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Establishing an End to *Lemon* in the Eleventh Circuit

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"Now, this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."

-Winston Churchill**

Over half a century ago, the Supreme Court decided Lemon v. Kurtzman*, the most controversial Establishment Clause case in judicial history. And despite the* Lemon *test's constant criticism, the Court has never expressly overruled the decision in its entirety. This continues to be the case even after* Kennedy v. Bremerton School District*, in which the Court noted* Lemon*'s abandonment rather than its complete abrogation. As a result, lower federal district courts have been left in limbo regarding whether* Lemon *is fair game for any of their Establishment Clause determinations and have been inconsistent in using it as continued precedent. This is creating a quagmire of First Amendment decisions throughout the country in an area of law that is already a muddled mess.*

Fortunately, this jurisprudential ambiguity no longer exists for those federal district courts in the Eleventh Circuit. Less than a month after the Kennedy *decision, the Eleventh Circuit issued the clear guidance that the Supreme Court has*

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** *Winston Churchill's Speech at the Mansion House, 10 November 1942*, IMPERIAL WAR MUSEUMS, https://www.iwm.org.uk/collections/item/object/1030031903 (last visited April 3, 2023).

perpetually failed to provide by expressly acknowledging the termination of the Lemon *test in its jurisdiction in* Rojas v. City of Ocala*. In doing so, the Eleventh Circuit concurrently refused to accede to the* Kennedy *majority's unsubstantiated claim that* Lemon*'s long abandonment was an uncontroverted part of the Court's First Amendment jurisprudence. In doing so, the Circuit established a fitting end to the application of* Lemon *within its geographical jurisdiction while holding the Court accountable for its inaccurate statements about that case.*

This Article argues that the Eleventh Circuit's Rojas *approach should become the standard bearer for other circuits' post-*Kennedy *determinations on the official termination of* Lemon *in their jurisdictions. Given the Supreme Court's continued failure to expressly overrule* Lemon *in its entirety, it has become incumbent upon the federal circuit courts to officially close this interpretive chapter to alleviate inconsistencies in one of the most divisive areas of constitutional law and to achieve efficiencies within their overwhelmed lower court dockets. As the judicial leader stepping into this void, the Eleventh Circuit has significantly contributed to clarifying a chaotic First Amendment doctrine. Consequently, the* Rojas *approach will prove to be an invaluable circuit breaker in the Establishment Clause jurisprudential canon.*

INTRODUCTION

Over half a century ago, the Supreme Court decided *Lemon v. Kurtzman*,[1] the most denigrated Establishment Clause case in judicial history.[2] And despite the *Lemon* test's constant criticism, the Supreme Court has never expressly overruled the decision in its entirety.[3] This was the case after the fractured 2019 *American Legion v. American Humanist Association* decision.[4] And it continues to be the case even after the 2022 decision of *Kennedy v. Bremerton School District*,[5] in which the majority of the Court did not state that it was "overruling *Lemon* entirely and in all contexts," but instead inaccurately claimed that it had "long ago abandoned" it.[6]

This has left lower federal district courts in a quandary in their Establishment Clause decision-making concerning whether the *Lemon* test continues to be an appropriate metric for any First Amendment analysis. Under the hierarchical precedent doctrine, lower courts must follow relevant binding precedent from controlling higher courts.[7] The Supreme Court has insisted on the application of this doctrine for lower courts even where it seems that precedent may be overruled.[8] So, in this instance, without a clear and determinative directive from a controlling higher court, there has been continued uncertainty for federal trial courts on whether *Lemon*

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[1] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[2] *See* Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 828–29 n.37 (2014) (outlining the vast criticism of *Lemon*); Rebecca E. Lawrence, Comment, *The Future of School Vouchers in Light of the Past Chaos of the Establishment Clause Jurisprudence*, 55 U. MIA. L. REV. 419, 428 (2001) (discussing the "continually criticized *Lemon* test").

[3] Josh Blackman, *Why Didn't Kennedy Formally Overrule Lemon?*, REASON (July 3, 2022, 1:44 AM), https://reason.com/volokh/2022/07/03/why-didnt-kennedy-formally-overrule-lemon/ (acknowledging that the Supreme Court has never formally overruled *Lemon*).

[4] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[5] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[6] *Id.* at 2449 (Sotomayor, J., dissenting).

[7] Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994).

[8] *See* Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 969 (2000) (discussing this directive).

is fair game for any of their Establishment Clause determinations.[9] This has the potential to create a quagmire of First Amendment decisions throughout the country in an area of law that is already a muddled mess.[10]

Fortunately, this jurisprudential ambiguity is no longer for those federal district courts in the Eleventh Circuit. Less than a month after *Kennedy* was handed down, the Eleventh Circuit issued the clear guidance that the Supreme Court has perpetually failed to provide by expressly acknowledging the final death knell of the *Lemon* test in its jurisdiction in *Rojas v. City of Ocala*.[11] At the same time, the Eleventh Circuit refused to accede to the *Kennedy* majority's wink-wink-nudge-nudge approach that *Lemon*'s long abandonment was an uncontroverted part of the Court's First Amendment jurisprudence.[12] In doing so, the Circuit established a fitting end to the application of *Lemon* within its geographical jurisdiction while holding the Court accountable for mishandling this maligned case.[13]

Consequently, the *Rojas* approach should become the standard bearer for other circuits' post-*Kennedy* determinations on the official termination of *Lemon* in their jurisdictions.[14] This has become a necessary judicial step to alleviate inconsistencies in one of the most

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[9] *See, e.g.*, St. Augustine Sch. v. Underly, No. 16-C-0575, 2022 WL 4357454, at *11 n.4 (E.D. Wis. Sept. 19, 2022) (expressing uncertainty as to whether *Kennedy* completely overruled *Lemon* and continuing to apply *Lemon* as "good law" in its Establishment Clause analysis as a result).

[10] *See* Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 35 (2007) ("Commentators and jurists on all sides of the debate about the proper scope of the Establishment Clause have long agreed that Establishment Clause doctrine is a chaotic and contradictory mess."); Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 60 (2017) (labeling the Court's establishment doctrine "notoriously confused and disarrayed"); David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 142 (1995) ("The specific holdings of the Court interpreting the Establishment Clause have been so inconsistent that most commentators long ago stopped trying to reconcile the cases.").

[11] Rojas v. City of Ocala, 40 F.4th 1347 (11th Cir. 2022).

[12] *See id.*

[13] *See id.* at 1351 (declaring the official death of *Lemon*).

[14] *See* discussion *infra* Section II.B.

controversial and complex areas of constitutional law—the interpretation of the Establishment Clause.[15] Given that multiple other circuit courts have adopted a parallel approach, *Rojas* will likely prove canonical in this area of jurisprudence as the case that blazed the path for the other federal circuits in ending the application of *Lemon* in their applicable district courts.[16] Further, *Rojas* or its progeny will likely serve as a vehicle to force the Supreme Court to make a final proclamation on the express overruling of the constantly criticized *Lemon*.[17] These outcomes will be invaluable contributions to constitutional analysis not only in the Eleventh Circuit itself but also for the entire country.[18]

I. THE BEGINNING: ESTABLISHMENT CLAUSE JURISPRUDENCE FROM RATIFICATION TO *KENNEDY*

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion[.]"[19] Over 150 years after this Amendment's ratification, the Supreme Court incorporated the Establishment Clause as operative against the states through the Fourteenth Amendment Due Process

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[15] *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (emphasizing the complexity of Establishment Clause interpretation); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 13 (2004) (arguing that a failure to recognize the complex nature of the Establishment Clause has resulted in jurisprudential errors in many federal courts).

[16] *See* discussion *infra* Section II.B.

[17] *Id.*

[18] *Id.*

[19] U.S. CONST. amend. I.

Clause's liberty provision in *Everson v. Board of Education*.[20] Consequently, this religion clause applies to a broad spectrum of federal and state governmental activities.[21]

Because of the breadth of the Establishment Clause's applicability, federal courts have analyzed its meaning in a multitude of complex fact patterns.[22] These divergent religious liberty decisions have evaluated religious expression in public environments, public financial assistance of religious entities, and religious practice regulation.[23] This has resulted in a vast collection of Establishment Clause

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[20] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause against the states through the Fourteenth Amendment's Due Process Clause for the first time); Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1124 (1988) (highlighting the amount of time between the ratification of the Establishment Clause and the Court's first extended examination of the Clause in *Everson*); Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 670 (2013) (noting the Fourteenth Amendment Due Process Clause's personal liberty provision as the basis for *Everson*'s incorporation).

[21] *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (discussing the application of the Establishment Clause to official governmental conduct); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 486 (1991) (discussing the Establishment Clause's broad applicability to federal and state governmental action); Richard C. Mason, *School Choice and the Establishment Clause: Theories of "Constitutional Legal Cause*,*"* 96 DICKINSON L. REV. 629, 644 (1992) (discussing the individual liberties protected by the Establishment Clause's incorporation).

[22] *See* Nicholas P. Cafardi, *The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?*, 87 CHI.-KENT L. REV. 707, 711 (2012) (discussing the complexity of Establishment Clause analysis); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 490 (2004) (discussing the range of factual scenarios to which the Supreme Court has applied the Establishment Clause).

[23] *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 875 (2005) ("The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions."); DANIEL O. CONKLE, RELIGION, LAW, AND THE CONSTITUTION 191 (1st ed. 2016) (identifying the regulation of religious expression in public environments and the public provision of financial aid to religious organizations as major areas of Establishment Clause jurisprudence); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV.

decisions by the federal judiciary regarding the central meaning of this First Amendment clause, which has also revealed significant jurisprudential dissension about the nature of the Framers' original intent in its adoption.[24]

Given the extensive range of this constitutional litigation, it should be no surprise that the Supreme Court has applied an equally divergent variety of analytical approaches in its Establishment Clause analyses.[25] This has led to a host of judicial and scholarly criticism claiming that the Court has engaged in consistently inconsistent decision-making in this area.[26] However, in justifying the variability of this doctrine, the Court has noted that this complex area of constitutional interpretation cannot be summarized with "a single verbal formulation"[27] as it does not involve "a precise, detailed provision in a legal code capable of ready application."[28]

155, 156 (2004) (identifying the "three major lines of religious liberty cases [as]: funding of religious organizations, regulation of religious practice, and sponsorship and regulation of religious speech"); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368–69 (2009) (discussing the Establishment Clause's applicability to government speech).

[24] *See* Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 521 (2019) (discussing the divide over the Establishment Clause's meaning).

[25] *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1097 (2006) (analyzing the diverse analytical approaches to Establishment Clause interpretation); William M. Janssen, *Led Blindly: One Circuit's Struggle to Faithfully Apply the U.S. Supreme Court's Religious Symbols Constitutional Analysis*, 116 W. VA. L. REV. 33, 47–50 (2013) (outlining the Court's Establishment Clause tests).

[26] *See, e.g.*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting) (pillorying the Court's Establishment Clause jurisprudence as being "in shambles"); Bauchman *ex rel.* Bauchman v. W. High Sch., 132 F.3d 542, 561 (10th Cir. 1997) (labeling this jurisprudence "a morass of inconsistent Establishment Clause decisions"); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) ("[S]ince *Everson*, the Court has reached results in establishment cases that are legendary in their inconsistencies.").

[27] Cnty. of Allegheny v. ACLU, Greater Pitt. Chapter, 492 U.S. 573, 591 (1989).

[28] Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

As a result, the Court has applied an array of tests in its Establishment Clause decisions.[29] In *Everson* and *Illinois ex rel. McCollum v. Board of Education*, its first two extended substantive Establishment Clause cases in 1947 and 1948, the Court employed both a Jeffersonian separationist analysis and a Madisonian neutrality approach.[30] In many subsequent decisions, the Court continued to use neutrality analysis as the guide star for its Establishment Clause interpretation.[31] However, it also has incorporated coercion

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[29] *See* Khaled A. Beydoun, *Bisecting American Islam? Divide, Conquer, and Counter-Radicalization*, 69 HASTINGS L.J. 429, 486–89 (2018) (discussing the variety of Establishment Clause tests applied by the Supreme Court); Dustin E. Buehler, *Solving Jurisdiction's Social Cost*, 89 WASH. L. REV. 653, 672 n.119 (2014) (same); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1627–32 (2006) (same).

[30] *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (emphasizing Jefferson's interpretation that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'" (citing Reynolds v. United States, 98 U.S. 145, 164 (1878))); *id.* at 12, 18 (using Madison's Memorial and Remonstrances Against Religious Assessments, 1785 to conclude that "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers"); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948) (finding an Establishment Clause violation based on the state action not complying with the "wall of separation between Church and State"). *See also* Steven K. Green, *A "Spacious Conception": Separationism as an Idea*, 85 OR. L. REV. 443, 443 (2006) (discussing how *Everson* established Jeffersonian separation as "constitutional canon"); Stephanie L. Shemin, *The Potential Constitutionality of Intelligent Design?*, 13 GEO. MASON L. REV. 621, 652 (2005) (emphasizing that *McCollum* required that the government must "maintain a neutral stance toward religion").

[31] *See, e.g.*, Zelman v. Simmons–Harris, 536 U.S. 639, 661–62 (2002) (applying a neutrality approach); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) (same); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 114 (2001) (same); Bd. of Educ. v. Grumet, 512 U.S. 687, 704–05 (1994) (same); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (same); Lee v. Weisman, 505 U.S. 577, 588–89 (1992) (same); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (same); Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice."); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963) ("[T]he Government [must] maintain strict neutrality, neither aiding nor opposing religion."); Engel v. Vitale, 370 U.S. 421, 430–31 (1962) (applying neutrality analysis); Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group . . . .").

analysis;[32] a historical approach;[33] a viewpoint equality test;[34] a private choice theory;[35] and endorsement analysis.[36] About this range of analytical approaches, the Court has stated that its Establishment

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[32] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) ("[C]oercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."); Town of Greece v. Galloway, 572 U.S. 565, 589 (2014) (acknowledging the propriety of coercion analysis in Establishment Clause interpretation); *Good News Club*, 533 U.S. at 115 (applying coercion analysis); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311–13 (same); *Lee*, 505 U.S. at 587 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting *Lynch*, 465 U.S. at 678)); *Engel*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *Zorach*, 343 U.S. at 311 (finding no Establishment Clause violation for a released public school student time program for off-site religious instruction because students were not coerced to engage in it).

[33] *See, e.g.*, *Kennedy*, 142 S. Ct. at 2428 (plurality opinion) ("[T]he Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (quoting *Town of Greece*, 572 U.S. at 576)); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (adopting the Marsh v. Chambers, 463 U.S. 783 (1983), historical approach for evaluating the constitutionality of public religious displays and monuments under the Establishment Clause); *Town of Greece*, 572 U.S. at 577 ("*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."); *Marsh*, 463 U.S. at 786–93 (applying a historical approach for Establishment Clause interpretation); *Engel*, 370 U.S. at 425 (finding school prayer violated the Establishment Clause because as "a matter of history . . . this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."). *But see* Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987) ("[A] historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.").

[34] *See, e.g.*, *Good News Club*, 533 U.S. at 107 (finding that exclusion of a religious student club from a school was not required by the Establishment Clause, but instead was viewpoint discrimination that violated the Free Speech clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (using a viewpoint equality analysis).

[35] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 226 (1997) (applying private choice theory); *Zobrest*, 509 U.S. at 9, 12 (same).

Clause jurisprudence consists of "line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State."[37]

Yet, in *Lemon*, the Court acknowledged that it and all courts "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[38] Despite this acknowledgment, the Court attempted to establish a workable test within these lines for Establishment Clause analysis in this very case in 1971.[39] Expanding upon the express purpose and primary effect test established in its 8–1 *School District of Abington Township v. Schempp* decision in 1963, the Court established a conjunctive, three-part framework for determining if government action passed constitutional muster under the Establishment Clause.[40] Under this infamous *Lemon* test, to meet the requirements of the Establishment Clause, (1) the government action "must have a secular legislative purpose"; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) the state action "must not foster 'an excessive government entanglement with religion.'"[41]

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[36] *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'" (quoting *Wallace*, 472 U.S. at 73, 76 (O'Connor, J., concurring))); *Good News Club*, 533 U.S. at 118 (finding a lack of perceived endorsement of religion indicated no Establishment Clause violation).

[37] *Lee*, 505 U.S. at 598.

[38] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[39] *See id.* at 612–13, 625.

[40] *See id.* at 612–13 (articulating the three-prong, conjunctive test for constitutionality under the Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) ("[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."); Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514, 515 n.8 (1994) (noting the expansion of the *Schempp* two-prong test by the *Lemon* three-prong test); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 142 (1986) (discussing the *Lemon* test's conjunctive nature).

[41] *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

The Court's entanglement analysis in *Lemon* made clear that a strict Jeffersonian separationist approach was no longer part of its Establishment Clause doctrine as "total separation between church and state . . . is not possible in an absolute sense."[42] Entanglement under this prong, then, did not involve a question of a breach of Jefferson's "wall."[43] Instead, it involved a determination of whether the state action crossed a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[44] Here, and throughout the opinion, the Court emphasized that the decision's test reflected the Framers' original intent in ratifying the First Amendment "to protect religious worship from the pervasive power of government"[45] and to prevent "political division along religious lines."[46]

The *Lemon* test became a central foundation of the Court's subsequent Establishment Clause analysis, with many subsequent First Amendment decisions incorporating its three-pronged framework.[47] However, this case also increasingly became the subject of intense criticism by many scholars and jurists,[48] including several Justices

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[42] *Id.* at 614.

[43] *Id.*

[44] *Id.*

[45] *Id*. at 623.

[46] *Id.* at 622; *see also* Barry P. McDonald, *Democracy's Religion: Religious Liberty in the Rehnquist Court and into the Roberts Court*, 2016 U. ILL. L. REV. 2179, 2224 (2016) (stating that *Lemon* reflects the Madisonian tenet that "the government [must] remain neutral towards religion by refraining from either favoring or disfavoring a religious sect or religion in general").

[47] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring) (stating that the Court applied *Lemon* in thirty of the thirty-one Establishment Clause cases it decided in the twenty years after *Lemon*); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314–15 (2000) (applying the *Lemon* test); Agostini v. Felton, 521 U.S. 203, 232–35 (1997) (applying a modified *Lemon* test); Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (applying the traditional *Lemon* test); Wallace v. Jaffree, 472 U.S. 38, 56–61 (1985) (same); Mueller v. Allen, 463 U.S. 388, 394 (1983) (same); Stone v. Graham, 449 U.S. 39, 40 (1980) (same); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 649–50 (1980) (same); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772–73 (1973) (same); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480–82 (1973) (same).

[48] *See* Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, C.J., dissenting) (calling *Lemon*'s principles "hopelessly

on the nation's high court.[49] Still, for over half of a century, *Lemon* continued to be an available interpretive tool for Establishment Clause decision-making, as the Supreme Court never expressly overruled the test in its entirety, despite contrary claims about the nature of the *American Legion v. American Humanist Association* and *Kennedy v. Bremerton School District* cases.[50]

American Legion did not expressly overrule *Lemon* in its entirety.[51] Instead, through a splintered set of seven different opinions, a majority of the Justices in this 2019 case found *Lemon* was no longer the appropriate constitutional test for evaluating whether public religious displays and monuments violate the Establishment

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open-ended"); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118–20 (1992) (deeming *Lemon* the catalyst for doctrinal chaos in establishment doctrine); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 495 (2002) (discussing vast criticism of *Lemon*).

[49] *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (referring to the "brain-spun" *Lemon* test); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("*Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .").

[50] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (noting that the Court had long abandoned *Lemon*, but not expressly overruling it); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–80 (2019) (plurality opinion) (discussing the *Lemon* test's shortcomings, but not expressly overruling it); Daniel O. Conkle, Lemon *Lives*, 43 CASE W. RES. L. REV. 865, 882 (1993) (discussing the longstanding use of *Lemon* by the Court in its Establishment Clause jurisprudence); Gabrielle Marie D'Adamo, *Separatism in the Age of Public School Choice: A Constitutional Analysis*, 58 EMORY L.J. 547, 564 (2008) (discussing how the *Lemon* test had never been overruled despite endemic criticism); Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 89 (2017) (discussing the extensive use of the *Lemon* test by the Court). *But see* Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1727 (2020) ("In its recent *American Legion* decision, the Supreme Court strongly suggested that the three-prong *Lemon* test is essentially dead letter."); Gabrielle Girgis, *A Little-Noted Puzzle in Religion Law, Post-Bremerton*, HARV. J.L. & PUB. POL'Y PER CURIAM 1, 1 (2022) ("*Bremerton* has killed *Lemon* . . . .").

[51] *See Am. Legion*, 139 S. Ct. at 2079–80 (criticizing *Lemon*, but not expressly overruling it in its entirety).

Clause.[52] Additionally, the *American Legion* plurality decision determined that *Marsh*'s historical approach was the standard that lower courts should use for this type of First Amendment analysis in the future.[53] However, this mishmash of opinions certainly did not provide an express abandonment of *Lemon* for all contexts,[54] as even acknowledged by one of *Lemon*'s harshest critics, Justice Thomas.[55] In fact, Thomas derided the Court for its continued failure to expressly overrule the case, arguing that "[i]t is our job to say what the law is, and because the *Lemon* test is not good law, we ought to say so."[56]

The prescience of Thomas's admonition became apparent with the jurisprudential splintering that ensued regarding the viability of *Lemon* post-*American Legion* in the federal courts. Based on *American Legion*'s failure to break entirely and formally with its past precedent of *Lemon*, multiple federal circuit and district courts continued to cite *Lemon* as an appropriate interpretive approach for most Establishment Clause questions (aside from public religious displays or monuments) or to apply the *Lemon* test in their Establishment Clause analyses per the hierarchical precedent doctrine.[57]

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[52] *See id.* at 2067–113 (providing six opinions finding there was no Establishment Clause violation and one in dissent).

[53] *See id.* at 2087 (plurality opinion).

[54] *See* Woodring v. Jackson Cnty., 986 F.3d 979, 981 (7th Cir. 2021) (noting, post-*American Legion*, that despite rampant criticism, the Court had not formally overruled *Lemon*).

[55] *Am. Legion*, 139 S. Ct. at 2097 (Thomas, J., concurring) (acknowledging that the case did not "overrule the *Lemon* test in all contexts").

[56] *Id.* at 2098.

[57] *See, e.g.*, Janny v. Gamez, 8 F.4th 883, 904 (10th Cir. 2021) (stating that the *Lemon* test remained a key component of Establishment Clause doctrine despite its criticism); Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 528–29 (E.D. Ky. 2020) (noting that, although the Court has criticized *Lemon*, "it has not been officially overruled, and the Sixth Circuit has stated that it is still the proper test for analyzing claims involving the Establishment Clause"); Irish 4 Reprod. Health v. U.S. Dep't of Health & Hum. Servs., 434 F. Supp. 3d 683, 709 (N.D. Ind. 2020) ("Although the *Lemon* test has been much criticized, the Seventh Circuit continues to faithfully apply it."); Case v. Ivey, 542 F. Supp. 3d 1245, 1278 (M.D. Ala. 2021) (acknowledging the criticism of *Lemon* but still applying it in its Establishment Clause analysis); Coble v. Lake Norman Charter Sch. Inc., No. 3:20-CV-00596-MOC-DSC, 2021 WL 1685969, at *3 n.3 (W.D.N.C. Mar.

Other federal jurists equated *American Legion* with *Lemon*'s complete and official death.[58] The Eleventh Circuit instead declared that the *Lemon* test was "dead . . . sort of,"[59] clarifying that a majority of the Court had determined that it was no longer good law for the evaluation of the constitutionality of public religious displays, ceremonies, and monuments, which would require historical guidance instead.[60]

After *American Legion* and before *Kennedy*, the Court did not resolve this uncertainty for the divided lower federal courts as it failed to mention *Lemon* once in a majority opinion in that interim. Only Justices Thomas and Gorsuch cited *Lemon* during those three years in a series of dissenting and concurring opinions,[61] with Thomas consistently continuing to harangue the Court for failing to "overrule[] *Lemon*."[62]

Unlike Thomas's criticism, Gorsuch argued that the Supreme Court had "long ago interred *Lemon*, and [that] it [was] past time for local officials and lower courts to let it lie" in his concurring opinion in the 2022 *Shurtleff v. City of Boston* decision.[63] Here, Gorsuch argued that the case resulted from a "drag[ging of] *Lemon* once more from its grave," which was "as risky as it was unsound" because "*Lemon* ignored the original meaning of the Establishment Clause,

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4, 2021) (expressly applying *Lemon*, rather than *American Legion*, to an Establishment Clause public school curriculum claim); Hilsenrath *ex rel.* C.H. v. Sch. Dist. of Chathams, 500 F. Supp. 3d 272, 289–90 (D.N.J. 2020) (noting that, while the *Lemon* test was "in flux," it remained the appropriate test for public school cases); Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1850 (2013) (characterizing the hierarchical precedent rule as "indefeasible and absolute").

[58] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 946 (9th Cir. 2021) (Nelson, J., dissenting) ("[T]he Supreme Court has effectively killed *Lemon*.").

[59] Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1326 (11th Cir. 2020).

[60] *Id.* at 1322 (quoting *Am. Legion*, 139 S. Ct. at 2081–82, n.16).

[61] *See infra* notes 63–67.

[62] Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1520 n.6 (2020) (Thomas, J., dissenting). *See also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring) (derisively referencing the Court's continued "entanglement" Establishment Clause analysis); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring) (criticizing the continued allowance of the "infamous test in *Lemon*").

[63] Shurtleff v. City of Boston, 142 S. Ct. 1583, 1610 (2022) (Gorsuch, J., concurring).

it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game."[64] Ironically, he pondered why state actors and lower courts continued to apply *Lemon*, arguing that the case "has long since been exposed as an anomaly and a mistake," citing *Town of Greece* and *American Legion* for support.[65] This was even though the *Town of Greece* majority opinion did not mention *Lemon* a single time and *American Legion* did not "overrule the *Lemon* test in all contexts."[66]

For a concurrence that labeled the continued invocation of *Lemon* "a myopic tactic," it was incredibly myopic for Gorsuch not to recognize that *Lemon*'s persistence was due to the Court failing to overrule it expressly in all contexts.[67] Just wishing and hoping is not a legitimate jurisprudential way to break with *stare decisis*. However, this *Shurtleff* concurrence proved to be a mere precursor to the *Kennedy* majority opinion's treatment of *Lemon*, authored by Gorsuch himself, later that term.[68]

In *Kennedy*, the majority criticized the Ninth Circuit for "overlook[ing] . . . the 'shortcomings' associated with this 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause [which] became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[69] The Court then cited its plurality opinion in *American Legion* and its decision in *Town of Greece v. Galloway* to support this proposition.[70] Citing another plurality opinion, the *Kennedy* majority stressed that its long-ago abandonment of "*Lemon* and its endorsement test offshoot"[71] was due to how "these tests 'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators."[72] The majority also cited *Shurtleff*, claiming that "just

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[64] *Id*.

[65] *Id.* at 1606.

[66] *See* Town of Greece v. Galloway, 572 U.S. 565, 565 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring).

[67] *Shurtleff*, 142 S. Ct. at 1608 (Gorsuch, J., concurring).

[68] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

[69] *Id.*

[70] *See id.*

[71] *Id.*

[72] *Id.* (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995)).

this Term, the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test."[73] From there, the majority stated that a history and tradition approach had superseded *Lemon* and its endorsement test offshoots for Establishment Clause analysis.[74] In her *Kennedy* dissent, Justice Sotomayor argued that the Court was "wrong" to "overrul[e] *Lemon* entirely and in all contexts" in this part of the majority opinion.[75]

However, a close look at the *Kennedy* case reveals that both the majority's and the dissent's claims concerning *Lemon* are wrong. First, the Court has not long abandoned "*Lemon* and its endorsement test offshoot."[76] And second, *Kennedy* itself did not overrule "*Lemon* entirely and in all contexts," which has resulted in continued uncertainty for lower courts.[77]

Concerning the first point, the *Kennedy* majority used the 2019 *American Legion* plurality decision and the 2014 *Town of Greece* case as the precedential support for its statement about the long abandonment of "*Lemon* and its endorsement test offshoot."[78] These cases' three to eight-year recency does not support a claim of a *long* abandonment of anything, especially given the Court's same-term determination in *Dobbs v. Jackson Women's Health Organization* that a "long sweep of history" was the equivalent of over 149 years.[79]

In addition to not supporting a long abandonment, *Town of Greece* did not abandon *Lemon* or establishment endorsement test analysis, despite *Kennedy*'s allusions to the contrary.[80] In fact, *Town*

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[73] *Id.* (citing *Shurtleff*, 142 S. Ct. at 1587–88).

[74] *See id.* at 2428.

[75] *Id.* at 2449 (Sotomayor, J., dissenting).

[76] *Id.* at 2427 (majority opinion).

[77] *Id.* at 2449 (Sotomayor, J., dissenting).

[78] *Id.* at 2427 (majority opinion).

[79] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2260 (2022) (emphasis added) (identifying a "long sweep of history" as being "over 100 years before [Roe v. Wade, 410 U.S. 113 (1973)] was handed down").

[80] *See Kennedy*, 142 S. Ct. at 2427 (citing Town of Greece v. Galloway, 572 U.S. 565, 575–77 (2014)).

of Greece did not cite *Lemon* a single time,[81] and it barely referenced endorsement.[82] Instead, the *Marsh* legislative prayer exception was applied in *Town of Greece* to hold that delivering Christian prayers before monthly town board meetings did not violate the Establishment Clause.[83] Using the *Marsh* historical approach, the Court found that the American "tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith" to support its conclusion that these state-sponsored prayers did not create an unconstitutionally coercive environment.[84] *Town of Greece* also referenced *Santa Fe Independent School District v. Doe* approvingly, essentially incorporating its endorsement analysis into the Establishment Clause historical approach.[85]

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[81] Justice Breyer's dissent is the only *Town of Greece* opinion to mention *Lemon*. *See Town of Greece*, 572 U.S. at 614–15 (Breyer, J., dissenting) (framing the "question in this case [as] whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the 'political division along religious lines' that 'was one of the principal evils against which the First Amendment was intended to protect'" (quoting Lemon v. Kurtzman, 403 U.S. 602, 622 (1971))).

[82] There are only two references to endorsement in the *Town of Greece* majority opinion. First, the Court summarized the lower Second Circuit's finding "[t]hat board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity." *Town of Greece*, 572 U.S. at 574. The second reference described how the four dissenting Justices in *County of Allegheny v. ACLU* "disputed that endorsement could be the proper test" for determining whether a Christmas nativity scene display at a county courthouse was a violation of the Establishment Clause. *Id.* at 579 (citing Cnty. of Allegheny v. ACLU, 492 U.S. 573, 670–71 (1989)).

[83] *Town of Greece*, 572 U.S. at 573–77 (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

[84] *Id.* at 584.

[85] *Id.* at 587 ("It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000))).

Similarly, the *American Legion* plurality decision did not expressly overrule *Lemon* in its entirety.[86] Instead, this case established that *Lemon* was no longer the appropriate test for evaluating the constitutionality of public religious displays and longstanding monuments under the Establishment Clause.[87] Additionally, this *American Legion* plurality determined that *Marsh*'s historical approach was the standard that lower courts should use for this specific subset of First Amendment analysis.[88]

Like the debunked long abandonment claim of the *Kennedy* majority, the dissent's claim that *Kennedy* "overrul[ed] *Lemon* entirely and in all contexts" is also an error.[89] Under a plain meaning analysis of its text, *Kennedy* did not expressly or formally overrule *Lemon*.[90] Under a cross-precedential analysis with its same-week decision in *Dobbs*, *Kennedy* did not expressly overrule *Lemon* either.[91] Instead, similar to *American Legion*, *Kennedy* identified another area of Establishment Clause decision-making to which *Lemon* no longer applies, albeit in a much more subtle way. In *Kennedy*, the majority's applied rejection of *Lemon* in the context of school prayer Establishment Clause analysis has resulted in a silent overruling of this case law for use in future school prayer Free Exercise cases.[92] However,

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[86] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–80 (2019) (plurality opinion) (criticizing *Lemon*, but not expressly overruling it in its entirety).

[87] *See supra* notes 51–53 and accompanying text.

[88] *See supra* notes 51–53 and accompanying text.

[89] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2449 (2022) (Sotomayor, J., dissenting).

[90] *See, e.g.*, Faraz Sanei, *Reclaiming Establishment: Identity and the "Religious Equality Problem*,*"* 71 U. KAN. L. REV. 1, 24 (2022) (stating that "the Court finally *abandoned* the *Lemon* test [in *Kennedy*,]" rather than stating the Court overruled *Lemon* (emphasis added)).

[91] *Compare Kennedy*, 142 S. Ct. at 2427 ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot."), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("We hold that *Roe* and *Casey* must be overruled.").

[92] *See Kennedy*, 142 S. Ct. at 2428 (stating that "original meaning and history" should take the place of "*Lemon* and the endorsement test"). In *Kennedy*, the Court implicitly applied a "historically sensitive understanding of the Establishment Clause" and determined that a school district's allowance of a public high school football coach–with a years-long history of praying with and proselytizing his players–to quietly pray on the fifty-yard-line of the school football

whether *Kennedy* provides the rule for evaluating all future Establishment Clause cases remains unclear. And federal district courts continue to be confused on this point, given that, post-*Kennedy*, several of these courts have continued to employ the *Lemon* test or have cited approvingly to *Lemon* as precedent in their evaluation of alleged Establishment Clause violations.[93]

Consequently, *Kennedy* is yet another decision in a long line of Supreme Court decisions that criticizes *Lemon* to no end without formally ending it entirely as a precedent. This will likely result in the continued uneven application of *Lemon* by the lower courts and state actors, especially given *Kennedy*'s paucity of guidance on the actual meaning of an application of "historical practices and understandings" for the evaluation of the constitutionality of prayer in the public school context, let alone for the evaluation of the constitutionality of all governmental prayer (if it so applies).[94] Ironically, this very doctrinal "chaos" is what the *Kennedy* majority had purportedly tried to ameliorate but has soundly failed to cure.[95]

Until the Court expressly overrules *Lemon* in its entirety and for all contexts, it remains culpable for its continued use by lower courts applying the hierarchical precedent doctrine. Indeed, as Justice Gorsuch stated concerning standing and justiciability confusion in his *American Legion* concurrence, "[t]he truth is, the fault lies here" with the Court.[96] However, the Court seems almost intransigent in not doing so, harming parties throughout the country litigating in an area of constitutional decision-making that is already a muddled mess and disserving the courts that need clear guidance on available

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field immediately following the end of the games was not a violation of the Establishment Clause and was, in fact, required to comply with the Free Exercise Clause. *See id.* at 2429.

[93] *See, e.g.*, Hunter v. U.S. Dep't of Educ., No. 6:21-cv-00474-AA, 2023 WL 172199, at *13–15 (D. Or. Jan. 12, 2023) (applying the *Lemon* test to determine the legal sufficiency of an Establishment Clause claim); Carroll v. Tobesman, No. PX-20-2110, 2023 WL 2139793, at *3 (D. Md. Feb. 21, 2023) (citing *Lemon* as binding precedent in an Establishment Clause case).

[94] *Kennedy*, 142 S. Ct. at 2428.

[95] *Id.* at 2427 (stating the tests of *Lemon* and its progeny "'invited chaos' in lower courts" (internal citations omitted)).

[96] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring).

interpretive tools for this complicated case law.[97] These constituencies and trial courts need a hero to resolve these continued jurisprudential ambiguities.

II. THE END OF THE BEGINNING: THE ELEVENTH CIRCUIT'S HALLMARK APPROACH TO ESTABLISH AN END TO *LEMON*

Enter the Eleventh Circuit stage right with the *Rojas v. City of Ocala* decision, issued within a month of *Kennedy* in 2022.[98] *Rojas* was the first circuit court decision to cite *Kennedy*.[99] It took the helpful step for lower courts within its ambit to signal the end of the use of the *Lemon* test for *all* Establishment Clause analyses in the Eleventh Circuit, rather than the drip-drip-drip piecemeal abrogation of *Lemon* utilized by the Supreme Court in *American Legion* and *Kennedy*.[100] However, in doing so, the Eleventh Circuit transparently acknowledged the Supreme Court's complete historical treatment of *Lemon* and its effect on its precedential status rather than acquiescing to the Court's false narrative of an uncontroverted long-ago abandonment of the case.[101] In doing so, the Circuit established an appropriate end to the application of *Lemon* within its geographical

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[97] *See* DeStefano v. Emergency Hous. Grp., Inc., 247 F.3d 397, 402 (2d Cir. 2001) (framing the case as "requiring [the court] to plunge into the thicket of Establishment Clause jurisprudence"); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 693 (1997) ("[T]he Supreme Court has made a mess of this area . . . ."); Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 315 (2007) (deeming this doctrine "a muddled mess"); Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 706 (2008) (describing Establishment Clause litigation as a "fight . . . through the thicket of *Lemon* (or whatever other test—coercion, neutrality, etc.—the court decides to use)").

[98] Rojas v. City of Ocala, 40 F.4th 1347 (11th Cir. 2022). *Rojas* was filed on July 22, 2022. *Id.* The *Kennedy* decision was issued on June 27, 2022. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[99] *See Rojas*, 40 F.4th at 1351.

[100] *Id.* (declaring the official end of *Lemon*); *see supra* notes 11–13 and accompanying text.

[101] *See Rojas*, 40 F.4th at 1351.

jurisdiction while holding the Court accountable for its inimical treatment of this embattled case.[102]

The *Rojas* approach to establishing an end to *Lemon* has set the high-water mark for the other federal circuit courts that will subsequently address the impact of *Kennedy* on the status quo of Establishment Clause doctrine in the federal courts. Given the Supreme Court's continued failure to expressly overrule *Lemon* in its entirety, it has become incumbent upon the federal circuit courts to officially close this interpretive chapter to alleviate inconsistencies in one of the most divisive areas of constitutional law and to achieve efficiencies within their overwhelmed lower court dockets.[103] The *Rojas* approach is the way to do so. By being the judicial leader of stepping into this void created by the Court's failure to overrule *Lemon* expressly and entirely, the Eleventh Circuit has significantly contributed to clarifying a chaotic First Amendment doctrine that needs all possible positives.[104]

A. Rojas v. City of Ocala

Rojas did not involve a question of the constitutionality of legislative prayer, a longstanding religious public monument, or school

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[102] *See id.* (providing a complete discussion of the status and state of *Lemon* in the Eleventh Circuit).

[103] *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 485 (1986) ("The Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application."); Kaelan Deese, *Justice Delayed: Federal Case Backlog Prompts Calls to Expand Courts*, WASH. EXAMINER (Sept. 5, 2022, 6:00AM), https://www.washingtonexaminer.com/policy/courts/caseloads-in-federal-courts-indicate-need-for-more-judges ("[L]ower-court federal judges are overworked and need help presiding over their growing caseload."); Daniel P. Suitor, *A Hill to Die On: Federal Court Reform in the 2020s*, 106 MINN. L. REV. 2591, 2597 (2022) (discussing backlogs in federal district courts).

[104] *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1440 (2000) (discussing the variety of corollary confusions that result from the unsettled state of *Lemon* in Establishment Clause jurisprudence); Allen M. Brabender, *The Crumbling Wall and Free Competition: Formula for Success in America's Schools*, 79 N.D. L. REV. 11, 23 (2003) ("[The Court's] reluctance to strictly apply the *Lemon* test to Establishment Clauses cases . . . coupled with the Court's failure to directly overrule the *Lemon* test, created confusion among the lower courts as to when to apply the test.").

prayer under the Establishment Clause.[105] Consequently, *Town of Greece*, *American Legion*, and *Kennedy* were not directly on point for the United States District Court for the Middle District of Florida or the Eleventh Circuit in their determinations of whether another form of state-sponsored prayer transgressed this religion clause of the First Amendment.[106] Of course, importantly, it would have been impossible for the federal district court to apply *American Legion* or *Kennedy* as the trial court decided *Rojas* before them.[107]

Instead, *Rojas* analyzed a state-sponsored prayer vigil organized in response to "a violent crime-spree in the late summer and early fall of 2014" in Ocala, Florida.[108] Specifically, over the course of three days in September 2014, there was an armed robbery at a local gas station and a series of drive-by shootings that left several individuals, including two children and an infant, severely injured.[109] In response to this extensive criminal action, the city's Chief of Police, Greg Graham, coordinated with a team of his police officers, volunteer police chaplains, and a community activist "to organize and sponsor a prayer vigil in the town square."[110] To publicize the event, Graham directed the posting of a letter with his signature on police department letterhead on the department's Facebook page that extended "blessings" to the community, called for "fervent prayer" to confront the criminal crisis, and urged attendance at a "Community Prayer Vigil" to do so.[111] All of the police chaplains were asked to

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[105] *See Rojas*, 40 F.4th at 1349 (providing the facts of the underlying case); *see also* Rojas v. City of Ocala, 315 F. Supp. 3d 1256, 1278, 1278 n.16 (M.D. Fla. 2018), *rev'd*, 40 F.4th 1347 (11th Cir. 2022) (providing that the case was neither "a school prayer case" nor "a legislative prayer case").

[106] *See Rojas*, 315 F. Supp. 3d at 1277–80; *Rojas*, 40 F.4th at 1351.

[107] The Eleventh Circuit decided *Rojas* in May 2018. *See generally Rojas*, 40 F.4th at 1347. The U.S. Supreme Court decided *American Legion* in June 2019 and *Kennedy* in June 2022. *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[108] *Rojas*, 315 F. Supp. 3d at 1263.

[109] *See* Michael LaTulipe, *RaceTrac Robbery Followed by Multiple Shootings: Two Children Shot*, OCALA POST (Sept. 12, 2014), https://www.ocalapost.com/armed-robbery-followed-by-multiple-shootings-two-children-shot/ (discussing these crimes); *Rojas*, 315 F. Supp. 3d at 1265 (providing facts related to the shootings).

[110] *Rojas*, 40 F.4th at 1349.

[111] *Rojas*, 315 F. Supp. 3d at 1265–66.

attend the prayer vigil, and several local clergy members were invited to participate by one of those chaplains.[112]

After being contacted by several citizens who were concerned that the prayer vigil was unconstitutional, Chief Graham initially "explain[ed] that the purpose of the Vigil was for the Police Department to engage the faith-based community to help make the community safer" and reaffirmed his "personal belief on the power of prayer."[113] Upon learning of the planned prayer vigil, Mayor Kent Guinn stood steadfastly by it and "readily embraced it as a government-sponsored event."[114]

About 500 to 600 people attended the prayer vigil on September 24, 2014, which lasted approximately an hour.[115] The police chief and mayor attended the downtown square event but did not address the crowd.[116] Only Christian uniformed police chaplains and community faith leaders prayed, sang, or delivered other religious speeches from the stage during the event, which was likened to a "Christian tent revival."[117] Other uniformed police officers attended the event "to engage with the crowd and provide security."[118]

County residents Lucinda and Daniel Hale attended the vigil in the hope that there would be a discussion on how to stop the violent criminal activities that had been occurring.[119] Because prayer was not a part of their lives, they could not participate in the vigil events.[120] Similarly, city resident Art Rojas attended the event but felt the vigil did not represent him as he was not a Christian.[121] Rojas stated that the vigil "was 'not a comfortable place for non-believers' and caused anyone present to feel 'some pressure to participate and

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112 *Id.* at 1267.
113 *Id.* at 1268.
114 *Id.* at 1269.
115 *See id.* at 1271.
116 *See id.* at 1270.
117 *Id.* at 1270–71, 1272.
118 *Id.* at 1271.
119 *See id.* at 1271–72.
120 *See id.*
121 *See id.* at 1272.

show approval,' lest they be seen as 'publicly opposing the police.'"[122] Approximately two months after the vigil, the Hales, Rojas, and Jean Porgal, another vigil attendee, all of whom described themselves as humanists or atheists, filed a lawsuit against the police chief, mayor, and city, claiming that the vigil had violated the Establishment Clause.[123]

The United States District Court for the Middle District of Florida determined that the state action related to the vigil on the part of the city and the police chief violated the First Amendment's Establishment Clause.[124] To reach this conclusion, the federal district court first determined that the plaintiffs had standing to bring the case.[125] Applying *Lujan*'s test for Article III standing, the Court determined that the plaintiffs "'suffered an injury-in-fact'" because they were community citizens who had an interest in confronting community crime by attending the vigil "but were unable to participate in any of the activity because the speakers only invited the audience to pray and sing."[126] Additionally, the causal connection and redressability prongs under that standing test were met, as the asserted injuries were causally connected to the city-sponsored prayer vigil and could be redressed through nominal damages for conduct that transgressed the Establishment Clause.[127] In closing the standing analysis, the court soundly rejected the defendants' claim that the constitutional injury could have been avoided by the plaintiffs choosing not to attend the vigil, finding that "being forced to choose between avoiding the religious message and being involved members of their community was exactly the Hobson's choice creating plaintiffs' injury."[128]

The trial court then turned to its substantive Establishment Clause analysis, and it applied the *Lemon* test because the parties *all*

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[122] *Id.* (internal citation omitted).

[123] *See id.* at 1273; Rojas v. City of Ocala, 40 F.4th 1347, 1349 (11th Cir. 2022).

[124] *Rojas*, 315 F. Supp. 3d at 1263.

[125] *See id.* at 1276.

[126] *Id.* at 1274–75 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

[127] *See id.* at 1275.

[128] *Id.* at 1276.

agreed that this test applied to the case.[129] In using the three-pronged test, the Court determined that the actions of the police chief and the City with regard to the state-sponsored prayer vigil failed each prong and violated the Establishment Clause.[130] Specifically, the court determined that the police department's call for "'fervent prayer'" and the vigil's religious content demonstrated that the event had a religious purpose rather than a secular one.[131] With respect to the principal or primary effect prong, the court determined that the public space prayer vigil failed this prong as it could "hardly be thought to be anything other than an endorsement of religion."[132] Finally, the court determined that the entanglement prong was also not satisfied, as "an invitation by a city police department encouraging the community's attendance at a Prayer Vigil [alone] entangles the government with religion" and the additional involvement of the uniformed police department chaplains in the event made "the entanglement . . . excessive."[133] The court concluded its analysis by determining this was a government-sponsored religious prayer event barred by the Establishment Clause rather than a community-sponsored activity that the Free Exercise Clause would protect.[134]

The court's grant of summary judgment to the plaintiffs on the First Amendment issue was appealed to the Eleventh Circuit.[135] Due to multiple deaths among the parties and a procedural issue in the lower court, the only remaining plaintiffs at the time of the 2022 circuit decision were Art Rojas and Lucinda Hale, and the only remaining defendant was the City of Ocala.[136] Although the parties had changed, the Eleventh Circuit addressed the same standing and Establishment Clause issues asserted in the lower court.[137] However, the circuit court was not as definitive in its analysis, concluding that

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129 *See id.* at 1277.
130 *See id.* at 1290.
131 *Id.* at 1278 (internal citation omitted).
132 *Id.* at 1279.
133 *Id.* at 1280.
134 *See id.* at 1280, 1282, 1290.
135 Rojas v. City of Ocala, 40 F.4th 1347 (11th Cir. 2022).
136 *See id.* at 1349 n.1.
137 *See id.* at 1349.

the answers to these questions of standing and constitutional violation were "'yes,' and 'maybe.'"[138] In reaching that "maybe," though, the Eleventh Circuit accomplished a significant step towards the closure of a jurisprudential chapter of unbridled inconsistency created by the Supreme Court.

But, first, the "yes" analysis should be addressed. Like the district court, the Eleventh Circuit determined that Hale had sufficient jurisdictional Article III standing under the established *Lujan* requirements.[139] The circuit court determined that Hale incurred "a 'personal injury . . . *as a consequence* of the alleged constitutional error'" because she voluntarily attended the prayer vigil to address crime in the community but was unable to participate in the event because it was solely a religious one.[140] The Eleventh Circuit concluded that it did not need to address whether Rojas had standing, given its determination that Hale had established sufficient standing.[141]

On the merits of the constitutional claim, the Eleventh Circuit reversed the lower court based on its application of the *Lemon* test for its Establishment Clause inquiry.[142] However, the court did so by maintaining a respectful stance toward the district court's analytical approach.[143] Specifically, the Eleventh Circuit explained that the lower federal court applied *Lemon* because all parties agreed it was "the controlling law."[144] This was because of the Supreme Court itself; the circuit court emphasized that "[e]ven though many Justices soured on *Lemon* over the years, the Court seemingly could not rid itself of that much-maligned decision."[145]

Then, in a generous but necessary nod to the Supreme Court's jurisprudential approach, the Eleventh Circuit declared that after the filing of the *Rojas* appeal, the Court in *Kennedy* "drove a stake through the heart of the ghoul and told us that the *Lemon* test is gone,

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138 *Id.*

139 *See id.* at 1350–51 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).

140 *Id.* (quoting Glassroth v. Moore, 335 F.3d 1282, 1292 (11th Cir. 2003)).

141 *See id.* at 1351.

142 *See id.* at 1351–52.

143 *See id.* at 1351.

144 *Id.*

145 *Id.*

buried for good, never again to sit up in its grave."[146] The circuit court clarified this statement in an express directive for all future Establishment Clause analyses in its underlying district courts in Florida, Georgia, and Alabama: "Finally and unambiguously, the Court has 'abandoned *Lemon* and its endorsement test offshoot.'"[147]

However, after this definitive flipping off of the switch of *Lemon* in its entirety in the Eleventh Circuit in this generous summary of the *Kennedy* decision, the circuit court did not allow the *Kennedy* majority's jurisprudential bait-and-switch timeline to pass without comment. [148] Here, the circuit court specifically stated that in the course of the abandonment of *Lemon*, the Supreme "Court asserted that it had already done it — 'long ago,' — which was news to a third of the Court's Justices . . . ."[149]

The Eleventh Circuit concluded its Establishment Clause analysis by holding the Supreme Court accountable for transparent decision-making, emphasizing the end to *Lemon* in the circuit, and providing the guidance that it could offer to its lower courts for future First Amendment cases.[150] Here, the circuit court stated that "[r]egardless of exactly when the ghastly decision was dispatched for good, the Supreme Court has definitively decided that *Lemon* is dead — long live historical practices and understandings."[151] As a result, the *Rojas* court remanded the case to the lower district court "to give it an opportunity to apply in the first instance the historical practices and understandings standard endorsed in *Kennedy*."[152]

After this decision, the City of Ocala filed a motion with the circuit court to stay the issuance of the mandate pending its application to the Supreme Court for a writ of certiorari and the Court's final disposition of the case.[153] In it, the city argued that the end of *Lemon*

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146 *Id.*

147 *Id.* (quoting Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022)).

148 *See id.* (quoting *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting)).

149 *Id.*

150 *Id.*

151 *Id.* (citing *Kennedy*, 142 S. Ct. at 2428).

152 *Id.* at 1352.

153 *See* Appellant City of Ocala's Motion to Stay the Issuance of the Mandate at 1, Rojas v. City of Ocala, 40 F.4th 1347 (11th Cir. Aug. 9, 2022) (No. 18-12679).

also signaled the end of offended observer status for standing, which was the basis for the *Rojas* plaintiffs' standing.[154] The Eleventh Circuit denied the motion and issued its mandate.[155] The City filed a Petition for Writ of Certiorari with the Supreme Court on September 23, 2022, in which it argued that the lower courts erred in their determination that the plaintiffs had sufficient Article III "'offended observer' standing[.]"[156] The Court denied this petition on March 6, 2023; as a result, the district court will now have the opportunity to apply the *Kennedy* historical practices and tradition standard to the Establishment Clause claim.[157]

B. *The Exponential Benefits of the* Rojas *Approach for Establishment Clause Jurisprudence*

The benefits of the *Rojas* approach are legion, with its definitive end to *Lemon*, its pointed acknowledgment of the *Kennedy* majority's attempted jurisprudential sleight of hand, and its precedential direction to its lower courts to apply the *Kennedy* "historical practices and understandings standard."[158] It is no wonder that most subsequent federal circuit court decisions encountering these same issues have used the hallmark approach of *Rojas*.[159] And for those circuits that have gone in a different direction or have not yet addressed the status of *Lemon* post-*Kennedy*, they should adopt the Eleventh Circuit's beneficent approach. This continued pattern among the

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[154] *See id.* at 8–10.

[155] *See* Judgment at 2, Rojas v. City of Ocala, 40 F.4th 1347 (11th Cir. Aug. 31, 2022) (No. 18-12679).

[156] Petition for Writ of Certiorari at i, City of Ocala v. Rojas, 143 S. Ct. 764 (U.S. Sept. 23, 2022) (No. 22-278) (internal citation omitted).

[157] *See* Denial of Petition for Writ of Certiorari at 1, *Rojas*, 143 S. Ct. 764 (No. 22-278). In a statement respecting the denial, Justice Gorsuch stated that *Kennedy* established that "the *Lemon* test . . . is no longer good law." *Id.* at 2 (Gorsuch, J., respecting the denial of certiorari). In his dissent to the denial, Justice Thomas inaccurately argued that *Kennedy* provided an "express abandonment of *Lemon*[.]" *Id.* at 1 (Thomas, J., dissenting from the denial of certiorari). However, Thomas also noted that "the Eleventh Circuit was correct that *Lemon* is no longer good law[.]" *Id.* at 2 (Thomas, J., dissenting from the denial of certiorari). This is yet another endorsement of the *Rojas* approach as the way to establish an end to *Lemon*.

[158] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

[159] *See infra* notes 162–206 and accompanying text.

federal circuit courts of following the *Rojas* footsteps will ultimately help to cure many of the deficiencies within Establishment Clause jurisprudence created by the high court's continued failure to expressly overrule *Lemon* in its entirety.

Since *Kennedy*, five of the United States Courts of Appeals, including the Eleventh Circuit, have squarely addressed the status of *Lemon*.[160] The Fourth, Second, and Ninth Circuits correctly applied the foundational analysis that the Eleventh Circuit accomplished in *Rojas*. Conversely, the Fifth Circuit's approach, although symmetrical in some ways to *Rojas*, demonstrated a less helpful jurisprudential alternative that colluded with the *Kennedy* majority's problematic glossing over of *Lemon*'s complete history. Comparing these cases definitively indicates that the Eleventh Circuit's first-in-time analysis of these issues among the federal circuit courts is superior.

The Fourth Circuit correctly utilized the *Rojas* approach in *Firewalker-Fields v. Lee*.[161] This case involved a claim that a regional jail's weekly television broadcasts of Christian religious services to its inmates violated the Establishment Clause.[162] Here, like the Eleventh Circuit, the Fourth Circuit provided a direct and helpful statement for its lower courts that "*Lemon* [is] finally dead[,]"[163] given *Kennedy*'s announcement "that the *Lemon* test—the Fourth Circuit's long-used, all-purpose Establishment Clause test—[was] no longer good law, and that in its place, courts should use an analysis that focuses on history, tradition, and original meaning."[164] Consequently, the Fourth Circuit would use *Lemon* "no more."[165]

However, in doing so, the court also acknowledged *Lemon*'s central place within its past Establishment Clause analytical framework, noting that it had "long used the three-pronged *Lemon* test . . .

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[160] *See* Firewalker-Fields v. Lee, 58 F.4th 104, 111 (4th Cir. 2023); Jusino v. Fed'n of Cath. Tchrs., Inc., 54 F.4th 95, 102 (2d Cir. 2022); Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 44 F.4th 867, 887–88 (9th Cir. 2022); Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 954 (5th Cir. 2022); Rojas v. City of Ocala, 40 F.4th 1347, 1352 (11th Cir. 2022).

[161] *Firewalker-Fields*, 58 F.4th at 104.

[162] *See id.* at 111.

[163] *Id.* at 121.

[164] *Id.* at 111.

[165] *Id.* at 121.

as a one-size-fits-all Establishment Clause test."[166] Like *Rojas*, the court also provided a frank acknowledgment of the Supreme Court's jurisprudential handling of *Lemon* in *Kennedy*, emphasizing that the Court had "upended" the Fourth's Circuit decades-long use of *Lemon* with *Kennedy*'s proclamation "that *Lemon* and its offshoots had been 'long abandoned.'"[167] Here, like the Eleventh Circuit in *Rojas*, the Fourth Circuit provided a necessary note on the actualities of the *Kennedy* precedent:

> The Court in *Kennedy* did not explicitly say that it was overruling *Lemon*. And the cases that it claimed had previously "abandoned" *Lemon—Town of Greece* and *American Legion*—did not explicitly say this either. But it is now clear that *Lemon* and its ilk are not good law.[168]

In doing so, the Fourth Circuit joined the Eleventh Circuit in getting the ball across the finish line to ensure the end of the application of *Lemon* in its lower district courts, while maintaining its judicial integrity in acknowledging the Supreme Court's failure to formally overrule *Lemon* in its entirety in *Kennedy*, *American Legion*, or *Town of Greece*.[169]

The final aspect of *Firewalker-Fields* that jibed with the appropriate *Rojas* approach was its direction to the lower federal courts within the circuit that, from that point forward, "historical practice and understanding 'must' play a central role in teasing out what counts as an establishment of religion."[170] Further, the Court appropriately remanded the Establishment Clause question to the underlying federal district court to have the "initial responsibility of working through" it especially given the "intervening legal developments" of *Kennedy*.[171] Even though the original plaintiff had submitted "an array of historical sources" to the Fourth Circuit in the

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166 *Id.*
167 *Id.*
168 *Id.* at 121 n.5 (internal citations omitted).
169 *See supra* notes 80–95 and accompanying text.
170 *Firewalker-Fields*, 58 F.4th at 122.
171 *Id.* at 122–23, 124.

appeal, the circuit court, like the Eleventh Circuit had in *Rojas*, "decline[d] the invitation to be a court of 'first view' and not 'a court of review.'"[172] Like *Rojas*, the *Firewalker-Fields* remand to the district court to resolve the Establishment Clause claim through the historical practices and understanding approach "in the first instance" was the appropriate procedural handling of the case, given that the lower court did not have the opportunity to do so pre-*Kennedy*.[173]

The Second Circuit also applied a similar approach to the Eleventh Circuit in its post-*Kennedy* discussion of *Lemon*, albeit in a case that did not deal with an Establishment Clause claim and that, therefore, did not allow for a remand of this type of First Amendment analysis.[174] In *Jusino v. Federation of Catholic Teachers, Inc.*, the Second Circuit clearly stated that *Lemon* was overruled.[175] Further, like *Rojas*, the court recognized the Supreme Court's fracturing within the *Kennedy* decision concerning the timeline of *Lemon*'s overruling, stating that *Lemon* was "overruled by the Supreme Court – depending on whom you ask – either 'long ago,'" or by the *Kennedy* decision itself.[176] Still, the Court made clear that it would interpret *Kennedy* as the basis for the end of *Lemon* within its jurisdiction because either "*Kennedy* actively overruled *Lemon* or simply recognized that *Lemon* was already a dead letter[.]"[177]

The Ninth Circuit also addressed *Lemon* post-*Kennedy* similarly to *Rojas* in its 2022 *Sabra v. Maricopa County Community College District* decision.[178] At first, the Ninth Circuit was not as definitive as the Eleventh Circuit concerning *Lemon*'s complete demise, stating that *Kennedy* "called into doubt much of [its] Establishment Clause case law, at least to the extent that law relies on *Lemon*."[179] However, like *Rojas*, *Sabra* recognized *Lemon*'s touchstone status

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172 *Id.* at 122.

173 *Id.* at 124.

174 *See* Jusino v. Fed'n of Cath. Tchrs., Inc., 54 F.4th 95, 102 (2d Cir. 2022).

175 *Id.*

176 *Id.* (quoting Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); *Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting)).

177 *Id.*

178 44 F.4th 867, 887–88 (9th Cir. 2022).

179 *Id.* at 887.

within its Establishment Clause jurisprudence for a "half century."[180] Also, like *Rojas*, the Ninth Circuit ultimately stated that "*Lemon* had been overruled and abandoned" and that "[g]oing forward," its "lower courts must now interpret the Establishment Clause by 'reference to historical practices and understandings.'"[181] Given that the underlying question was one of qualified immunity that assessed "the state of the law at the time of [the alleged constitutional violation]" in 2020, the circuit court did not need to remand the question of whether there was an Establishment Clause violation under the historical standard to the lower court, unlike *Rojas*.[182] Interestingly, although the Ninth Circuit mirrored much of the Eleventh Circuit's relevant approach in this case, it did not provide a parallel transparent examination of the *Kennedy* majority's jurisprudential sausage-making; instead, it merely noted that "the analysis prescribed by *Kennedy* marks a shift in the Court's Establishment Clause jurisprudence . . . ."[183]

Unlike these circuit court cases that followed the relevant basic *Rojas* approach, the Fifth Circuit took a different tack in evaluating whether courtroom prayer violated the Establishment Clause in *Freedom from Religion Foundation, Inc. v. Mack*.[184] Although the district court applied the *Lemon* test in granting summary judgment to the plaintiffs on this First Amendment claim by finding that the courtroom prayer ceremonies had "a nonsecular purpose and advance[d] and endorse[d] religion," the Fifth Circuit instead applied a historical analysis to reverse the lower court's judgment.[185] Rather than providing a clear above-the-line directive on the end of *Lemon* for its jurisdiction like *Rojas*, the Fifth Circuit instead chose a considerably less helpful approach via a footnote of colorful semantics that provided: "We do not, however, consider the *Lemon* test. Its long Night of the Living Dead . . . is now over. And it is too easily

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180 *Id.*

181 *Id.* at 887–88 (quoting *Kennedy*, 142 S. Ct. at 2428).

182 *Id.* at 874, 888 (internal citation omitted).

183 *Id.* at 888.

184 Freedom from Religion Found., Inc. v. Mack, 49 F.4th 941, 944 (5th Cir. 2022).

185 *See id.* at 948, 961.

manipulated to shed light on history's relevance."[186] While *Rojas* also used pun-filled language, the Eleventh Circuit's directive to its lower courts was clear: they could no longer apply *Lemon* in their Establishment Clause analysis.[187] This *Mack* approach provides considerably less clarity to its lower federal courts with its figurative footnote.

Further, unlike *Rojas*, *Mack* does not provide a critical discussion of *Kennedy*'s treatment of *Lemon* and does not address the Court's disputed timeline of *Lemon*'s overruling or abandonment. Instead, *Mack* cites *Kennedy* only four times to essentially support a rule that proper Establishment Clause analysis "depends on 'original meaning and history,' with particular attention paid to 'historical practices.'"[188] In doing so, the Fifth Circuit signed on to the *Kennedy* majority's unsupported narrative that history and tradition have always been *the* way to resolve all Establishment Clause questions because "[h]istory—not endorsement—matters."[189] Finally, unlike *Rojas*, the Fifth Circuit erred in its *Mack* decision by directly applying the historical approach to the Establishment Clause claim as a matter of law rather than remanding the case to the district court to apply this *Kennedy* standard, given that it did not have the opportunity to do so pre-*Kennedy*.[190] This procedural error aligns, though, with the Fifth Circuit's collusion with the history as primacy standard that the *Kennedy* majority also propped up in its Establishment Clause opinion.[191]

A review of these five post-*Kennedy* federal circuit decisions' treatments of *Lemon* definitively demonstrates that the Eleventh Circuit's approach in *Rojas* is the best way to improve the trajectory of the jumbled jurisprudence that interprets the meaning of the Establishment Clause. This is because the Eleventh Circuit in *Rojas* (1) provides a clear end to the application of *Lemon* in its entirety and in all contexts within its jurisdiction, a necessary step for its lower

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[186] *Id.* at 954 n.20 (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment)).

[187] *See supra* notes 137–52 and accompanying text.

[188] *Mack*, 49 F.4th at 951 (quoting Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022)).

[189] *See id.* at 954 n.20 (citing *Kennedy*, 142 S. Ct. at 2427–28).

[190] *See id.* at 948–54.

[191] *See id.* at 948–51.

courts given the Supreme Court's repeated failures to do so; (2) holds the Supreme Court accountable for its jurisprudential methodology in *Kennedy*; and (3) allows its underlying district court to provide a first instance application of the historical practices and understanding standard given that the trial court made its decision before the issuance of *Kennedy*.[192]

At first glance, it might seem overblown to emphasize the incredible benefit of the Eleventh Circuit's unambiguous termination of *Lemon* as applicable Establishment Clause precedent. Indeed, the one similarity between all of the circuit courts that have addressed *Lemon* post-*Kennedy* is the determination that *Lemon* is no longer good law, even if one has to decode a folksy footnote's judicial gloss to ascertain this similarity.[193] However, other federal circuit courts must continue to apply the Eleventh Circuit's approach of a precise above-the-line statement because federal district courts across the country continue to apply the *Lemon* test or utilize *Lemon* as a binding precedential rule in their Establishment Clause analyses even nine months after the *Kennedy* decision.[194]

Specifically, at least five federal district courts did so in a range of Establishment Clause cases within this period.[195] Many of these

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[192] *See infra* notes 195–214.

[193] *See supra* notes 160–90.

[194] *See infra* note 202.

[195] *See, e.g.*, Hunter v. U.S. Dep't of Educ., No. 6:21-cv-00474-AA, 2023 WL 172199, at *13–15 (D. Or. Jan. 12, 2023) (applying the *Lemon* test to determine the legal sufficiency of an Establishment Clause claim); Carroll v. Tobesman, No. PX-20-2110, 2023 WL 2139793, at *3 (D. Md. Feb. 21, 2023) (citing *Lemon* as binding precedent in an Establishment Clause case); St. Augustine Sch. v. Underly, No. 16-C-0575, 2022 WL 4357454, at *11 n.4 (E.D. Wis. Sept. 19, 2022) (applying *Lemon* as still good law); Monteer v. ABL Mgmt. Inc., No. 4:21-CV-756 ACL, 2022 WL 3814333, at *8 (E.D. Mo. Aug. 30, 2022) (applying the *Lemon* test to an Establishment Clause claim based on a finding that "it appears the Eighth Circuit employs the *Lemon* test"); Ervins v. Sun Prairie Area Sch. Dist., 609 F. Supp. 3d 709, 724 (W.D. Wis. 2022) (applying the *Lemon* test to an Establishment Clause claim even though it stated that "the continuing validity of the *Lemon* endorsement test is doubtful" per *Kennedy*).

decisions do not cite *Kennedy* at all, while others cite confusion regarding *Kennedy*'s specific impact on *Lemon* as precedent.[196] A paradigmatic example of this confusion can be found in one of these decisions that applied the *Lemon* test post-*Kennedy* to an Establishment Clause claim arising out of a federal district court in the Seventh Circuit, which has yet to issue a *Rojas*-like decision.[197] Here, the trial court justified its use of this test based on an application of the hierarchical precedent doctrine and on an honest confusion regarding *Kennedy*'s impact on *Lemon*, stating:

> In a recent case, the Supreme Court wrote that it "long ago abandoned *Lemon* and its endorsement test offshoot." Thus, it is possible that the Supreme Court no longer regards excessive entanglement as an Establishment Clause violation. However, in *Kennedy*, the Court was primarily concerned with the "endorsement test offshoot" of the *Lemon* test, which is not implicated in this case. Thus, I will assume that the entanglement prong of the *Lemon* test remains good law.[198]

This post-*Kennedy* accounting manifestly indicates that the trial courts in the federal judiciary need their binding circuit courts to draw clear lines in the sand on the complete demise of *Lemon* until the Supreme Court finally (if ever) does so. These courts of appeals should adopt the Eleventh Circuit's approach to achieve some judicial consistency within the federal courts' notoriously inconsistent Establishment Clause jurisprudence.[199]

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[196] *Compare, e.g.*, *Hunter*, 2023 WL 172199 (not citing *Kennedy*); *Carroll*, 2023 WL 2139793 (same); *Monteer*, 2022 WL 3814333 (same) *with St. Augustine Sch.*, 2022 WL 4357454 (expressing uncertainty as to whether *Kennedy* completely overruled *Lemon*); Napper v. Hankison, No. 3:20-cv-764-BJB, 2022 WL 3008809, at *15 n.12 (W.D. Ky. July 28, 2022) (finding that *Kennedy* only rejected part of *Lemon*'s application to Establishment Clause claims).

[197] *See St. Augustine Sch.*, 2022 WL 4357454, at *11, *11 n.4.

[198] *Id.* at *11 n.4 (internal citation omitted).

[199] *See* Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 587 (2008) (arguing that the Court has been inconsistent in its Establishment Clause decisions).

These circuit courts should also adopt the Eleventh Circuit's approach to ending *Lemon* to preserve two necessary components of judicial integrity—transparency and fidelity to the rule of law.[200] Reasoned decision-making that garners public trust requires both, and *Rojas* lives up to these ideals by pressing the Supreme Court to do the same.[201] An alternative "blind eye" approach,[202] like that of the Fifth Circuit in *Mack*,[203] will only contribute to perceptions of a delegitimized federal judiciary.[204]

Kennedy has engendered significant criticism for a Court that many already view as motivated by personal ideology rather than by fidelity to accurate constitutional interpretation.[205] This has become acute in light of perceptions regarding the "partisan polarization on religious issues on the Roberts [C]ourt . . . ."[206] The Court did not alleviate these concerns with *Kennedy*'s treatment of *Lemon*. Instead, it exacerbated them through its subtly silent "overruling" of

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[200] *See* Lee Epstein et al., *The Decision to Depart (or Not) from Constitutional Depart: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1118 (2015) (emphasizing the value of transparency as a matter of judicial integrity, especially for the Supreme Court); Evelyn Keyes, *Judicial Strategy and Legal Reason*, 44 IND. L. REV. 357, 382 (2011) ("[T]he integrity and functionality of the [judicial] system depends upon the shared expectation that lawmakers and judges will play by the rules of the game, i.e., that they will follow the rules and precedents produced by the system itself . . . .").

[201] *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995) (arguing that reason-giving is a "necessary condition of rational" jurisprudence).

[202] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000).

[203] *See supra* notes 184–90 and accompanying text.

[204] *See* Neil Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 87 (2022) (discussing the vital importance of the legitimacy of the federal courts to avoid unrest in the United States).

[205] *See, e.g.*, *Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2207 (2021) (predicting a trend of increasingly extreme religious ideology guiding the Roberts Court's decision-making process "[w]ith the passing of Justice Ginsburg and the confirmation of Justice Barrett"); Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, 12 UC IRVINE L. REV. 911, 970 (2022) ("[T]he Supreme Court [is now] controlled by a conservative supermajority that is eager to expand religious freedoms.").

[206] Lee Epstein & Eric Posner, *How the Religious Right Has Transformed the Supreme Court*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/opinion/supreme-court-religion.html.

Lemon with its undefined endorsement "offshoots" based on inapposite precedent and its lack of practical guidance to lower courts on how to apply a history and tradition interpretation for First Amendment religion clauses' analysis.[207] As a result, the Court has undercut both the legitimacy of its decision-making and its judicial authority, losing public trust in the process.[208]

Consequently, an additional benefit of the Eleventh Circuit's *Rojas* approach is its pulling back of the curtain on the actualities of *Lemon*'s abrogation in *Kennedy*, which should push the Justices to "be more transparent in their application of *stare decisis* policy by reformulating their justifications to reflect what they actually do, not what they say they do."[209] This approach is one that other federal circuit courts should emulate in the future. The resulting call by a multitude of circuit courts for the Supreme Court to provide accurate precedential applications to support its reasoning and to be candid in the exact status of its Establishment Clause jurisprudence could be an extraordinarily beneficial way to effectuate this type of change. Adopting the approach used by the Eleventh Circuit in *Rojas* could provide for incremental jurisprudential changes that could help to build back some of that lost legitimacy of the nation's high court based on an appearance of results-oriented decision-making.[210] This invaluable benefit alone should spur other circuits to take on the mantle of the Eleventh Circuit's candor in *Rojas*.

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[207] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022); *see also* A. Christopher Bryant & Kimberly Breedon, *How the Prohibition on "Under-Ruling" Distorts the Judicial Function (and What to Do About It)*, 45 PEPP. L. REV. 505, 522 (2018) (emphasizing the harms that occur with the dissolution of the "requirements of consistency and transparency" in judicial decision-making).

[208] *See Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUB. POL'Y CTR. (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets ("Only 46% of U.S. adults have a great deal/fair amount of trust in the Supreme Court to operate in the best interests of the American people, down from 68% in 2019 . . . . In APPC surveys since 2005, this is only the second time trust has dropped below 60%.").

[209] Epstein et al., *supra* note 200, at 1118.

[210] *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1936 (2008) (arguing that judicial authority requires "reasons for . . . rules, com-

The final reason that circuit courts should adopt a parallel approach to *Rojas* is based on the Eleventh Circuit's appropriate procedural remand of the Establishment Clause issues on their merits to the lower court. District courts are many things. However, they are not mind readers and should not be held to a standard where they should have predicted the Court's decision in *Kennedy*. *Kennedy* effectuated a seismic change to the Court's longstanding Establishment Clause jurisprudence by abandoning *Lemon* and substituting the required """historical practices and understandings""" interpretive model.[211] Consequently, federal circuit courts should ensure that their underlying district courts provide a "first instance [application of the] historical practices and understandings standard endorsed in *Kennedy*," just as the Eleventh Circuit correctly did in *Rojas*.[212]

In sum, the Eleventh Circuit's first-in-time post-*Kennedy* analysis of *Lemon* has proved to be the best model for moving the dial on the improvement of Establishment Clause jurisprudence as a whole. Its three-tiered approach of ending *Lemon* altogether, fully acknowledging *Kennedy*, and allowing its underlying district court complete review of the merits of the First Amendment claim in light of the new legal landscape is the approach that circuit courts should adopt from this point forward. This will help achieve the paramount goals of consistency and transparency at the core of reasoned judicial decision-making. It could also help motivate changes within the high court to earn back public trust and foster increased legitimacy within the federal judiciary. Finally, *Rojas* or a parallel decision by another circuit court in the Establishment Clause arena could and should serve as the vehicle on appeal for the Supreme Court to make a final proclamation on the express overruling of *Lemon* in all contexts and

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mands, orders, or instructions"); Colleen Slevin, *Chief Justice John Roberts Defends Legitimacy of Court*, AP NEWS (Sept. 10, 2022), https://apnews.com/article/abortion-us-supreme-court-denver-public-opinion-john-roberts-6921c22df48b105cdff5fabdc6c459bb (highlighting Chief Justice Roberts's concerns about the Court's legitimacy and his investment in that legitimacy given its essential importance to the country).

[211] *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)).

[212] Rojas v. City of Ocala, 40 F.4th 1347, 1352 (11th Cir. 2022).

in its entirety.[213] Achieving this type of clarity within the country's Establishment Clause jurisprudence would be unprecedented in every positive sense of that term.[214]

CONCLUSION

Establishment Clause analysis is controversial, intricate, and complex.[215] For seventy-five years, "almost every plausible textual, historical, and policy argument" has been asserted as the proper jurisprudential approach for interpreting this First Amendment religion clause.[216] In attempting to apply this range of approaches and standards per the hierarchical precedent doctrine, lower federal courts can easily become lost in this labyrinth and need accessible analytical approaches for these judicial inquiries.[217] Unsurprisingly, for over half a century, many of these courts looked to the three-pronged *Lemon* test for the basis of their reasoning as it provided

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[213] *See supra* notes 156–57 and accompanying text (discussing the denied petition for writ of certiorari in *Rojas* that will result in the remand of the case to the district court to apply the *Kennedy* history and tradition standard to the Establishment Clause issue).

[214] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) (emphasizing the importance of a principled approach of decision-making on constitutional issues); Mary B. Trevor, *From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions*, 45 U. TOL L. REV. 291, 302 (2014) (discussing the importance of clear, reasoned explanations in judicial opinions).

[215] *See* Kyle Duncan, *Misunderstanding Freedom from Religion: Two Cents on Madison's Three Pence*, 9 NEV. L.J. 32, 60 (2008) ("Establishment Clause jurisprudence has generated many controversial, persistent, and seemingly intractable questions."); Preston C. Green, III, et al., *Parents Involved, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503, 538 (2011) (discussing the complexities of Establishment Clause doctrine).

[216] Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 88 (1963).

[217] *See* Ryan v. Mesa Unified Sch. Dist., 64 F. Supp. 3d 1356, 1363 (D. Ariz. 2014) (likening Establishment Clause analysis to the navigation of a "legal labyrinth"); Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 872 (2005) (discussing the "Establishment Clause labyrinth").

one clear guideline, among many interpretive tools, for Establishment Clause analysis.[218] Even after *Kennedy*, the question of whether *Lemon* is still fair game for *any* aspect of this decision-making remains unclear for many of these courts, given the Supreme Court's perpetual failure to expressly overrule it in its entirety.

Consequently, clarity and consistency are desperately needed to avoid discordant decision-making and to attempt to ease the loss of judicial legitimacy in this critical area of First Amendment law.[219] Post-*Kennedy*, the Eleventh Circuit was the first federal circuit court to take these necessary steps with its *Rojas* decision.[220] Here, the Eleventh Circuit unambiguously instructed its lower courts to no longer employ *Lemon* for Establishment Clause analysis and to use a historical practices and understanding approach instead.[221] It accomplished this directive by squarely recognizing the shortcomings of the *Kennedy* majority and dissenting opinions and by procedurally tasking its lower court with the opportunity to employ the *Kennedy* historical standard.[222] The Eleventh Circuit's approach here is a paragon of effective judicial decision-making that other federal circuits should adopt to provide the clear and reasoned guidance all district courts need on the question of the Cerberus of *Lemon*.[223]

However, while parallel circuit approaches to *Rojas* will prove incredibly beneficial for judicial efficiencies and constitutional litigation consistencies, they should not be viewed as a panacea for the disordered doctrine of all Establishment Clause analysis.[224] Make no mistake; this will be the way to end *Lemon*, a long overdue step called for by voices from every part of the ideological spectrum and yet never formally achieved by the Supreme Court. However, it will

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[218] *See* Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 S.M.U. L. REV. 841, 877–78 (2013) (emphasizing the need for reasoned judgment in the Supreme Court's constitutional jurisprudence).

[219] *See* Schauer, *supra* note 201, at 633–34 (arguing that all judicial determinations need rationality).

[220] *See* discussion *supra* Section II.A.

[221] *See* discussion *supra* Section II.A.

[222] *See* discussion *supra* Section II.A.

[223] Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 205–06 (2009) (arguing that reasoning is the key to "reasoned judgment").

[224] *See* discussion *supra* Section II.B.

not and should not be seen as the creation of an exclusive bright-line rule of history and tradition as determinative primacy for these First Amendment cases.[225] The delineation of such a singular "Grand Unified Theory" is not an appropriate reflection of the "pluralistic American society in which these cases arise."[226] Further, much work still needs to be done on the exact constitutional meaning of the application of history and tradition to so many modern-day Establishment Clause concerns and on the adoption of standards to regain the public's trust in the legitimacy of this area of constitutional decision-making.[227]

Consequently, we should view the beneficent *Rojas* model of the Eleventh Circuit as a judicial mechanism that is the end of a beginning point for the reformation of Establishment Clause doctrine. It is neither the end of this First Amendment interpretive saga nor the beginning of the end, given that so "many questions remain" for Establishment Clause analysis in a post-*Kennedy* world, as saliently pointed out by the Fourth Circuit in its *Rojas*-like evaluation of *Lemon*.[228] However, it will be one helpful step—an end of the beginning—toward bringing much-needed clarity and consistency

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[225] *See* Amanda Harmon Cooley, *Justiciability and Judicial Fiat in Establishment Clause Cases Involving Religious Speech of Students*, 22 U. PA. J. CONST. L. 911, 990 (2020).

[226] *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J. concurring) (noting that although "[i]t is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause[,] . . . . [b]ut the same constitutional principle may operate very differently in different contexts."); Cooley, *supra* note 225, at 990.

[227] *See* Patricia Tevington, *Growing Share of Americans See the Supreme Court as 'Friendly' Toward Religion*, PEW RSCH. CTR. (Nov. 30, 2022), https://www.pewresearch.org/fact-tank/2022/11/30/growing-share-of-americans-see-the-supreme-court-as-friendly-toward-religion/ (providing statistics that forty-four percent of Americans believed that the Supreme Court Justices have been bringing too much of their own religious views into how they decide cases after the 2021-22 term).

[228] Firewalker-Fields v. Lee, 58 F.4th 104, 122 (4th Cir. 2023). Although *Marsh*, *Town of Greece*, and *Am. Legion* provided comprehensive analyses of how an application of history and tradition should be conducted for Establishment Clause claims involving legislative prayer and longstanding public monuments, *Kennedy* provides little but gossamer "guidance" on how this standard applies to

"[i]n an area of law where constitutional scholars and Supreme Court justices struggle to perceive the lines of demarcation of state establishment of religion . . . ."[229] And it could ultimately lead to a Supreme Court majority's final express pronouncement of the death of *Lemon* through its formal overruling in its entirety and in all contexts (unless, of course, the majority of the Court continues to punt on this particular issue rather than dealing with its own precedential sour lemon).

school prayer, let alone all other state action that could give rise to an Establishment Clause claim. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

[229] Amanda Harmon Cooley, *The Persistence of Lemon*, 47 U. DAYTON L. REV. 411, 444–45 (2022).