19-11029

In The
United States Court Of Appeals
For The Fifth Circuit

CENTER FOR INQUIRY, INC., *et al.*,

Plaintiffs – Appellants,

v.

JOHN F. WARREN,
in his official capacity as Clerk of Dallas County, Texas,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
NO. 3:18-CV-2943-B, HON. JANE J. BOYLE.

BRIEF AMICI CURIAE OF THE AMERICAN HUMANIST ASSOCIATION AND THE INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF PLAINTIFFS - APPELLANT AND REVERSAL

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CERTIFICATIONS UNDER FED. R. APP. P 29(a)

The undersigned counsel of record certifies that: (1) Neither party's counsel authored this brief in whole or in part; (2) Neither party nor party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) No person contributed money that was intended to fund preparing or submitting this brief other than the amici curiae; (4) Counsel for all parties have consented to the filing of this brief.

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

In accordance with Fifth Circuit Rule 29.2, amici hereby disclose that no one has an interest in this brief beyond the named amici, the American Humanist Association and the Interfaith Alliance Foundation.

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INTEREST OF AMICI CURIAE

The American Humanist Association ("AHA") is a national nonprofit membership organization based in Washington, D.C., with over 252 local chapters and affiliates in 43 states and the District of Columbia. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity. The AHA is dedicated to securing equal treatment for all Humanists.[1]

AHA's adjunct organization, the Humanist Society, was incorporated in 1939 under the laws of California to issue charters anywhere in the world and to train and certify Humanist clergy. The Humanist Society continues to endorse and train Humanist celebrants, chaplains, lay leaders, and invocators to conduct observances across the nation and worldwide, including weddings, commitment/same-sex unions, memorial services, baby namings, and other life-cycle events.

The Humanist Society currently has over 394 Humanist celebrants and chaplains in 44 states and 3 countries, including 19 in the State of Texas. Although some Humanist Society celebrants have officiated weddings in Texas, many

[1]To that end, the AHA has successfully litigated cases that establish that Humanism must be treated as a religion for Establishment Clause and Equal Protection Clause purposes. *E.g.*, *Am. Humanist Ass'n. et al., v. Frank L. Perry, et al.*, 2018 WL 1701356 (E.D.N.C. Mar. 29, 2018); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274 (D. Or. 2014).

Humanist celebrants understandably disapprove of referring to their Humanist lifestance as a "religion," and are chilled in their desire to officiate non-religious weddings that reflect the non-religious views of the newlyweds they serve. Many more AHA members would doubtless seek to officiate weddings for their fellow Humanists in Texas, if only allowed to do so.

The Interfaith Alliance Foundation is a 510(c)(3) nonpartisan organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, the Interfaith Alliance has 185,000 members across the country from 75 faith traditions as well as those without a faith tradition. The Interfaith Alliance is committed to ensuring that the United States is a nation where religious belief and practice are free and voluntary, and that the government does not favor or discriminate against citizens based on their religious beliefs or non-belief.

SUMMARY OF ARGUMENT

The district court's opinion shows reliance on history at its worst—upholding a discriminatory law in part because the practice has a long pedigree. The district court's fallacious appeal to the past is rooted in a fundamental misapprehension of the Supreme Court's guidance on the role of history in Establishment Clause and Equal Protection Clause cases. As discussed below, the Supreme Court has never

endorsed the idea that history is an independent basis for upholding a practice under the Establishment Clause. And the Supreme Court's cases outright prohibit reliance on historical practices to validate a discriminatory practice under the Equal Protection Clause.

In addition to unconstitutionally favoring religion over non-religion and categorically discriminating against atheists, Tex. Fam. Code § 2.202 violates the Establishment Clause because it delegates civic authority to individuals on the basis of their religion.

Fundamental questions of fairness and equality before the law must be judged according to the facts on the ground, not in the history books. Texas' hostility toward the non-religious is an anachronism in a nation where about one in four adults now claim no religious affiliation. This Court should look to the present, reverse the district court, and resign official discrimination against the non-religious to the dustbin of history.

ARGUMENT

I. History cannot justify contemporary practices that discriminate among religions or categorically discriminate against atheists and Humanists.

The court below correctly concluded that "even applying the historical test as stated in *Town of Greece*, the Court would not be able to conclusively determine that the Statute comports with the Establishment Clause." *Ctr. for Inquiry, Inc. v. Warren*, No. 3:18-CV-2943-B, 2019 U.S. Dist. LEXIS 138839, at *24 (N.D. Tex.

Aug. 16, 2019). But the court was wrong to even entertain a *Town of Greece v. Galloway*, 572 U.S. 565 (2014) analysis, and was mistaken in believing that the Supreme Court ever adopted an "historical test."

A. The Supreme Court has never held—and indeed has disavowed—that a practice may be upheld under the Establishment Clause simply because it has a strong historical pedigree.

"History" has never conferred an independent basis to uphold a practice under the Establishment Clause. The Supreme Court has consistently maintained that "no one acquires a vested or protected right in violation of the [Establishment Clause] by long use, *even when that span of time covers our entire national existence and indeed predates it*." *Walz v. Tax Comm'n.*, 397 U.S. 664, 678 (1970) (emphasis added). In *Walz*, although the Court had looked to history, it also evaluated both the purpose and effect of the statute, reaffirming that "the basic purpose" of the Establishment Clause is "to insure that no religion be sponsored or favored." *Id.* at 669. *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("The fact that such exemptions are of long standing cannot shield them from the strictures of the Establishment Clause.") (citing *Walz*, 397 U.S. at 678).

Indeed, the Supreme Court has repeatedly struck down practices with strong historical pedigrees. The 6-1 *Engel v. Vitale*, 370 U.S. 421 (1963) decision struck down nondenominational school prayer notwithstanding the New York Court of Appeals finding that "[a] few seconds of prayer in the schools, acknowledging

dependence on Almighty God, is consistent with our heritage of 'securing' the blessings of freedom which are recognized in both the Federal and State Constitutions as having emanated from Almighty God" and is "an integral part of our national heritage and tradition." *Engel v. Vitale*, 10 N.Y.2d 174, 179 (1961). In the Supreme Court's view, it was "an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies." *Engel*, 370 U.S. at 427.

In *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Supreme Court struck down a religious release-time program despite the practice's long history. *See id.* at 256 (Reed, J., dissenting) ("This is an instance where, for me, the history of past practices is determinative").

The Supreme Court declared the Maryland oath in *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) unconstitutional notwithstanding "much historical precedent for such laws." And in striking down the maintenance and repair provisions of a statutory scheme in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973), the Court reiterated that "historical acceptance without more would not alone have sufficed."

The Supreme Court in *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) reaffirmed the *Walz* rule, making it clear once again that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." In upholding legislative prayer in *Marsh*, the Court simply found that "far more [] than . . . historical patterns" justified the practice. *Id.* (quoting *Walz*, 397 U.S. at 678). It was the reasons *underlying* that long history that proved controlling. And those reasons were threefold: (1) historically, legislative prayer is an internal act intended to accommodate the spiritual needs of lawmakers rather than to promote religion to the public (*id.* at 791-92, 793 n.16); (2) historically, legislative prayer is ecumenical and nondiscriminatory; it does not "advance any one faith" in the prayers or the clergy selection (*id.* at 792-95); and (3) according to the *Marsh* Court, the First Congress authorized legislative prayer at the same time that it produced the Bill of Rights. *Id.* at 790-91.

Town of Greece broke no new ground. The Court simply applied *Marsh*'s threefold rationale to uphold legislative prayer by citizens at town council meetings. 572 U.S. 565. Justice Kennedy explained that the while the "Establishment Clause must be interpreted 'by reference to historical practices and understandings,'" that approach "must *not* be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 576 (emphasis added).

B. There is no Establishment Clause "history test."

Neither *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019) nor *Town of Greece* marked the sea-change suggested by the court below. *Warren*, 2019 U.S. Dist. LEXIS 138839, at *19. Neither case overruled the Establishment Clause's longstanding secular purpose and secular effect requirements (enshrined in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)), or the applicability of strict scrutiny in cases of discrimination among religions (*Larson v. Valente*, 456 U.S. 228, 246 (1982)). Even historical monuments remain subject to the *Lemon* test, as demonstrated by *American Legion* itself, *infra*. (As noted later in this section, Parts II-A and II-D of Justice Alito's opinion, in which he advocated doing away with *Lemon*, did not garner votes from a majority of Justices).

Briefly, *Lemon* was a carefully-considered 8-1 opinion of then-Chief Justice Burger that distilled the *entirety* of the Supreme Court's Establishment Clause jurisprudence into a sensible framework. *Lemon* was "a convenient, accurate distillation of [the] Court's efforts over the past [five] decades to evaluate a wide range of governmental action." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). The *Lemon* "test" "is a product of considerations derived from the *full sweep* of the Establishment Clause cases." *Nyquist*, 413 U.S. at 772-73 (emphasis added).

Long before *Lemon*, the Supreme Court (8-1) announced the following test in *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963):

"[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment" violates "the Constitution." This secular-purpose-and-effect test was articulated and utilized without controversy in a multitude of cases predating *Lemon.*[2]

Although *Marsh*—a narrow opinion by Chief Justice Burger—jettisoned *Lemon* in sustaining legislative prayer, the Court subsequently clarified that *Marsh* is "not useful" outside the legislative-prayer context. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (applying *Lemon*). *See also*, *e.g.*, *McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 860 n.10 (2005) (applying *Lemon* to religious display); *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying *Lemon* to school prayer). Indeed, in the same term as *Marsh*, in another decision written by Justice Burger, the Court applied *Lemon* to invalidate a "symbolic benefit" to religion in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 125-26 (1982).

[2] *E.g.*, *Torcaso*, 367 U.S. at 489-90 (invalidating law because "the purpose or effect" favored god-believers over atheists); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 598 (1961) ("neither the statute's purpose nor its effect is religious"); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (evaluating "the purpose or effect"); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961) ("The present purpose and effect . . . is to provide a uniform day of rest for all citizens."); *Engel*, 370 U.S. at 436 (finding unconstitutional "governmental endorsement" of religion); *Epperson v. Ark.*, 393 U.S. 97 (1968) (statute lacked secular purpose); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) (statute had a "secular legislative purpose and [] effect"); *Walz*, 397 U.S. at 669-70 ("Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are *intended* to establish or interfere with religious beliefs and practices or have the effect of doing so.") (emphasis added); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (the "Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose . . . and neutral in primary impact.").

Town of Greece did not discuss *Lemon* let alone overrule it. Instead, as Justice Alito summarized: "All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures." 572 U.S. at 603 (Alito, J., concurring). Justice Kennedy, who authored *Town of Greece*, had also joined the majority in *Santa Fe*, which invalidated school-sponsored prayer under *Lemon*'s purpose and effect prongs—a result that he noted in *Town of Greece* was not impacted by the decision. 572 U.S. at 587.

Lastly, in *American Legion*, despite Justice Alito's language in the plurality criticizing the "*Lemon* test," the majority did not overrule the test and ultimately scrutinized both purpose and effect. The majority opinion—Parts I, II-B, II-C, III, and IV—simply held that: (1) certain old monuments should be accorded a presumption of constitutionality;[3] and (2) the Bladensburg cross was constitutional because its *purpose* and *effect* were predominantly secular.[4] The portions of Justice Alito's opinion that criticized *Lemon* and proposed that courts "look[] to history for guidance"—Parts II-A and II-D—failed to garner a majority.[5] And although Part II-

[3] Justice Gorsuch criticized this presumption as unprincipled: "it's hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? . . . And where exactly in the Constitution does this presumption come from?" 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment).

[4] The Court upheld the cross based on highly unique role of the Latin cross in World War I and the fact that the cross was erected during that time. *See* 139 S. Ct. at 2089 (the Bladensburg Cross "carries *special significance* in commemorating *World War I*"); *id.* ("the symbol took on an added *secular meaning* when used in *World War I memorials*") (emphasis added).

[5] *Am. Legion*, 139 S. Ct. at 2089-82, 2087-89. Justice Kagan disagreed with these sections. *Id.* at 2094. Justices Thomas and Gorsuch only concurred in the judgment. *Id.* at 2094-103.

B outlined four considerations that "*counsel against* efforts" to apply *Lemon* in certain cases and "*toward* application of a presumption of constitutionality" (emphasis added), *infra*, these words did not overrule *Lemon* or other Supreme Court cases requiring a governmental secular purpose and effect. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (lower courts must *not* "conclude our more recent cases have, by implication, overruled an earlier precedent").

Indeed, *American Legion*'s treatment of *Lemon* is no different from *Van Orden v. Perry*, 545 U.S. 677, 686 (2005)'s treatment of *Lemon*, which did not stop the Court from applying *Lemon* the very same day in *McCreary*, 545 U.S. at 881 (finding Ten Commandments display unconstitutional for want of a secular purpose). In *Van Orden*, after criticizing *Lemon* as unworkable, the plurality in fact evaluated purpose and found "no evidence of such" a "primarily religious purpose in this case." 545 U.S. at 691 n.11. Justice Breyer—who penned the controlling opinion—likewise evaluated purpose and found that the donor group's efforts "to find a nonsectarian text underscore[d] the group's ethics-based motives." *Id.* at 701-02. (Breyer, J., concurring). And the display's placement in a museum-like context suggested that the state intended the "nonreligious aspects of the tablets' message to predominate." *Id*. at 701.

While *American Legion*—like *Van Orden*—was professedly decided without applying *Lemon*, the fractured decision did not discard *Lemon* or the longstanding

Establishment Clause principles that underlie it. Quite the opposite. While attempting to explain why the "*Lemon* test" is difficult to apply in cases involving old displays with unknown or multiple purposes, the Court in fact scrutinized purpose and effect just as it would under *Lemon*. Justice Kagan brought this point home when she wrote: "I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere—*as this very suit shows*." 139 S. Ct. at 2094 (Kagan, J., concurring in part) (emphasis added). Regarding purpose, the Court found that the government only "acquired the Cross and the land on which it sits [in 1961] in order to preserve the monument and address traffic-safety concerns." *Id.* at 2078. Justice Breyer added that "the organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers." *Id*. at 2091 (Breyer, J., concurring). Regarding effect, the majority noted that the cross "took on an added secular meaning when used in World War I memorials." *Id.* at 2089. The "image used in the Bladensburg memorial" had become a "symbol of sacrifice in the [first world] war" rather than a symbol of Jesus Christ. *Id.* at 2075-76. The Court upheld the memorial precisely because the cross's "religious associations are no longer in the forefront." *Id.* at 2087. Thus, the Court remained faithful to the secular purpose and effect requirements and in no way adopted a new "history test."

C. History cannot justify laws, such as Texas's marriage statute, that categorically discriminate against atheists.

In *Town of Greece*, the Court clarified that *Marsh* does not permit practices that discriminate against non-believers. 572 U.S. at 571, 577. Even in the legislative prayer context, the Court ruled that the government must maintain "a policy of nondiscrimination." *Id.* at 585-86. The Court upheld town of Greece's practice in part because "a minister or layperson of any persuasion, *including an atheist*, could give the invocation." *Id.* at 571. It was critical to the Court's decision that "[t]he town at no point excluded or denied an opportunity to a would-be prayer giver." *Id*. The Court admonished that "[i]f the course and practice over time . . . denigrate[s] nonbelievers or religious minorities," it "fall[s] short" of constitutionality. *Id.* at 583. Indeed, the Court was explicit that a "practice that classified citizens based on their religious views would violate the Constitution." *Id.* at 589.

Texas's marriage solemnization statute does exactly that. It classifies citizens based on their religious views.[6] Even the district court agreed: "the Statute provides religious couples a benefit—the ability to have a wedding performed by a celebrant who shares their ethical and moral values—*that it denies to secular couples*." *Warren*, 2019 U.S. Dist. LEXIS 138839, at *15 (emphasis added). Such a

[6] *Young v. Sw. Sav. & Loan Asso*., 509 F.2d 140, 142 (5th Cir. 1975) (Atheism is a religion under Title VII precluding religious discrimination); *Reed v. Great Lakes Cos*., 330 F.3d 931, 934 (7th Cir. 2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.").

discriminatory statute cannot be saved by history. The Supreme Court later acknowledged the pernicious nature of the *Marsh*-historical justification, asserting that it could "gut the core of the Establishment Clause," reasoning:

> The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically . . . but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.

Cty. of Allegheny v. ACLU, 492 U.S. 573, 603-05 (1989). Although a leading proponent of the so-called historical analysis, even Justice Kennedy made clear in his separate *Allegheny* opinion:

> [R]elevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause. Acts of "official discrimination against non-Christians" perpetrated in the 18th and 19th centuries by States and municipalities are of course irrelevant to this inquiry, but the practices of past Congresses and Presidents are highly informative.

Id. at 670 n.7 (concurring and dissenting). With regard to the authors of the First Amendment, Jefferson demanded equal treatment of "the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination," 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). Madison, in turn, was contemptuous of prejudice over "Jews, Turks & infidels" being elected to office. Robert S. Alley, *James Madison on religious liberty*, 72 (Prometheus Books 1985).

The Supreme Court has "unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to

select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). Newer members of the Supreme Court agree. As Justice Kavanaugh declared: "In our constitutional tradition, all citizens are equally American, no matter what God they worship or if they worship no god at all. Plaintiffs are atheists. As atheists, they have *no lesser rights* or status as Americans or under the United States Constitution than Protestants, Jews, Mormons, Muslims, Hindus, Buddhists, Catholics, or members of any religious group." *Newdow v. Roberts*, 390 U.S. App. D.C. 273, 287 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (emphasis added).

The *touchstone* for the Supreme Court's Establishment Clause jurisprudence has always been, and remains, that the "First Amendment mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson*, 393 U.S. at 104. Relying on the history of the Clause, Justice Black in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) outlined the considerations that have become the bedrock of Establishment Clause jurisprudence:

> Neither a state nor the Federal Government can . . . pass laws which aid one religion, *aid all religions, or prefer one religion over another*. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in religion . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

(emphasis added). *See also Bowen v. Kendrick*, 487 U.S. 589, 609-10 (1988) (opinion by Rehnquist) (reaffirming the requirement of "'neutrality among religions,

and between religion and nonreligion'") (citation omitted); *Gillette*, 401 U.S. at 450 ("the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."); *Torcaso*, 367 U.S. at 495 ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

Section 2.202 blatantly violates the touchstone principal of neutrality by preferring religion over non-religion. As the district court itself acknowledged, Section 2.202 creates two different sets of rules for religious and non-religious persons who wish to officiate marriages in Texas. If the would-be officiant is non-religious, their only options are to either run for state judgeship, be appointed by their local city government (if they have one) to be a municipal court judge, or somehow ingratiate themselves to the President to be appointed to the federal judiciary. But if the would-be officiant is religious, they will automatically have the authority to solemnize marriages, no questions asked. And they will have been given that authority on the *sole basis* that they claim a religious affiliation. As such, the statutory scheme violates the Establishment Clause at its core.

D. Section 2.202 violates the Establishment Clause by delegating governmental authority to religious officiants solely on the basis of their religious identity.

In *Larkin*, the Supreme Court, in an 8-1 decision, struck down "a Massachusetts statute, which vest[ed] in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school[.]" 459 U.S. at 117. The Court found that whatever supposed secular purpose the statute was meant to serve in theory, it plainly had the effect of advancing religion and excessively entangling the government with religion. *Id.* The statute unconstitutionally advanced religion because the "*mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-26 (emphasis added).

As for entanglement, the Court reasoned that the statute delegated "a power ordinarily vested in agencies of government" to churches. *Id.* at 122. The Court held that such a delegation of government power to a religious institution undermines "the core rationale underlying the Establishment Clause . . . preventing a fusion of governmental and religious functions." *Larkin*, 459 U.S. at 126 (quoting *Schempp*, 374 U.S. at 222).

Larkin "teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 698

(1994).[7] Section 2.202 does exactly that. It delegates a civic authority (marriage solemnization) to individuals according to religious identity. Indeed, beside clergy, the only people authorized to solemnize marriages in the State of Texas are current or former government officials who have been imbued with the public trust by virtue of either direct election (state and county court judges; justices of the peace), indirect election (municipal court judges), or appointment by the President and confirmation by the U.S. Senate (federal judges). Tex. Fam. Code § 2.202(4-5). The overwhelming majority of the judges authorized to solemnize marriages under the statute are subject to stringent minimum education and work experience qualifications.[8] This stands in stark contrast to Section 2.202's requirements for religious wedding officiants, which are virtually non-existent. The only inquiry that the State of Texas makes into the officiant's qualifications is whether the officiant is "a person who is an officer of a religious organization and who is authorized by the organization to conduct a marriage ceremony." Tex. Fam. Code § 2.202(3). As the lower court noted, the statute "does not require any particular inquiry or qualification for the religious official by the state." *Warren*, 2019 U.S. Dist. LEXIS 138839 at *33.

[7] Courts within the Fifth Circuit have properly applied *Larkin* to strike down government actions that vest religious institutions with state power or that use religious organizations to carry out state functions. *See Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 632 n.21 (W.D. Tex. 2018); *ACLU Found. of La. v. Blanco*, No. 07-04090, 2007 U.S. Dist. LEXIS 74590, at *17 (E.D. La. Oct. 5, 2007).

[8] *Judge Qualifications and Selection in the State of Texas*, txcourts.gov, https://www.txcourts.gov/media/48745/Judge-Qualifications-6_26_14.pdf (last accessed Dec. 17, 2019).

What's more, any person caught solemnizing marriages while not authorized to do so under the statute has committed a crime. Tex. Fam. Code § 2.202(c) ("a person commits an offense if the person knowingly conducts a marriage ceremony without authorization under this section. An offense under this subsection is a Class A misdemeanor").

II. There is no rational basis to sustain Texas's discrimination against non-religious couples and celebrants.[9]

A. Historical practices cannot justify discrimination under the Equal Protection Clause.

Regardless of the limited role historical practices played to justify legislative prayer under the Establishment Clause, *supra*, historical practices can never justify discriminatory practices under the Equal Protection Clause. *See, e.g.*, *Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-25 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"); *Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 332 n.23 (2003) ("[I]t is circular reasoning, not

[9] Because Texas's statute facially discriminates *among* religions, it is subject to strict scrutiny under *Larson*, 456 U.S. at 246. Nonetheless, as the Seventh Circuit correctly found in *Ctr. for Inquiry v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014), marriage solemnization statutes that discriminate against atheists and humanists do not even survive the minimum rational basis standard. Thus, we apply the rational basis here to underscore this point, while maintaining that strict scrutiny is the correct test to apply.

analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.").

In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) condemned *Bowers*' misguided reliance on "the history of Western civilization and Judeo-Christian moral and ethical standards." The Court instructed courts evaluating Equal Protection challenges to look forward, just as the authors of the Fourteenth Amendment did, who "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. Rather than bowing to a "history and tradition" of legal discrimination against gays and lesbians, the new, more inclusive direction of "our laws and traditions in the past half century are of most relevance here." *Id.* at 571-72.

Extending *Marsh*'s "logic" to the Equal Protection Clause would gut the core of the clause itself. The "logic" has aptly been described as follows: "[t]he founders did it. Everyone since them has done it. No one is abusing it. Therefore it is constitutional." Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 Cal. L. Rev. 293, 338 (1993). We must never forget that "not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history." *McDonald v. City of Chi.*, 561 U.S. 742, 875-76 (2010) (Stevens, J., dissenting).

> Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.

Frontiero v. Richardson, 411 U.S. 677, 685 (1973). Applying *Marsh*'s perfunctory reasoning in Equal Protection jurisprudence would therefore justify anti-miscegenation laws (*Loving v. Virginia*, 388 U.S. 1 (1967)), racial segregation (*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)), and even slavery (*Scott v. Sandford*, 60 U.S. 393 (1857)). *Marsh*'s logic would permit women to be denied the right to vote and practice law, among many other rights now secured to them. This is precisely why the reliance on tradition central to *Marsh* and *Town of Greece* is so cabined by the Supreme Court to the specific arena of legislative prayer.

B. Time and change have made Section 2.202's discrimination against non-religious couples and celebrants an anachronism.

Marsh's logic is further inapplicable here because there simply is no "unambiguous and unbroken history" to justify Texas's marriage solemnization scheme akin to that contemplated in the context of legislative prayer. As the Supreme Court recently recognized, "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Marriage and marriage

ceremonies have undergone a significant transformation since the Founding, and have continued to do so at pace over the last two decades.

In *Obergefell*, Justice Kennedy correctly observed that "the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Id.* at 2603. In the context of marriage, Justice Kennedy noted such sweeping societal shifts have necessitated eliminating discriminatory legal regimes once thought to be part-and-parcel of the institution of marriage, such as husbands having plenary power over marital property, differential treatment between husbands and wives in obtaining death benefits, laws making alimony available to divorced women, but not to divorced men, and so forth. *Id.* at 2604 (collecting cases). The fact that these discriminatory practices had long historical pedigrees could not save them under the Equal Protection Clause.

C. Religious demographics have changed significantly since Section 2.202 was codified.

Section 2.202 was first codified into Texas law in 1997. In the twenty-two years since, the religious demographics of Texas and the United States as a whole have changed significantly.

A 1997 Gallup poll found that 89% of the United States population claimed some religious affiliation, compared with just 9% claiming none.[10] When Gallup

[10] *Religion*, GALLUP, INC., https://news.gallup.com/poll/1690/religion.aspx (last accessed Dec. 18, 2019).

posed the same question in 2018, they found that just 76% of respondents claimed some religious affiliation.[11] This 13% reduction in religious belief coincided with a commensurate increase in the non-religious population. By 2018, 20% of the U.S. population claimed no religious affiliation at all.[12] Over that same time period, the percentage of Americans claiming to be members of a "church or synagogue" dropped from 67% in 1997 to just 50% in 2018.[13] A Pew Research study conducted between 2018 and 2019 found that 26% of Americans were non-religious—either atheist, agnostic, or "nothing in particular."[14]

These trends are reflected in Texas. The Pew Research Center's 2014 study estimated that about 18% of Texans did not affiliate with any religion,[15] a number corroborated by the Public Religion Research Institute's (PRRI) 2016-17 research.[16] In fact, "none" was the third most popular "religion" in the State of Texas circa 2016-17, just a single percentage point behind white evangelical protestants and five percentage points behind Catholics.[17] As of today, "none" may very well be the

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Gregory A. Smith, *et al.*, *In U.S., Decline of Christianity Continues at Rapid Pace: An Update on America's Changing Religious Landscape*, PEW RESEARCH CENTER (Oct. 17, 2019), pewforum.org/wp-content/uploads/sites/7/2019/10/Trends-in-Religious-Identity-and-Attendance-FOR-WEB-1.pdf.
[15] *Religious Composition of Adults in Texas*, PEW RESEARCH CENTER, pewforum.org/religious-landscape-study/state/texas/.
[16] Robert P. Jones, Ph.D. and Daniel Cox, *America's Changing Religious Identity*, *PUBLIC RELIGION RESEARCH INSTITUTE* (Sept. 6, 2017), prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.
[17] *Id.*

second-most prevalent "religious affiliation" in Texas. A study released by PRRI in 2019 pegged the percentage of non-religious Texans at about 22%.[18] According to a state population estimate from the *U.S. Census Bureau*, that would place the overall number of non-religious Texans in 2019 at about 6.3 million.[19]

By way of illustration: if the non-religious population of Texas suddenly decided to move to one location and incorporate as a city, they would immediately become the largest city in Texas and the second largest city in the United States behind only New York City, with a population larger than the *combined* populations of Houston, Dallas, and San Antonio, and Austin,[20] and more populous than thirty-three individual states.[21]

D. As religious demographics rapidly change, marriage—and weddings—continue to evolve as well.

The rapid shift in religious demographics over the last two decades has tracked with changes to weddings and marriage. Perhaps the most dramatic change in marriage nationwide was marked by the Supreme Court's 2015 decision in

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[18] Natalie Jackson, Ph.D., *Demographic Changes in Texas Could Transform the State in 2020*, *PUBLIC RELIGION RESEARCH INSTITUTE* (Sept. 12, 2019), prri.org/spotlight/demographic-changes-in-texas-could-transform-the-state-in-2020/.

[19] *Quick Facts: Texas, U.S. CENSUS BUREAU*, https://www.census.gov/quickfacts/TX

[20] *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2018 Population, U.S. CENSUS BUREAU*, factfinder.census.gov/bkmk/table/1.0/en/PEP/2018/PEPANNRSIP.US12A.

[21] *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018, U.S. CENSUS BUREAU*, factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2018_PEPANNRES&src=pt.

Obergefell, which legalized same-sex marriage on the national scale. Of course, same-sex marriage had been legal in many states long before *Obergefell.* And this is far from the only major development on the marriage front, *infra.*

Where it once may have been taken for granted that weddings are an affair reserved for the religious sphere and presided over by religious officiants, this is no longer the case. A number of states, including Colorado,[22] Illinois,[23] Kansas,[24] Pennsylvania[25] and Wisconsin,[26] as well as the District of Columbia,[27] allow for "self-uniting" marriages, wherein the couple may solemnize their own marriage without the need for any third-party officiant. *See also Knelly v. Wagner*, 2:07-cv-01272, Dkt. No. 14 (W. D. Pa., filed Sept. 27, 2017) ("Self-uniting marriage licenses have been issued in Pennsylvania under the statute in question for decades, without regard to the religious or nonreligious affiliations of the parties seeking the licenses.").

And where couples do utilize some manner of officiant for their wedding, fewer and fewer couples have clergy solemnize the ceremony. A recent study by *The American Enterprise Institute* (AEI) found that 48% of newlyweds ages 18-34 opted for either a friend or family member, or a secular government official to solemnize

[22] Colo. Rev. Stat. § 14-2-109(1).
[23] 750 Ill. Comp. Stat. Ann. 5/209(a).
[24] Kan. Stat. Ann. § 23-2504(b-c).
[25] 23 Pa. Cons. Stat. Ann. § 1504 (b).
[26] Wis. Stat. Ann. § 765.16 (1m)(c).
[27] D.C. Code § 46-406 (b)(9).

their wedding in a non-religious setting.[28] AEI's research found a sharp downward trend in clergy-officiated weddings over the last several decades—60% of Americans over 65 reported having a clergy-officiated wedding in a religious setting, compared with 52% of Americans ages 50-64 and 33% of Americans ages 35-49.[29]

Researchers have tied the decline in religious weddings and officiants to the overall decline in American religiosity. *See* Cox, *et al*., *supra* note 28 ("The most important reason couples decide to have a secular wedding service is also the most obvious: They are not religious."). Anne Duncan, an associate professor of religion at Goucher College, said of this trend: "There are a lot of folks who maybe still believe in God, still have some form of religious or spiritual practice, but are not formally connected to a particular religious denomination or community, and so they need somebody else to provide that service."[30]

As the non-religious population continues to grow, the population of couples opting for non-religious weddings will inevitably grow in kind, as the data supports. Among un-married Americans, just 30% percent say they would prefer to be married in a church or other house of worship by a religious leader, whereas 56% would

[28] Daniel E. Cox, *et al., The decline of religion in American family life, THE AMERICAN ENTERPRISE INSTITUTE* (Dec. 11, 2019), www.aei.org/research-products/report/the-decline-of-religion-in-american-family-life/.
[29] *Id.*
[30] Brittany Britto, *The new normal: Friends and family presiding at weddings*, THE BALTIMORE SUN (Feb. 17, 2017), baltimoresun.com/features/bs-lt-wedding-officiant-20170219-story.html.

prefer to have their wedding officiated by non-clergy in a non-religious setting.[31] These non-religious couples and their non-religious officiants deserve to have the same rights and privileges afforded to religious couples and officiants, *viz.*, the right to have their marriage solemnized by an officiant who shares their lifestance, and the right to solemnize a marriage in accordance with their sincerely held beliefs, respectively. Section 2.202 denies them those rights.

In sum, Section 2.202 privileges religious couples and religious officiants over non-religious couples and non-religious officiants—some 6.3 million Texans. No amount of history, unbroken or otherwise, can justify that.

CONCLUSION

For the above reasons, this Court should reverse the district court's decision.

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[31] Cox, *et al.*, *supra* note 28.

CERTIFICATE OF SERVICE

I certify that on December 23, 2019 the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,421 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Respectfully submitted,

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