No. 21-418

In The Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,

v.

BREMERTON SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Statutes

Other

Page(s)

Page(s)

Page(s)

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g., Espinoza v. Mont. Dep't of Revenue,* 140 S. Ct. 2246 (2020). The ACLJ is dedicated, *inter alia*, to religious liberty and freedom of speech.

SUMMARY OF THE ARGUMENT

Justice Scalia's satirical characterization of the *Lemon* test's immortality has proven prescient. *Lemon* continues to stalk Establishment Clause litigation in the lower courts notwithstanding this Court's unequivocal repudiation of it in *American Legion v. American Humanist Society*. This case is the second one this term requiring the Court's review of a lower court's holding that the *Lemon*/endorsement test justifies suppression of private speech.[2] While many federal judges recognize that *Lemon* is truly dead, multiple cases have applied *Lemon* since

---

[1] All parties filed blanket consents with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Shurtleff v. City of Boston*, 986 F.3d 78, 96–97 (1st Cir. 2021), *cert. granted*, 142 S. Ct. 55 (2021).

American Legion was decided. Expressly abandoning *Lemon* was not enough. Overruling *Lemon* is necessary to restore principled adjudication to the lower federal courts' Establishment Clause jurisprudence.

There is no reason to retain *Lemon*, least of all the doctrine of stare decisis. Each stare decisis factor weighs overwhelmingly in favor of overruling *Lemon*. *Lemon* is a textbook example of a decision that is egregiously wrong, unworkable, superseded by later developments in this Court's precedents, and bereft of reliance interests.

As evidenced by nearly a half century of often scathing criticism from scholars, members of this Court, and lower court judges, *Lemon* is poorly reasoned. Its foundational flaw, of course, is that it is untethered to the original meaning of the Establishment Clause. Devoid of sound doctrinal underpinnings, *Lemon* is elastic and unprincipled. The addition of the anti-historical endorsement inquiry made matters worse because the ever malleable "objective observer" standard promotes wildly inconsistent results.

Because it is unprincipled and elastic, *Lemon* is unworkable. From its inception, it has been incapable of facilitating evenhanded, consistent development of legal principles and therefore undermines the integrity of the judicial process. *Lemon's* unworkability is further manifested by this Court's refusal to apply it in a single case for more than a decade. Instead, the Court's history and tradition test now supersedes *Lemon*.

The doctrine of stare decisis should not afford refuge to an egregiously wrong decision that

frequently has been used, as it was in this case, to abridge First Amendment rights to free speech and free exercise. It is time to overrule *Lemon.*

This Court should also expressly abandon *Santa Fe Independent School District v. Doe,* upon which the Ninth Circuit relied. Another case in which mere shadows were mistaken for real threats, *Santa Fe* is as ahistorical as *Lemon*. The original understanding of the Establishment Clause provides no support for *Santa Fe's* premise that religious expression in public schools threatens an establishment of religion. To the contrary, education and religion were inextricably linked at the founding. Similarly, *Santa Fe*'s boundless definition of psychological coercion goes far beyond the original concept of legal coercion that the Establishment Clause was intended to prevent.

Santa Fe contributed significantly to the widespread notion that religion in the public schools is dangerous and to be squelched. It should be repudiated.

ARGUMENT

I. Incoherence in the Lower Courts' Establishment Clause Jurisprudence Will Continue Until *Lemon* is Overruled.

Almost thirty years ago, Justice Scalia remarked on *Lemon's* tendency to rise from the grave and stalk the Court's Establishment Clause jurisprudence.[3]

---

[3] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) ("Like

Scholars and judges alike thought that *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067 (2019), finally killed and interred *Lemon*. *See, e.g.*, Michael W. McConnell, *No More (Old) Symbol Cases,* Cato Sup. Ct. Rev., 2018–2019, at 91, 104, 106 (welcoming *Lemon's* "death" in *American Legion* and stating "I cannot imagine a lower court thinking, after this, that the *Lemon* test is good law"); *see also Kennedy v. Bremerton School District*, 4 F.4th 910, 945 (9th Cir. 2021) (Nelson, J., joined by Callahan, Bumatay, Vandyke, and Ikuta, JJ., dissenting from denial of rehearing en banc) (noting *Lemon's* death); *Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306, 315 (5th Cir. 2021) (holding that *Lemon* no longer applies under Supreme Court jurisprudence); *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020); *Freedom From Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280–81 (3d Cir. 2019).

And yet many lower court judges act as if *Lemon* lives on. *See* Section B *infra*. As did the Ninth Circuit in this case, courts repeatedly resurrect the ghoul, with the predictable result that "mere shadow[s]" are mistaken for "real threat[s]." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment) (quoting *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

The clear guidance provided in *American Legion* is

---

some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

evidently not enough. *Lemon* will continue to haunt the lower courts until this Court overrules it.

A. No plausible reading of *American Legion* supports the notion that *Lemon* is applicable in any context.

Building upon *Town of Greece v. Galloway*, 572 U.S. 565 (2014), *American Legion* instructed lower courts to analyze Establishment Clause issues "look[ing] to history for guidance." 139 S. Ct. at 2087 (plurality opinion). Nothing in the decision suggested that this instruction was limited to the context of that case.

Seven justices in four opinions understood *American Legion* to jettison *Lemon* in favor of the history and tradition test. The plurality opinion noted that *Lemon* (1) could not resolve the "great array of laws and practices that came to the Court," *id.* at 2080; (2) had been "harshly criticized by Members of this Court," "lamented by lower court judges, and questioned by a diverse roster of scholars," *id*. at 2081; and (3) was incompatible with many official acknowledgements of religion's close identification with our history and government, *id.* at 2080–81.

In his concurrence, Justice Kavanaugh reiterated that the Court no longer applies *Lemon* and pointed out that *Lemon* could not explain the Court's Establishment Clause jurisprudence in five separate case categories. *Id.* at 2092 (Kavanaugh, J., concurring).

Justice Gorsuch understood the plurality opinion to have "shelved" *Lemon,* a result he approved because *Lemon* was "a misadventure" that fostered

"chaos" and enabled the lower courts "'to reach almost any result in almost any case.'" 139 S. Ct. at 2101 (Gorsuch, J., concurring) (quoting Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 119 (1992)).

Justice Breyer joined the plurality opinion's discussion of *Lemon's* failures but wrote separately with Justice Kagan to conclude that the Bladensburg Cross satisfied the Establishment Clause's purpose of "assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e].'" 139 S. Ct. at 2090–91 (Breyer, J., joined by Kagan, J., concurring) (quoting *Van Orden*, 545 U.S. at 698 (Breyer, J. concurring in judgment)).

Perhaps foreseeing *Lemon*'s resurgence in some lower courts, Justices Thomas urged that *Lemon* be overruled because the test has no basis in the Establishment Clause's original meaning and "has 'been manipulated to fit whatever result the Court aimed to achieve.'" *Id.* at 2097 (Thomas, J., concurring in judgment) (quoting *McCreary Cnty. v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting)).

How any lower court could conclude, as the Ninth Circuit did here, that *Lemon* retained any viability in any context or that this Court had given insufficient guidance about what should replace it is a mystery. Justice Scalia's humorous characterization of *Lemon's* immortality has proven prophetic.

B. *Lemon* Must Be Overruled Because the Lower Courts Continually Resurrect It Despite this Court's Clear Repudiation of It.

This case is before the Court because the Ninth Circuit held that the endorsement prong of the *Lemon* test required Bremerton School District to fire Coach Kennedy for his private prayers. *Kennedy v. Bremerton Sch. Dist.,* 991 F.3d 1004, 1018 (9th Cir. 2021) (holding that "an objective observer could reach *no other conclusion* than that BSD endorsed Kennedy's religious activity by not stopping the practice") (emphasis in original). The Ninth Circuit is regrettably far from alone. Lower courts still apply *Lemon* to a variety of Establishment Clause cases despite *American Legion's* clear repudiation of the test.

D.C. Circuit: *In re Navy Chaplaincy*, No. 19-5204, 2020 WL 11568892, at *3 (D.C. Cir. Nov. 6, 2020), *cert. denied sub nom. Chaplaincy of Full Gospel Churches v. Dep't of the Navy*, 142 S. Ct. 312 (2021) (requiring Plaintiffs to allege that a policy violated the *Lemon* test before analyzing the policy under the Establishment Clause).

First Circuit: *Shurtleff v. City of Bos.*, No. 18-cv-11417-DJC, 2020 WL 555248, at *5 (D. Mass. Feb. 4, 2020), *aff'd,* 986 F.3d 78 (1st Cir. 2021), *cert. granted*, 142 S. Ct. 55 (2021) (analyzing whether *Lemon* test justified state's discrimination against religious speech in public forum); *Abuhajeb v. Pompeo*, 531 F. Supp. 3d 447, 460 (D. Mass. 2021) (requiring Plaintiffs who bring Establishment Clause claims to allege that the government violated a prong of the *Lemon* test).

Third Circuit: *Ctr. for Inquiry, Inc. v. Warren*, No. 3:18-cv-2943-B, 2019 WL 3859310, at *9–10 (N.D. Tex. Aug. 16, 2019), *vacated*, 845 F. App'x 325 (5th Cir. 2021) (analyzing Texas statute prohibiting solemnization by non-governmental secular individuals under *Lemon*); *Hilsenrath ex rel. C.H. v. Sch. Dist. of Chathams*, 500 F. Supp. 3d 272, 289–90 (D.N.J. 2020) (applying *Lemon* test to public school case).

Fourth Circuit: *Coble v. Lake Norman Charter Sch., Inc.*, 499 F. Supp. 3d 238, 244 (W.D.N.C. 2020), *appeal dismissed*, No. 20-2206, 2020 WL 9550949 (4th Cir. Nov. 25, 2020) (applying *Lemon*'s second prong but noting that *Lemon* "has been questioned but not overturned"); *Coble v. Lake Norman Charter Sch.* Inc., No. 3:20-cv-00596MOCDSC, 2021 WL 1685969, at *1, 3–4 (W.D.N.C. Mar. 4, 2021) (applying *Lemon* in a case involving school materials that disparaged Christianity); *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 432–33 (E.D. Va. 2020) (analyzing COVID-19 restrictions for churches under the *Lemon* test); *Reese v. Jacobs*, No. 3:18-cv-140, 2020 WL 1269786, at *7–9 (E.D. Va. Mar. 16, 2020) (applying *Lemon* to a prisoner's Establishment Clause claim); *Antietam Battlefield KOA v. Hogan*, 501 F. Supp. 3d 339, 346 (D. Md. 2020) (requiring Plaintiffs who bring Establishment Clause claims to allege that the government violated a prong of the *Lemon* test).

Fifth Circuit: *Freedom From Religion Found., Inc. v. Mack*, 540 F. Supp. 3d 707, 716 (S.D. Tex. 2021) (invalidating official's opening prayer ceremony under *Lemon* test).

Sixth Circuit: *InterVarsity Christian Fellowship/USA v. Bd. of Governors*, 534 F. Supp. 3d 785, 830 (E.D. Mich. 2021) (expressing confusion over the appropriate test for Establishment Clause cases); *Danville Christian Acad., Inc. v. Beshear*, 503 F. Supp. 3d 516, 529 (E.D. Ky. 2020) (concluding that the *Lemon* test "is still the proper test for analyzing claims involving the Establishment Clause").

Seventh Circuit: The Seventh Circuit understands that *Lemon* no longer applies to religious displays, *see Woodring v. Jackson County*, 986 F.3d 979, 981 (7th Cir. 2021), but continues to apply *Lemon* to other Establishment Clause claims. *E.g. Knudtson v. Cty. of Trempealeau*, 982 F.3d 519, 529 (7th Cir. 2020) (affirming the lower court's application of *Lemon* because the Seventh Circuit "appl[ies] the primary effect test—and the endorsement articulation of that test—through the lens of an objectively reasonable observer"); *St. Augustine Sch. v. Underly*, 21 F.4th 446, 448–49 (7th Cir. 2021), *reh'g denied*, No. 17-2333, 2022 WL 170868 (7th Cir. Jan. 19, 2022) (analyzing transportation benefits under *Lemon* rather than under the equal access principles espoused in *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2263 (2020)); *Jones v. West*, No. 2:16-cv-1687-PP, 2020 WL 686119, at *5 (E.D. Wis. Feb. 11, 2020) (applying *Lemon*); *Elim Romanian Pentecostal Church v. Pritzker*, No. 1:20-cv-2782, 2020 WL 2468194, at *5 (N.D. Ill. May 13, 2020), *aff'd*, 962 F.3d 341 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1753 (2021) (reviewing COVID-19 restrictions against churches under the *Lemon* test); *Irish 4 Reprod. Health v. United States Dep't of Health & Hum. Servs.*, 434 F. Supp. 3d 683, 709 (N.D. Ind. 2020)

(analyzing a motion to dismiss under *Lemon* in a case involving religious exemptions for contraceptive coverage).

Eighth Circuit: *Monteer v. ABL Mgmt. Inc.*, No. 4:21-cv-756 ACL, 2021 WL 3570301, at *6 (E.D. Mo. Aug. 12, 2021), *reconsideration denied*, No. 4:21-cv-756 ACL, 2021 WL 3847137 (E.D. Mo. Aug. 27, 2021) ("[I]t appears that the Eighth Circuit employs the *Lemon* test.").

Tenth Circuit: *Aguilera v. City of Colorado Springs*, 836 F. App'x 665, 670 & n.7 (10th Cir. 2020), cert. denied, 142 S. Ct. 76 (2021) (holding that "we follow the tripartite test from *Lemon*" because *American Legion's* repudiation of *Lemon* was limited to religious display cases); *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1155 (D.N.M. 2020) (describing the *Lemon* test as the closest thing to a definitive test for the Establishment Clause).

Eleventh Circuit: Like the Seventh Circuit, the Eleventh Circuit recognizes that *Lemon* no longer applies to religious displays. *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1321 (11th Cir. 2020); But the Eleventh Circuit continues to apply *Lemon* in other Establishment Clause cases. *See, e.g. Case v. Ivey*, 542 F. Supp. 3d 1245, 1278 (M.D. Ala. 2021) (holding that *Lemon* applies to Establishment Clause challenge to COVID restrictions because it does not involve religious displays); *Smith v. Dunn*, 516 F. Supp. 3d 1310, 1330–31 (M.D. Ala. 2021), *rev'd on other grounds sub nom. Smith v. Comm'r, Alabama Dep't of Corr.*, 844 F. App'x 286 (11th Cir. 2021) (applying *Lemon* to a prisoner's Establishment Clause claim).

American Legion mapped the route out of *Lemon*'s Establishment Clause "purgatory."[4] Overruling *Lemon* is necessary to induce lower courts to leave. No justification exists for retaining *Lemon,* least of all the doctrine of stare decisis.

II. Stare Decisis Does Not Support Retention of *Lemon*.

Lemon finds no shelter in the doctrine of stare decisis. Stare decisis is "not an inexorable command." *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018). Nor is it "the art of methodically ignoring what everyone knows to be true." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). The doctrine "is at its weakest when [the Court] interprets the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling our prior decisions." 138 S. Ct. at 2478. Indeed, stare decisis cannot justify exalting erroneous court precedents above the Constitution itself. *See* Amicus Brief of Amer. Ctr. For Law & Justice, *Dobbs v. Jackson Women's Health Org*., No. 19-1392 (U.S. July 29, 2021). The doctrine is further weakened where, as here, an egregiously wrong interpretation of the Establishment Clause is deployed to abridge First Amendment rights to free speech and free exercise. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Ramos*, 138 S. Ct. at 2478.

---

[4] *ACLU v. Mercer Cnty*., 432 F.3d 624, 636 (6th Cir. 2005).

The factors used to determine whether to retain a precedent weigh overwhelmingly in favor of overruling *Lemon*. The decision is egregiously wrong, unworkable, superseded by later developments in this Court's precedent, and devoid of reliance interests. *Id.* at 2478–79.

A. *Lemon* is Egregiously Wrong and Poorly Reasoned.

Proof of *Lemon*'s poor reasoning is manifest in a half century of criticism from scholars and judges alike. *Lemon*'s weaknesses appeared from its inception. *See, e.g., Roemer v. Maryland Bd. of Public Works,* 426 U.S. 736, 768–69 (1976) *(*White, J., concurring in judgment*)* ("The threefold test of *Lemon* imposes unnecessary, and . . . superfluous tests for determining [an Establishment Clause violation]."). Chief of its many flaws is that *Lemon* has no basis in the original meaning of the Establishment Clause.[5] *See*, *e.g.*, *American Legion*, 139 S. Ct. at 2101 (Thomas, J., joined by Gorsuch, J., concurring); *Espinoza*, 140 S. Ct. at 2263 (Thomas, J., joined by Gorsuch. J., concurring) ("Thus, the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect. Properly understood, the Establishment Clause does not

[5] The *Lemon* Court essentially threw up its hands on its obligation to determine the original meaning of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1973) (contending that "the language of the Religion Clauses of the First Amendment is, at best, opaque").

prohibit States from favoring religion."); *Town of Greece v. Galloway*, 572 U.S. 565, 604–05 (2014) (Thomas, J., concurring in part and concurring in judgment) (summarizing historical evidence); *Wallace v. Jaffree*, 472 U. S. 38, 89 (1985) (Burger, C.J., dissenting) (Majority's application of *Lemon* reflects a "naive preoccupation with an easy, bright-line approach for addressing constitutional issues" that all but ignores the purpose of "the Establishment Clause itself."); *see also id.* at 110 (Rehnquist, J., dissenting) (The *Lemon* test "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine.").

The scholarly consensus is that *Lemon* has no basis in the Establishment Clause's original meaning.[6] Since *American Legion* was decided, a

---

[6] *See, e.g.,* Donald L. Drakeman, *Church, State, and Original Intent* 260 (2010) (concluding that the Establishment Clause prohibits Congress "from establishing a 'national religion'"); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 317 (1986) (stating that *Lemon* is "both historically unjustified and textually incoherent"); Michael McConnell, *Establishment and Disestablishment at the Founding, Part I*: *Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131–81 (2003); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 936–39 (1986); Vincent P. Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. Pa. J. Const. L. 585, 632 (2006).

A comprehensive survey of thirty-seven state constitutions in effect when the Fourteenth Amendment was adopted demonstrated that none of the states would have viewed non-

corpus linguistics analysis of founding era texts[7] provided additional compelling evidence that *Lemon*/endorsement is irreconcilable with the original meaning of the Establishment Clause. The analysis revealed that the most frequent practices associated with an establishment of religion at the founding were: 1) legal or official designation of a specific church or faith; 2) government coercion of

---

endorsement as a feature of their constitution's non-establishment provisions. On the contrary, the state constitutional anti-establishment provisions are replete with endorsement of religion. *See generally* D. Getchel, M. Brady, *How the Constitutions of the Thirty-seven States in Effect when the Fourteenth Amendment Was Adopted Demonstrate that the Governmental Endorsement Test in Establishment Clause Jurisprudence Is Contrary to American History and Tradition*, 17 Tex. Rev. Law & Pol. 125 (2012).

[7] Corpus linguistics analysis is an emerging data-driven method of studying language that uses large collections of texts known as corpora. Professor Stephanie Barclay used the method to assess the ordinary meaning of the Establishment Clause. Stephanie Barclay, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 529 (2019).

The judiciary is beginning to recognize the value of corpus linguistics analysis. *See, e.g., Carpenter v. United States*, 585 U.S. 1, 7 n.4 (2018) (Thomas, J., dissenting) (stating that "at the founding, "search" did not mean a violation of someone's reasonable expectation of privacy) (citing Corpus of Historical American English, https://corpus.byu.edu/coha; Google Books (American), https://googlebooks.byu.edu/x.asp; Corpus of Founding Era American English, https://lawncl.byu.edu/cofea); *Wilson v. Safelite Grp., Inc*., 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring) ("Because the text . . . is clear, we should go no further. And the text is clear, as many tried-and-true tools of interpretation confirm. But so does one more: corpus linguistics. Courts should consider adding this tool to their belts.").

individuals enforced by legal penalties or government persecution of dissenters; 3) government interference with affairs of both established churches and non-established churches; 4) preferential public support of the established church (particularly in the form of direct taxes levied for the church); and 5) restrictions of civic or political participation to members of the established church. Barclay, *supra*, at 548–51.

By contrast, no version of the word "endorse" ever appeared in proximity to the word "establish." More importantly here, the analysis produced no evidence that prayers or religious practices in public schools (had they existed at the founding) would have been viewed as an establishment. *Id.* at 547, 555.

As might be expected from a test divorced from the Establishment Clause's original meaning, *Lemon* has created "doctrinal chaos" leading to inconsistent and unprincipled results.[8] *Lemon* is "so elastic in its

---

[8] McConnell, *Crossroads*, *supra*, at 118–20 (highlighting the "doctrinal confusion" and the "inconsistencies within" the *Lemon* test and the way the test has created room for subjectivity and wide discretion on the part of judges); Paulsen, *supra*, at 315 (Court's Establishment Clause jurisprudence is a "schizophrenic pattern of decisions."); William J. Cornelius, *Church and State-the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality*?, 16 St. Mary's L.J. 1, 8 (1984) (arguing that "Constitutional law scholars and other observers are virtually unanimous in labeling the Supreme Court's decisions in establishment cases as inconsistent and unprincipled judgments"); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 18 (1978) (arguing that the Court's Establishment Clause cases applying *Lemon* to school programs had shown "no sign of consistency").

application that it means everything and nothing."[9] *McCreary Cnty. v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

The addition of the endorsement inquiry[10] only heightened the doctrinal chaos created by *Lemon* and ensured greater confusion and inconsistency.[11] Several Justices have noted the inconsistency

---

[9] Douglas Laycock*, A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 450 (1986); Thomas R. McCoy Gary, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 Vand. L. Rev. 249, 252 (1986) (arguing that the *Lemon* test is "flexible and amorphous," and that it seems impossible to reconcile the jurisprudence applying the formula in any coherent fashion); Steven G. Gey*, Religious Coercion and The Establishment Clause*, 1994 U. Ill. L. Rev. 463, 467 (1994) (stating that "the *Lemon* test frequently has resembled a constitutional Rorschach test, reflecting the often contradictory constitutional views of different observers.").

[10] First proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring), the governmental endorsement test was intended to clarify *Lemon's* three-part test. Without advancing any support from the history of the Establishment Clause itself, Justice O'Connor asserted that "government endorsement or disapproval of religion" is one of "the principles enshrined in the Establishment Clause." *Id.* at 688–89. The endorsement test requires courts to evaluate whether a "reasonable observer," aware of all the relevant facts and their history and context, would view the challenged practice as "a disapproval of his or her religious choices." *County of Allegheny v. ACLU*, 492 U.S. 573, 630–31 (1989) (O'Connor, J., concurring).

[11] Steven Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 269 (1987); Jesse Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & Politics 499 (2002) (arguing that the *Lemon* test has been completely replaced by the endorsement test, while also critiquing that test for its subjectivity and its enabling of broad judicial discretion).

between the endorsement test and historic acknowledgments of the nation's religious heritage:

> The machinery employed by the [majority and concurring] opinions . . . is no more substantial than the antinomy that accommodation of religion may be required but not permitted, and the bold but unsupportable assertion (given such realities as the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation with which sessions of our Court are opened and, come to think of it, the discriminatory protection of freedom of religion in the Constitution) that government may not "convey a message of endorsement of religion."

Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 29 (1989) (Scalia, J., joined by Kennedy, J., and Rehnquist, C.J., dissenting); *American Legion*, 139 S. Ct. at 2101 (Thomas, J., joined by Gorsuch, J., concurring) (asking "how 'reasonable' must our 'reasonable observer' be, and what exactly qualifies as impermissible 'endorsement' of religion in a country where 'In God We Trust' appears on the coinage, the eye of God appears in its Great Seal, and we celebrate Thanksgiving as a national holiday ('to Whom are thanks being given')?").

Worst of all, the *Lemon* and endorsement tests, taken to their logical extremes, threaten to swallow

the Free Exercise Clause[12] and, as in this case, the Free Speech Clause. Here, the infinitely malleable objective observer purportedly would believe that the school district endorsed Kennedy's private prayers notwithstanding the school district's sustained public opposition to those prayers. *See Kennedy,* 991 F.3d at 1018. When the endorsement test is used to blur the distinction between private speech and government speech, private speech is the inevitable casualty. S*ee, e.g.*, *Corder v. Lewis Palmer Sch. Dist.*, 568 F. Supp. 2d 1237, 1249 (D. Colo. 2008), *aff'd*, 566 F.3d 1219 (10th Cir. 2009) (holding that Establishment Clause justified penalizing student by withholding her diploma until she apologized for religious content in her graduation speech).

B. *Lemon* Is Unworkable.

Hand in glove with *Lemon's* poor reasoning is its unworkability. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (noting that a core component of a decision's reasoning is its workability). The workability inquiry asks whether the precedent has "promote[d] the evenhanded, predictable, and consistent development of legal principles, foster[ed] reliance on judicial decisions, and contribute[d] to the actual and perceived integrity of the judicial process." *Id.*

---

[12] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1380–88 (1981) (criticizing *Lemon* as an "important source of confusion" that has led the Establishment Clause to threaten free exercise principles).

Lemon has done none of these things. The *Lemon*/endorsement tests undermine "evenhanded, predictable, and consistent development of legal principles" and the integrity of the judicial process. *Lemon* has resulted in a "strange Establishment Clause geometry of crooked lines and wavering shapes." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. at 399 (Scalia, J., concurring); *County of Allegheny*, 492 U.S. at 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("The endorsement test is flawed in its fundamentals and unworkable in practice" because it would consistently produce results contrary to history and precedent.); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (*Lemon*/endorsement "are so utterly indeterminate that they permit different courts to reach inconsistent results."). If anything, the *Lemon* test exceeds the unworkability of the *Abood* test struck down in *Janus*. *See Janus*, 138 S. Ct. at 2481 (emphasizing that the line *Abood* created "between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision").

The depiction of a cross in a city seal is unconstitutional—except when it's not. *Compare Harris v. Zion*, 927 F.2d 1401 (7th Cir. 1991) (applying *Lemon*/endorsement to strike down a city seal bearing a depiction of a cross), *with Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991) (applying *Lemon*/endorsement to uphold a city seal bearing a depiction of a cross).

Religious content in a high school student's graduation speech is unconstitutional—except when

it's not. *Compare Adler v. Duval County Sch. Bd.,* 250 F.3d 1330 (11th Cir. 2001) (holding that school policy permitting graduating student, elected by her class, to deliver an unrestricted message of her choice at the graduation ceremony did not violate the Establishment Clause) *with Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000) (holding that permitting a student's graduation speech with "sectarian" content would violate the Establishment Clause).

The best evidence of *Lemon*'s unworkability is that this Court has either "expressly declined to apply the test or has simply ignored it" in all Establishment Clause cases since 2005. *American Legion*, 139 S. Ct. at 2080. *Lemon* was of no use in resolving Establishment Clause cases "involving a great array of laws and practices." *Id.* at 2082.

In sum, *Lemon*'s validity is far past being "hotly contested." *Lemon* has been incapable of "functioning as a basis for decision" for nearly two decades. *See Citizens United v. FEC*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring). Like a food item knowingly avoided for too long in the refrigerator, *Lemon* should be tossed out.

C. Subsequent Legal Developments Have Undermined *Lemon*.

If ever a case was undermined by subsequent legal developments, it is *Lemon*. *Lemon* cannot explain five categories of Establishment Clause cases. *American Legion,* 139 S. Ct. at 2092 (Kavanaugh, J., concurring). Instead, principles other than *Lemon* determined the outcome in each case. *See id.*

(distilling from the Court's precedents the "overarching principles" of history and tradition, equal treatment of the religious with the secular, legislatively created religious exemptions, and absence of governmental coercion). Those principles undermined *Lemon's* core premise that the Establishment Clause required the government to maintain strict neutrality between the religious and the secular.

Town of Greece v. Galloway, 572 U.S. 565, 576 (2014), made explicit what many of the Court's precedents had suggested for years. "The Establishment Clause must be interpreted by reference to historical practices and understandings." *American Legion* applied *Town of Greece*'s history and tradition test to religious displays but also removed all remaining doubt that *Lemon* is a dead letter in all Establishment Clause contexts.

D. No Reliance Interests Justify Retention of *Lemon*.

While reliance interests may be important in determining whether to overrule a case, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), no such interests exist here. Overruling *Lemon* will occasion no "prospective economic, regulatory, or social disruption." *Ramos*, 140 S. Ct. at 1406; *Payne*, 501 U.S. at 828 (stating that "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights"). The only economic interests at stake in the Establishment Clause context are those of legal advocacy groups devoted to "a relentless extirpation of all contact between

government and religion." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring).

More significantly, even if there were parties with a credible reliance claim, it is weakened when a precedent provides "no longer a clear or easily applicable standard." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018). As the lower courts have long lamented, *Lemon* created a "judicial morass" devoid of clear or easily applicable standards. *See, e.g.*, *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, n.1 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing en banc) (doubting "whether *Lemon* and progeny actually create discernable tests, rather than a mere ad hoc patchwork").

As was true about *Abood* in *Janus,* anyone who claims reliance on *Lemon* has "been on notice for years regarding this Court's misgivings." *Janus*, 138 S. Ct. at 2484 (citing majority and concurring opinions calling *Abood* into doubt).

The most important reliance interest is always "the reliance interests of the American people" in preserving constitutional liberties. *Ramos*, 140 S. Ct. at 1408. (Gorsuch, J., joined by Ginsburg, Breyer, & Sotomayor, JJ.). The Constitution does not allow judges to "to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.*

Lemon spectacularly fails to qualify for immunity under the doctrine of stare decisis. Overruling *Lemon* is critical to restoring coherence to Establishment Clause adjudication in the lower courts. Formally abandoning *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000) is additionally warranted because it is one of *Lemon*'s progeny that repeatedly has been

used to squelch private religious speech in public schools.

III. As One of *Lemon*'s Progeny, *Santa Fe* Should Be Formally Abandoned.

The Ninth Circuit relied on *Santa Fe* to hold that permitting Coach Kennedy's private prayers on the school football field after games would violate the Establishment Clause. *Kennedy,* 991 F.3d at 1017 (citing *Santa Fe,* 530 U.S. at 308). Having denounced the endorsement test in both *Town of Greece* and *American Legion*, this Court should take the opportunity presented in this case to abandon the son of *Lemon*, *Santa Fe*.

Because of its ahistorical assumptions that the Establishment Clause 1) forbids the government from favoring religion and 2) equates social pressure with governmental coercion, *Santa Fe* is no more faithful to the original meaning of the Establishment Clause than is *Lemon*. *See Santa Fe*, 530 U.S. at 318 (Rehnquist, C.J. joined by Scalia, Thomas, JJ., dissenting) (noting the irreconcilability between the majority opinion in *Santa Fe* and George Washington's proclamation, "at the request of the very Congress which passed the Bill of Rights, . . . [of] a day of 'public thanksgiving and prayer'").

As embodied in this case*, Santa Fe* is responsible for substantial case law suppressing religious exercise and speech in public schools. The following are just a few examples:

- Students singing a song repeating the sentiments of the National Motto at a school

assembly. *S.D. v. St. Johns Cty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1094 (M.D. Fla. 2009) (holding that the performance of a country music song entitled "In God We Still Trust" at a school assembly violated the Establishment Clause).

- A coach joining students on his team when they assembled for private prayer. *See, e.g., Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008) (holding that a coach violated the Establishment Clause when he bowed his head and took a knee while his team prayed).
- A mother reading verses from Psalms as part of an "all-about-me-week" in which parents were invited to read their kindergartner's favorite book during "show and tell." *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009).
- An invocation given by a student volunteer at a high school graduation. *Deveney v. Bd. of Educ. of Cty. of Kanawha*, 231 F. Supp. 2d 483, 484 (S.D.W. Va. 2002).

In many other instances, school districts claim this Court's Establishment Clause precedents compel them to adopt policies that discriminate against religious expression. *See, e.g.*, *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1225 (W.D. Wash. 2007), *aff'd*, 580 F.3d 1087, 1090 (9th Cir. 2009) (dismissing student's constitutional claims because school's denial of permission for wind ensemble to perform

"Ave Maria" at graduation was necessary to avoid "collision with the Establishment Clause"); *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1238 (11th Cir. 2019) (holding that *Santa Fe* justified public high school athletic association's decision to deny permission to use school address system for prayer before championship game between two Christian high schools).

A. *Santa Fe*'s Endorsement Test Analysis is Ahistorical.

At the founding, "the religious character of education was a given." Michael Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. Cal. Interdis. L.J. 219, 232 (2002); *see also* David Fellman, *Separation of Church and State in the United States: A Summary View*, 1950 Wis. L. Rev. 427, 443 (1950). Education was primarily the province of clergy, who often intermixed religious training with secular subjects. *See* Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 663 (1998); Alexis De Tocqueville, 1 *Democracy In America* 314 (2d ed. 1900) ("Almost all education is entrusted to the clergy.").

Religious education was therefore widespread, and often supported by public funds. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, *supra*, at 666. "In many cases it was difficult to distinguish between public and private institutions because they were often housed in the same building." *Id.* When "religion"

began to be excluded from the public sphere at the later part of the nineteenth century, it was primarily an attempt to exclude Roman Catholicism, not all religious practice. *Id*.; *Espinoza*, 140 S. Ct. at 2266 (2020) (Thomas, J., concurring).

The important connection between religious faith and education was reflected in state constitutions. For example, the Massachusetts Constitution, authored by John Adams and one of the foundations of the Federal Constitution,[13] affirms: "the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion and morality" attained through "public worship of God and . . . public instructions in piety, religion, and morality." Mass. Const. of 1780 pt. I, art. III. This same provision further authorized "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 [] teachers of piety, religion and morality." *Id*.

Pennsylvania, which was also at the center of the development of religious liberty,[14] considered "religious societies" as ideally situated "for the advancement of religion or learning." Pa. Const. of 1776 §§ 44–45. "And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious

---

[13] *See* S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 Temp. L. Rev. 883 (1997).

[14] Michael McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409, 1425 (1990).

and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state." *Id.*

Echoing the Massachusetts Constitution,[15] the First Congress enacted the Northwest Ordinance of 1787, which expressly linked religion with education and encouraged both: "Religion, morality, and knowledge, being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. The Northwest Ordinance confirms that Congress did not intend the Establishment Clause to require government to be neutral between religion and irreligion. *See Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, C.J., dissenting).

What is more, the recent corpus linguistics analysis discussed earlier found no evidence that prayers or religious expression in schools would have been considered an establishment of religion at the time of the Establishment Clause's ratification. Barclay, *supra*, at 555. The Establishment Clause was implicated only when parents and students were not permitted to choose between religious schools. *Id.* at 555 n.311. In other words, the only context at the founding in which establishment concerns were raised in the educational context was when government *prevented* religious education. *The Remonstrant*, [No. IV], Pa. J. (Oct. 20, 1768),

---

[15] *See* David Tyack, et. al., *Law and the Shaping of Public Education 1785-1954*, at 26–27 (1987).

reprinted in A Collection Of Tracts From The Late News Papers 83 (N.Y., John Holt 1768) ("[T]he Toleration Act . . . deprived all parents that were not of the established Church, of the great trust committed to them by GOD, and nature, to train up their own children according to their own sentiments in religion, and the fear of GOD."). It was assumed that education would be religious, and the primary concern was ensuring parents would have the opportunity of choosing the manner of that education.

Santa Fe's holding that the Establishment Clause forbids school officials from endorsing religion is not only ahistorical, it is anti-historical. *Santa Fe*'s coercion analysis fares no better.

B. *Santa Fe*'s Coercion Analysis is Ahistorical.

Coercion at the founding did not include mere social pressure. For an establishment to occur, legal compulsion was an "essential element."[16] As Professor McConnell has explained:

> In the debates in the First Congress concerning the wording of the first amendment, James Madison, the principal draftsman and proponent, said of the committee draft that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law,

[16] McConnell, *The Lost Element*, *supra* at 936–39; *see also* Barclay, *supra*, at 548–51 (2019) (concluding that coercion entailed legal penalties or government persecution of dissenters).

> nor compel men to worship God in any manner contrary to their conscience." Upon further questioning by those who feared that the proposed amendment "might be taken in such latitude as to be extremely hurtful to the cause of religion," Madison clarified the point. He stated that he "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[17]

See also Lee v. Weisman, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting) (stating that "the coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty"); *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) ("[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers."). *Santa Fe*'s holding that social pressure is sufficiently coercive to qualify as an establishment of religion conflicts with the original meaning of the Establishment Clause.

In sum, religious expression by public school officials would not have been understood at the founding to constitute an establishment. Formal abandonment of *Santa Fe* is necessary to ensure lower court understanding that *Lemon* and its progeny

---

[17] McConnell, *The Lost Element*, *supra* at 936 (quoting 1 Annals of Cong. 7 30-31 (J. Gales ed. 1834) (Aug. 15, 1789)) ("If Madison's explanations to the First Congress are any guide, compulsion is not just an element, it is the essence of an establishment." *Id.* at 937.

must no longer be permitted to "frighten the little children and school attorneys"[18] of the nation's public schools.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit, overrule its decision in *Lemon v. Kurtzman,* and repudiate its decision in *Santa Fe Indep. Sch. Dist. v. Doe.*

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus

Counsel for Amicus Curiae
March 2, 2022

[18] *Lamb's Chapel*, 508 U.S. at 398 (1993) (Scalia, J., concurring).