

**Commonwealth of Massachusetts
Supreme Judicial Court**

No. SJC-13877

CLAIRE FITZMAURICE, JAY TARANTINO,
DR. CONEVERY BOLTON VALENCIUS, MATTHEW VALENCIUS,
LUCILLE DIGRAVIO, DAVID REICH, CYNTHIA ROCHE-COTTER,
MICHAEL COTTER, SHERYL LECLAIR, CODY HOOKS,
SALVATORE BALSAMO, MARIANNE BALSAMO,
MARTHA PLOTKIN, AND KATHLEEN GERAGHTY,

Plaintiffs-Appellees,

v.

CITY OF QUINCY AND THOMAS P. KOCH,
IN HIS OFFICIAL CAPACITY AS MAYOR OF QUINCY,

Defendants-Appellants.

On Appeal from a Decision of the
Superior Court in Norfolk County

**BRIEF OF PROTECT THE FIRST FOUNDATION
AS *AMICUS CURIAE* SUPPORTING
DEFENDANTS-APPELLANTS AND REVERSAL**

Daniel B. Winslow (BBO # 541972)
PRETI, FLAHERTY, BELIVEAU &
PACHIOS, CHARTERED, LLP
60 State Street, Suite 1100
Boston, MA 02109
Telephone: (617) 226-3800
dwinslow@preti.com

Gene C. Schaerr*
Joshua J. Prince*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

**Pro hac vice* filed

Counsel for Amicus Curiae

CORPORATE DISCLOSURE

Pursuant to Supreme Judicial Court Rule 1:21, *amicus curiae* Protect the First Foundation states that it is a nonprofit organization with no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE.....	2
TABLE OF AUTHORITIES	4
RULE 17(C)(5) DECLARATION	7
INTRODUCTION AND INTERESTS OF <i>AMICUS CURIAE</i>	8
STATEMENT.....	10
ARGUMENT SUMMARY.....	11
ARGUMENT.....	12
I. <i>Lemon’s</i> Flexible and Easily Manipulated Standard Results In Unpredictable and Inconsistent Outcomes.	13
A. As jurists and scholars alike recognized, <i>Lemon</i> can easily be manipulated.	13
B. <i>Lemon</i> does not produce coherent results because it can be manipulated.	17
II. This Court Should Decline to Adopt <i>Lemon</i> Because, In Other Areas of Law, the Court Has Valued Clear and Predictable Standards that <i>Lemon</i> Cannot Produce.	20
CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Cases

<i>ACLU of Ohio Found., Inc. v. Ashbrook</i> , 375 F.3d 484 (6th Cir. 2004).....	20
<i>Am. Atheists, Inc. v. Duncan</i> , 616 F.3d 1145 (10th Cir. 2010).....	19
<i>Am. Atheists, Inc. v. Duncan</i> , 637 F.3d 1095 (10th Cir. 2010).....	19
<i>Am. Jewish Cong. v. City of Chicago</i> , 827 F.2d 120 (7th Cir. 1987).....	15
<i>Am. Legion v. Am. Humanist Ass’n</i> , 588 U.S. 29 (2019)	12, 15, 16
<i>Barnes v. Cavazos</i> , 966 F.2d 1056 (6th Cir. 1992).....	15
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968)	17
<i>Colo. v. Treasurer & Receiver Gen.</i> , 378 Mass. 550 (1979).....	8, 10
<i>Commonwealth v. Almonor</i> , 482 Mass. 35 (2019).....	21
<i>County of Allegheny v. ACLU Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989)	18, 19
<i>Doe ex rel. Doe v. Elmbrook Sch. Dist.</i> , 687 F.3d 840 (7th Cir. 2012).....	15
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987)	23
<i>Freedom From Religion Found., Inc. v. County of Lehigh</i> , 933 F.3d 275 (3d Cir. 2019).....	16

<i>Freethought Soc’y v. Chester County</i> , 334 F.3d 247 (3d Cir. 2003)	20
<i>Glassroth v. Moore</i> , 335 F.3d 1282 (11th Cir. 2003)	20
<i>Harris v. City of Zion</i> , 927 F.2d 1401 (7th Cir. 1991)	19
<i>Katz, Nannis & Solomon, P.C. v. Levine</i> , 473 Mass. 784 (2016)	20
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022)	8, 12
<i>Kondrat’yev v. City of Pensacola</i> , 903 F.3d 1169 (11th Cir. 2018)	16
<i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993)	14, 15, 16
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	8, 12
<i>Levitt v. Comm. for Pub. Educ. & Religious Liberty</i> , 413 U.S. 472 (1973)	18
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	15, 18
<i>McCreary County v. ACLU of Ky.</i> , 545 U.S. 844 (2005)	13
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975)	13, 17
<i>Modrovich v. Allegheny County</i> , 385 F.3d 397 (3d Cir. 2004)	20
<i>Murray v. City of Austin</i> , 947 F.2d 147 (5th Cir. 1991)	19
<i>Roch v. Mollica</i> , 481 Mass. 164 (2019)	20, 21, 22

<i>Shurtleff v. City of Boston</i> , 596 U.S. 243 (2022)	14
<i>Summum v. City of Ogden</i> , 297 F.3d 995 (10th Cir. 2002).....	20
<i>Taylor v. Martha’s Vineyard Land Bank Comm’n</i> , 475 Mass. 682 (2016)	21
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005)	14
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985)	13
<i>Walsh v. Sec’y of Commonwealth</i> , 430 Mass. 103 (1999)	21
<i>Wolman v. Walter</i> , 433 U.S. 229 (1977)	18
Constitutional Provisions	
Mass. Const. Pt. 1, art. 3	9, 23
Other Authorities	
Jesse H. Choper, <i>The Religion Clauses of the First Amendment: Reconciling the Conflict</i> , 41 U. Pitt. L. Rev. 673 (1980)	16
Amanda Harmon Cooley, <i>Establishing an End to Lemon in the Eleventh Circuit</i> , 77 U. Mia. L. Rev. 972 (2023)	8
Michael W. McConnell, <i>Religious Participation in Public Programs: Religious Freedom at a Crossroads</i> , 59 U. Chi. L. Rev. 115 (1992)	17
Jeffrey M. Shaman, <i>Is Constitutional Jurisprudence Hostile to Religion?</i> , 42 DePaul L. Rev. 317 (1992)	17

RULE 17(C)(5) DECLARATION

Neither the parties, nor their counsel, authored any part of this brief or contributed any money intended to fund its preparation and submission. Further, no person or entity other than *amicus* and its counsel contributed any money intended to fund the preparation and submission of this brief. Neither *amicus* nor its counsel have represented either party to the present appeal in another proceeding involving similar issues, nor have they been a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

Eight years after the United States Supreme Court decided *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court held that *Lemon* provided “guidelines” for understanding Article 3 of the Massachusetts Declaration of Rights. *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 558 (1979). But it did not adopt *Lemon* as a “mechanistic ‘test[],’” nor should it here. *Ibid.* After all, in the decades since *Colo*, *Lemon* became the “most denigrated Establishment Clause case in judicial history.”¹ Indeed, in overruling *Lemon*, the Supreme Court called the test articulated there unworkable because it “invited chaos” among the lower courts. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (cleaned up). This Court should reject any invitation to extend that “chaos” by adopting *Lemon* as state law.

Whether *Lemon* should be revived is important to *amicus* Protect the First Foundation (“PT1”), a nonprofit organization dedicated to defending First Amendment rights. In cases involving the federal Establishment Clause, PT1 has a vital interest in ensuring that courts

¹ Amanda Harmon Cooley, *Establishing an End to Lemon in the Eleventh Circuit*, 77 U. Mia. L. Rev. 972, 974 (2023) (citations omitted).

apply the proper test because an inaccurate or overly expansive interpretation risks distorting the delicate balance the Framers struck in the First Amendment between preventing established religion and safeguarding free religious exercise and free speech. And PT1's interest in preserving that proper constitutional balance is just as strong in cases involving state constitutions. If this Court were to read the prohibition on religion being "established by law" too broadly, Mass. Const. Pt. 1, art. 3, it could harm free-exercise and free-speech rights just as easily as an overbroad reading of the federal Establishment Clause.

PT1 agrees with Appellants' showing that *Lemon* produces incoherence. It writes separately to expand on that showing and explain why the resulting indeterminacy is a powerful reason under existing Massachusetts law to reject *Lemon's* test. This Court has repeatedly recognized determinacy's importance in other legal contexts, and it is especially important here because this Court's interpretation of Article 3 will guide government officials as they navigate the proper role of religious symbols in public life. Consistent with this Court's other cases, this Court should insist on determinacy here by rejecting *Lemon*.

STATEMENT

The City of Quincy hopes to install statues of Catholic Saints Florian and Michael at its new public-safety building. I.App.23, II.App.225. In addition to their religious roles, both performed secular public duties, and have special significance to firefighters and police officers. II.App.225. St. Florian pioneered firefighting in Rome. II.App.210–16. St. Michael protected against wrongdoers. II.App.146.

Plaintiffs, Quincy residents, sued to enjoin the planned installation of these statues, arguing that they sent “an exclusionary message to non-Catholics.” I.App.24–26. The lower court preliminarily enjoined the statues’ installation, applying the federal *Lemon* test to the state constitution. II.App.332–37. And it did so despite acknowledging that the U.S. Supreme Court had “explicitly rejected” the *Lemon* test because it posed “daunting problems” and had significant “shortcomings.” II.App.323–24 (collecting cases). The court nevertheless considered itself bound by this Court’s decision in *Colo*, 378 Mass. 550, which it believed adopted the *Lemon* test. II.App.324. And the court concluded that, even if *Colo* did not adopt *Lemon*, this Court likely would not look to history and tradition to address the statues’ constitutionality. II.App.324–25.

ARGUMENT SUMMARY

PT1 agrees with Appellants (at 50) that *Lemon* is an “ahistorical, atextual, and indeterminate” test that this Court should reject. It also agrees with Appellants (at 36–47) that the Court should instead look to the text, history, and tradition of Article 3 to determine what it means and what it allows. PT1 writes separately to expand on Appellants’ showing that *Lemon* leads to indeterminate results.

PT1 first summarizes (at 12–17) the many judicial and academic critiques of *Lemon* to show that *Lemon* can be manipulated into reaching basically any conceivable result. PT1 then provides (at 17–20) examples when the U.S. Supreme Court and the lower courts applied *Lemon* and reached different results on similar facts.

Finally, PT1 analyzes (at 20–23) this Court’s precedents holding that legal determinacy is a value worth preserving. And PT1 uses past examples of the chaos produced by *Lemon* to explain why this Court should decline to adopt *Lemon*—that is, it would do violence to a value this Court has rightly protected elsewhere.

ARGUMENT

In *Lemon v. Kurtzman*, the United States Supreme Court held that a law violates the federal Establishment Clause if it lacked a secular purpose, had a “primary effect” that promoted or inhibited religion, or fostered excessive government entanglement with religion. 403 U.S. at 612–13 (citations omitted). When this Court first looked to *Lemon* for guidance in *Colo*, the *Lemon* test was new and had primarily applied in funding cases. But as courts across the country began to apply *Lemon* in Establishment Clause cases involving broader issues, obvious problems emerged. These problems led the U.S. Supreme Court to move away from *Lemon* before abandoning it altogether. See *Kennedy*, 597 U.S. at 534; *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 49 (2019) (plurality opinion) (collecting cases). If this Court adopted *Lemon* as a framework for interpreting the corresponding provision of Massachusetts law, it would invite many of the same problems that infected federal Establishment Clause cases for decades.

I. *Lemon’s* Flexible and Easily Manipulated Standard Results In Unpredictable and Inconsistent Outcomes.

Foremost among *Lemon’s* problems is that it is so malleable, leading to inconsistent and unprincipled results.

A. As jurists and scholars alike recognized, *Lemon* can easily be manipulated.

Lemon’s indeterminacy has been recognized by judges and academics alike for decades. Indeed, the ink was barely dry before the U.S. Supreme Court recognized that the *Lemon* test, though “clearly stated,” is “not easily applied.” *Meek v. Pittenger*, 421 U.S. 349, 358 (1975), *overruled in part by Mitchell v. Helms*, 530 U.S. 793 (2000).

1. As then-Justice Rehnquist emphasized, the difficulty in applying *Lemon* inevitably led to “unprincipled results” that caused the Supreme Court “to fracture into unworkable plurality opinions.” *Wallace v. Jaffree*, 472 U.S. 38, 110–12, 107 n.6 (1985) (Rehnquist, J., dissenting) (citing examples of cases decided by a “bare” 5-4 majority). Justice Scalia went further still, complaining that *Lemon* could be “manipulated to fit whatever result the Court aimed to achieve.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

As Justice Thomas later explained, the problem lay with the “flexibility” the Court left in applying the *Lemon* test’s prongs, rendering

the test “incapable of consistent application” and susceptible to “the personal preferences of judges.” *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring). As Justice Gorsuch later recognized, the *Lemon* test asks whether the law or government action has a secular purpose but gives little guidance for determining a law’s “purpose.” *Shurtleff v. City of Boston*, 596 U.S. 243, 277 (2022) (Gorsuch, J., concurring). It inquires into whether a law’s primary effect is to advance religion but defers to judges in determining a law’s “primary” effect and says nothing about how much advancement is too much. *Ibid.* And it bars “excessive” entanglement without clearly establishing when entanglement becomes excessive. *Ibid.* And “[m]ore than 50 years” after *Lemon*, “the answers to all these questions remain unknown.” *Ibid.*

Worse still, *Lemon* was so malleable that courts could “invoke it” to “strike down a practice” and “ignore it entirely” to “uphold a practice.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in judgment). From this malleability in application the now-famous analogy of the “ghoul in a late-night horror movie” was born. *Id.* at 398. *Lemon* can “scare” government officials when courts “wish it to do so” but be forced “to return to the tomb at will” when

courts find it inconvenient. *Id.* at 399. No wonder Justice Thomas later condemned *Lemon* as “not provid[ing] a sound basis for judging Establishment Clause claims.” *Am. Legion*, 588 U.S. at 78 (Thomas, J., concurring in the judgment).

2. Judges in lower courts also quickly soured on *Lemon*. The Sixth Circuit “profess[ed] confusion and frustration with *Lemon*’s analytical framework.” *Barnes v. Cavazos*, 966 F.2d 1056, 1063 (6th Cir. 1992) (per curiam). Judge Easterbrook characterized *Lemon* as “too plastic,” “hopelessly open-ended” and “unconstitutionally vague.” *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting).

This was a longstanding grievance. As early as 1987, Judge Easterbrook complained that since, under *Lemon* and its progeny, “everything matters,” “nothing is dispositive,” and the “elements cut in different directions,” judges were left to “do little but announce [their] gestalt.” *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (discussing *Lynch v. Donnelly*, 465 U.S. 668 (1984), a case decided under *Lemon*), *overruled in part by Woodring v. Jackson County*, 986 F.3d 979 (7th Cir. 2021). And the Third

Circuit echoed Justice Scalia’s *Lamb’s Chapel* concurrence, 508 U.S. at 398, when it concluded that the *Lemon* test never really seemed to “guide[] the Supreme Court itself” since it only came into play when it was convenient. *Freedom From Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280–81 (3d Cir. 2019).

In short, to look to the Supreme Court’s Establishment Clause jurisprudence under *Lemon* was, to borrow from Judge Newsom, to invoke “a technical legal term of art, a hot mess.” *Kondrat’yev v. City of Pensacola*, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring in judgment), *vacated and remanded for further consideration under American Legion*, 588 U.S. 917 (2019) (mem.).

3. As Justice Gorsuch also recognized in *American Legion*, “scholars of all stripes have criticized the doctrine.” *Am. Legion*, 588 U.S. at 85 (Gorsuch, J., concurring in the judgment). To list just two, Professor Jesse Choper explained that the “application of the Court’s three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis.”² And Professor Michael McConnell

² Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 680 (1980).

criticized the test as resulting in “chaos” since it allows courts freedom to “reach almost any result in almost any case.”³

B. *Lemon* does not produce coherent results because it can be manipulated.

These judges and scholars were right. Neither the U.S. Supreme Court nor the lower federal courts applied *Lemon* coherently—not because they were stupid or acting in bad faith, but because the *Lemon* test was inherently incoherent.

1. Cases involving government benefits readily illustrate the problem. For example, *Board of Education v. Allen*, the case that gave rise to *Lemon*’s first prong, permitted a state to lend textbooks to sectarian schools. 392 U.S. 236, 243–44 (1968). But *Meek v. Pittenger* later held that giving instructional material and equipment to parochial schools went too far. 421 U.S. at 364–66. The resulting incoherence was rightly mocked: “It is permissible to loan a book, but impermissible to loan a map. What about an atlas ... a book of maps?”⁴

³ Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 119 (1992).

⁴ Jeffrey M. Shaman, *Is Constitutional Jurisprudence Hostile to Religion?*, 42 DePaul L. Rev. 317, 321 (1992).

And in *Levitt v. Committee for Public Education & Religious Liberty*, the Supreme Court struck down a New York law offering reimbursements to private schools for “certain costs of testing and recordkeeping.” 413 U.S. 472, 474, 480 (1973). But a few years later, the Court upheld a statute giving state standardized tests and scoring services to private religious schools. *Wolman v. Walter*, 433 U.S. 229, 255 (1977), *overruled in part by Mitchell v. Helms*, 530 U.S. 793 (2000). Such incoherence left government officials with no guidance at all.

2. Results were no more consistent in religious symbol cases. In *Lynch v. Donnelly*, the Supreme Court upheld a religious Christmas creche that joined a larger, predominantly secular Christmas display. 465 U.S. at 679–81. But in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Supreme Court held that a Christmas creche standing alone was unconstitutional. 492 U.S. 573, 579, 598–602 (1989), *overruled in part by Town of Greece v. Galloway*, 572 U.S. 565 (2014). To complicate matters even further, in the *same case*, the Supreme Court held that a Chanukkah menorah a few blocks away from the unconstitutional creche was permissible because of its location and since “the menorah’s message is not exclusively religious.” *Id.* at 613–16. But

the Court cautioned that it was not “foreclos[ing] the possibility that the display of the menorah might” be unconstitutional in a different case or even, shockingly, “on remand.” *Id.* at 620–21. The *Lemon* “test” can thus produce inconsistent results even within a single case.

Things were no better in the federal circuits. In *American Atheists, Inc. v. Duncan*, the Tenth Circuit found that crosses placed on public property as a memorial to fallen police officers violated *Lemon*. 616 F.3d 1145, 1150 (10th Cir.), *as amended on reh’g*, 637 F.3d 1095 (10th Cir. 2010). But four judges sharply criticized that opinion for focusing on the wrong contextual details and conveyed—for different reasons than the majority despite both groups purporting to apply *Lemon*—that they would have allowed the crosses. *Am. Atheists*, 637 F.3d at 1101–02 (Kelly, J., dissenting). Likewise, the Fifth Circuit in *Murray v. City of Austin*, 947 F.2d 147, 149, 158 (5th Cir. 1991), held that the Establishment Clause permitted a city seal featuring a cross, while the Seventh Circuit in *Harris v. City of Zion*, 927 F.2d 1401, 1402, 1410–13 (7th Cir. 1991), held that the Establishment Clause forbade one.

Then come the many Ten Commandment cases. The Third Circuit applied *Lemon* when it upheld two Ten Commandment displays outside

county courthouses. See *Freethought Soc’y v. Chester County*, 334 F.3d 247, 250–51 (3d Cir. 2003); *Modrovich v. Allegheny County*, 385 F.3d 397, 411–13 (3d Cir. 2004), both abrogated by *Am. Legion*, 588 U.S. 29 (2019). But the Sixth, Tenth, and Eleventh Circuits invoked *Lemon* to strike down similarly-situated Ten Commandment monuments at government buildings as unconstitutional. See *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 490–94 (6th Cir. 2004); *Summun v. City of Ogden*, 297 F.3d 995, 1009–11 (10th Cir. 2002); *Glassroth v. Moore*, 335 F.3d 1282, 1295–97 (11th Cir. 2003).

As these cases show, *Lemon*’s malleability can lead to different results on remarkably similar facts.

II. This Court Should Decline to Adopt *Lemon* Because, In Other Areas of Law, the Court Has Valued Clear and Predictable Standards that *Lemon* Cannot Produce.

Such haphazard inconsistency is antithetical to Massachusetts law. This Court has declined, for example, to expand judicial review of arbitration awards, warning that it would undermine arbitration’s “predictability, certainty, and effectiveness.” *Katz, Nannis & Solomon, P.C. v. Levine*, 473 Mass. 784, 794 (2016) (citations omitted). Likewise, in *Roch v. Mollica*, this Court stressed the importance of “[a] consistent

common law” to guarantee “predictability.” 481 Mass. 164, 170 (2019). And the Court then used that principle as a basis to adopt a bright-line rule for transient jurisdiction. *Ibid.*

The list goes on. In another case, for example, this Court adopted a rule requiring a warrant before seeking real-time location data because, as Justice Lenk explained, “police, trial judges, prosecutors, and defense counsel are entitled to as clear a rule as possible.” *See Commonwealth v. Almonor*, 482 Mass. 35, 64 (2019) (Lenk, J., concurring) (cleaned up).

In yet another case, the Court declined to replace a longstanding brightline rule governing easements with a more flexible standard. *See Taylor v. Martha’s Vineyard Land Bank Commission*, 475 Mass. 682, 686–88 (2016). And in a different area of the law, the Court refused to reconsider a hard-and-fast rule rejecting anything other than an “exact copy” of the form provided by the Secretary of the Commonwealth in voter initiatives. *Walsh v. Sec’y of Commonwealth*, 430 Mass. 103, 103–08 (1999).

These cases spanning multiple disciplines show that, in Massachusetts, “predictability” is an important value. And it “is especially important in areas ... ‘in which reliance upon existing judicial

precedent often influences individual action.” *Roch*, 481 Mass. at 170 (citation omitted).

In the present setting, no one can doubt that the law governing religious establishment influences how government entities act. But, as the cases decided under *Lemon* show, when *Lemon* provides the governing legal framework, it can be nearly impossible for local government officials, legislators, and even judges to correctly determine what is permissible and what is not. *Lemon* is thus the very type of malleable, fact-intensive framework that this Court has long rejected in other areas of law.

No less than in federal cases, adoption of the *Lemon* framework for applying Article 3 of the Massachusetts Declaration of Rights would prove disastrous for all government officials, who must navigate the Free Exercise and Free Speech provisions of both Articles 2 and 16 of that Declaration and the federal First Amendment while keeping within state disestablishment limits. Rather than subjecting governments to “such a maze” that makes “even the most conscientious governmental officials ... guess what motives will be held unconstitutional,” this Court should strike a different path—the history and tradition test that the City

champions. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

CONCLUSION

Lemon confused courts and governments alike and produced unprincipled results in the federal courts. There is no reason to believe it would be any different in Massachusetts. This Court should thus expressly reject *Lemon* as the wrong test under art. 3 of the Massachusetts Declaration of Rights. The juice is not worth the squeeze.

Dated: April 15, 2026

Respectfully submitted,

/s/ Gene C. Schaerr

Gene C. Schaerr*

Joshua J. Prince*

SCHAERR | JAFFE LLP

1717 K Street NW, Suite 900

Washington, DC 20006

Telephone: (202) 787-1060

gschaerr@schaerr-jaffe.com

**Pro hac vice* filed

/s/ Daniel B. Winslow

Daniel B. Winslow (BBO # 541972)

PRETI, FLAHERTY, BELIVEAU &

PACHIOS, CHARTERED, LLP

60 State Street, Suite 1100

Boston, MA 02109

Telephone: (617) 226-3800

dwinslow@preti.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, I certify that the foregoing Brief of *Amicus Curiae* complies with Rules 17 and 20 and 21 .

I further certify that this brief complies with the typeface and type-style requirements of Rule 20(a)(3)(E) because it was prepared in a proportionally spaced 14-point Century Schoolbook font, and complies with the word limitation set forth in Rule 20(a)(2)(C) because, exempting portions excluded by Rule 20(a)(2)(D), it contains 3,060 words as calculated by the word-count feature of Microsoft 365 Word.

I further certify that all redactions required by Rule 21 have been made.

Dated: April 15, 2026

/s/ Daniel B. Winslow
Daniel B. Winslow (BBO # 541972)

CERTIFICATE OF SERVICE

Pursuant to Rule 13(e) of the Massachusetts Appellate Rules of Procedure, I certify that on April 15, 2026, I served the foregoing brief upon the attorneys of record for each party via the electronic filing system and via email:

James S. Timmins, jtimmins@quincyma.gov
Robert Thompson, rthompson@quincyma.gov
CITY OF QUINCY
1305 Hancock Street
Quincy, MA 02169

Joseph C. Davis, jdavis@becketfund.org
Eric C. Rassbach, erassbach@becketfund.org
Andrea R. Butler, abutler@becketfund.org
Caleb H. Angell, cangell@becketfund.org
Laura Wolk Slavis, lslavis@becketfund.org
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Avenue NW, Suite 400
Washington, DC 20006

Jessie J. Rossman, jrossman@aclum.org
Rachel E. Davidson, rdavidson@aclum.org
Suzanne Schlossberg, sschlossberg@aclum.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108

Alexandra Arnold, aarnold@clohertysteinberg.com
CLOHERTY & STEINBERG LLP
One Financial Center, Suite 1120
Boston, MA 02111

/s/ Daniel B. Winslow
Daniel B. Winslow (BBO # 541972)