**No. SJC-13877**

# COMMONWEALTH OF MASSACHUSETTS
# SUPREME JUDICIAL COURT

CLAIRE FITZMAURICE & OTHERS,

*Plaintiffs-Appellees,*

*v.*

CITY OF QUINCY & ANOTHER,

*Defendants-Appellants.*

Appeal from a Decision of the
Superior Court in Norfolk County

## BRIEF FOR *AMICI CURIAE* PROFESSORS MICHAEL MCCONNELL AND JOHN WITTE, JR. IN SUPPORT OF DEFENDANTS-APPELLANTS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici* are professors Michael McConnell and John Witte, Jr., prominent legal scholars whose research and scholarly interests focus on the relationship between law and religion.

Michael McConnell is the Richard & Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. He previously served as a judge on the U.S. Court of Appeals for the Tenth Circuit, and his extensive scholarship on the federal Establishment Clause has played a significant role in informing the nation's judiciary on the meaning and application of that Clause. He authored an *amicus* brief in *American Legion v. American Humanist Ass'n*, 588 U.S. 29 (2019), arguing that the U.S. Supreme Court should evaluate Establishment Clause cases under a historical analysis rather than under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). His scholarship was cited extensively in *American Legion*. *See* 588 U.S. at 50 n.15 (plurality opinion); *id.* at 75 n.1 (Thomas, J., concurring in the judgment); *id.* at 85 (Gorsuch, J., concurring in the judgment).

John Witte, Jr. is the Robert W. Woodruff University Professor of Law, McDonald Distinguished Professor of Religion, and Faculty Director of the Center for the Study of Law and Religion at Emory University. A leading specialist on the intersection of law and religion, he has published more than 300 articles, 18 journal symposia, and 45 books. Professor Witte authored the leading article on the meaning of art. 3 of the Massachusetts Declaration of Rights. *See* John Witte, Jr., *"A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment*, 41 J. Church & State 213 (1999), updated in John Witte, Jr., *The Blessings of Liberty: Human Rights and Religious Freedom in the Western Legal Tradition* (Cambridge University Press, 2022), 105-37.[1]

[1] Pursuant to Rule 17(c)(5), *Amici* Professors McConnell and Witte state as follows: *Amici* and *Amici*'s counsel authored the brief in whole. No party, party's counsel, person, or entity contributed money that was intended to fund the preparation or submission of the brief. Neither Professor McConnell nor Professor Witte has represented any of the parties to the present appeal.

## SUMMARY OF ARGUMENT

This case presents the question whether the City of Quincy's commission and planned installation of statues of Florian and Michael—figures with both secular and religious significance—violates art. 3 of the Massachusetts Constitution's Declaration of Rights. The Court has also asked whether it should adopt the U.S. Supreme Court's test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to decide that question. The answer to both questions is no. The text and history of art. 3 confirm that these statues easily pass constitutional muster. And this Court should not adopt *Lemon*—the U.S. Supreme Court has abandoned that test for good reason, and it bears no relation to the text or history of art. 3.

As detailed in the Appellants' opening brief, the Quincy City Council in 2017 approved the design of a new public-safety building to house emergency services, including the fire and police departments. Appellants' Br. Add.68. The City plans to install two statues at the entrance to the building. The first is of Florian, a Roman soldier who lived during the third century AD and was famous for putting out fires. Multiple faith and cultural traditions have venerated him, and he is an important historical figure associated with fire protection. II.App.225. In fact, the

"Florian cross" is a well-known symbol representing fire departments in Massachusetts and around the world. II.App.122-27.

The second is of Michael the Archangel, a significant figure both in literature and in multiple faith traditions, who is associated with upholding righteousness and resisting evil. *See* Maggie Phillips, *The Army's Favorite Saint*, Tablet Magazine (Aug. 31, 2021), https://perma.cc/L6PJ-LLXN; Appellants' Br. 18-19. Michael bears special significance to the police community, with police awards and facilities for police officers around the world bearing his name. *See* II.App.160-65.

Plaintiffs sued in May 2025, asserting that the planned installation of the statues violated art. 3 of the Massachusetts Declaration of Rights and seeking declaratory and injunctive relief. *See* I.App.46. Their main theory is that the statues "impermissibly advanc[e]" Catholicism under the *Lemon* test. I.App.60.

This case is an easy one. The text and history of art. 3 confirm that the Massachusetts Constitution does not require the "hermetic separation" of church and state. *Arno v. Alcoholic Beverages Control Comm'n*, 377 Mass. 83, 91 (1979) (citation omitted). Instead, art. 3 protects "all religious sects" from "law[s]" that deny equal protection or subordinate

one sect to another. Mass. Const. amend. art. XI. That protection is not implicated here, for two reasons. First, the installation of the statues is not a "law," and the statues do not deny equal protection to any religious sect or subordinate one sect to another. Second, the history of public imagery in Massachusetts confirms that the statues fall well within the bounds of art. 3 as historical and religious symbols of bravery, courage, and honor.

Adopting the *Lemon* test would only muddle that straightforward analysis. *Lemon* departs from this Court's traditional approach to constitutional interpretation, which is tethered to text and history. *Lemon*'s atextual, ahistorical, multifactor balancing test was notoriously confusing and difficult to apply and resulted in broadly and unnecessarily disfavoring religion as a whole. This Court has used *Lemon* only as a sometimes helpful guide, and the U.S. Supreme Court has rightly abandoned it. It would be strange for this Court to now adopt a failed federal test as a principle of state law. *Lemon* bears no relationship to the text or history of art. 3 (or the federal Establishment Clause), and adopting it would only encourage litigation and complicate cases that are straightforward under this Court's traditional approach to constitutional interpretation.

The Court should reverse and expressly reject *Lemon* as a principle of state law.

## ARGUMENT

### I. The Quincy Statues Are Consistent With The Text And History Of Art. 3.

As this Court has explained time and again, constitutional questions are resolved by using "traditional principles of constitutional interpretation." *In re Op. of the Justs. to the Governor*, 461 Mass. 1205, 1209 (2012). Text and history, as expounded by this Court's caselaw, are the touchstones of that analysis. *See id.*

Here, Plaintiffs raise an art. 3 challenge to the Quincy statues. But the text and history of art. 3 confirm that it provides equal protection under the law to all religious sects. It does not pit government against religion by attempting to erase religion from the public square. The Quincy statues are thus constitutional.

#### A. The Text And History Of Art. 3 Make Clear That It Prohibits Laws That Discriminate Against Religious Sects, Not All Religious Expressions.

The operative text of art. 3 provides that "all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and

no subordination of any one sect or denomination to another shall ever be established by law." Far from prohibiting religious expression, this provision of art. 3 protects it by prohibiting law-based discrimination against religious groups. The historical context of this provision makes clear that it is fully compatible with public religious expression.

As originally ratified in 1780, art. 3's main purpose was affirmatively to "provide[] for public financial support of the [C]hristian religion." *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 556 (1979) (citing Mass. Const. pt. 1, art. III). It continued a "century-long system" of local communities paying their pastors through taxes. Witte, *A Most Mild Establishment*, at 229. Art. 3 permitted local communities to require constituents to pay taxes or tithes to support the local "Protestant teacher[] of piety, religion and morality," or in the event that a worshiper preferred a different teacher (*i.e.*, minister), to support that religious teacher. It read:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: *Therefore, to promote their happiness and to secure the good order and preservation of their government, the peo-*

*ple of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily*.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided, notwithstanding, that the several towns, parishes, precincts, and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all moneys paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said moneys are raised.

Any every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law.

Mass. Const. pt. I, art. III (emphasis added).

Art. 3 thus expressly "encouraged an established church." Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U. L. Rev. 887, 892 (1980). This religious tithing system was controversial from the time art. 3 was ratified (and even before)—it established the funding of Protestant religion as a matter of state constitutional law and garnered "[r]ancorous" controversy at the drafting convention. Witte, *A Most Mild Establishment*, at 229.

Given the intense debate surrounding the funding of Protestant pastors, art. 3 qualified the religious tithing system with its last paragraph: "[E]very denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be *equally under the protection of the law*: and no *subordination* of any one sect or denomination to another shall ever be established *by law*." Mass. Const. pt. I, art. III (emphasis added). This provision "was the first formal statement in Massachusetts history of religious equality before the law not only for individuals but also for groups." Witte, *A Most Mild Establishment*, at 231. So while the religious tithing system favored the Protestant

religion, art. 3 protected every Christian denomination from unequal treatment under the law.

Over the next fifty years, Massachusetts communities grew increasingly dissatisfied with the religious taxation system, particularly as multiple faith traditions emerged. *See* Witte, *A Most Mild Establishment*, at 249-50. So in 1833, art. 3 was amended to remove the religious tithe system. *See* Mass. Const. amend. art. XI. Art. 3 was also amended to make clear that the "equal[] . . . protection of the law" and "subordination" provisions applied to *all* religious groups, not just Christian ones. *See id.*

Despite these changes, key provisions of art. 3's opening paragraph remain unchanged. To this day, art. 3 declares that "the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government." *See* Mass. Const. amend. art. XI. And it guarantees a host of protections to religious groups, including the right of "religious societies" to meet, "elect their pastors or religious teachers," "contract with them for their support," and maintain "membership" rosters. *Id.*

Today, art. 3's guarantee that "all religious sects and denominations . . . shall be equally under the protection of the law," together with

its prohibition against "subordination of any one sect or denomination to another . . . by law," constitutionally secure these religious rights. Mass. Const. amend. art. XI. These clauses are not steamrollers that cause "[t]he complete obliteration of all vestiges of religious tradition from our public life." *Colo*, 378 Mass. at 561. To the contrary, they protect religion.

In that regard, art. 3 has never been "neutral on the subject of religion." Wilkins, *Judicial Treatment*, at 891. It directly *affirms* the role of religion in civic life. This "basic model of religious liberty" remains unchanged today and "lies at the heart of modern theories of accommodationism and religious communitarianism." Witte, *A Most Mild Establishment*, at 218-19.

The rest of the Massachusetts Constitution confirms as much. *See Op. of the Justs.*, 461 Mass. at 1209 (Constitution must be interpreted as "a single harmonious instrument" (citation omitted)). The Constitution is steeped in Massachusetts' rich tradition of weaving together public and religious life—invoking the "Supreme Being," "by name or pseudonym," a dozen times. Witte, *A Most Mild Establishment*, at 239.

The preamble calls the Constitution a "covenant," made possible by the "goodness of the Great Legislator," mirroring ceremonial liturgy used since the signing of the Mayflower Compact of 1620. Witte, *A Most Mild Establishment*, at 238 (quoting Mass. Const. pmbl.). Likewise, art. 2 establishes a moral and legal right and duty to "worship the Supreme Being." Mass. Const. pt. I, art. II. Chapter V of the Frame of Government further declares that "the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the [C]hristian religion, and the great benefit of this and the other United States of America." *Id.* pt. II, ch. 5, art. I.

None of these provisions establishing a public religious morality triggered much debate during the constitutional convention, and all "were passed without controversy, or even recorded comment. And they remain unchanged today." Witte, *A Most Mild Establishment*, at 240.

Indeed, the famous Eleventh Amendment of 1833—famous because it was the last constitutional text in America purportedly to "disestablish" religion—repeated the language of this moral establishment: that

"the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a Republican Government." Mass. Const. amend. art. XI.

The Massachusetts Constitution does not require the government to eradicate any practice or symbol that may have significance to religious communities. That is why this Court approved the use of public funds to pay religious chaplains who opened the Legislature with prayer. *Colo*, 378 Mass. at 554. For the framers, the "hermetic separation" of church and state was both "impossib[le]" and undesirable, and art. 3 was never designed to that end. *Id.* at 560 (citation omitted).

### B. The Quincy Statues Do Not Violate Art. 3.

The text and history of art. 3 confirm that the Quincy statues pass constitutional muster. They neither deny equal protection of the law to any religious sect, nor do they subordinate one sect to another by law. And they follow a long line of religiously themed art, established since at least the 1800s, on public display in Massachusetts.

#### 1. Art. 3's Text Does Not Prohibit The Quincy Statues.

Art. 3 (1) confirms that all religious sects "shall be equally under the protection of the law," *Glaser v. Congregation Kehillath Israel*, 263

Mass. 435, 437 (1928), and (2) "guard[s] against an ecclesiastical hierarchy, and a religious test, by prohibiting a subordination of one denomination . . . to another," *Thaxter v. Jones*, 4 Mass. 570, 572-73 (1808).

Critically, art. 3 prohibits the denial of "equal[] . . . protection" and "subordination" when it is occasioned "*by law*." Mass. Const. pt. I, art. III (emphasis added). But it affirmatively endorses "the public worship" and the virtues of "piety, religion and morality" and says nothing about government action that encourages these values. Mass. Const. amend. art. XI. This Court has interpreted the "equally under the protection of the law" and "subordination" clauses consistently with their purpose of prohibiting discrimination by operation of law. *See, e.g.*, *Sisters of the Holy Cross of Mass. v. Town of Brookline*, 347 Mass. 486, 496 (1964) (upholding zoning law exemptions); *Glaser*, 263 Mass. at 437 (interpreting state law to treat religious entities similarly with respect to legal defenses to avoid an art. 3 violation); *Commonwealth v. Has*, 122 Mass. 40, 42 (1876) (denying art. 3 claim based on Sunday closing law).

This case is clear—it doesn't involve the protection of *the law* or subordination *by law* at all. Plaintiffs complain that the mayor "decided

to install" statues that have both secular and religious significance. Appellees' Br. 14. They do not allege that any law required him to do so. Thus, on its face, art. 3 does not apply to Quincy's installation of the statues.

Further, the installation of the statues does not provide unequal protection or institute subordination of religious sects. As for the "equally under the protection of the law" provision, this Court evaluates whether religious sects are treated differently. So, for instance, in *Glaser*, the Court relied on the "equal[] . . . protection" language of art. 3 when holding that a Jewish temple was "not liable for the negligence of its officers or servants." *Glaser*, 263 Mass. at 437. The Court noted that Christian churches were treated as charitable corporations that do not face liability in such circumstances. *Id.* Thus, affording Jewish houses of worship the same benefit complied with art. 3's requirement that all "religious sects . . . shall be equally *under the protection of the law*." *Id.* (emphasis added).

Plaintiffs made no argument at all below as to why the statues deprived any "religious sect or denomination" of equal protection of the law. Instead, Plaintiffs argued they violated the *Lemon* test and focused on

how the statues allegedly make them feel—"[t]he statues make me feel like I don't count because I am not Catholic"; "[i]f the statues were erected, I would feel less welcome in my own city"; "these statues make me feel excluded." I.App.64. But even putting aside the fact that the statues are not Catholic—they represent historic and literary figures embraced by many faith and cultural traditions—subjective feelings do not mean that the statues deny equal protection to religious sects under the law.

On appeal, rather than engage with the constitutional text, Plaintiffs urge the Court to ignore it altogether by arguing that the Court must "respond to social change." Appellees' Br. 42 (citing substantive due process caselaw for the recognition of new fundamental rights). But this Court may not ignore the "plain language of the constitutional provision," the lodestar for any exercise of constitutional interpretation. *Op. of the Justs.*, 461 Mass. at 1209; *cf.* Transcript of Oral Argument at 35, *Trump*

*v. Barbara*, No. 25-365 (U.S. Apr. 1, 2026) (Roberts, C.J.) ("Well, it's a new world. It's the same Constitution."), https://perma.cc/5KZR-GRD8.[2]

Plaintiffs' claims likewise fail under the "subordination" clause of art. 3. For that prong, this Court has again focused on whether a "preference" to "one religion or form of religious belief" is "established by *law*." *Has*, 122 Mass. at 42 (1876) (emphasis added). So this Court has rejected an art. 3 challenge to a law that required all businesses to close on Sundays. *Id.* In doing so, it held that even if "a great majority of the people celebrate it as a day of peculiar sanctity"—*i.e.*, the day most people at the time went to church—the law "impose[d] upon no one any religious ceremony or attendance upon any form of worship." *Id.* So it did not "occasion[] . . . any subordination" of one religion to another. *Id.*

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[2] Contrary to Plaintiffs' suggestion that art. 3 must "respond to social change" without reference to historical practice, Appellees' Br. 42 (citation omitted), this Court has always consulted "text, history, and purpose" to apply the Constitution to new circumstances, *Barron v. Kolenda*, 491 Mass. 408, 416 (2023). Considerations of the "changing world" when evaluating substantive due process rights that are not written in the text have no bearing here, *Kligler v. Att'y Gen.*, 491 Mass. 38, 62 (2022)—this case is about interpreting a written constitutional provision with a long and established history.

No law is at issue here, and Plaintiffs cannot show that the Quincy statues create a "preference" for "one religion or form of religious belief" over another. *Has*, 122 Mass. at 42. Florian and Michael are not distinctively Catholic or even religious—they have significance to people from many different denominations and no religious tradition at all. Florian is an ancient Roman soldier who pioneered brigades dedicated to firefighting. He is a historic person whose significance extends far beyond one sect. Municipalities across Massachusetts and across the world use the Florian cross. II.App.122-27. Michael's strength and protection similarly have significance to policemen regardless of their faith tradition. Indeed, cities around the world acknowledge Michael's importance to police officers—for example, police service awards and facilities often bear the name St. Michael. II.App.160-65.

Not only do these statues have secular significance, but they also have religious significance outside of a singular faith tradition. The complaint focuses on these figures as Catholic saints, but Florian and Michael are respected across an array of faith traditions. For example, Michael is described in Judaism as "a protector and advocate of the Jewish

people," Appellants' Br. 19 n.3; in Islam, he "assisted in preparing Muhammad spiritually to receive revelation," *id.* at 19 n.4; and in Anglicanism, Eastern Orthodoxy, and Lutheranism, he is celebrated with a feast day, *id.* at 19 n.5. And Florian is recognized as a saint in both the Catholic and Eastern Orthodox traditions, *St. Florian*, St. George Orthodox Church of Bos. (May, 2014), https://perma.cc/BQ3Z-DTDS, and is widely revered across Central Europe and by people of many faith traditions. The statues thus do not affect the "subordination of any one sect or denomination to another" because multiple faith traditions, and many people with no religious tradition at all, revere Florian and Michael. Mass. Const. amend. art. XI.

Thus, the Quincy statues do not run afoul of the text of art. 3.

### 2. The History Of Art. 3 Confirms That The Statues Are Permissible.

This Court should also consider Massachusetts' "history" of symbolic imagery "in relation to the purposes and history of the governing constitutional amendments." *Colo*, 378 Mass. at 554. "The long history of a certain practice" and "its acceptance as an uncontroversial part of our national and State tradition" weigh against "striking it down." *Id.* at 557.

Since at least the 1800s, public art in Massachusetts (and across the United States) has reflected religious imagery, evidencing its "long history" as an accepted practice. *Colo*, 378 Mass. at 557.

For instance, the Massachusetts State House has displayed a statue of David since the 19th century. *See Massachusetts State House Art and Artifact Collections—Sculpture*, Mass.gov, https://perma.cc/VU2T-PNTL (last visited Apr. 14, 2026). It also displays murals titled "John Eliot Preaching to the Indians," dated 1646; "The Dawn of Tolerance in Massachusetts: Public Repentance of Judge Samuel Sewall for his Action in the Witchcraft Trials," dated 1696; a statue of Anne Hutchinson gazing upward with a Bible clasped to her heart, installed in 1922; and a statue of Mary Dyer, a Quaker martyr, installed in 1959.[3] An eight-foot-four plaster cast of Michelangelo's *Moses* likewise stood in "a place of honor in the Worcester Courthouse in Lincoln Square"

[3] *See Massachusetts State House Art and Artifact Collections—Murals*, Mass.gov, https://perma.cc/3G2J-DHSW (last visited Apr. 2, 2026); Commonwealth of Mass. State House Art Comm'n, *Women Subjects, Women Artists in the Massachusetts State House Art Collection*, Mass.gov (2020), https://perma.cc/7PB5-KE68.

for 97 years and remains in the courthouse at its new location. *See Sculpture in the Courthouse and the Law Library*, Mass.gov (Nov. 16, 2014), https://perma.cc/X39K-5N88.

In 1963, the Massachusetts State House added a sculpture titled "Creation," a representation of hands modeling a human figure that invokes the Old Testament story of creation. *See Creation*, Smithsonian, https://www.si.edu/object/creation-sculpture%3Asiris_ari_296718. And in 1981, Boston Common erected a memorial for Catholic Pope John Paul II, widely respected by people of many faith traditions. II.App.42.

The Commonwealth is not alone in these displays of religious imagery. Communities across the United States have likewise displayed such public art for hundreds of years. *See* Appellants' Br. 44-46.

The myriad examples of religious imagery in the Commonwealth's civic spaces demonstrate that art. 3 has never required the elimination of religiously resonant images, persons, statements, or themes from the civic culture of Massachusetts. *See Colo*, 378 Mass. at 560-61. The statues of Florian and Michael follow a long history of public imagery with religious significance, which this Commonwealth has approved.

*  *  *

It is unsurprising that Plaintiffs cannot cite a single relevant art. 3 case endorsing their argument. The text of art. 3 and Massachusetts' rich history of public symbolism defy any argument that the statues of Florian and Michael, respected all over the world for their historical and religious significance, somehow deny equal protection of the law to or subordinate by law any religious sect in Massachusetts. This Court should hold as much.

## II. This Court Should Not Adopt The *Lemon* Test.

Unable to prevail under art. 3, Plaintiffs ask this Court to resolve this case under the now-defunct *Lemon* test that the U.S. Supreme Court officially declared "abandoned" in 2022. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). This Court should decline the invitation. *Lemon* does not account for the unique text and history of art. 3 and thus departs from this Court's method of constitutional interpretation; indeed, it was "atextual" and "ahistorical" even as to the federal Establishment Clause. *Id.* at 507 (citation omitted). Given that the U.S. Supreme Court has roundly rejected the *Lemon* test for the Establishment Clause, this Court should not adopt it in the context of art. 3.

### A. This Court Interprets The Declaration of Rights Through The Lens Of Text And History.

There is no need for this Court to adopt *Lemon*—the Court already has an established method of interpreting the Declaration of Rights, and it has never bound itself to the U.S. Supreme Court's interpretation of differently worded provisions of the Federal Constitution.

Text and history are the touchstones of this Court's constitutional analysis. *Op. of the Justs.*, 461 Mass. at 1209. The Court "look[s] first to the plain language of the constitutional provision." *Id.* The Declaration of Rights "was written to be understood by the voters to whom it was submitted for approval." *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 665 (2011) (citation omitted). To that end, it "is to be interpreted in the sense most obvious to the common intelligence" based on "familiar and approved usage of the language." *Id.* (citation omitted). A corollary to this principle is that "every word and phrase in the Constitution was intended and has meaning." *Powers v. Sec'y of Admin.*, 412 Mass. 119, 124 (1992). So no word "of the Constitution [may] be ignored as meaningless." *In re Op. of the Justs.*, 332 Mass. 769, 777 (1955).

The Court also considers the context of the provision—it evaluates each provision "in combination with each other and all other parts of the Constitution as forming a single harmonious instrument for the government of the Commonwealth." *In re Op. of the Justs.*, 291 Mass. 578, 586 (1935); *Op. of the Justs.*, 461 Mass. at 1209 (same).

Next, the Court considers the history and purpose of the provision. It evaluates "the ends designed to be accomplished," "the conditions under which it was framed," "the benefits expected to be conferred, and the evils hoped to be remedied." *Carney v. Att'y Gen.*, 447 Mass. 218, 224 (2006) (quoting *Loring v. Young*, 239 Mass. 349, 372 (1921)). As this Court has made clear, "one must first understand the history" of the constitutional provision "[t]o understand the meaning." *Op. of the Justs.*, 461 Mass. at 1210.

When comparing federal and state constitutional provisions, this Court has routinely used text and history as the guideposts for state constitutional interpretation, rather than unthinkingly accepting the U.S. Supreme Court's interpretation of a federal analogue.

Consider, for instance, this Court's decision that art. 12 of the Declaration of Rights provides greater protection than the Fifth Amendment

of the U.S. Constitution on the right to silence. *Commonwealth v. Clarke*, 461 Mass. 336, 346 (2012). In holding as much, this Court explained that it looked to "the text and history of art. 12," along with its prior caselaw, all of which confirmed that art. 12 "provides greater protection against self-incrimination than the Fifth Amendment." *Id.*

Likewise, in *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83 (1983), this Court held that art. 9 of the Declaration of Rights provided greater protection for free speech than the First and Fourteenth Amendments of the U.S. Constitution. The Court reasoned that, unlike the federal Constitution's free-speech provisions, "art. 9 is not by its terms directed only against governmental action," so the Court rejected the federal "State action" requirement, noting that there is no need "to force a parallelism with the Federal Constitution." *Id.* at 88-89.

In short, this Court has never bound itself with the U.S. Supreme Court's interpretation of the U.S. Constitution when interpreting differing provisions of the Commonwealth's Constitution. *E.g.*, *Att'y Gen. v. Colleton*, 387 Mass. 790, 795 (1982). Instead, this Court employs the traditional tools of constitutional interpretation—"text" and "history," as explicated in the caselaw—to discern the meaning of each provision of the

Declaration of Rights. *Commonwealth v. Gonzalez*, 452 Mass. 142, 154 (2008).

### B. Adopting *Lemon* Would Be A Stark Departure From This Court's Approach To Constitutional Interpretation.

This Court's approach to constitutional interpretation compels rejecting *Lemon*. *Lemon* was adopted for the federal Establishment Clause, which, unlike art. 3, provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. *Lemon* was roundly criticized because it bore no relationship even with that constitutional text and produced a muddled, impossible-to-predict jurisprudence that proved hostile to religious expression. The Supreme Court rightly abandoned *Lemon*, and this Court should not resurrect it for art. 3, which is worded much differently than the Establishment Clause.

In 1971, *Lemon* adopted a three-part, "'ahistorical, atextual' approach" to evaluate cases under the Establishment Clause. *Kennedy*, 597 U.S. at 523 (citation omitted). Under the *Lemon* test, government activity benefitting a particular religion was permissible only if (1) the statute had "a secular legislative purpose"; (2) "its principal or primary effect [was] one that neither advances nor inhibits religion"; and (3) it did not

foster "an excessive entanglement with religion." *Lemon*, 403 U.S. at 612 (citation omitted). Eventually, the *Lemon* test was expanded to ask whether "a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion." *Kennedy*, 597 U.S. at 534.

A product of the "Religion Clause jurisprudence" of the twentieth century, the *Lemon* test produced "confusion and inconsistency—with a heavy dose of hostility to religion." Michael W. McConnell, *Stuck with a Lemon*, 83 ABA J. 46, 47 (1997); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 117-18 (1992). Indeed, the test "had three strikes against it from the beginning." Michael W. McConnell & Nathan S. Chapman, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, 88 (2023). "It was plagued by conceptual ambiguity, overemphasized separationism at the expense of religious freedom, and was a mismatch with the historical understanding of disestablishment." *Id.* Confronted with the shortcomings of this attempt at a "one-size-fits-all doctrine," the Supreme Court ultimately "craft[ed] more context-specific doctrines in various categories of cases" in the twenty years leading to *Kennedy*. *Id.*

Legal scholars across the ideological spectrum have often highlighted the problems with the Supreme Court's jurisprudence on the Religion Clauses, including the *Lemon* test, shaped during the Warren and Burger Courts. Professor McConnell has said that a "more confused and often counterproductive mode of interpreting the First Amendment would have been difficult to devise." *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. at 115. And Professor Leonard Levy, on the "pole opposite" to Professor McConnell, noted that the Supreme Court's jurisprudence made him think "the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." *Id.* (quoting Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 163 (1st ed. 1986)).

A principal difficulty with the *Lemon* test was that it interpreted the Establishment Clause "to forbid the government to aid or advance religion." McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. at 117. In other words, the *Lemon* test purports to demand absolute neutrality—a virtually impossible demand in a religious society governed by a federal Constitution that simultaneously guarantees the free exercise of religion. *Id.* "In a world in which the government aids or advances

many different causes and institutions, this means that the government *must* discriminate against religion" to maintain so-called neutrality. *Id.* at 117-18. Thus, under *Lemon*, "the Establishment Clause is said to require what the Free Exercise Clause forbids." *Id.* at 118.

Not only is the *Lemon* test inconsistent with the Free Exercise Clause, it is inconsistent within itself—the "primary effect" prong often stands in irreconcilable tension with the "entanglement" prong. While the "primary effect" prong of *Lemon* seemingly required the state to be "certain" that governmental funds are not used for religious purposes, the "'entanglement' prong forbids what the 'effects' prong requires"—*i.e.*, the state may not meddle in the internal affairs of religious groups. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. at 118. Even early on, the Supreme Court acknowledged that the prongs of *Lemon* create a "Catch-22" in this respect. *Bowen v. Kendrick*, 487 US 589, 615 (1988).

It is unsurprising, then, that the *Lemon* test "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." *Kennedy*, 597 U.S. at 534 (citation omitted); *see also* Brief for the Becket Fund as Amicus Curiae Supporting

Petitioners, *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29 (2019) (Nos. 17-1717, 18-18), at 4 (criticizing the "deep dive into subjectivity" that the *Lemon* test required).

Illustrative of the difficulty is the Supreme Court's wildly unpredictable jurisprudence over time, which only sometimes gave credence to *Lemon*: A Presbyterian minister could, consistent with the Establishment Clause, lead the legislature in daily prayers, *Marsh v. Chambers*, 463 U.S. 783, 793 (1983); *Town of Greece v. Galloway*, 572 U.S. 565, 591 (2014), but a moment of silence in schools was unconstitutional under *Lemon*, *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); the government could, consistent with the Establishment Clause, give religiously-affiliated organizations money to teach about sexual behavior under *Lemon*, *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988), but could not do so for those organizations to teach science or history, *Lemon*, 403 U.S. at 618-19; the government could, consistent with the long-held understanding of the Establishment Clause, provide religious school students with books, *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968) (pre-*Lemon*), but not with maps under *Lemon*, *Wolman v. Walter*, 433 U.S. 229, 249-51 (1977). *See* McConnell, *Religious Freedom at a Crossroads*,

59 U. Chi. L. Rev. at 119. In short, *Lemon*-test jurisprudence was "a mess." *Id.* (collecting cases).

Justices over the years decried the *Lemon* test as "flawed in its fundamentals and unworkable in practice," *Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part); "abstract and ahistoric," *Shurtleff v. City of Bos.*, 596 U.S. 243, 279 (2022) (Gorsuch, J., concurring in judgment); "inconsistent," *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Thomas, J., concurring); and, perhaps most colorfully, a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

Questions about *Lemon* abounded. "Just how mistake-prone might an observer be and still qualify as reasonable? On what authority may courts exercise the awesome power of judicial review to declare a duly enacted law unconstitutional thanks only to (admitted) errors about the relevant facts or law?" *Shurtleff*, 596 U.S. at 279 (Gorsuch, J., concurring in judgment). And *Lemon* produced a host of misconceptions—for example, that the Establishment Clause includes "a 'modified heckler's veto,

in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort,'" or that it "'compel[s] the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Kennedy*, 597 U.S. at 534-35 (first alteration in original) (citations omitted).

Amidst this chaos, the U.S. Supreme Court "abandoned the *Lemon* test, one factual context at a time." McConnell & Chapman, *Agreeing to Disagree*, at 91. Finally, the U.S. Supreme Court declared the *Lemon* test officially "abandoned" in *Kennedy*. 597 U.S. at 510. Much like this Court's approach, the U.S. Supreme Court directed that the Establishment Clause be interpreted "by 'reference to historical practices and understandings'" of an establishment of religion. *Id.* (quoting *Town of Greece*, 572 U.S. at 576); *see* Brief of the Becket Fund, as Amicus Curiae Supporting Petitioners, *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29 (Nos. 17-1717, 18-18), at 4 (noting that the relevant question is "whether the government's actions share the historic characteristics of an 'establishment of religion' at the time of the founding").

Against that landscape, there are many reasons for this Court not to adopt the "ahistorical, atextual" *Lemon* test, and no reasons in its favor. *Kennedy*, 597 U.S. at 523 (citation omitted). In addition to the fact that the U.S. Supreme Court itself has roundly rejected the *Lemon* test, art. 3 does not track the text of the Establishment Clause for which the *Lemon* test was designed. Far from prohibiting "any law respecting the establishment of religion," like the Establishment Clause, art. 3 simply prohibits denying any religious sect equal protection under the law or subordinating one religion to another. Mass. Const. amend. art. 11.

In fact, if the *Lemon* test were applied to the Massachusetts Constitution, the Massachusetts Constitution itself might fail. As explained above, the Massachusetts Constitution is everywhere endorsing and entangled with religion—mentioning the "Supreme Being," by name or pseudonym, a dozen times, and establishing a *duty* to worship God. *See supra*, at 18. Further, similar to the U.S. Constitution's Free Exercise Clause, the Massachusetts Constitution guarantees the "right" to "worship[] God in the manner and season most agreeable to the dictates of his own conscience." Mass. Const. pt. I, art. II. So any application of the

*Lemon* test would necessarily run into the right that art. 2 of the Massachusetts Constitution explicitly protects.

Plaintiffs' main argument for the application of *Lemon* is that this Court has sometimes *referenced* it when deciding cases under the Massachusetts Constitution. *See Colo*, 378 Mass. at 558; Appellees' Br. 26. But this Court has never adopted it. The few cases applying it in Massachusetts predate *Kennedy* and used it only as a "guideline[]"; they did not endorse it as a "test[]" or "precise limit[]." *Colo*, 378 Mass. at 558.

As this Court has said time and time again, it must "view the purposes and history of the practice in relation to the purposes and history of the governing constitutional amendments," and caselaw on similar practices. *Colo*, 378 Mass. at 554. The Quincy statues are consistent with the text of art. 3 and with historical practice in Massachusetts, and Plaintiffs have presented no evidence to the contrary. The Court need not and should not apply *Lemon*—the Quincy statues pass constitutional standards, and this Court should hold as much.

## CONCLUSION

This Court should reverse the judgment of the Superior Court.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including Rules 13(e), 16, 17, and 20.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. A. P. 20(a)(2)(D), the brief contains 6,543 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, in 14 point New Century Schoolbook font. The Undersigned has relied on the word-count feature of this word-processing system in preparing this certificate.

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## CERTIFICATE OF SERVICE

I, Joseph V. Cavanagh III, hereby certify, under the penalties of perjury, that on April 17, 2026, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, and I served two copies on the following counsel by electronic mail with consent of the counsel being served, pursuant to Mass. R. A. P. 13(c):

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