No. 20-1800

In the Supreme Court of the United States

HAROLD SHURTLEFF, *et al.*,

Petitioners,

v.

CITY OF BOSTON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION, THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, CHRISTIAN LEGAL SOCIETY, THE NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, THE FAMILY FOUNDATION, THE ILLINOIS FAMILY INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS

in Support of Petitioners

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INTERESTS OF *AMICI CURIAE*[1]

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

The **Ethics and Religious Liberty Commission** (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. To the extent the Christian flag is understood to be connected to Christian nationalism, NAE disavows support for that political ideology. Nevertheless, NAE believes that the First Amendment safeguards a private organization's right to promote such a message in a designated public forum.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

Christian Legal Society (CLS), founded in 1961, is a nondenominational association of Christian attorneys, law students, and law professors,

with student chapters at approximately 90 law schools. Since 1975, CLS's legal advocacy division, the Center for Law & Religious Freedom, has worked to protect all Americans' free exercise and free speech rights, in both this Court and Congress.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Massachusetts, seek to ensure that the free exercise of religion and the autonomy of religious organizations is protected.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area. PJI often represents religious organizations whose members wish to speak and congregate publicly without unconstitutional, discriminatory restrictions.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its mem-

bers throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

SUMMARY OF ARGUMENT

Providing organizations the opportunity to communicate on public property does not give the government the authority to discriminate based on the viewpoint of their speech, even when the forum is used at other times for the government's own speech. That conclusion follows from both this Court's forum analysis under the Free Speech Clause and its Free Exercise Clause precedents requiring religious organizations to be treated on a nondiscriminatory basis when government benefits are dispensed or restrictions imposed. Both lines of cases condemn Boston's actions here.

Even if Boston had set up a limited, rather than a designated, forum, the First Circuit was manifestly wrong in holding that the flag Camp Constitution desired to exhibit while it spoke on the city plaza did not qualify because it was described as a "Christian" flag. The city had put no limits on what flag a civic organization like Camp Constitution could display. Nor does the Establishment Clause justify Boston's viewpoint discrimination against such speech. The speech is of private origin, and the Establishment Clause restrains the government alone.

ARGUMENT

Your *Amici* concur with Petitioners that (a) Boston established, by policy and practice, a designated public forum from which Petitioners were wrongfully excluded; (b) the city's unfettered discretion to preclude whatever speech it desired was an unlawful prior restraint; and (c) the First Circuit wrongly identified Petitioners' speech as fairly attributable to the government. In its government speech cases, this Court has warned that attribution of speech to the government must be applied with care because it has the potential to trample protected speech of private individuals.[2] The courts below failed to heed that

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[2] *See Walker v. Tex. Div., Sons of Confederate Vets., Inc.*, 576 U.S. 200, 208, 219 (2015); *id.* at 221 (Alito, J., dissenting); *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009); *see also Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017) ("[T]he government-speech doctrine . . . is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we

warning and improperly discriminated against private speech because of the flag's religious nature. Without unduly repeating the Petitioners' arguments, your *Amici* wish to emphasize the following.

I. Just Because the Government Sometimes, or Even Principally, Uses Its Property for Its Own Speech Does Not Eliminate Its Use as a Public Forum for Private Speech on Other Occasions

To blunt the fact that it has hundreds of times allowed private groups to display their flags from one of the three flagpoles before its city hall, Boston in the courts below has heavily relied on the fact that it often flies its own flag from that same flagpole. But the fact that a government sometimes, or even principally, uses a particular forum for its own speech does not mean that it cannot, as Boston has expressly done here, utilize its property on other occasions as a forum for private speech.

This is so for all types of forums as identified by this Court.[3] Government-owned parks, a traditional public forum, are often used for government-sponsored activities, but parks also have been used "from time immemorial" by private speakers. Government ownership and use does not mean that private users of the parks are stripped of their First

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must exercise great caution before extending our government-speech precedents.").

[3] *See generally Summum*, 555 U.S. at 469-70.

Amendment protections.[4] The same is true of "designated" and "limited" public forums, which by definition involve mixed government and private uses. For instance, public universities often set aside areas for free speech on their campuses.[5] That the universities at other times also use that space for official business does not make the speech of students and other private citizens, when in the designated forum, government speech. And this is true even when private parties must apply for and receive approval or a license from an official to use the government-owned space.[6]

That the symbolic speech of a flag was directly associated with speaking on the city plaza brings this same point into focus. Boston does not contend that every group that has used that space was speaking for the city. But the associated flag raisings by the many organizations were part and parcel of their use of the plaza, as they could only exhibit their flags while they were present there. When they departed, their flags came down. There is no meaningful difference between a group's speaking on the plaza and its flying its chosen flag while it does so. Neither the organization's speech on the plaza nor the associated symbolic speech emanating from the flagpole is government speech.

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[4] *See Hague v. CIO*, 307 U.S. 496, 515 (1939).

[5] *See*, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981).

[6] *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (public elementary school); *Widmar*, 454 U.S. at 265 (public university); *Se. Promotions*, *Ltd. v. Conrad*, 410 U.S. 546 (1975) (municipal auditorium); *Hague*, 307 U.S. at 516 (streets and parks).

II. Even If Boston Properly Limited the Forum to Flags of "Civic Organizations," Petitioner Is Such an Organization

As if it were the beginning and end of the proper analysis, the First Circuit repeatedly states that Boston had restricted use of the third flagpole to "flags of countries, civic organizations, or secular causes." *See, e.g.*, *Shurtleff v. Boston*, 986 F.3d 78, 84, 91, 92, 93 (1st Cir. 2021). Without more, it excludes from this grouping Camp Constitution and its desire to exhibit a "Christian" flag as its symbol.

This justification for Boston's action never gets out of the blocks. The city's definition of the forum does not focus on the flag itself, but, instead, on the *organization* that has selected the flag. In this instance, Boston does not—and could not—contest that Camp Constitution is a civic organization. Indeed, the First Circuit expressly identified Camp Construction as a civic organization when it noted that it seeks "to enhance understanding of the country's Judeo-Christian moral heritage" and give short speeches by local clergy and others on Boston's history. *Id.* at 84.

The forum's only constraint was that Camp Constitution be a civic organization, which it admittedly was. Thus, it was allowed to raise the flag of its choice.

III. Religious Organizations Are Civic Organizations

Even if Camp Constitution were considered a religious group such as a church, it would still qualify

as a "civic organization." It is befuddling that the First Circuit apparently thinks otherwise.

From the founding of our country, churches have been one of the most, if not *the* most, important of civic institutions. To use just two, well-known illustrations, the Northwest Ordinance of 1787 recited that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[7] And President Washington began the tradition of calling for days of thanksgiving and fasting to encourage civic harmony and love of country.[8] Tocqueville, too, wrote that religious organizations were among the most important civic counterweights to the selfish individualism that could destroy our democratic society.[9]

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[7] Act of Aug. 7, 1789, § 3, 1 Stat. 50, 52 (as reenacted by the First Congress) (quoted in *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 US 819, 862 (1995) (Thomas, J., concurring); *Wallace v. Jaffree,* 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting)).

[8] Noted by this Court in *Marsh v. Chambers*, 463 U.S. 783, 787-88 (1983), and *Town of Greece v. Galloway*, 572 U.S. 565, 580 (2014).

[9] *See* Alexis de Tocqueville, *Democracy in Am*. vol. 1, pt. II, ch. 9 ("On Religion Considered as a Political Institution: How Mightily It Contributes to the Persistence of the Democratic Republic Among the Americans"); vol. 2, pt. I, ch. 5 ("How Religion Uses Democratic Instincts in the U.S."); vol. 2, pt. II, ch. 9 ("How Americans Apply the Doctrine of Self-interest Properly Understood in the Matter of Religion"); 633 (identifying religion as "among the chief" causes of "maintenance of American political institutions") (Library of Am. ed. 2004) (Arthur Goldhammer, tr.).

This Court has found much the same in *Lamb's Chapel v. Moriches Union Free School District.*[10] There the school district allowed after-hours use of its buildings for "social, civic, and recreational" purposes, but denied it for "religious purposes."[11] When a church applied to use a school building to show a film series on media influences on "traditional, Christian family values," the school district refused the request because the film was church-related.[12] This Court reversed, noting that the discussion of family values was related to civic purposes, whether the topic was presented from a religious viewpoint or otherwise.[13]

The lesson of *Lamb's Chapel* is this: Just because a cultural group is religious or addresses topics of societal relevance from a religious perspective does not somehow disqualify it as a "civic organization." Religious institutions are engaged in the public discourse and enterprise of this country, the very definition of "civic institutions."[14]

This case is also controlled by *Rosenberger v. Rector and Visitors of the University of Virginia.*[15] *Ros-*

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[10] 508 U.S. 384 (1983).
[11] 508 U.S. at 386-87.
[12] *Id.* at 388-89.
[13] *Id.* at 393.
[14] In *Lamb's Chapel*, the state law forbade use of the schools for religious purposes. Boston had no such formal policy at the time of the events here, and its later attempt to do so does not survive the ruling in *Lamb's Chapel* in any event.
[15] 515 U.S. 819 (1995).

enberger involved the public university's practice of paying the printing costs of student publications, but refusing to do so for one such periodical because it "primarily" voiced a Christian perspective.[16]

This Court first set out several basic principles, including those for limited public forums:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.
>
> These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. . . .
>
> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.[17]

Then, relying largely on *Lamb's Chapel*, this Court found that, by singling out otherwise permitted speech because it was rendered from a religious perspective, the university had engaged in unconstitu-

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[16] *Id.* at 822-23, 825-26.

[17] *Id.* at 828-29 (citations omitted).

tional viewpoint discrimination:

> The church group in *Lamb's Chapel* would have been qualified as a social or civic organization, save for its religious purposes. Furthermore, just as the school district in *Lamb's Chapel* pointed to nothing but the religious views of the group as the rationale for excluding its message, so in this case the University justifies its denial of [funding] on the ground that the contents of [the publication] reveal an avowed religious perspective.[18]

Similarly, Camp Constitution qualifies as a civic organization (indeed, like in *Rosenberger* and unlike in *Lamb's Chapel*, it does not hold itself out as a religious organization[19]) and the reason it was denied permission to raise its flag was because the city deemed its viewpoint religious. Just as this Court rejected the university's attempt to fall back on government-speech principles in *Rosenberger*, it should reject Boston's attempt here:

> It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech

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[18] *Id.* at 832.

[19] *See id.* at 826 (student publication was not a "religious organization," as it was not primarily devoted to worship activities).

> it facilitates does not restrict the University's own speech, which is controlled by different principles.[20]

Here, Boston has facilitated private speech by making its flagpole available to civic organizations. It matters not that the city did not have to do so; that is true of every designated forum. What the city could not permissibly do, once making the forum available, was discriminate against private speech voiced from a religious viewpoint. *Id.*

Boston created this opportunity for organizations to display their flags in order to establish "an environment in the City where everyone feels included, . . . to raise awareness in Greater Boston and beyond about the many countries and cultures around the world[, and] to foster diversity and build and strengthen connections among Boston's many communities." *Shurtleff,* 986 F.3d at 82-83. Communities and organizations may not be excluded from a forum with such purposes simply because they speak from a religious viewpoint.

IV. Boston's Discrimination Against Speech Because It Is Religious Also Violates the Free Exercise Clause

The nub of this case is that Boston refused to allow this civic organization to fly its flag, despite allowing all other civic organizations using the city plaza to do so, because the flag was religious. This also violates the Free Exercise Clause.

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[20] *Id.* at 834.

This Court has recently applied the principle that a government may not deny a benefit that would otherwise be available simply because the recipient is religious. In *Trinity Lutheran Church v. Comer*,[21] this Court struck down Missouri's refusal to supply a school with playground resurfacing solely because it was religious. In *Espinoza v. Montana Department of Revenue*,[22] this Court repudiated Montana's discrimination against religious schools that otherwise qualified for student scholarships derived with the encouragement of state income tax credits. And in *Roman Catholic Diocese of Brooklyn v. Cuomo*[23] and *Tandon v. Newsom*,[24] this Court struck down limits on religious gatherings that were more stringent than those imposed on comparable secular gatherings.

The discrimination that Boston shows by refusing to let this civic organization fly its flag is no different in kind and is frankly acknowledged by the city: it refused to let the flag be flown solely because it was "Christian," i.e., religious. This admitted discrimination against religion violates the Free Exercise Clause.[25]

That governments are not allowed to discriminate *against* religious exercise follows logically from the fact that the text and underpinnings of the Religion Clauses *favor* religion. When the EEOC in *Hosanna-Tabor Evangelical Lutheran Church and School v.*

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[21] 137 S. Ct. 2012 (2017).
[22] 140 S. Ct. 2246 (2020).
[23] 141 S. Ct. 63 (2020).
[24] 141 S. Ct. 1294 (2021).
[25] *See Trinity Lutheran Church*, 137 S. Ct. at 2024-25.

EEOC argued that religious organizations have no greater rights than other groups, this Court labeled that contention "untenable," as "the text of the First Amendment itself . . . gives special solicitude" to them.[26] And the protection of religion demanded by the Free Exercise Clause did not materialize in a vacuum. It was grounded on assumptions, widely held at the time, that a Divine Providence exists (called that and "Nature's God," "Creator," and "Supreme Judge of the world" in the Declaration of Independence);[27] that he will punish immoral conduct as he has defined or disclosed it;[28] and that religious liberty is an inalienable right acknowledged, not granted, by government.[29] Thus, when a government treats the free exercise of religion *worse* than other, similar conduct, it always violates both the text and underlying, motivating purposes of the First Amendment.

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[26] 565 U.S. 171, 189 (2012).

[27] U.S. Decl. of Indep., *available at* https://www.ushistory.org/declaration/document/ (last visited Nov. 3, 2021).

[28] *Cf.* U.S. Const. art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, cl. 3 (requiring oath or affirmation); *see generally* Michael D. Breidenbach, *Religion Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment*, in The Cambridge Companion to the First Amendment and Religious Liberty (Cambridge Univ. Press 2020) (Michael D. Breidenbach & Owen Anderson, eds.).

[29] *See generally* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 154-66 (1991); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Govt. in Am. Constitutional History (1965).

V. The Establishment Clause Does Not Excuse Boston's Free Speech and Free Exercise Violations

Wafting through this case at various times and with sundry intensities is the thought that Boston's violation of the Free Speech and Free Exercise Clauses could be justified by resort to the Establishment Clause. This Court in both *Lamb's Chapel* and *Rosenberger* put a stake in the heart of any such idea.

In *Lamb's Chapel*, relying on *Widmar v. Vincent*,[30] this Court noted that the showing of the film series that used a religious perspective would not be school-sponsored (even though shown in the school), would have been open to the public, and would have been shown on school property that "had repeatedly been used by a variety of private organizations."[31] All of these same factors apply to Camp Constitution's use of the flagpole, along with that of almost 300 other civic organizations.

In *Rosenberger*, this Court reversed the Court of Appeals' conclusion that, by funding the printing costs of "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy,"[32] the university

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[30] 454 U.S. 263, 271-72 (1981).

[31] *Id.* at 395. The majority's use of the tripart test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as part of its Establishment Clause analysis was criticized by three concurring justices. 508 U.S. at 387 (Kennedy, J., concurring); *id.* at 397-401 (Scalia and Thomas, JJ., concurring).

[32] 515 U.S. at 838.

would violate the Establishment Clause. Noting that the Establishment Clause's "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse," this Court continued, "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[33]

The *Rosenberger* Court applied this principle to a hypothetical situation apropos of that involved here:

> a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. . . . Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-

[33] *Id.*

neutral basis.[34]

Paraphrased, Boston may maintain its own flagpole and give civic organizations access to it on a religion-neutral, first-come-first-served basis. Boston giving access to an organization to express a religious viewpoint with its flag no more violates the Establishment Clause than giving that same group access to the adjoining public square. Like the university's denial of the students' right of free speech in *Rosenberger*, upholding Boston's action here "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[35]

CONCLUSION

The First Circuit's decision is manifestly contrary to this Court's precedent and shows a hostility toward, rather than a protection of, our religious and speech freedoms. It should be reversed.

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[34] *Id.* at 843-44 (relying on *Lamb's Chapel*, *Widmar*, and *Bd. of Educ. of Westside Community Schs. v. Mergens,* 496 U.S. 226, 250 (1990)).

[35] *Id.* at 845-46. For an explanation of how the Establishment Clause and Free Exercise Clauses, by their very text and structure, do not work at cross-purposes and can never conflict, *see* Carl H. Esbeck, *The Establishment Clauses: Its Original Meaning and What We Can Learn from the Plain Text*, 22 Federalist Soc'y Rev. 26, 37-38 (2021). The same holds true for the Establishment and Free Speech Clauses.

Respectfully submitted
this 22nd day of November 2021,

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