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File Name: 26a0238p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RUSS GORDON; CATHY STACKPOOLE,
Plaintiffs-Appellants,

v.

CITY OF HAMTRAMCK, MICHIGAN; HAMTRAMCK CITY COUNCIL; AMER GHALIB,
Defendants-Appellees.

No. 25-1917

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:23-cv-12812—David M. Lawson, District Judge.

Argued: June 2, 2026

Decided and Filed: August 21, 2026

Before: MOORE, WHITE, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: Marc M. Susselman, Canton, Michigan, for Appellants. Lindsey R. Johnson, SCHENK & BRUETSCH PLC, Detroit, Michigan, for Appellees. **ON BRIEF:** Marc M. Susselman, Canton, Michigan, for Appellants. Lindsey R. Johnson, Peter E. Doyle, SCHENK & BRUETSCH PLC, Detroit, Michigan, for Appellees.

MOORE, J., delivered the opinion of the court in which WHITE, J., concurred, and THAPAR, J., concurred except for Part II.D. THAPAR, J. (pp. 22–26), delivered a separate opinion concurring in part and concurring in the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge. Eighteen flagpoles line a street in Hamtramck, Michigan's historic district. The City of Hamtramck ("City") owns the flagpoles and, from 2013 to 2023, charged its Human Relations Commission ("HRC") with maintaining them. The HRC adopted an unwritten policy of flying any flag that a resident requested—usually, the flags of countries with which residents had ties. But not always. In June 2021, the HRC's Chair, Russ Gordon, received a request to fly the Pride flag in celebration of Pride Month. Adhering to the HRC's policy, Gordon ordered a Pride flag. Because it arrived in late autumn, Gordon waited to raise the Pride flag until 2022.

In November 2021, however, Hamtramck residents elected a new City government. Amer Ghalib won the mayoral race, and several newcomers won City Council seats. After Gordon raised the Pride flag in 2022, the City's new administration asked Gordon to remove it. He refused, and the Pride flag flew through the end of the year. But in 2023, the City Council passed a resolution that permitted only the American, Michigan, Hamtramck, and Prisoner of War flags, plus the flags of nations which represented Hamtramck's international character, to fly from City-owned flagpoles. When Gordon and another HRC member, Cathy Stackpoole, raised the Pride flag in defiance of that resolution, the City Council removed them from the HRC and stripped the HRC of its authority over the flagpoles.

Gordon and Stackpoole then brought Free Speech, Establishment, and Equal Protection Clause claims against the City, City Council, and Mayor Ghalib. The district court granted summary judgment to the defendants. For the reasons that follow, we **AFFIRM** the district court's judgment.

I. BACKGROUND

Within Hamtramck's historic district, the City owns eighteen flagpoles that line both sides of Joseph Campau Avenue. R. 83 (Gordon Dep. at 16, 18) (Page ID #6959–60). For years, the flagpoles sat in a state of disuse and disrepair—difficult to distinguish from the adjacent

"light poles and power poles." *Id.* Gordon, however, sensed an opportunity. In 2013, Gordon was the Chair of the HRC, *id.* at 14–16 (Page ID #6959), a twelve-person commission selected by the Mayor and the City Council and charged with "promot[ing] mutual understanding and respect for multi-culturalism and diversity," Hamtramck, Mich., Code of Ordinances §§ 32.075, 32.076(A). Consonant with the HRC's mission statement, Gordon lobbied the City Council to restore the flagpoles so that the HRC could "raise flags to represent different people in Hamtramck." R. 83 (Gordon Dep. at 16) (Page ID #6959).

The City Council supported the idea and passed a resolution authorizing the HRC "to move forward with [its] flagpole restoration project." R. 61-1 (Resolution 2013-102) (Page ID #4753). The resolution further empowered the HRC "to solicit funds" to "restor[e] and maint[ain]" the city flagpoles and to "purchase . . . flags" without restriction. *Id.* The HRC relied on donations from local businesses to repair the flagpoles and to purchase flags, and possessed "control" over "the project," including "all the flag selections." R. 83 (Gordon Dep. at 16–17, 19) (Page ID #6960); *see also* R. 83 (Majewski Dep. at 8) (Page ID #6895) ("The [HRC] did not have to request approval from the Mayor or from Council on what flags would be flown. And they never did.").

While Gordon helmed the HRC, the HRC lacked a written policy governing flag selection. Instead, it was the HRC's "practice to display any flag which a resident of Hamtramck requested be displayed." R. 61-1 (Gordon Aff. ¶ 4) (Page ID #4758). And the HRC received public input through less-than-formal channels. Gordon, for instance, received requests from "people on the street," even taking flag requests from passersby while he was "12 feet off the ground hooking up . . . flag[s]." R. 83 (Gordon Dep. at 19–21) (Page ID #6960). The HRC did not vote to approve each flag, although members occasionally mentioned flag requests in passing at meetings. *Id.* at 62 (Page ID #6971). In the end, the HRC usually "just acquiesced" to flag requests. *Id.*

Pursuant to this unwritten policy, Gordon obtained and raised the flags of over twenty countries with which Hamtramck residents and their families had ties, such as Bangladesh, Mexico, Poland, Ukraine, and Yemen. R. 61-1 (Gordon Aff. ¶ 4) (Page ID #4758); R. 61-1 (List of Flags) (Page ID #4763). He also obtained several non-country flags, including "a flag

honoring the Cherokee nation," the flag of Sicily, and the flag of the African Union. R. 61-1 (Gordon Aff. ¶ 4) (Page ID #4758); R. 61-1 (List of Flags) (Page ID #4763). The HRC rotated the flags on display, save for two flagpoles—one at the end of "each . . . line of flagpoles"—from which it always flew the American and Prisoner of War ("POW") flags. R. 61-1 (Gordon Aff. ¶¶ 6–7) (Page ID #4759). And the HRC flew flags from May to Thanksgiving each year; it did not fly flags in the winter. *Id.* ¶ 8 (Page ID #4759).

"Only on one occasion" did the HRC refuse to honor a resident's request. R. 83 (Gordon Dep. at 31) (Page ID #6963). Several years into the HRC's maintenance of the flagpoles, it received a request from a resident to fly the Serbian flag. *Id.* at 32 (Page ID #6963).[1] Gordon observed that Hamtramck's Bosnian population outnumbered its Serbian population, and the HRC feared "generating conflict between the [City's] Bosnian and . . . Serbian residents" in light of lingering hostilities from the Bosnian War and genocide. R. 61-1 (Gordon Aff. ¶ 5) (Page ID #4758–59). So, although Gordon purchased a Serbian flag, the HRC voted not to raise it. R. 83 (Gordon Dep. at 32–34) (Page ID #6963–64).

The HRC also flew the Pride flag on Joseph Campau Avenue. In June 2021, the City Council voted on a request from the Arts and Culture Commission ("ACC") to display the Pride flag in Zussman Park[2] to celebrate Pride Month that year. *See* R. 83 (Resolution 2021-73) (Page ID #6716). The resolution proved to be divisive. The City Council deadlocked three to three, requiring then-Mayor Karen Majewski to cast a tiebreaking vote in favor of the resolution. R. 83 (Gordon Dep. at 45) (Page ID #6966); R. 83 (Ghalib Dep. at 20) (Page ID #6917). After the resolution passed, the city manager called Gordon to request, on the ACC Chair's behalf, that the HRC fly the Pride flag on Joseph Campau Avenue. R. 83 (Gordon Dep. at 40–41) (Page ID #6965). Gordon agreed, on the basis that "doing so was in keeping with the Commission's policy of displaying any flag that a resident of Hamtramck requested." R. 61-1 (Gordon Aff. ¶ 10) (Page ID #4760). Gordon then ordered a Pride flag, but it did not arrive until after

[1]The resident who made the request was not Serbian. R. 61-1 (Gordon Aff. ¶ 5) (Page ID #4758–59); R. 83 (Gordon Dep. at 33) (Page ID #6963).

[2]Zussman Park is across the street from Hamtramck City Hall, both of which are approximately half a mile away from Joseph Campau Avenue. *See Livingston Christian Schs. v. Genoa Charter Township*, 858 F.3d 996, 1008 (6th Cir. 2017) ("We may take judicial notice of maps showing the distances between . . . locations.").

Thanksgiving—when the HRC stopped displaying flags for the year. *Id.* ¶¶ 9, 11 (Page ID #4759–60).

In November 2021, however, Hamtramck's residents elected a new mayor, Ghalib, and two new City Council members. *Id.* ¶ 12 (Page ID #4760); *see* R. 83 (Ghalib Dep. at 10) (Page ID #6915). Soon after Gordon displayed the Pride flag for the first time in May 2022, the city manager told Gordon that Ghalib and at least one City Council member wanted the Pride flag removed. R. 61-1 (Gordon Aff. ¶¶ 13–14) (Page ID #4760–61); R. 83 (Gordon Dep. at 46–49) (Page ID #6967). Ghalib and several councilmembers then had multiple meetings with Gordon concerning the Pride flag. R. 83 (Gordon Dep. at 50) (Page ID #6968); R. 83 (Ghalib Dep. at 27–29) (Page ID #6919).

During one meeting, Ghalib stated that Hamtramck residents had complained to him about the Pride flag, and he disclaimed its display as the policy "of the previous administration." R. 61-1 (Gordon Aff. ¶ 15) (Page ID #4761). Another politician at some point also suggested "leav[ing] it up for a couple of months and then tak[ing] it down." R. 83 (Gordon Dep. at 50) (Page ID #6968). Gordon, however, believed that the HRC had the "sole authority. . . to decide what flags to display from the flagpoles," so he "refused to remove the Pride flag, and it remained [on] display[] through Thanksgiving[] 2022." R. 61-1 (Gordon Aff. ¶ 14) (Page ID #4761).

The following year, the City Council moved to curb the HRC's flag-selection power. It drafted a resolution titled "Resolution to Maintain and Confirm the Neutrality of the City of Hamtramck Towards its Residents." R. 83 (Resolution 2023-82) (Page ID #6726). The resolution provided that:

> **WHEREAS**, the City of Hamtramck is one of the most diverse cities in the United States, in which we should proudly promote and embrace its diversity; and
>
> **WHEREAS**, the City must and will serve and treat its residents equally, with no discrimination, or special treatment to any group of people; and
>
> **WHEREAS**, the City has authorized in the past, the Human Relations Commission to install nations [sic] flags on the City flagpoles to represent the international character of the City, Resolution 2013-102: [sic] and

> **WHEREAS**, each religious, ethnic, racial, political, or sexually oriented group is already represented by the country it belongs to; and
>
> **WHEREAS**, the City does not want to open the door for radical or racist groups to ask for their flags to be flown; and
>
> **WHEREAS**, this resolution does not in any way, shape or form infringe upon the fundamental right of an individual or business in the City of Hamtramck to engage [sic] free speech. Nor does this resolution limit speech by public employees provided that such employees engage in such speech in a protected time, manner and place.
>
> **NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Hamtramck, Wayne County, Michigan, that the government of the City of Hamtramck does not allow any religious, ethnic, racial, political, or sexual orientation group flags to be flown on the City's public properties, and that only, the American flag, the flag of the State of Michigan, the Hamtramck Flag, the Prisoner of War flag and the nations' flags that represent the international character of our City shall be flown.

Id.

The City Council held a public hearing regarding Resolution 2023-82 on June 13, 2023. *See* City of Hamtramck, *City Council Meeting, June 13, 2023* (YouTube, June 13, 2023), https://www.youtube.com/live/RfwM_q9pFKs. Some residents voiced support for the resolution; one hoped that "the public places and city property will not be used to support any freedoms of any parties without the freedoms of other parties." *Id.* at 00:02:18–00:04:02. Multiple individuals opposed the resolution, considering it an affront to members of the LGBTQ+ community. *See, e.g.*, *id.* at 02:30:30–03:06:20. Councilmember Choudhury voiced his support for the resolution at the hearing, remarking that:

> The resolution does not prevent private citizens from flying the Pride flag around the city. We only want to respect the religious rights of our citizens. Pride Month is a time to celebrate [the] diversity of the LGBTQ community, which includes people of all ages [and] abilities. . . .You guys are welcome to the community. . . . [Y]ou are not unwelcome. You are welcome here. But we have to respect the religious. We have to respect the people around here. Schools, mosques, churches.

Id. at 03:24:40–03:26:40. The City Council passed the resolution that day. *See* R. 83 (Resolution 2023-82) (Page ID #6726).

Gordon and another HRC member, Stackpoole, believed that Resolution 2023-82 was unconstitutional, so they raised the Pride flag on one of the flagpoles on Joseph Campau Avenue on July 9, 2023. R. 61-1 (Gordon Aff. ¶ 17) (Page ID #4761–62); R. 83 (Gordon Dep. at 58–59) (Page ID #6970). Ghalib and Councilmember Hassan directed the Hamtramck police to take the flag down shortly thereafter. *Id.* Gordon and Stackpoole's actions prompted further action from the City Council two days later. First, the City Council passed a resolution removing Gordon and Stackpoole from the HRC for "intentionally violat[ing] the laws of the City of Hamtramck by flying a flag in contravention of" the prior Resolution. R. 83 (Resolution 2023-99) (Page ID #6842). Second, the City Council passed Resolution 2023-100, which "stripped" the HRC of its "authority and control over any and all flag poles on City property," giving the City "dominion, authority and control over such flagpoles as the sole authority determining compliance under the laws of the City of Hamtramck and State of Michigan." R. 83 (Resolution 2023-100) (Page ID #6844). Since the passage of Resolution 2023-100, the City Council has exercised "authority over the flags displayed from the flagpoles" on Joseph Campau Avenue. D. 15 (Appellant Br. at 8); *see also* Hamtramck, Mich., Code of Ordinances § 7-02 ("The legislative authority of the City and all administrative and executive powers not otherwise delegated, are hereby vested in the council."). And the record indicates that the City Council has decided to fly "only . . . American flags" along Joseph Campau Avenue "to prevent any issues in the City." R. 83 (Ghalib Dep. at 37–38) (Page ID #6921–22).

The plaintiffs commenced this action against the defendants in the United States District Court for the Eastern District of Michigan in November 2023. R. 1 (Compl. at 1–23) (Page ID #1–23). As relevant here, in the operative complaint, Gordon and Stackpoole allege that Resolutions 2023-82, 2023-99, and 2023-100 violate the Free Speech, Establishment, and Equal Protection Clauses and seek declaratory, injunctive, and monetary relief. R. 43 (Second Am. Compl. at 8–17) (Page ID #2154–63).

Following discovery, Gordon and Stackpoole moved for partial summary judgment, and the defendants opposed. The district court denied the plaintiffs' summary-judgment motion. *Gordon v. City of Hamtramck* ("*Gordon I*"), No. 23-12812, 2025 WL 1970243, at *1 (E.D. Mich. July 14, 2025). First, the district court found that Gordon and Stackpole's free-speech

claim failed pursuant to *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). *Gordon I*, 2025 WL 1970243, at *7–10. The district court suggested that the Joseph Campau Avenue flagpoles were likely a forum for government speech before adoption of Resolution 2023-82 but ultimately found that the flagpoles were "indisputably" so afterward. *Id*. at *8. The district court then rejected Gordon and Stackpoole's Establishment Clause claim, declining to rely on their "'evidence' of [City Council members'] subjective motivation to advance a religious viewpoint" and finding that Resolution 2023-82 was facially "devoid of any reference or endorsement of any religion or viewpoint." *Id.* at *10. Lastly, the district court ruled that the plaintiffs had failed to adequately develop their Equal Protection Clause claim. *Id.* at *11.

The defendants then moved for summary judgment on all of Gordon and Stackpoole's claims, which Gordon and Stackpoole opposed. Tracking its earlier opinion, the district court granted the defendants' motion in full, *Gordon v. City of Hamtramck* ("*Gordon II*"), 799 F. Supp. 3d 603, 605 (E.D. Mich. 2025), and entered judgment in the defendants' favor, R. 85 (Judgment) (Page ID #7395). Gordon and Stackpoole then moved for reconsideration, and the district court denied their motion. R. 87 (D. Ct. Order Den. Pls.' Mot. for Recons. at 1–3) (Page ID #7424–26). This appeal timely followed. R. 89 (Notice of Appeal) (Page ID #7431–33).

II. ANALYSIS

On appeal, Gordon and Stackpoole argue that the City's Resolution 2023-82 violates the Constitution in three ways. First, they raise a free-speech challenge to Resolution 2023-82. D. 15 (Appellant Br. at 13–43). Second, they assert that Resolution 2023-82 violates the Establishment Clause. *Id.* at 44–50. Third, they insist that Resolution 2023-82 violates the Equal Protection Clause. *Id.* at 27–28.

A. Standard of Review

"We review de novo a district court's grant of summary judgment." *Zillow, Inc. v. Miller*, 126 F.4th 445, 455 (6th Cir. 2025) (quoting *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012)). Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We view the evidence in the light most favorable to the nonmovants and draw all

reasonable inferences in their favor. *Zillow*, 126 F.4th at 455. A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Federal Rule of Appellate Procedure 10(b)(2)

Before turning to the merits of Gordon and Stackpoole's claims, we must briefly address the defendants' argument that Federal Rule of Appellate Procedure 10(b)(2) limits the scope of our review. D. 18 (Appellee Br. at 16–21). Pursuant to that rule, "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Fed. R. App. P. 10(b)(2). According to the defendants, Rule 10(b)(2) prohibits us from reviewing "the district court's factual findings" because Gordon and Stackpoole did not order transcripts of the parties' oral arguments in the district court. D. 18 (Appellee Br. at 20).

But the district court made no factual findings for the plaintiffs to contest. Instead, the district court obeyed the simple "rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Anderson*, 477 U.S. at 249). And because the district court reduced its reasoning to writing in two opinions, we do not require the oral-argument transcripts to discern the district court's reasoning. *Cf. Bivens v. Zep, Inc.*, 147 F.4th 635, 652 (6th Cir. 2025), *cert. denied*, No. 25-932, ___ S. Ct. ____, 2026 WL 1052175 (Apr. 20, 2026). In short, Rule 10(b)(2) is inapplicable.

C. Free-Speech Claim

We begin with Gordon and Stackpoole's free-speech challenge to Resolution 2023-82. Gordon and Stackpoole argue that the Joseph Campau Avenue flagpoles conveyed private speech from 2013 to 2023 and continue to do so. *See, e.g.*, D. 15 (Appellant Br. at 17–18, 21, 25, 31). In their view, Resolution 2023-82's flag limitations thus constitute impermissible content- and viewpoint-based restrictions on private speech. *See, e.g.*, *id.* at 16. The defendants, conversely, assert that the City permissibly closed the flagpoles to private speech and contend

that they now communicate only government speech. D. 18 (Appellee Br. at 21). Before Resolution 2023-82, we assume without deciding that the flagpoles conveyed private speech and that they were a designated public forum. But because we conclude that Resolution 2023-82 closed the flagpoles as a forum for private speech, we hold that the plaintiffs' free-speech claim fails.

The First Amendment's Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, cl. 3, and applies to the states and their political subdivisions "under the Due Process Clause of the Fourteenth Amendment," *Packingham v. North Carolina*, 582 U.S. 98, 101 (2017). When evaluating the constitutionality of speech restrictions affecting government-owned property, "we consider three questions: (1) whether the speech is protected under the First Amendment; (2) what type of forum is at issue and, therefore, what constitutional standard applies; (3) whether the restriction on speech in question satisfies the constitutional standard for the forum." *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010).

1. Whether the flagpoles conveyed protected speech

The crux of Gordon and Stackpoole's free-speech claim is whether the Joseph Campau Avenue flagpoles serve as a forum for private speech or government speech. Although the Free Speech Clause restricts the government's ability to regulate private speech, it imposes no limits on government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). "A government entity has the right to speak for itself," and in doing so, may "say what it wishes." *Id.* (citation modified). This latitude is essential—"[w]ere the Free Speech Clause interpreted otherwise, government would not work." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). "After all, the government must be able to 'promote a program' or 'espouse a policy' in order to function." *Shurtleff*, 596 U.S. at 248 (quoting *Walker*, 576 U.S. at 208).

The distinction between private and government speech can be murky when the "government invites the people to participate in a program." *Id.* at 252. In such circumstances, we must determine whether the "government-public engagement transmit[s] the government's

own message" or "instead create[s] a forum for the expression of private speakers' views." *Id.* This requires us to "conduct a holistic inquiry" that is "driven by a case's context rather than the rote application of rigid factors." *Id.* Although there is no exhaustive list of relevant factors, the Supreme Court has highlighted three: (1) "the history of the expression at issue"; (2) "the public's likely perception as to who (the government or a private person) is speaking"; and (3) "the extent to which the government has actively shaped or controlled the expression." *Id.* Applying these factors in *Shurtleff*, the Court held that Boston created a forum for private, not government, speech when it allowed members of the public "to raise flags of their choosing" on a flagpole outside Boston City Hall. *Id.* at 248.

Here, the first factor is not decisive. The "general history" of flag-flying suggests that the Joseph Campau Avenue flagpoles conveyed government speech, but the history factor is "only our starting point," as we must center our attention on "the details of *this* flag-flying program." *Id.* at 253–55. The remaining two factors, however, are difficult to apply. Given that Gordon and Stackpoole have presented us with virtually no information about the character of the area surrounding the flagpoles, we cannot evaluate the public-perception factor. With respect to the control factor, the plaintiffs' shifting characterizations of Gordon's actions give us pause. At times, the plaintiffs leverage Gordon's status as the HRC's Chair to impute his lax content-control policies to the City. *See, e.g.*, D. 15 (Appellant Br. at 20–21). But elsewhere, the plaintiffs seemingly characterize Gordon as a private actor, emphasizing that he "used his own ladder to raise . . . flags" and stored flags "in his home." *Id.* at 16. Rather than endeavoring to harmonize these characterizations, we assume without deciding that the flagpoles were a forum for private speech before Resolution 2023-82.

2. The type of forum at issue

Our caselaw recognizes "four types of fora: (1) the traditional public forum, (2) the designated public forum, (3) the limited public forum, and (4) the nonpublic forum." *Brindley v. City of Memphis*, 934 F.3d 461, 467 (6th Cir. 2019). The vigor of the First Amendment's protections depends on the type of forum at issue. *Miller*, 622 F.3d at 534. Gordon and Stackpoole do not contend that the flagpoles were a traditional public forum—that is, an "area[] that [has] historically been open to the public for speech activities," like "public streets and

sidewalks." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). They instead contend that the Joseph Campau Avenue flagpoles operated as a designated public forum before Resolution 2023-82. *See, e.g.*, D. 15 (Appellant Br. at 31). Designated public fora lack the historical pedigree as "sites for discussion and debate" that define traditional public fora. *McCullen*, 573 U.S. at 476. Rather, a designated public forum comes into being when the government intentionally "opens a piece of public property to the public at large, treating [it] as if it were a traditional public forum." *Miller*, 622 F.3d at 534. We assume without deciding that the flagpoles were a designated public forum.

3. The constitutionality of closing the flagpoles to private speech

Ordinarily, we would proceed to evaluate whether the challenged resolution restricts speech, and if so, whether it survives strict scrutiny. *Brindley*, 934 F.3d at 467. But governments are not obliged "to indefinitely retain the open character of [a designated public forum]." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Satawa v. Macomb Cnty. Rd. Comm'n*, 689 F.3d 506, 517 (6th Cir. 2012) (acknowledging that the government may close a designated public forum); *see also Cooper-Keel v. Michigan*, No. 23-1642, 2024 WL 3440019, at *2 (6th Cir. Apr. 9, 2024) (order) (concluding that even if a state court had intended to open its Facebook page as a designated public forum, the court permissibly "closed it" when it "decided to prohibit all public commenting"). Indeed, in *Shurtleff*, the Court opined that although Boston had created a forum for public speech, "nothing prevent[ed] Boston from changing its policies"—and altering the status of the flagpole outside City Hall—"going forward." 596 U.S. at 258.

But the government's closure power may not be absolute: there may be situations where the government's decision to alter or close a nontraditional forum constitutes impermissible viewpoint discrimination. Several of our sibling circuits, for instance, have acknowledged this possibility. *See, e.g.*, *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) (recognizing that "[t]he government is free to change the nature of any nontraditional forum as it wishes," but cautioning that the government must do so "*in good faith*," i.e., that it cannot close a forum "as a mere pretext" or "as a ruse for impermissible viewpoint discrimination"); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 365 (D.C. Cir. 2018)

("For the Government to change the nature of a forum in order to deny access to a particular speaker or point of view surely would violate the First Amendment."). Other circuits have held, however, that the government's purpose for closing a forum is irrelevant when it indefinitely closes a nonpublic forum to all private speech. *See, e.g.*, *Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 231–32 (4th Cir. 2013) (declining to adapt "a clean-hands requirement" for government closure of a designated public forum to all speech); *Satanic Temple v. City of Belle Plaine*, 80 F.4th 864, 868 (8th Cir. 2023) (same where "[t]he City closed the limited public forum to everyone, not just speakers with certain views"). All in all, the law on so-called retaliatory forum closures is far from settled. *See, e.g.*, Stephen R. Elzinga, Note, *Retaliatory Forum Closure*, 54 Ariz. L. Rev. 497, 513–20 (2012); Frank D. LoMonte, *Everybody Out of the Pool: Recognizing A First Amendment Claim for the Retaliatory Closure of (Real or Virtual) Public Forums*, 30 U. Fla. J.L. & Pub. Pol'y 1, 3 (2019) (characterizing this as a "murky area of constitutional law"). We have no occasion to wade into those contested waters here. Gordon and Stackpoole concede that governments may permissibly close a nontraditional forum to *all* private speech. *See* D. 15 (Appellant Br. at 40–41). They argue instead that the City failed to close the flagpoles to private speech because it continued to allow the POW flag and the flags of foreign nations. *See id.* We thus proceed to analyze whether the City closed the flagpoles to all private speech via Resolution 2023-82.

Several guideposts assist with our analysis. First, in *Shurtleff*, the Court pointed Boston to the City of San José, California's flag ordinance as an example of how "to make clear it wished to speak for itself by raising flags." 596 U.S. at 257. That policy, the Court emphasized, "provides in writing that its 'flagpoles are not intended to serve as a forum for free expression by the public,' and lists approved flags that may be flown 'as an expression of the City's official sentiments.'" *Id.* at 257–58 (citation modified). Beyond *Shurtleff*'s endorsement of the San José policy, we look to two decisions from our sibling circuits: *Sons of Confederate Veterans*, 722 F.3d 224, and *Scaer v. City of Nashua*, 162 F.4th 256 (1st Cir. 2025).

Sons of Confederate Veterans concerned a City of Lexington, Virginia, policy that had "allowed private speakers access to its flag standards" for over a decade. 722 F.3d at 230. In doing so, Lexington opened its flag standards as a designated public forum. *Id.* But after the

Sons of Confederate Veterans flew the Confederate battle flag from those standards during a parade, Lexington passed an ordinance "restricting any future use of the City-owned flag standards to three flags only": the American, Virginia, and City of Lexington flags. *Id.* at 226–227. The Sons of Confederate Veterans sued, arguing in part that the ordinance constituted viewpoint discrimination. *Id.* at 227. The Fourth Circuit disagreed, holding that the city's ordinance comported with the First Amendment because "the City did not exclude either a specific speaker or a specific class of speech, but closed a designated public forum by disallowing all private expression from its flag standards." *Id.* at 231.

At the opposite end of the spectrum sits *Scaer*. There, Nashua, New Hampshire, had allowed its residents to supply flags of their choosing for display from a designated "Citizen Flag Pole" in front of City Hall. *Scaer*, 162 F.4th at 258–59. For several years, "the City did not reject a single request to fly a flag." *Id.* at 260. But in 2020, the City rejected a resident's requests to fly a "Save Women's Sports flag" and a flag associated with the Libertarian Party. *Id.* And then, responding to *Shurtleff*, Nashua adopted a policy in 2022 which purported to close the flagpole to private speech but in fact continued to allow members of the public to fly flags from the flagpole. *Id.* at 260–61.[3] After residents sued, the First Circuit rejected Nashua's attempt to analogize its 2022 policy to the *Shurtleff*-endorsed San José policy. *Id.* at 265–66. Rather than closing the flagpole to private speech or adopting a tightly controlled, closed-list system of flag selection, "Nashua continued to reserve a pole for private parties to fly a flag in support of their own causes, accepted unsolicited applications from private parties, permitted the private parties to pick the dates on which the flags were flown and to supply and retain ownership of the flags, and allowed private parties to arrange ceremonies." *Id.* at 266.

[3]The Nashua policy provided that: "A flag pole in front of City Hall may be provided for use by persons to fly a flag in support of cultural heritage, observe an anniversary, honor a special accomplishment, or support a worthy cause. Any group wishing to fly a flag must provide the flag. This potential use of a City flag pole is not intended to serve as a forum for free expression by the public. Any message sought to be permitted will be allowed only if it is in harmony with [C]ity policies and messages that the [C]ity wishes to express and endorse. This policy recognizes that a flag flown in front of City Hall will be deemed by many as City support for the sentiment thereby expressed, [C]ity administration reserves the right to deny permission or remove any flag it considers contrary to the City's best interest." *Scaer*, 162 F.4th at 260 (alterations in original).

Here, Resolution 2023-82 more closely resembles San José's and Lexington's policies than Nashua's. After Resolution 2023-82, only four specific flags and one broader category of flags can fly on Hamtramck's flagpoles—"the American flag, the flag of the State of Michigan, the Hamtramck Flag, the Prisoner of War flag and the nations' flags that represent the international character of [the] City." R. 83 (Resolution 2023-82) (Page ID #6726). The first four flags are discrete and, save for the Prisoner of War flag, mirror the flags permitted under Lexington's policy. *See Sons of Confederate Veterans*, 722 F.3d at 226–27. Resolution 2023-82 does provide for a fifth, capacious category of nations' flags absent from Lexington's policy.[4] Although the Court did not reference it in *Shurtleff*, San José's ordinance contains a similar provision, allowing certain ceremonial flags to fly from its flagpoles, including "[f]lags of the governments recognized by the United States." City of San José, *Exhibition of Federal, State, and City Flags from City Buildings—All Occasions* 3 (Oct. 17, 2006), https://www.sanjoseca.gov/home/showpublisheddocument/19499/636685458724030000 [https://perma.cc/QR7A-F7ZP]. Most significantly, nothing in Resolution 2023-82 allows the public to participate in flag selection, and nothing in the record suggests that the City has retained the HRC's freewheeling content-control practices. *Cf. Scaer*, 162 F.4th at 265–66. Our review of the record, in fact, suggests that the opposite occurred. The City dismissed Gordon, the architect of the HRC's practices, *see* R. 83 (Resolution 2023-99) (Page ID #6842), and stripped the HRC of its ability to pick flags altogether, *see* R. 61-1 (Resolution 2023-100) (Page ID #6844). Consistent with Resolutions 2023-82 and 2023-100, the City Council has elected to display American flags along Joseph Campau Avenue. R. 83 (Ghalib Dep. at 37–38) (Page ID #6921–22). We therefore hold that the Joseph Campau Avenue flagpoles are a forum for government speech.

[4]In their opening brief, Gordon and Stackpoole argue that the broad category of permissible flags renders Resolution 2023-82 unconstitutionally vague. D. 15 (Appellant Br. at 41–43). As they point out, however, the district court never addressed this argument. *See id.* For good reason. The plaintiffs did not present this argument in any summary-judgment briefing. "[B]ecause they failed to raise this argument in the district court, they have forfeited the argument on appeal." *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 378 (6th Cir. 2008). In any event, Gordon and Stackpoole do not explain how the void-for-vagueness doctrine even applies to self-imposed limits on government speech, as we characterize the flagpoles post-Resolution 2023-82.

Gordon and Stackpoole raise several unpersuasive counterarguments. First, they assert that the City and San José policies are distinguishable because Resolution 2023-82 does not "state that the list of flags identified in the Resolution represents the City's 'official sentiments.'" D. 15 (Appellant Br. at 26). True, but this distinction does not move the needle. Though not an exact match, the Resolution states that the approved flags were chosen to "represent the international character of our City," which indicates an intention to use the flagpoles for government expression. R. 83 (Resolution 2023-82) (Page ID #6726). And, regardless, the fact remains that Resolution 2023-82 instituted a "tightly controlled, closed-list system of flag selection." *Scaer*, 162 F.4th at 266.

Next, according to Gordon and Stackpoole, Resolution 2023-82 allows private speech to trickle through because the City can display the flags of other nations, some of which had flown previously along Joseph Campau Avenue at the behest of residents. D. 15 (Appellant Br. at 27, 31, 41). It is unclear, however, why the *City*'s choice to display, say, the flag of Poland, would convert the flagpoles to a forum for private speech simply because a resident had previously requested the same flag. Gordon and Stackpoole fail to identify any authority that would require us to bar forever the City from choosing to fly a flag that the HRC had previously raised.

Finally, Gordon and Stackpoole argue that the Joseph Campau Avenue flagpoles cannot convey government speech because it is "incomprehensible" to juxtapose the American flag, a symbol of freedom, with the flags of Russia, Egypt, Ethiopia, Lebanon, and Pakistan, countries which they characterize as undemocratic. *Id.* at 22–25. Suffice it to say, however, that raising an assemblage of national flags conveys a coherent message—the celebration of Hamtramck's "international character." R. 83 (Resolution 2023-82) (Page ID #6726).[5]

We therefore affirm the district court's grant of summary judgment to the defendants on Gordon and Stackpoole's free-speech claim.

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[5]Nor is there support for Gordon and Stackpoole's supposition that the flying of the POW flag constitutes private speech. In fact, at least one court has opined, "the statutorily-required display of the United States and POW/MIA flag" is "government speech." *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1324 (Fed. Cir. 2002).

D. Establishment Clause Claim

Gordon and Stackpoole next contend that Resolution 2023-82 violates the Establishment Clause because the defendants enacted it with the purpose of advancing religion. D. 15 (Appellant Br. at 44–50). The First Amendment's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, cl. 1, and "is applicable to the states by operation of the Due Process Clause of the Fourteenth Amendment." *Bormuth v. County of Jackson*, 870 F.3d 494, 498 n.1 (6th Cir. 2017) (en banc). For decades, we evaluated Establishment Clause claims under the tripartite framework laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Pursuant to *Lemon*, government action did not violate the Establishment Clause when it: (1) had "a secular legislative purpose," (2) had a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) did not "foster an excessive government entanglement with religion." *Id.* (citation modified). Over time, the Court further synthesized an "endorsement" test, which asked "whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).

But *Lemon* itself is no longer good law. In *Kennedy*, the Court observed that it had "long ago abandoned *Lemon* and its endorsement test offshoot." 597 U.S. at 534 (first citing *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 46–52 (2019) (plurality opinion); and then citing *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014)). The Court then explained that in *Lemon*'s wake, "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 535 (citation modified). Gordon and Stackpoole, however, altogether ignore *Kennedy* and do not attempt to grapple with its effects on Establishment Clause jurisprudence. Instead, they cite *Lemon* and its progeny for the proposition that legislation must have a secular purpose. D. 15 (Appellant Br. at 47–48).[6]

Despite *Kennedy* and the parties' silence, we may remain bound to evaluate whether Resolution 2023-82 had a secular purpose. As *Kennedy* explained, the *Lemon* test was meant to operate as "a 'grand unified theory' for assessing Establishment Clause claims." 597 U.S. at 534

[6]To be fair, the defendants also do not raise *Kennedy* in their opposition.

(quoting *Am. Legion*, 588 U.S. at 60). *Lemon*'s first prong, which stated the secular-purpose requirement, springs from older jurisprudential soil. Indeed, the Court articulated the secular-purpose (and primary-effect) requirement over a decade before *Lemon* in *McGowan v. Maryland*, 366 U.S. 420, 449 (1961) (upholding Sunday closing laws because their "present purpose and effect" was secular). The Court then reiterated the secular-purpose and primary-effect requirements two years later in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). There, the Court began its analysis by acknowledging that the Establishment Clause embodies a neutrality principle—one that "stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions" so as to place governmental support "behind the tenets of one or of all orthodoxies." 374 U.S. at 222. In turn, the Court wrote that "to withstand the strictures of the Establishment Clause," an enactment must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.*

Accordingly, although *Kennedy* recognized the abrogation of "*Lemon* and its progeny," 597 U.S. at 534, it is unclear if it disturbed the Court's pre-*Lemon* Establishment Clause caselaw that requires government action to possess a secular purpose, *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 631–35 (5th Cir. 2026) (en banc) (Southwick, J., dissenting); Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Norms*, 100 Chi.-Kent L. Rev. 601, 620–29 (2025). It is possible then that the secular-purpose requirement invoked by the plaintiffs and articulated in *McGowan* and *Schempp* applies. *See Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021) ("[O]ur job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled."); *Jusino v. Fed'n of Cath. Tchrs., Inc.*, 54 F.4th 95, 102 (2d Cir. 2022) (holding that Supreme Court caselaw that relies on *Lemon* "remains binding" "unless and until the Supreme Court sees fit to overrule [it] directly"); *Childs v. Webster*, 168 F.4th 1020, 1030 (7th Cir. 2026) (same).

We need not decide, however, whether the secular-purpose requirement retains vitality post-*Kennedy* because Gordon and Stackpoole fail to address *Kennedy* and their Establishment Clause claim fails even under the test that they invoke. The secular-purpose requirement Gordon

and Stackpoole rely on requires us to determine whether Resolution 2023-82's "predominant purpose was secular." *Satawa*, 689 F.3d at 526. To do so, we look to the "'text, legislative history, and implementation of the statute,' or comparable official act[s]." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). "[T]he Establishment Clause," in other words, "extends beyond facial discrimination." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). But "an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862.

We generally defer to the government's stated purpose, unless the plaintiff can demonstrate that it is a "sham" masking a predominating "religious objective." *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011) (citation modified). Here, the defendants claim that they enacted Resolution 2023-82 with the secular objective of reserving the flagpoles for government speech and maintaining government neutrality, pointing to the Resolution's text, which is facially devoid of any religious endorsement. D. 18 (Appellee Br. at 32–33). As stated above, Gordon and Stackpoole do not contest that this is a proper legislative purpose, and they cannot demonstrate that this objective was a sham to advance religion.

The plaintiffs first point to the expert report of Andrew Flores, a political science professor who reviewed the discovery materials and concluded that the City Council members who voted on Resolution 2023-82 were influenced by the religious views of their constituents. R. 83 (Flores Rep. at 5–6) (Page ID #7351–52). Flores attempted to discern the "true" reasons why City Council members voted in favor of Resolution 2023-82, and purported to establish that it was statistically likely that they voted in favor of the resolution because they endorsed the religious views of their constituents. *Id.* His report, in other words, is an impermissible invitation for us to engage in "judicial psychoanalysis." *McCreary*, 545 U.S. at 862.

Retreating from Flores's report, Gordon and Stackpoole argue that a reasonable factfinder could infer that Resolution 2023-82 "was motivated by religious sentiments" by looking to Councilmember Choudhury's hearing statement (i.e., that he wanted to respect Hamtramck residents' religious views) and "depositions of the Council members" where they gave "evasive" answers about whether Islam considers same-sex relationships a sin. D. 15 (Appellant Br. at 48).

Our ability to consider individual legislators' statements when evaluating whether a statute's ostensible secular-purpose is a sham remains an open question. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 636 (2018). Assuming that we may, Councilmember Choudhury's statement, during an hours-long hearing, that "we have to respect the religious," *supra* at 6, fails to demonstrate that Resolution 2023-82's primary purpose was to advance religion. *Cf. Lukumi*, 508 U.S. at 540–42. As for the remaining City Council members' "evasive" responses, Gordon and Stackpoole do not name those City Council members, meaningfully describe their testimony, or provide citations to the record. D. 15 (Appellant Br. at 48). Elsewhere, Gordon and Stackpoole do claim that Ghalib testified that same-sex relationships are "considered sinful in . . . Islam." D. 15 (Appellant Br. at 9). Ghalib did testify that he believed same-sex relations are considered "sinful . . . in every religion." R. 83 (Ghalib Dep. at 51) (Page ID #6925). But Ghalib gave this answer when asked about his understandings of Islam, not why he supported Resolution 2023-82. *See id.* In any event, Ghalib did not even vote on resolution 2023-82, *see* Hamtramck, Mich., Code of Ordinances § 7-06, so it is altogether unclear how his deposition testimony demonstrates that Resolution 2023-82's primary purpose was to advance religion.

We thus affirm the district court's grant of summary judgment to defendants on Gordon and Stackpoole's Establishment Clause claim.

E. Equal-Protection Claim

The district court granted summary judgment to the defendants on the plaintiffs' equal-protection claim, finding that Gordon and Stackpoole had made "no serious effort to defend" it. *Gordon II*, 799 F. Supp. 3d at 611. Gordon and Stackpoole ignore this finding and instead summarily assert that Resolution 2023-82 violates the Equal Protection Clause because it excluded Pride flags from the list of permissible flags out "of animosity toward the class of persons affected." D. 15 (Appellant Br. at 28) (citation modified). In advancing this argument, the plaintiffs identify nothing in the record that supports this conclusion rather than a desire to avoid seemingly taking an official City position on matters that City residents might find sensitive. *See id.* at 27–29. Accordingly, because the plaintiffs did not develop this claim below

(a finding that they do not contest) and do not do so on appeal, they have forfeited it. *See Alford v. Deffendoll*, 165 F.4th 490, 499 (6th Cir. 2026).

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

CONCURRENCE

THAPAR, Circuit Judge, concurring in part and concurring in the judgment. Over thirty years ago, Justice Scalia memorably described the *Lemon* test as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). More recently, the Supreme Court killed *Lemon* once and for all. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). Or so everyone thought. While our sister circuits have recognized *Lemon*'s demise, the panel majority suggests that *Lemon* may continue to haunt the Sixth Circuit. Because I would heed the Supreme Court's instruction to let *Lemon* rest in peace, I write separately to explain how I would resolve Russ Gordon and Cathy Stackpoole's Establishment Clause claim.

I.

Start with some points of agreement. I agree with the majority that the City of Hamtramck's flag display was government speech, which must comply with the Establishment Clause. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). And the majority correctly rejects Gordon and Stackpoole's request to examine the City Councilmembers' subjective motivations in voting for Resolution 2023-82, which limited the types of flags that could fly on the City's flagpoles. But my agreement ends there.

The majority posits that the "now abrogated" *Lemon* test may continue to bind us, albeit in disguise. *Groff v. DeJoy*, 600 U.S. 447, 460 (2023). *Lemon* prescribed three factors to analyze Establishment Clause claims: (1) the government action must have a "secular legislative purpose," (2) its primary effect must neither advance nor inhibit religion, and (3) the action must not foster an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Sound familiar? The majority suggests that we may need to continue using those same factors by asking whether the Resolution has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Maj. Op. at 18 (quoting *Sch. Dist. of Abington Twp.*

v. Schempp, 374 U.S. 203, 222 (1963)). There's just one problem: The Supreme Court "long ago abandoned *Lemon*." *Kennedy*, 597 U.S. at 534–36.

Admittedly, *Lemon*'s status remained unsettled for many years. *See Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 49 (2019) (collecting cases). Its "ambitious[] attempt[] to find a grand unified theory of the Establishment Clause" failed, generating confusion at the Supreme Court and in this circuit. *Id.* at 60. So the Court cast aside *Lemon* in favor of a "more modest approach" grounded in history. *Id.*; *see also Marsh v. Chambers*, 463 U.S. 783, 786–87 (1983); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). The Court made its change of course abundantly clear in *Kennedy*, announcing that "[i]n place of *Lemon* and the endorsement test . . . [,] the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" 597 U.S. at 535 (quoting *Galloway*, 572 U.S. at 576).

Unsurprisingly, our sister circuits have heard that instruction loud and clear. They have uniformly concluded that the Supreme Court "explicitly abandoned" *Lemon* and its progeny. *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 588 (5th Cir. 2026) (en banc); *see also Hilsenrath ex rel. C.H. v. Sch. Dist. of Chathams*, 136 F.4th 484, 491 (3d Cir. 2025); *Firewalker-Fields v. Lee*, 58 F.4th 104, 121–23 (4th Cir. 2023); *Hunter v. U.S. Dep't of Educ.*, 115 F.4th 955, 964–67 (9th Cir. 2024); *Rojas v. City of Ocala*, 40 F.4th 1347, 1351 (11th Cir. 2022). And they've dutifully looked to historical practices and understandings rather than governmental purpose. *See Nathan*, 173 F.4th at 593–601; *Hilsenrath*, 136 F.4th at 491; *Firewalker-Fields*, 58 F.4th at 122; *Hunter*, 115 F.4th at 965; *Rojas*, 40 F.4th at 1351.[1] We should've done the same here.

Instead, the majority suggests that *Kennedy* may not have overruled earlier cases that "require[d] government action to possess a secular purpose." Maj. Op. at 18. But in announcing

[1]In response, the majority points to two circuit cases that it claims continue to apply *Lemon*. Maj. Op. at 18. But in one case, the Seventh Circuit explicitly recognized that "[g]oing forward, courts *must* evaluate Establishment Clause challenges by interpreting the First Amendment in light of the historical practices and understandings at the Founding." *Childs v. Webster*, 168 F.4th 1020, 1030 (7th Cir. 2026) (emphasis added) (quotation omitted). That's exactly the approach we should've followed here. And in the other case, the Second Circuit simply continued to apply a pre-*Kennedy* holding that the National Labor Relations Act doesn't cover teachers in church-operated schools. *Jusino v. Fed'n of Cath. Tchrs., Inc.*, 54 F.4th 95, 101–02 (2d Cir. 2022). But the Second Circuit didn't purport to apply a governmental-purpose test to evaluate future Establishment Clause claims.

Lemon's death, the Supreme Court didn't need to list every case applying a purpose test and clarify that those cases were overruled, too. When the Court abandons one test and announces another, we should take it at its word—not ask it to pore through the U.S. Reports to list every single decision abrogated by the new holding. *See Asher v. Texas*, 128 U.S. 129, 131–32 (1888). Reading its opinions so narrowly would demote the Supreme Court to a glorified bookkeeper.

To see why, consider the cases that the majority discusses. Start with *Schempp*. It's true that the Supreme Court hasn't overruled *Schempp* by name. But in overruling *Lemon*, the Supreme Court didn't just reject a particular misapplication of the Establishment Clause. It emphatically rejected *Lemon*'s entire approach "call[ing] for an examination of a law's purposes, effects, and potential for entanglement with religion" as unworkable and "ahistorical." *Kennedy*, 597 U.S. at 534. And *Schempp* followed that approach, plain and simple. *See* 374 U.S. at 222 (asking whether government action has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion"). What's more, *Kennedy* prescribed a different test for *all* Establishment Clause claims moving forward. 597 U.S. at 536 (describing "[a]n analysis focused on original meaning and history" as "the rule rather than some exception" in such cases (quotation omitted)). So applying *Schempp* would require ignoring *Kennedy*, which we can't do.

Next, take *McCreary*. That case guides the majority's Establishment Clause analysis. *See* Maj. Op. at 19 (citing *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005)). But *McCreary* is among *Lemon*'s "progeny" and has thus been "abandoned." *Kennedy*, 597 U.S. at 534. So we can't rely on *McCreary*, either.

At bottom, while only the Supreme Court can overrule its own cases, it doesn't need to provide a catalogue when doing so. And when it abandons a test—like governmental purpose—and tells us to apply another test in its place—such as history—we must follow its lead. *See Nathan*, 173 F.4th at 592. So we should have resolved Gordon and Stackpoole's Establishment Clause challenge by looking to historical practices and understandings, not the City's purpose.

II.

Applying the history-based test set out in *Kennedy*, I agree with the majority that the Resolution didn't violate the Establishment Clause. The Supreme Court has provided some

guidance over the decades to shape our inquiry. Courts must "focus[] on the particular issue at hand and look[] to history for guidance." *Am. Legion*, 588 U.S. at 60. In doing so, we must assess whether the challenged action is akin to the core evil the Clause sought to prohibit: government establishment of religion. *See Galloway*, 572 U.S. at 608 (Thomas, J., concurring in part and concurring in the judgment). And the Resolution at issue here simply doesn't fit the bill.

What did the establishment of religion mean at the founding? At a high level, the framers were primarily concerned about laws coercing citizens to "engage in formal religious exercise" and imposing penalties for noncompliance. *Kennedy*, 597 U.S. at 537 (quotation omitted); *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). Scholars and jurists have helpfully identified some specific hallmarks of established religion at the founding. *See, e.g.*, Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003); *Shurtleff v. City of Boston*, 596 U.S. 243, 285–87 (2022) (Gorsuch, J., concurring in the judgement). Walking through these hallmarks makes clear that Resolution 2023-82 doesn't come close to a state establishment of religion.

First, founding-era establishments of religion involved government support for and control over churches. That included "control over the doctrine and personnel" of an established church, with the government often providing financial assistance and using the church to perform civil functions. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in the judgment); *see also Nathan*, 173 F.4th at 597 (discussing examples). Second, established religion left no room for dissent. Attendance at the established church was compulsory, and individuals who didn't participate were punished. *Weisman*, 505 U.S. at 640–41 (Scalia, J., dissenting); McConnell, *supra*, at 2144–46. So were dissenting churches. *Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring in the judgment). Though not exhaustive, these founding-era examples provide guideposts that should have structured our analysis of Gordon and Stackpoole's Establishment Clause claim.

And that analysis would've been simple. For starters, plaintiffs bear the burden to show that a challenged practice violates the Establishment Clause. *See Nathan*, 173 F.4th at 594; *Hilsenrath*, 136 F.4th at 491 & n.54; *Firewalker-Fields*, 58 F.4th at 122 & n.7. But Gordon and

Stackpoole didn't offer *any* historical evidence that the Establishment Clause bars Resolution 2023-82. That failure dooms their challenge.

Nor is there any evidence they *could* have presented to change that result. The Resolution doesn't resemble any founding-era hallmarks of established religion. The City hasn't exerted any control over religious belief or exercise by limiting the content of its flag display. Even assuming religion motivated certain City Councilmembers to pass the ordinance, the City hasn't compelled its residents to proclaim any religious creed or adopt those Councilmembers' beliefs. Rather, Hamtramck's residents remain free to express their contrary views. In short, because Resolution 2023-82 doesn't involve any coerced religious exercise, it doesn't run afoul of the Establishment Clause.

* * *

The Supreme Court couldn't have been any clearer—*Lemon* is dead. But the majority cracks the door open for the ghost of *Lemon* to keep haunting the Sixth Circuit. That crack risks subjecting future Establishment Clause plaintiffs to an amorphous test "flawed in its fundamentals, unworkable in practice, and inconsistent with our history and our precedents." *Shurtleff*, 596 U.S. at 282 & n.9 (Gorsuch, J., concurring in the judgment) (quotation omitted). Instead, we should have heeded the Supreme Court's guidance and resolved this case by looking to our nation's history. So in a future case, we should recognize what our sister circuits have already understood: Any inquiry into whether the government acted with a secular purpose has no place in Establishment Clause jurisprudence.