No. 23-35174

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH HUNTER, *et al.*,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Defendants-Appellees,
and
COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES,
Defendant-Intervenor-Appellee.

On appeal from the United States District Court for the District of Oregon, No. 6:21-cv-00474-AA, Hon. Ann Aiken, District Judge

BRIEF *AMICUS CURIAE* OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Jewish Coalition for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Jewish Coalition for Religious Liberty (JCRL) is an incorporated group of rabbis, lawyers, and professionals who practice Judaism and are committed to defending religious liberty. JCRL believes in the unique societal benefits of religious diversity and seeks to protect the ability of all Americans to freely practice their faith. JCRL also has an interest in restoring an historical understanding of the Establishment Clause that offers broad protection to religious liberty, particularly to members of minority religions and those committed to traditional religious practice.

Amicus is concerned that the lower court's reliance on the now-discredited Establishment Clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), could lead other courts astray and cause continued confusion among the lower courts. *Amicus* therefore urges the Court to apply instead the Establishment Clause test set forth in *Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 2428-29 (2022). Application of the *Kennedy* "historical practices and understandings" test leads to the conclusion that Title IX's religious exemption is constitutional. *See id*. at

[1] As required by Fed. R. App. P. 29(a)(4)(E), *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *Amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

2428. Reaching that conclusion in this appeal will provide helpful guidance to the lower courts in this Circuit.[2]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The lower court reached the right Establishment Clause result, but for the wrong reason. The district court applied the now-abrogated ahistorical three-prong Establishment Clause test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). But in *Kennedy v. Bremerton School District*, the Supreme Court recognized that *Lemon* had been repudiated, holding that the Establishment Clause must instead "be interpreted by 'reference to historical practices and understandings.'" 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

Plaintiffs contend, Br.45-50, that allowing religious colleges and universities to receive federal funding under the Title IX's exemption for religious colleges and universities violates the Establishment Clause. But that conclusion runs headlong into *Kennedy*.

Kennedy holds that the government violates the Establishment Clause when a law or practice shows the "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." 142 S. Ct. at 2429. Specifically, footnote 5 of the *Kennedy* opinion relied on Justice Gorsuch's concurrence in *Shurtleff v. City of Boston*, 596 U.S.

[2] *Amicus* limits its discussion to the Establishment Clause claim in the appeal.

243, 285-87 (2022) (Gorsuch, J., concurring), and Professor Michael McConnell's scholarship to hold that religious establishments at the time of the Founding bore certain "historical hallmarks." 142 S. Ct. at 2429 n.5. These hallmarks are (1) "government . . . control over the doctrine and personnel of the established church"; (2) "government mandated attendance in the established church and punish[ing] people for failing to participate"; (3) "punish[ment for] dissenting churches and individuals for their religious exercise"; (4) "restricted political participation by dissenters"; (5) "financial support for the established church, often in a way that preferred the established denomination over other churches"; and (6) "government us[e of] 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 286 (Gorsuch, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131-81 (2003)).

Based on these historical hallmarks, Title IX's religious exemption easily passes constitutional scrutiny. Indeed, religious schools have historically received government funding for education and religious exemptions have long existed in American law. By clarifying these points, this Court can untangle Establishment Clause doctrine and provide much-needed guidance for lower courts in this Circuit.

ARGUMENT

I. The Court should apply *Kennedy's* historical-practices-and-understandings test and hold that the Title IX religious exemption does not violate the Establishment Clause.

For decades, despite "being repeatedly killed and buried, *Lemon* stalk[ed] our Establishment Clause jurisprudence." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). But in *Kennedy v. Bremerton School District*, the Supreme Court explained that it had "long ago abandoned *Lemon* and its endorsement test offshoot." 142 S. Ct. at 2427. "In place of *Lemon* and the endorsement test, [the Supreme Court] has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (quoting *Town of Greece*, 572 U.S. at 576). The *Kennedy* test analyzes whether, based on historical hallmarks, the relevant law is an unconstitutional establishment of religion. Here, Title IX's religious exemption lacks any hallmarks of a historical establishment. This Court should therefore affirm the lower court's decision but on the basis of the *Kennedy* test, not the *Lemon* test.

A. The district court correctly held that Title IX's religious exemption does not violate the Establishment Clause.

The district court correctly held that there was no violation of the Establishment Clause. However, the court got the right answer by asking

the wrong question, incorrectly relying on *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The *Lemon* test applied by the district court had not been used by the Supreme Court for decades prior to *Kennedy*. And even prior to *Lemon*, the Court had long interpreted the Establishment Clause based on history. For example, in 1947, the Court decided *Everson v. Board of Education of Ewing Township*, which incorporated the Free Exercise Clause against the States. 330 U.S. 1 (1947). In reaching that decision, it relied extensively on history. *See id.* at 9-16. *See also, e.g., Torcaso v. Watkins*, 367 U.S. 488, 490-92 (1961) (applying a historical analysis); *Walz v. Tax Comm'n,* 397 U.S. 664, 680 (1970) (same).

When the Court decided *Lemon* 24 years after *Everson*, it did not apply any historical analysis, confessing it could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612. In place of history, the Court relied solely on the "cumulative criteria" developed in the preceding 24 years of Establishment Clause cases to "glean[]" *Lemon*'s three-prong test. *Id*. at 612-13.

However, just twelve years after developing the *Lemon* test, the Court decided *Marsh v. Chambers*, 463 U.S. 783 (1983), where it moved back towards a historical analysis. *Marsh* involved an Establishment Clause challenge to the Nebraska legislature's practice of opening a state legislative session with a prayer by a chaplain paid with public funds. *Id.*

at 785. In *Marsh*, the Court upheld the practice because legislative prayers existed at the Nation's Founding and such practices were "deeply embedded in the history and tradition of this country." *Id.* at 786, 795. The Court did not rely on *Lemon* at all.

After *Marsh*, the *Lemon* test and its "endorsement test" offshoot—an additional avenue for discerning Establishment Clause infringement proposed by Justice O'Connor in her concurring opinion for *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O'Connor, J., concurring)—were used sparingly by the Court, despite their consistent use in lower courts. *See* Eric Rassbach, Town of Greece v. Galloway: *The Establishment Clause and the Rediscovery of History*, Cato S. Ct. Rev. 71, 79-80 (2014) ("[A]s with the original *Lemon* test, the endorsement test has become one that the lower courts feel duty-bound to apply, even if the Supreme Court does not feel so obligated"). The Court commonly criticized *Lemon,* and the bulk of its opinions began using history and tradition as touchstones in deciding Establishment Clause inquiries. *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080-85, 2087 (2019) (discussing *Lemon's* inadequacies and adopting an "approach that focuses on the particular issue at hand and looks to history for guidance"); *Town of Greece*, 572 U.S. at 577 (ignoring *Lemon* to instead opt for an analysis based on historical practices and understandings).

This shift led to confusion among lower courts as to whether *Lemon* still governed, and if not, what analysis lower courts should apply in its

place. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 946-47 (9th Cir. 2021) (Nelson, J., dissenting from denial of rehearing en banc) (stating that "the Supreme Court . . . effectively killed *Lemon*," "[b]ut despite *Lemon*'s demise, we are left to sort through the continued application of its progeny"). Then, with the *Kennedy* decision, the Court definitively resolved the confusion, holding that it had "long ago abandoned *Lemon* and its endorsement test offshoot" and instead "instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." 142 S. Ct. at 2427-28 (internal quotation omitted). Since *Kennedy*, courts, including the Supreme Court and this Court, have made clear that *Lemon* is "abrogated" and no longer governs for Establishment Clause controversies. *Groff v. DeJoy*, 600 U.S. 447, 460 (2023); *see also Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1163-64 (9th Cir. 2022) (relying on *Kennedy* rather than *Lemon* to decide an Establishment Clause issue).

The district court therefore reached the correct conclusion, but for the wrong reason. *See* 1-ER-30-37 (applying the *Lemon* test and finding the "religious exemption in this case passes muster"). Nonetheless, this Court can readily apply the correct test from *Kennedy* to uphold the constitutionality of Title IX's religious exemption.

B. Under *Kennedy*, laws violate the Establishment Clause only when they share common hallmarks with historical establishments.

In *Kennedy*, the Supreme Court explained 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." *Kennedy*, 142 S. Ct. at 2429 & n.5; Daniel L. Chen, Kennedy v. Bremerton School District: *The Final Demise of Lemon and the Future of the Establishment Clause*, Harv. J.L. & Pub. Pol'y Per Curiam 1, 9 (2022). In reaching this conclusion, the Court included a footnote at the end of the "hallmarks" sentence that provides a key for understanding the Court's reasoning. *See Kennedy*, 142 S. Ct. at 2429 n.5. *See also* Chen, *Final Demise* at 9; Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 Iowa L. Rev. 2097, 2104-05 (2023).

In footnote 5, *Kennedy* adopted portions of Justice Gorsuch's *Shurtleff* concurrence. *Kennedy*, 142 S. Ct. at 2429 n.5 (citing *Shurtleff*, 596 U.S. at 285-89 (Gorsuch, J., concurring) (discussing coercion and certain other historical hallmarks of an established religion)). In his concurrence, Justice Gorsuch cited to the scholarship of Professor Michael McConnell, which identified common characteristics, or "hallmarks," of historical religious establishments. *Shurtleff*, 596 U.S. at 286 (2022) (Gorsuch, J., concurring) (citing Michael W. McConnell, *Establishment and*

Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2110-12, 2131 (2003)).

Justice Gorsuch explained that "founding-era religious establishments" had certain "telling traits":

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. 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 286 (2022) (Gorsuch, J., concurring) (citing McConnell, *Establishment and Disestablishment*, at 2131-81).

A thread common to many of the historical hallmarks was the ill of coercion, as "[m]ost of these hallmarks reflect[ed] forms of coercion regarding religion or its exercise." *Shurtleff*, 596 U.S. at 286 (cleaned up). 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*, 142 S. Ct. at 2429 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Lee v. Weisman*, 505 U.S. 577, 589 (1992)). 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*, 142 S. Ct. at 2429 (emphasis added). And in footnote 5 of *Kennedy*, the Court cited to the part of Justice Scalia's dissent in *Lee v. Weisman* that stated that "a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support." *Id.* at 2407 n.5 (citing *Lee*, 505 U.S. at 640-42 (Scalia, J., dissenting)).

Importantly, "[t]hese traditional hallmarks help explain many of [the Supreme] Court's Establishment Clause cases, too." *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring). Take *Torcaso*, which declared test oaths unconstitutional. 367 U.S. at 496. Under *Kennedy*'s framework, *Torcaso* was correctly decided because it falls within the fourth hallmark, government restrictions on political participation by dissenters. *See Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

Or consider *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), which declared that granting churches veto power over liquor licenses was unconstitutional. A court employing a historically sensitive understanding of the Establishment Clause would reach the same result because such a law "give[s] churches monopolistic control over civil functions"—the sixth historical hallmark. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

Similarly, the ministerial exception recognized and applied in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru,*

140 S. Ct. 2049 (2020), rests partially on the Establishment Clause because it falls squarely within the first hallmark—government control over the doctrine and personnel of the church.

In sum, as multiple courts have already concluded, 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." *Hilsenrath ex rel. C.H. v. Sch. Dist. of the Chathams*, --- F. Supp. 3d ---, 2023 WL 6806177, at *6 (D.N.J. Oct. 16, 2023) (citing Chen, *Final Demise* at 9). The "six hallmarks of founding-era religious establishments" are thus the "guiding principles for Establishment Clause jurisprudence." *Id.* at *6 n.14; *see also Maddonna v. United States Dep't of Health & Hum. Servs.*, --- F. Supp. 3d ---, 2023 WL 7395911 (D.S.C. Sept. 29, 2023) ("'[F]ounding-era religious establishments often bore certain telling traits[.]'" (quoting *Shurtleff*, 596 U.S. at 285-86 (Gorsuch, J., concurring))); *Rogers v. McMaster*, --- F. Supp. 3d ---, 2023 WL 7396203, at *11-12 (D.S.C. Sept. 29, 2023) (applying "hallmarks" of "founding-era religious establishments") (cleaned up); *Erie v. Hunter*, --- F. Supp. 3d ---, 2023 WL 3736733, at *7-8 (M.D. La. May 31, 2023) (forced attendance at a Christian worship service over civil detainee's express objection and under threat of penalty violated the Establishment

Clause because that conduct fell within the second hallmark of a historical establishment).

C. Title IX's religious exemption displays none of the six hallmarks of historical establishments.

If a law does not share any of the six historical hallmarks, there is no Establishment Clause violation. Here, the Title IX religious exemption does not demonstrate any of the six historical hallmarks, and thus does not qualify as an "establishment" under *Kennedy*'s historical-practices-and-understandings test.

1. Control over doctrine and personnel of the church.

The first hallmark of a religious establishment is state control over the established church. At the time of the Founding, this control manifested itself in two ways that are startling to modern eyes: the control of religious doctrine and the appointment and removal of religious officials. McConnell, *Establishment and Disestablishment* at 2132. For example, Maryland, Virginia, North Carolina, South Carolina, and Georgia established the Church of England. Parliament determined the articles of faith of the Church of England as well as the text of the Book of Common Prayer, and provided that the monarch would be the Supreme Governor of the Church. These colonies, like England, mandated that all ministers preaching publicly accept the Church of England's doctrines. *See* 1 William Blackstone, *Commentaries on the Laws of England* 364-83; *see also* Thomas 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, *Establishment and Disestablishment* at 2140-41; *see also Hosanna-Tabor*, 565 U.S. at 182-83 (reviewing the historical "background" against which "the First Amendment was adopted"); *see also Our Lady*, 140 S. Ct. at 2061-62 (surveying English and early colonial history for examples of governmental control of religious offices).

Here, Title IX's religious exemption does not constitute government control over doctrine or personnel because it does not force or compel religious institutions to do anything relating to their beliefs or personnel. While the process for claiming an exemption requires an institution to show that it is religious and has religious beliefs that conflict with Title IX, these requirements are merely a means of ensuring that a school is submitting a good faith application. *See* 34 C.F.R. § 106.12(c). The Title IX religious exemption does not constitute an intrusive command to adopt certain religious beliefs or retain specific personnel. Indeed, the exemption *prevents* unnecessary entanglement, allowing organizations to exercise their beliefs without interference and receive the same financial benefits as other schools.

2. Compelled church attendance.

The second hallmark—compulsory church attendance—was present throughout the history of England and the colonies. Prior to the Founding, England fined those who failed to attend Church of England worship services. McConnell, *Establishment and Disestablishment* at 2144. The colonies quickly followed. Virginia's earliest settlers attended twice-daily services on pain of losing daily rations, whipping, and six months of hard-labor imprisonment. George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). While Virginia later eased those laws, versions of them remained in force until 1776. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 521 (Burt Franklin 1970) (1902). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. *See id.* at 513-15; Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in . . . religion"); McConnell, *Establishment and Disestablishment* at 2145-46.

Here, the Title IX religious exemption does not compel anyone to attend church, nor does it make any religious observance compulsory.

3. Punishment for dissenting worship.

The third hallmark of an establishment includes laws restricting and punishing worship by dissenting religious groups. Under the guise of heresy laws, English law targeted the practices of Puritans, Baptists, Presbyterians, and especially Catholics. *Id.* at 2160-61.

The Massachusetts Bay Colony notoriously enacted similar provisions after the Puritans fled England. Massachusetts Bay persecuted and banished dissenters who refused to adopt the established church's beliefs, including the validity of infant baptism. *Id.* at 2161-62. It also whipped, mutilated, and hanged individuals who did not subscribe to Puritan religious beliefs. *Id.* at 2162. 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. Several colonies banned Catholic churches altogether. *Id.* at 2166.

Here, Title IX's religious exemption does not punish or place any restrictions on worship on any religious body, because all religious groups can avail themselves of the exemption. Therefore, the punishment-of-dissenters hallmark is not implicated.

4. Restrictions on political participation.

The fourth hallmark of establishment consists of restricting political participation based on church affiliation or lack thereof. Prior to the Founding, English law allowed only Anglicans to hold public office and vote. *Id.* at 2177. Similar restrictions on officeholding were also common in colonial America. *Id.* 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. Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 27 (2023). Although religious tests were prohibited at the federal level by the Religious Test Clause of Article VI, McConnell, *Establishment and Disestablishment* at 2178, Maryland's version of religious disqualification lasted until 1961, when the Supreme Court struck it down. *See Torcaso*, 367 U.S. at 496.

Here, Title IX's religious exemption does not restrict political participation based on church affiliation or lack thereof. All religious institutions that believe that Title IX conflicts with their sincerely held religious beliefs can obtain an exemption—and any institution or individual, such as Plaintiffs, are free to agree or disagree with practices without facing any political penalty for doing so.

5. Financial support of the established church.

The fifth hallmark of an establishment is public financial support of the established church. At the Founding, this support took a few 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, *Establishment and Disestablishment*, at 2147-48, 2152. Land grants were the most significant form of financial support, providing land for churches,

parsonages, and religious schools in addition to income-producing land that ministers used to supplement their income. *Id.* at 2148.

This hallmark is the most relevant to this case, as Title IX's religious exemption allows public funds to flow to religious schools. Nonetheless, this funding scheme fits comfortably within historical practice, for at least two reasons.

Aid to private religious schools. First, the Supreme Court has repeatedly explained that "there is no 'historic and substantial' tradition against aiding private religious schools." *Carson v. Makin*, 596 U.S. 767, 788 (2022) (cleaned up). Indeed the tradition is all the other direction: "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2258 (2020). "Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy," including by making grants to private religious schools for the education of the poor. *Id.*

"Both before and after the ratification of the First Amendment, the federal government and virtually every state that ended church taxes also funded religious activity—specifically, religious schools of all kinds." Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Penn. 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." *Id.* This "pervasive" historical practice clarifies 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, *Church Taxes* at 117, 185-86; *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).

Many of the Founders "argued that refusing to fund certain schools because of their religious activity was a form of discrimination." Storslee, *Church Taxes*, 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. Further, programs funding religious schools with public taxes were "accepted without objection" at the Founding. *Id.* at 181, 185 ("For proponents of religious liberty at the Founding, church taxes were objectionable because their exclusive aim was financing worship . . . But the same objection did not apply when funds were provided to religious entities for other reasons, most notably for education.").

Exemptions that accommodate. Second, exemptions designed to accommodate—particularly for religious minorities—have been standard practice ever since the Founding.

At the time of the Founding, "religious minorities sometimes needed an accommodation and the government often provided one, on such matters as oath requirements, compulsory jury service, sabbath laws, the priest-penitent privilege, marriage laws, and import restrictions." Chapman & McConnell, *Agreeing to Disagree* 96. But "[s]uch accommodations were never seen as an establishment of religion" because "accommodations enabled people to carry out beliefs *contrary* to the majority," which "were in a sense the *opposite* of an establishment, promoting diversity and dissent rather than uniformity." *Id*. *Cf*. Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 872, 905 (2019) ("Whereas establishments exist to encourage the state's preferred religion, accommodations preserve free exercise by minimizing the government's power over religious activity.").

Instead, the Founders *expected* and accepted religious accommodations. *See* Storslee, *Church Taxes* at 133 n.108, 185. George Washington and James Madison were two such proponents of exemptions, finding them necessary to protect religious exercise. Chapman & McConnell, *Agreeing to Disagree* 97. As Professor Douglas Laycock put it, "There is virtually no evidence that anyone thought

[religious exemptions] were constitutionally *prohibited* or that they were part of an establishment of religion." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1796 (2006); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1511 (1990). That is because religious exemptions were "an early step in the long process of *dis*establishment." Laycock, *Regulatory Exemptions* at 1803.

For example, to prevent conflict with religious beliefs, state legislatures at the Founding exempted Quakers from colonial oath requirements, military conscription, religious assessments, and "other sources of conflict between religious convictions and general legislation" such as removing their hats in court. *See* McConnell, *Origins* at 1467-73; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1117-19 (1990). "Since accommodations [at the Founding] enabled people to carry out beliefs contrary to the majority, they were in a sense the opposite of an establishment[.]" Chapman & McConnell, *Agreeing to Disagree* 96.

Courts also acknowledged that "principles of disestablishment" did not prevent legislatures from providing religious accommodations. *Id*. *See, e.g.*, *Simon's Executors v. Gratz*, 2 Pen. & W. 412, 414-16 (Pa. 1831) ("The religious scruples of persons concerned with the administration of justice will receive all the indulgence that is compatible with the business of

government; and had circumstances permitted it, this cause would not have been ordered for trial on the Jewish Sabbath."). And when religious exemptions to compulsory military service, enacted by the Colonial Congress during the Revolution, were challenged as an establishment during World War I, the Supreme Court refused to find any violation of the First Amendment. *The Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918) ("We pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the [draft statute] . . . because we think its unsoundness is too apparent to require us to do more.").

Recent Supreme Court decisions continue the tradition. The Court has held that "there is ample room for accommodation of religion under the Establishment Clause," especially where the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987). In *Employment Division v. Smith*, the Court acknowledged that legislative exemptions for religious beliefs have a place in our society. 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well"). And in *Walz*, the Court upheld state and federal tax exemptions for religious institutions, finding there was "more than a century of our history and

uninterrupted practice" of granting such exemptions. 397 U.S. at 680. Indeed, there was "no genuine nexus between tax exemption and establishment of religion." *Id.* at 676.

Here, the Title IX exemption comes within both of these Supreme-Court-approved traditions. First, the government is providing funding to private religious schools to further education—not to further religion *qua* religion. That puts it firmly in the tradition of "governments [that] provided financial support to private schools, including denominational ones." *Espinoza*, 140 S. Ct. at 2258. The Title IX exemption is also part of the long tradition of exemptions designed to accommodate. The fifth hallmark of an establishment is therefore not implicated.

6. Use of the church for governmental functions.

The sixth hallmark of a religious establishment is a church's near "monopolistic control over civil functions." *Shurtleff*, 596 U.S. at 286. 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, *Establishment and Disestablishment* at 2169-76 (explaining 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 recognized only those teachers who were licensed by a church; Virginia ministers were tasked with keeping vital statistics; and South Carolina

recognized only those marriages that were performed in an Anglican church. *Id.* at 2173, 2175, 2177.

Here, Title IX's religious exemption does not delegate a public function or grant a monopoly over higher education to religious schools. *See*, *e.g.*, *Grendel's Den*, 459 U.S. 116 (religious body given control over liquor licensing). Since the schools function as entirely independent educational bodies and are not clothed with any governmental authority, this hallmark is not present.

D. Plaintiffs' other Establishment Clause arguments are meritless.

Historical practice aside, Plaintiffs make three arguments as to why Title IX's religious exemption is unconstitutional. First, they argue that the exemption prefers religion to non-religion. Br.46. Second, they claim the exemption discriminates between religions. Br.47-48. And third, they assert that the exemption improperly forces federal employees to decide religious matters. Br.48-49. All three arguments are meritless.

1. No discrimination between religion and "irreligion."

First, Plaintiffs argue that the exemption is unconstitutional because it only applies to religious schools and therefore "gives special privileges" by "preferring religion to irreligion." Br.46. This argument is a nonstarter.

If a law were unconstitutional anytime it "preferred religion to irreligion," then every single religious accommodation would be unlawful.

See Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) ("Were the Court of Appeals' view the correct reading of our decisions, all manner of religious accommodations would fall."). Of course, no court has ever held that, and for good reason: "the text of the First Amendment itself . . . gives special solicitude to" religious organizations. *Hosanna-Tabor*, 565 U.S. at 189; *Amos*, 483 U.S. at 338 ("[The Supreme Court] has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause."). And, courts, including the Supreme Court, have consistently upheld statutory religious accommodations that limit government interference with religious exercise. *See, e.g., Walz*, 397 U.S. at 680; *Amos*, 483 U.S. at 338; *Cutter*, 544 U.S. at 713.

2. No discrimination among religions.

Second, Plaintiffs argue that the exemption "discriminates between religious sects" because religious groups whose tenets conform to Title IX's requirements have no need to use the exemption. Br.47. Specifically, Plaintiffs allege that "the Exemption confers a valuable regulatory benefit—freedom from red tape and civil liability—on those orthodox sects favored by the legislative majorities who adopted the Exemption, while denying it to smaller, unpopular or politically unpowerful sects." Br.48.

This argument is rooted in neither logic nor reality. The government does not prefer one religion or denomination over another (or disfavor another religion) simply by creating an exemption and then permitting all religious organizations to avail themselves of that exemption. *Cutter*, 544 U.S. at 723-24 ("RLUIPA does not differentiate among bona fide faiths . . . It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."). When upholding the validity of tax exemptions for houses of worship in *Walz*, the Court stated that the government "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship[.]" 397 U.S. at 673.

In short, the fact that some organizations claim the exemption while others abstain does not constitute a denominational preference by the government, and Plaintiffs fail to offer any authority suggesting otherwise. Again, accepting Plaintiffs' argument would mean that every religious exemption would be unconstitutional because no religious exemption is utilized by every single religion in the country. That is not the law.

3. No entanglement.

Third, Plaintiffs argue that "[t]he Exemption also runs afoul of historical practices and understandings of the Establishment Clause because it conscripts federal employees as ecclesiastical inquisitors."

Br.48. Plaintiffs allege that the exemption requires a government bureaucrat to decide religious matters by asking whether a religious school's beliefs are inconsistent with Title IX, thereby entangling church and state. Br.48-49.

This argument is a red herring. Government officials are not required by the Title IX exemption (or other similar religious accommodations) to conduct an inquisition into a religious organization's beliefs and practices—they are required *not* to. Government officials can conduct basic inquiries into, for example, the sincerity or religiosity of religious beliefs, but they cannot second-guess a religious person's or group's own self-understanding of its beliefs and practices. In *Hobby Lobby*, for example, the Supreme Court rejected both the idea that testing sincerity is difficult and the idea that courts can judge the validity of religious beliefs. *See Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 717 (2014) (rejecting government argument that testing sincerity of closely held corporations is difficult); *id.* at 725 ("it is not for us to say that their religious beliefs are mistaken or insubstantial"). *See also Holt v. Hobbs*, 574 U.S. 352, 362-63 (2015) ("idiosyncratic" beliefs protected); *Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from denial of certiorari) ("The argument that a plaintiff's own interpretation of his or her religion must yield to the government's interpretation is foreclosed by our precedents.").

Here, Title IX's religious exemption, like similar religious accommodations, requires only a straightforward determination that a religious college has religious tenets that conflict with the application of Title IX. 20 U.S.C. § 1681(a)(3). Government officials are then required to defer to the religious organization's understanding of its own beliefs. *Maxon v. Fuller Theological Seminary*, No. 20-56156, 2021 WL 5882035, at *2 (9th Cir. Dec. 13, 2021) (unpublished). As in other areas of the law, that approach will *decrease* church-state conflict, not increase it.

II. The *Lemon* standard has been especially harmful to Orthodox Jews.

It is no idle matter whether the *Lemon* standard continues to be used by courts in this Circuit or is instead definitively replaced by the *Kennedy* standard, not least because the *Lemon* standard has so often harmed religious minorities.

Orthodox Jews in particular have suffered great disadvantages stemming from *Lemon*. For example, *Lemon* was the reason offered by state prison systems for denying observant Jewish prisoners a kosher dietary accommodation under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. *See, e.g., Benning v. Georgia*, 391 F.3d 1299, 1309 (11th Cir. 2004). *Lemon* was the reason that the Federal Emergency Management Agency denied generally available disaster relief funding to synagogues, including those damaged by hurricanes in Florida. *See Chabad of Key West, Inc. v. FEMA*, No. 17-

cv-10092 (S.D. Fla. Feb. 13, 2018), Dkt. 29 (lawsuit dismissed after FEMA changed policy to allow disaster relief funding for houses of worship including synagogues). And *Lemon* was also often the reason offered for denying synagogues the right to build or operate. *See, e.g., Gagliardi v. City of Boca Raton*, No. 16-cv-80195, 2017 WL 5239570, at *7-8 (S.D. Fla. Mar. 28, 2017), *aff'd sub nom. Gagliardi v. TJCV Land Trust*, 889 F.3d 728 (11th Cir. 2018).

And those are just the uses of *Lemon* that turned into litigation. *Lemon*'s shadow has been far more extensive, convincing many municipalities and other government bodies that they simply should not accommodate Orthodox Jews. And sadly this folk-wisdom understanding of what the Establishment Clause requires is still not entirely gone. Even though the Supreme Court has declared *Lemon* dead, local officials and their lawyers continue to give it an afterlife, treating Jewish religious practice as something to be carefully avoided. *See, e.g.*, Caramia Valentin, *Agreement Reached: Controversy surrounding temple's request to add Menorah to New Bern Christmas display ends*, The Sun Journal (Nov. 17, 2023), https://t.ly/h-_W0 (describing municipal attorney advice that whether menorah could be part of holiday display turned on whether menorah was religious symbol or not).

That is why it is crucial that this Court instruct the lower courts in this Circuit not to rely on *Lemon* as the district court wrongly did here. Orthodox Jews—like many other religious minorities—are often

misunderstood. Their religious beliefs and practices are unknown or at least unfamiliar to the vast majority of Americans. They therefore have special need of religious accommodations like the Title IX exemption, and special need of a firm repudiation of *Lemon*.

III. This Court can resolve the Establishment Clause argument without remanding to the district court.

Plaintiffs ask for a remand, Br.45, but there is no need for remand based on the undisputed facts in the record.

Appellate courts retain discretion to remand a legal question to the district court to address in the first instance. But often, when a legal question is straightforward, the interests of judicial efficiency militate strongly in favor of deciding the question at the appellate level. *See Marilley v. Bonham*, 844 F.3d 841, 854-55 (9th Cir. 2016) (refusing to remand the Equal Protection Clause question given the simplicity of the answer); *Thompson v. Paul*, 547 F.3d 1055, 1063 (9th Cir. 2008) ("[T]he [district] court did not reach the question of whether the complaint satisfies the heightened pleading requirements of the PSLRA. . . . Without burdening the reader with a detailed recounting of the complaint beyond that provided, *supra*, we simply say that Thompson's complaint, pleading a violation of Section 10(b), satisfies the heightened standard of the PSLRA.").

Here, judicial efficiency weighs in favor of applying *Kennedy* and resolving the Establishment Clause question now. In *Kennedy* itself, the

Supreme Court reversed the grant of summary judgment for the defendants and granted summary judgment for the plaintiff, holding that Defendants' Establishment Clause argument was meritless in light of historical practices and understandings. *Kennedy*, 142 S. Ct. at 2433. And to decide the Establishment Clause question here, this Court need only analyze whether the Title IX's religious exemption falls within historically defined religious establishments, an inquiry that simply requires analogizing to the six hallmarks described in *Kennedy*. As demonstrated above, Title IX's religious exemption shows *none* of the six hallmarks. *See* Section I.C above.

Plaintiffs plead with this Court to remand to develop the "historical record." Br.45. But *Kennedy* already explains the relevant "historical record": the six hallmarks of religious establishments. No remand is necessary to discern the Court's legal holding regarding what historical practices are important because *Kennedy* itself decisively answers that question.

Moreover, Plaintiffs' request to develop the historical record is nothing more than a late-breaking litigation tactic. The Supreme Court decided *Kennedy* while Defendants' motions to dismiss and Plaintiffs' motion for a preliminary injunction were pending. But only Defendants-Intervenors filed a notice of supplemental authority pointing the district court to *Kennedy*. Dkt. 172. And even then, Plaintiffs never responded to *Kennedy* and never claimed that *Kennedy* required further elaboration.

Instead, Plaintiffs opted to file multiple declarations and supplemental briefs, none of which were relevant to *Kennedy*. Dkts. 173-74, 178-80.[3] And when Defendant-Intervenor filed another notice of supplemental authority regarding the passage of the Respect for Marriage Act, Dkt. 186, Plaintiffs responded to that supplemental authority with a ten-page brief, Dkt. 187. So Plaintiffs' tardy embrace of *Kennedy*—after remaining curiously silent at the district court—poses no obstacle for deciding the Establishment Clause question now. Rather, remanding would do little besides incentivizing bad-faith gamesmanship.

CONCLUSION

The Court should affirm the decision below, but on the basis of the *Kennedy* historical-practices-and-understandings test rather than the *Lemon* test.

[3] In one filing in district court, Plaintiffs acknowledged the existence of both *Kennedy* and *Carson*. Dkt. 173 at 9. But Plaintiffs responded only to *Carson* and stated that "Plaintiffs will more fully respond to Intervenor-Defendants [sic] arguments in a separate filing." *Id.* at 9 n.7. Plaintiffs never did so. Religious Schools Ans. Br.33. Additional briefing interpreting *Kennedy* might have been helpful, as the district court found Plaintiffs' Establishment Clause arguments "confusing and contradictory." 1-ER-34.

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Respectfully submitted,

/s/ *Eric Rassbach*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1 because it contains 6,870 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point proportionally spaced typeface using Microsoft Word 2019.

Dated: November 22, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2023, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

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