No. 23-1275

In the
Supreme Court of the United States

EUNICE MEDINA, ***Interim Director, South Carolina Department of Health and Human Services*****,**

Petitioner,

v.

PLANNED PARENTHOOD SOUTH ATLANTIC, **ET AL.,**

Respondents.

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

BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONER

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Howard Slugh, *When the Court Takes Away Lemon: What the Praying Coach Ruling Means for Religious Americans,* Religious Freedom Institute (Jul. 2, 2022) 23

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INTERESTS OF AMICUS 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.

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).

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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.

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 and those entrusted with executing the Court's decisions.

When the Court fails to state clearly whether it is overruling precedent, the ambiguity 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. When the Court disregards precedent without clearly stating that it is overruling it and without providing the reasons for that decision, that failure undermines the doctrine of stare decisis and erodes confidence in the legitimacy of the Court.

These weighty concerns are all at issue in this case. In *Gonzaga University v. Doe*, 536 U.S. 273 (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.

Id. at 283 (original emphasis). This statement appears to repudiate the test employed in *Blessing v. Freestone*, 520 U.S. 329 (1997) ("*Blessing*") and *Wilder* v. *Virginia Hospital Association,* 496 U.S. 498 (1990) ("*Wilder*"). These cases employed three factors to find a conferral: 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 Center, Inc.*, 575 U.S. 320 (2015) the Court, citing *Gonzaga*, specifically repudiated *Wilder*: "our 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 & Hospital Corp. v. Talevski*, 599 U.S. 166 (2023) ("*Talevski*"), the Court reaffirmed that the relevant test for a § 1983 private right of action had been 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." *Id.* 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."[2] A review of three of these examples of "stealth overruling" will illustrate the problems that it creates for the judicial system and those that interact with it. The rule of law requires that the Court clearly state the status of prior precedent called into question, 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.

ARGUMENT

I. The confusion created by the long-lived *Chevron* doctrine illustrates the need for the Court to explicitly overturn precedent.

Last term, this Court held that courts must exercise their "independent judgment" in deciding

[2] Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), N.Y.U. Sch. of Law Public Law & Legal Theory Rsch. Paper Series (July 2010).

whether an agency action was within the scope of its authority. *Loper Bright Enters. v. Raimondo*, 603 U.S 369, 412 (2024). *Loper* overturned *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a forty-year precedent that created the so-called "*Chevron* doctrine." This controversial doctrine required courts to use a two-step (at least) analysis when confronted with a dispute over the meaning of a statute administered by a federal agency.

First the reviewing court would determine whether Congress had directly spoken to the question at issue. If Congress's intent was clear, that decided the matter. The court and the agency must adhere to the intent of Congress. If, however, Congress had not directly addressed the matter, and the statute was silent or ambiguous, then the court proceeded to the second step, in which it decided whether the agency's interpretation was based on a permissible construction of the statute. If it was a permissible construction, then the court could not substitute its own construction of a statutory provision but had to defer to the agency. *Chevron*, 467 U.S. at 842-44.

Chevron replaced *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* held that the ruling of an agency was not controlling on the courts but should be accorded weight depending upon the "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

The pro-bureaucracy "fiction" underlying *Chevron,* namely, that statutory ambiguities are

always intended by Congress to favor governmental interpretations over those of courts, led to continuous modifications of the doctrine. *Loper*, 603 U.S. at 404. Indeed, the Court had not itself employed the doctrine since 2016.[3] *Id*. at 406.

This Court has made numerous fixes to *Chevron* over the years. For instance, in *United States v. Mead Corp*., 533 U. S. 218 (2001) the Court added an additional initial step to the two-step *Chevron* doctrine, which came to be known as "step zero." *Mead* held that

> administrative implementation of a particular statutory provision qualifies for *Chevron* deference *when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in exercise of that authority*.

Id. at 226-27 (emphasis added). The agency's authority would not be binding, however, if it was "procedurally defective, arbitrary or capricious in

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[3] For example, in *Sackett v. EPA*, 598 U.S. 651 (2023), without referencing *Chevron*, the Court asserted that a clear statement from Congress is necessary when it wished to alter the federal/state balance or the federal government's power over private property. The Court refused to defer to the EPA's interpretation of "waters of the United States" in the Clean Water Act as including wetlands with a "significant nexus" to traditional navigable waters, instead requiring that the wetlands have "a continuous surface connection" to waters of the United States.

substance, or manifestly contrary to the statute." *Id.* at 227.

The Court also limited the application of *Chevron* substantively. In *King* v. *Burwell*, 576 U. S. 473 (2015), the Court held that *Chevron* deference to the Internal Revenue Service interpretation of 26 U.S.C. § 36B was inappropriate because *Chevron* does not apply to "questions of deep 'economic and political significance'". *Id.* at 486. Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S 120 (2000), applying step one of *Chevron*, the Court rejected the FDA's position that it had authority to regulate the "safety" of tobacco products as a drug under the Food, Drug and Cosmetic Act since Congress had enacted other tobacco-specific legislation and because "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion". *Id.* at 160. These cases having "deep economic and political significance" came to be decided under the "major questions doctrine" and required that the agency show clear congressional authorization. *West Virginia* v. *EPA*, 597 U.S. 697, 721-23 (2022) (rejecting the EPA's interpretation in a case involving capping carbon dioxide emissions which would have substantially restructured the American energy market and holding that the agency must point to "clear congressional authorization" in "extraordinary cases" of "economic and political significance").

Furthermore, this Court declined to apply *Chevron* to cases involving judicial review provisions. *Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) (holding that under the Migrant and

Seasonal Agricultural Worker Protection Act, Congress had established the judiciary and not the Department of Labor, as the adjudicator of private rights of action under that statute). It also held that the *Chevron* doctrine did not apply to an agency's interpretation of a statute it does not administer. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 519-20 (2018) (holding that no *Chevron* deference was due in a case involving arbitration agreements between employers and employees that called for individualized proceedings since the National Labor Relations Board does not administer the Arbitration Act).

The result of the Court's attempts to clarify and limit without overruling *Chevron* was confusion in the lower courts as to how or when to apply the *Chevron* doctrine. "[T]he many refinements . . . made in an effort to match *Chevron*'s presumption to reality" have caused some lower courts to "simply bypass[] *Chevron*, saying it makes no difference for one reason or another." *Loper,* 603 U.S. at 404-05; *id*. at 406 (noting even courts that did cite *Chevron* "did not always heed the various steps and nuances of that evolving doctrine")

For example, in *County of Amador v. United States DOI*, 872 F. 3d 1012, 1021-22 (9th Cir. 2017), *cert. denied*, No. 17-1432, 2018 U.S. LEXIS 4224, the lower court refused to apply the *Chevron* doctrine, as the county requested, because it agreed with the DOI's interpretation of the meaning of the Indian Reorganization Act. "But we need not decide whether *Chevron* deference (or any other level of deference) is appropriate, because we reach the same conclusion as Interior when we review the timing-of-recognition issue de novo." *Id.* This

decision could be interpreted as applying step one of *Chevron* to find no ambiguity, but the court declined to characterize it that way.[4]

After decades of confusion, this Court finally overturned *Chevron* in *Loper*, citing the same concerns with inconsistency and confusion that are at issue in this case. The Court should not wait so long this time to put to rest the issue presented in the instant case.

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

The landmark case of *Miranda v. Arizona*, 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 safeguards were necessary because of the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he

[4] *See also Estrada-Rodriguez v. Lynch*, 825 F.3d 397 (8th Cir. 2016), *cert. denied*, No. 16-304, 2016 U.S. LEXIS 6523 (without invoking *Chevron*, denying the petition of an alien to review a decision of the Board of Immigration Appeals ordering him removed from the United States because the agency's unpublished decision by a single-member panel did not carry the force of law); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g. Co.*, 747 F.3d 673, 685 (9th Cir. 2014) (applying *Skidmore* deference and deciding that the Copyright Office's interpretation of the Copyright Act was "persuasive" because it was a "longstanding administrative interpretation upon which private actors had relied").

would not otherwise do so freely." *Id.* at 467. Although the Court acknowledged the possibility of alternative means of protecting criminal suspects' 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 indicated at any time that he wished to invoke his Fifth Amendment privilege against self-incrimination or wanted an attorney, all interrogation must cease. *Id.* at 473-74. The Court held that before any statements could be 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, however, the Court has backed away from the requirement that persons in custody *must* 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. New York*, 401 U.S. 222 (1971) the Court allowed evidence presumptively 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. *Id.* 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 *New York v. Quarles*, 467 U.S. 649 (1984) ("*Quarles*"), the Court allowed into evidence a respondent's statement and a gun located 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 *Michigan* 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." *Id.* at 657. Justice Marshall disagreed, questioning whether, once the gun was retrieved, and the public safety concern had abated, it was still necessary to allow the evidence at trial. *Id.* at 686 (Marshall, J., dissenting). He concluded 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. *Id.* (Marshall, J., dissenting).

Relying on *Quarles*, the Fourth Circuit in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), upheld a statute enacted by Congress intended to overrule *Miranda* and replace 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." *Id.* at 672. But this Court reversed, ruling the suspect's confession inadmissible, and stating that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively." *United States v. Dickerson*, 530 U.S. 428, 444 (2000).

The Court's assertion in *Dickerson* that "*Miranda* announced a constitutional rule" was an apparent contradiction of a prior precedent. In *Oregon v. Elstad*, 470 U.S. 298 (1985) ("*Elstad*") the defendant made an incriminating 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. *Id.* at 303-04. Unfortunately, police officers and those training them could well read *Elstad* as a playbook for evading *Miranda* by obtaining confessions from defendants, reading them their rights, *then* obtaining second confessions which would then be admissible under *Elstad*. *See Rhode Island 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).[5]

Even after *Dickerson*, the Court continued to weaken the "constitutional rule" of *Miranda*. In *Missouri v. Seibert*, 542 U.S. 600 (2004) ("*Seibert*"), the defendant was convicted of second-degree

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[5] Friedman, *supra* note 2, at 22-23, note 105.

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." *Id.* at 615. 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."[6] The factors identified by the Court 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 *United States 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

[6] Friedman, *supra* note 2, at 23.

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*, 597 U.S. 134 (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.

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. As Professor Friedman noted:

> 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.[7]

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[7] Friedman, *supra* note 2, at 49.

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,[8] with the result that "Cops ignore *Miranda*; courts then ignore the failure to adhere to *Miranda*."[9] This double-messaging does nothing to enhance uniformity in application of the law across jurisdictions or predictability in judicial decision-making.[10]

Regardless of what one thinks about the merits of *Miranda*, an explicit overruling, if that is what the Court intends, 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.[11] Avoiding difficult issues does not promote the legitimacy of the Court. The Court's modifications of *Miranda* combined with its unwillingness to overrule it weakens the doctrine of *stare decisis* and respect for precedent.

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[8] Friedman, *supra* note 2, at 25 (citing multiple examples); Michael Vitiello, *Miranda Is Dead. Long Live Miranda*, 54 Tex. Tech L. Rev. 59, 87 (2021).

[9] Friedman, *supra* note 2, at 51.

[10] *Id*. at 51.

[11] Friedman, *supra* note 2, at 34.

III. *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). *Lemon* 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 the day it was announced, with some commentators decrying 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."[12] This alchemy, they argue, betrayed the Founders' intentions.[13]

In fact, *Lemon* was criticized not only by legal scholars, but also by other members of the Supreme Court itself, with pointed barbs appearing in concurring and dissenting opinions in Establishment Clause cases. For example, in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court, relying on *Lemon*, invalidated state statutes providing 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." *Id.* at 820 (Burger, C.J., dissenting).[14]

Three years later, in 1976 the Court affirmed a state statute providing for annual grants to private

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[12] Ilya Shapiro, *There's No Juice Left in Lemon,* Cato Institute (Jun. 22, 2021), 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, 74 Mercer L. Rev. 1221, 1228-29 (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 Pitt. Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part, dissenting in part).

[13] Shapiro, *supra* note 12.

[14] *See* also Lipp, *supra* note 12, at 1231.

colleges as long as the funds were not used for sectarian purposes. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976), Justice White, joined by Chief Justice Rehnquist, concurred in the judgment, but stated "I am no more reconciled now to *Lemon* than I was when it was decided." *Id.* 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 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." *Id.* 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." *Id.* at 110 (Rehnquist, J., dissenting).

Subsequent Supreme Court decisions altered the *Lemon* test without explicitly overruling it. In *County 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 entitled '"Salute to Liberty."' *Id.* at 582. 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. *Id.* at 592, 620.

At one point the Court even 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. *Agostini v. Felton*, 521 U.S. 203, 233 (1997) ("[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 aid of religious schools less restricted.[15]

Eventually, in other cases involving the Establishment Clause, the Court simply declined to employ the *Lemon* test at all and/or questioned its usefulness. The first such case was *Lee v. Weisman*, 505 U.S. 577 (1992). Without explicitly doing a *Lemon* analysis, the Court invalidated 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." *Id.* at 644 (Scalia, J., dissenting). The dissent accused the Court of ignoring *Lemon* and substituting

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[15] See Lipp, *supra* note 12, at 1228-29.

instead a "psycho-coercion test" having no roots in our history and being "infinitely expandable." *Id.* (Scalia, J., dissenting).

In some cases, this Court eschewed a *Lemon* analysis, even when the lower courts relied upon it. In *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), 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. *Simmons-Harris v. Zelman*, 536 U.S. 639 (2002).

The Fifth Circuit in *Van Orden* v. *Perry*, 351 F.3d 173 (5th Cir. 2003), *aff'd*. 545 U.S. 677 (2005), relying on *Lemon*, held that the placement of a Ten Commandment monument on the Texas State Capitol grounds did not violate the Establishment Clause. The Court stated, "we think [the *Lemon* test is] 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." *Id.* at 685-86.

The Sixth Circuit again relied upon *Lemon* in *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rev'd* 544 U.S. 709 (2005), when it invalidated Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") (Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§2000-cc-2000cc-5) on the basis of the Establishment Clause. Without relying on *Lemon*, this Court reversed, reasoning that giving greater protections to religious rights does not automatically create an Establishment Clause

violation unless such accommodations are excessive, impose unjustified burdens on other persons, or jeopardize the functioning of the institution. *Id.* at 724-25.

Numerous other cases through the years have also treated *Lemon* as irrelevant. *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 also Am. Legion,* 588 U.S. at 49 (listing cases that either declined to apply *Lemon* or ignored it).

The *apparent* end of *Lemon*—in the eyes of the Supreme Court, at least—came in *Kennedy v. Bremerton School District*, 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." *Id.* at 534-35. Significantly, the Court did not specifically say that

Lemon had been "overruled," but legal analysts have interpreted the language in *Bremerton* as essentially accomplishing the same result.[16]

One of the reasons the *Bremerton* Court gave for abandoning the *Lemon* test was that, as in the instant case, the test had "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." *Bremerton*, 597 U.S. at 534 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69, n.3 (plurality opinion) (1995) A brief comparison of circuit courts decisions leading up to *Bremerton* proves this to be true. Many Circuits, upon applying *Lemon*, had found no Establishment Clause violations in cases of private groups erecting private religious displays on public property. *See, 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 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 consisting of scenes from the New Testament on public property when the permit was given on a first-come, first-served basis); *Ams.*

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[16] Lipp, *supra* note 12, at 1235; Noah Feldman, *Supreme Court is Eroding the Wall Between Church and State*, Bloomberg (Jun. 27, 2022), https://www.bloomberg.com/opinion/articles/2022-0627/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 (Jul. 2, 2022), https://religiousfreedominstitute.org/when-the-court-takes-away-lemon-what-the-praying-coach-ruling-means-for-religious-americans/.

United for Separation of Church & St. 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); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (permitting the display of religious paintings at a public park).

Conversely, also applying *Lemon*, other lower court decisions of the same era *had* found Establishment Clause violations when private citizens were permitted to erect religious displays in public places. *See, 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); *Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989) (disallowing a 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*, 596 U.S. 243 (2022), the First Circuit cited *Lemon* to justify the City's refusal to fly a private Christian flag on a flagpole at City Hall, although other groups were allowed to display their flags. This Court overturned the judgment in the same term as the *Bremerton* case was decided, with the concurring opinion criticizing the use of *Lemon* to reach the underlying erroneous decision: "this 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." *Shurtleff v. City of Bos.*, 596 U.S. 243, 277 (2022) (Gorsuch, J., concurring).

Unfortunately despite this Court admitting to "abandon[ing]" *Lemon* in *Bremerton,* some lower courts continue to apply it, 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. While the Court may believe its language disparaging *Lemon* was explicit enough, many lower courts have continued to rely on *Lemon* (all while not even mentioning *Bremerton*.) *See, e.g.*, *Carroll v. Tobesman*, No. PX-20-2110, 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.*, No. 1:21-cv-00385, 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.*, No. 4:21-CV-756, 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.)

IV. To resolve the split in the circuits, this Court should clarify whether the *Blessing/Wilder* line of cases has been overruled.

In overturning *Chevron*, this Court did not shy away from noting the adverse consequences of its failure to explicitly overrule what was increasingly seen to be an erroneous and unworkable precedent. *Loper,* 603 U.S. at 405-06. *Bremerton*, too, 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, supra,* Sec. I.

The concurrence by Judge Richardson in the Fourth Circuit decision below rightly noted the need for clarity on the precedential status of *Wilder* and *Blessing* after *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 resolve the current 5-2 circuit split that exists regarding the continued vitality of *Blessing/Wilder*. Pet. Cert. 4.

Notably, six of the cases creating this split involve the abortion provider Planned Parenthood.[17]

[17] 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*

(continues)

Historically, decisions in abortion-related cases have "led to the distortion of many important but unrelated legal doctrines"—typically in ways that favor abortion and abortion providers. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 286-87 (2022). The potential for distortion here would be best checked by an unambiguous decision that leaves no room for lower courts to discern a rejuvenation of the *Blessing/Wilder* line of cases, and no need to harmonize the old rule with the new, as the Fourth Circuit tried to do here. App. to Pet. Cert. 15a – 21a.

An unambiguous overruling of *Blessing* and *Wilder* would create uniformity and predictability in judicial decision making and disincentivize suits by proxy plaintiffs 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, *amicus* urges the Court to clearly state that *Talevski* has overruled the *Blessing/Wilder* line of cases and enunciate the proper legal rule to apply in private rights of action brought under § 1983.

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).

Respectfully submitted,

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