No. 24-1261

IN THE
Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOL, INC.,
Petitioner,
v.
FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Jewish Coalition for Religious Liberty (JCRL) submits this brief as *amicus curiae* in support of Petitioner.[1]

JCRL is a non-denominational organization of Jewish communal and lay leaders seeking to protect the ability of Americans to freely practice their faith. Since its founding, JCRL has recruited a volunteer network of accomplished attorneys, submitted legal briefs, and written op-eds in Jewish and general-media outlets in defense of religious liberty.

As a group representing adherents to a minority religion, JCRL has a profound interest in ensuring that Establishment Clause jurisprudence nurtures, rather than stifles, the diversity of religious viewpoints and practices in the United States. To that end, JCRL urges the Court to grant certiorari in this case to repudiate the endorsement test and reaffirm that government speech need not be sanitized of religious content to comply with the Establishment Clause.

INTRODUCTION

Despite this Court's instruction in *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022), federal courts continue to use the discredited endorsement test, whereby a government violates the Establishment Clause if a reasonable observer might construe the government's speech or conduct as an

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amicus curiae*'s intent to submit this brief at least ten days before it was due.

endorsement of religion. By mistakenly applying that element of the *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) regime that *Kennedy* buried, lower courts create needless hostility toward requests for religious accommodation. The Court should grant certiorari in this case to clarify that the First Amendment does not require governments to sanitize their activities of religious content.

This case typifies the problem. Respondent refused to accommodate a communal prayer as part of the opening ceremonies of a football championship game between two private Christian schools because Respondent was afraid of giving "the impression that it was endorsing the prayer by allowing the use of its PA system." Pet. App. 200a-201a. The opinion below then validated Respondent's concerns by stating that such accommodations could "lead to a violation of the Establishment Clause." Pet. App. 51a n.12.

That is wrong. There is no requirement of secularism in government speech. The Establishment Clause is no longer understood to " 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.' " *Kennedy*, 597 U.S. at 535 (quoting *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment)). "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*. (quoting *Town of Greece* v. *Galloway*, 572 U.S. 576 (2014)). And our national tradition has long permitted religious government speech.

The Court should step in to bury the endorsement and related offended-observer tests for good. Their

ongoing use, even if limited and mistaken post-*Kennedy*, causes governments to bristle at even benign requests for religious accommodation, placing them out of step with the best of our traditions. *See, e.g.*, Caramia Valentin, *AGREEMENT REACHED: Controversy surrounding temple's request to add a Menorah to New Bern Christmas display ends*, SUN J. (Nov. 17, 2023), https://perma.cc/93H4-DA7J (city government struggling to decide whether a menorah is too religious to include in a holiday display). Undue sensitivity to an easily offended observer's estimation of what is religious and what is secular also disproportionately disadvantages religious minorities, whose symbols and practices tend to stand out as unambiguously religious. That poses a very real problem for Jewish communities that depend on government accommodation of religious practices that are unfamiliar to many Americans.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CONFIRM THAT THE GOVERNMENT MAY LAWFULLY ENGAGE IN RELIGIOUS EXPRESSION.

A. Government Religious Expression Is Consistent With The Nation's History And Traditions.

1. The Court's *Lemon* decision attempted to encapsulate in a three-part framework "the cumulative criteria developed by the Court over many years" of Establishment Clause jurisprudence. 403 U.S. at 612. After *Lemon*, courts faced with an establishment claim were to evaluate whether a challenged government action had a "secular legislative purpose," whether its "effect" was nonreligious, and whether it

"entangle[d]" the government with religion. *Id*. at 612-613.

The endorsement test was born a few years later when, under *Lemon*'s effect prong, some Justices began to ask whether a reasonable observer would infer from the government's actions that "the State itself is endorsing a religious practice or belief." *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *see also County of Allegheny* v. *American Civ. Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989); *id*. at 630, 632, 635 (O'Connor, J., concurring in part and concurring in the judgment); *id*. at 642-643 (Brennan, J., concurring in part and dissenting in part); *id*. at 668, 676-677 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Lemon's attempt "to devise a one-size-fits-all test for resolving Establishment Clause disputes" "produced only chaos." *Shurtleff* v. *City of Boston*, 596 U.S. 243, 277 (2022) (Gorsuch, J., concurring in the judgment). Rather than drawing principled constitutional lines, *Lemon* sowed confusion in lower courts and raised the possibility that government activity would be denounced based solely on "perceptions" or "discomfort." *Kennedy*, 597 U.S. at 534 (quoting *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)). *Lemon* also "bypassed any inquiry into the [Establishment] Clause's original meaning," leading courts to hold unlawful time-honored American practices like the display of a cross, menorah, or religious figure on government property. *Shurtleff*, 596 U.S. at 277 (Gorsuch, J., concurring in the judgment).

The Court has rightly "abandoned *Lemon* and its endorsement offshoot" as "ahistorical." *Kennedy*, 597 U.S. at 534. "[*Kennedy*] put to rest any question about *Lemon*'s vitality" and "claims alleging an establishment of religion must [now] be measured against the Constitution's original and historical meaning, not the sensitivities of a hypothetical reasonable observer." *City of Ocala* v. *Rojas*, 143 S. Ct. 764, 765 (2023) (Gorsuch, J., statement respecting denial of certiorari). The operative question is "whether the challenged practice fits 'within the tradition' of this country." *American Legion* v. *American Humanist Ass'n*, 588 U.S. 29, 86 (2019) (Gorsuch, J., concurring in the judgment); *accord Town of Greece*, 572 U.S. at 577.

2. Religious government speech is consistent with the country's traditions. This Court has long recognized that we are a "religious people whose institutions presuppose a Supreme Being." *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)). For the past two-and-a-half centuries, not only has religion "been closely identified with our history and government," *Zorach*, 343 U.S. at 312, but government-sponsored religious expression has been woven into "the fabric of our society." *Id*.

That history shows that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690 (plurality opinion). The Constitution does not "oblige government to avoid any public acknowledgment of religion's role in society" or "require eradication of all religious symbols in the public realm." *Salazar* v. *Buono*, 559 U.S. 700, 718-719 (2010) (plurality opinion).

The Court should correct that misconception and explain that the "hallmark of historical establishment[] of religion" is "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis omitted).

a. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984).

The First Congress, in reenacting the Northwest Territory Ordinance of 1787, affirmed that religion "shall forever be encouraged" because it is "necessary to good government and the happiness of mankind, schools and the means of education." *American Legion*, 588 U.S. at 61. That same Congress, in the same week it approved the Establishment Clause, commenced a centuries-long tradition of "pa[ying] chaplains" to facilitate prayer in "the House and Senate." *Id.*; *see also* Office of the Chaplain, First Prayer of the Continental Congress, UNITED STATES HOUSE OF REPRESENTATIVES (Sept. 7, 1774), https://perma.cc/9ZEV-45YQ; Office of the Chaplain, Opening Prayer, UNITED STATES HOUSE OF REPRESENTATIVES (June 13, 2025), https://perma.cc/R55C-9A89. "[T]he Framers considered legislative prayer a benign acknowledgment of religion's role in society." *Town of Greece*, 572 U.S. at 576. The practice serves "to solemnize congressional meetings, unifying those in attendance as they pursue[] a common goal of good governance." *American Legion*, 588 U.S. at 61.

President George Washington issued a "Thanksgiving Proclamation" during his first year in office—a tradition that "almost all our Presidents" continued.

Lynch, 465 U.S. at 675 n.2. Subsequent presidents have issued proclamations honoring non-Christian faiths, acknowledging, among other holidays, the Jewish High Holy Days. *See id*. at 677.

Other presidential "[e]xamples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound," including in presidential speeches, statements, and proclamations. *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, J., concurring in the judgment). President Washington's farewell address described religion and morality as " 'indispensable supports' to 'political prosperity.' " *American Legion*, 588 U.S. at 61 (quoting Farewell Address (1796), in 35 THE WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed. 1940)). And modern presidents remain in the habit of asking for divine blessing on the Nation. *See*, *e.g.*, Remarks by President Biden During Service at Royal Missionary Baptist Church | North Charleston, SC, THE WHITE HOUSE (Jan. 19, 2025), https://perma.cc/N2AS-LWPS ("God bless you all. And may God protect our troops."); Presidential Message on Pentecost, THE WHITE HOUSE (June 8, 2025), https://perma.cc/9UFW-B3TV ("May God bless you, and may He continue to bless the United States of America.").

There is also "convincing evidence that it was common for Founding-era Justices to preside over court-term-opening ceremonies at which chaplains delivered prayers," that "those Justices also personally delivered short, ecumenical supplications in charges to grand jurors and, sometimes, in their judicial opinions," and that "federal courts have recited from the Founding to the present" "short, ecumenical

supplications" in court. *Freedom From Religion Found.* v. *Mack*, 49 F.4th 941, 957 (5th Cir. 2022).

Some religious content transcends any one branch of government. The motto "In God We Trust," inscribed on the Nation's currency, has been upheld as "consistent with historical practices," *New Doe Child #1* v. *United States*, 901 F.3d 1015, 1023 (8th Cir. 2018), and a permissible "reference to our religious heritage," *Lynch*, 465 U.S. at 676. "Judged by historical standards," this and other religious government mottos "no more represent[] a step toward an establishment of religion than does" this Court's "practice of opening each session of court with a crier's recitation of the set piece that concludes . . . 'God save the United States and this Honorable Court.' " *American Civ. Liberties Union of Ohio* v. *Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001).

The "use of 'so help me God' in oaths for government officials is deeply rooted in the Nation's history and tradition" as well. *Newdow* v. *Roberts*, 603 F.3d 1002, 1018 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment). "State constitutions in effect at the ratification of the First Amendment similarly included 'so help me God' in state officials' oaths of office," and those words "remain to this day a part of oaths prescribed by law at the federal and state levels." *Id*.

Governmental use of religious symbols also permeates the historical record and contemporary practice. Both "the founding generation, as well as the generation that ratified the Fourteenth Amendment," would have considered it "commonplace" to display "a religious symbol on government property." *American Legion*, 588 U.S. at 76 (Thomas, J., concurring in the

judgment). Yet "[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment." *Shurtleff*, 596 U.S. at 287 (Gorsuch, J., concurring in the judgment) (quoting M. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 107 (2019)).

The government's use of religious symbols, like the government's use of religious speech, remains ongoing. "There are countless . . . illustrations of the Government's acknowledgment of our religious heritage" in the form of "graphic manifestations of that heritage." *Lynch*, 465 U.S. at 677. "The very chamber in which oral arguments" in this Court are heard "is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments." *Id*. Next door are "statues of Moses and the Apostle Paul . . . in the Library of Congress." *American Legion*, 588 U.S. at 88 (Gorsuch, J., concurring in the judgment). Just a few blocks down Pennsylvania Avenue are yet more "depictions of the Ten Commandments found in the Justice Department and the National Archives." *Id*. "[C]rosses . . . can be found in the U.S. Capitol building." *Id*. And all that is "mere steps" from where this Court sits on One First Street. *Id*.

"The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to 'roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine.' " *Shurtleff*, 596 U.S. at 287 (Gorsuch, J., concurring in the judgment) (quoting *American Legion*, 588 U.S. at 56). To suggest "that the First

Amendment commands 'a brooding and pervasive devotion to the secular[]' . . . simply perverts our history." *Capitol Square*, 243 F.3d at 300 (quoting *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 213 (1963)). "If our history demonstrates anything, it demonstrates that '[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.' " *Id.* (quoting *Chaudhuri* v. *Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997)).

b. Although the First Amendment does not require banishment of religion from the public square—"[s]uch absolutism [being] inconsistent with our national traditions," *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment)—it does prohibit "actual legal coercion." *American Legion*, 588 U.S. at 73 (Thomas, J., concurring in the judgment). "It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise." *Town of Greece*, 572 U.S. at 586 (quotation marks omitted).

But mere "offense" does not constitute coercion. *Id.* at 589 ("[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views."). To suggest that the Establishment Clause was concerned with curbing government speech that the public prefers "not [to] hear and in which they need not participate," *id.* at 590, is to disregard a major "animating purpose" behind the nation's founding: to escape religious-based "harassment and persecution." M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2186 (2003).

The Court should redirect overzealous anti-establishment concerns to those "telling traits" of an Establishment Clause violation that are supported by constitutional history. *Shurtleff*, 596 U.S. at 285-286 (Gorsuch, J., concurring in the judgment). Beyond the obvious prohibition against establishing an official church, our national tradition recoils from government control over religious doctrine or personnel, mandated church attendance, punishment of heterodoxy, religious qualifications for public office or political participation, financial support for a favored church, and use of a particular church to carry out civil functions. *See id*. (citing M. McConnell, *Establishment and Disestablishment at the Founding*, *supra*, at 2110-2112, 2131); *American Legion*, 588 U.S. at 76 (Thomas, J., concurring in the judgment). These, not mere participation in religious expression, are the "hallmarks" of a religious establishment. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in the judgment).

B. Local Government Officials And Federal Courts Nonetheless Continue To Assume That The Government May Not Engage In Religious Expression, And This Court Should Grant Review To Set Them Straight.

1. While things have improved following the *Kennedy* decision, *Lemon*'s reasonable-observer test continues to stalk Establishment Clause jurisprudence "[l]ike some ghoul in a late-night horror movie." *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). Even after *Kennedy*, courts and local government officials regularly take it as given that

governments may not engage in or support religious expression because such expression could be construed as an endorsement of religion.

Take *Rojas* v. *City of Ocala*, 739 F. Supp. 3d 1068 (M.D. Fla. 2024). City officials joined local faith communities to organize a prayer vigil in the wake of a violent crime spree, and a group of atheists sued to challenge the municipality's promotion and sponsorship of the vigil. *Id*. at 1070. Although the court concluded that no one was "coerced" into participating, it nevertheless held that the vigil violated the Establishment Clause based on its erroneous view that the "government should not be a prime participant in religious debate *or expression*." *Id*. at 1084 (emphasis added). Echoing the reasonable-observer test, the court was specifically concerned about government "endorsement of religion." *Id*. at 1090.

In *Hittle* v. *City of Stockton*, city officials tried to evade Title VII liability for their decision to terminate their Fire Chief by "invoking vague notions of avoiding the endorsement of religion." 101 F.4th 1000, 1029 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc). The officials' termination decision was based—at least in part—on the Fire Chief's attendance at a religious leadership conference on city time and while using a government vehicle. *Id*. Although it was normal for Fire Department officials to attend leadership conferences in their work vehicles during work hours, the city officials concluded that the Fire Chief was wrong to attend that particular conference "because the City is not permitted to further religious activities." *Id*. at 1030.

The city's zeal to avoid religious endorsement caused it to treat religion as if it were toxic or uniquely

distasteful. But it was acting "on a mistaken view that it had a duty to ferret out and suppress religious observances." *Id*. at 1020 (quoting *Kennedy*, 597 U.S. at 544). "If such logic had any remaining purchase before *Kennedy*, it certainly shouldn't have [] any now." *Id*. Yet the Ninth Circuit appeared to credit the " 'concern[] that the City could violate constitutional prohibitions' in this way as 'legitimate.' " *Id*. at 1029; *see also id*. at 1020 ("[N]otwithstanding the Supreme Court's repeated attempts to rid our Establishment Clause jurisprudence of the endorsement test, it apparently lives on in the Ninth Circuit.").

Several courts have expressly suggested that the reasonable-observer test may still be good law. *See*, *e.g.*, *White* v. *Hamilton Cty. Gov't*, No. 1:19-cv-304, 2023 WL 11979765, at *12 n.13 (E.D. Tenn. Mar. 29, 2023) ("It is not entirely clear from *Kennedy* whether the Supreme Court repudiated th[e] 'reasonable observer' test."); *Roll Call 4 Freedom, LLC* v. *Los Angeles*, No. 22-cv-1725, 2022 WL 19333281, at *9 n.9 (C.D. Cal. July 26, 2022) (suggesting that *Kennedy* "clearly criticized" but did not "entirely discard[]" "*Lemon*'s 'endorsement test' "). By reinforcing the "spurious" yet persistent view that local governments may not constitutionally engage in religious expression, *Shurtleff*, 596 U.S. at 280 (Gorsuch, J., concurring in the judgment), cases like these risk misleading government officials, who likewise continue to be driven by the reasonable-observer test.

2. Even outside of litigation, governments seem to be motivated by the reasonable-observer test *Kennedy* abrogated. When New Bern, North Carolina's Jewish community asked to include a menorah alongside other holiday decorations in the local holiday

exhibition, city officials initially rejected the request because they thought the Establishment Clause forbid the government from displaying religious symbols. William C. Duncan, *Ambiguous rulings about holiday displays leave local governments on uncertain ground*, SUTHERLAND INST. (Dec. 18, 2023), https://perma.cc/UP5P-PLBG. The city ultimately reversed course, but only because it concluded that the menorah could be seen as both a secular and religious object. Valentin, *supra*. That is still thinking in terms of the imagined dilemma posed by the reasonable-observer test. The city continued to operate under the flawed premise that the Establishment Clause did not permit its speech to be alloyed by religious expression.

The Waterville School District in upstate New York refused a student's request to start a Bible club after the District's lawyers advised that "recognizing a religious club would unconstitutionally 'endorse' religion." Sarah Wagner, *Student Permitted to Form Bible Club After Previous Denial*, AM. FAITH (Dec. 6, 2024), https://perma.cc/8KVJ-ZXDK. The school backtracked only when a religious-liberty legal organization sent a letter pointing out that this Court's *Kennedy* decision rendered the lawyers' advice "legally incorrect." *Id*.

A teacher in Loudoun County, Virginia was prohibited from including a Bible verse in her email signature block even though other teachers were permitted to add nonreligious personal and political messages to their signature blocks. Nick Minock, *Loudoun County Public Schools bans teacher from using Bible verses in email signature*, ABC 7 NEWS (Apr. 12, 2023), https://perma.cc/5W4S-A9KD. The school district incorrectly thought the Establishment Clause required it "to

refrain from any communication that could be perceived as the school division's official endorsement of any particular religion." Faith Perkins, *Loudoun County teacher banned from putting Bible verse in email signature*, THE LION (Apr. 20, 2023), https://perma.cc/LQ3Q-V83H.

3. The reasonable-observer test reared its head again in this very case. The Florida High School Athletic Association (FHSAA), a state-created entity that organizes and regulates a high school athletics league for public and private schools, denied a request by two Christian schools to use the public-address system for a pregame prayer at a FHSAA-sponsored championship game because the FHSAA believed that it " 'could be seen as endorsing or promoting religion,' which would violate the Establishment Clause." Pet. App. 12a (brackets omitted). The Eleventh Circuit then gave credence to the FHSAA's unfounded fears by agreeing that it might "lead to a violation of the Establishment Clause" if the FHSAA were to "[a]ccommodate religion in its own expression." Pet. App. 51a n.12; *see also* Pet. 9-10.

This is just a small sampling of the reasonable-observer test's enduring influence. No one should be deprived of a religious accommodation or the ability to fully express themselves in public because of contrived concerns about the Establishment Clause. The Court should put a stop to this constitutional phantasm by taking this case and stating in no uncertain terms that the Establishment Clause is not a gag order on religious governmental expression.

C. The Reasonable-Observer Test Creates A Political Environment That Is Needlessly Hostile Toward Religion.

1. A "government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion." *American Legion*, 588 U.S. at 56. That is why "[i]t has never been thought either possible or desirable to enforce a regime of total separation [of church and state]." *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973); *see also Lynch*, 465 U.S. at 673 ("The concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."). "Our constitution was not designed to erase religion from American life" but "to ensure 'respect and tolerance.' " *Shurtleff*, 596 U.S. at 288 (Gorsuch, J., concurring in the judgment) (quoting *American Legion*, 588 U.S. at 63).

Establishment Clause jurisprudence should encourage rather than hinder governments' "honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *American Legion*, 588 U.S. at 63. Government participation in religious expression "respect[s] the religious nature of our people." *Lynch*, 465 U.S. at 677-678 (quoting *Zorach*, 343 U.S. at 314) (alteration omitted). And it models the "respect and tolerance for differing views" that is so critical to the resilience of a pluralistic society. *American Legion*, 588 U.S. at 63.

That respect and tolerance has long extended to the Jewish faith. "The Hanukkah lighting ceremonies and receptions at the White House," for instance, "have become an important and meaningful holiday tradition that is proudly anticipated by the Jewish community and its leadership each year." Donna Hayashi-Smith, *Lighting the Menorah: Celebrating Hanukkah at the White House*, THE WHITE HOUSE HIST. ASS'N (Nov. 23, 2020), https://perma.cc/NK8T-VBV6. As President George W. Bush stated in 2001, the lighting of the menorah at the White House sends a powerful message that the White House is "the people's house, and it belongs to people of all faiths." Press Release, *President's Remarks at White House Lighting of Menorah*, THE WHITE HOUSE (Dec. 10, 2001), https://perma.cc/3NWB-HQP4.

Since 1979, the federal government has allowed the Chabad group American Friends of Lubavitch to erect the thirty-foot-high National Menorah on the Ellipse in Washington. Rebecca Cohen, *Rabbi lights the way for the National Menorah event at Hanukkah,* WASH. POST (Dec. 7, 2012), https://wapo.st/2Sp5CUd. And in 2004, governors from all fifty States issued proclamations or statements of congratulations to mark the National Menorah's twenty-fifth anniversary. National Menorah, *Proclamations*, AMERICAN FRIENDS OF LUBAVITCH (2024), https://perma.cc/8V7N-CZS5. In the words of one of the National Menorah's original organizers, the display "show[s] that Jews [can] raise their heads up without fear." Cohen, *supra.*

Many permanent displays also incorporate Jewish symbols. Various government-owned Holocaust memorials incorporate the Star of David, Torah scroll, or menorah. *See*, *e.g.*, South Carolina Holocaust

Memorial, ONE COLUMBIA: ARTS AND CULTURE (June 6, 2011), https://perma.cc/KM82-BX3L; Nathan Rapoport, Monument to Six Million Jewish Martyrs, ASSOCIATION FOR PUBLIC ART (1964), https://perma.cc/M2CE-ABJQ. One notable example is the New England Holocaust Memorial in Boston, which is a publicly maintained display consisting of "six luminous glass towers, each reaching 54 feet high, and each lit internally from top to bottom," meant to invoke the candles of a menorah while representing the six million Jews murdered in the Holocaust. *Design of the Memorial*, NEW ENGLAND HOLOCAUST MEMORIAL (last visited June 10, 2025), https://perma.cc/7U6P-L2DM.

2. The reasonable-observer test interferes with these and countless other attempts to imbue respect for different faith communities into our shared public life. Far from vindicating Establishment Clause principles, the test legitimizes the constitutional fiction that public religious acknowledgments or accommodations are a departure from the acceptable, scrupulously secular society. *See*, *e.g.*, Pet. 9 (explaining that the FHSAA's refusal to accommodate communal prayer left players "frustrated and confused, feeling like the FHSAA's decision sent a message that it was wrong for [them] to use the public-address system so that [they] could pray together as two Christian school communities").

But that constitutional fiction is just that. "[T]he Establishment Clause as originally understood makes clear there is 'no constitutional requirement which makes it necessary for government to be hostile to religion and throw its weight against efforts to widen the effective scope of religious influence.' " *Kennedy* v. *Bremerton Sch. Dist.*, 4 F.4th 910, 953 (9th Cir. 2021)

(Nelson, J., dissenting from denial of rehearing en banc) (quoting *Zorach*, 353 U.S. at 314).

A false fear of violating the Establishment Clause may even impede other First Amendment rights. That risk is particularly acute where—as in this case—"a government claims that speech by one or more private speakers is actually government speech." *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring in the judgment). When that happens, it can be difficult to determine whether the government is communicating its own official view or is instead opening a forum for private citizens to engage in private expression.[2]

If it turns out to be that private expression is at issue, the government is constitutionally prohibited from snubbing religious messages simply because they are religious. "[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious point of view." *Good News Club*, 533 U.S. at 112; *see also Shurtleff*, 596 U.S. at 261 (Kavanaugh, J., concurring); Pet. 17. "Indeed, excluding religious messages from public forums that are open to other viewpoints is a 'denial of the right of free speech' indicating 'hostility to religion' that would 'undermine the very neutrality the Establishment

[2] Of course, where government speech is at issue, the government is not required to engage in religious expression merely because the expression would be consistent with the Establishment Clause. *See Shurtleff*, 596 U.S. at 247-248 (noting that "when the government speaks for itself, the First Amendment does not demand airtime for all views"); *American Legion*, 588 U.S. at 72 (Kavanaugh, J., concurring) ("The Court's ruling *allows* the State to maintain the cross on public land. The Court's ruling does not *require* the State to maintain the cross on public land.").

Clause requires.' " *Shurtleff*, 596 U.S. at 274 (Alito, J., concurring in the judgment) (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995)).

Yet this Court's cases demonstrate a pattern of public officials relying on the reasonable-observer test to turn the Establishment Clause on its head, using endorsement fears to prohibit private religious expression in public forums. *See*, *e.g.*, *Rosenberger*, 515 U.S. at 836 (university justified denial of funding to Christian student publication based on the Establishment Clause); *Good News Club*, 533 U.S. at 102 (school denied use of school facilities to Christian group based on the Establishment Clause); *Shurtleff*, 596 U.S. at 258 ("Boston acknowledges that it denied Shurtleff's request because it believed flying a religious flag at City Hall could violate the Establishment Clause."). The reasonable-observer test has thus "led to a strange world in which local governments have sometimes violated the First Amendment in the name of protecting it." *Id*. at 280 (Gorsuch, J., concurring in the judgment).

II. ENTRENCHMENT OF *LEMON*'S REASONABLE-OBSERVER TEST HAS MADE IT MORE DIFFICULT FOR JEWISH AMERICANS TO PRACTICE THEIR FAITH.

1. The reasonable-observer test is particularly harmful to minority faiths because their religious expression tends to stand out as unusual and draw objection in a way that majority-faith expression does not.

Certain acknowledgments of religious practices and symbols are sufficiently common to have

"evol[ved] . . . through the centuries" and taken on a "secular rather than [] a religious character." *McGowan* v. *Maryland*, 366 U.S. 420, 444 (1961). The reasonable observer who is "aware of the history and context of the community and forum," *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment), considers those developments.

But secularized religious acknowledgments derive primarily from the majority religion. Familiar acknowledgments of Christianity are therefore more likely to be viewed as secular. *See*, *e.g.*, *Lynch*, 465 U.S. at 685 (upholding a nativity scene erected as part of a Christmas display because it had a sufficiently "secular purpose"); *County of Allegheny*, 492 U.S. at 601 (stating that the "government may acknowledge Christmas as a cultural phenomenon" though not "as a Christian holy day"). The symbols and practices of minority faiths are inherently less familiar, and consequently their religious connotations are more pronounced. And while some elements of the Jewish faith may have become perceived as secularized, *see Van Orden*, 545 U.S. at 701 (recognizing the secular dimension of a Ten Commandments display); *County of Allegheny*, 492 U.S. at 614 (similar, with respect to a menorah), less familiar Jewish religious items and symbols such as the mezuzah, eruv, or sukkah retain their distinctly religious character. The reasonable-observer analysis is more likely to treat such symbols as constitutionally suspect.

The obstinacy of the reasonable-observer test thus risks disparate treatment of religious minorities, which runs counter to the Nation's history of welcoming religious outgroups. *See* Letter from George

Washington to Newport Hebrew Congregation (Aug. 18, 1790), *George Washington: Writings* 767 (John Rhodehamel 1997) ("All possess alike liberty of conscience and immunities of citizenship."); *see also* Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1159 (1991) (noting that the Free Exercise Clause is "specially concerned with the plight of minority religions").

2. American Jews have sought government accommodations for a variety of religious practices, from physical movement on the Sabbath, to Kosher meals, to observance of Jewish holidays. A notable example is the eruv, which is a visible, physical, "ceremonial demarcation of an area," typically constructed by hanging wires on preexisting municipal utility poles to enclose a section of a town. *See Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 152 (3d Cir. 2002). According to Jewish law, adherents may not carry anything—including keys, strollers, food, and children—outside their private residences on the Sabbath, except within the area enclosed by an eruv. The eruv thus facilitates the journey to and from synagogue.

Numerous municipal governments have approved the construction of eruvs within their city limits to accommodate Jewish religious minorities. Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. DAVIS L. REV. 1617, 1630 (2015) (noting that there are more than 130 eruvs in the United States). Although eruvs are indistinguishable from standard utility wiring, *Tenafly*, 309 F.3d at 152, they have sometimes been viewed with suspicion by individuals who have challenged their constitutionality based on being "made uncomfortable" by the presence

of an eruv, *Jewish People for Betterment of Westhampton Beach* v. *Village of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (per curiam). The plaintiffs in *Westhampton Beach*, for example, alleged that a local eruv was a "constant and ever-present symbol, message, and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity." *Id*. (quotation marks omitted). Such challenges may cause municipal governments to think twice about allowing Jews to construct eruvs, which amounts to a "heckler's veto" over what would be a constitutionally permissible accommodation. *Kennedy*, 597 U.S. at 534 (quoting *Good News Club*, 533 U.S. at 119).

Holidays and food also sometimes necessitate government accommodation. Although majority-religion holidays like Christmas are already excused for all federal employees, *see infra* p. 18-19, followers of Judaism may require government accommodation to celebrate holidays like Sukkot and Passover, as well as lesser-known holidays like Purim. And Jewish servicemembers and Jewish attendees of state-sponsored events need government accommodation of Kosher dietary restrictions.

A legal culture that views the presence of religion in the public square as impermissible endorsement is unlikely to value preserving space for religious minorities' practices or to be moved by their requests for accommodation. But such accommodations reflect "the best of our traditions," *Zorach*, 343 U.S. at 314, while the reasonable-observer test is an aberration of a "bygone era when this Court took a more freewheeling approach to interpreting legal texts," *Shurtleff*, 596 U.S. at 276 (Gorsuch, J., concurring in the judgment)

(quotation marks omitted). The Court should take this case to jettison the reasonable-observer test once and for all and to reaffirm that governments may accommodate all minority religions—including Judaism—without fear of a reasonable-observer heckler's veto.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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