No. 17-60

In the
Supreme Court of the United States

CITY OF BLOOMFIELD, NEW MEXICO,
Petitioner,

v.

JANE FELIX; B.N. COONE,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Several members of this Court have acknowledged that the test adopted in *Lemon v. Kurtzman* for assessing Establishment Clause challenges is both hopelessly subjective and ahistorical. The modification of that test proposed by Justice O'Connor in *Lynch v. Donnelly*—the so-called Endorsement Test—never formally adopted by a majority of this Court but widely followed in the lower courts, has only made matters worse. Indeed, under the version of the test employed by the Tenth Circuit below, not just the Ten Commandments monument at issue here, but much of our nation's heritage, documents, and symbols (including, ironically, two of the other "secular" monuments on the same lawn, the Declaration of Independence and the Gettysburg Address) could not be acknowledged by government. In short, *Lemon* has yielded an intolerable, and distinctly anti-religious, intrusion on the police power of the States by the federal judiciary. It is long past time for this Court to remedy the problem by addressing the following questions:

1. Should the ahistorical extension of the Establishment Clause to the States adopted by this Court in *Everson v. Bd. of Education* be revisited?

2. Even if the incorporation of the Establishment Clause against the States is to be retained, should it be limited to an anti-coercion principle rather than the more nebulous test adopted in *Lemon*, as modified by the Endorsement Test, in order to be more solicitous of the State's police power to advance the health, safety, welfare, *and morals* of the people?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issue in this case that the unalienable rights that just governments are established to project are those with which all human beings "are endowed by their Creator," as the Declaration of Independence states, and the practical wisdom, so eloquently articulated by President George Washington in his Farewell Address, that that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, on the importance—and constitutionality—of public devotion to moral and religious principles as a necessary pre-condition to maintaining liberty and our republican form of government, including HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); Larry P. Arnn & Douglas A. Jeffrey, "We Pledge Allegiance—American Christians and Patriotic Citizenship," in DANIEL C. PALM,

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

ED., ON FAITH AND FREE GOVERNMENT (1997); and John C. Eastman, "We Are a Religious People Whose Institutions Presuppose a Supreme Being," 5 NEXUS: J. OPINION 13 (Fall 2000). The Center has previously participated in a number of cases before this Court addressing the original meaning of the Establishment Clause, including *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014); *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Reason Foundation ("Reason") is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com, www.reason.org, and www. reason.tv. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant legal and constitutional issues.

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech, religious liberty, and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

SUMMARY OF ARGUMENT

The Establishment Clause was added to the Constitution to protect *states* from a federal establishment of religion. The decision to incorporate the Establishment Clause against the states divorced that constitutional protection from its purpose and has led to confusion in the law.

The so-called *Lemon* test is emblematic of this confusion. Rather than protecting an individual right, the test has instead bred hostility against religion. This is a result that was never intended by either the founding generation. Further, the test is internally inconsistent and has led to further confusion in the law.

REASONS FOR GRANTING THE WRIT

I. This Court's Extension of the Establishment Clause to the States, Without Analysis, Was Ahistorical and Has Intruded upon Core State Police Powers.

A. The Establishment Clause Was Designed to Prevent the Federal Government from Interfering with State Support of Religion.

As has long been recognized, the First Amendment (like the other provisions of the Bill of Rights) originally applied only to the federal government, not to the state governments. "Congress shall make no law..." meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly

true with respect to the Establishment Clause, whose language, "Congress shall make no law respecting the establishment of religion," was designed with a two-fold purpose: First, to prevent the federal government from establishing a national church; and second, to prevent the federal government from otherwise interfering with the state-established churches and other state aid to religion that existed at the time. *See*, *e.g.*, W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); M. HOWE, THE GARDEN AND THE WILDERNESS 23 (1965) (both cited in G. Stone, *et. al.*, eds., CONSTITUTIONAL LAW 1539 (3d ed. 1996)). In other words, the Establishment Clause was as much a federalism provision as a substantive bar to a national church. *See*, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

Of course, the Fourteenth Amendment affected a fundamental change in our constitutional order and afforded to individuals federal protection against state governments that would interfere with their fundamental rights. The Free Speech and Free Exercise clauses of the First Amendment invite incorporation, for example, as they deal with individual rights warranting protection from intrusion by government at any level. *See* Akhil Amar, "The Bill of Rights as a Constitution," 100 YALE L. J. 1131, 1159 (1991). As such, incorporation of these right through the Fourteenth Amendment's guarantee of liberty (or perhaps, more properly, its guaranty of the privileges of citizenship) is consistent with the intent of the framers of that amendment to secure fundamental rights, privileges and immunities from interference by state governments. "That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth

Amendment—is the safeguarding of individual's right to free exercise of his religion has been consistently recognized." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

The Establishment Clause, however, is on its face different in kind from other provisions that have been incorporated and made applicable to the states via the Fourteenth Amendment. It was designed as a two-fold restraint on Congress, prohibiting not just the establishment of a national church but also other means by which the federal government might interfere with existing state-supported religion. In other words, the drafters of the Establishment Clause designed it to reserve religious matters to the people of the States and the state governments they established.

Justice Thomas's observation in *Newdow* that "the Establishment Clause is a federalism provision, which, for this reason, resists incorporation," is therefore strongly supported by the original understanding of the Clause. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2328 (2004) (Thomas, J., concurring in the judgment) (emphasis added). Any other approach yields the peculiar interpretation of the Establishment Clause that has allowed the federal courts and, via section 5 of the Fourteenth Amendment, the Congress, to do the very thing the clause was designed to prevent, namely, interfere with state support of religion. *Zelman*, 536 at 678 (Thomas, J., concurring); *see also Newdow*, 124 S. Ct., at 2332 (Thomas, J., concurring in the judgment) (noting the irony "that a constitutional provision evidently designed to leave the

States free to go their own way should now have become a restriction upon their autonomy") (citing *Schempp*, 374 U.S. at 310) (Stewart, J., dissenting)).

Thus, even if the public display of the Ten Commandments would be unconstitutional when done by the federal government, *but see* Office of the Curator, Supreme Court of the United States, "Courtroom Friezes: South and North Walls" (acknowledging depiction of Moses with the Ten Commandments on the South Frieze of this Court's courtroom),[2] such an interpretation in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the Fourteenth Amendment. "Whenever the Judiciary [breathes still further substantive content into the Due Process Clause], it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting); *see also Newdow*, 124 S. Ct., at 2320 (Rehnquist, C.J., concurring in the judgment) ("When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies").

In holding that the Establishment Clause was nonetheless incorporated by the Fourteenth Amendment as a restraint on the States, this Court in *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947), merely cited prior Free Speech and Free Exercise cases with-

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[2] Available at https://www.supremecourt.gov/about/northandsouthwalls. pdf (last visited Aug. 9, 2017).

out so much as a word of analysis of the obvious differences between those clauses, on the one hand, and the Establishment Clause, on the other. Such an analysis is long overdue, and this case presents a good opportunity for conducting it.

B. If the Establishment Clause Applies to the States at All, It Should Not Apply in the Same Manner that It Applies to the Federal Government.

If the Establishment Clause is to apply to the States at all, the scope of prohibited activity must simply be narrower than that prohibited to the Federal Government, in order for the States to be able to exercise core police powers reserved to them in our federal system. In other words, this Court should reconsider whether the Clause can continue to be treated as fully incorporated, jot-for-jot, without running afoul both of the original understanding of the First and Fourteenth Amendments and this Court's recent federalism decisions. Justice Thomas's concurring opinions in *Newdow* and *Zelman* persuasively demonstrate that it cannot be.

It is well established and recently reaffirmed that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the States or to the people. *See*, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995); U.S. Const. Amend. X. As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external

> objects.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (J. Madison) (Clinton Rossiter, ed., 1961).

It is equally well settled that chief among the powers reserved to the States is the police power—the power to protect the "safety, health, peace, good order, and morals of the community." *Cowley v. Christensen*, 137 U.S. 86, 89 (1898); *see also*, *e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 304 (1932). Moreover, the fostering of morality among the citizenry, particularly that fostered by religion, has for most of our nation's history been viewed as an essential component of that core State function. Thus, any proper interpretation of the Establishment Clause as applied to the States simply must recognize the important role religion has always played in State efforts to undertake this core police power.

In exercising their power to regulate the health, safety, welfare and, particularly, the morals of the people, States have employed a wide variety of means, including lending support to religious institutions. *See*, *e.g.*, Pa. Const. of 1776, § 45 ("all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged and protected"); Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for

the advancement of religion and learning, shall be encouraged and protected"). States have often been described as "experimental social laboratories." *Roth v. United States*, 354 U.S 476, 505 (1957) (Harlan, J., dissenting). As such, "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). Therefore, while the Federal Government may "make *no law* respecting the establishment of religion," U.S. Const. Amend. I (emphasis added), the States should be able to "pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." *Zelman*, 526 U.S., at 679 (Thomas, J., concurring).

Several members of this Court have recognized this important distinction between state and federal action in other First Amendment contexts. Justice Harlan, for example, stated in *Roth*: "I do not think it follows that state and federal powers in this area [First Amendment incorporated to the States by the Fourteenth Amendment] are the same." *Roth*, 354 U.S., at 503. Justice Jackson put it more bluntly, convinced "that the Fourteenth Amendment did not 'incorporate' the First [Amendment's Free Speech Clause], that the powers of Congress and of the States over [the subject of criminal libel] are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not." *Beauharnais v. Illinois*, 343 U.S. 250, 288 (1951) (Jackson, J., dissenting).

What is true for the Free Speech Clause is even more true for the Establishment Clause: Wholesale incorporation not only intrudes upon State powers well beyond what was envisioned by the adopters of the Fourteenth Amendment, but it undermines the ability of the States to protect the health, safety, welfare, and particularly the morals of the people. Again, this case provides an excellent opportunity for this Court to revisit the extent to which the Establishment Clause, even if incorporated, can be applied to the States in the same manner that it applies to the federal government.

II. The *Lemon* Test Has Yielded a Level of Hostility Toward Religion that Is Inconsistent with Our Founding Principles and Has Been Called into Question by a Majority of this Court.

Even if this Court adheres to existing precedent incorporating the Establishment Clause against the States, and even if it declines the invitation to apply the incorporated Establishment Clause more flexibly than it applies the Clause to the federal government, it should grant the petition for a writ of certiorari in this case in order to overrule, or at least severely limit, the *Lemon* test.

One of the many problems with the Court's holding in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is its misconstruing of the word "respecting" in the Establishment Clause. The Court took that word to mean that the prohibition was not just of an established church, but of any conduct that might lead the establishment of religion more broadly. *See, e.g.*, *id.* at 612. The limited debate we have from the First Congress strongly suggests otherwise.

The initial language proposed by James Madison would merely have prohibited the federal government from establishing a national religion. *See* 1 Cong. Reg. 427 (June 8, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS 59-60 (Neil H. Cogan, ed., Oxford Univ. Press 1997) ("nor shall any national religion be established"). After several members of Congress expressed concern that the proposed language did not do enough to protect existing state support of religion, the language was eventually amended to prohibit the federal government from making any law "respecting" an establishment of religion, thus accomplishing the twin purposes of prohibiting the establishment of a national religion and of preventing federal interference with the existing state churches. *See*, *e.g.*, 2 Cong. Reg. 194-97 (Aug. 15, 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS at 59-60 (Rep. Sylvester expressing concern that the language "might be thought to have a tendency of abolishing religion altogether"); *Id*. (Rep. Huntington expressing fear "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion").

From that misconception of the Clause, the Court adopted the now familiar, three-part test that any governmental action that has the advancement of religion generally as its purpose or effect, or that leads to government entanglement with religion, violates that Establishment Clause. That test has been the subject of strong criticism by numerous members of this Court (past as well as present). *See*, *e.g.*, *McCreary Cty., Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (noting that "a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the

brain-spun 'Lemon test' that embodies the supposed principle of neutrality between religion and irreligion") (citing *Van Orden*, 545 U.S. at 692-93 (Thomas, J., concurring); *Board of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U. S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655-56, 672-73 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting)); *see also Committee for Public Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (disparaging "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in Lemon").

The *Lemon* test has also been criticized by legal scholars across the ideological spectrum. *See, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-399 (1993) (Scalia, J., concurring in judgment) (collecting criticism of *Lemon* and noting his "agree[ment] with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced," *citing, e.g.,* Jesse H. Choper, "The Establishment Clause and Aid to Parochial Schools—An Update," 75 CAL. L. REV. 5 (1987); William P. Marshall, "'We Know It When We See It': The Supreme Court and Establishment," 59 S. CAL. L. REV. 495 (1986); Michael W. McConnell, "Accommodation of Religion," 1985 Supreme Ct. Rev. 1; Philip B. Kurland, "The Religion Clauses and the Burger Court," 34 CATH. U. L. REV. 1 (1984); R. Cord, SEPARATION OF

CHURCH AND STATE (1982); Jesse H. Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. PITT. L. REV. 673 (1980)).

Indeed, the test as actually written in *Lemon* is internally contradictory. The "effects" prong bars conduct that has the primary effect of either advancing *or inhibiting* religion, *Lemon*, 403 U.S. at 612, but as this case amply demonstrates, preventing the "advancement" of religion, or more broadly, anything that might be perceived as an endorsement of religion, in most cases will necessarily "inhibit" religion by excluding it from the public square. Yet it is that test—or more precisely, a particularly rigorous version of it—that was applied by the Court below.

It is time to bury this "ghoul" once and for all. *See Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment). The petition for writ of certiorari should be granted at least for that purpose.

CONCLUSION

This Court rendered the Establishment Clause applicable to the States in 1947 without a word of analysis. Its decision has severely undermined the ability of the States to exercise their core police powers to advance the health, safety, welfare, and particularly the morals of the people. The incorporation decision itself should be revisited. At the very least, the incorporated Establishment Clause should be applied against the States less restrictively than it is applied against the federal government. Finally, certiorari is warranted to overrule or at least severely curtail the *Lemon* test.

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Respectfully submitted,

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