelman v. Simmons-Harris,* 536 U.S. 639, 662–63 (2002) (upholding a school voucher program that included religious schools); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2262–63 (2020) (holding that Montana could not exclude religious schools from its scholarship program); *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 845–46 (1995) (finding no Establishment Clause interest in excluding Christian student publication from certain benefits and funding).

Boston's flag display program violates the Free Exercise Clause because it gerrymanders the categories and subjects religious displays to unique disfavor.[9] *See Shurtleff*, 986 F.3d at 93 (defining the flag program as open to "flags of countries, civic organizations, or secular causes"); *see also Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)).

Because Boston's claimed Establishment Clause interest is illusory under *American Legion*, it cannot use that interest to justify discriminating against Petitioner's religious perspective. *See, e.g.*, *Widmar v.*

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[9] The First Circuit's reliance on *Carson ex rel. O.C. v. Makin,* 979 F.3d 21 (1st Cir. 2020), is misplaced given that *Carson* is currently under review by this Court.

Vincent, 454 U.S. 263, 276 (1981) (holding that the government's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause was limited by the Free Exercise and Free Speech Clauses) ("In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech."). Therefore, the First Circuit wrongly concluded that Boston had "legitimate" Establishment Clause concerns and that Boston made a "valid choice to remain secular." *Shurtleff*, 986 F.3d at 95–96.

CONCLUSION

For the foregoing reasons, the First Circuit's decision should be reversed.

Respectfully submitted,

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
LEA E. PATTERSON
CHRISTINE K. PRATT
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, Texas 75075
[redacted]

Counsel for Amicus Curiae