COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
C.A. NO 25CV00576

CLAIRE FITZMAURICE, et al.

Plaintiffs,

v.

CITY OF QUINCY and THOMAS P. KOCH, *in his official capacity as Mayor of Quincy*,

Defendants.

MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION TO DISMISS

Defendants oppose Plaintiffs' Motion for a Preliminary Injunction. The same reasons that form the basis for Defendants' opposition also serve as the basis to dismiss the Complaint in its entirety. Defendants therefore submit this memorandum in support of both their opposition and their motion to dismiss.

BACKGROUND

This action, filed by fifteen residents of Quincy "who practice various faiths,[1]" seeks a declaratory judgment "to protect their rights under the Massachusetts Constitution and to ensure that their government respects their community's rich religious pluralism.[2]" The claim is prompted by a decision to install statues of the Archangel Michael—a figure important to many police officers—and the Roman Soldier Florian—a figure important to many firefighters—on the

[1] Complaint, second introductory paragraph at Page Two.
[2] Id.

face of the newly-constructed Public Safety Building in Quincy. The project, nearing the end of an eight-year public process, has been the subject of at least five public hearings before the City Council, the city's legislative body charged with oversight of the project's funding[3]. Following the most recent public hearing, at which the finishing stages of the project were discussed—including reference to the statues, Plaintiffs filed suit.

The claimed prompt: Plaintiffs' characterization of the statues as depicting "Catholic saints." This, despite the fact that nothing "Catholic" is being displayed as part of either statue.[4]While Plaintiffs are correct that both Michael and Florian have been venerated as saints in the Catholic Church, their status as such is incidental to their being internationally recognized symbols of first responders—the reason for the installation of monuments in their honor on Quincy's public safety building.

Plaintiffs' choice to classify the two monuments outside Quincy's public safety building as "Catholic statues" is the sole foundation for their claim. The classification ignores the secular function of the statues: to serve as symbols of the values "truth," "justice," "bravery," and the triumph of "good over evil." Quincy has a powerful interest in promoting these values on the part of those who conduct the public safety services within. The statues are not being installed for any religious purpose whatsoever, and nothing "Catholic" is being displayed as part of either monument. Plaintiffs do not have to do anything that implicates their own religious beliefs when entering the building. They simply will walk in and conduct whatever secular business they wish to conduct and will remain free to exercise their own religious beliefs in whatever manner they

[3] Complaint at ¶¶ 20, 21(Sixth Sentence), 23.
[4] See Complaint at ¶ 31, Images 2 and 3.

wish to when departing. Plaintiffs' sole claim fails for these reasons, all as more fully discussed, below.

MATERIAL FACTS

A. Plaintiffs and their claim

Plaintiffs are three married couples and nine individuals, all living in Quincy. Complaint at ¶¶ 3-17. As there is no general jurisdiction in equity to entertain a suit by individual taxpayers to prevent a city from exercising its corporate powers,[5] a statutory foundation for standing must be shown. *Fuller et al. v. Trustees of Deerfield Academy and Dickinson High School, et al.,* 252 Mass. 258 (1925) (citations omitted). The fact that Plaintiffs are seeking declaratory relief does not confer standing on them to pursue this matter. See *Pratt v. Boston,* 396 Mass. 37, 43 (1985) ("[T]he requirement of 'standing' is not avoided by a prayer for declaratory relief." [citation omitted]).

As Plaintiffs refer in their complaint to the status of some as being "taxpayers," (e.g., ¶¶ 3 and 4 et al.), and to the expenditure of public funds (¶¶ 54-56), it appears the apparent basis on which they rely to press their claim is G.L. c. 40, § 53—the so-called ten taxpayer statute. However, Plaintiffs do not claim to be acting as private attorneys general through their ten taxpayer status. *See LeClair v. Town of Norwell,* 430 Mass. 328, 332 (1999) ("In cases brought under this statute, the taxpayers are acting as private attorneys general."). Instead, their sole claim is that they seek "to protect their rights under the Massachusetts Constitution and to ensure that their government respects their community's rich religious pluralism."[6] Thus, the taxpayers

[5] *Amory v. Assessors of Boston*, 310 Mass. 199 (1941).
[6] Complaint, second introductory paragraph at Page Two.

must show a likelihood of success on the merits and that the requested relief would be in the public interest. *Edwards v. Boston*, 408 Mass. 643, 646-647 (1990) (emphasis added).

Finally, beyond explaining that they invoke Article 3 "to protect their rights"[7] they make no allegation as to how their rights are being interfered with—nor could they. This is not a case where Defendants' actions are alleged to be interfering with one's free exercise of religion, nor is there any allegation that Defendants are providing funding to a church or religious society—both of which are proscribed under art. 3, as amended. Plaintiffs are simply offended by the planned statues, and, unwilling to confine themselves to the ordinary means for airing ideological disagreements with the government—the political process—have sought to make a lawsuit of it.

B. There is no allegation of discriminatory intent in the decision to append the statues to the new public safety building.

Mayor Koch selected statues of Michael and Florian for installation on the Public Safety Building due to their status as prominent figures in the police and fire communities worldwide. The selection had nothing to do with Catholic sainthood. Were each not recognized as symbolic figures of the police and fire service and had each not borne significance to the police, fire and public safety officials who will occupy the building, he would not have selected their visages for the façade of the building. They were selected by Mayor Koch while working with a local architect on the final design features without any religious input whatsoever. Affidavit of Thomas P. Koch, at ¶¶3, 4, filed herewith.

At the time, the Mayor recalled his work—in 2017/2018—on the construction of the Hancock Adams Common project in the heart of Quincy Center. That project included a plan for

[7] *Id.*

statues of John Adams and John Hancock to be built and installed at either end on the newly constructed common. His goal then was to honor two of the founders of our country who were Quincy natives and nationally-known historic leaders. The Hancock and Adams statues were very positively received at the time and continue to serve as a popular feature on the town common. Affidavit of Thomas P. Koch, at ¶¶ 5.

This experience was another factor prompting the Mayor to install monuments on the Public Safety Building. As with Adams and Hancock, he regarded it to be similarly appropriate to erect statues—this time acknowledged symbols of the police and fire service that might inspire the men and women who work in the building, boosting morale, and ensuring their lifesaving work would remain maximally effective. There was nothing religious about the decision. The fact that Michael and Florian happen to be venerated in the Catholic Church is only ancillary to their status as prominent figures in the police and fire services and was not a consideration in the decision. Affidavit of Thomas P. Koch at ¶ 6.

ARGUMENT

"[T]he 'hermetic separation' of church and State is an impossibility which the Constitution has never required." *Arno v. Alcoholic Beverages Control Comm'n*, 377 Mass. 83, 91 (1979). Shortly after its decision in *Arno,* the S.J.C. further observed: "The complete obliteration of all vestiges of religious tradition from our public life is unnecessary to carry out the goals of nonestablishment and religious freedom set forth in our State and Federal Constitutions." *Colo v. Treasurer and Receiver General,* 378 Mass. 550, 561 (1979). Likely for these reasons, Plaintiffs do not cite a single Massachusetts case enjoining a merely passive government symbol under the Constitution because it happens to have religious significance for

some—yet they nonetheless seek the extraordinary relief of a preliminary injunction. For the reasons below, that request should be denied, and the complaint should be dismissed.

A. THE PLANNED STATUES OF MICHAEL AND FLORIAN DO NOT VIOLATE ARTICLE 3.

Plaintiffs rely on the final sentence of Part 1, art. 3 of the Massachusetts Declaration of Rights as a basis for preliminary relief—claiming that, as amended, it removed "religious favoritism" from the Massachusetts Constitution. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at p. 10. But Article 3 has always been primarily about public financial support for religious institutions.

In its original iteration, Article 3 provided for the establishment, support and maintenance of the Congregational Church. *Caplan v. Town of Acton*, 479 Mass. 69, 76 (2018). At its inception in 1780, it was understood that the "happiness of a people, and the good order and preservation of a civil government" depended upon such an investment. Mass. Const. Part 1, art. 3. Following "decades of 'lawsuits, bad feeling, and petty persecution'" the Commonwealth abolished government support for the Congregational Church in 1833. *Caplan,* 479 Mass. at 76-77. This amendment "guarantee[d] the equal protection of 'all religious sects and denominations'" and "effectively ended religious assessments." *Id.*

This case, however, doesn't involve government funding of religious institutions. Rather, relying heavily on *Colo*—a case that *upheld* prayer to open legislative sessions in the face of a similar constitutional challenge—Plaintiffs say the statues are unconstitutional because they violate a test derived from the U.S. Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Plaintiffs' Memo. at 11-17. But the U.S. Supreme Court has expressly "abrogated" *Lemon*, *Groff v. DeJoy*, 600 U.S. 447, 460 (2023), and that test can no longer govern in

Massachusetts, either. In any event, the statues pass muster even under the abrogated *Lemon* test.

1. The *Lemon* test is no longer the law.

Plaintiffs' entire memorandum revolves around the four-part test articulated in *Colo*, which asks whether the practice (1) has "a 'secular legislative purpose,'"; (2) has a "primary effect" that "'neither advance[s] nor inhibit[s] religion'"; (3) results in "'excessive government entanglement' with religion; and (4) "has a 'divisive political potential.'" 378 Mass. at 558.

But the S.J.C. adopted that test because those were "the criteria which ha[d] been established by the United States Supreme Court" in *Lemon v. Kurtzman* for evaluating claims under the federal Establishment Clause, which the S.J.C. found "equally appropriate to claims under the cognate provisions of the Massachusetts Constitution." *Id.* *Colo* was decided in 1979, when *Lemon* was still good law. But the U.S. Supreme Court has now "abandoned *Lemon*" under the federal Establishment Clause. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). So on *Colo*'s reasoning, these "criteria" can no longer be "appropriate" under the Massachusetts Constitution, either. *Colo*, 378 Mass. at 558.

Plaintiffs cite no case from Massachusetts applying the four-part test from *Colo* after *Lemon*'s abrogation. And indeed, for Massachusetts courts to now resurrect *Lemon* would violate the U.S. Constitution's Supremacy Clause. That Clause states that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. As such, the Clause "'creates a rule of decision' directing state courts that they 'must not give effect to state laws that conflict with federal law,'" including, of course, the federal Free Exercise Clause. *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 488 (2020) (quoting *Armstrong v. Exceptional Child Ctr. Inc.*,

575 U.S. 320, 324 (2015)). Thus, no interpretation of a state constitutional provision can stand if it necessarily infringes the federal Free Exercise Clause. *Id.* at 484-85 (state's "interest in separating church and State 'more fiercely' than the Federal Constitution" cannot stand "in the face of the infringement of free exercise here.")

The Supreme Court abandoned *Lemon* precisely because it needlessly "generate[d] conflict" with rights protected under the federal Free Exercise Clause, by inviting parties like Plaintiffs to attempt "'to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Kennedy*, 597 U.S. at 534-35, 542-43. And the federal Constitution does not permit "state experimentation in the suppression of … the free exercise of religion." *Espinoza*, 591 U.S. at 485. Accordingly, just as *Lemon* needed to be jettisoned on the federal level to avoid trampling on Free Exercise rights, it can no longer be good law in Massachusetts.

2. Under the text of Article 3 and current Establishment Clause law alike, the statues are perfectly lawful.

Looking to the plain text of Article 3 shorn of *Lemon*, the statues plainly do not violate it. They do not deny the equal "protection of the law" to any "sect[or] denomination[]," and they do not cause the "subordination of any one sect or denomination to another" to be "established by law." Indeed, they do not impose obligations on, allocate benefits to, or regulate any "sect or denomination" in any way. They are simply passive statues of figures with secular significance.

Current law under the federal Establishment Clause reaches the same result. In place of the now-abandoned *Lemon* test, the U.S. Supreme Court has instructed "that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy*, 597 U.S. at 510. To the extent *Colo* incorporates federal analogues, then, that is the same test

that now must govern under the "cognate provisions of the Massachusetts Constitution." *Colo*, 378 Mass. at 558.

Moreover, the Supreme Court has explained what the relevant historical practices and understandings *are*—namely, "the hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537 & n. 5. Under this approach, recent federal decisions have explained, if the government action at issue "does not resemble a traditional hallmark of religious establishment," then it does not violate the Establishment Clause. *Hilsenrath on behalf of C.H. v. Sch. Dist. of Chathams*, 136 F.4th 484, 486, 491 (3d Cir. 2025). And the "plaintiff has the burden of proving a set of facts that would have historically been understood as an establishment of religion." *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023).

Plaintiffs have not even attempted to allege such facts here. Nor could they. The hallmarks of a founding-era establishment include, for example, "mandated attendance in the established church," government control over the established church, and "punish[ing] dissenting churches and individuals for their religious exercise." *Shurtleff v. City of Boston*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring). They do not include mere symbolic depictions of figures that some people view as religious and others do not. Indeed, "'[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment." *Id.* at 287. Nor do Plaintiffs point to any such evidence in Massachusetts at the time Article 3 was adopted. That straightforward proposition ends this dispute.

In fact, for "the founding generation, as well as the generation that ratified the Fourteenth Amendment," "displaying a religious symbol on government property" was "commonplace." *Am. Legion v. Am. Humanist Ass'n* 588 U.S. 29, 76 (2019) (Gorsuch, J., concurring in judgment). As

the Supreme Court has recognized, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984). That history stretches from Presidential Thanksgiving and prayer proclamations, to the motto "In God We Trust" on our currency, to "graphic manifestations of" our religious heritage in paintings and sculptures. *Id.* at 674-77. The planned statues here—to the extent they have religious content at all—are just another example.

Indeed, statues analogous to the Michael and Florian statues appear on public property and buildings throughout the Commonwealth and nation. The John Adams Courthouse in Boston—where the Massachusetts S.J.C. itself sits—features statues of Moses and of "Religion," a woman holding "a large Bible and … large cross" and wearing "the coif of a nun." Affidavit of James S. Timmins Ex. 1 at 5. Above the "central door" of the Boston Public Library looms the "head of Minerva, the Goddess of Wisdom." *Id.* at 7. In Plymouth, what is "[t]hought to be the largest solid granite monument in the United States" is a statue "built to honor the passengers of the Mayflower," which features "the heroic figure of 'Faith' with her left hand clutching the Bible." *Id.* at 15. Other statues on public land in Massachusetts depict Puritans, a Catholic archbishop, the Biblical parable of the Good Samaritan, and the Unitarian clergyman "[k]nown as the 'apostle of Unitarianism.'" *Id.* at 10, 11, 18, 22. If Plaintiffs are right that any "permanent statues" with "obvious religious significance" are unconstitutional, Plaintiffs' Memo. at 12, 14, then all these statues—many of which have stood for a century or more—would have to come down next.

Nor is Massachusetts alone in having such statues. Rather, like the S.J.C.'s courthouse, the courthouse of the U.S. Supreme Court features numerous statues of religious figures—including the Muslim prophet Muhammad, the Biblical king Solomon, the Roman goddess Juno, and Moses (the last of these in three separate statues). Affidavit of James S. Timmins Ex. 2 at 1-

6. Inside the U.S. Capitol are full-size statues of the Native American "religious leader" Po'Pay, the 19th-century "president of the [Church of Jesus Christ of Latter-Day Saints]" Brigham Young; and the Protestant "evangelical preacher[]" Billy Graham, holding a Bible and with quotes from the Bible on its base. *Id.* at 11-12, 16. And while Plaintiffs here are especially exercised about statues of figures who are also Catholic saints, the U.S. Capitol features those in abundance, too—including statues of Father Junipero Serra, Father Damien of Molokai, and "King Louis IX of France," *i.e.*, "Saint Louis." *Id.* at 9-10, 21.

Moving outside of the Nation's capital, there are prominent statues of figures who are also Catholic saints across the country. A "bronze statue of St. Clare, the city's namesake," looks over Santa Clara, California. *Id.* at 30. Statues of Joan of Arc stand on public land in New Orleans, Philadelphia, and Washington, D.C. *Id.* at 27, 39, 57. A Cleveland courthouse features a statue of "Pope Gregory the Great." *Id.* at 56. And the "Mother Cabrini Memorial," erected just five years ago, sits in Battery Park in New York City. *Id.* at 51. Indeed, the Statue of Liberty is itself a "figure of Libertas, a robed Roman liberty goddess." *Id.* at 54.

Moreover, this commonplace practice extends specifically to depictions of the figures at issue here—Michael and Florian. A mural of Florian covers the side of the Venice Beach Fire Station in California. *Id.* at 29. A police department building in Texas features "a statue of Saint Michael the Archangel with a fallen officer." *Id.* at 64. The Pennsylvania Railroad War Memorial is a statue of "the Archangel Michael, angel of the Resurrection, lifting a lifeless soldier in his arms." *Id.* at 58. And the crest of the *USS Michael Monsoor*—a Navy destroyer—is a "winged arm" holding a sword, which the Navy describes as "a heraldic representation of St. Michael the Archangel." *Id.* at 25.

The examples could be multiplied. *See generally* Affidavit of James S. Timmins Exs. 1-2. In the face of all this, it beggars belief to suggest that purely passive statues of Michael and Florian—which do not require or control any religious practice but instead merely depict figures important to Quincy first responders—violate a historically informed understanding of the Establishment Clause. The same is true of the cognate provisions of the Massachusetts Constitution—ending this case.

3. Even under the *Lemon* test, the statues are perfectly lawful.

Even if this Court were to ignore *Lemon*'s abrogation and continue to apply the *Lemon* test as articulated in *Colo*, however, the statues would still be constitutional.

Purpose. First, the statues unambiguously have "secular purposes." *Colo*, 378 Mass. at 559. As Mayor Koch affirms, the purpose of the statues is to serve as symbols of the values "truth," "justice," "bravery," and the triumph of "good over evil," and to inspire and honor the first responders who put their lives on the line to protect the lives and property of Quincy's citizens every day. Affidavit of Thomas P. Koch at ¶ 2. That purpose is not religious and has nothing to do with "religious favoritism." *Cf.* Plaintiffs' Memo. at 10-11.

Plaintiffs' contrary argument boils down to the notion that Mayor Koch cannot have a secular purpose because Michael and Florian are viewed by some people as saints. *Id.* at 11-12. But this argument contradicts how the *Lemon* test works: "a permissible secular purpose" is not "transformed into an impermissible religious one" merely because the government makes its "point with an artifact whose historical significance derives, in whole or in part, from its religious symbolism." *See, e.g.*, *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 239 (2d Cir. 2014). In *Colo* itself, for example, the S.J.C. found "secular purposes" even for the overtly religious practice of opening legislative sessions with prayer—namely, "the maintenance of a long

tradition and the continuation of a ritual which prompts legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform." 378 Mass. at 559.

And Mayor Koch's secular purposes here are easily ascertainable, since the relationship between first responders and the figures of Michael and Florian indeed exists and transcends any of those figures' religious associations. *See Am. Legion*, 588 U.S. at 53 ("[A]s time goes by, the purposes associated with an established monument, symbol, or practice often multiply."). Contrary to Plaintiffs' suggestions, Michael is not just a Catholic figure, but appears in ancient literature—scripture for Muslim,[8] Jewish,[9] and Christian[10] believers—as a saving defense against the power of evil represented by the devil. And Florian is remembered as a Roman soldier reputed to have "saved a whole town from a devastating fire with just a single pitcher of water."[11]

It is therefore unsurprising that these figures would serve as an inspiration to police officers and firefighters the world over. Firefighters around the world celebrate International Firefighters Day on May 4—the same day some Christian traditions commemorate the feast day of St. Florian. Affidavit of James S. Timmins Ex. 4. Municipalities across Massachusetts and nationwide use the "Florian cross" to signify their fire departments. Affidavit of James S. Timmins Exs. 3, 5. Many police officers have a "portrait of St. Michael" tattooed on their skin. Affidavit of James S. Timmins Ex. 6. A national organization existing to "serve and honor all our First Responders, Veterans, and their families" is the National Society of St. Michael and St. Florian. Affidavit of James S. Timmins Exs. 7, 8. And when first responders are asked to pay the ultimate sacrifice,

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[8] *Qur'an* 2:98.
[9] *Daniel* 12:1.
[10] *Revelation* 12:7-9.
[11] *See* Affidavit of James S. Timmins Ex. 15.

the figures of Florian and Michael commemorate their passing through poetry[12] and monuments.[13] *See also, e.g.*, Affidavit of James S. Timmins Ex. 9 (Toronto Police Service award for exemplary officers: "the St. Michael Award"); Affidavit of James S. Timmins Ex. 10 (Chicago substance-abuse treatment center for police officers: "Saint Michael's House").

Under the *Lemon* test, courts "generally defer" to a lawmaker's "plausible secular purpose." *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985). That rule resolves the inquiry here.

Effect. Second, the statues' primary effect will "neither advance nor inhibit religion." *Colo*, 378 Mass. at 558. Instead, their primary effect will be to encourage and inspire the Quincy firefighters and police officers who routinely put their lives at risk for their fellow citizens, reminding them of the lofty values at stake when they show up to work. *See Colo*, 378 Mass. at 559 (primary effect of opening legislative sessions with prayer was to "prompt[] legislators to reflect on the gravity and solemnity of their responsibilities and of the acts they are about to perform").

As just explained, Michael and Florian have long served precisely these purposes for police officers and firefighters around the world—and *Lemon*'s "effect" prong is measured from the perspective of an "objective observer fully aware of the relevant circumstances." *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010) (primary effect of requiring recitation of pledge containing "under God" was "not the advancement of religion, but the advancement of patriotism"); *see also Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737, 748-749 (Mass. 2014) (adopting reasoning of *Freedom From Religion Foundation* under

[12] "Fallen," a poem often used to commemorate firefighters who die in the line of duty, invites the deceased to "rest with St. Florian." Affidavit of James S. Timmins Ex. 11.

[13] One prominent statue of St. Michael travels the country and is temporarily installed to honor the lives of fallen police officers. Affidavit of James S. Timmins Ex. 12.

Massachusetts law). Indeed, the objective observer would take note of a conspicuous way that the planned Michael and Florian statues depart from the typical representation of these figures in Catholic iconography: the planned statues do not have halos.[14] This detail would for the objective observer drive a conspicuous wedge between the planned statues and the way these figures would be depicted in a religious setting. And even if the statues "clearly resulted in an indirect benefit to a religion"—they do not—that still would not be enough, as the "benefit" would be merely "incidental to a secular purpose." *Taunton E. Little League v. City of Taunton*, 389 Mass. 719, 725 (1983).

Plaintiffs' argument to the contrary depends largely on a strained analogy to *Colo*, which they say "likely" would have come out the other way "[h]ad the chaplain positions in *Colo* excluded clergy of all religions but Catholicism." Plaintiffs' Memo. at 13-14. But the need to invoke a counterfactual version of *Colo* only underscores Plaintiffs' lack of actual support in the caselaw. More importantly, *Colo* cuts directly against Plaintiffs. Plaintiffs there emphasized that the two legislative chaplains had for decades exclusively been Catholic priests, which they said demonstrated an equal protection violation. 378 Mass. at 557. But the S.J.C. rejected this theory, explaining that "[t]he mere fact that two persons of a particular faith have been appointed to these positions for over the past twenty years does not demonstrate … that such decisions were based on religious discrimination." *Id.* Just so here: The mere fact that the two figures given positions on the Public Safety Building's façade are Catholic saints does not demonstrate that the Mayor's decision to erect their statues constitutes "religious discrimination"; they were chosen not for religious reasons but for their significance to first responders. *Id.*

[14] *Compare* Compl. p.16 *with* Affidavit of James S. Timmins Ex. 13; Affidavit of James S. Timmins Ex. 14.

Plaintiffs also invoke comments from individual Councilors and the opposition of individual members of "the Quincy Interfaith Network." Plaintiffs' Memo. at 13. But at most, the cherrypicked Councilor comments show only *incidental* effects anticipated by two individuals (who did not choose the statues). And the fact that some citizens oppose the statues does not show that they have a primarily religious effect; if it did, then virtually every public symbol with religious meaning would run afoul of the Constitution. *See Freedom From Religion Foundation*, 626 F.3d at 11 ("the constitutionality of a state statue does not turn on the *subjective* feelings of plaintiffs as to whether a religious endorsement has occurred").

Entanglement. Third, the statues will not result in "'excessive government entanglement' with religion." *Colo*, 378 Mass. at 558. "Where unconstitutional entanglement has been found, it has been in the government's continuing monitoring or potential for regulating the religious activity under scrutiny." *Attorney General v. Bailey*, 386 Mass. 367, 379 (1982). Meanwhile, the government action at issue here—erecting statues—does not require "monitoring" or "regulating" anything at all.

Plaintiffs' only citations are to cases holding that there was a risk of government entanglement "where the State exercises control over the design features of a church," with ongoing power to approve or disapprove the church's decisions. *Caplan*, 479 Mass. at 91-92 (citing *The Society of Jesus of New England v. Boston Landmarks Comm'n*, 409 Mass. 38, 42 (1990)). That is exactly the sort of governmental monitoring of private institutions' religious activity that, as just stated, can give rise to entanglement concerns—and it has nothing to do with this case, where the statues will be erected and maintained on government property, with no private religious activity implicated whatsoever.

Plaintiffs also suggest entanglement arises when "government officials choose certain religious figures to venerate," "approve the design of image of those religious icons," and "place[] a permanent and prominent imprimatur on specific conceptions of both the saints and the demon." Plaintiffs' Memo. at 15. But this is wordplay, not argument. Mayor Koch has not chosen to "venerate" or given an "imprimatur" to anything, and the planned statues are not "religious icons." Plaintiffs cannot bootstrap their way into a constitutional violation by way of inflammatory language.

Moreover, Plaintiffs' "imprimatur" theory is broad enough to foreclose virtually any representation of a figure with religious significance on a public building, all of which by necessity have to make some choice about how to represent the figure, which in the nature of things may not be universally agreed on by every member of the public. If Plaintiffs were correct, the S.J.C. and the Supreme Court have themselves violated the Constitution multiple times over. Plaintiffs' novel argument is meritless.

Divisiveness. Finally, Plaintiffs say the Court should take into account their claim that the "statues are politically divisive." Plaintiffs' Memo. at 16-17. But Plaintiffs overlook that while this inquiry originated in *Lemon*-era caselaw from the U.S. Supreme Court, that Court long ago expressly "confined" the "language ... respecting political divisiveness" to "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983).

Plaintiffs cite a case invoking a similar consideration in the related context of direct financial grants paid to religious organizations. Plaintiffs' Memo. at 16 (citing *Caplan*, 479 Mass. at 93-94 ("*government support of churches* has always and inevitably been a politically divisive issue in Massachusetts") (emphasis added)). But they cite no case ever applying this inquiry to

evaluate passive government symbolism based on factors like the existence of "an online petition against" it, Plaintiffs' Memo. at 16—and to do so would turn what is supposed to be a legal inquiry into a nakedly political one. In a diverse polity like the commonwealth, the remedy for disagreeable government expression can only be to look away or engage the political process—not to sue. And indulging Plaintiffs' innovation would be especially inappropriate given the remarkably meager evidence of "divisiveness" Plaintiffs muster here. *See* Plaintiffs' Memo. at 16 (citing, *inter alia*, the opposition of "at least one Councilor").

B. FOR QUINCY TO REFUSE TO PUT UP THE STATUES BECAUSE OF PLAINTIFFS' OBJECTIONS WOULD FORCE QUINCY TO VIOLATE FEDERAL LAW.

In fact, not only is Quincy not *required* to give into Plaintiffs' demands to not put up the statues—federal law *forbids* it. That is because Plaintiffs' requested relief runs afoul of the Equal Protection Clause of the United States Constitution.

The principal motivation behind Plaintiffs' argument is the contention that merely being invited to voluntarily gaze upon images of figures that—in addition to having secular significance, are also Catholic saints—is so offensive to them that it cannot be tolerated. But the Supreme Court has repeatedly admonished that the government violates the Equal Protection Clause when it "single[s] out a certain class of citizens for disfavored legal status or general hardships" based on "animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 633 (1996); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear … are not permissible bases for" discriminating against the intellectually disabled).

But "negative attitudes" toward Catholicism are at the heart of Plaintiffs' argument. Plaintiffs' chief complaint is that they will be "confronted" with "behemoth" images of Catholic saints when they drive by the public safety building. *See, e.g.*, Fitzmaurice decl. ¶ 11; Tarantino Decl. ¶ 10; Rosenthol Decl. ¶ 8; M. Valencius Decl. ¶ 10; Mot.14, Reich Decl. ¶ 11; Roche-Cotter

Decl. ¶ 11; Leclair Decl. ¶ 11. This violates Plaintiffs' "rejection of Catholicism," Tarantino Decl. ¶ 5, as a religion that "divide[s] the world into 'good' and 'bad,'" M. Valencius Decl. ¶ 6. Plaintiffs even go so far as to derisively equate the millennia-old veneration of Archangel Michael as "evil," "deeply offensive," and an "icon[] to violence," Fitzmaurice Decl. ¶ 8, Rosenthol Decl. ¶ 7, Leclair decl. ¶ 5; Balsamo decl. ¶ 7, tantamount to condoning "how George Floyd was killed," Balsamo decl. ¶ 7, and tending to "exacerbate the trend in rising antisemitism," Leclair ¶ 8. But such "private [and erroneous] biases" cannot serve as the basis of Quincy's decision whether or not to erect the proposed statues. *Cleburne*, 473 U.S. at 448. The Federal Equal Protection Clause binds Quincy along with every other governmental actor, "and the City may not avoid the strictures of that Clause by deferring to the [discriminatory] wishes or objections of some fraction of the body politic." *Id.*

C. THE OTHER PRELIMINARY-INJUNCTION FACTORS FAVOR DEFENDANTS.

For the reasons already given, Plaintiffs have failed to state a claim on the merits—so not only should their preliminary injunction be denied, but their case should be dismissed. *See, e.g.*, *Garcia v. Dep't of Housing & Community Dev.*, 480 Mass. 736, 754 (2018).

To the extent the Court reaches the other preliminary-injunction factors, however, they favor Defendants. Plaintiffs will not suffer irreparable harm from the erection of statues that they are not forced to observe. Moreover, should they prevail on the merits, the statues can readily be removed. And the balance-of-harms and public-interest factors favor Defendants, since the public has an interest in Mayor Koch achieving his goal in erecting the statues: honoring Quincy's first responders and inspiring them to carry out their lifesaving work with maximum effectiveness. *See LeClair v. Town of Norvell*, 430 Mass. 328, 337 (1999).

CONCLUSION

For the foregoing reasons, and those raised at oral argument, the motion to dismiss should be granted. At minimum, Plaintiffs' motion for preliminary injunction should be denied.

Respectfully submitted,

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