No. 23-1275

In the Supreme Court of the United States

ROBERT M. KERR, Director, South Carolina Department of Health and Human Services,
Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, ET AL.,
Respondents.

On Petition For A Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICI CURIAE LIFE LEGAL DEFENSE FOUNDATION AND THE PROLIFE CENTER AT THE UNIVERSITY OF ST. THOMAS (MN) IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amicus Life Legal Defense Foundation ("Life Legal") is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Its mission is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. Life Legal litigates cases to protect human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care. Because money is fungible, Life Legal opposes taxpayer funding of abortion providers, including Planned Parenthood, which is the largest provider of abortion services in the United States.

Life Legal is concerned that lack of clarity by the Court as to whether precedent has been overruled creates uncertainty in the law and allows lower courts to impose their personal preferences in cases that involve ideological matters, such as abortion and its funding.

Amicus Prolife Center at the University of St. Thomas (MN) seeks to promote effective legal protection for human life from the moment of fertilization to natural death through scholarly research, curriculum development, and legal

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[1] No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* or its counsel funded it. Pursuant to Rule 37.2, notice was given to counsel of record for all parties on June 24, 2024, more than 10 days prior to the due date.

initiatives. As an academic center, the faculty associated with the Center are responsible for training law students and others regarding ethical representation of clients, including fulfilling lawyers' duty of candor to the court. Fulfilling this duty requires knowledge of whether a case is directly adverse to the legal proposition it is used to support. Cases overruled sub silentio make such certainty virtually impossible.

Another significant part of the Center's work consists of assisting government officials in drafting, passing, and defending laws to protect human life. Current uncertainty regarding the legal framework applicable to abortion statutes and regulations makes the work of helping officials draft laws far more difficult and can lead to unnecessary litigation after enactment of new laws. Thus, the Center has a unique interest in clarity in whether a case remains binding legal precedent or has been overruled.

SUMMARY OF ARGUMENT

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Furthermore, "The judicial Power of the United States [is] vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, §1. Necessarily, the "inferior" courts look to the Supreme Court for a clear explanation of what the law is, so that they can faithfully execute their responsibilities in the judicial system. Clearly announced rules enhance uniformity in application of the law across jurisdictions, predictability in

judicial decision-making, and respect for the judiciary in the eyes of the public as well as those entrusted with executing the Court's decisions.

When the Court fails to state clearly when it is overruling precedent, it opens the door to myriad problems. It creates confusion in the legal system. It allows lower courts to pick and choose which legal rules they will apply, sometimes favoring their own ideological preferences. It undermines *stare decisis* when the Court casts aside precedent without clearly stating that it is overruling it and without providing the reasons for the decision. It erodes confidence in the legitimacy of the Court.

These weighty concerns are all at issue in this case. In *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("*Gonzaga*"), after a review of cases discussing whether Spending Clause statutes create private rights of action under 42 U.S.C. § 1983, this Court stated, "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. . . . [I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." This statement seemed to be a repudiation of the test employed in *Blessing v. Freestone*, 520 U.S. 329 (1997) ("*Blessing*") and *Wilder* v. *Va. Hosp. Ass'n,* 496 U.S. 498 (1990) ("*Wilder*"), which involved three factors: 1) that Congress must have intended that the relevant statute benefit the plaintiff, 2) that the right is not so "vague and amorphous" that enforcement would strain judicial competence, and 3) that the statute must unambiguously impose a binding obligation on the states. *Blessing*, 520 U.S. at 340-41; *Wilder*, 496 U.S. at 510-11.

Later, in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015) the Court, citing *Gonzaga*, specifically repudiated *Wilder*. "[O]ur later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified. *Armstrong*, 575 U.S. at 330, n.*. Yet the Court never specifically said it had overturned *Blessing/Wilder*.

In *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166 (2023) ("*Talevski*"), the Court reaffirmed that the relevant test for a § 1983 private right of action was announced in *Gonzaga*, stating that the statutory provision must be "phrased in terms of the persons benefited" and contain "rights-creating" individual-centric language with an "unmistakable focus on the benefited class." 599 U.S. at 183. Justice Barrett in her concurrence acknowledged *Wilder* as one of only two cases that interpreted a Spending Clause statute to confer a private right of action under § 1983. *Id.* at 194 (Barrett, J., concurring). She said nothing to indicate that *Wilder* was no longer valid law.

This lack of clarity has predictably resulted in a 5-2 split in the circuits over the correct test for determining the existence of a private right of action for a Spending Clause statute under § 1983. Pet. Cert. 24-28.

The present case is not the first time that the Court's unwillingness to explicitly overturn precedent has caused confusion in the lower courts. One legal commentator refers to the practice as "stealth overruling." Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, New York University School of Law Public Law & Legal Theory Research Paper Series (July 2010). A review of two of these examples

of "stealth overruling" will illustrate the problems that it creates for the judicial system and those that interact with it. It is important for the rule of law that the Court clearly state the status of prior precedent, and this case offers a prime opportunity for the Court to do just that with respect to the current status of the *Blessing/Wilder* line of cases. We urge the Court to grant the Petition and clarify the proper rule to apply when a plaintiff seeks to enforce a right purportedly found in a Spending Clause statute under § 1983.

ARGUMENT

I. *Miranda v. Arizona* and its progeny illustrate the confusion that results when the Court fails to explicitly overturn precedent.

The landmark case of *Miranda v. Ariz.*, 384 U.S. 436 (1966) held that the Fifth Amendment required procedural safeguards to protect persons in custody from incriminating themselves during an interrogation. The Court said the reason for the safeguards was the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. Although the Court acknowledged the possibility of alternative means of protecting the privilege against self-incrimination, and that its "decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform," the Court nonetheless declared that the police "must" inform the person in custody of his rights prior to engaging

in interrogations. *Id*. The individual must be informed that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to counsel during any questioning, and that, if he is indigent, an attorney will be provided for him. *Id*. at 467-73. Furthermore, the Court required that if the person indicates at any time that he wishes to invoke his Fifth Amendment privilege against self-incrimination or wants an attorney, all interrogation must cease. *Id*. at 473-74. Before any statements are admissible in court, the government must meet a high burden of proof to show a defendant waived his constitutional rights. *Id*. at 475. "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, *prerequisites to the admissibility of any statement made by a defendant*." *Id*. at 476 (emphasis added).

Therefore, while acknowledging the possibility of alternative methods of protecting the rights of persons in custody, the *Miranda* Court nonetheless required the police to inform any person in custody of his rights prior to engaging in interrogation. The penalty for failure to follow the Court's procedural safeguards was the inadmissibility in court of any evidence, including "fruits" of any statements resulting from the interrogation. *Id*. at 500 (Clark, J., dissenting).

In several subsequent cases, the Court has backed away from the requirement that persons in custody be read their *Miranda* rights for any of their statements made under interrogation to be admissible in court. Yet, the Court has never specifically overruled *Miranda*.

In *Harris v. N.Y.*, 401 U.S. 222 (1971) the Court allowed evidence inadmissible under *Miranda* to be used at trial to impeach the defendant's credibility. The defendant had made certain statements while in custody before being warned of a right to counsel. 401 U.S. at 223-24. This contradicted *Miranda*'s clear directive that "The requirement of warnings and waiver of rights is *fundamental with respect to the Fifth Amendment privilege*" and are "prerequisites to the admissibility of any statement made by a defendant." *Miranda,* 384 U.S. at 476. The *Miranda* Court made no distinction between statements used to establish the truth of the matter and those used to impeach a defendant. Both uses of a statement can be incriminating to a defendant, and thus *Harris* undermined the core reasoning of *Miranda*.

In *N.Y. v. Quarles*, 467 U.S. 649 (1984) ("*Quarles*"), the Court allowed into evidence a respondent's statement and a gun obtained as a result of his statement, citing a concern for public safety as a new exception to the inadmissibility of evidence obtained in violation of *Miranda*. Although the respondent was handcuffed in the presence of four officers, and the officers did not read him his rights before questioning him about the whereabouts of the gun, the Court said there was "no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist." *Quarles*, 467 U.S. at 654. The Court weakened the existing *requirement* from *Miranda* that police use procedural safeguards and instead stated, "The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to ensure

that the right against compulsory self-incrimination [is] protected.'" *Id*. (quoting *Mich.* v. *Tucker*, 417 U.S. 433, 444 (1974)). The Court reasoned that because the issuance of the *Miranda* warnings might have deterred the suspect from telling the officers where the gun was, the need to protect the public safety overrode "the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Quarles*, 467 U.S. at 657. What is unclear from the case is why, once the gun was retrieved, and the public safety concern had abated, it was still necessary to allow the evidence at trial. There was no immediate public safety concern in allowing the evidence in, even if the officers' unwillingness to read the respondent his rights in that situation was understandable. Therefore, the Court could have upheld the strictures of *Miranda* without any immediate threat to public safety, yet, it chose to deviate from *Miranda* instead. *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting).

In *Or. v. Elstad*, 470 U.S. 297 (1985) ("*Elstad*") the defendant made an admission prior to being read his rights. Once the officers read him his rights, he confessed to the crime of burglary. The Court held that the subsequent confession given after the *Miranda* warning was not the "'tainted fruit of the poisonous tree' of the *Miranda* violation" and was therefore admissible since there was no evidence it had not been voluntary. *Elstad*, 470 U.S. at 303-04. Unfortunately, police officers took *Elstad* as a playbook for evading *Miranda* by obtaining confessions from defendants, then reading their rights, then obtaining second confessions which would then be admissible under *Elstad*. Officers also violated *Miranda* by continuing to question suspects

who had invoked their rights. Friedman, *supra*, at 22-23, note 105. *See R.I. v. Innis*, 446 U.S. 291 (1980) (holding that a voluntary statement by a defendant in custody who has invoked his right to counsel, but before counsel had been obtained, was admissible).

In *Mo. v. Seibert*, 542 U.S. 600 (2004) ("*Seibert*"), the defendant was convicted of second-degree murder in a case where the officer intentionally withheld *Miranda* warnings, successfully obtained a confession, gave her the warnings, and obtained a second confession. While disallowing both confessions, the Court gave a list of factors that lower courts should consider in determining whether "*Miranda* warnings delivered midstream could be effective enough to accomplish their object." The Court thereby provided police officers with a more-detailed playbook on how to circumvent *Miranda*'s ban on admitting "fruit of the poisonous tree." Friedman, *supra*, at 23. Those factors included the level of detail and completeness of the questions and answers in the first interrogation; whether the contents of the two confessions overlapped; the timing and setting of the two confessions; the continued presence of police personnel; and the extent to which the second round of questions were continuous with the first. *Seibert*, 542 U.S. at 615.

The Court went further in *U.S. v. Patane*, 542 U.S. 630 (2004) ("*Patane*"), by holding that nontestimonial evidence, in this case a gun, obtained as a result of a voluntary statement is admissible. The Court interpreted *Elstad* as standing for the proposition that "a blanket suppression rule could not be justified by reference to the 'Fifth Amendment goal of assuring trustworthy evidence' or by any

deterrence rationale." *Patane*, 542 U.S. at 639-40. The Court stated that the Fifth Amendment was "self-executing" in its protection of those subject to coercive police interrogations and that this "explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further. . . . Our cases also make clear the related point that a mere failure to give *Miranda* warnings *does not, by itself, violate a suspect's constitutional rights* or even the *Miranda* rule." *Id*. at 640 (emphasis added). This reasoning is difficult to square with the language of *Miranda* itself which virtually equated the Fifth Amendment's protections with the reading of the *Miranda* rights before any in-custody statements could be admitted into evidence. *Miranda,* 384 U.S. at 476.

The Court affirmed its reasoning in *Patane* when it held in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) that the use of a petitioner's un-Mirandized statement could not provide a basis for a claim under 42 U.S.C. § 1983 because a violation of *Miranda* was not a violation of the Fifth Amendment.

This lack of clarity regarding the status of *Miranda* caused some confusion in the Fourth Circuit in *U.S. v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *rev'd* 530 U.S. 428 (2000). The court considered the validity of a statute enacted by Congress which was intended to overrule *Miranda* and replaced it with a voluntariness test for admissibility of evidence. The court held that Congress could "overrule judicially created rules of evidence and procedure that are not required by the Constitution" and that the reading of the Miranda rights was not constitutionally required but was only "prophylactic," citing the Supreme Court

decision in *Quarles*. 166 F.3d at 672. The Supreme Court reversed, ruling the suspect's confession inadmissible, and stating that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively." 530 U.S. at 444. This decision is difficult to reconcile with the Court's later decisions in *Patane* and *Tekoh,* which held the opposite, namely that the failure to read a suspect his rights was not a constitutional violation.

Confusion resulting from the evolution of *Miranda* jurisprudence is also reflected in lower court decisions which, when applying *Seibert* in cases decided after December 31, 2005, are split ideologically as to whether evidence is admissible or not.

> Using the political party of the appointing president as a proxy for ideology, for federal Courts of Appeals on which Republican-appointed judges constitute a majority of the appellate panel, evidence is admitted in 88.9% of the cases, whereas it is admitted in only 70.0% of cases decided by majority Democrat-appointed panels. Friedman, *supra*, at 49 note 242.

Patane also noted the split in the circuits regarding admissibility of "fruits" after the Court's decisions in *Elstad* and *Dickerson*. *Patane*, 542 U.S. at 634.

In light of all the case law chipping away at *Miranda*, it is unclear why the Court has not explicitly overruled it, perhaps making the reading of a suspect's rights simply one factor to consider

when determining if a confession was voluntary or coerced. Some commentators have taken the position that *Miranda* has in fact been overruled, or at least abandoned. Friedman, *supra*, at 25, note 121; Michael Vitiello, *Miranda Is Dead. Long Live Miranda,* 54 Texas Tech Law Review 59, 87 (2021).

This gradual retreat from the explicit rule of *Miranda* has created confusion in the lower courts similar to the confusion over whether courts should apply the *Blessing/Wilder* standard or the *Gonzaga* standard in deciding whether an enforceable § 1983 private right of action exists under a Spending Clause statute. *Seibert* in particular has given police the green light to experiment with interrogation tactics, hoping to elicit admissible confessions from suspects that would not have been admissible under *Miranda*. The result is that "Cops ignore *Miranda*. Courts then ignore the failure to adhere to *Miranda*." Friedman, *supra*, at 51. This double-messaging does nothing to enhance uniformity in application of the law across jurisdictions or predictability in judicial decision-making. *Id*. at 51, n. 255. Regardless of what one thinks about the merits of *Miranda*, an explicit overruling, explaining that the Fifth Amendment is not abrogated by the overturning of *Miranda*, would be transparent and would address the public's concerns. In fact, one commentator has opined that the reason for "stealth overruling" is in fact avoidance of bad publicity. Friedman, *supra*, at 34. Avoiding difficult issues does not promote the legitimacy of the Court. The Court's modifications of *Miranda* combined with its unwillingness to overrule it threatens the importance of *stare decisis* and respect for precedent.

II. *Lemon v. Kurtzman* also exemplifies the need for consistency in Supreme Court jurisprudence.

In 1971, the Court issued its ruling in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), which involved two state statutes providing public aid to church-related elementary and secondary schools. The Court announced a three-part test to decide if a statute violates the Establishment Clause: 1) the statute must have a secular legislative purpose, 2) its principal or primary effect must neither advance nor inhibit religion, and 3) it must not foster an excessive government entanglement with religion. *Id*. at 612-13. In applying the test to the statutes at issue, the Court found that they were unconstitutional because "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion." *Id.* at 614.

The *Lemon* test has been controversial since it was first announced, with some commentators noting its ahistorical nature. Some scholars noted that *Lemon* turned the Establishment Clause from a prohibition on the establishment of a state religion in order to *protect* liberty of conscience into a "sword to be used against innocuous symbols and subjective 'entanglements' that don't impinge on anyone's freedom." This alchemy, they argue, betrayed the

Founders' intentions. Ilya Shapiro, *There's No Juice Left in Lemon,* Cato Institute (June 22, 2021).[2]

Subsequent Supreme Court decisions altered the test, without explicitly overruling it. In *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court upheld a recurring holiday display on public property of a Menorah and a Christmas tree with a sign bearing the mayor's name and text declaring the city's "salute to liberty." The Court elaborated on the purposes and effects prong of the *Lemon* test by asking whether a reasonable observer would conclude that the government action constituted an endorsement of religion. 492 U.S. at 592, 620.

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court modified the *Lemon* test by combining the second and third prongs into one that explored whether the government "entanglement" had the effect of promoting religion. 521 U.S. at 233 ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.") The Court determined that the government aid in question did not 1) result in governmental indoctrination, 2) define its recipients by reference to religion, or 3) create an excessive entanglement. *Id*. at 234-35. This restating of the three-prong *Lemon* test arguably made government

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[2] https://www.cato.org/commentary/theres-no-juice-left-lemon. *See* Samantha Thompson Lipp, *The Rise of Public School Prayer with the Demise of* Lemon v. Kurtzman 1228-29, 74 Mercer Law Review (2023). ("[A]ccommodationists fundamentally opposed the *Lemon* test because they believed '[t]his view of the Establishment Clause reflect[ed] an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents.'" (Quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (Kennedy, J., concurring in part, dissenting in part).

aid of religious schools less restricted. *See* Lipp, *supra* note 2, at 1228-29.

Concurring and dissenting Supreme Court opinions have persistently criticized the *Lemon* decision. In *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court invalidated state statutes which provided for maintenance and repair and tuition reimbursement grants for nonpublic schools as well as tax benefits for parents of children attending nonpublic schools. Chief Justice Burger, in a dissent joined by Associate Justices White and Rehnquist, stated "I am quite unreconciled to the Court's decision in *Lemon v. Kurtzman*. . . . I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country." (Burger, C.J., dissenting).[3]

In *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976), the Court affirmed a state statute providing for annual grants to private colleges as long as the funds were not used for sectarian purposes. Justice White, joined by Rehnquist, concurred in the judgment, but stated "I am no more reconciled now to *Lemon* than I was when it was decided." *Roemer*, 426 U.S. at 768 (White, J., concurring).

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court invalidated state statutes that authorized a period of silence for meditation or voluntary prayer while also allowing teachers to lead willing students in a prescribed prayer. In a concurring opinion, Justice O'Connor stated, "Despite its initial promise, the *Lemon* test has proved problematic. The

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[3] *See* Lipp, *supra* note 2, at 1231.

required inquiry into 'entanglement' has been modified and questioned . . . and in one case we have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all." 472 U.S. at 68 (O'Connor, J., concurring.) Justice Rehnquist in his dissent stated that the *Lemon* test "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." 472 U.S. at 110 (Rehnquist, J., dissenting).

Later, in other cases involving the Establishment Clause, the Court simply declined to employ the *Lemon* test at all and/or questioned its usefulness. In *Lee v. Weisman*, 505 U.S. 577 (1992) the Court invalidated, without explicitly doing a *Lemon* analysis, the practice of public schools in Providence, Rhode Island, of inviting members of the clergy to give prayers at school graduation ceremonies. Justice Scalia's dissent, joined by Chief Justice Rehnquist, and Justices White and Thomas, stated, "Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." The dissent accused the Court of ignoring *Lemon* and substituting instead a "psycho-coercion test" having no roots in our history and being "infinitely expandable." *Wiesman*, 505 U.S. at 644 (Scalia, J., dissenting).

More than a decade later, the Court held that the placement of a Ten Commandment monument on the Texas State Capitol grounds did not violate the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677 (2005) ("*Van Orden*"). The Court stated,

"[W]e think [the *Lemon* test] not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." 545 U.S. at 685.

The same year that *Van Orden* was decided, the Court upheld Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§2000cc - 2000cc-5, which prohibited the government from imposing a substantial burden on the religious exercise of an institutionalized person unless it satisfied strict scrutiny. *Cutter v. Wilkinson*, 544 U.S. 709 (2005) ("*Cutter*"). Justice Thomas, in a concurrence stated, "The Court properly declines to assess RLUIPA under the discredited test of *Lemon v. Kurtzman*." *Cutter,* 544 U.S. at 726, n. 1 (Thomas, J., concurring). *See Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding Nebraska Legislature's practice of opening its session with a prayer by a chaplain paid by the state without referencing the *Lemon* test); *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (upholding the practice of opening town board meetings with a prayer given by local clergy, citing historical practices rather than *Lemon*); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 19 (2019) (upholding retaining the display of a Bladensburg Cross on state-owned land and maintained with public funds as a memorial for the county's soldiers who died in World War I, citing history rather than *Lemon* for guidance). *See Am. Legion,* 588 U.S. at 49 for a list of cases that have declined to apply *Lemon* or simply ignored it.

The apparent end of *Lemon* came in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022)

("*Bremerton*"). The Court upheld the right of a high school football coach to pray at midfield after games because his speech was private and not ordinarily within the scope of his duties as a coach. In so doing, the Court stated that it had "long ago abandoned *Lemon* and its endorsement test offshoot" and had instead "instructed that the Establishment Clause must be interpreted by reference to historical practices and understanding." *Bremerton,* 597 U.S. at 534-35. Significantly, the Court did not specifically say that *Lemon* had been "overruled," but legal analysts have taken the language in *Bremerton* as essentially accomplishing the same result.[4]

One of the reasons the *Bremerton* Court gave for abandoning the *Lemon* test was that, as in the current case, the test had caused chaos in the lower courts which came to differing results in similar circumstances and had resulted in a "minefield" through which state legislators had to walk. *Id.* Indeed, lower courts applying *Lemon* found no Establishment Clause violation in, e.g., *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (allowing religious group to erect and maintain a menorah display in a public forum within a government building for the duration of

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[4] Lipp, *supra* note 2, at 1235; Noah Feldman, *Supreme Court is Eroding the Wall Between Church and State*, Bloomberg, (June 27, 2022), https://www.bloomberg.com/opinion/articles/2022-06-27/supreme-court-upends-church-state-law-in-case-of-praying-coach; Howard Slugh, *When the Court Takes Away Lemon: What the Praying Coach Ruling Means for Religious Americans,* Religious Freedom Institute (July 2, 2022), https://religiousfreedominstitute.org/when-the-court-takes-away-lemon-what-the-praying-coach-ruling-means-for-religious-americans/.

Chanukah); *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993) (upholding granting of a city permit to erect a Christmas display on public property when the permit was given on a first-come, first-served basis); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (allowing a privately funded menorah display in a downtown public plaza during Chanukah); and *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (permitting the display of religious paintings at a public park). Conversely, other lower courts applying *Lemon* found Establishment Clause violations in, *e.g.*, *Smith v. Cnty. of Albemarle*, 895 F.2d 953 (4th Cir. 1990) (holding that the Board of Supervisors had violated the Establishment Clause by permitting the Jaycees to erect a crèche on the front lawn of the County Office Building), and *Kaplan v. Burlington*, 891 F.2d 1024 (2nd Cir. 1989) (disallowing menorah display in a public park during the holiday season).

Even if the "chaos" could be attributed to the difficulty in applying the test itself, the fact remains that lower courts continued to apply *Lemon* even long after this Court began moving away from it in the 1990s. In *Shurtleff v. City of Boston*, 986 F.3d 78 (1st Cir. 2021), *rev'd and remanded*, 142 S. Ct. 1583 (2022), the First Circuit cited *Lemon* to justify the City's refusal to fly a private Christian flag on a flagpole at City Hall. This Court overturned the judgment, and the concurring opinion noted the role *Lemon* played in the erroneous decision. "[T]his Court . . . abandoned *Lemon* and returned to a more humble jurisprudence centered on the Constitution's original meaning. Yet in this case, the city chose to

follow *Lemon* anyway."). 142 S. Ct. at 1604 (Gorsuch, J., concurring).

In *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *rev'd*. 536 U.S. 639 (2002), the Sixth Circuit employed a *Lemon* analysis in holding that a state voucher program, which contained no restriction on religious schools as to their use of the funds, violated the Establishment Clause. This Court reversed, without citing *Lemon* in the majority opinion. The Fifth Circuit in *Van Orden* v. *Perry*, 351 F.3d 173 (5th Cir. 2003), *aff'd*. 545 U.S. 677 (2005), in which the court held that the placement of a Ten Commandment monument on the Texas State Capitol grounds did not violate the Establishment Clause, and the Sixth Circuit in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rev'd* 544 U.S. 709 (2005), in which the court invalidated Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 on the basis of the Establishment Clause, both relied on *Lemon* in their reasoning, while this Court eschewed *Lemon* in its analysis and relied on other grounds.

Even after this Court admitted to "abandon[ing]" *Lemon* in *Bremerton,* some lower courts continue to apply it, thus underscoring the need for this Court to explicitly overrule precedent, rather than using alternative language that leaves lower courts unsure of which standard to apply. These decisions did not mention *Bremerton* at all. *Carroll v. Tobesman*, 2023 U.S. Dist. Lexis 29253, at *7 (D. Md. 2023) (citing *Lemon* test in finding that denial of kosher meals to a prisoner violated the Establishment Clause); *Buchanan v. Jumpstart S.C.*, 2022 U.S. Dist. LEXIS 157191, at *34 (D. S.C. 2022) (employing the *Lemon* test and holding that

the South Carolina Department of Corrections' agreement with Jumpstart, a non-profit religious organization dedicated to helping inmates reenter the community did not violate the Establishment Clause); *Monteer v. ALB Mgmt.*, 2022 U.S. Dist. LEXIS 155993, at *24-25 (E.D. Mo. 2022) (citing *Lemon* test and holding that the act of serving holiday meals at Christmas and Thanksgiving and handing out Bibles to a Muslim jail detainee did not violate the Establishment Clause.)

III. To resolve the split in the circuits, this Court should grant the petition and clarify whether the *Blessing/Wilder* line of cases is overruled.

Bremerton cited the disarray in the lower courts as one important reason to reject *Lemon*. *Bremerton*, 597 U.S. at 534. A similar state of affairs in the Court's *Miranda* jurisprudence has resulted in circuit courts appearing to take sides along ideological lines over the question of admitting evidence under the *Seibert* factors. *See* Sec. I.

The concurrence by Judge Richardson in the Fourth Circuit decision rightly noted the need for clarity on the precedential status of *Wilder* and *Blessing* in light of this Court's decision in *Talevski*, in order to provide guidance to the lower courts. App. to Pet. Cert 35a-36a. To avoid the continued confusion surrounding the existence of a § 1983 private right of action under a Spending Clause statute, this Court should grant the Petition and resolve the current 5-2 circuit split that exists regarding the continued relevance of *Blessing/Wilder*. The Fourth, Sixth, Seventh, Ninth and Tenth Circuits all continue to apply *Blessing*

while the Fifth and the Eight Circuits reject the *Blessing/Wilder* test and apply *Gonzaga*. Pet. Cert. 4. Six of the cases involve the abortion provider Planned Parenthood.[5] Historically, abortion has been a subject that has the unique ability to distort legal rules. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 286 – 87 (2022). The combination of the lack of clarity as to the proper rule to apply in hot-button cases that involve abortion contributes even more so to disarray in the lower courts and undermines the rule of law.

The Court's opacity on the continuing relevance of the *Blessing/Wilder* standard in light of *Gonzaga* has resulted in a "dizzying breakdance" that lower courts have had to contend with, similar to the effects of the continued retention of the *Chevron* doctrine, which has now been discarded. *Loper Bright Enters. v. Raimondo*, No. 22-451, at 32 (June 28, 2024). As in the current case, some lower courts applied *Chevron*, and some did not, which "undermined the very rule of law that stare decision exists to secure." *Loper*, at 28 note 7, 33.

It is precisely because of *stare decisis* that some courts are unwilling to cast aside prior precedent that the Court has not clearly overruled and prefer instead to attempt to harmonize the old rule with the new, as the Fourth Circuit tried to do here. App. to Pet. Cert. 15a – 21a. If that is not what

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[5] The current case and *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 350 (5th Cir. 2020) (en banc); and *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

this Court intended in *Gonzaga* when it clearly stated, "We *now reject* the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983" (536 U.S. at 283) (emphasis added), then it needs to make that known by explicitly overruling *Blessing* and *Wilder*. An unambiguous rejection of these cases would create uniformity and predictability in judicial decision making and consequently reduce suits by plaintiffs who are frequently mere proxies asserting baseless private rights of action under § 1983. Clearly explaining the reasons for overruling *Blessing/Wilder* would honor *stare decisis*. In the end, respect for the rule of law and for the Court would be enhanced.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the Petition and clarify the proper legal rule to apply in private rights of action brought under § 1983.

Respectfully Submitted,

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