Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-13877

CLAIRE FITZMAURICE & OTHERS,
Plaintiffs-Appellees,

v.

CITY OF QUINCY & ANOTHER,
Defendants-Appellants.

ON APPEAL FROM JUDGMENT OF THE
SUPERIOR COURT IN NORFOLK COUNTY

BRIEF OF AMICUS CURIAE
PIONEER NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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ISSUES PRESENTED

Amicus curiae Pioneer New England Legal Foundation addresses the following issue identified by the Court in its amicus announcement:

> Whether (…) the court should evaluate that question pursuant to the framework set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or whether a different framework should apply.

INTEREST OF AMICUS CURIAE

PioneerLegal, LLC (PioneerLegal), doing business as Pioneer New England Legal Foundation (the "Legal Foundation"), is a nonprofit, nonpartisan legal research and litigation entity.[1] The Legal Foundation seeks to promote open and accountable government, economic opportunity, free enterprise, property rights, and educational opportunities, in New England and across the country, through legal action and public education.

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[1] Pursuant to Mass. R. App. P. 17(a)(1)(5), the Legal Foundation states that neither the plaintiff-appellee, nor defendant-appellant, nor their counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), the Legal Foundation also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

This case is of particular importance to the Legal Foundation because disputes involving the separation of church and state have the potential to constrain educational choice and education-funding reforms across the country. In many jurisdictions, courts have treated any indirect benefit to religious schools as constitutionally suspect, thereby impeding policies designed to expand educational opportunities such as scholarship programs, tax-credit scholarships, and other forms of private school choice. These interpretations have often prevented states from adopting neutral programs that empower families, especially low- and middle-income families, to select educational environments that best meet their children's needs.

This case presents an important opportunity for the Court to consider whether to continue applying the framework of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in cases involving the separation of church and state. If the Court decides to reject the *Lemon* framework, it should also reject the "history and tradition" framework adopted by the United States Supreme Court in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), which expressly overruled *Lemon*.

SUMMARY OF ARGUMENT

The framework set forth in *Lemon v. Kurtzman* has proven unworkable and has been abandoned by the Supreme Court of the United States. In *Kennedy v. Bremerton School District*, the Court replaced *Lemon* with an approach grounded in "historical practices and understandings," focusing in particular on whether government action resembles an established church or imposes religious coercion.

Federal courts applying *Kennedy* have already demonstrated that this framework is no more coherent and administrable than the *Lemon* test. Historical traditions are inconsistent and open to varying interpretations.

Finally, the Commonwealth's history and tradition regarding the separation of church and state is mixed at best. This history is not particularly helpful in determining whether the City of Quincy should be able to honor its first responders through passive, commemorative statues, or in deciding the wide range of cases that continue to arise out of the intersection of government and religion.

ARGUMENT

I. THE U.S. SUPREME COURT HAS OVERRULED *LEMON*.

For decades, courts applied the three-part test of *Lemon v. Kurtzman*, which required a court to determine whether a challenged government action (1) has a secular purpose; (2) has a "principal or primary effect" that "neither advances nor inhibits religion"; and (3) does not foster "an excessive government entanglement with religion," 403 U.S. at 612–613 (internal quotation marks omitted). The Court later elaborated that the "effect[s]" of a challenged action should be assessed by asking whether a "reasonable observer" would conclude that the action constituted an "endorsement" of religion. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592, (1989); *id.,* at 630 (O'Connor, J., concurring in part and concurring in judgment).

The *Lemon* framework has been criticized for its indeterminacy and its reliance on subjective judicial assessments:

> If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. . . . As Establishment Clause cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve

> them. It could not explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving. The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.

American Legion v. American Humanist Association, 588 U.S. 29, 49-50 (2019) (citations, internal quotations, and footnotes omitted.)

In *Kennedy v. Bremerton School District*, the Supreme Court formally rejected *Lemon* and the related endorsement test, holding that "this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" 597 U.S. at 507. The Court emphasized that the Establishment Clause is primarily concerned with preventing forms of religious establishment historically understood to be prohibited, particularly governmental coercion of religious observance. Government may not "make a religious observance compulsory" and that "coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.*

In order to determine whether government action violates the Establishment Clause, Kennedy suggests that courts must "focus [ ] on original meaning and history." *Kennedy*, 597 U.S. at 536 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014). Any practice that was "accepted by the Framers and has withstood the critical scrutiny of time and political change" does not violate the Establishment Clause. *Town of Greece*, 572 U.S. at 577. This shift reflects a move away from abstract inquiries into perceived religious "effects" and toward a more objective and historically grounded analysis.

II. THIS COURT SHOULD NOT ADOPT *KENNEDY*'S "ORIGINAL MEANING AND HISTORY" FRAMEWORK.

Kennedy was decided by a 6-3 majority of the Supreme Court, with Justice Gorsuch writing the majority opinion holding that the Bremerton School District violated football coach Joseph Kennedy's rights under both the Free Exercise and Free Speech Clauses of the First Amendment when it suspended him for praying at midfield after games, stating:

> Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not

> censorship and suppression, for religious and nonreligious views alike.

Kennedy, 597 U.S. at 514.

Justice Sotomayor dissented, joined by Justices Breyer and Kagan, advancing three broad lines of argument: (1) the majority fundamentally misconstrued the factual record by treating Kennedy's prayers as private and personal; (2) the majority misapplied the Free Speech Clause by wrongly characterizing *Kennedy*'s prayer as private; and (3) the majority gave inadequate weight to the Establishment Clause by abandoning established precedent, accepting too narrow a view of coercion in the school setting, and failing to account for the full context of *Kennedy*'s prayer practice. *Kennedy*, 597 U.S. at 546-547 (Sotomayor, dissenting).

Justice Sotomayor acknowledged the criticism of *Lemon*, but did not agree that it should be overruled:

> Neither the critiques of *Lemon* as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon* in all situations support this Court's decision to dismiss that precedent entirely, particularly in the school context.

Kennedy, 597 U.S. at 572-573 (Sotomayor, dissenting). Justice Sotomayor objected that the Court had overruled "one grand unified theory," only to replace it with another: "It holds that courts must interpret whether an

Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.'" *Id.* This history-and-tradition approach does not afford school administrators sufficient guidance in resolving issues regarding religious expression:

> For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

Id., 597 U.S. at 573–74.

Cases decided since Kennedy have shown the flaws in its "history and tradition" analysis. In *Hilo Bay Marina, LLC v. State*, 156 Haw. 478 (2025), the Hawai'i Supreme Court declined to adopt *Kennedy's* historical practices test for state Establishment Clause analysis. The court expressed concerns about requiring judges to play "amateur historian" in resolving constitutional disputes, citing Justice Kagan's dissent in *Brown v. Davenport,* 596 U.S. 118, 149 (2022), regarding "the peril of looking at

history through a 21st-century lens." 156 Haw. at 504. In addition, the Court noted that the best approach to the interpretation of a state constitution may not be the same as the Supreme Court's preferred method of interpreting the U.S. Constitution. "It would be discordant to require that the Hawai'i Establishment Clause be construed based on the historical practices and understandings of the Founding Fathers given that the Hawai'i Constitution was adopted by its electorate in 1959, one-hundred and seventy-two years after the U.S. Constitution was adopted." 156 Haw. at 505. As will be discussed below, there are concerns that a history and tradition approach may not be the best way for Massachusetts courts to interpret the Massachusetts Constitution.

A Texas case notes that even professional historians do not agree on the history and tradition of the Establishment Clause. *Nathan v. Alamo Heights Indep.*, 795 F. Supp. 3d 910, 916 (W.D. Tex.), hearing en banc ordered 157 F.4th 713 (5th Cir. 2025), an opinion which is both "colorful" and thorough in equal measure, was an attempt to enjoin the enforcement of a Texas statute requiring the posting of the Ten Commandments in Texas public schools. The court was required to

choose between the testimony of each side's "religious and constitutional legal historian." 795 F. Supp. 3d at 944.

The competing experts agreed that "the public school system did not exist at the founding." *Id.* Plaintiff's expert "found no evidence that the Ten Commandments were permanently displayed in early American public schools," while the government's expert "found virtually no evidence that the Founders understood the Establishment Clause to require the strict separation of church and state." *Id.* The court ultimately found the plaintiff's expert to be "more persuasive" and enjoined the government from displaying the Ten Commandments in public schools. 795 F. Supp. 3d at 949. The case is now before the Fifth Circuit for en banc review. 157 F.4th at 713.

It is difficult to see how the historical evidence presented in *Nathan* assisted the court in reaching its decision on the Establishment Clause concerns regarding mandatory posting of the Ten Commandments. Likewise, it is difficult to see how historical evidence will help this Court determine whether the City of Quincy may erect the statutes at issue in the present case.

As an alternative to the flawed *Lemon* test and the equally-flawed history and tradition test of *Kennedy*, perhaps this Court should return to the pre-*Lemon* understanding of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15-16 (1947), quoting *Reynolds* v. *United States,* 98 US 145, 164 (1879). Because the City of Quincy does not violate any of the principles set forth in *Everson* by erecting the statutes in question, it is not a constitutional violation for the City to do so.

III. THE COMMONWEALTH'S HISTORY AND TRADITION DOES NOT PROVIDE AN APPROPRIATE FRAMEWORK FOR RESOLVING DISPUTES ABOUT THE SEPARATION OF CHURCH AND STATE.

One of the inherent difficulties of a strict focus on history and tradition is the lack of agreement on important principles among the framers of the Constitution. While Jefferson may have preferred a wall of separation between church and state, John Adams and the authors of the Massachusetts Constitution preferred an established church, selected by the government and funded by the taxpayers. As this Court has noted, "the original Declaration of Rights, adopted in 1780, provided for public financial support of the Christian religion. Not until 1833 was the present art. 3 . . . substituted for this provision, ending direct public support of religion." *Colo v. Treasurer & Receiver General*, 378 Mass. 550, 556 (1979). This Court has recognized that this provision of the original Declaration of Rights "essentially meant support of the Congregational Church." *Caplan v. Town of Acton*, 479 Mass. 69, 78 (2018).

There are other troubling aspects of the history and tradition of Massachusetts regarding the establishment of tradition. Even after the Massachusetts Constitution was amended in 1833 to end direct government funding of a particular religion, the courts continued to

enforce religious orthodoxy through prosecutions under the blasphemy statute. In *Com. v. Kneeland*, 37 Mass. 206, 20 Pick. 206 (1838), this Court upheld a conviction for blasphemy based on its conclusion that a statute making it a crime to "willfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world" was constitutional. 37 Mass. at 213. The Court noted that "blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God." *Id.* The Court engaged in its own "history and tradition" analysis to find the anti-blasphemy statute to be constitutional:

> It seems now to be somewhat late to call in question the constitutionality of a law, which has been enacted more than half a century, which has been repeatedly enforced, and the validity of which, it is believed, until this prosecution, has never been doubted, though there have been many prosecutions and convictions under it. It was itself a revision of the colonial and provincial laws, to the same effect, already cited. It was passed very soon after the adoption of the constitution, and no doubt, many members of the convention which framed the constitution, were members of the legislature which passed this law. In 1820 another convention was called to revise the constitution, the subjects of religious freedom and of universal toleration were long and earnestly discussed, but no suggestion was made, that the statute of

> 1782, against blasphemy, was in violation of the Declaration of Rights. More recently, upon a general and careful revision of our whole body of statute law, the law in question was reenacted, with some unimportant modifications, not affecting the present question.

37 Mass. at 217-218. *Kneeland* is a good example of how a blind obedience to history and tradition can result in the perpetuation of bad law.

The issue of public support for religious institutions arose again in the Constitutional Convention of 1853, which adopted art. 18 of the Amendments, commonly known as the "anti-aid amendment," to prevent the appropriation of public funds to sectarian schools. This Court has previously recognized the anti-Catholic roots of the anti-aid amendment:

> By 1850, more than one-fourth of Boston residents were Irish. Hostility toward Irish Catholics grew among those who felt threatened by the combined forces of mass immigration, urbanization, and industrialization. Rumors spread about a "papal plot" to spread Catholic influence throughout the government and in particular the public school system. These anti-Catholic sentiments were well known to the framers of art. 18. Indeed, some delegates believed (and historians today agree) that art. 18 was itself targeted specifically against Catholic schools.

Caplan, supra, 479 Mass. at 78 (citations omitted throughout). The original anti-Catholic bias of the anti-aid amendment has now evolved into a more generalized anti-religious bias. Art. 18 continues in 2026 to

constrain families of all faiths from exercising their fundamental right to enroll their children in private religious schools. See, e.g., *Hellman v. Massachusetts Dep't of Elementary & Secondary Educ.*, No. 25-1417, 2026 WL 787924, at *3 (1st Cir. Mar. 20, 2026).

This Court should be hesitant to adopt the history and tradition of the Commonwealth regarding the establishment of religion as the sole or even primary source of guidance as to the resolution of disputes such as the present case.

CONCLUSION

For the foregoing reasons, the Court should decline to rely upon the discredited framework of *Lemon v. Kurtzman* and should likewise reject the indeterminate "history and tradition" approach articulated in *Kennedy v. Bremerton School District*. Neither framework provides a clear, objective, or administrable standard for resolving Establishment Clause disputes.

Instead, the Court should adopt an approach grounded in the core constitutional prohibition against governmental establishment of religion, one that focuses on preventing coercion, compelled support, or preferential treatment of religion, while permitting neutral government

actions that neither advance nor inhibit religious exercise. This is true and particularly important in the Commonwealth. Massachusetts' own history and tradition in this area is inconsistent and, at times, reflects practices incompatible with modern constitutional guarantees, and offers little reliable guidance for deciding contemporary disputes.

Applying a clear and neutral standard, the Court should uphold the ability of the City of Quincy to engage in passive, commemorative expression that honors its first responders without violating the Establishment Clause.

Respectfully submitted,

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/s/ Gabriela Forero

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify the non-excluded portions of this Brief contains 3,164 words in Century Schoolbook 14-point font, based on the word count feature in Microsoft Word.

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CERTIFICATE OF SERVICE

I, Gabriela Forero, hereby certify that on this 13th day of April 2026, I served the foregoing document on counsel for the parties by causing it to be delivered by the Tyler Host system and email to:

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