No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among many others, in lawsuits across the country and around the world.

Becket has frequently litigated cases involving the Establishment Clause, as counsel for both parties and *amici curiae*. See, *e.g.*, *Kondrat'yev* v. *City of Pensacola*, 949 F.3d 1319 (11th Cir. 2020) (cross memorial in city park); *Freedom From Religion Found., Inc.* v. *County of Lehigh*, 933 F.3d 275 (3d Cir. 2019) (county seal containing Latin cross); *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) (challenge to exhibition of "Ground Zero Cross" in museum); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012) (ministerial exception rooted in both Establishment and Free Exercise Clauses); *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (Pledge of Allegiance); *New Doe Child #1* v. *United States*, 901 F.3d 1015 (8th Cir. 2018) (challenge to "In God We Trust" on currency). In particular, Becket has long opposed application of the *Lemon* test, arguing that the Establishment Clause must be applied with reference to the historical question of what constituted a religious "establishment" at the time of the Founding. See Brief of The Becket Fund for Religious Liberty as *Amicus Curiae* in

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[1] No counsel for a party authored this brief in whole or in part and no person other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Support of Petitioners, *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067 (2019) (Nos. 17-1717, 18-18); Brief of The Becket Fund for Religious Liberty as *Amicus Curiae* in Support of Petitioners, *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014) (No. 12-696) (both arguing for historical approach to Establishment Clause questions).

Becket has also represented Boise Rescue Mission Ministries in litigation concerning its Christian ministry programs. See *Intermountain Fair Housing Council* v. *Boise Rescue Mission Ministries*, 657 F.3d 988 (9th Cir. 2011). The Ninth Circuit's decision below relied on circuit precedent that found an Eighth Amendment violation by refusing to consider shelter beds at Boise Rescue Mission. *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019).

Becket offers this brief to explain that the Ninth Circuit's novel interpretation of the Eighth Amendment was made possible only by grossly misconstruing the Establishment Clause. Becket is concerned that the Ninth Circuit's standard—which categorically disregards consideration of housing at religious shelters in part due to their "overall religious atmosphere," "Christian messaging," and "Christian iconography on the shelter walls"—improperly relies on discredited reasoning from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).[2]

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[2] Becket offers no opinion on the underlying Eighth Amendment issues in this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two Terms ago, this Court explained it had "long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 535 (quoting *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014)).

But this Court's writ does not yet run throughout the land. Many lower courts continue to apply *Lemon* without mentioning *Kennedy*; others cite *Kennedy* but then apply *Lemon*; and still others claim applying *Kennedy* is too hard, and that it provides little guidance to lower courts.

The Ninth Circuit's decision below is illustrative. As part of its Eighth Amendment analysis, the Ninth Circuit deduced an alleged Establishment Clause problem. Relying on its own pre-*Kennedy* precedent—which refused to count housing at religious shelters in part because they possessed an "overall religious atmosphere," "Christian messaging," and "Christian iconography" on their "shelter walls"—the court found an Eighth Amendment violation. But the Ninth Circuit's interpretation of the Establishment Clause does not align with historical practices and understandings; if anything, it continues to rely on *Lemon* and its endorsement test offshoot.

The Ninth Circuit's error was by no means foreordained. In the two years since this Court decided *Kennedy*, other courts have easily applied the *Kennedy*

test to different fact patterns, holding that the six hallmarks of Founding-era religious establishments are the touchstone for historical-practices-and-understandings analysis. In deciding the Eighth Amendment issue, this Court should therefore reiterate that *Kennedy* meant what it said, and that lower courts, government officials, and litigants may conclude that government conduct violates the Establishment Clause only if it demonstrates the six hallmarks of historical religious establishments.

ARGUMENT

I. Lower courts—like the Ninth Circuit here—are misinterpreting the Establishment Clause.

Whether the Establishment Clause *ought* to be part of any Eighth Amendment analysis is a question beyond the scope of this brief. (We have our doubts.) But the Ninth Circuit's peculiar form of Eighth Amendment analysis incorporates an erroneous understanding of the Establishment Clause rooted in *Lemon* rather than *Kennedy*. Nor is the Ninth Circuit alone in this error: other courts continue to apply the *Lemon* framework or simply refuse to apply *Kennedy*. In ruling on the Eighth Amendment claim in this appeal, the Court should therefore expressly reject the Ninth Circuit's approach to the Establishment Clause and explain that *Kennedy*'s historical test governs.

A. Many courts are still applying *Lemon*.

Although *Lemon* is "now abrogated," *Groff* v. *DeJoy*, 600 U.S. 447, 460 (2023), many courts continue to apply it. Indeed, the reports of *Lemon*'s death have not traveled nearly far enough. Lower courts around the country continue to eschew *Kennedy*'s history-and-

tradition test in favor of the *Lemon* test. And many continue to apply *Lemon* or *Lemon*-derived precedent without any reference to *Kennedy*. See, *e.g.*, *Douglas* v. *Pearlstein*, No. 18-cv-533, 2023 WL 6379766, at *3 (D. Or. Sept. 29, 2023) (applying three-prong *Lemon* framework to reject Muslim prisoner's Establishment Clause claim related to halal diet); *Paulo* v. *Williams*, No. 19-cv-474, 2023 WL 6261480, at *8 (D. Nev. Sept. 25, 2023) (applying *Lemon* to reject Buddhist prisoner's Establishment Clause claim related to religious diet); *Monteer* v. *ABL Mgmt. Inc.*, No. 21-cv-756, 2022 WL 3814333, at *8 (E.D. Mo. Aug. 30, 2022) (applying *Lemon* to deny Muslim prisoner religious diet); *Hunter* v. *United States Dep't of Educ.*, 650 F. Supp. 3d 1104, 1127 (D. Or. 2023) (applying *Lemon* in challenge to Title IX religious exemption); *Buchanan* v. *JumpStart S.C.*, No. 21-cv-385, 2022 WL 3754732, at *10 (D.S.C. Aug. 30, 2022) (applying *Lemon* in challenge to government partnership with religious transitional house). One court stubbornly applied *Lemon* even after both citing *Kennedy* and acknowledging that this Court "long ago abandoned" *Lemon*. *Roll Call 4 Freedom, LLC* v. *City of L.A.*, No. 22-cv-1725, 2022 WL 19333281, at *9 (C.D. Cal. July 26, 2022). Another applied *Lemon* by relegating *Kennedy* to a "*but see*" citation and explaining that *Kennedy* merely "criticiz[ed] the Ninth Circuit's use of the *Lemon* test." *Abiding Place Ministries* v. *Newsom*, No. 21-cv-518, 2023 WL 2001125, at *8 (S.D. Cal. Feb. 14, 2023). See also *Williams* v. *Board of Educ. of City of Chi.*, No. 20-4540, 2023 WL 3479161, at *8 (N.D. Ill. May 16, 2023) (denying summary judgment on Establishment Clause claim because students could feel subjective pressure "to support religious aspects of the activity when they

saw others reflecting on the religiosity of the activity" (cleaned up)).

B. Some courts struggle to apply *Kennedy*.

Other courts correctly recognize that *Lemon* no longer governs, but then fail to apply *Kennedy*, or have complained that *Kennedy*'s historical analysis is difficult to apply. For example, the Fourth Circuit says that "[o]pen questions abound" as to how to apply *Kennedy*'s historical test. *Firewalker-Fields* v. *Lee*, 58 F.4th 104, 122 n.8 (4th Cir. 2023). District courts claim "there is little useful precedent to guide" them and that *Kennedy* provides "little more than * * * extremely general and abstract direction." *Virden* v. *Crawford County,* No. 23-cv-2071, 2023 WL 5944154, at *4 (W.D. Ark. Sept. 12, 2023); see also *Huck* v. *United States*, No. 22-cv-588, 2023 WL 6163615, at *8 (D. Utah Sept. 21, 2023) (describing *Kennedy*'s test as "relatively unchartered [sic] waters"); *Miller* v. *Marshall*, No. 23-cv-304, 2023 WL 4606962, at *7 (S.D. W. Va. July 18, 2023) (claiming that post-*Kennedy* "Establishment Clause jurisprudence is hardly a paragon of clarity"). Some prominent scholars and commentators have asserted that *Kennedy*'s holding about historical practices and understandings is "cryptic" and "unclear." Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy: *The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 435, 477 (2023); see also Richard A. Epstein, *Unnecessary Church-State Confusion*, Hoover Institution: Defining Ideas (July 25, 2022), https://perma.cc/GEK5-8CR2 (*Kennedy* "unceremoniously buried the *Lemon* test, but without developing a different test, beyond making a now-fashionable bow toward the 'original meaning and history'" of the Establishment Clause).

C. The Ninth Circuit did not apply *Kennedy* but instead applied circuit precedent rooted in *Lemon*.

The Ninth Circuit's decision is of a piece with these other decisions because its reasoning relied on *Lemon*'s mode of analysis rather than *Kennedy*'s historical test. The Ninth Circuit imported a *Lemon*-based Establishment Clause test into its Eighth Amendment analysis, Pet. App. 19a, relying exclusively on a recent decision of its own, *Martin* v. *City of Boise*, which discounted any beds in shelters that had a "religious atmosphere," meaning in part "Christian messaging on the shelter's intake form" and "Christian iconography on the shelter walls," 920 F.3d 584, 609-610 (9th Cir. 2019). *Martin*, in turn, leaned on a single circuit decision, *Inouye* v. *Kemna*, to interpret the Establishment Clause, and *Inouye* used *Lemon*'s framework. See *ibid.* (applying *Inouye* v. *Kemna*, 504 F.3d 705, 712-713 & n.7 (9th Cir. 2007)); see also City Br. 46 (describing *Martin*'s provenance in *Lemon*).

Instead of recognizing that this line of Circuit precedent had been abrogated along with its progenitor *Lemon*, the Ninth Circuit offhandedly declared that "shelters with a 'mandatory religious focus'" cannot "be counted as available due to potential violations of the First Amendment's Establishment Clause." Pet. App. 19a. The court did not bother to explain what it meant by a "mandatory religious focus," nor why merely "potential violations" are sufficient. Instead, it relied solely on its prior decision in *Martin* v. *City of Boise* to justify excluding religious shelters. *Ibid.*

II. The Establishment Clause must be interpreted according to "historical practices and understandings."

A. *Kennedy* explained the historical practices and understandings standard.

Courts and commentators—including the Ninth Circuit—have not heeded *Kennedy*'s guidance. What was that guidance? "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece*, 572 U.S. at 576). The Court went on to explain that a "historically sensitive understanding of the Establishment Clause" requires assessing whether governmental conduct bears certain "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.* at 537 & n.5. This Court then explained the substance of those "hallmarks" in footnote 5 of its decision.

In that footnote, this Court specifically relied on three authorities—Justice Scalia's dissent in *Lee* v. *Weisman*, Justice Gorsuch's concurrence in *Shurtleff* v. *City of Boston*, and Professor Michael McConnell's seminal 2003 law review article, *Establishment and Disestablishment at the Founding*. See *Kennedy*, 597 U.S. at 537 n.5 (relying on *Lee* v. *Weisman*, 505 U.S. 577, 640-642 (1992) (Scalia, J., dissenting), *Shurtleff* v. *City of Boston*, 596 U.S. 243, 285-287 (2022) (Gorsuch, J., concurring in judgment), and Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110-12, 2131 (2003)).

The part of Justice Scalia's dissent cited in *Kennedy*'s footnote 5 introduced the idea of "hallmarks" of "historical establishments of religion." *Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("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*."). Similarly, the part of Justice Gorsuch's *Shurtleff* concurrence relied on by the Court walked through Professor Michael McConnell's discussion of six "hallmarks" of historical religious establishments. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment) (citing McConnell, 44 Wm. & Mary L. Rev. at 2131-2181).

The *Shurtleff* concurrence explained that "founding-era religious establishments" possessed certain "telling traits":

1. First, the government exerted control over the doctrine and personnel of the established church.
2. Second, the government mandated attendance in the established church and punished people for failing to participate.
3. Third, the government punished dissenting churches and individuals for their religious exercise.
4. Fourth, the government restricted political participation by dissenters.
5. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches.

6. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.

Shurtleff, 596 U.S. at 285-286 (Gorsuch, J., concurring in judgment) (citing McConnell, 44 Wm. & Mary L. Rev. at 2131-2181).

"Most"—but not all—of these historical hallmarks were problematic because they "reflect[ed] forms of coercion regarding religion or its exercise." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment) (cleaned up); see also Michael W. McConnell, *The Supreme Court And The Cross*, Hoover Institution (Mar. 1, 2019), https://perma.cc/RQ84-RT2V ("The historical test includes coercion, because so much of the historic establishment of religion was coercive."). Accordingly, under the historical approach as described in *Kennedy*, the government cannot "'make a religious observance compulsory,'" "'coerce anyone to attend church,'" or "force citizens to engage in 'a formal religious exercise.'" *Kennedy*, 597 U.S. at 537 (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), and *Lee*, 505 U.S. at 589). Indeed, "coercion *along these lines* was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537 (emphasis added).[3]

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[3] Importantly, whether government conduct violates the Establishment Clause cannot be reduced to a mere coercion inquiry. See *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment); McConnell, *The Supreme Court And The Cross* (the historical test "is far more textured than merely a coercion test. It includes government action that favors one religion over another,

In contrast to the decision below, some courts have had no trouble understanding and following *Kennedy*'s instruction. For example, in *Hilsenrath ex rel. C.H.* v. *School Dist. of Chathams*, the district court rejected an Establishment Clause challenge to teaching (in a non-devotional way) about Islam in a world history survey course. No. 18-cv-966, 2023 WL 6806177, at *6 (D.N.J. Oct. 16, 2023). The district court held that the "'hallmarks' of an Establishment Clause violation may be found at the *Kennedy* majority decision footnote 5," which serves as a "cipher" for understanding "how the Court interprets the Establishment Clause by reference to history and tradition." *Ibid.* (quoting Daniel L. Chen, Kennedy v. Bremerton School District: *The Final Demise of* Lemon *and the Future of the Establishment Clause*, 21 Harv. J.L. & Pub. Pol'y Per Curiam 9 (2022)). The district court went on to hold that "these six hallmarks of founding-era religious establishments" are the "guiding principles for Establishment Clause jurisprudence." *Id.* at *6 n.14. Other lower courts have similarly gotten the Court's message in *Kennedy*. See, *e.g.*, *Rogers* v. *McMaster*, --- F. Supp. 3d ---, No. 19-cv-1567, 2023 WL 7396203, at *11-12 (D.S.C. Sept. 29, 2023) (applying "hallmarks" of "founding-era religious establishments"); *Maddonna* v. *United States Dep't of Health & Hum. Servs.*, --- F. Supp. 3d ---, 2023 WL 7395911 (D.S.C. Sept. 29,

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that involves the government in doctrinal or ecclesiological issues, that invests religious bodies with political power, and much more. In short, a historical approach is bounded and objectively administrable, but not as narrow as 'coercion' or as subjective as 'endorsement.'"); Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 Iowa L. Rev. 2097, 2105 (2023) ("Notably, not all of these hallmarks involve coercion.").

2023) ("'[F]ounding-era religious establishments often bore certain telling traits.'" (quoting *Shurtleff*, 596 U.S. at 285-286) (Gorsuch, J., concurring in judgment) (cleaned up)); *Pendleton* v. *Jividen*, No. 22-cv-178, 2023 WL 2591474, at *11 (S.D. W. Va. Mar. 21, 2023) (identifying hallmarks of historical establishments, including government sponsorship of religious exercise, coercing or punishing dissenting worship, and formally preferring one religion over another).

B. Under *Kennedy*, a law violates the Establishment Clause only when it shares common "hallmarks" of historical establishments.

At the Founding, an establishment of religion had a well-defined meaning. *Shurtleff*, 596 U.S. at 285 (Gorsuch, J., concurring in judgment). "[V]irtually every American—and certainly every educated lawyer or statesman—knew from experience what those words meant." McConnell, 44 Wm. & Mary L. Rev. at 2107.

Nine of the thirteen colonies had religious establishments, and the Founders were familiar with the centuries-old establishment in England. McConnell, 44 Wm. & Mary L. Rev. at 2107. These establishments varied in their particulars—some narrowly established a single denomination and harshly punished dissenters, while others broadly supported multiple denominations and were more tolerant of dissent. *Id.* at 2131-2180.

But importantly, all established churches shared six common characteristics or "hallmarks" described above. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). And under *Kennedy*'s historical

inquiry, governmental conduct violates the Establishment Clause only when it shares a historical analogue with these six hallmarks of religious establishments. Those six hallmarks can be summed up:

1. Control over doctrine and personnel of the church

The first hallmark of a religious establishment is state control over the established church. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). At the time of the Founding, state control manifested itself in ways that are startling to modern eyes: the control of religious doctrine and the appointment and removal of religious officials. McConnell, 44 Wm. & Mary L. Rev. at 2132.

In the Church of England, Parliament determined the articles of faith, approved the Book of Common Prayer, established the King as head of the church, and required all ministers to accept established doctrine. The early colonies adopted similar practices. In Virginia, the General Assembly required that worship be conducted only in accordance with the canons of the Church of England—as prescribed by the British Parliament—and ministers had to be approved by the governor. See 1 William Blackstone, *Commentaries on the Laws of England* *364-383; see also Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011).

In many colonies, the power of appointment and removal also ended up in government hands, creating "a religious climate subservient to, and supportive of, the local aristocratic order." McConnell, 44 Wm. &

Mary L. Rev. at 2140-2141; see also *Hosanna-Tabor*, 565 U.S. at 182-183 (reviewing the historical "background" against which "the First Amendment was adopted"); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2061-2062 (2020) (surveying English and early colonial history for examples of governmental control of religious offices). This control over ministerial selection was a crucial element of establishment the Founders sought to avoid. *Hosanna-Tabor*, 565 U.S. at 183.

2. Compelled church attendance

Another hallmark of a religious establishment is compulsory church attendance. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). Prior to the Founding, England fined those who failed to attend Church of England worship services. McConnell, 44 Wm. & Mary L. Rev. at 2144. The colonies quickly followed. *Ibid.* Virginia's earliest settlers attended twice-daily services on pain of losing daily rations, whipping, and six months of hard-labor imprisonment. George MacLaren Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 512-515 (Burt Franklin 1970) (1902); Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion"); McConnell, 44 Wm. & Mary L. Rev. at 2145-2146.

3. Punishment for dissenting worship

The third hallmark of a historical establishment consists of laws restricting and punishing worship by

dissenting religious groups. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). Under the guise of heresy laws, English law targeted the practices of Puritans, Baptists, Presbyterians, and especially Catholics. McConnell, 44 Wm. & Mary L. Rev. at 2160-2161.

Massachusetts notoriously enacted similar provisions after the Puritans fled England. Massachusetts persecuted and banished dissenters who refused to adopt the established church's beliefs, including the validity of infant baptism. McConnell, 44 Wm. & Mary L. Rev. at 2161-2162. It also whipped, mutilated, and hanged individuals who did not subscribe to Puritan religious beliefs. *Id.* at 2162. Several colonies banned Catholic churches altogether. *Id.* at 2166. And Virginia imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm" and horse-whipped others for the same offense. *Id.* at 2118, 2166. In fact, "[s]eeing Baptist ministers in jail inspired the young James Madison * * * to write his first impassioned encomium to religious liberty in a letter to his college friend William Bradford." Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 24 (2023).

4. Restrictions on political participation

The fourth hallmark of a religious establishment is the restriction of political participation based on religious affiliation or lack thereof. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). At the time of the Founding, English law allowed only Anglicans to hold public office and vote. McConnell, 44 Wm. & Mary L. Rev. at 2176-2177. Similar restrictions

on officeholding were also common in colonial America. *Ibid.* And most colonies imposed religious restrictions on the right to vote. These policies included negative restrictions, such as denying the franchise to certain denominations, as well as affirmative restrictions, such as extending the franchise only to members of defined denominations. Chapman & McConnell, *Agreeing to Disagree* 27.

5. Financial support of the established church

The fifth hallmark of a religious establishment is public financial support of the established church, "often in a way that preferred the established denomination over other churches." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). At the Founding, this support took many forms—from compulsory religious taxes raised solely for the support of churches and ministers (so-called "tithes") to direct grants from the public treasury, to specific taxes, to land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147-2148, 2152. Land grants, the most significant form of public support, provided not only land for churches and parsonages but also income-producing land that ministers used to supplement their income. *Id.* at 2148.

Importantly, the fifth hallmark does not forbid "nondiscriminatory public financial support for religious institutions alongside other entities." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment) (citing *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260-2263 (2020); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 466-467 (2017); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 662-663 (2002)); see also *Carson* v. *Makin*,

596 U.S. 767, 780 (2022). Rather, "[b]oth before and after the ratification of the First Amendment, the federal government and virtually every state that ended church taxes also funded religious activity." Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111, 117 (2020). "Even denominations * * * which were in the vanguard of disestablishmentarianism * * * sought and received legislative grants for support of their colleges and seminaries." Chapman & McConnell, *Agreeing to Disagree* 119. "[T]he most vocal opponents of the Virginia assessment, for example, supported public subsidies for denominational schools even as they dismantled the old establishment." *Ibid.*

This "pervasive" historical practice makes clear that "where the government's interest in providing funding rested on something other than financing religion for its own sake," it was "wholly unobjectionable." Storslee, 169 U. Pa. L. Rev. at 117, 185-186; see also Stephanie H. Barclay, Brady Earley, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 558 (2019) (similar). In fact, many of the Founders "argued that *refusing* to fund certain schools because of their religious activity was a form of discrimination." Storslee, 169 U. Pa. L. Rev. at 119, 191. And many Founding-era citizens believed denying funding for schools solely because of their religious activity was prohibited, as "such denials functioned as a penalty on religious practice" in violation of constitutional guarantees. *Id.* at 191; accord *Carson*, 596 U.S. at 789.

6. Use of the church for governmental functions

The final hallmark of a religious establishment is a church's near "monopolistic control over civil functions." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in judgment). At the Founding, States used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. McConnell, 44 Wm. & Mary L. Rev. at 2169-2176 (explaining that duties of church officials in colonial Virginia included reporting misdemeanors such as drunkenness, adultery, and slander). Thus, at certain points in state history, New York prohibited individuals from becoming schoolmasters without a license from the church; Virginia ministers were tasked with keeping vital statistics; and Anglican colonies like South Carolina recognized only those marriages that were performed in an Anglican church. *Id*. at 2173, 2175.

This sixth hallmark makes sense of this Court's precedents. For example, the statute giving churches power to veto liquor licenses in *Larkin* v. *Grendel's Den, Inc.* was unconstitutional because it granted monopolistic control over civil functions. 459 U.S. 116 (1982); see also *Shurtleff*, 596 U.S. at 286 (Gorsuch, J,, concurring in judgment). But at the same time, this Court has upheld the ability of religious organizations to perform important civil functions like foster care where other secular options are generally available. See *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021).

* * *

There is abundant historical evidence of what constituted an "establishment of religion" at the time of the Founding. *Shurtleff*, 596 U.S. at 287 (Gorsuch, J., concurring in judgment); McConnell, 44 Wm. & Mary L. Rev. at 2110-2180. *Kennedy*'s historical test therefore gives courts an objective and narrowly defined task: determine whether the challenged governmental practice shares the six hallmarks of an establishment at the time of the Founding.

III. Rightly interpreted, the Establishment Clause does not support the Ninth Circuit's Eighth Amendment analysis.

Here, enforcement of Grants Pass's camping ordinances does not share any of the hallmarks of an establishment. The Ninth Circuit noted that one private shelter in Grants Pass required residents to attend chapel and church services, reasoning that it would be a "potential violation[] of the First Amendment's Establishment Clause" to count shelters with a "mandatory religious focus" as an alternative to camping. Pet. App. 19a, 21-22a. According to the Ninth Circuit, this would effectively "coerce an individual to attend religion-based treatment programs" "via the threat of prosecution." *Martin*, 920 F.3d at 610.

But this confuses private and state action. To be sure, state coercion "*by force of law and threat of penalty*" to attend religious services is a hallmark of an establishment. *Lee*, 505 U.S. at 640 (Scalia, J., dissenting), cited in *Kennedy*, 597 U.S. at 537 n.5. If the government coerced someone in its custody to attend religious services, that would violate the Establishment Clause. See, *e.g.*, *Erie* v. *Hunter*, No. 21-cv-267, 2023

WL 3736733, at *7 (M.D. La. May 31, 2023) ("obvious" that "a state employee cannot compel a civil detainee to attend a Christian worship service over his express objection and under threat of penalty"). Likewise if the government required someone to attend religious services as a condition of parole. See *Janny* v. *Gamez*, 8 F.4th 883, 908 (10th Cir. 2021) (collecting cases rejecting the *Lemon* test in this context).

Here, however, Grants Pass does not compel anyone to be present anywhere, much less at religious services; it simply restricts the ability to camp or sleep in outdoor spaces. It does not prescribe whether an individual goes to a shelter, gets a hotel room, leaves town, or makes other arrangements. Nor does Grants Pass prescribe how individuals must conduct themselves when they use these or other options. The mere fact that one private shelter among all possible alternatives requires religious services is not attributable to the government. Thus, this hallmark of a historical establishment is not present.

* * *

The Ninth Circuit's way of analyzing the Establishment Clause is long on *Lemon* and short on text, history, and tradition. *Kennedy* warned against letting "concerns about phantom constitutional violations" distort other doctrines of constitutional law. 597 U.S. at 543. And in different circumstances, the Court has advised governments that they may not categorically "disqualify" religious institutions "solely because they are religious." *Carson*, 596 U.S. at 780. The Ninth Circuit's flat "disqualif[ication]" of religious shelters here, *ibid.*, based on hastily drawn findings of "constitutional violations," *Kennedy*, 597 U.S. at 543, flouts

these principles and pays little heed to *Kennedy*'s historical test.

CONCLUSION

The Court should expressly reject the Ninth Circuit's construction of the Establishment Clause and reiterate that lower courts should apply *Kennedy*'s historical test instead. And it should analyze the relationship between Grants Pass and the religious shelter, if at all, only in light of historical practices and understandings.

Respectfully submitted.

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