

No. 18-1898

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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HAROLD SHURTLEFF, *et al.*,  
*Plaintiffs–Appellants*,

v.

CITY OF BOSTON, *et al.*,  
*Defendants–Appellees*.

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On Appeal from a Final Judgment of the  
United States District Court for the District of Massachusetts  
Case No. 1:18-cv-11417-DJC, Hon. Denise J. Casper

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**BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS  
*AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici* are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

## TABLE OF CONTENTS

	<b>Page(s)</b>
Corporate Disclosure Statement.....	i
Table of Authorities .....	iii
Interests of the <i>Amici Curiae</i> .....	1
Introduction and Summary of Argument.....	2
Argument.....	4
A. The Judgment Is Consistent With The History, Purpose, And Original Understanding Of The Establishment Clause. ....	5
1. Our Nation is built on the understanding that even modest governmental involvement with religion is a grave threat to religious freedom. ....	6
2. The Framers recognized that religious pluralism and civil harmony require government to refrain from taking sides in matters of religion. ....	13
B. Boston’s Policy Against Flying Religious Flags Advances Religious Freedom.....	16
1. Symbols have concrete, real-world effects.....	16
2. The Christian flag, which bears the Latin cross, is a potent religious symbol. ....	18
3. Boston’s decision to refrain from flying the Christian flag appropriately respects the First Amendment and all city residents.....	22
Conclusion .....	26

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>ACLU of Ga. v. Rabun Cty. Chamber of Commerce, Inc.</i> , 698 F.2d 1098 (11th Cir. 1983) .....	22
<i>ACLU of Ill. v. City of St. Charles</i> , 794 F.2d 265 (7th Cir. 1986) .....	22
<i>American Atheists, Inc. v. Davenport</i> , 616 F.3d 1145 (10th Cir. 2010) .....	22
<i>American Humanist Ass’n v. Md.–Nat’l Capital Park &amp; Planning Comm’n</i> , 874 F.3d 195 (4th Cir. 2017), <i>cert. granted</i> , 139 S. Ct. 451 (2018) .....	23
<i>Ariz. Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011) .....	12
<i>Capitol Square Review &amp; Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995) .....	4
<i>County of Allegheny v. ACLU Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989) .....	5, 23
<i>Davis v. Beason</i> , 133 U.S. 333 (1890) .....	12
<i>Ellis v. City of La Mesa</i> , 990 F.2d 1518 (9th Cir. 1993) .....	20
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962) .....	<i>passim</i>
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968) .....	3
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947) .....	<i>passim</i>
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968) .....	12

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; Sch. v. EEOC</i> , 565 U.S. 171 (2012) .....	12
<i>Illinois ex rel. McCollum v. Bd. of Educ.</i> , 333 U.S. 203 (1948) .....	12
<i>Kondrat'yev v. City of Pensacola</i> , 903 F.3d 1169 (11th Cir. 2018) .....	22
<i>Larson v. Valente</i> , 456 U.S. 228 (1982) .....	2
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992) .....	<i>passim</i>
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984) .....	24
<i>McCreary County v. ACLU of Ky.</i> , 545 U.S. 844 (2005) .....	<i>passim</i>
<i>Pleasant Grove City v. Summum</i> , 555 U.S. 460 (2009) .....	4
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984) .....	16
<i>Reynolds v. United States</i> , 98 U.S. 145 (1878) .....	12
<i>Salazar v. Buono</i> , 559 U.S. 700 (2010) .....	5, 20
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000) .....	3, 24
<i>Separation of Church &amp; State Comm. v. City of Eugene</i> , 93 F.3d 617 (9th Cir. 1996) .....	22
<i>Shurtleff v. City of Boston</i> , 337 F. Supp. 3d 66 (D. Mass. 2018) .....	4, 5, 23
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989) .....	17

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>Trunk v. City of San Diego</i> , 629 F.3d 1099 (9th Cir. 2011) .....	22
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005) .....	15
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1871) .....	12
<i>W. Va. Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	16, 17, 26
 <b>Constitution</b>	
U.S. Const. amend. I .....	<i>passim</i>
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<i>About the Presbyterian Mission Agency</i> , PRESBYTERIAN MISSION, <a href="https://bit.ly/2qARzyX">https://bit.ly/2qARzyX</a> .....	21
AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) .....	13
GEORGE WILLARD BENSON, THE CROSS: ITS HISTORY AND SYMBOLISM (1934) .....	19
<i>The Children’s Own: The Christian Flag</i> , 84 CHRISTIAN ADVOCATE 1802 (Nov. 11, 1909), <a href="https://bit.ly/2Tn6y0b">https://bit.ly/2Tn6y0b</a> .....	21, 22
Elesha Coffman, <i>Do You Know the History of the Christian Flag?</i> , CHRISTIANITY TODAY (Aug. 2008), <a href="https://bit.ly/2zHTmGq">https://bit.ly/2zHTmGq</a> .....	21, 22
DANIEL COX & ROBERT P. JONES, PUB. RELIGION RESEARCH INST., AMERICA’S CHANGING RELIGIOUS IDENTITY (2017), <a href="http://bit.ly/2wboSZW">http://bit.ly/2wboSZW</a> .....	16
5 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES (George Thomas Kurian & Mark A. Lamport eds., 2016) .....	21

## TABLE OF AUTHORITIES—continued

	Page(s)
Carl H. Esbeck, <i>Protestant Dissent and the Virginia Disestablishment, 1776-1786</i> , 7 GEO. J.L. & PUB. POL'Y 51 (2009) .....	9, 10
EUSEBIUS, LIFE OF CONSTANTINE (Averil Cameron & Stuart G. Hall trans. 1999) .....	19
THE FEDERALIST NO. 10 (James Madison) .....	14
THE FEDERALIST NO. 51 (James Madison) .....	14
NOAH FELDMAN, DIVIDED BY GOD (2005) .....	8, 9
Noah Feldman, <i>The Intellectual Origins of the Establishment Clause</i> , 77 N.Y.U. L. REV. 346 (2002).....	6, 8, 9
Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), <a href="http://bit.ly/2jMsrVO">http://bit.ly/2jMsrVO</a> .....	9
<i>Frequently Asked Questions: Signs and Symbols</i> , PRESBYTERIAN MISSION, <a href="https://bit.ly/2UYqYJq">https://bit.ly/2UYqYJq</a> .....	22
EDWIN S. GAUSTAD, ROGER WILLIAMS (2005) .....	7
Frederick Mark Gedicks, <i>Lynch and the Lunacy of Secularized Religion</i> , 12 NEV. L.J. 640 (2012).....	25
<i>History</i> , NAT'L COUNCIL OF CHURCHES, <a href="https://bit.ly/2IfaWcy">https://bit.ly/2IfaWcy</a> .....	21
WINTHROP S. HUDSON, RELIGION IN AMERICA (3d ed. 1981).....	13
Thomas Jefferson, <i>The Virginia Statute for Religious Freedom</i> (Jan. 16, 1786), <i>reprinted in</i> FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY (John J. Patrick ed., 1995) .....	10, 11
Kyle D. Johnson et al., <i>Pilot Study of the Effect of Religious Symbols on Brain Function: Association with Measures of Religiosity</i> , 1 SPIRITUALITY IN CLINICAL PRAC. 82 (2014), <a href="http://bit.ly/2ifUo4M">http://bit.ly/2ifUo4M</a> .....	18
DOUGLAS KEISTER, STORIES IN STONE: A FIELD GUIDE TO CEMETERY SYMBOLISM AND ICONOGRAPHY (2004) .....	20
JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., Hackett Publ'g Co. 1983) (1689) .....	8, 9

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
BRUCE W. LONGENECKER, <i>THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL</i> (2015) .....	19
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> , reprinted in <i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947) (appendix to dissent of Rutledge, J.) .....	10, 11
Letter from James Madison to William Bradford (Apr. 1, 1774), <a href="http://bit.ly/2h57Xm5">http://bit.ly/2h57Xm5</a> .....	9
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RICHARD P. MCBRIEN, <i>CAESAR’S COIN: RELIGION AND POLITICS IN AMERICA</i> (1987).....	7
Michael W. McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 HARV. L. REV. 1490 (1990) .....	<i>passim</i>
ALISTER E. MCGRATH, <i>CHRISTIANITY: AN INTRODUCTION</i> (3d ed. 2015) .....	18, 19, 20
JON MEACHAM, <i>AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION</i> (2006) .....	14, 15
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<i>National Council of the Churches of Christ in the U.S.A.</i> , ENCYC. BRITANNICA, <a href="https://bit.ly/2RKOEzo">https://bit.ly/2RKOEzo</a> .....	21
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NICHOLAS JACKSON O’SHAUGHNESSY, <i>POLITICS AND PROPAGANDA</i> (2004) .....	16
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**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>Pope Francis: The Cross Is the Gate of Salvation</i> , CATHOLIC NEWS (Mar. 12, 2017), <a href="http://bit.ly/2CLyEqE">http://bit.ly/2CLyEqE</a> .....	20
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JONATHAN RILEY-SMITH, THE CRUSADES: A HISTORY (2d ed. 2005) .....	19
Philip A. Saigh, <i>The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren</i> , 109 J. SOC. PSYCHOL. 167 (1979) .....	18
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3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) .....	3
RICHARD TAYLOR, HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN CHURCHES AND CATHEDRALS (2003) .....	19
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JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2005) .....	15

## INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>

*Amici* are religious and civil-rights organizations whose members include adherents to a wide array of faiths and beliefs, including those that have historically been subjected to religious discrimination and official disfavor. *Amici* are united in respecting the important but distinct roles played by religion and government in the life of our Nation. From the time of the founding, the Establishment Clause and the religious and philosophical ideals on which it is premised have protected religious freedom for all Americans by ensuring that government does not interfere in private matters of conscience.

A governmental display of the Christian flag in front of city hall is exclusionary to the countless Americans not represented by that religious symbol. More than that, it places a heavy thumb on the scale in favor of one religion over others and over nonreligion. *Amici* have strong interests in ensuring that religious freedom is protected against such governmental favor or disfavor and that this Court's jurisprudence remains true to the fundamental principles on which the Religion Clauses of the First Amendment are based.

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<sup>1</sup> *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to this filing.

*Amici* are:

- Americans United for Separation of Church and State.
- American Humanist Association.
- Anti-Defamation League.
- Central Conference of American Rabbis.
- Freedom From Religion Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- Muslim Advocates.
- National Council of Jewish Women.
- People For the American Way Foundation.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Sikh Coalition.
- Union for Reform Judaism.
- Women of Reform Judaism.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982); accord, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (government must remain “neutral[] between

religion and religion, and between religion and nonreligion” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

By ordaining that civil government and religious authorities operate in separate spheres, the Framers sought to safeguard religious freedom for all: When free from governmental influence and interference, religions may grow organically, letting all worship and pray, or not, according to the dictates of their conscience. And by prohibiting the alignment of secular and religious power, the Framers undertook to “cut off the means of religious persecution.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833). Thus, the First Amendment does not allow government to express support or preference for any faith or denomination, no matter how modest or benign in intent that expression may seem.

Because religious symbols are powerful expressions of ideas, for many people it would be profoundly affirming to see a flag promoting their own religion flying outside city hall. But to those who do not subscribe to the beliefs represented by the flag, the display instead may send a stigmatizing message of exclusion from the political community. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). And even for adherents to the favored religion, the government’s use, for its own purposes, of their religious symbol may be demeaning to both their faith and the revered symbol. *See id.*

The Framers effected a separation of government and religion as the means to ensure enduring religious freedom. As our Nation becomes increasingly pluralistic, that cause is more important than ever. Boston's policy here not to display religious flags in front of City Hall thus respects the diverse faiths of all city residents, in keeping with the First Amendment and the fundamental freedoms that it safeguards. This Court should therefore reject any invitation to forsake our Nation's "profound commitment to religious liberty" (*McCreary*, 545 U.S. at 884) and should instead reaffirm the founding principles and essential protections for religious freedom that have served this country and all its people so well for so long.

### ARGUMENT

As the district court held, the flags displayed at City Hall constitute government speech. *Shurtleff v. City of Boston*, 337 F. Supp. 3d 66, 75 (D. Mass. 2018). The messages conveyed by the flags must therefore comply with the dictates of the Establishment Clause. *Id.* at 76; *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

The Christian flag that Appellants have asked the City to raise outside City Hall depicts a red Latin cross inside a blue canton on a white field. *Shurtleff*, 337 F. Supp. 3d at 71. "[T]he Latin cross . . . is the principal symbol of Christianity around the world." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and

concurring in the judgment); *accord Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment). The Christian flag thus straightforwardly represents Christians and Christianity; and Appellants intend its display at City Hall to honor their religion and its adherents. *See Shurtleff*, 337 F. Supp. 3d at 71. Were the City to fly the flag alongside the American and Massachusetts flags—the very symbols of government—its action would serve a purely religious purpose: unambiguously proclaiming the value of a particular religion. *Cf. County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (explaining that a Latin cross atop city hall would unconstitutionally proselytize Christianity). By declining to do so, the City has properly preserved its neutrality among religions, as the Framers directed and the Establishment Clause requires.

**A. THE JUDGMENT IS CONSISTENT WITH THE HISTORY, PURPOSE, AND ORIGINAL UNDERSTANDING OF THE ESTABLISHMENT CLAUSE.**

The architects of the First Amendment recognized that “Religion & Govt. will both exist in greater purity, the less they are mixed together.” Letter from James Madison to Edward Livingston (July 10, 1822), <http://bit.ly/2zUXhBT>. This principle—that religion flourishes best when government is involved least—has deep roots in theology and political philosophy that long predate the founding of the Republic. Grounded in the

understanding that freedom of conscience is an essential component of faith, as well as the experience of a long, sad history of religiously based strife and oppression, the principle of separation recognizes that governmental support for religion corrodes true belief, makes religious denominations and houses of worship beholden to the state, and places subtle—or not so subtle—coercive pressure on individuals and groups to conform.

**1. Our Nation is built on the understanding that even modest governmental involvement with religion is a grave threat to religious freedom.**

a. The notion of freedom of conscience as a moral virtue traces to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be a moral guide and that acting against one's conscience is sin. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 356–57 (2002). Martin Luther built on this idea, teaching that the Church lacks authority to bind believers' consciences on spiritual questions: “the individual himself c[an] determine the content of his conscience based on scripture and reason.” *Id.* at 358–59. John Calvin developed the idea further, preaching that individual conscience absolutely deprives civil government of authority to dictate in matters of faith. *See id.* at 359–61.

These tenets found expression in the New World teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams

preached that for religious belief to be genuine, people must come to it of their own free will; compelled belief and punishment of dissent are anathema to true faith, and religious practices are sinful unless performed “with[] *faith* and true perswasion that they are the true institutions of God.” ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE* (1644), *reprinted in* 3 *COMPLETE WRITINGS OF ROGER WILLIAMS* 12 (Samuel L. Caldwell ed., 1963).

Thus, Williams taught that keeping government from involving itself with or taking sides in matters of religion is crucial to protect religious dissenters against persecution and to safeguard religion itself against impurity and dilution. *See id.* at 12–13; EDWIN S. GAUSTAD, *ROGER WILLIAMS* 59 (2005); RICHARD P. MCBRIEN, *CAESAR’S COIN: RELIGION AND POLITICS IN AMERICA* 248 n.37 (1987) (“[T]he Jews of the Old Testament and the Christians of the New Testament ‘opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world. . . . [I]f He will ever please to restore His garden and Paradise again, it must of necessity be walled in peculiarly unto Himself from the world.’” (quoting Williams)). When government involves itself in matters of religion, even if just to give the barest nod of approval to a particular faith or set of beliefs, the inherent coercive authority of the state debases religion and impedes the exercise of free will. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 434



n.20 (1962) (explaining Williams’s view that “the doctrine of separation of church and state . . . was necessary in order to protect the church from the danger of destruction which he thought inevitably flowed from control by even the best-intentioned civil authorities”).

b. Not only did this theology guide the development of religion in America, but it also became the foundation for the political thought that shaped our constitutional order. Notably, John Locke, whose writings influenced the Framers of the First Amendment (*see* Feldman, *Intellectual Origins, supra*, at 350–52; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1490, 1430–31 (1990)), built the teachings into his theory of government. Echoing Williams, he expressed the view that religious acts are meaningful only if done sincerely and freely. NOAH FELDMAN, *DIVIDED BY GOD* 29–30 (2005). And he incorporated the principle into his argument for religious toleration:

[W]hatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. . . . [W]hen all is done, they must be left to their own Consciences.

JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 38 (James H. Tully ed., Hackett Publ’g Co. 1983) (1689).

Based on this understanding, Locke reasoned that citizens must not and cannot delegate matters of individual conscience to government. *See*

FELDMAN, DIVIDED BY GOD 30. Thus, he concluded, “civil government” should not “interfere with matters of religion except to the extent necessary to preserve civil interests.” Feldman, *Intellectual Origins, supra*, at 368 (summarizing Locke); *see also* McConnell, *supra*, at 1433–35.

Many of this Nation’s founders took these teachings to heart. Benjamin Franklin, for example, stated:

When a Religion is good, I conceive that it will support itself; and when it cannot support itself, and God does not take care to support [it], so that its Professors are oblig’d to call for the help of the Civil Power, ‘tis a Sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), <http://bit.ly/2jMsrVO>. And James Madison viewed governmental support for religion as “[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize.” Letter from James Madison to William Bradford (Apr. 1, 1774), <http://bit.ly/2h57Xm5>.

c. Madison’s commitment to freedom of conscience informed his opposition to Patrick Henry’s proposal in 1784 that Virginia fund religious education through property taxes. *See* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 GEO. J.L. & PUB. POL’Y 51, 77–78 (2009). Madison objected to Henry’s proposed legislation as an infringement on “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience,” a gross intrusion into religion, and a threat to civil government. James Madison, *Memorial and Remonstrance*

*Against Religious Assessments* ¶¶ 12–13, 15, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63–72 (1947) (appendix to dissent of Rutledge, J.). He argued that governmental support for religion would only “weaken in those who profess [the benefited] [r]eligion a pious confidence in its innate excellence,” while “foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.” *Id.* ¶ 6.

These arguments not only led to the defeat of Henry’s proposal but also inspired passage of Thomas Jefferson’s Bill for Establishing Religious Freedom (see Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY (Dec. 1994), <http://theatlntc/2idj7Xo>), the forebear of the First Amendment’s Religion Clauses (see *Everson*, 330 U.S. at 13).

Jefferson’s Bill declared it an “impious presumption of legislators and rulers, civil as well as ecclesiastical . . . [to] assume[] dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others.” Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), reprinted in *FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY* 94, 95 (John J. Patrick ed., 1995). And it recognized that governmental favoritism “tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it.” *Id.* at 95. Or as Madison

put it, “experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. . . . What have been [their] fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.” Madison, *Memorial and Remonstrance*, ¶ 7.

In short, the Virginia statute embodied the belief that religion neither requires nor benefits from the support of government: “truth is great and will prevail if left to herself.” Jefferson, *Virginia Statute, supra*, at 95. And it conveyed the understanding that even modest, seemingly benign governmental favoritism influences individual religious practice and pressures clergy, houses of worship, and denominations to conform their teachings to the predilections of bureaucrats. *See id.* at 94–95.

d. “[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.” *Everson*, 330 U.S. at 13 (citing *Davis v. Beason*, 133 U.S. 333, 342 (1890); *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)). Jefferson and Madison’s vision, premised on a commitment to robust freedom of conscience, accordingly defined the original understanding

of the Establishment Clause. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183–85 (2012) (identifying Madison as “the leading architect of the religion clauses”); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011) (same); *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (same). “[T]he Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison’s life, thought and sponsorship.” *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting).

In recognition “that a union of government and religion tends to destroy government and to degrade religion” (*Engel*, 370 U.S. at 431 (1962)), “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere” (*Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948); *accord* Letter from James Madison to Edward Livingston, *supra*). “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate” (*Engel*, 370 U.S. at 431–32)—perversion that occurs when a faith is favored as much as when one is disfavored (*see Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (“The favored religion may be compromised as political figures reshape the religion’s beliefs for their own

purposes; it may be reformed as government largesse brings government regulation.”)).

**2. The Framers recognized that religious pluralism and civil harmony require government to refrain from taking sides in matters of religion.**

The Framers intended not only to protect “the freedom of the individual to worship in his own way,” but also to guard against the “anguish, hardship and bitter strife that could come when zealous religious groups struggle[] with one another to obtain the Government’s stamp of approval.” *Engel*, 370 U.S. at 429.

a. Though the United States was more homogenous in 1789 than it is today, this country has, from the beginning, been home to unprecedented religious diversity. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; Quakers influenced society significantly in Pennsylvania. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 45 (1998); WINTHROP S. HUDSON, *RELIGION IN AMERICA* 46 (3d ed. 1981). And the Framers well knew that “[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Everson*, 303 U.S. at 8–9. Religious pluralism thus represented both a great national strength

and a profound threat. The Framers recognized that separation of civil power from religious was the antidote to divisiveness and violence.

Their belief grew out of the liberty-of-conscience teachings in the theology of Roger Williams and the philosophy of John Locke. Williams made the religious case against using the tools of the state to promote religion, even to the slightest degree, because that inevitably leads to “persecution for cause of Conscience” in breach of the “expresse command of God that Peace be kept.” WILLIAMS, *supra*, at 59, 61. And Locke, “[w]riting in the aftermath of religious turmoil in England and throughout Europe,” had recognized “the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others’ province,” producing civil strife. McConnell, *supra*, at 1431–32. Locke argued, therefore, that separation was a prerequisite to lasting peace. *See id.*

b. Hence, the Framers set out to create a sustainable system of government for the Nation’s diverse people and faiths (*see* JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 101 (2006))—one that ensured religious liberty for all through the acceptance and preservation of religious pluralism (*see* JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 45 (2d ed. 2005) (citing THE FEDERALIST NOS. 10, 51 (James Madison))). *Cf.* McConnell, *supra*, at 1513, 1516 (arguing that Free Exercise Clause was result of, and

protection for, religious pluralism). It was against this philosophical and political backdrop, including the lived experience of the persecution of Baptists and other religious dissenters at the hands of the established Anglican church (see Andy G. Olree, “*Pride Ignorance and Knavery*”: James Madison’s Formative Experiences with Religious Establishments, 36 HARV. J.L. & PUB. POL’Y 211, 215, 226–27, 266–67 (2013)), that Virginia enacted Jefferson’s Bill for Establishing Religious Freedom.

In short, the Establishment Clause reflects Madison and Jefferson’s “plan of preserving religious liberty to the fullest extent possible in a pluralistic society,” allowing religion to flourish while quelling the civil strife that pluralism may engender. See *McCreary*, 545 U.S. at 882 (O’Connor, J., concurring). “[A]ssur[ing] the fullest possible scope of religious liberty and tolerance for all” was understood to be the only way “to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

As our country becomes ever more religiously diverse (see DANIEL COX & ROBERT P. JONES, PUB. RELIGION RESEARCH INST. AMERICA’S CHANGING RELIGIOUS IDENTITY (2017), <http://bit.ly/2wboSZW>), these fundamental safeguards for the freedom of all to believe, or not, and to worship, or not,



according to the dictates of their conscience are more important today than ever before.

**B. BOSTON’S POLICY AGAINST FLYING RELIGIOUS FLAGS ADVANCES RELIGIOUS FREEDOM.**

**1. Symbols have concrete, real-world effects.**

a. Symbols have power. They communicate complex ideas, often more effectively and more forcefully than mere words. “The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.” *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943); *see also Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) (“one picture is worth a thousand words”). Symbols not only communicate ideas but also persuade and motivate action. “[T]hey attract public notice, they are remembered for decades or even centuries afterwards. A symbol speaks directly to the heart.” NICHOLAS JACKSON O’SHAUGHNESSY, *POLITICS AND PROPAGANDA* 102 (2004).

Hence, “[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Barnette*, 319 U.S. at 632. For example, “[p]regnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in ‘America.’” *Texas v. Johnson*, 491 U.S. 397, 405 (1989). That is why images of the Stars and Stripes being hoisted atop Mount Suribachi on Iwo Jima in 1945 and above the rubble of the World

Trade Center in 2001 carry such immense cultural and emotional meaning: They express American resilience more completely and eloquently than words ever could.

b. The same is true for religious symbols. They may convey at a glance millennia of collective experience, hope, and triumph to those who hold them dear—and at times the opposite messages to those who do not.

Empirical research confirms this commonsense understanding: Religious symbols have real, measurable effects on adherents and nonadherents alike, even when displayed with no intent to proselytize or coerce. Viewing religious symbols has, for example, a statistically significant effect on students' academic performance. Researchers found in controlled experiments that Catholic-school students did systematically better on standardized tests when the examiner wore a cross and systematically worse when the examiner wore a Star of David. See Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417, 417–18 (1986). And both Christian and Muslim students scored better than expected when the examiner wore a symbol of their faith and worse than expected when the examiner wore a symbol of the other faith. See Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167, 168–70 (1979).

These effects are not limited to children. Research has also revealed that exposure to religious symbols that adult test subjects viewed as negative (such as an inverted pentagram) suppressed brain activity, while exposure to religious symbols that the subjects regarded as positive (such as a dove) had no deleterious effects. See Kyle D. Johnson et al., *Pilot Study of the Effect of Religious Symbols on Brain Function: Association with Measures of Religiosity*, 1 SPIRITUALITY IN CLINICAL PRAC. 82, 82, 84 (2014), <http://bit.ly/2ifUo4M>.

**2. The Christian flag, which bears the Latin cross, is a potent religious symbol.**

a. Perhaps no religious symbol is more commonly known, or more laden with meaning, than the Latin cross. See, e.g., ALISTER E. MCGRATH, CHRISTIANITY: AN INTRODUCTION 256–57 (3d ed. 2015). Since the earliest days of Christianity, “[t]he cross has been the universally acknowledged symbol of the Christian faith.” *Id.* at 256. It achieved special prominence beginning in the fourth century, when the Roman Emperor Constantine adopted Christianity for the Empire (BRUCE W. LONGENECKER, THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL 2–5, 11 (2015)) and began using the cross “as protection against the attacks of the enemy” (EUSEBIUS, LIFE OF CONSTANTINE 1:29 (Averil Cameron & Stuart G. Hall trans. 1999) (early Church historian’s description of Constantine’s vision and dream leading to use of cross)).

The cross has been consistently and unequivocally associated with Christianity ever since. *See* MCGRATH, *supra*, at 256. It was the primary symbol used during the Crusades to distinguish the crusaders from opposing forces. *See* JONATHAN RILEY-SMITH, *THE CRUSADES: A HISTORY* 16 (2d ed. 2005). And it was vitally important to Medieval and Renaissance art, when “the painted picture was invaluable as an interpreter and exponent of religious truths,” because the cross visually communicated the Church’s message of redemption. GEORGE WILLARD BENSON, *THE CROSS: ITS HISTORY AND SYMBOLISM* 121, 136 (1934). Thus, countless portrayals of Jesus’ death included the cross, not just as representational art, but to disseminate Church doctrine. *See* MCGRATH, *supra*, at 257. For similar reasons, crosses have historically adorned and been design elements for churches, inside and out. *See* RICHARD TAYLOR, *HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN CHURCHES AND CATHEDRALS* 39–42 (2003).

Pope Francis has explained: “The Christian Cross is not something to hang in the house ‘to tie the room together’ . . . or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil.” *Pope Francis: The Cross Is the Gate of Salvation*, CATHOLIC NEWS (Mar. 12, 2017), <http://bit.ly/2CLyEqE>; *cf.* U.S. CONFERENCE OF CATHOLIC BISHOPS, *BUILT OF LIVING STONES: ART, ARCHITECTURE, AND WORSHIP* § 91 (2000) (“[T]he image of Christ crucified . . . makes tangible our

belief that our suffering when united with the passion and death of Christ leads to redemption.”).

In short, the cross is not merely *a* symbol of Christianity; it is *the* symbol. See MCGRATH, *supra*, at 256; DOUGLAS KEISTER, *STORIES IN STONE: A FIELD GUIDE TO CEMETERY SYMBOLISM AND ICONOGRAPHY* 172 (2004); see also *Salazar*, 559 U.S. at 725 (2010) (Alito, J., concurring in part and concurring in the judgment) (“The cross is of course the preeminent symbol of Christianity.”). It is a “pure religious object” (Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1075–76 (2005)) that serves as the physical embodiment of the Christian tenets of resurrection and redemption (see, e.g., *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (“[T]he Latin cross . . . represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ.” (internal quotation marks omitted))).

b. Conceived in the 1890s (Elesha Coffman, *Do You Know the History of the Christian Flag?*, CHRISTIANITY TODAY (Aug. 2008), <https://bit.ly/2zHTmGq>), the Christian flag was designed to trade on the symbolic power of flags and that of the cross, with the aim to unite all the world’s Christians under a single banner (see *The Children’s Own: The Christian Flag*, 84 CHRISTIAN ADVOCATE 1802, 1802 (Nov. 11, 1909), <https://bit.ly/2Tn6y0b>). The Federal Council of Churches, which represented dozens of Christian

communities (*History*, NAT'L COUNCIL OF CHURCHES, <https://bit.ly/2IfaWcy> (last visited Mar. 7, 2019)), formally recognized the flag in 1942 (5 ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES 1359 (George Thomas Kurian & Mark A. Lamport eds., 2016)).<sup>2</sup> And the Presbyterian Mission Agency, the “ministry arm of the Presbyterian Church” (*About the Presbyterian Mission Agency*, PRESBYTERIAN MISSION, <https://bit.ly/2qARzyX> (last visited Mar. 7, 2019)), acknowledges the Christian flag on its website as a “symbol of God’s realm” that, if used, should be “given a preeminent place” over other flags in a church (*Frequently Asked Questions: Signs and Symbols*, PRESBYTERIAN MISSION, <https://bit.ly/2UYqYJq> (last visited Mar. 7, 2019)).

The flag’s colors and emblem—the Latin cross—were chosen deliberately to represent core Christian principles and concepts. Its white field represents peace and purity. Coffman, *supra*. Its blue canton signifies fidelity. *Id.* And most crucially, its Latin cross, colored red to denote the blood of Christ (*id.*), symbolizes Christianity itself (*The Children’s Own, supra*).

c. The potency of the cross for transmitting complex spiritual messages and encouraging Christian religious practice is why institutions and

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<sup>2</sup> The Federal Council of Churches was formed in 1908, when 32 Christian communities in the United States banded together to seek social reforms. *History*, NAT'L COUNCIL OF CHURCHES, <https://bit.ly/2IfaWcy> (last visited Mar. 7, 2019). In 1950, the Federal Council merged with eleven other Christian interdenominational agencies to form the National Council of Churches, forming what is now “the largest ecumenical body in the United States.” *National Council of the Churches of Christ in the U.S.A.*, ENCYC. BRITANNICA, <https://bit.ly/2RKOEzo> (last updated Oct. 15, 2018).

individuals choose to display it. It is why the cross is the sole symbol on the flag designed to represent all of Christendom. And it is why the federal courts have routinely held unconstitutional governmental displays involving the Latin cross.<sup>3</sup>

**3. Boston’s decision to refrain from flying the Christian flag appropriately respects the First Amendment and all city residents.**

As the district court concluded, the “primary purpose” of “displaying the Christian flag alongside that of the United States and the Commonwealth in

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<sup>3</sup> See, e.g., *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1171 (11th Cir. 2018) (holding Latin cross in public park, maintained at city expense, violated Establishment Clause); *Trunk v. City of San Diego*, 629 F.3d 1099, 1111 (9th Cir. 2011) (“[T]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause.”) (quoting *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996)); *American Atheists, Inc. v. Davenport*, 616 F.3d 1145, 1160, 1164 (10th Cir. 2010) (holding that Latin crosses along public highways endorsed Christianity in violation of Establishment Clause); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 270–71 (7th Cir. 1986) (holding that illuminated Latin cross atop fire station during Christmas season violated Establishment Clause); *ACLU of Ga. v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) (holding that lighted Latin cross on state land violated Establishment Clause); see also *Allegheny*, 492 U.S. at 599 (explaining that cross display in government building would be unconstitutional endorsement of Christianity).

*Amici* are aware that the U.S. Supreme Court is currently reviewing a decision enjoining a war memorial in the form of a Latin cross in a traffic circle. See *American Humanist Ass’n v. Md.–Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195 (4th Cir. 2017), *cert. granted*, 139 S. Ct. 451 (2018). Whereas the question there is whether the governmental entity *may* display the cross under those circumstances when it wishes to do so, the question here is instead whether Boston *must* display a flag with the Latin cross at City Hall when it has a policy of *not* flying religious flags.

front of City Hall” “would be to convey government endorsement of a particular religion.” *Shurtleff*, 337 F. Supp. 3d at 77. Indeed, “[b]lowing in the wind, these side-by-side flags could quite literally become entangled.” *Id.* What is more, to force the City to fly Appellants’ Christian flag would violate the “longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs.” *Allegheny*, 492 U.S. at 621 (opinion of Blackmun, J.); *accord Lee*, 505 U.S. at 599 (Blackmun, J., concurring) (“Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization.”).

Not only is Appellants’ proffered message forbidden to the City by the Establishment Clause, but it would disrespect and infringe on the religious freedom of all Bostonians. Governmental “sponsorship of a religious message . . . sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)). Boston is home to considerable religious diversity. *See Metro-Area Membership Report: Boston-Cambridge-Newton*, ASS’N OF RELIGION



DATA ARCHIVES, <https://bit.ly/2X7sIC2> (listing over 100 different “religious bodies” represented in Boston metropolitan area as of 2010).

Seeing at the seat of city government, which ought to represent all of us, a religious symbol that represents only some, flying in place of the Boston flag and with equal dignity to the American and Massachusetts flags, would announce with utmost clarity: “This city is Christian. Those who don’t share our faith do not belong.” That message is not just wrong but dangerous, for “nothing does a better job of roiling society” than “when the government weighs in on one side of religious debate.” *McCreary*, 545 U.S. at 876.

Nor are nonadherents the only people who may be alienated and pressured if the City were forced to display the Christian flag. Many Christians would view the display as official misappropriation of their sacred symbol—a gross intrusion on the ability of the faithful to define their own beliefs and a denigration of the cross and the Christian flag. *See* Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640, 645–46 (2012). And displaying the flag at the seat of city government would, through the government’s power and “special status” in the marketplace of ideas (*see McCreary*, 545 U.S. at 883 (O’Connor, J., concurring)), interfere with our constitutional commitment to freedom of conscience by forcibly associating a religion and its adherents with the City and its policies, with which members of the putatively favored faith may

strongly disagree. After all, “[v]oluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.” *Id.* The First Amendment rightly makes individuals, not government, the final arbiters in religious matters. *See id.* Boston followed that mandate here.

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The Establishment Clause commands that government stay out of contentious theological disputes as a means to ensure religious freedom for all. *Lee*, 505 U.S. at 591. Disallowing official religious displays implies no disrespect for religion, for it is not antireligious to say that matters of faith and belief are best left to individuals, families, and their houses of worship, free from the heavy hand of government. *See Engel*, 370 U.S. at 435. “The explanation lies in the lesson of history . . . that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.” *Lee*, 505 U.S. at 591–92.

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642. The City of Boston is bound to respect the religious beliefs of all its citizens. By declining Appellants’ demand that it display a religious symbol, the City did just that: It properly refrained from aligning itself with any particular

religion, thus remaining true to our national heritage and deep commitment to true religious freedom.

### CONCLUSION

The judgment of the district court should be affirmed.

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 5,945 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013, set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ Richard B. Katskee

**CERTIFICATE OF SERVICE**

I certify that on March 11, 2019, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

*/s/ Richard B. Katskee*

**APPENDIX**

## **APPENDIX OF *AMICI CURIAE***

### **Americans United for Separation of Church and State**

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that represents more than 125,000 members and supporters across the country. Its mission is to advance the free-exercise rights of individuals and religious communities to worship, or not, as they see fit and to preserve the separation of religion and government as a vital component of democratic governance. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church–state cases decided by the Supreme Court, this Court, and the federal and state courts nationwide.

### **American Humanist Association**

The American Humanist Association is a national nonprofit membership organization based in Washington, DC, with more than 239 local chapters and affiliates in 43 states and the District of Columbia, and over 34,000 members, including many in Massachusetts. Founded in 1941, AHA is the nation’s oldest and largest Humanist organization. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—a responsibility to lead a meaningful, ethical life that adds to the greater good of humanity.

## **Anti-Defamation League**

Anti-Defamation League is a leading anti-hate organization. Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, its timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, ADL continues to fight all forms of hate with the same vigor and passion. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

## **Freedom From Religion Foundation**

The Freedom From Religion Foundation, Inc. is a nationally recognized 501(c)(3) educational nonprofit incorporated in 1978. Its two purposes are to educate about nontheism, and to preserve the cherished constitutional principle of separation between religion and government. FFRF works as an umbrella for those who are free from religion (freethinkers, atheists, agnostics and nonbelievers) and who are committed to upholding the Establishment Clause. FFRF currently has 31,200 U.S. members, including more than 550 in Massachusetts. FFRF ends hundreds of state-church



entanglements each year through education and persuasion, including litigating, publishing a newspaper, and broadcasting educational programming.

### **Jewish Social Policy Action Network**

The Jewish Social Policy Action Network is an organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one, and in which members of all minority faiths were constantly reminded of their outsider status by prominent governmental displays of religious symbols. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion, or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, or an atheist and an American. JSPAN believes that the gift of church–state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and that therefore great care must be taken to prevent any erosion of the Establishment Clause. Critical to this effort is that members of minority faiths not be made to feel like second-class citizens in their own country by being subjected to government-sponsored displays of

Christian religious symbols, especially those closely linked to the exercise of civil authority. Although many Christians also find it offensive when their sacred symbol is co-opted for governmental purposes, for Jews and other minority religious groups, governmental use of such symbols sends a divisive message that their faith group does not enjoy the same privileged status.

### **Muslim Advocates**

Muslim Advocates is a national legal-advocacy and educational organization that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim in American public life. The issues at stake in this case directly relate to Muslim Advocates's work fighting for civil-rights protections for American Muslim communities.

### **National Council of Jewish Women**

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles states that "Religious

liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society.” Consistent with our Principles and Resolutions, NCJW joins this brief.

### **People For the American Way Foundation**

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles that both the Free Exercise and Establishment Clauses of the First Amendment protect the freedom of religion, and that governmental action that promotes a particular religion, as appellants have sought in this case, harms religious liberty for all and violates the First Amendment.

### **Reconstructing Judaism**

Reconstructing Judaism is the central organization of the Reconstructionist movement. We train the next generation of rabbis, support

and uplift congregations and *havurot*, and foster emerging expressions of Jewish life—helping to shape what it means to be Jewish today and to imagine the Jewish future. There are over 100 Reconstructionist communities in the United States committed to Jewish learning, ethics, and social justice. Reconstructing Judaism believes in the importance of the separation of church and state to ensure religious freedom and equal rights and equal dignity for all.

### **Reconstructionist Rabbinical Association**

The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality.

### **Sikh Coalition**

The Sikh Coalition is the largest community-based Sikh civil-rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower the Sikh community, to create an environment where

Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism. The Sikh Coalition joins this brief out of the belief that religious freedom should be protected for all Americans.

**Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism**

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups; and the Men of Reform Judaism come to this issue out of our longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity.