

No. 25-_____

In the Supreme Court of the United States

CADE BRUMLEY, ET AL.,
Petitioners,

v.

DARCY ROAKE, ET AL.,
Respondents.

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

**CONDITIONAL PETITION FOR
WRIT OF CERTIORARI AND APPENDIX
VOLUME 1 OF 2 (Pages 1a–242a)**

ERIC C. RASSBACH
JOSEPH C. DAVIS
BENJAMIN A. FLESHMAN
AMANDA L. SALZ
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 PENNSYLVANIA AVE.
NW, SUITE 400
WASHINGTON, D.C. 20006

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
Counsel of Record
ZACHARY FAIRCLOTH
Principal Deputy
Solicitor General
CAITLIN A. HUETTEMANN
Assistant Solicitor General
LOUISIANA DEPARTMENT OF
JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov

May 21, 2026

QUESTIONS PRESENTED

1. Whether respondents' challenge to H.B. 71 is non-justiciable.
2. Whether H.B. 71 is facially unconstitutional under either the Establishment Clause or the Free Exercise Clause of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Cade Brumley, in his official capacity as the Louisiana State Superintendent of Education; Conrad Appel, in his official capacity as a member of the Louisiana State Board of Elementary and Secondary Education (BESE); Judy Armstrong, in her official capacity as a member of BESE; Kevin Berken, in his official capacity as a member of BESE; Preston Castille, in his official capacity as a member of BESE; Simone Champagne, in her official capacity as a member of BESE; Sharon Latten-Clark, in her official capacity as a member of BESE; Lance Harris, in his official capacity as a member of BESE; Paul Hollis, in his official capacity as a member of BESE; Sandy Holloway, in her official capacity as a member of BESE; Stacey Melerine, in her official capacity as a member of BESE; Ronnie Morris, in his official capacity as a member of BESE; East Baton Rouge Parish School Board; Livingston Parish School Board; Vernon Parish School Board; and St. Tammany Parish School Board. They were defendant-appellants below. Orleans Parish School Board also is a named defendant in the district court but is not a petitioner here.

Respondents are Darcy Roake and Adrian Van Young, on behalf of themselves and on behalf of their minor children, real parties in interest A.V. and S.V.; Mamie Broadhurst and Richard Williams, on behalf of themselves and on behalf of their minor child, real party in interest N.W.; Jeff Sims, on behalf of himself and on behalf of his minor children, real parties in interest A.S., C.S. 1, and C.S. 2; Jennifer Harding and Benjamin Owens, on behalf of themselves and on behalf of their minor child, real party in interest A.O.;

Christy Alkire, on behalf of herself and on behalf of her minor child, real party in interest L.A.; David and Erin Hawley, on behalf of themselves and on behalf of their minor children, real parties in interest A.H. and L.H.; Dustin McCrory, on behalf of himself and on behalf of his minor children, real parties in interest E.M., P.M., and L.M.; Gary Sernovitz and Molly Pulda, on behalf of themselves and on behalf of their minor child, real party in interest T.S.; and Joshua Herlands, on behalf of himself and on behalf of his minor children, real parties in interest E.H. and J.H. They were the plaintiffs-appellees below.

STATEMENT OF RELATED CASES

Roake v. Brumley, No. 24-30706 (5th Cir.). Judgment and en banc opinion entered Feb. 20, 2026.

Roake v. Brumley, No. 24-cv-517 (M.D. La.). Ruling and order entered Nov. 12, 2024.

Nathan v. Alamo Heights Indep. Sch. Dist., No. 25-50695 (5th Cir.). Judgment and en banc opinion entered Apr. 21, 2026.

Nathan v. Alamo Heights Indep. Sch. Dist., No. 25-cv-756 (W.D. Tex.). Order entered Aug. 20, 2025.

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CONDITIONAL PETITION FOR WRIT OF CERTIORARI

In 2024, the Louisiana Legislature passed H.B. 71, which requires the display of the Ten Commandments in public school classrooms. In 2025, the Texas Legislature enacted S.B. 10, which also requires the display of the Ten Commandments in public school classrooms. In the proceedings below, plaintiffs (represented by the same attorneys) filed facial challenges to both laws under the Establishment Clause and the Free Exercise Clause, asserting materially identical arguments. They filed those facial challenges before any plaintiff had seen a Ten Commandments display on their classroom wall—and even though, as to Louisiana’s law, Louisiana school governing authorities had not yet exercised their statutory discretion to determine the nature and context of the displays.

Two district courts nonetheless granted preliminary injunctions against the enforcement of both laws. After a Fifth Circuit panel upheld the injunction against Louisiana officials’ enforcement of H.B. 71, the en banc Fifth Circuit vacated that decision, granted en banc review, and consolidated appeals regarding both laws for oral argument because they “concern[] the same issues.” App.432a n.52.

The en banc Fifth Circuit subsequently vacated the two preliminary injunctions. It did so first in Louisiana’s case, *Roake v. Brumley*, where an en banc majority vacated the injunction against the enforcement of H.B. 71 on ripeness grounds (but did not reverse and render a judgment of dismissal as Louisiana requested). Two months later, the Fifth Circuit decided

Texas’s case, *Nathan v. Alamo Heights Independent School District*, where an en banc majority found the challenge to S.B. 10 ripe by distinguishing Louisiana’s law, but vacated the injunction on the merits (and rendered a judgment of dismissal)—relying on the *Roake* en banc opinion and rejecting the *Roake* panel opinion throughout.

There is no need for this Court’s intervention. That is principally because the Fifth Circuit’s exhaustive *Roake* and *Nathan* decisions are correct. Those decisions are a tour de force, applying basic Article III principles and faithfully implementing this Court’s directives in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), and *Mahmoud v. Taylor*, 606 U.S. 522 (2025). And in reaching its conclusions, the Fifth Circuit expressly aligned itself with the Third and Fourth Circuits, ensuring a circuit consensus rather than a circuit conflict. *See, e.g.*, App.409a (citing *Hilsenrath ex rel. C.H. v. Sch. Dist. of Chathams*, 136 F.4th 484 (3d Cir. 2025); *Firewalker-Fields v. Lee*, 58 F.4th 104 (4th Cir. 2023)). Further, this Court’s intervention not only is unwarranted but also would be premature given the active percolation of these issues now ongoing in the lower courts.

Counsel for the *Roake* and *Nathan* plaintiffs, however, have represented that they may seek this Court’s review. *See* Appl. at 5, *Roake v. Brumley*, No. 25A1239 (U.S. May 7, 2026) (seeking an extension of time “to align the briefing of any petitions filed in these cases”). If they do so, it is possible that they will seek review in only one case, giving the Court a blinkered view of the consolidated proceedings below. That incomplete picture would handicap this Court’s consideration in a

context where the Fifth Circuit’s two decisions are joined at the hip.

Louisiana thus files this conditional petition for writ of certiorari—conditional upon this Court’s consideration and grant of any petition for writ of certiorari arising out of *Nathan*. To be clear, this is a purely protective measure: This Court should deny any petition to review the Fifth Circuit’s decisions in *Roake* and *Nathan*. But, if the Court were inclined to grant review, it should consider both cases together just as the Fifth Circuit did, to ensure that the full array of relevant factual and legal arguments is squarely before the Court. In that circumstance, Louisiana would urge the Court to affirm the judgment below and add the relief that Louisiana requested but did not receive: outright dismissal of the *Roake* lawsuit. *See Forney v. Apfel*, 524 U.S. 266, 271 (1998) (a prevailing party that receives “only half a loaf” of relief is entitled to appeal).

OPINIONS BELOW

The Fifth Circuit’s en banc opinion (App.1a–60a) is reported at 170 F.4th 292. The Fifth Circuit’s panel opinion (App.61a–125a) is reported at 141 F.4th 614. The district court’s opinion (App.126a–376a) is reported at 756 F. Supp. 3d 93.

JURISDICTION

The Fifth Circuit issued its en banc decision on February 20, 2026. App.1a–60a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause and Free Exercise Clause of the First Amendment provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” U.S. Const. amend. I.

The text of Louisiana’s Ten Commandments law, La. R.S. § 17:2124, is reproduced at App.528a–34a.

STATEMENT OF THE CASE

A. The Ten Commandments

The Ten Commandments “have historical significance as one of the foundations of our legal system.” *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 53 (2019); *accord Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality op.) (explaining that “the Ten Commandments ... have an undeniable historical meaning”). Indeed, the Commandments not only undergird longstanding prohibitions on murder, theft, perjury, and the like, but also substantiate the central claim in one of our founding documents—that there is a transcendent and ultimate source of rights and duties that is not the government. *See* Decl. of Indep. ¶ 2.

Perhaps unsurprisingly, then, our Nation has long displayed the Ten Commandments in prominent public spaces. For example, for nearly a century, a sculpture of Moses has adorned this Court’s own courtroom as one of the “great lawgivers of history”—holding the Ten Commandments. *Courtroom Friezes: South and North Walls*, Office of the Curator, Supreme Court of the United States, perma.cc/BJV5-3GLL. And in the

Library of Congress, a bronze statue of Moses holding the Ten Commandments stands tall over the Main Reading Room. *Main Reading Room*, Library of Congress, perma.cc/PY3S-QZVX. Today, similar Ten Commandments displays have been identified in “almost every state.” Br. for United States as *Amicus Curiae* at *11, *1a–7a, *Van Orden v. Perry*, 545 U.S. 677 (2005), (No. 03-1500), 2005 WL 263790 (“non-exhaustive survey”).

B. Louisiana’s H.B. 71

In 2024—and in keeping with that tradition—Louisiana enacted H.B. 71, which requires public schools (including public colleges and universities) to display the Ten Commandments in each classroom. La. R.S. § 17:2124 (2024) (reproduced at App.528a–34a). H.B. 71 specifies that the Commandments’ text must be “identical” to the text on the monument upheld in *Van Orden*, 545 U.S. 677; printed in “large, easily readable font” on “a poster or framed document that is at least eleven inches by fourteen inches”; and “the central focus” of the display. § 17:2124(A)(6), (B)(1), (C)(1); App.529a, 530a–31a, 534a. Each display must include a statutorily required, three-paragraph “context statement” about the history of the Ten Commandments in American public education. § 17:2124(B)(3); App.532a–33a.

It is up to “[e]ach governing authority” to determine “[t]he nature of the display,” though H.B. 71 provides schools with examples of documents to consider displaying alongside the Ten Commandments, such as “the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance.” § 17:2124(B)(1),

(B)(4); App.530a, 533a. No school governing authority is required to pay for the displays but must accept either donated displays or donated funds. § 17:2124(B)(5); App.533a.

H.B. 71 requires the Louisiana State Board of Elementary and Secondary Education (BESE) to “adopt rules and regulations in accordance with the Administrative Procedure Act” for the law’s implementation; and the Department of Education (DOE) to “identify appropriate [compliance] resources” that are “free of charge” and list them on the Department’s “website.” § 17:2124(B)(6)(a), (b); App.533a.

C. District Court Proceedings

1. Five days after Louisiana Governor Jeff Landry signed H.B. 71 into law in June 2024, the *Roake* plaintiffs—public-school parents and their minor children—sued the Louisiana State Superintendent of Education, the BESE members in their official capacities, and five parish school boards. They claim that H.B. 71 facially violates the First Amendment’s Establishment Clause and Free Exercise Clause. CA5.ROA.76–79.

As to the Establishment Clause, the *Roake* plaintiffs assert that H.B. 71 “prescrib[es] an official religious text for schoolchildren to venerate.” CA5.ROA.77. And as to the Free Exercise Clause, they allege that H.B. 71 “substantially burdens the[ir] religious exercise” by “pressuring them to suppress or limit expression of their religious or nonreligious backgrounds, beliefs, or practices” or to “adopt[] the state’s favored religious scripture.” CA5.ROA.78–79.

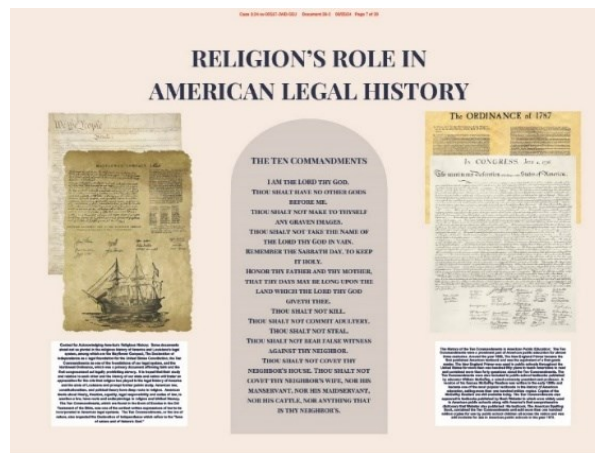
Two weeks later, the *Roake* plaintiffs sought a preliminary injunction barring the named defendants (and others not before the district court) from enforcing and following H.B. 71. CA5.ROA.239–46. They also relied on an “expert” report from law professor Steven Green, the former legal director of the plaintiffs’ counsel, Americans United for Separation of Church and State, who opined, *contra American Legion*, that “the Ten Commandments are not a foundation of the American government or legal system.” CA5.ROA.852.¹

2. Because the ink was hardly dry on H.B. 71, “DOE staff members d[id] not yet know how DOE ... w[ould] implement H.B. 71.” CA5.ROA.477–78. As part of Louisiana’s motion to dismiss and opposition to a preliminary injunction, however, DOE submitted a declaration stating that it “w[ould] likely consider” certain “illustratives ... or variations of them.” *Id.* Those illustratives (letter-size versions compiled at CA5.ROA.480–94 and reproduced in the district court’s decision at App.214a–26a) demonstrate the unlimited universe of potential displays that Louisiana

¹ As the Fifth Circuit would later note in highlighting “the risk of appointing someone as an expert in ‘legal history,’” Green previously wrote the exact opposite. App.437a n.56. And in fact, he testified before the district court that his opinions are “inconsistent with th[e] statements [of the Supreme Court] and established law,” opining that “[m]any of the Justices of the Supreme Court are not historians,” and commenting on *American Legion*’s discussion of the Ten Commandments: “It’s just his [Justice Alito’s] opinion, I guess.” CA5.ROA.2376, 2419; *cf. Am. Legion*, 588 U.S. at 35, 53 (Ten Commandments discussion joined by Roberts, C.J., and Breyer, Kagan, and Kavanaugh, JJ.).

school governing authorities might adopt and post in compliance with H.B. 71. To take just a few:

A school governing authority might adopt a display (App.215a) explaining religion's role in American legal history, by highlighting not just the Ten Commandments but also the Mayflower Compact, the Northwest Ordinance, and the Declaration of Independence:



A school governing authority also might adopt a display (App.226a) explaining this Court's decision in *Van Orden*:


IMPORTANT SUPREME COURT CASES VAN' ORDEN' V. PERRY

THE SUPREME COURT FOUND NO ESTABLISHMENT CLAUSE VIOLATION, WITH THE PLURALITY OPINIONS EMPHASIZING THAT "ACKNOWLEDGEMENTS OF THE ROLE PLAYED BY THE TEN COMMANDMENTS IN OUR NATION'S HISTORY ARE COMMON THROUGHOUT AMERICA." THE COURT NOTED THAT MOSES AND THE COMMANDMENTS APPEAR IN THE SUPREME COURT COURTROOM ITSELF, THE GATES LEADING TO THE COURTROOM, AND THE DOORS LEADING INTO THE COURTROOM.


THE MAIN DISSENT JOINED BY JUSTICE GINSBURG AND TWO OTHER JUSTICES DISAGREED WITH THE COURT'S JUDGMENT, BUT ACKNOWLEDGED THAT "A DISPLAY OF THE COMMANDMENTS ACCOMPANIED BY AN EXPOSITION OF HOW THEY HAVE INFLUENCED MODERN LAW WOULD MOST LIKELY BE CONSTITUTIONALLY UNOBJECTIONABLE." THE DISSENT ALSO RECOGNIZED THAT THE COMMANDMENTS COULD "BE INTEGRATED CONSTITUTIONALLY INTO A COURSE OF STUDY IN PUBLIC SCHOOLS."

NOTE: THIS IS A 10-5 DECISION OF THE TEN COMMANDMENTS FOR LIFE IN AMERICA, INC. CURRENT VERSION OF THE "TEN" AND "TEN COMMANDMENTS" FOR EXAMPLE, THE CATHOLIC "TEN COMMANDMENTS" FOR LIFE IN AMERICA, INC. HAS USED THE PHRASE "THE TEN COMMANDMENTS" TO PROMOTE THE "TEN" OF THE "TEN COMMANDMENTS FOR LIFE IN AMERICA, INC."

THIS CASE ASKED WHETHER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT ALLOWS THE DISPLAY OF A MONUMENT INSCRIBED WITH THE TEN COMMANDMENTS ON THE TEXAS STATE CAPITOL GROUNDS.




Or, a school governing authority might adopt displays invoking inspiring leaders from our Nation’s history—such as a display (App.221a) comparing Moses’s Ten Commandments with Martin Luther King, Jr.’s “Ten Commandments for Non-Violence”:



MLK & MOSES

LIKE MOSES HANDED DOWN THE LAW, MARTIN LUTHER KING JR. REQUIRED BIRMINGHAM CAMPAIGN VOLUNTEERS TO SIGN A COMMITMENT CARD CONSISTING OF TEN COMMANDMENTS.



TEN COMMANDMENTS FOR NON-VIOLENCE

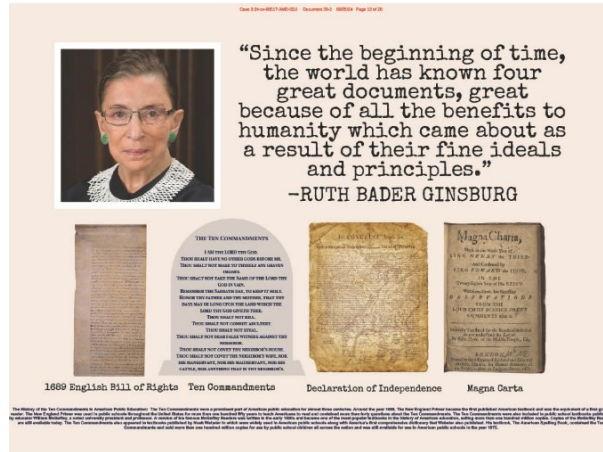
REFLECT DAILY ON THE TEACHINGS AND LIFE OF JESUS. REMEMBER ALWAYS THAT THE NON-VIOLENT MOVEMENT SEES JUSTICE AND RECONCILIATION, NOT VICTORY. WALK AND TALK IN THE MANNER OF LOVE, FOR GOD IS LOVE. PRAY DAILY TO BE USED BY GOD IN ORDER THAT ALL MEN MIGHT BE FREE. SACRIFICE PERSONAL WISHES IN ORDER THAT ALL MEN MIGHT BE FREE. OBSERVE WITH BOTH FRIEND AND FOE THE ORDINARY RULES OF COURTESY. SEEK TO PERFORM BEGOTEN SERVICE FOR OTHERS AND FOR THE WORLD. REFRAIN FROM THE VIOLENCE OF TONGUE, OR HEART. STRIVE TO BE IN GOOD SPIRIT AND BODILY HEALTH. FOLLOW THE DIRECTIONS OF THE MOVEMENT AND OF THE CAPTAIN ON A DEMONSTRATION.

THE TEN COMMANDMENTS

I AM THE LORD THY GOD, THOU SHALT HAVE NO OTHER GODS BEFORE ME, THOU SHALT NOT MAKE TO THYSELF ANY GRAVEN IMAGES, THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN, REMEMBER THE SABBATH DAY, TO KEEP IT HOLY, HONOR THY FATHER AND THY MOTHER, THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE, THOU SHALT NOT KILL, THOU SHALT NOT COMMIT ADULTERY, THOU SHALT NOT STEAL, THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR, THOU SHALT NOT COVET THY NEIGHBORS HOUSE, THOU SHALT NOT COVET THY NEIGHBORS WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBORS.

Similarly, a school governing authority might adopt a display (App.220a) highlighting Justice Ginsburg’s thoughts on the Ten Commandments from a school paper that she republished in 2016 in *My Own*

Words, where she described the English Bill of Rights, the Ten Commandments, the Declaration of Independence, and the Magna Carta as “four great documents” in the history of the world:



The possibilities truly are endless.

3. Notwithstanding the vast unknowns in this case, the district court issued a decision on November 12, 2024, denying Louisiana’s motion to dismiss and granting a preliminary injunction, finding H.B. 71 “**FACIALLY UNCONSTITUTIONAL and UNCONSTITUTIONAL IN ALL APPLICATIONS.**” App.375a.

The court rejected Louisiana’s ripeness and standing arguments, reasoning that, although the *Roake* plaintiffs have never seen an H.B. 71 display on their school walls, “the risk of a future encounter” with H.B. 71 displays is “certainly impending.” App.173a. On the merits, the court held that H.B. 71 “runs afoul of *Stone v. Graham*,” 449 U.S. 39 (1980), a decision in which this Court applied the secular-purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to strike

down a Kentucky law requiring displays of the Ten Commandments in public-school classrooms. App.132a; *see* App.278a (based on *Stone* “alone, the Court could deny AG Defs. MTD”).

The court claimed to be avoiding “the now-defunct *Lemon* test” itself. App.256a. But it nevertheless concluded that “any purported secular purpose [of H.B. 71] was not sincere but rather a sham,” and that the actual purpose was “overtly religious,” as demonstrated by “the legislative history and fundraising efforts of the Governor.” *Id.*; App.131a & n.5. The court also concluded that, “even if [it] did examine [the *Roake* plaintiffs’ Establishment Clause] claim under” this Court’s current approach, the motion to dismiss would still be denied and the *Roake* plaintiffs would still be entitled to a preliminary injunction. App.278a. On this point, the court relied extensively on Green’s report and testimony, which it found “convincing, logical, and consistent with the Court’s own review of the evidence.” App.352a.

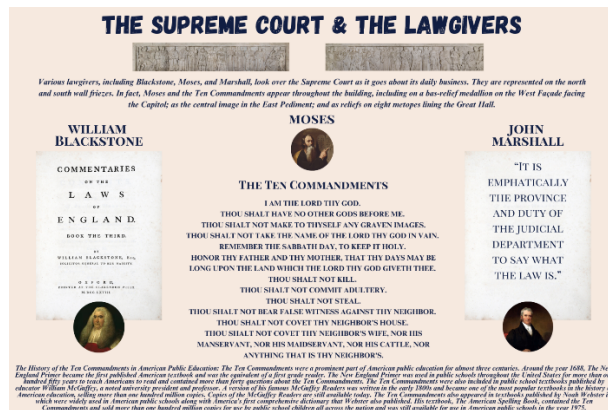
The court further held that the *Roake* plaintiffs were likely to succeed on their free-exercise claim because their “testimony confirms, inter alia, [their] religious or nonreligious beliefs, the manner in which the Act substantially burdens those beliefs, and the ways in which [the] Act is inconsistent with any historical tradition by being discriminatory and coercive.” App.353a.

D. Fifth Circuit Panel Proceedings

1. Louisiana immediately appealed that decision to the Fifth Circuit. While that appeal was pending, the Louisiana Attorney General issued a January 2025


guidance letter urging each Louisiana school governing authority to “select, and display at its discretion, the four displays attached to this guidance letter.” *H.B. 71 Guidance for Louisiana Schools*, Office of the Attorney General (Jan. 3, 2025), perma.cc/N2TH-GL87 (Letter). Full-size versions are available at that link. The displays were included in briefing below, *see* CA5.ECF.271 at 7–10; were distributed to the en banc Fifth Circuit as bench exhibits and discussed during oral argument; and are reproduced here.

One discusses the Supreme Court building’s architecture and its focus on great lawgivers like Moses:



One discusses Moses and other notable figures featured in the House Chamber in the United States Capitol:


THE HOUSE OF REPRESENTATIVES & THE LAWGIVERS



**MOSES
THE LAWGIVER**

THE TEN COMMANDMENTS

I AM THE LORD THY GOD.
THOU SHALT HAVE NO OTHER GODS BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF ANY GRAVEN IMAGES.
THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN.
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY.
HONOR THY FATHER AND THY MOTHER, THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE.
THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY NEIGHBOR'S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOR'S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBOR'S.



**SPEAKER
MIKE JOHNSON**

Twenty-three marble relief portraits hanging over the gallery doors of the House Chamber in the U.S. Capitol depict historical figures noted for their work in establishing the principles that underlie American law. These lawgivers include notable figures like Hammurabi, Solon, and Thomas Jefferson. When the Speaker of the House occupies his position on the dais, he looks directly at yet another lawgiver, Moses. In fact, the Architect of the Capitol emphasizes that the 22 other lawgivers lining the Chamber walls are oriented "so that all look towards the full-face relief of Moses in the center of the north wall."

The History of the Ten Commandments in American Public Education. The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1688, The New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used in public schools throughout the United States for more than one hundred fifty years to teach Americans to read and contained more than forty questions about the Ten Commandments. The Ten Commandments were also included in public school textbooks published by American William McGuffey, a nationally prominent and prolific. A version of his famous McGuffey Readers were written in the early 1800s and became one of the most popular textbooks in the history of American education, selling more than one hundred million copies. Copies of the McGuffey Readers are still available today. The Ten Commandments also appeared in textbooks published by Noah Webster in which were widely used in American public schools along with James O. Fisher's first comprehensive dictionary that Webster also published. His textbook, The American Spelling Book, contained the Ten Commandments and sold more than one hundred million copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

A third discusses religion's role in American public education, keying on the statutorily required context statement and its focus on Noah Webster and William McGuffey:

Religion's Role in American Public Education


The History of the Ten Commandments in American Public Education. The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1688, The New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used in public schools throughout the United States for more than one hundred fifty years to teach Americans to read and contained more than forty questions about the Ten Commandments.

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The Ten Commandments also appeared in textbooks published by Noah Webster in which were widely used in American public schools along with American's first comprehensive dictionary that Webster also published, no doubt. The American Spelling Book, contained the Ten Commandments and sold more than one hundred million copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

THE TEN COMMANDMENTS

I AM THE LORD THY GOD.
THOU SHALT HAVE NO OTHER GODS BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF ANY GRAVEN IMAGES.
THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN.
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY.
HONOR THY FATHER AND THY MOTHER, THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE.
THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY NEIGHBOR'S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOR'S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBOR'S.

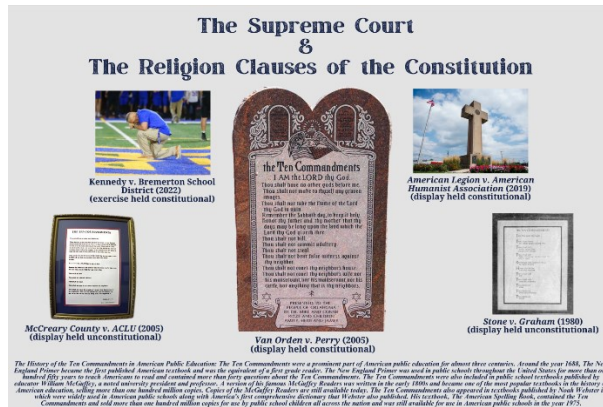


NOAH WEBSTER **WILLIAM MCGUFFEY**



Note: This is the version of the Ten Commandments upheld by the Supreme Court in Van Orden v. Perry, but different faith traditions adopt different versions.

And the final one highlights this Court's notable decisions regarding the Religion Clauses of the Constitution:



Beyond recommending that schools use these displays, the Attorney General’s guidance letter states that “each display should be between the statutory minimum size, 11 inches by 14 inches, and 18 inches by 24 inches.” Letter at 1. More, “[t]o avoid any possibility of confusion regarding whether displays are attributable to individual teachers, a school should place its displays on any classroom wall other than behind a teacher’s desk, podium, or location from which a teacher ordinarily delivers instruction.” *Id.* And finally, a school should “place its displays among others reflecting educational content.” *Id.* at 2.

2. Despite the growing record showing that the *Roake* plaintiffs’ facial challenges could not possibly account for the universe of ways that H.B. 71 may be constitutionally implemented, the Fifth Circuit panel affirmed the district court’s preliminary injunction.

On jurisdiction, the *Roake* panel acknowledged that no parent or student had seen an H.B. 71 display. But the panel nevertheless concluded that it had “sufficient information for a fact-intensive and context-

specific analysis,” that the *Roake* plaintiffs “demonstrated standing to assert their Establishment Clause claims” based solely on H.B. 71’s text, and that the panel “must follow binding precedent” authorizing offended-observer standing. App.74a, 86a, 90a.

As for the merits, the *Roake* panel concluded that “*Stone v. Graham* is controlling.” App.108a. The panel’s entire analysis on that score was a secular-purpose inquiry under *Lemon*: The panel attacked “Louisiana’s purported legislative purpose” as a “sham” and as “implausible [and] inadequate.” App.103a–08a (citation omitted). And in a bald footnote, the panel asserted that “[w]e do not undertake this analysis to revive *Lemon*, but only for the limited purpose of deciding whether *Stone*’s facts and reasoning control.” App.104a n.21.

In the alternative, the *Roake* panel held that H.B. 71 would fail scrutiny under *Kennedy* as well. The panel expressly rejected Louisiana’s argument that, “under *Kennedy*, the threshold question in an Establishment Clause analysis is whether the challenged practice implicates historical hallmarks of religious establishments.” App.108a. Instead, the panel believed that “the question before us is whether the permanent posting of the Ten Commandments in public school classrooms fits within, or is consistent with, a broader tradition of using the Ten Commandments in public education.” App.110a. Having framed the inquiry that way, the panel summarily credited the *Roake* plaintiffs’ allegations that no such tradition exists, and so they “adequately pleaded an Establishment Clause violation under *Kennedy*.” App.111a.

The panel did not address the Free Exercise Clause claim. App.95a n.16. And now-retired Judge Dennis wrote separately to say both that the *Roake* plaintiffs “have standing under settled Supreme Court precedents recognizing ‘offender observer’ standing in Establishment Clause cases” and that *Kennedy* “did [not] eliminate the component parts of *Lemon*.” App.118a.

E. Fifth Circuit En Banc Proceedings

1. That brings us to the immediate proceedings below. Louisiana sought en banc review of the *Roake* panel decision, which the en banc Fifth Circuit vacated in October 2025 in granting en banc review. *See Roake v. Brumley*, 154 F.4th 329 (5th Cir. 2025).

In the meantime, Texas was facing its own litigation (filed by the same attorneys asserting the same theories) with respect to Texas’s Ten Commandments law. Before the Fifth Circuit vacated the *Roake* panel decision, a Texas district court enjoined the enforcement of Texas’s law, relying directly and extensively on the *Roake* panel decision. *See Nathan v. Alamo Heights Indep. Sch. Dist.*, 795 F. Supp. 3d 910, 939 (W.D. Tex. 2025) (“The Fifth Circuit rejected each of [Texas’s] arguments in *Roake*[.]”). Texas then appealed *Nathan* to the Fifth Circuit and sought initial en banc review “alongside” *Roake*. CA5.ECF.248 at 1. Louisiana endorsed that approach because it would place “the fulsome records developed across both cases” before the en banc Fifth Circuit. *Id.* The Fifth Circuit granted Texas’s request shortly after granting en banc review in *Roake*, and directed that *Nathan* “shall be heard by the court en banc with oral argument along with 24-30706, *Roake v. Brumley*.” *Nathan*

v. Alamo Heights Indep. Sch. Dist., 157 F.4th 713, 714 (5th Cir. 2025).

2. Following consolidated en banc oral argument in January 2026, the Fifth Circuit first issued its decision in *Roake*. Discussed more fully below, that decision rejected the entirety of the *Roake* panel’s ripeness analysis, vacating the district court’s injunction on that ground alone.

The Fifth Circuit explained that Article III limits federal courts to deciding actual cases and controversies. App.5a. But there are too many unknowns in this case, especially given that the constitutionality of a Ten Commandments display “turns on ‘the context of the display’ and ‘how the text is used.’” *Id.* (citing *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment)). No one knows the content of any particular Ten Commandments display that a plaintiff might see at some unknown date, nor does anyone know how that display might be oriented, contextualized, or referenced (or not referenced) by a teacher in a particular classroom. App.6a.

“In the absence of this evidence,” the Fifth Circuit concluded, “we are not able to conduct the fact-intensive and context-specific analysis required by the Supreme Court’s Ten Commandments cases.” *Id.* (citation modified). What the *Roake* plaintiffs demand “is not judging” but “guessing.” App.9a. And the “Article III judicial power stops there” because the *Roake* plaintiffs’ facial claims are “nonjusticiable.” App.11a.

On that basis, the en banc Fifth Circuit vacated the preliminary injunction, but did not reverse or render judgment for Louisiana.

3. Two months later, the en banc Fifth Circuit issued its decision in *Nathan*—and in *Nathan*, the en banc court rejected the entirety of the *Roake* panel’s merits analysis.

The Fifth Circuit began with Article III jurisdiction, distinguishing Texas’s law from Louisiana’s in “three key ways”: (1) Louisiana’s statute expressly “delegates” to school officials discretion to determine the nature of the display, while Texas’s does not; (2) Louisiana’s statute “specifies that local displays may (or may not) incorporate other historical documents,” while Texas’s “mandates that displays ‘include only’ the provided text of the Commandments”; and (3) Louisiana’s statute “does not specify where displays must appear,” while Texas’s “requires posting them in ‘a conspicuous place.’” App.392a–93a. Unlike in its *Roake* analysis, therefore, the Fifth Circuit believed that the Texas law “establishes a uniform display requirement we can evaluate as a matter of law without further factual development.” App.393a.²

The Fifth Circuit followed that ripeness determination with a rejection of the Establishment Clause and Free Exercise Clause claims in these cases, including a thorough takedown of the *Roake* panel decision discussed more fully below.

Beginning with the Establishment Clause, the Fifth Circuit observed that the Texas district court had “followed our court’s since-vacated panel decision”

² Judges Oldham and Willett declined to join this discussion and the en banc majority’s finding of Article III standing because, in their view, Article III bars these plaintiffs from resting on offended-observer standing. App.447a.

in *Roake*. App.386a. But the *Roake* panel was wrong. It was wrong about *Stone* being controlling because “*Stone* depended entirely on *Lemon* and nothing but *Lemon*.” App.398a. “[W]e do not have the option of ignoring the Supreme Court’s express directives, [and] we cannot continue applying *Lemon*” after *Kennedy*, observed the Fifth Circuit. App.402a. The *Roake* panel was also wrong about the proper Establishment Clause test post-*Kennedy*. This Court has never endorsed the “bizarre view” that “any modern practice *not* supported by a founding-era tradition *does* violate the Establishment Clause.” App.435a. Instead, “[t]he correct analysis”—endorsed by this Court and applied by the Third and Fourth Circuits—“is to ask whether a challenged law shares the ‘hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.’” App.436a. And there is no serious claim that the passive display of a religious symbol implicates those hallmarks.

On the Free Exercise Clause, the Fifth Circuit recognized that “the core of a free-exercise violation—a substantial burden on religious belief or practice—is missing.” App.441a. The Ten Commandments laws require nothing of these plaintiffs; they simply require a passive display, which is completely unlike, for example, the disruptive reeducation activities this Court invalidated in *Mahmoud*. Accordingly, the Free Exercise Clause challenge fails.

With these findings, the en banc Fifth Circuit vacated the Texas district court’s injunction, reversed, and rendered judgment dismissing the *Nathan* suit.

REASONS FOR GRANTING THE CONDITIONAL PETITION

I. THIS COURT’S REVIEW IS UNWARRANTED.

The Fifth Circuit’s careful decisions in the *Roake* and *Nathan* cases are correct—and there is no reason to disturb them. As to *Roake* itself, that is principally because the challenges are non-justiciable. And even if that were not so, the Establishment Clause and Free Exercise Clause facial challenges fail on the merits, as the Fifth Circuit held in *Nathan*. There also is no circuit split, and no urgency for this Court to intervene given the active percolation of these issues that is ongoing in the lower courts. For all of these reasons, therefore, there is no need for this Court’s review.

A. This Case Is Non-Justiciable.

Start with Article III. The Fifth Circuit correctly held that the *Roake* case does not get off the ground because it is not ripe. And as Judges Oldham and Willett separately wrote, the *Roake* and *Nathan* plaintiffs also lack Article III standing. Either way, therefore, Article III prohibits this case from proceeding.

1. The Fifth Circuit rightly ended the *Roake* appeal on ripeness. “Article III limits federal courts to resolving ‘Cases’ and ‘Controversies,’” the court wrote. App.5a (citing U.S. Const. art. III, § 2). “Because of that limitation, the issues we decide must be ripe—not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Id.* (citing *Trump v. New York*, 592 U.S. 125, 131 (2020) (per curiam)) (quotation marks omitted). And the *Roake* plaintiffs’ suit fails to meet that standard.

Under this Court’s precedents, the constitutionality of a Ten Commandments display “turns on ‘the context of the display’ and ‘how the text is *used*.’” *Id.* (citing *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment)). But those are unknowns in this case. Yes, “H.B. 71 sets certain ‘minimum requirement[s]’ regarding the text, size, and accompanying ‘context statement’ of the displays,” but “it leaves ‘[t]he nature of the display’ entirely to the discretion of local school boards.” App.5a–6a (citing La. R.S. § 17:2124(B)(1)–(3)). No one “know[s], for example, how prominently the displays will appear, what other materials might accompany them, or how—if at all—teachers will reference them during instruction.” App.6a. And “[m]ore fundamentally,” no one “even know[s] the full content of the displays themselves.” *Id.* As a result, the Fifth Circuit concluded, “we cannot evaluate ‘how the text is used,’ because we do not yet know—and cannot yet know—how the text will be used.” *Id.* (citation omitted). “And ‘[i]n the absence of this evidence, we are not able to conduct the fact-intensive and context-specific analysis required by’ the Supreme Court’s Ten Commandments cases.” *Id.*

“That same evidentiary gap,” the Fifth Circuit continued, “forecloses the parents’ Free Exercise claims, because ‘the question of whether a law substantially interferes with the religious development of a child will always be fact-intensive,’ requiring courts to ‘consider the specific context in which the instruction or materials at issue are presented.’” App.6a–7a (quoting *Mahmoud*, 606 U.S. at 550) (citation modified).

That was the ballgame. For rendering a judicial determination “that every possible H.B. 71 display” is

unconstitutional “would oblige [a court] to hypothesize an open-ended range of possible classroom displays and then assess each under a context-specific standard that depends on facts not yet developed and, indeed, not yet knowable.” App.9a. That “is not judging,” the Fifth Circuit recognized, “it is guessing.” *Id.* And the “Article III judicial power stops there” because the *Roake* plaintiffs’ facial claims are “nonjusticiable.” App.11a.

2. Although the en banc Fifth Circuit had no need to identify other Article III problems, Judges Oldham and Willett separately—and correctly—endorsed Louisiana’s independent argument that the *Roake* and *Nathan* plaintiffs lack Article III standing. Their claims “hinge on the mistaken premise that individuals can sue because they are offended—a proposition that is wrong as a matter of Constitutional structure and Supreme Court precedent.” App.447a. Indeed, “[t]his case is a textbook offended observer case.” *Id.* “From top to bottom, the idea is that the plaintiffs (1) worry that they will one day see a poster; (2) worry that they might find that poster offensive; so (3) they invoke federal jurisdiction for protection from potential, hypothetical future offenses.” App.448a.

But there is no basis in Article III or this Court’s precedents for offended-observer standing. “[T]here is no historical comparator to offended-observer standing” that might suggest that this is a legitimate “basis for suit in American courts.” App.449a. In fact, “the opposite is true.” *Id.* Time and again, this Court has reiterated that “[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient

by itself to meet Art[icle] III's requirements." *Id.* (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)); see *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 396 (2024) (holding that "sincere legal, moral, ideological, and policy objections ... alone do not establish a justiciable case or controversy in federal court"); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (reasoning that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not a cognizable injury-in-fact).

For that reason, Judges Oldham and Willett joined the growing "chorus of judges from across the country [that] have rejected offended-observer standing." App.450a (citing, among others, *Am. Legion*, 588 U.S. at 80–83 (Gorsuch, J., concurring in the judgment); *City of Ocala v. Rojas*, 143 S. Ct. 764, 766 (2023) (Thomas, J., dissenting from denial of certiorari)). "Plaintiffs have no basis to invoke the federal judicial power merely because they are offended by a holy text that is a cornerstone of Western civilization." App.454a–55a. And the *Roake* plaintiffs' theory in this case—which extends offended-observer standing to future anticipatory offense—is as clear a warning signal as any that this Court must "clarify that offended observer standing has no place in our constitutional order." App.455a.

Whether on ripeness or on standing, Article III forecloses the *Roake* plaintiffs' suit—and the Fifth Circuit correctly held as much.

B. Plaintiffs Have No Viable Facial Claims.

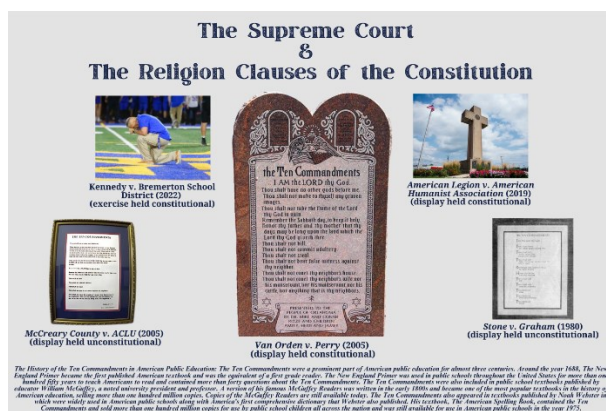
The Fifth Circuit likewise saw no need to reach the merits of the *Roake* plaintiffs' Establishment Clause and Free Exercise Clause claims. But, as the Fifth Circuit made clear in *Nathan*, those claims are dead in the water. That is principally because of the demanding facial standard in this pre-enforcement context, which the plaintiffs come nowhere close to meeting. It is also because the plaintiffs have no viable claims under a straightforward application of this Court's decisions in *Kennedy* and *Mahmoud*.

1. The *Roake* plaintiffs' threshold merits problem is their inability to surmount the high facial standard. Everyone agreed below that, because the plaintiffs "have asserted a facial challenge to H.B. 71," they "must show that there is no set of circumstances under which [H.B. 71] is constitutional." App.95a (quoting *Croft v. Perry*, 624 F.3d 157, 164 (5th Cir. 2010)); App.134a. As Judges Oldham and Willett explained (hearkening back to this Court's own recent precedent), "[f]acial challenges are an uphill battle" and they are "disfavored." App.452a (citation omitted).

That daunting standard, moreover, is more daunting still because this is a pre-enforcement challenge—and this Court "has made it difficult to bring a challenge before States have even attempted to enforce the [challenged] law." App.453 (citing *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497–504 (1982)). By asking the federal courts "to combine a facial and pre-enforcement challenge," the plaintiffs have asked for adjudication of a nakedly speculative question: "whether these plaintiffs with a

hypothetical injury about a hypothetical sign might ever face a hypothetical situation where the law is constitutional.” App.454a.

To ask that question is to answer it. It would be passing strange to conclude, for example, that a poster describing this Court’s First Amendment cases somehow violates the Constitution simply because the poster features a photo of the Ten Commandments.



Yet that is the logical conclusion of the *Roake* plaintiffs’ theory. Asked by Chief Judge Elrod below specifically about how this poster could be deemed to violate the Establishment Clause, the *Roake* plaintiffs’ counsel implausibly claimed that the poster is unconstitutionally “coercive” “because the central focus is the Ten Commandments.” CA5 Oral Arg. Audio at 1:14:40–15:40.

These facial challenges thus cannot survive the facial standard. Little more would be necessary to dispose of them—and to affirm the judgment below. *Cf.*, e.g., *Moody v. NetChoice, LLC*, 603 U.S. 707, 717 (2024) (“Today, we vacate both decisions for reasons

separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice’s challenge.”).

2. In any event, the *Roake* plaintiffs fare no better on the merits of their Establishment Clause claim. The Fifth Circuit reasoned as much in two key steps: (a) rejecting the notion that *Lemon* via *Stone v. Graham* continues to supply the governing test; and (b) following this Court’s directive in *Kennedy* to adjudicate Establishment Clause challenges based on the historical hallmarks of an establishment of religion.

a. The plaintiffs’ mantra throughout this litigation has been that this Court’s decision in *Stone* controls this litigation—and that the lower courts would be defying this Court’s precedent to conclude otherwise. As the Fifth Circuit recognized, the exact opposite is true.

This Court could not have been clearer in *Kennedy* when “it announced it had ‘long ago abandoned *Lemon*’” and “*Lemon*’s ‘offshoot,’ known as the ‘endorsement test,’” rejecting reliance on “*Lemon* and its progeny.” App.396a, 397a (citing *Kennedy*, 597 U.S. at 534). The Court’s directive, of course, is that, “when analyzing Establishment Clause claims, courts [must] not consider any of the three *Lemon* prongs—whether a law has a secular purpose, whether it advances or inhibits religion, and whether it excessively entangles government and religion.” App.397a.

But that is the problem with *Stone*: “*Stone* depended entirely on *Lemon* and nothing but *Lemon*.” App.398a. Specifically, it began by applying *Lemon*’s secular-purpose prong. *See* 449 U.S. at 41 (“We conclude that Kentucky’s statute requiring the posting of

the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.”). And it ended by applying *Lemon*’s secular-purpose prong. *Id.* at 42–43 (“We conclude that [the Kentucky statute] violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution.”).

“Remove the three-part *Lemon* test, and *Stone*’s reasoning vanishes.” App.398a. Put otherwise, the only way to apply *Stone* is to apply *Lemon*. That is why the en banc Fifth Circuit criticized the *Roake* panel for applying *Lemon*’s secular-purpose test while protesting that “[w]e do not undertake this [secular-purpose] analysis to revive *Lemon*, but only for the limited purpose of deciding whether *Stone*’s facts and reasoning control.” App.398a–99a. “That makes no sense,” said the en banc Fifth Circuit. App.399a. “*Stone*’s ‘reasoning’ is the *Lemon* test, full stop. So, what the *Roake* panel denied it was doing (‘reviving *Lemon*’) and what it admitted it was doing (‘deciding whether *Stone*’s facts and reasoning control’) are the same thing.” *Id.*

Because *Stone* is bad law after *Kennedy*, the Fifth Circuit was duty-bound to recognize as much—and it did. “The notion that we must nonetheless continue to apply any part of *Lemon* flies in the face of [this Court’s] explicit directives,” said the court. App.401a. “Because we do not have the option of ignoring the Supreme Court’s express directives, we cannot continue applying *Lemon*.” App.402a. Or, otherwise put: “Plaintiffs ignore [*Lemon*’s] obituary. Under the guise of applying *Stone*, they would have us exhume *Lemon* and parade its corpse around the Federal Reporter. That we cannot do.” App.404a.

b. With *Stone* interred alongside *Lemon*, the Fifth Circuit correctly recognized that its task was to articulate and apply the appropriate Establishment Clause test in the wake of *Kennedy*. *Kennedy* itself instructed that “[t]he Clause ‘must be interpreted by reference to historical practices and understandings,’ using an interpretation that ‘faithfully reflects the understanding of the Founding Fathers’ and ‘focuses on original meaning and history.’” App.405a (citing *Kennedy*, 597 U.S. at 535–36).

On that score, the Fifth Circuit linked arms with “two sister circuits”—the Third and Fourth Circuits—who have agreed that “*Kennedy*’s analysis distills to this inquiry: Have plaintiffs ‘prov[en] a set of facts that would have historically been understood as an establishment of religion?’” *Id.* (citing *Hilsenrath*, 136 F.4th at 491 n.54; *Firewalker-Fields*, 58 F.4th at 122 n.7); accord App.409a (“If a modern law is challenged under the Establishment Clause, courts must test that law against what the founding generation would have regarded as an establishment of religion.”). The Fifth Circuit then walked through a detailed historical account of what the founding generation understood an establishment of religion to be.

That account maps onto the “hallmarks” of founding-era establishments to which the *Kennedy* Court alluded: “(1) government control over religious doctrine, governance, and church personnel; (2) compulsory church attendance; (3) compelled financial support, especially in the form of land grants and religious taxes; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for civil functions; and (6) restriction of political participation to

members of the established church.” App.422a (citing *Kennedy*, 597 U.S. at 537 n.5).

That analysis, the Fifth Circuit observed, is easily applied here because the Ten Commandments laws “plainly lack[] the features of founding-era establishments”—*e.g.*, punishment through fines, taxes, and legal disabilities, or regulation of church functions and personnel. App.424a. Indeed, that is why the plaintiffs “rely on none of these features of establishments” to press their Establishment Clause challenge. *Id.*

Instead, their “principal argument” has been that these laws “resemble[] historic establishments because [they are] coercive.” *Id.* That argument seizes on a line in *Kennedy* that spoke of “coercion.” But “*Kennedy* explained that the ‘coercion’ characteristic of establishments consisted of forcing people to ‘attend church’ or ‘engage in a formal religious exercise.’” App.425a (citing *Kennedy*, 597 U.S. at 537) (quotation marks omitted). And “merely displaying religious text in a classroom” is “worlds apart” from that type of unconstitutional coercion. *Id.* Indeed, laws like Louisiana’s and Texas’s “do[] not compel any student to engage in formal religious exercise”—or do anything at all. App.425a–26a.

Moreover, the plaintiffs “have not identified a shred of founding-era evidence equating the government’s use of religious text, displays, or symbols with an establishment of religion.” App.426a. In fact, the available literature suggests “that no one ‘ever claimed at the founding that the display of religious symbols was a form of religious establishment.’” *Id.* & n.47. Indeed, such a claim would likely come as a

shock to not only the founding generation but also to a modern generation familiar with widespread religious imagery across our Nation. *See* App.426a–28a (detailing examples).

All this ends the plaintiffs’ Establishment Clause challenge. Under the Third, Fourth, and Fifth Circuits’ uniform precedents, the plaintiffs “bore the burden of showing that the [Ten Commandments] displays would have been understood as a founding-era establishment.” App.428a. They did not, and could not, carry that burden—and so their challenge fails.

3. The *Roake* plaintiffs’ Free Exercise Clause claim is similarly meritless. The Fifth Circuit made quick work of that claim because “the core of a free-exercise violation—a substantial burden on religious belief or practice—is missing.” App.441a. Everyone “agree[s] that a key precedent” on this score is *Mahmoud*. App.439a. And “[m]easured against *Mahmoud*,” Louisiana’s and Texas’s laws “fall[] far short of transgressing the Free Exercise Clause.” *Id.*

Unlike the curriculum and disruptive instruction at issue in *Mahmoud*, these Ten Commandments laws “create[] no religious curriculum designed to shape children’s beliefs or subvert their parents’ teaching.” *Id.* “Teachers are not required or encouraged to offer religious reflections on the Ten Commandments.” *Id.* “Nor are they told to proselytize students who ask about the displays or disagree with the Commandments.” *Id.* “Nor are they given lesson plans instructing that certain students (say, atheist, nontheist, pol-

ytheist, or agnostic students) are to be told their beliefs are ‘hurtful’ or ‘hateful.’” *Id.* (quoting *Mahmoud*, 606 U.S. at 553).

Instead, all these laws “require[] is a poster on a classroom wall.” App.442a. And while the plaintiffs in *Roake* and *Nathan* “disagree with the poster’s content,” “disagreement alone does not transform [these laws] into religious coercion—and certainly not into the [sort of] compulsory sex re-education program invalidated in *Mahmoud*.” *Id.* Indeed, “no case suggests that the mere presence of religious language in a school display is *ipso facto* religious coercion.” *Id.* And for good reason: Such a rule would prohibit schools from displaying the Declaration of Independence or Lincoln’s Second Inaugural Address—or even requiring the recitation of the Pledge of Allegiance. *See* App.443a. That, of course, is not the law. And below, in response to this problem with the plaintiffs’ theory, their “counsel could only say, ‘that’s obviously not this case.’” *Id.*

Plaintiffs’ claim, if credited, would go far beyond what was at issue in *Mahmoud*. There, the plaintiffs were specifically asked about a situation where a school displays posters that students or their parents might object to, and the plaintiffs disclaimed any constitutional right to veto those posters. Tr. of Oral Arg. at 58, *Mahmoud v. Taylor*, 606 U.S. 522 (2025) (No. 24-297); *cf. Mahmoud*, 606 U.S. at 568 (maj. op.) (distinguishing “opt outs” from giving parents “substantive control over the curriculum itself”); *id.* at 625 (Sotomayor, J., dissenting) (“[F]or public schools to function, it is inescapable that some students will be exposed to ideas and concepts that their parents may

find objectionable on religious grounds. ... To presume that public schools must be free from all such exposure is to presume public schools out of existence.”). Nothing in this Court’s opinion suggests a different answer here.

C. These Issues Are Actively Percolating in the Lower Courts.

Even if the plaintiffs’ claims were not plainly meritless, certiorari would be premature. *Nathan* is the first post-*Kennedy* court of appeals decision to grapple with how to apply *Kennedy* to a case involving passive religious displays. And far from indicating any emerging disagreement among the circuits over the proper understanding of *Kennedy*, the Fifth Circuit expressly aligned itself with decisions from the Third and Fourth Circuits. No circuit has disagreed.

Nor is there likely to be any shortage of future opportunities to consider these issues. Indeed, the specific issue of Ten Commandments displays in public schools is actively percolating in the lower courts. Like Louisiana and Texas, Arkansas has passed a law requiring the display of the Ten Commandments in public school classrooms. A challenge to that law is currently pending in the Eighth Circuit. *See Stinson v. Arkansas*, No. 26-1722 (8th Cir. filed Apr. 14, 2026). And two other states—in two additional circuits—have recently enacted their own versions of laws providing for Ten Commandments displays in public schools. *See* 2025–26 Tenn. Pub. Acts, ch. 924 (May 14, 2026); Ala. Act No. 2026-428 (Apr. 13, 2026).

In light of *Kennedy*’s clarification of the law, moreover, other Ten Commandments displays are being

posted (or reposted) on public property in other contexts. *See, e.g., Indiana Civil Liberties Union v. Braun*, No. 1:00-cv-00811 (S.D. Ind. Dec. 29, 2025), ECF 60 (Indiana seeking relief from *Lemon*-era injunction forbidding Ten Commandments monument on state-capitol grounds); Ky. H.J. Res. 15 (Mar. 27, 2025) (Kentucky re-erecting Ten Commandments monument on state-capitol grounds). And other challenges to Ten Commandments displays have already been filed. *See, e.g., Cave v. Jester*, ___ F. Supp. 3d ___, 2026 WL 916187 (E.D. Ark. Mar. 31, 2026), *appeal filed* No. 26-1829 (8th Cir.). There is no need for the Court to cut short the process of *Kennedy*'s reception in the lower courts. If that process ultimately demonstrates confusion in the lower courts' understanding of *Kennedy*, there will be ample opportunity to grant certiorari then. But there is no reason to disturb the en banc Fifth Circuit's correct application of *Kennedy* now.

II. IF THE COURT WERE INCLINED TO GRANT NATHAN, IT SHOULD LIKEWISE GRANT ROAKE.

As the foregoing makes clear, there are numerous reasons why the Fifth Circuit was right to vacate the *Roake* and *Nathan* injunctions. All that goes to show why there is no need for this Court's intervention—and, if the various plaintiffs elect to file cert petitions, the Court should deny them.

If the Court were inclined to grant any petition arising from *Nathan*, however, then the Court should grant this *Roake* petition as well. That is so for three independent reasons.

First, this is how the Fifth Circuit approached the two cases. Only *Roake* proceeded through both a district court preliminary-injunction decision and a Fifth Circuit panel decision. When Louisiana sought en banc review in *Roake*, Texas filed its initial en banc petition in *Nathan* seeking review “alongside” *Roake*—and Louisiana expressly endorsed that approach because it would place “the fulsome records developed across both cases” before the en banc Fifth Circuit. CA5.ECF.248 at 1. That joint request naturally resulted in a consolidated oral argument since the two cases “concern[] the same issues.” App.432a n.52. The same approach would thus make sense here.

Second, the Fifth Circuit saw material differences between Louisiana’s and Texas’s laws—and Louisiana has a significant interest in defending its own law here on its own terms. As discussed above, the Fifth Circuit read Texas’s law to prohibit the contextualization of the Ten Commandments displays (while Louisiana’s does not) and to require the conspicuous placement of the displays (while Louisiana’s does not). Based on those distinctions, the Fifth Circuit deemed the *Nathan* challenge ripe but the *Roake* challenge unripe.

Any proceeding in this Court would thus begin with a serious Article III question, including not just ripeness but also the standing of “these plaintiffs [who have sued over] a hypothetical injury about a hypothetical sign.” App.454a (Oldham, J.). Because that question was dispositive in *Roake*, Louisiana has a vested interest in the outcome of that question. By the Fifth Circuit’s lights, Louisiana has the best odds of prevailing on an Article III basis. And if Louisiana did not prevail on its Article III arguments, it would be in

the same position as Texas in defending its Ten Commandments law on the merits—and only Louisiana has illustratives that drive a dagger through the plaintiffs’ facial challenges.

Third, Louisiana is conditionally appealing to secure relief that it requested, but did not receive, from the Fifth Circuit. It asked the en banc Fifth Circuit to “reverse and render judgment” for Louisiana. CA5.ECF.271 at 71; *see* CA5.ECF.369-1 at 11 (“The Court should reverse and render judgment for Defendants.”). But the Fifth Circuit did not do so. Instead, it elected only to “VACATE the preliminary injunction.” App.4a, 11a; *contra* App.17a (Ho, J., concurring in the judgment) (reasoning that *Roake* “should be easy to dismiss” on the merits); App.384 (*Nathan* en banc decision “RENDER[ING] judgment dismissing Plaintiffs’ Establishment and Free Exercise claims”).

Where a prevailing party receives “only half a loaf”—*i.e.*, half of the relief it requested—this Court has held that the party “can appeal the [otherwise-favorable] order insofar as it denies her the relief she has sought.” *See Forney*, 524 U.S. at 271 (preserving an appeal right where a party received only a remand rather than a reversal). So it is here: Louisiana sought not just vacatur of the preliminary injunction below but judgment in its favor ending the *Roake* lawsuit—the precise judgment Texas received. Accordingly, this conditional appeal preserves Louisiana’s right under *Forney* to obtain that relief.

To be sure, this is a unique situation in many respects. In light of the Fifth Circuit’s exhaustive and correct resolution of these cases, Louisiana cannot

overstate its opposition to any request for this Court's review. At the same time, however, Louisiana must preserve its rights in the event that this Court wishes to grant a request for review. In that situation, the factors above—the consolidated proceedings in the Fifth Circuit, the stated differences between the Texas and Louisiana laws (and records), and the scope-of-relief issue—would counsel in favor of considering *Roake* and *Nathan* in tandem.

CONCLUSION

The Court should grant this petition only if it is inclined to grant a petition for writ of certiorari arising from *Nathan*.

Respectfully submitted,

ERIC C. RASSBACH
 JOSEPH C. DAVIS
 BENJAMIN A. FLESHMAN
 AMANDA L. SALZ
 THE BECKET FUND FOR
 RELIGIOUS LIBERTY
 1919 PENNSYLVANIA AVE.
 NW, SUITE 400
 WASHINGTON, D.C. 20006

ELIZABETH B. MURRILL
 Attorney General
 J. BENJAMIN AGUIÑAGA
 Solicitor General
Counsel of Record
 ZACHARY FAIRCLOTH
 Principal Deputy
 Solicitor General
 CAITLIN A. HUETTEMANN
 Assistant Solicitor General
 LOUISIANA DEPARTMENT OF
 JUSTICE
 1885 N. Third St.
 Baton Rouge, LA 70802
 (225) 506-3746
 AguinagaB@ag.louisiana.gov

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT,
FILED FEBRUARY 20, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-30706

DARCY ROAKE, REVEREND, ON BEHALF
THEMSELVES AND ON BEHALF OF THEIR
MINOR CHILDREN, REAL PARTY IN INTEREST
A.V., REAL PARTY IN INTEREST S.V.; ADRIAN
VAN YOUNG, ON BEHALF OF THEMSELVES
AND ON BEHALF OF THEIR MINOR CHILDREN,
REAL PARTY IN INTEREST A.V., REAL PARTY
IN INTEREST S.V.; MAMIE BROADHURST,
REVEREND, ON BEHALF OF THEMSELVES
AND ON BEHALF OF THEIR MINOR CHILD,
REAL PARTY IN INTEREST N.W.; RICHARD
WILLIAMS, REVEREND, ON BEHALF OF
THEMSELVES AND ON BEHALF OF THEIR
MINOR CHILD, REAL PARTY IN INTEREST
N.W.; JEFF SIMS, REVEREND, ON BEHALF OF
HIMSELF AND ON BEHALF OF HIS MINOR
CHILDREN, REAL PARTY IN INTEREST A.S.,
REAL PARTY IN INTEREST C.S. 1, REAL PARTY
IN INTEREST C.S. 2; JENNIFER HARDING, ON
BEHALF OF THEMSELVES AND ON BEHALF
OF THEIR MINOR CHILD, REAL PARTY IN
INTEREST A.O.; BENJAMIN OWENS, ON BEHALF
OF THEMSELVES AND ON BEHALF OF THEIR
MINOR CHILD, REAL PARTY IN INTEREST A.O.;

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DAVID HAWLEY, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN REAL PARTY IN INTEREST A.H., REAL PARTY IN INTEREST L.H.; ERIN HAWLEY, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, REAL PARTY IN INTEREST A.H, REAL PARTY IN INTEREST L.H.; DUSTIN MCCRORY, ON BEHALF OF THEMSELVES AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST E.M.; REAL PARTY IN INTEREST P.M., REAL PARTY IN INTEREST L.M.; GARY SERNOVITZ, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST T.S.; MOLLY PULDA, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD. REAL PARTY IN INTEREST T.S.; CHRISTY ALKIRE, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, REAL PARTY IN INTEREST L.A.; JOSHUA HERLANDS, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST E.H., REAL PARTY IN INTEREST J.H.,

Plaintiffs-Appellees,

v.

CADE BRUMLEY, IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE SUPERINTENDENT OF EDUCATION; CONRAD APPEL, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE

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LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION (LSBESE); JUDY ARMSTRONG, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; KEVIN BERKEN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; PRESTON CASTILLE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; SIMONE CHAMPAGNE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; SHARON LATTEN-CLARK, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; LANCE HARRIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; PAUL HOLLIS, LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; SANDY HOLLOWAY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; STACEY MELERINE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; RONNIE MORRIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; EAST BATON ROUGE PARISH SCHOOL BOARD; LIVINGSTON PARISH SCHOOL BOARD; VERNON PARISH SCHOOL BOARD; ST. TAMMANY PARISH SCHOOL BOARD,

Defendants-Appellants.

Filed February 20, 2026

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:24-CV-517

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Before ELROD, *Chief Judge*, JONES, SMITH, STEWART, DENNIS, RICHMAN, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON, DOUGLAS, AND RAMIREZ, *Circuit Judges*.

PER CURIAM:

Courts do not decide constitutional questions in the abstract. Nor is constitutional adjudication an exercise in imagination. Our role is more modest—and more demanding: to resolve concrete disputes grounded in real facts and an actual record.

Louisiana House Bill 71 (H.B. 71) requires public schools to display the Ten Commandments in each classroom. *See* LA. STAT. ANN. § 17:2124(B)(1). The question before us, however, is not whether H.B. 71 is constitutional, but whether that issue is fit for judicial resolution at this time.

A group of parents sued to enjoin H.B. 71's implementation, arguing that the statute is facially unconstitutional under both the Establishment and Free Exercise Clauses of the First Amendment. The district court granted a preliminary injunction, concluding that the parents' claims were ripe and meritorious. A panel affirmed, and we voted to rehear the case en banc. Because the parents' challenge turns on unresolved factual and contextual questions, equitable relief was premature, and we VACATE the preliminary injunction.

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Article III limits federal courts to resolving “Cases” and “Controversies.” U.S. CONST. art. III, § 2. Because of that limitation, the issues we decide “must be ‘ripe’—not dependent on ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Trump v. New York*, 592 U.S. 125, 131, 141 S.Ct. 530, 208 L.Ed.2d 365 (2020) (per curiam) (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

This case illustrates why that limitation matters. There can be no doubt that the Ten Commandments bear immense religious significance. “For believing Jews and Christians,” they are “the word of God handed down to Moses on Mount Sinai.” *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 53, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019). But they also “have historical significance as one of the foundations of our legal system.” *Id.* That dual character forecloses any categorical rule against their display on public property. *See Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (upholding a Ten Commandments monument on the Texas State Capitol grounds). Instead, constitutionality turns on “the context of the display” and “how the text is *used*.” *Id.* at 701, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment) (emphasis in original).¹

While H.B. 71 sets certain “minimum requirement[s]” regarding the text, size, and accompanying “context statement” of the displays, it leaves “[t]he nature of the

1. As we have previously recognized, “JUSTICE BREYER’S concurrence is the controlling opinion in *Van Orden*.” *Staley v. Harris Cnty.*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (en banc).

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display” entirely to the discretion of local school boards. LA. REV. STAT. § 17:2124(B)(1)-(3). That delegation—and those minimum requirements—necessarily leave numerous essential questions unanswered. We do not know, for example, how prominently the displays will appear, what other materials might accompany them, or how—if at all—teachers will reference them during instruction. More fundamentally, we do not even know the full content of the displays themselves. Although the statute requires inclusion of the Commandments and a context statement, it expressly permits additional content—such as “the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance”—to appear alongside them. *Id.* § 2124(B)(4).

Simply put, we cannot evaluate “how the text is used,” *Van Orden*, 545 U.S. at 701, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment) (emphasis omitted), because we do not yet know—and cannot yet know—how the text will be used. And “[i]n the absence of this evidence, we are not able to conduct the fact-intensive and context-specific analysis required by” the Supreme Court’s Ten Commandments cases. *Staley v. Harris Cnty.*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc).² That same evidentiary

2. As an adjunct to their main Establishment Clause argument, the parents contend that H.B. 71 imposes a denominational preference by prescribing a version of the Commandments they characterize as uniquely Protestant. The plaintiffs do not allege, however, that H.B. 71 imposes any formal disadvantage on adherents of a particular faith. “Properly phrased,” their claim is instead that H.B. 71 “works a de facto discrimination among religions.” *Gillette v. United States*, 401 U.S.

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gap forecloses the parents' Free Exercise claims, because "the question whether a law 'substantially interfer[es] with the religious development' of a child will always be fact-intensive," requiring courts to "consider the specific context in which the instruction or materials at issue are presented." *Mahmoud v. Taylor*, 606 U.S. 522, 550, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025) (alteration in original) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). Moreover, "the plaintiffs suffer no concrete harm from the challenged policy itself, which does not require them 'to do anything or to refrain from doing anything.'" *Trump*, 592 U.S. at 134, 141 S.Ct. 530 (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998)).

The panel concluded that "[t]his case is not like *Staley* where 'no decision ha[d] been made regarding *any aspect* of the future display of the [stored] monument," reasoning that here certain aspects of the future displays are known. *Roake v. Brumley*, 141 F.4th 614, 630 (5th Cir. 2024) (emphasis and alterations in original) (quoting *Staley*, 485 F.3d at 309). But "the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) (alteration in original) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)). The panel's unduly cramped reading of *Staley*—limiting

437, 451-52, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). In the context of a religious display, such a claim necessarily turns on how the allegedly discriminatory text is presented and employed—facts not yet developed here.

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it to cases in which literally no aspect of a future display is known—does precisely that. Properly understood, *Staley* does not turn on whether *some* details of a future display are known, but on whether courts can evaluate constitutionality without resorting to conjecture. There, the challenged monument was known in considerable detail. *See Staley v. Harris Cnty.*, 461 F.3d 504, 506 (5th Cir. 2006) (describing the monument), *dismissed as moot on reh'g en banc*, 485 F.3d 305 (5th Cir. 2007). If those facts were insufficient to present a ripe controversy, it is difficult to understand how today's record does so.³

The parents (and the principal dissent) seek to sidestep this difficulty by framing the case as an attack on H.B. 71's minimum requirements alone. But an unripe challenge does not become ripe merely because a party asserts that the challenged action would be unlawful on any conceivable set of facts. The Supreme Court has squarely rejected that approach. In *Texas v.*

3. Shortly before argument, Louisiana notified us that the Vernon Parish School Board—one of the defendants—adopted a resolution stating that, if the district court's injunction is lifted, it “intends to direct all schools within its jurisdiction to immediately implement H.B. 71 in accordance with” guidance issued by the state Attorney General. That guidance includes model displays and other implementation suggestions. Although the resolution provides additional detail regarding how H.B. 71 may be implemented within the Vernon Parish School District, neither party contends that it alters the ripeness analysis. While ripeness is jurisdictional, *see Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002), we are not required to consider “arguments in favor of jurisdiction” that the parties have not raised, *E.T. v. Paxton*, 41 F.4th 709, 717 (5th Cir. 2022). We decline to do so here.

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United States, the challengers—no differently than the challengers here—asked the Court “to hold that under no circumstances” would the challenged action be lawful. 523 U.S. at 301, 118 S.Ct. 1257. The Court made swift work of that argument, explaining that the Justices lacked “sufficient confidence in [their] powers of imagination to affirm such a negative.” *Id.* It reiterated that, even when a plaintiff insists that a law can never be constitutionally applied, “[d]etermination of the scope . . . of legislation in advance . . . involves too remote and abstract an inquiry for the proper exercise of the judicial function.” *Id.* (brackets and first ellipsis in original) (quoting *Int’l Longshoremen’s & Warehousemen’s Union, Loc. 37 v. Boyd*, 347 U.S. 222, 224, 74 S.Ct. 447, 98 L.Ed. 650 (1954)). That admonition applies with particular force here, where constitutionality turns on context that does not yet exist.

Asking us to declare—here and now, and in the abstract—that every possible H.B. 71 display would violate the Establishment Clause would require precisely what *Texas* forbids: the substitution of speculation for adjudication. It would oblige us to hypothesize an open-ended range of possible classroom displays and then assess each under a context-sensitive standard that depends on facts not yet developed and, indeed, not yet knowable. That exercise exceeds the judicial function. It is not judging; it is guessing. And because it rests on conjecture rather than a concrete factual record, it does not cure the ripeness defect—it compounds it. Facial challenges, no less than as-applied challenges, may “degenerate into conjecture rather than rulings on concrete controversies.” *La Union del Pueblo Entero v. Abbott*, 167 F.4th 743, 754 (5th Cir. Feb. 12, 2026).

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That does not mean, of course, that every facial challenge (whether under the Establishment Clause or otherwise) requires specific facts about implementation. On the contrary, we have long acknowledged that “[a]nticipatory constitutional challenges . . . ‘play a most vital role’” in modern constitutional litigation. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1033 n.18 (5th Cir. 1981) (quoting *Int’l Soc’y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979)). But that role is not unlimited. Ripeness does not demand unqualified certainty—but it does demand facts sufficient to permit judicial judgment rather than speculation. Because there is no “unqualified right to pre-enforcement review of constitutional claims in federal court,” *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 49, 142 S.Ct. 522, 211 L.Ed.2d 316 (2021), we must “insist that an anticipatory challenge to a statute’s constitutionality grow out of a ‘real, substantial controversy between parties . . . a dispute definite and concrete.’” *Int’l Soc’y for Krishna Consciousness*, 601 F.2d at 817 (ellipsis in original) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). Anticipatory review therefore turns not on the scope of a plaintiff’s legal theory, but on the existence of a dispute concrete enough to be judged rather than imagined.

Many statutes provide far greater detail than H.B. 71, and many constitutional provisions require far less contextual inquiry than the Establishment Clause. If H.B. 71 were such a statute, or if the Establishment Clause demanded less contextual sensitivity, this case might well be ripe. But H.B. 71 confers sweeping discretion on local

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school boards, and the Establishment Clause demands close attention to context. That incongruity is dispositive: it forecloses judicial review at this stage and renders the plaintiffs’ claims nonjusticiable. We add, however, that nothing in today’s narrow holding prevents future as-applied challenges once the statute is implemented and a concrete factual record exists.

* * *

“As this case comes to us . . . it does not—at this time—present a dispute ‘appropriately resolved through the judicial process.’” *Trump*, 592 U.S. at 131, 141 S.Ct. 530 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). Article III judicial power stops there. Accordingly, we VACATE the preliminary injunction.

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JAMES C. HO, *Circuit Judge*, concurring in the judgment:

A new Louisiana law requires the display of the Ten Commandments in public schools. The law is constitutional and consistent with our Founding traditions. I would vacate the preliminary injunction for that reason.

The court today vacates the preliminary injunction on ripeness grounds instead. But the important thing is that the decision vacates the preliminary injunction—and allows us to uphold the Louisiana law against constitutional attack in the future. So I’m content to concur in the judgment.

That said, I would avoid ripeness and vacate on the merits. Ordinarily, we must decide jurisdiction first. But in an appeal of a preliminary injunction, there is no order of operations—we may vacate on the merits, without ruling on jurisdiction at all. *See Munaf v. Geren*, 553 U.S. 674, 691, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008). Indeed, “[a]djudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail.” *Id.* If “the Government is entitled to judgment as a matter of law, it is appropriate for us to *terminate the litigation now.*” *Id.* at 692, 128 S.Ct. 2207 (emphasis added).

We last confronted these issues in *United States v. Abbott*, 110 F.4th 700 (5th Cir. 2024). The majority vacated the preliminary injunction on the merits, and remanded for further proceedings, without deciding jurisdiction. *Id.* at 722. I wrote separately to note that I would vacate on

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jurisdictional grounds instead—specifically, the political question doctrine. I believed that was not only correct, but would “preclude further litigation entirely,” *id.* at 727 n.2—and thus “terminate the litigation now.” *Munaf*, 553 U.S. at 692, 128 S.Ct. 2207.

I mention this, not to relitigate *Abbott*, but to say that, if it was proper to vacate on the merits in *Abbott*, then it’s *a fortiori* proper to do so here too. No further facts are needed to vacate the preliminary injunction here on the merits. Moreover, upholding Louisiana law would “terminate the litigation” entirely. *Id.* That’s what I sought to do in *Abbott*. And I’d do the same here.

I.

Plaintiffs contend that their constitutional objection to the Louisiana Ten Commandments law “may properly begin and end” with *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).

That’s telling, because *Stone* turns entirely on *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)—and everyone agrees that *Lemon* is no longer good law after *Kennedy v. Bremerton School District*, 597 U.S. 507, 534, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (noting that “this Court long ago abandoned *Lemon*”).

Stone begins by observing that, under the first prong of the *Lemon* test, statutes “must have a secular legislative purpose.” *Stone*, 449 U.S. at 40, 101 S.Ct. 192. It then rests its holding explicitly—and exclusively—on

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the first prong of *Lemon*: “We conclude that Kentucky’s statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.” *Id.* at 41, 101 S.Ct. 192. In the ensuing paragraphs, *Stone* focuses entirely on the secular legislative purpose test. And it ends by reprising its holding: “We conclude that [the Kentucky law] violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution.” *Id.* at 42-43, 101 S.Ct. 192. Moreover, the Supreme Court has repeatedly reaffirmed that *Stone* is premised on the legislative purpose prong of *Lemon*. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 690, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion of Rehnquist, C.J.) (*Stone* turned on the law’s “plainly religious purpose”); *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 859, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (“*Stone* found a predominantly religious purpose”).

Plaintiffs nevertheless insist that *Stone* remains good law, never mind the Court’s “abandon[ment]” of *Lemon*. *Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407. After all, it’s well established that, “[i]f a precedent of [the Supreme] Court . . . appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

But *Stone* doesn’t rely on “reasons” that the Supreme Court has later “rejected.” *Stone* relies on *precedent* that the Supreme Court has *overturned*.

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What Plaintiffs may really be suggesting is that *Stone* is still binding because the Supreme Court hasn't yet explicitly overturned it *by name*.

But under that rule, Asian children could still be subject to racial segregation in public schools. After all, the Supreme Court hasn't overturned *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927), by name, either.

Of course, that isn't how we apply Supreme Court precedent. *Gong Lum* plainly rests on *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)—just as *Stone* plainly rests on *Lemon*. And *Plessy* is no longer good law after *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)—just as *Lemon* is no longer good law after *Kennedy*.

In short, *Plessy* is gone, so *Gong Lum* is gone. See, e.g., *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 862-63 (9th Cir. 1998) (noting that *Gong Lum* was “repudiated” in *Brown*). And so too here: *Lemon* is gone, so *Stone* is gone. We're not bound by *Stone* any more than we're bound by *Gong Lum*.

II.

Plaintiffs offer a backup argument. They hope to reanimate *Stone* by reconceptualizing it as a coercion case.

But nothing in *Stone* holds—or even suggests—that a passive display of the Ten Commandments is somehow

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coercive. Indeed, the word “coercion” appears nowhere in *Stone*. There’s a perfectly reasonable explanation for that omission, of course: *Stone* turned on purpose, not coercion. It focused on legislative motive, not public impact.

Later Supreme Court opinions have further affirmed that passive religious displays are not coercive. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 618, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Souter, J., concurring) (observing that a “prominent display of a nativity scene on public property . . . coerced no one into accepting or supporting whatever message it proclaimed”); *Van Orden v. Perry*, 545 U.S. 677, 694, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (Thomas, J., concurring) (“The mere presence of [a Ten Commandments] monument along [the plaintiff’s] path involves no coercion and thus does not violate the Establishment Clause.”). So have we. *See, e.g., Briggs v. Mississippi*, 331 F.3d 499, 505 (5th Cir. 2003) (“[a] mere display on public property . . . is in no meaningful sense . . . coercive”).

Moreover, we couldn’t regard a passive display of the Ten Commandments as coercive, without overturning established precedent permitting the daily recitation of the Pledge of Allegiance in public schools. *See, e.g., Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010). After all, if a mere display is coercive, then surely an audible daily recitation of the Pledge of Allegiance every morning for one’s entire public school education is, too.

Notably, counsel for Plaintiffs conceded during oral argument that the daily recitation of the Pledge of

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Allegiance would indeed present “a problem” under their theory of coercion. Oral Arg. at 53:01. “Both are issues,” counsel acknowledged. Oral Arg. at 53:30.

Counsel nevertheless intimated that there’s a difference “of degree” between the daily recitation of the Pledge of Allegiance and the passive display of the Ten Commandments. Oral Arg. at 53:48.

But for what it’s worth, I agree: Passive displays are even less coercive than being forced to listen every morning to the monotheistic and anti-atheist Pledge of Allegiance. *Stone* itself confirms this—“the Bible verses involved in this case are *merely* posted on the wall, rather than read aloud.” 449 U.S. at 42, 101 S.Ct. 192 (emphasis added). *Cf. Lee*, 505 U.S. at 639, 112 S.Ct. 2649 (Scalia, J., dissenting) (“[S]ince the Pledge of Allegiance . . . include[s] the phrase ‘under God,’ recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction.”).

So there’s no coercion in this case. And that conclusion is fatal to all of Plaintiffs’ First Amendment claims.

III.

Once *Stone* is removed, this case should be easy to dismiss. Plaintiffs present no historical evidence that remotely suggests that our Founders would have regarded a passive display of the Ten Commandments as an impermissible “establishment of religion.” U.S. CONST. amend I. *See, e.g., Kennedy*, 597 U.S. at 537 & n.5, 142 S.Ct.

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2407 (noting the “hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment”) (citing, *inter alia*, *Shurtleff v. City of Boston*, 596 U.S. 243, 285-86, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (Gorsuch, J., concurring)). To the contrary, our Nation’s history proves precisely the opposite.

Our Nation’s Founders didn’t just permit religion in education—they *presumed* that there would be religion in education. Indeed, our Founders firmly believed that our Constitution wouldn’t work without a religious people.

John Adams famously observed that “[o]ur Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.” John Adams, Letter to the Massachusetts Militia (Oct. 11, 1798). John Jay similarly wrote that “Providence has been pleased to give this one connected country, to one united people, . . . professing the same religion, attached to the same principles of government.” THE FEDERALIST No. 2, at 9 (John Jay) (J. Cooke ed. 1961). The Massachusetts Declaration of Rights, contained in the 1780 Massachusetts Constitution, proclaimed that “the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality.” MASS. CONST. pt. I, art. III.

Given the centrality of religion in our Founders’ conception of good citizenship, it’s not surprising that religion was a cornerstone of American education from the beginning. The First Congress understood religious instruction to be a necessary element of education,

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providing in the Northwest Ordinance of 1789 that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” 1 Stat. 50, 52 (1789).¹ Samuel Adams implored fellow Americans to educate their children in “the Study, and Practice of the exalted Virtues of the Christian system, which will happily tend to subdue the turbulent passions of Men, and introduce that Golden Age beautifully described in figurative language; when the Wolf shall dwell with the Lamb, and the Leopard lie down with the Kid—the Cow, and the bear shall feed; their young ones shall lie down together, and the Lyon shall eat straw like the Ox—none shall then hurt, or destroy; for the Earth shall be full of the Knowledge of the Lord.” Samuel Adams, Letter to John Adams (Oct. 4, 1790).

During the Founding era, American children were typically educated in church-supported schools or by private tutors. See Expert Report of Steven K. Green at 18, *Roake v. Brumley*, No. 3:24-cv00517 (M.D. La. Aug. 26, 2024). And one of the most popular textbooks used in that education was the *New England Primer*, which features extensive religious material including poems, prayers, and lessons, including the Ten Commandments. See WESTMINSTER ASSEMBLY, *THE NEW ENGLAND PRIMER*

1. The Continental Congress adopted the Northwest Ordinance of 1787, and the First Congress reaffirmed it in the Northwest Ordinance of 1789. See *Fulton v. City of Philadelphia*, 593 U.S. 522, 577-78, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (Alito, J., concurring); Tara Ross and Joseph C. Smith Jr., *UNDER GOD* 88-89 (2008).

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IMPROVED: FOR THE MORE EASY ATTAINING THE TRUE READING OF ENGLISH: TO WHICH IS ADDED THE ASSEMBLY OF DIVINES, AND MR. COTTON'S CATECHISM (Bos., Edward Draper 1777). *See also* Mark David Hall & Andrea Picciotti-Bayer, *Ten Commandments in the Public Square and Public Schools*, 34 WM. & MARY BILL RTS. J. 175, 219 (2025). From 1680 to 1830, more than 6.5 million copies of the *New England Primer* were sold. *Id.* So it's safe to say that that textbook was in common use in early American education. *See, e.g., Morgan v. Plano Independent School Dist.*, 612 F. Supp. 2d 750, 754 n.3 (E.D. Tex. 2009) ("The founding fathers would have been familiar with the *New England Primer* used by students in colonial society."). Other textbooks used in early American education, such as *McGuffey's Readers* and Noah Webster's *American Spelling Book*, likewise featured religious material including the Ten Commandments. *See* Hall & Picciotti-Bayer, 34 WM. & MARY BILL RTS. J. at 223.

* * *

We can vacate the preliminary injunction without addressing jurisdiction, because "it is plain that the plaintiff cannot prevail" on "the merits." *Munaf*, 553 U.S. at 691, 128 S.Ct. 2207. So we can "terminate the litigation now." *Id.* at 692, 128 S.Ct. 2207. No further facts are needed to uphold the Louisiana Ten Commandments law against Plaintiffs' constitutional attacks.

The Louisiana law violates neither the Establishment Clause nor the Free Exercise Clause. It is fully consistent with the Constitution, and what's more, it reinforces our

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Founders' firm belief that the children of America should be educated about the religious foundations and traditions of our country.

We must never forget that, as Americans, “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 96 L.Ed. 954 (1952). So “[w]hen the state encourages religious instruction,” it “respects the religious nature of our people,” “accommodates . . . their spiritual needs,” and “follows the best of our traditions.” *Id.* at 313-14, 72 S.Ct. 679.

In sum, the Louisiana Ten Commandments law is not just constitutional—it affirms our Nation’s highest and most noble traditions.

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JAMES L. DENNIS, *Circuit Judge*, joined by GRAVES, HIGGINSON, DOUGLAS, and RAMIREZ, *Circuit Judges*, dissenting:

The Ten Commandments—here, a version from the King James Bible—are a sacred text, drawn verbatim from scripture and not a mere moral code or historical relic. By placing that text on permanent display in public school classrooms, not in a way that is curricular or pedagogical, the State elevates words meant for devotion into objects of reverence, exposing children to government-endorsed religion in a setting of compulsory attendance. That is precisely the kind of establishment the Framers anticipated and sought to prevent.

More than forty-five years ago, the Supreme Court confirmed this in *Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), holding that classroom postings of the Ten Commandments, when unincorporated into the curriculum, serve only “to induce . . . schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments,” and cannot stand under the Establishment Clause. The Court has never retreated from that holding. To the contrary, it reaffirmed *Stone*’s core reasoning in *McCreary County v. Am. C.L. Union*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005), and *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005).

Today, the Fifth Circuit deploys ripeness as a calculated stratagem to evade these precedents in the Louisiana case. That maneuver is as unfortunate as it is incorrect for the reasons ably explained by JUDGE

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RAMIREZ.¹ Because I would affirm the district court’s judgment in full, I dissent.

* * *

In *Stone v. Graham*, the Supreme Court struck down a Kentucky statute virtually identical to H.B. 71, holding that it violated the Establishment Clause by requiring the Ten Commandments to be displayed in classrooms. *See* 449 U.S. at 42-43, 101 S.Ct. 192. Louisiana contends that we may disregard *Stone* because it relied on *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971),² which Louisiana claims the Supreme Court effectively abandoned in *Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022). Louisiana

1. Not only does the statute specify the posters’ size, placement, and minimum content, but nearly every public school in Louisiana has already received posters designed by the Louisiana Attorney General. *See* Patrick Wall, *Louisiana Public Schools Receive Donated Ten Commandments Posters Amid Legal Battle*, NOLA.COM (Jan. 17, 2026), <https://perma.cc/2ZXW-JPBK>; *see also* Ho, J., concurrence (contending there is no requirement that we resolve this appeal on ripeness grounds).

2. *Lemon* formalized a three-part test for evaluating Establishment Clause violations: state action is unconstitutional if it (1) lacks a secular legislative purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement between government and religion. 403 U.S. at 612-13, 91 S.Ct. 2105. Over time, courts interpreting the second prong began asking whether a “reasonable observer” would view the government’s challenged action as an “endorsement” of religion, giving rise to the so-called “endorsement test.” *See, e.g., County of Allegheny v. Am. C.L. Union*, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

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concedes, however, that *Kennedy* did not mention *Stone* or *Lemon*'s secular purpose requirement, on which *Stone* relied in part. *Stone* controls for two reasons.

I

First, even adopting Louisiana's gloss on *Kennedy*, lower courts are bound to follow directly on-point Supreme Court precedent, leaving no room to question the ruling merely because it "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *see also* NATHAN S. CHAPMAN & MICHAEL W. McCONNELL, *AGREEING TO DISAGREE* 92 (Geoffrey R. Stone ed., 2023) (similar). That command reflects the obligation of vertical fidelity that defines the role of an inferior court. No special exception exists for Fifth Circuit judges.

To be sure, *Stone* is directly on point. H.B. 71 and the Kentucky statute both:

1. Require the Ten Commandments to be displayed in every public school classroom;
2. Mandate minimum poster size and placement requirements;
3. Include "contextual" statements describing the "historical basis" for each display;
4. Make the Ten Commandments the central focus;

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5. Permit private financing;
6. Task the superintendent with implementation; and
7. Do not integrate the Ten Commandments into an educational curriculum.

Compare LA. R.S. § 17:2124(B), *with Stone*, 449 U.S. at 39 n.1, 101 S.Ct. 192 (citing KY. REV. STAT. § 158.178 (1980)).

Under H.B. 71, other foundational documents may be displayed, but only the Ten Commandments are mandatory, prominently displayed, and printed in large, legible text. LA. R.S. § 17:2124(B)(1), (4)(a). A display meeting H.B. 71's requirements is materially indistinguishable from those struck down in *Stone*.

Stone's reasoning applies equally here. The Supreme Court rejected Kentucky's claimed secular purpose because the Ten Commandments were not integrated into the curriculum—"where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42, 101 S.Ct. 192 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). Posting the Ten Commandments on classroom walls served no educational function. The same is true under H.B. 71. The posters must be displayed indiscriminately in every classroom, regardless of subject matter, and without curricular integration. LA. R.S. § 17:2124(B)(1).

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Louisiana claims its Legislature had a valid secular purpose: to promote understanding of the Ten Commandments as part of the state's historical and educational tradition. Courts are normally deferential to such legislative purposes, but the purpose must be sincere, not a sham. *See Croft v. Governor of Tex.*, 624 F.3d 157, 166 (5th Cir. 2010) (first quoting *Edwards v. Aguillard*, 482 U.S. 578, 587, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), and then quoting *Wallace v. Jaffree*, 472 U.S. 38, 64, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (POWELL, J., concurring)). Here, the legislative record demonstrates that a religious objective dominated. Sponsors repeatedly invoked teaching children "what God commands," lamented the decline of Christianity, and openly framed opposition to H.B. 71 as an "attack on Christianity." Another co-sponsor touted the law as a religious counterbalance to secular education.

The statutory text reinforces this pretext. The Ten Commandments must be displayed prominently and legibly, while other foundational documents are optional and may remain hidden. LA. R.S. § 17:2124(A)(9). As in *Stone*, "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S. at 42, 101 S.Ct. 192. That objective is unconstitutional.

II

Second, and independently, *Stone* remains controlling because Louisiana vastly overstates *Kennedy*'s significance. *Kennedy* repudiated only the endorsement

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test—an offshoot of *Lemon*'s second prong—and left intact the broader framework of Establishment Clause doctrine: the requirement of a secular legislative purpose, the prohibition on policies whose primary effect advances religion, and the concern about excessive entanglement between church and state. These principles predate *Lemon* and remain binding. See 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 (2025).

Consider *School District of Abington Township v. Schempp*, the Court's seminal school prayer case decided nearly a decade before *Lemon*. There, the Schempp family challenged a Pennsylvania law requiring students to read the Bible at the start of each school day. The Court held that a law must have a secular legislative purpose to withstand the strictures of the Establishment Clause. 374 U.S. at 222, 83 S.Ct. 1560 (citing *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947)); *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). That foundational principle still binds us. Unless *Schempp* and its progeny are overruled—which Louisiana has never sought—the inquiry into the purpose of a state-sponsored religious display remains mandatory. Abandoning *Stone* would mark a first and perilous step toward unraveling decades of school prayer jurisprudence, grounded in the special need to protect young, impressionable public school students from state-sponsored indoctrination.

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Louisiana's reliance on *Kennedy* as overruling *Stone* underscores the error. *Kennedy* turned on whether Coach Kennedy's personal post-game prayers were protected private speech. The Court held that they were and that the school district could not restrict them. The Ten Commandments display here, by contrast, is indisputable state action undertaken for religious reasons. Yet Louisiana contends that *Kennedy* swept away *Lemon* entirely, along with *Stone*, replacing the established framework with a singular focus on history and tradition.

That is wrong, and I refuse to go along with it. True, *Kennedy* states that "this Court long ago abandoned *Lemon* and its endorsement test offshoot." 597 U.S. at 510, 142 S.Ct. 2407. But only the endorsement test—the reasonable-observer inquiry—was addressed. *Kennedy* did not revisit the secular-purpose requirement, the analysis of primary effects, or the concern with excessive entanglement. These requirements predate *Lemon*, and they remain binding. As Professors Lupu and Tuttle explain, *supra* at 629, "*Lemon's* component parts thus remain alive, and function in a variety of contexts, even if citations to *Lemon* now will disappear."

* * *

Bound by *Stone v. Graham* and its progeny, and mindful that we are not the Supreme Court, I conclude that permanently posting the Ten Commandments in every public school classroom, without curricular incorporation and with compulsory attendance, violates the Establishment Clause. Our court avoids confronting that conclusion only through procedural artifice. I dissent.

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HAYNES, *Circuit Judge*, dissenting:

I concur with the conclusion of Judge Ramirez's dissent that this case is ripe. Simply stated, the Louisiana statute clearly requires the posting of the Ten Commandments, which is what the Plaintiffs are challenging, so there is nothing to wait on in that arena, as we explained in our panel opinion filed on June 20, 2025. I also concur with the last paragraph in Judge Ramirez's dissent that the preliminary injunction was proper, and we should affirm the district court as we explained in our panel opinion. I respectfully note that we must follow what the Supreme Court requires; thus, my determination is not based on what I think of the Ten Commandments but following the Constitution as the Supreme Court has explained.

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STEPHEN A. HIGGINSON, *Circuit Judge*, joined by DENNIS, GRAVES, DOUGLAS, and RAMIREZ, *Circuit Judges*, dissenting:

I join JUDGE RAMIREZ’s principal dissent, disagreeing with the court majority that we cannot examine state-compelled scriptural text at this juncture because H.B. 71’s legislative command to all public schools “leave[s] numerous essential questions unanswered.” I also join JUDGE DENNIS’s dissent, emphasizing that it is not our role to overturn *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), a particularly stark Fifth Circuit usurpation given CHIEF JUSTICE REHNQUIST’s two-paragraph reiteration of *Stone* in *Van Orden v. Perry*, 545 U.S. 677, 691, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion), a decision our court today correctly embraces.¹

I write separately to further disagree with the court majority that the biblical scripture that all

1. Determinatively, in *Van Orden*, Chief Justice Rehnquist juxtaposed the history of religious displays *on* monuments with displays and practices *in* school classrooms, from which schoolchildren cannot withdraw. 545 U.S. at 690-91, 125 S.Ct. 2854; *see also id.* at 703, 125 S.Ct. 2854 (Breyer, J., concurring in judgment) (“This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state.”). Despite this, our court majority asserts that in-class displays remain subject to variation; regardless of context and location, every parent knows a child’s curiosity does not always train in the teacher’s direction.

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Louisiana schoolchildren now must “confront[],” *id.*, is indeterminately religious—that the state law command that students stare at the King James Version of the Decalogue all day, every day, for every year of their compulsory education “turns on” facts to be determined.

Although the court majority opines that no “categorical rule” prohibits the display of the Commandments on public property, over the ebb and flow of First Amendment interpretation, the Supreme Court has been constant with one fixed star: prohibiting government orthodoxy and denominational discrimination. *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 247, 145 S.Ct. 1583, 221 L.Ed.2d 881 (2025); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). That prohibition is paramount against government placement of a preferred religion in schools and classrooms. *See Van Orden*, 545 U.S. at 691, 125 S.Ct. 2854 (“We have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” (cleaned up)).²

We know from Louisiana lawmakers the chosen scriptural text was not happenstance. The legislators had definitive religious motivation when they selected a

2. *Town of Greece v. Galloway*, 572 U.S. 565, 577, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *see also Rowan County v. Lund*, 585 U.S. 1035, 1037-38, 138 S.Ct. 2564, 201 L.Ed.2d 1101 (2018) (Thomas, J., dissenting from denial of certiorari) (explaining that *Town of Greece’s* historical inquiry concerns the “specific practice” at issue).

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Protestant version of the Decalogue to display.³ As one of the “country’s most distinguished scholars of the Religion Clauses,”⁴ Professor Michael W. McConnell, has stated about H.B. 71, “the state legislature is singling out a particular religious text to be displayed in a way that is not curricular or pedagogical but rather reverential.”⁵

3. The primary author and sponsor of the law was clear: “It is so important that our children learn what God says is right and what He says is wrong.” And another co-author and co-sponsor described the law’s opponents as waging an “attack on Christianity.”

4. *Fulton v. City of Philadelphia*, 593 U.S. 522, 554, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (Alito, J., concurring in judgment); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 n.5, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (citing Professor McConnell’s scholarship in explaining the “hallmarks of religious establishment the framers sought to prohibit”); *Shurtleff v. City of Boston*, 596 U.S. 243, 277, 286, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (Gorsuch, J., concurring in judgment) (same); *Hilsenrath v. Sch. Dist. of Chathams*, 136 F.4th 484, 491 (3d Cir. 2025) (same). The other “distinguished scholar[]” recognized by the Supreme Court in *Fulton* for scholarship that has assisted its recent Establishment Clause jurisprudence, 593 U.S. at 554, 141 S.Ct. 1868, Professor Douglas Laycock, notably serves as amicus counsel for a group of religious amici that submitted a brief in support of plaintiffs here, *see* En Banc Brief of Amicus Curiae Baptist Joint Committee for Religious Liberty, et al. at 28 (No. 24-30706).

5. Mark Walsh, *Posting Ten Commandments in Schools Was Struck Down in 1980. Could That Change?*, Educ. Wkly. (Jul. 11, 2024), <https://www.edweek.org/policy-politics/posting-ten-commandments-in-schools-was-struck-down-in-1980-could-that-change/2024/07>.

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Indeed, *every* faith-based organization before us—on behalf of thousands of members—and *every* clergy and devout plaintiff agree that Louisiana must not pick and post specific scripture that the state commands will confront children in state classrooms. All religious voices submitted to us, barring one individual, oppose Louisiana’s attempt to select, inculcate, and enforce this version of gospel text in compulsory public education.

History confirms that the Supreme Court has been especially vigilant against denominational discrimination inside the schoolhouse gate. *See Barnette*, 319 U.S. at 637, 63 S.Ct. 1178 (“Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.”); *see also Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (“As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”).

To us, Jewish plaintiffs and organizations voice that it violates their faith to make Jewish children stare at a Protestant “misappropriat[ion]” of their most sacred text.⁶ As one Jewish parent plaintiff swore to in district court, “I believe that H.B. 71 (1) misappropriates a Jewish text, ripping it from its Jewish context, (2) selectively edits that

6. Two centuries ago, classroom use of the King James Bible was bitterly opposed by Catholics. *See Joan DeFattore, The Fourth R: Conflicts Over Religion in America’s Public Schools* 46-49 (2007) (describing Catholic opposition to the King James Version of the Ten Commandments in Massachusetts schools).

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text by altering its meaning and obscuring or erasing its Jewish significance, and (3) then mandates the display of the altered text to non-Jews, in violation of core Jewish tenets that oppose proselytizing.” Another Jewish parent insists on the unique importance of the first commandment for Jews. Louisiana’s version omits a “key piece of the Ten Commandments and of the Jewish story”—that is, the deliverance of Jews from slavery in Egypt, after which the God of Israel entered into his contractual relationship, through the Decalogue, with his chosen people.⁷

The same violation is inflicted on plaintiffs and amici who ascribe to other Abrahamic faiths. For example, one Presbyterian minister and parent plaintiff explains how Louisiana’s “stamp of approval” for a specific version of the Ten Commandments “sends the message” to him, his children, and his community “that people of some religious denominations or faith systems are superior to others”

7. These competing versions of the Decalogue are temporally and theologically incompatible—even if the King James Version is philologically ecumenical—with the Christian eisegesis of the Hebrew Bible as anticipating the messiahship of Jesus. As Rabbi Mara Nathan, a plaintiff in this case’s Texas companion, criticizes, the Protestant text is nowhere “found in Jewish tradition. It is a Christianized version of the Commandments that omits explicitly Jewish aspects of scripture. For example, in Judaism, the sacredness of the Commandments is rooted in the Jewish belief that, at Mount Sinai, Moses entered into a covenant with God on behalf of the children of Israel after they were freed from slavery. The Ten Commandments are a sign of the covenant between God and Jewish people. The text of the first Commandment required by [Texas’s equivalent law] erases this foundational Jewish tenet and historical context.”

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and conveys a state-endorsed “religious hierarchy.” Likewise, a group of Baptist, Evangelical Lutheran, and United Church of Christ amici notes that there “is no singular, universally accepted version of the Ten Commandments.” See *En Banc Brief of Amicus Curiae Baptist Joint Committee for Religious Liberty, et al.* at 28 (No. 24-30706).

Needless to say, any child who adheres to a non-Abrahamic faith—such as Hindus and Buddhists—who may not believe in one divine lawgiver, or one creator god, or in revealed religion at all, will look all day at a religious perplexity, contrary to their parents’ teachings and their own religious beliefs. *Contra Mahmoud v. Taylor*, 606 U.S. 522, 530, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025).⁸ That is why a coalition of over thirty religious organizations describes how the Decalogue is “inconsistent” with many faith traditions, such as by “openly forbid[ing] the practice” of polytheistic religions. See *En Banc Brief of Amicus Curiae National Council of Jewish Women, et al.* at 19-21 (No. 24-30706).

As James Madison warned presciently, government attempts to “employ Religion as an engine of Civil policy”

8. As the Supreme Court made clear in *Mahmoud*, “A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses a very real threat of undermining the religious beliefs and practices that the parents wish to instill. And a government cannot condition the benefit of free public education on parents’ acceptance of such instruction.” 606 U.S. at 530, 145 S.Ct. 2332 (internal quotation marks and citations omitted).

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are “an unhallowed perversion of the means of salvation.”⁹ Yet, today, the court majority permits Louisiana to do just that. H.B. 71 displaces parents and churches as belief-givers. *Contra Mahmoud*, 606 U.S. at 537, 145 S.Ct. 2332 (“The practice of educating one’s children in one’s religious beliefs, like all religious acts and practices, receives a generous measure of protection from our Constitution.”); *id.* at 559, 145 S.Ct. 2332 (rejecting the “chilling vision of the power of the state to strip away the critical right of parents to guide the religious development of their children”). It puts the Establishment Clause in friction with the Free Exercise Clause. *Contra Kennedy*, 597 U.S. at 532-36, 142 S.Ct. 2407 (describing the “complementary” purposes of the two religion clauses). And, differently corrosive, it risks pitting religions against each other—an evil the Framers sought to protect against when they wrote into the original Constitution the No Religious Test Clause

9. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in 5 *The Founders’ Constitution* 82, 83 (Philip B. Kurland & Ralph Lerner eds., 1987); see also Michael W. McConnell, *No More (Old) Symbol Cases*, 2018-2019 *Cato Sup. Ct. Rev.* 91, 97 (noting that attempts to “interject” religious symbols “as a type of religious identity politics” offend “religious believers because they politicize religion”). Albeit with neither this historical nor scholarly pedigree, I continue to think that “[f]aith is demeaned and enfeebled when government enforces it. The reason is as old as the First Amendment and rooted in common sense: ‘ecclesiastical establishments’ weaken belief in the ‘innate excellence’ of religion and strengthen the ‘suspicion’ of nonbelievers.” *Freedom from Religion Found., Inc. v. Mack*, 54 F.4th 320, 324 (5th Cir. 2022) (Higginson, J., dissenting from denial of rehearing en banc) (citation omitted).

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disestablishment imperative. *See* U.S. Const., art. VI § 3.¹⁰

10. As Edmund Randolph famously explained at Virginia’s ratifying convention, the No Religious Test Clause’s fundamental purpose was to “put[] all sects on the same footing.” 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 204 (Jonathan Elliot ed., 2d ed. 1836); *see also* *Murphy v. Collier*, 587 U.S. 901, 901, 139 S.Ct. 1475, 203 L.Ed.2d 633 (2019) (Kavanaugh, J., concurring) (“The government may not discriminate against religion generally or against particular religious denominations.”).

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IRMA CARRILLO RAMIREZ, *Circuit Judge*, joined by STEWART, DENNIS, GRAVES, HIGGINSON, and DOUGLAS, *Circuit Judges*, dissenting:

H.B. 71 mandates detailed minimum requirements for “when, where, [and] under what circumstances” the Ten Commandments shall be displayed in every Louisiana public-school classroom. Because the statute does not mandate the display of any other document, we are not required to “wait and see” the “nature” of a Ten Commandments display “in a particular classroom on a particular day” before evaluating Plaintiffs’ First Amendment claims. And Plaintiffs assert that H.B. 71 is unconstitutional in all applications regardless of what other materials may surround the Ten Commandments, so this case presents pure legal issues that require no additional factual development. Because this case is ripe, I respectfully dissent.

I

H.B. 71 states, in relevant part:

- (1) No later than January 1, 2025, each public school governing authority shall display the Ten Commandments in each classroom in each school under its jurisdiction. The nature of the display shall be determined by each governing authority with a minimum requirement that the Ten Commandments shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches. The text of the

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Ten Commandments shall be the central focus of the poster or framed document and shall be printed in a large, easily readable font.

(2) The text shall read as follows:

“The Ten Commandments
I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor’s house.

Thou shalt not covet thy neighbor’s wife,
nor his manservant, nor his maidservant, nor his cattle,
nor anything that is thy neighbor’s.”

LA. R.S. § 17:2124(B)(1)-(B)(2).

The Ten Commandments must be displayed with a “context statement” about the “History of the Ten Commandments in American Public Education.” *Id.*

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§ 17:2124(B)(3). H.B. 71 also states that schools “may” display “the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance . . . along with the Ten Commandments.” *Id.* § 17:2124(B)(4). But the statute does not *mandate* the display of any other documents along with the Ten Commandments.

Plaintiffs assert that H.B. 71 facially violates the First Amendment’s Establishment Clause and Free Exercise Clause.

II

Louisiana asserts that Plaintiffs’ claims are not ripe because they “seek to enjoin displays they have never seen and whose form and appearance have not yet been determined.”

“Ripeness doctrine ‘is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.’” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n.18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)). It is “peculiarly a question of timing.” *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). And its “basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

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“A court should dismiss a case for lack of ‘ripeness’ when the case is abstract or hypothetical.” *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987). “The ripeness inquiry hinges on two factors: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration.” *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 679 (5th Cir. 2022) (citation modified).

A

Louisiana argues that Plaintiffs have not met the first element of the ripeness inquiry—that their claims are fit for judicial decision.

1

“A matter is fit for review when it presents pure legal questions that require no additional factual development.” *Id.* Facial challenges that assert a law is unconstitutional in all applications present quintessential “pure question[s] of law.” See *United States v. Rafoi*, 60 F.4th 982, 996 (5th Cir. 2023) (“A facial challenge to the constitutionality of a statute presents a pure question of law. . . .”). “In the context of a facial challenge, a purely legal claim is presumptively ripe for judicial review. . . .” *Whole Woman’s Health v. Cole*, 790 F.3d 563, 591 (5th Cir. 2015) (quoting *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009)), *rev’d on other grounds sub nom.*, *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016). These claims generally “[do] not require a developed factual record.” *Id.* (quoting *Harris*, 564 F.3d at 1308).

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Here, Plaintiffs assert that H.B. 71 is facially unconstitutional under the First Amendment’s Establishment and Free Exercise Clauses. These are “pure question[s] of law.” *See Rafoi*, 60 F.4th at 996. Louisiana, however, asserts that additional factual development is required to resolve the legal issues presented because “the *context* in and around the posters” is unknown and variable, given that no H.B. 71 posters have yet been displayed.

a

In evaluating Establishment Clause claims concerning Ten Commandments displays, the Supreme Court has instructed that “focusing on the text of the Commandments alone cannot conclusively resolve [the] case. Rather, to determine the message that the text . . . conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.” *Van Orden v. Perry*, 545 U.S. 677, 701, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in the judgment).

In *Van Orden*, the Supreme Court considered an Establishment Clause challenge to a singular display of the Ten Commandments on Texas State Capitol grounds. *Id.* at 681, 125 S.Ct. 2854 (plurality opinion). The display was among “17 monuments and 21 historical markers,” and had been there for several decades before the plaintiff sued. *Id.* at 681-82, 125 S.Ct. 2854. The Supreme Court held the display was constitutional under the Establishment Clause. *Id.* at 681, 125 S.Ct. 2854.

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In so holding, the Court focused its analysis on the contextual differences between the display of the Ten Commandments on public grounds versus the display “on the grounds of a public school.” *See id.* at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment); *id.* at 690-91, 125 S.Ct. 2854 (plurality opinion) (distinguishing Establishment Clause cases involving religion in schools). It explained that the “*limits* to the display of religious messages or symbols” often arise in the “classroom context.” *Id.* at 690, 125 S.Ct. 2854 (emphasis added). In fact, the Supreme Court has *repeatedly* emphasized that the “classroom context,” *id.*, is *different* from cases involving a singular and discretionary display on public grounds. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (“As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”); *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary.”); *Mahmoud v. Taylor*, 606 U.S. 522, 554-55, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025) (“In other contexts, we have recognized the potentially coercive nature of classroom instruction of this kind. . . . Young children, like those of petitioners, are often impressionable and implicitly trust their teachers.” (citation modified)).¹

1. *See also McCreary County v. ACLU*, 545 U.S. 844, 908, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (Scalia, J., dissenting) (“If, as discussed above, the Commandments have a proper place in our

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The Court in *Van Orden* also acknowledged its holding in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam), that “a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom” was unconstitutional. 545 U.S. at 690, 125 S.Ct. 2854. As *Van Orden* emphasized, this was because the religious displays in *Stone* arose “in the context of public elementary and secondary schools,” where the “text confronted students every day.” *Id.* at 691, 125 S.Ct. 2854 (citation modified). *Van Orden* described *Stone* as an example of the Court’s “vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Id.* (quoting *Edwards*, 482 U.S. at 583-84, 107 S.Ct. 2573). And it specifically pointed out that “[t]he placement of the Ten Commandments monument on [public] grounds is a *far more passive use of those texts*

civic history, even placing them by themselves can be civically motivated—especially when they are placed, *not in a school* (as they were in the *Stone* case upon which the Court places such reliance), but in a courthouse.” (emphasis added)); *City of Elkhart v. Books*, 532 U.S. 1058, 1060-61, 121 S.Ct. 2209, 149 L.Ed.2d 1036, (2001) (REHNQUIST, C.J., dissenting) (“We have been particularly vigilant in monitoring compliance with the Establishment Clause in [the *Stone*] context, where the State exerts great authority and coercive power over students through mandatory attendance requirements.” (citation modified)); *Lee*, 505 U.S. at 643, 112 S.Ct. 2649 (SCALIA, J., dissenting) (“[O]ur school prayer cases turn in part on the fact that the classroom is inherently an instructional setting, and daily prayer there—where parents are not present to counter the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure—might be thought to raise special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children. . . . (citation modified)).

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than was the case in *Stone*.” *Id.* (emphasis added). As a result, *Van Orden* does not just make clear that context is important to the Establishment Clause inquiry in religious display cases. It also makes clear that the necessary context exists in cases involving a challenge to a statute that mandates permanent religious displays in public-school classrooms “where, given the impressionability of the young, government must exercise particular care in separating church and state.” *See id.* at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment).

b

Disputes arising under the Free Exercise Clause are likewise “fact-intensive.” *Mahmoud*, 606 U.S. at 550, 145 S.Ct. 2332.² But the Supreme Court has still warned that, “when a deprivation of First Amendment rights is at stake, a plaintiff need not wait for the damage to occur before filing suit.” *Id.* at 559-60, 145 S.Ct. 2332. In *Mahmoud*, the Supreme Court found a justiciable case where parents asserted pre-enforcement Free Exercise Clause challenges to a school board’s policy of not allowing elementary school students to opt out of instruction regarding “LGBTQ+-inclusive” storybooks. *Id.* at 537-43, 145 S.Ct. 2332. The school board did not contest that it would be “introducing the storybooks into classrooms, that it [was] requiring teachers to use them as part of

2. Louisiana only substantively addresses Plaintiffs’ Establishment Clause claims—largely ignoring their claims under the Free Exercise Clause. But ripeness is generally addressed “claim by claim.” *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 n.27 (5th Cir. 2021).

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instruction, and that it ha[d] encouraged teachers to approach classroom discussions in a certain way.” *Id.* at 560, 145 S.Ct. 2332. So, the parents had “undoubtedly” shown a certainly impending injury or a substantial risk of harm. *Id.* at 560, 145 S.Ct. 2332 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). The record was also not “too ‘threadbare’ to demonstrate a burden on [parents’] religious exercise.” *Id.* at 559, 145 S.Ct. 2332. The Court did “not need to ‘wait and see’ how a particular book [was] used in a particular classroom on a particular day before evaluating the parents’ First Amendment claims.” *Id.* at 560, 145 S.Ct. 2332. It “need[ed] only [to] decide whether—if teachers act[ed] according to the clear and undisputed instructions of the Board—a burden on religious exercise [would] occur.” *Id.*³

3. In discussing justiciability, the Supreme Court in *Mahmoud* did not make clear whether it was evaluating standing, ripeness, or both. It cited the well-established standing principle that “to pursue a pre-enforcement challenge, a plaintiff must show that ‘the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.’” *Mahmoud*, 606 U.S. at 560, 145 S.Ct. 2332 (quoting *Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334). But the Court also emphasized the necessity of a sufficiently developed “record,” *id.* at 559-60, 145 S.Ct. 2332, which generally concerns ripeness. See *New Orleans Pub. Serv., Inc.*, 833 F.2d at 587 (“[A] case is not ripe if further factual development is required.”). “The justiciability doctrines of ripeness and standing often intersect because the question of whether a plaintiff has suffered an adequate harm is integral to both.” *Prestage Farms, Inc. v. Bd. of Sup’rs of Noxubee Cnty.*, 205 F.3d 265, 268 n.7 (5th Cir. 2000). And *Mahmoud*’s justiciability holding is particularly on-point here, as both cases involve pre-enforcement First Amendment challenges where the asserted

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Here, H.B. 71 thoroughly outlines the mandatory religious displays. A state-selected Protestant version of the Ten Commandments is to be permanently displayed “in each classroom in each school”; “on a poster or framed document that is at least eleven inches by fourteen inches” where the text is the “central focus” and “printed in a large, easily readable font”; accompanied by a “context statement” regarding the “History of the Ten Commandments in American Public Education.” LA. R.S. § 17:2124(B)(1)-(3). The statute requires the display of no other materials.

The details provided by H.B. 71 are particularly germane to the constitutional inquiry in the “classroom context” in which this case arises, where the “text” will “confront[] . . . students every day.” *See Van Orden*, 545 U.S. at 690-91, 125 S.Ct. 2854; *see also Mahmoud*, 606 U.S. at 554, 145 S.Ct. 2332 (recognizing the uniquely “coercive nature of classroom instruction”). And they provide the information necessary to conduct a “fact-intensive and context-specific” analysis with respect to Plaintiffs’ Establishment Clause claims, *see Staley v. Harris Cnty.*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc), and to “decide whether—if teachers act according to the clear and undisputed instructions of [H.B. 71]—a burden on religious exercise will occur.” *See Mahmoud*, 606 U.S. at 560, 145 S.Ct. 2332.

harm is rooted in the religious coercion of students in public schools. *See Mahmoud*, 606 U.S. at 550, 553-54, 145 S.Ct. 2332.

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Because H.B. 71 provides sufficient information about the mandatory classroom religious displays, and requires no other materials to be displayed, “no additional factual development” is required to determine the statute’s facial invalidity. *See Gulfport Energy Corp.*, 41 F.4th at 679; *see also Mahmoud*, 606 U.S. at 559-60, 145 S.Ct. 2332 (finding that the record was not “too threadbare” to evaluate parents’ Free Exercise Clause claims regarding the use of LGBTQ+-inclusive storybooks in elementary schools, and that the Court did “not need to wait and see how a particular book is used in a particular classroom on a particular day before evaluating the parents’ First Amendment claims” (citation modified)). The dispute here is not “abstract or hypothetical.” *New Orleans Pub. Serv., Inc.*, 833 F.2d at 586. “[T]he court would be in no better position to adjudicate the issues in the future than it is now.” *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (quoting *Simmonds v. INS*, 326 F.3d 351, 359 (2d Cir. 2003)).

2

Louisiana primarily relies on *Staley* to argue that Plaintiffs’ claims are not fit for judicial decision. But *Staley* does not compel dismissal.

In *Staley*, the plaintiff challenged the refurbishment and rededication of a monument featuring a Bible, which had been displayed on county courthouse grounds for several decades. 485 F.3d at 307. A panel of this court concluded that, in “the specific context of the refurbishment and rededication of the monument, . . . the display of the Bible violated the Establishment Clause.”

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Id. This court granted rehearing en banc. *Id.* But shortly before en banc oral argument, the courthouse “closed for renovations” and was expected to “remain closed for a few years,” during which time the monument was to be “removed and placed in storage.” *Id.*

The en banc court stressed the “importance of facts and context” in religious display cases, which was “evident from the respective outcomes” in *Van Orden* and *McCreary*, both of which “address[ed] the constitutionality of Ten Commandments displays.” *Id.* at 308. Ultimately, the court held the case was “moot” because “[o]ut of sight in some warehouse, the monument no longer raise[d] the potential Establishment Clause violations that offended [the plaintiff].” *Id.* at 309. As to ripeness, it explained:

[A]ny dispute over a probable redisplay of the Mosher monument is not ripe because there are no facts before us to determine whether such a redisplay might violate the Establishment Clause. Indeed, no decision has been made regarding any aspect of the future display of the monument. In the absence of this evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*. Thus, any claim that the Establishment Clause may be violated after the Courthouse and grounds have been renovated, is not ripe for review.

Id. In other words, the case was not ripe because it was “not known when, where, or under what circumstance the monument and Bible [would] be restored. . . .” *Id.* at 307.

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First, this case is ripe for all of the reasons *Staley* was not. Although the monument in *Staley* was known in considerable detail, the court had “no facts” regarding “when, where, or under what circumstances” its redisplay would occur. *See id.* (emphasis added). In fact, the *Staley* court was uncertain if the monument would be redisplayed at all. *See id.* at 309. In discussing ripeness, the court characterized the redisplay as only “probable,” emphasizing that “no decision ha[d] been made regarding any aspect of the future display. . . .” *Id.* (emphasis added). As a result, the dispute was not ripe because it “rest[ed] upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Id.* (citation modified) (quoting *United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003)).

Here, H.B. 71 provides the precise details that were lacking in *Staley*—minimum requirements for “when, where, [and] under what circumstances” the Ten Commandments are to be displayed in all public-school classrooms:

- *What will be displayed?* The exact Protestant version of “the Ten Commandments” set out in the statute, LA. R.S. § 17:2124(B)(1)-(B)(2), which is quoted above;
- *How will it be displayed?* As “the central focus” of a “poster or framed document that is at least eleven inches by fourteen inches,” and “printed

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in a large, easily readable font,” along with the “context statement” also provided by the statute, *id.* § 17:2124(B)(1), (B)(3) (emphasis added);

- *When will it be displayed?* Every day of every schoolyear, beginning “[n]o later than January 1, 2025,” *id.* § 17:2124(B)(1);
- *Where will it be displayed?* In every Louisiana public-school classroom, regardless of class subject matter, student age, or student grade, where it can be seen by students,⁴ *id.*

Display in accordance with these minimum requirements is not “probable”—it is certain and mandatory under the statute. *See Staley*, 485 F.3d at 309.

b

Second, *Staley*’s emphasis on the “fact-intensive and context-specific analysis required” in Establishment Clause cases is derived from *Van Orden* and *McCreary*. *Id.* at 307-08. Like *Staley*, both cases concerned the display of religious materials on public grounds, but they resulted in different outcomes due to their “specific facts and context.” *Id.* at 308-09; *compare Van Orden*, 545 U.S.

4. To “display” something means “to place or spread (something) for people to see.” *Display*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/5YQK-NVUP>. The requirement that the Ten Commandments be “display[ed]” in each classroom and “be printed in a large, easily readable font,” LA. R.S. § 17:2124(B) (1), dictates that the posters be placed within students’ view.

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at 692, 125 S.Ct. 2854 (finding no Establishment Clause violation where the Ten Commandments were displayed at the Texas State Capitol), *with McCreary*, 545 U.S. at 881, 125 S.Ct. 2722 (finding an Establishment Clause violation where the Ten Commandments were displayed in two Kentucky courthouses). As discussed, *Van Orden* reveals that the “context” required by *Staley* is not as specific as any conceivable detail that may or may not surround a religious display. *See Van Orden*, 545 U.S. at 703, 125 S.Ct. 2854. Nor does *McCreary* require such specificity. *See McCreary*, 545 U.S. at 874, 125 S.Ct. 2722 (emphasizing only that “*purpose* needs to be taken seriously under the Establishment Clause and needs to be understood in light of context” (emphasis added)). Instead, the “limits to the display of religious messages or symbols” are exemplified in cases like *Stone*, where there are “particular concerns that arise in the context of public elementary and secondary schools.” *Van Orden*, 545 U.S. at 690-91, 125 S.Ct. 2854 (citation modified). Importantly, *Van Orden* focused on distinguishing displays of the Ten Commandments on public grounds and displays “on the grounds of a public school,” *id.* at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment)—the circumstances in *Van Orden* were “far more passive.” *Id.* at 691, 125 S.Ct. 2854 (plurality opinion).

Here, this court knows enough about the context of the H.B. 71 displays—the permanent display of the Ten Commandments, using minimum size and font requirements, with no requirement to display other materials, in *classrooms*—to evaluate the statute’s constitutionality.

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Third, unlike this case, *Staley* did not involve a *facial challenge* to a statute *mandating* a religious display. Rather, *Staley* and the cases it primarily relied on—*Van Orden* and *McCreary*—all involved singular, *discretionary* religious displays. Because H.B. 71 provides the “aspect[s] of the future display[s],” and because Plaintiffs assert purely legal facial challenges, this court has sufficient information to conduct the Establishment Clause inquiry described in *Staley*. *See* 485 F.3d at 309. And even if Plaintiffs’ Establishment Clause claims were unripe under *Staley* (they are not), that case does not shed light on the ripeness inquiry for claims asserted under the Free Exercise Clause—which Louisiana fails to substantively address at all. Those claims are ripe under *Mahmoud*.

3

Finally, Louisiana suggests that this case is not ripe because factual development about the potential variations among displays is necessary. These arguments are rooted in two H.B. 71 provisions: one expressly allowing certain documents to be displayed “along with the Ten commandments,” LA. R.S. § 17:2124(B)(4), and one allowing “each governing authority” to “determine[.]” the “nature of the display.” *Id.* § 17:2124(B)(1). Louisiana, however, ignores both the text of H.B. 71 and the nature of Plaintiffs’ *facial* claims.

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H.B. 71 does not mandate any display beyond the Ten Commandments and the context statement: § 17:2124(B) (4) states that schools “*may*”—*not shall*—display other documents, such as “the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance . . . along with the Ten Commandments.” *Id.* § 17:2124(B)(4). Even if H.B. 71 did not expressly allow schools to display other documents “along with the Ten Commandments,” *see id.*, the statute still would not prohibit the posting of other documents.⁵ And although § 17:2124(B)(1) allows schools to “determine[]” the “nature of the display,” the statute leaves little else to determine. Schools are required to permanently display as a “central focus” a state-selected version of the Ten Commandments on a “poster or framed document,” using minimum size and font requirements, accompanied by a specific context statement. *Id.* § 17:2124(B)(1)-(3). Section 17:2124(B)(4) and the portion of § 17:2124(B)(1) allowing schools to “determine[]” the “nature of the display” are not meaningful to the ripeness inquiry because H.B. 71 is, in effect, no different from a statute that does not include those provisions. It is no different, for example, from a similar statute passed in Texas. *See* TEX. EDUC. CODE

5. Louisiana’s own reading of the statute underscores this point. As evidenced by the numerous sample H.B. 71 displays the state cites, which include the Ten Commandments alongside quotes and pictures of prominent figures like Justice Ruth Bader Ginsburg, Martin Luther King Jr., and Lin Manuel Miranda portraying Alexander Hamilton, § 17:2124(B)(4) does not limit allowable documents to the Mayflower Compact, Declaration of Independence, and Northwest Ordinance, even though those are the only ones explicitly outlined in the statute.

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§ 1.0041 (requiring the display of the Ten Commandments in all public-school classrooms without any provision expressly allowing or prohibiting the display of other documents).

In fact, the Texas statute—Senate Bill 10 (S.B. 10)—is being challenged in a separate appeal, which we consolidated with this case for purposes of en banc oral argument only. *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. 25-50695 (5th Cir. 2025), Dkt. 90 (Oct. 31, 2025). Texas has maintained that S.B. 10 is substantively identical to H.B. 71, arguing it permits “innumerable ways that teachers could integrate Ten Commandments posters into the classroom, *including displaying them with material from other faiths or with contextualizing documents* such as the Declaration of Independence and the Northwest Ordinance.” Brief of Appellants at 20, *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. 25-50695 (5th Cir. Nov. 24, 2025) (emphasis added). In first remarks during oral argument, it stated: “Like Louisiana’s statute, Texas’s S.B. 10 violates neither the Establishment Clause nor the Free Exercise Clause, particularly in the facial challenge context. Although S.B. 10 does not require contextualization of the Ten Commandments, neither does it forbid providing context similar to that which Louisiana has suggested.”

Louisiana’s argument that the court must know what other materials *may* accompany each Ten Commandments poster to evaluate H.B. 71’s constitutionality also ignores the nature of Plaintiffs’ *facial* claims—that H.B. 71’s minimum requirements render it unconstitutional in *all*

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applications.⁶ Whether that is true goes to the merits of Plaintiffs’ claims—which is separate from the ripeness inquiry. Answering that question requires no further factual development. As the Supreme Court has made clear, this court does “not need to ‘wait and see’ how a particular [poster] is used in a particular classroom on a particular day before evaluating the parents’ First

6. To be clear, this case is not ripe merely because Plaintiffs assert facial challenges. It is ripe because H.B. 71, on its face, provides sufficient details about the mandatory classroom religious displays such that this court can evaluate the statute’s constitutionality. This case is not like *Texas v. United States*, 523 U.S. 296, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998), which—although a declaratory action—did not concern a facial challenge comparable to the one presented here. Rather, in that case, Texas sought a declaration that a particular provision of a state statute, which outlined potential sanctions for school boards failing to satisfy certain accreditation criteria, was not implicated by § 5 of the Voting Rights Act of 1965. *Texas*, 523 U.S. at 298-99, 118 S.Ct. 1257. In holding that the case was not ripe, the Supreme Court emphasized the uncertainty surrounding whether the sanctions contemplated by the state statute would be ordered in the first place. *Id.* at 300, 118 S.Ct. 1257. And even if the Court had “greater certainty,” it stated that the case would not be fit for judicial decision because Texas sought a holding that “under no circumstances [could] the imposition of these sanctions constitute a change affecting voting”—which the Court did not have “sufficient confidence” to determine. *Id.* at 301, 118 S.Ct. 1257. Here, on the other hand, the display of the Ten Commandments in accordance with H.B. 71 is not just “currently foreseen or even likely”—it is inevitable and mandatory. *See id.* at 300, 118 S.Ct. 1257. This certainty, along with the detailed minimum requirements provided by H.B. 71, gives this court enough information to resolve the question of H.B. 71’s facial invalidity using settled Establishment and Free Exercise Clause principles.

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Amendment claims.” *See Mahmoud*, 606 U.S. at 560, 145 S.Ct. 2332.⁷ We “need only decide whether—if teachers act according to the clear and undisputed instructions of [H.B. 71]—a burden on religious exercise” or an Establishment Clause violation “will occur.” *See id.*

* * *

The minimum requirements of H.B. 71 specify the contents of the Ten Commandments displays as well as “when, where, [and] under what circumstances” they will be presented. *See Staley*, 485 F.3d at 307. Because Plaintiffs’ facial claims present “pure question[s] of law,” *see Rafoi*, 60 F.4th at 996, that require “no additional factual development,” *see Gulfport Energy Corp.*, 41 F.4th at 679, this case is fit for judicial decision.

7. Louisiana points to its numerous hypothetical H.B. 71 displays that incorporate the Ten Commandments among other documents. Setting aside the assumption that these sample displays are H.B. 71-compliant and constitutional, which is not readily apparent, *Mahmoud* rejects the premise of the state’s argument. As discussed, this court need not wait and see how the Ten Commandments posters are used in a particular classroom on a particular day to evaluate Plaintiffs’ facial challenge. *See Mahmoud*, 606 U.S. at 560, 145 S.Ct. 2332. Instead, where, as here, the court can ascertain what the posters *must* look like under H.B. 71, it need not and should not consult hypothetical displays to address the legal issues presented. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (“In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.”).

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Louisiana does not contest the second element of the ripeness inquiry, i.e., whether the parties will suffer hardship should this court withhold consideration. This factor does not warrant short shrift.

Plaintiffs demonstrate hardship where they “show[] the real possibility of irreparable adverse consequences were [the court] to deny review.” *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). That is why the Supreme Court has made clear that “when a deprivation of First Amendment rights is at stake, a plaintiff need not wait for the damage to occur before filing suit.” *Mahmoud*, 606 U.S. at 559-60, 145 S.Ct. 2332.

Here, Plaintiffs assert that H.B. 71 violates their rights under the Establishment and Free Exercise Clauses. They allege that, despite “not subscrib[ing] to the state’s official version of the Ten Commandments,” they “will be pressured into religious observance, veneration, and adoption of this religious scripture” and “will feel pressure to avoid fully expressing or practicing their own faiths and religious beliefs or non-religious beliefs. . . .” The parent-Plaintiffs also assert that H.B. 71 will usurp their role in directing their children’s religious education, values, and upbringing. *See Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 486, 140 S.Ct. 2246, 207 L.Ed.2d

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679 (2020) (“[W]e have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972))).

This is not a case in which “the plaintiffs [will] suffer no concrete harm from the challenged policy itself, which does not require them to do anything or to refrain from doing anything.” *Trump v. New York*, 592 U.S. 125, 134, 141 S.Ct. 530, 208 L.Ed.2d 365 (2020) (citation modified). In this public-school context, “denying prompt judicial review would impose a substantial hardship on [Plaintiffs], forcing them to choose between” sending students to public school and facing a burden on their First Amendment rights, incurring the cost of sending their children to private schools,⁸ or avoiding school and “risking costly [fines] and criminal prosecution” under Louisiana’s compulsory attendance laws. *See Susan B. Anthony*, 573 U.S. at 167-68, 134 S.Ct. 2334; *see also* LA. R.S. §§ 17:154.1(A)(1), 17:221(A)(1)-(2).

III

Because Plaintiffs’ claims are ripe, for the reasons already explained by the panel, I would hold that Plaintiffs

8. The “availability” of private or home schooling “is no answer to the parents’ First Amendment objections.” *See Mahmoud*, 606 U.S. at 561, 145 S.Ct. 2332. “Public education is a public benefit, and the government cannot ‘condition’ its ‘availability’ on parents’ willingness to accept a burden on their [First Amendment rights].” *See id.* (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017)).

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have standing to assert their Establishment Clause claims, that they have plausibly alleged those claims, that they are likely to succeed on the merits of those claims, and that the remaining preliminary injunction factors are satisfied. *See Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025), *reh'g en banc granted, opinion vacated*, 154 F.4th 329 (5th Cir. 2025). I respectfully dissent.

**APPENDIX B — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT,
FILED JUNE 20, 2025**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-30706

DARCY ROAKE, REVEREND, ON BEHALF
THEMSELVES AND ON BEHALF OF THEIR
MINOR CHILDREN, REAL PARTY IN INTEREST
A.V., REAL PARTY IN INTEREST S.V.; ADRIAN
VAN YOUNG, ON BEHALF OF THEMSELVES
AND ON BEHALF OF THEIR MINOR CHILDREN,
REAL PARTY IN INTEREST A.V., REAL PARTY
IN INTEREST S.V.; MAMIE BROADHURST,
REVEREND, ON BEHALF OF THEMSELVES
AND ON BEHALF OF THEIR MINOR CHILD,
REAL PARTY IN INTEREST N.W.; RICHARD
WILLIAMS, REVEREND, ON BEHALF OF
THEMSELVES AND ON BEHALF OF THEIR
MINOR CHILD, REAL PARTY IN INTEREST
N.W.; JEFF SIMS, REVEREND, ON BEHALF OF
HIMSELF AND ON BEHALF OF HIS MINOR
CHILDREN, REAL PARTY IN INTEREST A.S.,
REAL PARTY IN INTEREST C.S. 1, REAL PARTY
IN INTEREST C.S. 2; JENNIFER HARDING, ON
BEHALF OF THEMSELVES AND ON BEHALF
OF THEIR MINOR CHILD, REAL PARTY IN
INTEREST A.O.; BENJAMIN OWENS, ON BEHALF
OF THEMSELVES AND ON BEHALF OF THEIR
MINOR CHILD, REAL PARTY IN INTEREST A.O.;

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DAVID HAWLEY, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN REAL PARTY IN INTEREST A.H., REAL PARTY IN INTEREST L.H.; ERIN HAWLEY, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, REAL PARTY IN INTEREST A.H, REAL PARTY IN INTEREST L.H.; DUSTIN MCCRORY, ON BEHALF OF THEMSELVES AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST E.M.; REAL PARTY IN INTEREST P.M., REAL PARTY IN INTEREST L.M.; GARY SERNOVITZ, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST T.S.; MOLLY PULDA, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD. REAL PARTY IN INTEREST T.S.; CHRISTY ALKIRE, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, REAL PARTY IN INTEREST L.A.; JOSHUA HERLANDS, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST E.H., REAL PARTY IN INTEREST J.H.,

Plaintiffs-Appellees,

v.

CADE BRUMLEY, IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE SUPERINTENDENT OF EDUCATION; CONRAD APPEL, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE

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LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION (LSBESE); JUDY ARMSTRONG, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; KEVIN BERKEN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; PRESTON CASTILLE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; SIMONE CHAMPAGNE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; SHARON LATTEN-CLARK, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; LANCE HARRIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; PAUL HOLLIS, LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; SANDY HOLLOWAY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; STACEY MELERINE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; RONNIE MORRIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; EAST BATON ROUGE PARISH SCHOOL BOARD; LIVINGSTON PARISH SCHOOL BOARD; VERNON PARISH SCHOOL BOARD; ST. TAMMANY PARISH SCHOOL BOARD,

Defendants-Appellants.

Filed June 20, 2025

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:24-CV-517

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Before Dennis, Haynes, and Ramirez, *Circuit Judges*.

Irma Carrillo Ramirez, *Circuit Judge*:

Parents and students challenge a statute requiring public schools to permanently display the Ten Commandments in every classroom in Louisiana. The district court found the statute facially unconstitutional and preliminarily enjoined its enforcement. We AFFIRM.

I

A

The Louisiana governor signed House Bill 71, Act. No. 676 (H.B. 71) into law in June 2024. In pertinent part, it provides:

- (1) No later than January 1, 2025, each public school governing authority shall display the Ten Commandments in each classroom in each school under its jurisdiction. The nature of the display shall be determined by each governing authority with a minimum requirement that the Ten Commandments shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches. The text of the Ten Commandments shall be the central focus of the poster or framed document and shall be printed in a large, easily readable font.

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(2) The text shall read as follows:

“The Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor’s house.

Thou shalt not covet thy neighbor’s wife,
nor his manservant, nor his maidservant, nor his cattle,
nor anything that is thy neighbor’s.”

La. R.S. § 17:2124(B)(1)-(B)(2).

The Ten Commandments¹ must be displayed with a “context statement” about the “History of the Ten

1. Plaintiffs’ complaint alleges that H.B. 71 adopts a Protestant version of the Ten Commandments. Their expert agreed: “[I]t is my expert opinion that the version of the Ten Commandments adopted under H.B. 71 is Protestant and *not* nondenominational.” Louisiana offered no rebuttal.

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Commandments in American Public Education,”² and “may” be displayed with “the Mayflower Compact, the Declaration of Independence, and the Northwest

2. The “context statement” reads:

The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1688, *The New England Primer* became the first published American textbook and was the equivalent of a first grade reader. *The New England Primer* was used in public schools throughout the United States for more than one hundred fifty years to teach Americans to read and contained more than forty questions about the Ten Commandments.

The Ten Commandments were also included in public school textbooks published by educator William McGuffey, a noted university president and professor. A version of his famous *McGuffey Readers* was written in the early 1800s and became one of the most popular textbooks in the history of American education, selling more than one hundred million copies. Copies of the *McGuffey Readers* are still available today.

The Ten Commandments also appeared in textbooks published by Noah Webster in which were widely used in American public schools along with America’s first comprehensive dictionary that Webster also published. His textbook, *The American Spelling Book*, contained the Ten Commandments and sold more than one hundred million copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

Id. § 17:2124(B)(3).

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Ordinance.” *Id.* § 17:2124(B)(3)-(B)(4). Public school governing authorities are not required to pay for the displays. Instead, they can “accept donated funds to purchase the displays” or “accept donated displays.” *Id.* § 17:2124(B)(5). H.B. 71 tasks the Louisiana Board of Elementary and Secondary Education (BESE) with adopting rules and regulations to ensure the statute’s “proper implementation.” *Id.* § 17:2124(B)(6)(a). H.B. 71 also applies to postsecondary institutions. *See id.* § 17:2124(C)(1).

H.B. 71 includes several legislative findings and a declaration of legislative intent, which, in relevant part, provide:

- (4) Recognizing the historical role of the Ten Commandments accords with our nation’s history and faithfully reflects the understanding of the founders of our nation with respect to the necessity of civic morality to a functional self-government. . . .
- (5) Including the Ten Commandments in the education of our children is part of our state and national history, culture, and tradition.
- (6) The text of the Ten Commandments set forth in Subsection B of this Section is identical to the text of the Ten Commandments monument that was upheld by the Supreme Court . . . in *Van Orden v. Perry*, 545 U.S. 677, 688, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005).

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...

(9) It is the Legislature’s intent to apply the decision set forth by the Supreme Court . . . in *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), to continue the rich tradition and ensure that the students in our public schools may understand and appreciate the foundational documents of our state and national government.

Id. § 17:2124(A)(4)-(A)(9).

B

On June 24, 2024, a group of multi-faith and non-religious Louisiana parents³ brought suit on their own behalf (Parents) and on behalf of their minor children (Students) (collectively, Plaintiffs), challenging the constitutionality of H.B. 71 under the Establishment Clause and Free Exercise Clause of the First Amendment. They sued Cade Brumley, who is the Louisiana State Superintendent of Education (Superintendent), several

3. Plaintiffs subscribe to a wide range of religious and non-religious views including Unitarian Universalism, Judaism, Reform Judaism, Presbyterian Christianity, atheism, non-religiousness, and agnostic atheism. Plaintiffs allege that the Protestant version of the Ten Commandments set out in H.B. 71 differs from the version observed by most adherents of the Catholic and Jewish faiths. They further allege that many other religions do not regard the commandments as part of their belief system at all.

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BESE members in their official capacities, and five parish school boards (collectively, Louisiana).⁴ After filing their complaint, Plaintiffs moved for preliminary injunctive relief, and proffered the expert report of Dr. Steven K. Green, a law professor and constitutional and religious historian. Dr. Green's report concluded that there is no evidence of a longstanding historical tradition of permanently displaying the Ten Commandments in public school classrooms.

Louisiana moved to exclude Dr. Green's expert testimony, moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), opposed the preliminary injunction, and alternatively moved to stay the injunction pending appeal. It argued that Plaintiffs' claims were unripe, Plaintiffs lacked standing, and the Superintendent and the BESE-member defendants were entitled to sovereign immunity, and it challenged the merits of Plaintiffs' First Amendment claims.

After a hearing, the district court denied Louisiana's motions and issued a preliminary injunction. The

4. Plaintiffs sued East Baton Rouge Parish School Board, Livingston Parish School Board, Vernon Parish School Board, St. Tammany Parish School Board, and Orleans Parish School Board. Because Orleans Parish School Board is not a party to this appeal and independently moved to dismiss the complaint and opposed the preliminary injunction before the district court, "Louisiana" refers to all the defendants, excluding the Orleans Parish School Board. We held the Orleans Parish School Board's appeal in abeyance pending our resolution of this appeal. *See* Abeyance Order, *Orleans Par. Sch. Bd. v. Brumley*, No. 24-30779 (5th Cir. Dec. 19, 2024), Dkt. No. 11.

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preliminary injunction prohibited Louisiana from enforcing H.B. 71.⁵ The court also ordered the Superintendent and the BESE-member defendants to provide notice of its ruling to all Louisiana public schools.

Louisiana appeals the entry of a preliminary injunction and the denial of its motion to dismiss and motion to exclude Plaintiffs' expert testimony.

II

This court has jurisdiction to review “final decisions” under 28 U.S.C. § 1291 and interlocutory orders under 28 U.S.C. § 1292(a)(1). A preliminary injunction is an appealable interlocutory order. *See* 28 U.S.C. § 1292(a)(1). Ordinarily, the denial of a motion to dismiss is not an appealable final decision under § 1291 as it is “neither a ruling on the merits nor an effective termination of all or any discrete part of the district court proceedings.” *Save the Bay, Inc. v. U.S. Army*, 639 F.2d 1100, 1103 (5th Cir. 1981) (per curiam). “But to the extent the underpinnings of [Louisiana’s] motion [to dismiss] are inextricably intertwined with the district court’s subsequent rulings challenged on appeal, . . . we have jurisdiction to address those issues.” *Jiao v. Xu*, 28 F.4th 591, 596 (5th Cir. 2022).

Louisiana opposed the preliminary injunction on the same grounds asserted in its motion to dismiss, and

5. Because H.B. 71 would have gone into effect on January 1, 2025, La. R.S. § 17:2124(B)(1), if the preliminary injunction were vacated, the statute would go into effect immediately.

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the district court ruled on the motions simultaneously. Accordingly, we have jurisdiction over those rulings.

III

Louisiana challenges the denial of its motion to dismiss for lack of subject matter jurisdiction, contending that the district court lacked subject matter jurisdiction based on ripeness, standing, and sovereign immunity.

We review the denial of a motion to dismiss for lack of subject matter jurisdiction *de novo*. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). Plaintiffs, as “the party asserting jurisdiction,” bear the burden of proof. *Id.*

A

“A court should dismiss a case for lack of ‘ripeness’ when the case is abstract or hypothetical.” *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987)). To assess ripeness, courts evaluate “(1) ‘the fitness of the issues for judicial decision[,]’ and (2) ‘the hardship to the parties of withholding court consideration.’” *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm’n*, 70 F.4th 914, 930 (5th Cir. 2023) (quoting *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)).

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1

On the first prong, “a claim is ‘fit for judicial decision’ if it presents a pure question of law that needs no further factual development.” *Braidwood Mgmt.*, 70 F.4th at 930 (citing *New Orleans Pub. Serv.*, 833 F.2d at 586-87). This means that a claim is ripe so long as it is not “contingent [on] future events that may not occur as anticipated, or indeed may not occur at all.” *Book People, Inc. v. Wong*, 91 F.4th 318, 333 (5th Cir. 2024) (alteration in original) (quoting *Braidwood Mgmt.*, 70 F.4th at 930).

Louisiana is wrong that further factual development is needed in this case. Citing *Staley v. Harris County*, 485 F.3d 305 (5th Cir. 2007) (en banc), Louisiana argues that Plaintiffs’ claims are not fit for judicial decision because Plaintiffs have not yet encountered an H.B. 71 poster—they do not know what any given display will look like, what context may accompany the Ten Commandments, or where in any specific classroom a display may be placed. *Staley* provides no support.

Staley concerned the constitutionality of a monument displaying a Christian Bible at a county courthouse in Texas. 485 F.3d at 307. A panel of this court held that displaying the monument violated the Establishment Clause, but days before the case would be reheard en banc, the courthouse placed the monument in storage. *Id.* Our en banc court held that “any dispute over a probable redisplay of the . . . monument [was] not ripe because there [were] no facts before [it] to determine whether such a

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redisplay might violate the Establishment Clause.” *Id.* at 309. “In the absence of this evidence,” the en banc court determined it was “unable to conduct the fact-intensive and context-specific analysis” required in Establishment Clause jurisprudence. *Id.*

Plaintiffs’ lawsuit targets H.B. 71’s minimum requirements, which reflect “when, where, or under what circumstance[s]” the Ten Commandments are to be displayed. *Id.* at 307.

- *What will be displayed?* “The text of the Ten Commandments”—the exact Protestant version of which is provided by the statute, La. R.S. § 17:2124(B)(1)-(B)(2);
- *How will it be displayed?* As “the *central focus*” of a “poster or framed document that is *at least* eleven inches by fourteen inches,” and “*printed in a large, easily readable font,*” along with a “context statement,” also provided by the statute, *id.* § 17:2124(B)(1), (B)(3) (emphases added);
- *When will it be displayed?* “No later than January 1, 2025,” and for the duration of the entire school year, *id.* § 17:2124(B)(1);
- *Where will it be displayed?* In every Louisiana public school classroom, regardless of class subject

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matter, student age, or student grade, somewhere that it can be seen by students,⁶ *id*;

- *Why will it be displayed?* Purportedly for historical reasons, *see id.* § 17:2124(A)(9).

This case is not like *Staley* where “no decision ha[d] been made regarding *any aspect* of the future display of the [stored] monument.” 485 F.3d at 309 (emphases added). The text of H.B. 71 provides sufficient information for a fact-intensive and context-specific analysis. Plaintiffs’ claims are fit for judicial decision; the first ripeness prong is satisfied.

2

On the second ripeness prong, Plaintiffs have shown hardship should we withhold court consideration.

“The Supreme Court has found hardship to inhere in legal harms, such as the harmful creation of legal rights

6. Notably, Louisiana does not suggest that there is a possibility that the displays may not be seen by students. During oral argument, Louisiana argued that “there is a fundamental difference between, for example, an 11-inch by 14-inch poster in the back corner of a classroom, and an 11-foot by 14-foot poster in the front wall of the classroom.” To “display” something means “to place or spread (something) for people to see.” *Display*, Merriam-Webster Dictionary, <https://perma.cc/955S-KS6N>. Because H.B. 71 requires that the Ten Commandments be “display[ed]” in each classroom and “be printed in a large, easily readable font,” La. R.S. § 17:2124(B)(1), the statutory text dictates that the posters be placed within students’ view.

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or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being ‘force[d] . . . to modify [one’s] behavior in order to avoid future adverse consequences.’” *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (alterations in original) (quoting *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007)). Whether the challenged statute or regulation “inflicts significant practical harm upon the interests that [Plaintiffs] advance[.]” is “an important consideration.” *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733-34, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

Here, Plaintiffs allege that the displays violate their rights under the First Amendment’s Establishment Clause. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Absent judicial intervention, Louisiana will implement H.B. 71. As a result, Students will be subjected to displays that accord with the statute’s minimum display requirements, in every classroom during every school day. H.B. 71 therefore inflicts significant practical harm on Plaintiffs’ First Amendment rights. *See id.*; *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 486, 140 S.Ct. 2246, 207 L.Ed.2d 679 (2020) (recognizing “the rights of parents to direct ‘the religious upbringing’ of their children” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972))). Plaintiffs have demonstrated that there is hardship in withholding consideration sufficient to “justify judicial intervention.” *See Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (“[T]he ripeness inquiry focuses on whether an injury

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that has not yet occurred is sufficiently likely to happen to justify judicial intervention.” (alteration in original) (citation omitted); *Braidwood Mgmt.*, 70 F.4th at 931-32 (“[L]itigants are entitled to relief where they “remain under a constant threat” that government officials will use their power’ to enforce the law against them. Therefore, plaintiffs’ claims are ripe.” (footnote omitted)).

Plaintiffs’ claims are ripe; the district court did not err.

B

Louisiana next challenges whether Plaintiffs have standing to press their Establishment Clause claim, focusing on the injury-in-fact element.

To establish Article III standing, a plaintiff must show “an injury in fact” that is “fairly traceable to the challenged action” and “redress[able] by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citation modified). The injury-in-fact element “ensure[s] that the plaintiff has a ‘personal stake in the outcome of the controversy.’” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Accordingly, “an injury must be ‘concrete, particularized, and actual or imminent.’” *Clapper v.*

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Amnesty Int’l USA, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citation omitted).⁷

1

Louisiana’s argument that Plaintiffs lack standing to press their Establishment Clause claims is two-fold: First, it argues that in cases involving religious displays, allegations of future encounters are insufficient for purposes of establishing standing. Second, citing non-binding, minority-view Supreme Court opinions, it contends that the “offended observer standing” doctrine is “profoundly wrong” and urges that we overturn our “offended observer” precedent. We address each argument in turn.

7. Although Louisiana only challenges this element, we must still ensure the other standing requirements are satisfied. *See Lujan*, 504 U.S. at 559, 112 S.Ct. 2130 (“[The Constitution] limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’”). The district court found that Plaintiffs’ alleged injuries were traceable to the action of each defendant because the BESE-member defendants are required to “adopt rules and regulations . . . to ensure the proper implementation” of H.B. 71, La. R.S. § 17:2124(B)(6)(a), and the Superintendent is required to “[i]mplement the policies and programs of the board and the laws affecting schools under the jurisdiction of the board,” *id.* § 17:22(3). The district court found redressability because “it is highly likely” that Plaintiffs’ alleged injuries would be remedied by an injunction prohibiting the display of the Ten Commandments as required by H.B. 71 and implementation of rules regarding the displays. We find no error.

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Parts of the Ten Commandments include basic principles regarding criminal conduct that are part of a civilized society, such as the prohibition against murder. However, they come from religious texts and include commandments that have clear religious import, such as requiring worship of one God and keeping the Sabbath holy. Their display in public school classrooms, as required by H.B. 71, qualifies as a religious display.

Unwanted exposure to government-sponsored religious displays and exercises can, under certain circumstances, violate a plaintiff's First Amendment rights. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (examining the constitutionality of a Nativity scene displayed in a shopping center during the holiday season); *County of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter*, 492 U.S. 573, 598-602, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (permanently enjoining a county from displaying a Nativity scene in the county courthouse, but permitting a menorah to be displayed outside of a county building), *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (holding unconstitutional student-led and student-initiated prayer announced over the speaker system before football games). Because "government speech must comport with the Establishment Clause," *Pleasant*

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Grove City v. Summum, 555 U.S. 460, 468, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), “Establishment Clause injury can occur when a person encounters the Government’s endorsement of religion.” *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017); *see e.g., Murray v. City of Austin*, 947 F.2d 147, 151-52 (5th Cir. 1991) (finding standing to challenge religious insignia where plaintiff encountered insignia on utility bill); *Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941, 949-50 (5th Cir. 2022) (finding standing where plaintiff had an “ongoing confrontation” with prayer ceremony in courtroom).

Confrontation with a religious display or exercise satisfies the injury-in-fact requirement of standing only if the plaintiff can “identify [a] personal injury suffered by [the plaintiff] as a consequence of the alleged constitutional error.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *see Barber v. Bryant*, 860 F.3d 345, 353 (5th Cir. 2017) (“A plaintiff has standing to challenge a religious display where his stigmatic injury results from a ‘personal[] confront[ation]’ with the display.” (alterations in original) (citation omitted)). This means that alleging a confrontation, alone, is insufficient. Naked allegations that the Constitution has been violated are also insufficient. *Valley Forge*, 454 U.S. at 485-86, 102 S.Ct. 752. Rather, in Establishment Clause cases, the injury is being “personally exposed” to a *government’s* religious message “with which [a plaintiff] disagrees, or . . . has had to assume a burden to avoid.” Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing & the Establishment Clause*, 7 Charleston L.

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Rev. 607, 633 (2013); *Id.* at 637 (“A conflict between belief and message is the basis of adversity between plaintiff and her government where the basic problem is government taking sides on a religious question.”); *see e.g., Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 211-12, 224 n.9, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (atheist family and Unitarian family had standing to challenge statute requiring that the Holy Bible and Lord’s Prayer be read at the start of school day); *Lee v. Weisman*, 505 U.S. 577, 599, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (“The sole question presented is whether [under the Establishment Clause] a religious exercise may be conducted at a graduation ceremony in circumstances where . . . young graduates who object are induced to conform.”). And in the public school context, a government’s injurious religious message “carr[ies] a particular risk of indirect coercion.” *Lee*, 505 U.S. at 592, 112 S.Ct. 2649; *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (discussing “the sensitive relationship between government and religion in the education of our children” and noting that “[t]he government’s activities in this area can have a magnified impact on impressionable young minds”), *overruled on other grounds by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

ii

“An allegation of future injury may suffice [to satisfy Article III] if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.” *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334 (internal

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quotation marks and citation omitted); *accord. Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (“But ‘[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” (alteration in original) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923), *aff'd*, 263 U.S. 350, 44 S.Ct. 123, 67 L.Ed. 1144 (1923))); *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (“[W]e have repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact. . . .”); *Dep’t of Com. v. New York*, 588 U.S. 752, 767, 139 S.Ct. 2551, 204 L.Ed.2d 978 (2019) (holding States had standing to bring action based on “primarily future injuries”); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024) (“Moreover, the injury must be actual or imminent . . . meaning that the injury must have already occurred *or be likely to occur soon*.” (emphasis added)). So, too, can allegations of future confrontations satisfy the injury-in-fact element of standing. This is particularly true when a plaintiff seeks prospective relief. *See All. for Hippocratic Med.*, 602 U.S. at 381, 144 S.Ct. 1540.

In *School District of Abington Township v. Schempp*, the Supreme Court invalidated two statutes requiring that Bible verses be read to students over the school’s intercommunications system at the start of every school day. 374 U.S. 203, 83 S.Ct. 1560. Students were “asked to stand and join in repeating the prayer in unison,” but could excuse themselves either by stepping out of the classroom or simply not participating upon a parent’s

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written request. *Id.* at 207, 83 S.Ct. 1560. Finding that the plaintiffs had standing to challenge the statutes under the Establishment Clause, the Supreme Court said:

It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

Id. at 224 n.9, 83 S.Ct. 1560 (citations omitted). The Court explained that “[t]he plaintiffs in *Schempp* had standing, not [merely] because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.” *Valley Forge*, 454 U.S. at 486 n.22, 102 S.Ct. 752; *see also Lee*, 505 U.S. at 584, 112 S.Ct. 2649 (finding a “live and justiciable controversy” based on an alleged future injury where the plaintiff challenging a policy permitting clergy members to pray during middle and high school graduations was enrolled at a school where it was “likely, if not certain, that an invocation and benediction [would] be conducted at . . . graduation”).

We have previously held that a plaintiff need not wait for “actual implementation of [a] statute” or an “actual violation[] of his rights” to seek relief. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996).

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Ingebretsen involved a pre-implementation challenge to a Mississippi statute permitting “student-initiated voluntary prayer” during school-related student events under the Establishment Clause. *Id.* at 277-78 (citation omitted). Rejecting Mississippi’s argument that the plaintiff lacked standing because the statute had not yet been implemented, we held that “[t]here [was] no need for [the plaintiff] to wait for actual implementation of the statute and actual violations of his rights under the First Amendment where the statute ‘makes inappropriate government involvement in religious affairs inevitable.’” *Id.* (citing *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981), *aff’d*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982)); *see also Barber*, 860 F.3d at 357 (“Future injuries can provide the basis for standing, but they ‘must be certainly impending to constitute injury in fact[.]’”).⁸

Louisiana argues that *Staley* and *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494 (5th Cir. 2007) (en banc), overturned *Ingebretsen*, so Plaintiffs must supply

8. Louisiana cites *Barber* for the proposition that, in religious display cases, this court has “required an encounter with the offending item or action to confer standing.” *See* 860 F.3d at 353. But the quoted language cannot be divorced from its accompanying context. *Barber* involved a Mississippi statute prohibiting any discriminatory action against persons who acted in accordance with certain beliefs listed in a subsection of the bill. *Id.* at 350-51. This court held that the plaintiffs lacked standing because “[t]he beliefs listed in that section exist only in the statute itself.” *Id.* at 354. We even distinguished the plaintiffs’ injuries from those alleged in religious display cases, concluding that “religious-display cases [did] not provide a basis for standing to challenge the endorsement of beliefs that exist only in the text of a statute.” *Id.*

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proof of an actual encounter with an H.B. 71 display to establish standing. At the outset, we note that Louisiana does not grapple with *Schempp*—a future injury case where the Supreme Court found standing to press an Establishment Clause claim. Nevertheless, *Staley* and *Doe* are both distinguishable and neither decision purported to overturn *Ingebretsen*, so *Ingebretsen* remains good law.

Staley addressed mootness and ripeness—not standing. *See* 485 F.3d at 309. *Doe* involved a challenge to a school board’s practice of opening its meetings with a prayer. *Doe v. Tangipahoa Par. Sch. Bd.*, 473 F.3d 188, 191 (5th Cir. 2006), *rev’d en banc*, 494 F.3d 494 (5th Cir. 2007). We held that the plaintiff, whose sons attended schools under the board’s jurisdiction, lacked standing to challenge the invocations because even after a trial on the merits, there was insufficient proof in the record that he or his sons had been exposed to the invocations. 494 F.3d at 497. *Doe* was not a pre-implementation facial challenge, and the issue was not whether the plaintiffs *would be* injured by the prayers if they were to occur in the future. Instead, the allegedly injurious invocations *had occurred* “since at least 1973,” 473 F.3d at 192, but the plaintiffs had not proven that they had ever witnessed them or would in the future. *See* 494 F.3d at 497-98.

The precedents of the Supreme Court and this court establish that, in an Establishment Clause case, a plaintiff can generally satisfy the injury-in-fact element of standing when he experiences—or certainly will experience—unwanted exposure to government-sponsored religious displays or exercises in the course of his regular activities.

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See Schempp, 374 U.S. at 224 n.9, 83 S.Ct. 1560; *Lee*, 505 U.S. at 584, 112 S.Ct. 2649; *Ingebretsen*, 88 F.3d at 277-78.

iii

Here, H.B. 71 requires that the Ten Commandments be permanently displayed in every classroom of every public elementary, middle, and high school in Louisiana. Under Louisiana's compulsory education laws, students must attend school for at least 177 days per year, La. R.S. § 17:154.1(A)(1), and legal guardians must "assure the attendance of the[ir] child[ren] in regularly assigned classes during regular school hours" or be fined or imprisoned, *id.* § 17:221(A)(1)(b)-(A)(1)(c). If H.B. 71 goes into effect,⁹ impressionable Students will confront a display of the Ten Commandments for nearly every hour of every school day of their public school education in the course of their regular activities. Plaintiffs allege that H.B. 71's version of the Ten Commandments is contrary to the religious and non-religious beliefs they hold. H.B. 71 does not provide a means for students to avoid the displays or avoid unwanted exposure to a government-sponsored religious display. Students have shown standing. *See Schempp*, 374 U.S. at 211-12, 224 n.9, 83 S.Ct. 1560; *Lee*, 505 U.S. at 599, 112 S.Ct. 2649.

Parents have likewise pleaded an injury-in-fact sufficient to confer standing to assert their Establishment Clause claims. Because of Students' regular exposure with

9. Absent a preliminary injunction, H.B. 71 would currently be in effect. *See id.* § 17:2124(B)(1).

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the H.B. 71 displays, Parents are “directly affected” by the challenged statute. *Schempp*, 374 U.S. at 224 n.9, 83 S.Ct. 1560; see *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680, 684 (7th Cir. 1994) (holding that parents have standing to allege an Establishment Clause claim where an “impermissible establishment of religion might inhibit their right to direct the religious training of their children”); *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495 (8th Cir. 1988) (holding plaintiff’s claim remained in controversy because she had a “parental interest in having her children educated in a public school free of religious activities”).

We find no error in the district court’s ruling that Plaintiffs demonstrated standing to assert their Establishment Clause claims.

b

Louisiana contends that Plaintiffs cannot establish “offended observer standing,” as characterized by non-binding, minority-view Supreme Court opinions. It nevertheless urges us to reconsider our “offended observer” precedents in light of *Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022), which overruled the test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), for assessing Establishment Clause claims,¹⁰ and

10. In *Kennedy*, the Supreme Court declared that it had “long ago abandoned *Lemon* and its endorsement test offshoot.” See 597 U.S. at 534, 142 S.Ct. 2407.

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because the doctrine is “profoundly wrong.”¹¹ Louisiana’s arguments fail at the threshold.

i

The Supreme Court has never expressly and formally recognized “offended observer standing” in a majority opinion; this term appears only in non-binding minority opinions. *See City of Ocala v. Rojas*, ___ U.S. ___, 143 S. Ct. 764, 215 L.Ed.2d 143 (2023) (Mem.) (Gorsuch, J., statement regarding denial of certiorari) (Thomas, J., dissenting from denial of certiorari); *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 79-89, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019) (Gorsuch, J., concurring in the judgment); *Espinoza*, 591 U.S. at 495, 140 S.Ct. 2246 (Thomas, J., concurring). In a concurrence, one of the Supreme Court’s members has stated that under the “offended observer” standing theory, “offense *alone* qualifies as a ‘concrete and particularized’ injury sufficient to confer standing” and it therefore has no basis in law. *Am. Legion*, 588 U.S. at 80, 139 S.Ct. 2067 (Gorsuch, J., concurring in the judgment) (emphasis added);¹² *see also*

11. *See Post*, at 649-52 (Dennis, J., concurring).

12. The *American Legion* concurrence argues,

Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to . . . *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). *Lemon* held that whether governmental action violates the Establishment Clause depends on its (1) purpose, (2) effect, and (3) potential to “excessive[ly] . . . entangl[e]” church and state, a standard [the] Court came to understand

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City of Ocala, 143 S. Ct. at 767 (Thomas, J., dissenting from denial of certiorari) (“In every other area, we have been clear that ‘offense alone [is] insufficient to convey standing.’” (citation omitted)).

Plaintiffs allege more than “offense alone,” however. As noted, if H.B. 71 goes into effect, Students will be subjected to unwelcome displays of the Ten Commandments for the entirety of their public school education. There is no opt-out option. Plaintiffs are not mere bystanders who have “fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which [they] disagree[.]” *Valley Forge*, 454 U.S. at 485, 102 S.Ct. 752; *see id.* at 486 n.22, 102 S.Ct. 752 (“The plaintiffs in *Schempp* had standing . . . because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.”). Nor are Plaintiffs asking the courts to redress “‘generalized grievances’ about the conduct of Government.” *See Am.*

as prohibiting the government from doing anything that a “reasonable observer” might perceive as “endorsing” religion. And lower courts reasoned that, if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue. Here alone, lower courts concluded . . . an observer’s offense must “suffice to make an Establishment Clause claim justiciable.”

Id. at 84, 139 S.Ct. 2067 (second alteration in original) (citations and quotation marks omitted).

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Legion, 588 U.S. at 80, 139 S.Ct. 2067 (Gorsuch, J., concurring in the judgment) (citation omitted) (opining that “[o]ffended observer standing is deeply inconsistent” with the rule that “‘generalized grievances’ . . . are insufficient to confer standing”). They allege that Students “will be pressured to observe, meditate on, venerate, and follow this scripture and to suppress expression of their own religious beliefs and backgrounds at school.” Indeed, the Supreme Court has recognized that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” *Lee*, 505 U.S. at 592, 112 S.Ct. 2649.

Plaintiffs are more than mere “offended observers.” Students and Parents will be “directly affected” by H.B. 71; this is sufficient to confer standing. *Schempp*, 374 U.S. at 224 n.9, 83 S.Ct. 1560.

ii

Louisiana notably does not specify the precedent it asks us to reconsider based on *Kennedy*.

Under our court’s rule of orderliness,¹³ *Kennedy* is not an intervening change in relevant law, because it did not examine or even mention standing. In that case, a school district suspended and later fired a high

13. “It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by . . . the Supreme Court, or our en banc court.” *Jacobs v. Nat’l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

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school football coach for praying on the school football field after games. The coach sued the district under the Free Exercise and Free Speech Clauses. 597 U.S. at 519—23, 142 S.Ct. 2407. The school district invoked the Establishment Clause as a defense to the coach’s Free Exercise and Free Speech claims, arguing that his Free Exercise rights were “in ‘direct tension’” with its obligations under the Establishment Clause pursuant to “*Lemon* and its progeny.” *Id.* at 532, 534, 142 S.Ct. 2407. The Supreme Court rejected the district’s argument, set aside *Lemon*, and clarified that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” *Id.* at 535, 142 S.Ct. 2407 (quotation marks omitted). Because it was primarily a Free Exercise Clause and Free Speech Clause challenge, *Kennedy* does not provide an appropriate basis upon which we may reconsider our Establishment Clause standing caselaw. *See Collins v. Dep’t of the Treasury*, 83 F.4th 970, 985 (5th Cir. 2023) (concluding that a Supreme Court decision was not an intervening change in Appropriations Clause law “because it was not an Appropriations Clause case”). And “[a]s middle-management circuit judges, we must follow binding precedent.” *Consumers’ Rsch. v. Consumer Prod. Safety Comm’n*, 91 F.4th 342, 346 (5th Cir. 2024), *cert. denied*, ___ U.S. ___, 145 S. Ct. 414, 220 L.Ed.2d 170 (2024).¹⁴

14. Because Plaintiffs have standing under the Establishment Clause, we do not reach Louisiana’s arguments regarding whether Plaintiffs have standing to press their Free Exercise Clause claims. *See Sherbert v. Verner*, 374 U.S. 398, 410, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (declining to reach plaintiff’s equal protection claim “[i]n view of the result [the Court] reached under the First

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C

Louisiana next argues that the Superintendent and the BESE-member defendants are entitled to sovereign immunity. It contends that the *Ex parte Young*¹⁵ exception to sovereign immunity is inapplicable here because (1) there must be a direct threat of enforcement against the plaintiffs to find an ongoing violation of federal law in a pre-enforcement challenge like this one, and (2) these defendants lack the requisite enforcement authority over H.B. 71.

“Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity.” *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 39, 142 S.Ct. 522, 211 L.Ed.2d 316 (2021).

and Fourteenth Amendment’s guarantee of free exercise of religion”); *see also e.g., Espinoza*, 591 U.S. at 488-89 & n.5, 140 S.Ct. 2246 (finding Free Exercise violation; declining to reach Establishment Clause and Equal Protection claims); *Flast v. Cohen*, 392 U.S. 83, 104 n.25, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (finding standing to press Establishment Clause claim; declining to reach Free Exercise claim); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018) (finding Free Exercise violation; declining to reach Free Speech claim); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 n.8, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (finding First Amendment violation; declining to reach Equal Protection claim); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (finding Voting Rights Act violation; declining to reach First Amendment and Equal Protection claims).

15. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

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“This bar also applies to suits like this one ‘against state officials or agencies that are effectively suits against a state.’” *Book People*, 91 F.4th at 334 (quoting *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019)). Under the *Ex parte Young* exception to sovereign immunity, “a litigant may sue a state official in his official capacity if the suit seeks prospective relief to redress an ongoing violation of federal law.” *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020) (citing *Ex parte Young*, 209 U.S. at 167-68, 28 S.Ct. 441).

The Supreme Court has warned that “a court need only conduct a ‘*straightforward*’ inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (alteration in original) (emphasis added). The ongoing and continuous violation of federal law requirement “merely distinguishes between cases where the relief sought is prospective in nature, . . . and cases where relief is retrospective.” *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999). It “does not mean that the enforcement of the allegedly unconstitutional state statute actually must be in progress against the particular plaintiffs initiating suit.” *Id.* Rather, “the *Ex parte Young* analysis turns on the complaint’s context,” that is, “whether ‘the state officer, by virtue of his office, has some connection with the enforcement of the act.’” *Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 519 (5th Cir. 2017) (citing *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441); *see id.* (rejecting defendants’ argument that

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the *Ex parte Young* exception did not apply because the challenged action was not enforced against the plaintiff, noting the correct inquiry was “whether state defendants [had] the requisite connection to the enforcement of the [challenged action]”).

“To satisfy the required enforcement connection, the state official must have a duty beyond ‘the general duty to see that the laws of the state are implemented.’” *Book People*, 91 F.4th at 335 (citation omitted). “We have defined ‘enforcement’ as ‘compulsion or constraint,’” such that “[i]f the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation.” *Id.* (alteration in original) (quoting *City of Austin*, 943 F.3d at 1002). “Plaintiffs need only show a ‘scintilla of enforcement by the relevant state official.’” *Id.* (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020)).

H.B. 71 commands the BESE to “adopt rules and regulations . . . to *ensure* [its] proper implementation.” La. R.S. § 17:2124(B)(6)(a) (emphasis added). Louisiana argues that this obligation does not amount to enforcement power because the possibility that the BESE may someday promulgate rules and regulations is insufficient to invoke *Ex parte Young*. See *Whole Woman’s Health*, 595 U.S. at 44, 142 S.Ct. 522 (holding that the possibility that the Texas Medical Board “might in the future” promulgate a rule that the attorney general could enforce was insufficient to invoke *Ex parte Young*). But the BESE is not merely *permitted* to adopt rules and regulations implementing H.B. 71, it *must* do so. La. R.S. § 17:2124(B)(6)(a) (“The

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[BESE] *shall* adopt rules and regulations in accordance with the Administrative Procedure Act to ensure the proper implementation of this Section.” (emphasis added)).

Louisiana also argues that the BESE’s exercise of its authority to implement H.B. 71 will not compel or constrain anyone to obey the challenged law. *See Book People*, 91 F.4th at 335. We disagree because the rules and regulations adopted by the BESE must “ensure [H.B. 71’s] proper implementation,” meaning the BESE-member defendants will necessarily compel “each public school governing authority [to] display the Ten Commandments in each classroom in each school under its jurisdiction.” La. R.S. § 17:2124(B)(6)(a), (B)(1). And under state law, the Superintendent must “implement the policies and programs of the [BESE] and the laws affecting schools under the jurisdiction of the [BESE].” *Id.* § 17:22(3)-(4). As the district court concluded: “[A]n injunction against the Superintendent would prevent the implementation of any regulations related to H.B. 71, thus preventing constitutional violations.”

All that our caselaw requires is a “scintilla of enforcement.” *Book People*, 91 F.4th at 335. The district court ruled that Plaintiffs met their burden; we find no error.

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IV

Louisiana next challenges the denial of its Rule 12(b)(6) motion to dismiss Plaintiffs' Establishment Clause claims.¹⁶

We review the denial of a motion to dismiss for failure to state a claim *de novo*. *Ramming*, 281 F.3d at 161. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).¹⁷

The parties agree that Plaintiffs have asserted a facial challenge to H.B. 71. “To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which [H.B. 71] is constitutional.” *Croft v. Perry*, 624 F.3d 157, 164 (5th Cir. 2010).

16. Because we do not address whether Plaintiffs have standing to press their Free Exercise Claims, *see supra* note 14, we do not reach Louisiana's arguments regarding these claims. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) (“[A] federal court generally may not rule on the merits of a case without first determining that it has . . . subject matter jurisdiction[. . .]” (citation omitted)).

17. As noted, because the “underpinnings” of Louisiana's motion to dismiss are “inextricably intertwined” with the district court's ruling issuing a preliminary injunction, we have jurisdiction to address the 12(b)(6) ruling. *See Jiao*, 28 F.4th at 596.

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A

The Establishment Clause “was intended to erect ‘a wall of separation between Church and State.’” *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244 (1878)). At a minimum, the Establishment Clause ordains that no federal or state government “can pass laws which aid one religion, aid all religions, or prefer one religion over another.” *Id.* at 15, 67 S.Ct. 504.

The Supreme Court “has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). That vigilance must be exercised with prescribed “care and restraint” because public education is primarily in the hands of the States and local authorities. *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); see *Yoder*, 406 U.S. at 213, 92 S.Ct. 1526 (“Providing public schools ranks at the very apex of the function of a State.”). This means “[c]ourts . . . cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.” *Epperson*, 393 U.S. at 104, 89 S.Ct. 266. For still, “a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by . . . the First Amendment, and the traditional interest

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of parents with respect to the religious upbringing of their children.” *Yoder*, 406 U.S. at 214, 92 S.Ct. 1526.

The protections afforded to schoolchildren by the Establishment Clause unquestionably “implicate basic constitutional values.” *Epperson*, 393 U.S. at 104, 89 S.Ct. 266. As the Court has previously explained:

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure. Furthermore, “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . .”

Edwards, 482 U.S. at 584, 107 S.Ct. 2573 (alterations in original) (citations omitted). That is why a religious practice may be deemed unconstitutional in the “special context of the public elementary and secondary school system,” but deemed constitutional elsewhere. *Id.* at 583, 107 S.Ct. 2573.

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Perhaps no better case illustrates the nature of H.B. 71's constitutional problem than *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam). In *Stone*, the Supreme Court struck down a Kentucky statute requiring that the Ten Commandments be displayed on the wall of every public classroom in the state because it had no "secular legislative purpose."¹⁸ 449 U.S. at 41, 101 S.Ct. 192 (applying *Lemon* test).

According to Kentucky, the statute's secular legislative purpose was reflected on the displays in a small notation

18. The statute read:

(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'

(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act."

Id. at 39 n.1 (citing 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980)).

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below the Commandments: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.” *Id.* at 41, 101 S.Ct. 192. The Court held that the state’s avowed purpose was a sham, and the statute was therefore unconstitutional. *Id.* It explained, “[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” *Id.* at 40-42, 101 S.Ct. 192 (footnote and citations omitted).

Instead of integrating the Ten Commandments “into [a] school curriculum[] where the Bible may . . . be used in an appropriate study,” which the state could lawfully do, the posters “serve[d] no such educational function.” *Id.* at 42, 101 S.Ct. 192 (citing *Schempp*, 374 U.S. at 225, 83 S.Ct. 1560). Rather, “[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. . . . [That] is not a permissible state objective under the Establishment Clause.” *Id.*

Twenty-five years after it decided *Stone*, the Supreme Court held in *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion), that a monument of the Ten Commandments displayed on the Texas State Capitol grounds was constitutional under the Establishment Clause. The Court declined to apply the

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Lemon test—“[i]nstead, [its] analysis, [was] driven both by the nature of the monument and by our Nation’s history.” *Id.* at 686, 125 S.Ct. 2854. It found that “[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.” *Id.* (citing *Lynch*, 465 U.S. at 674, 104 S.Ct. 1355). It then found similar “acknowledgments of the role played by the Ten Commandments in our Nation’s heritage.” *id.* at 688-90, 125 S.Ct. 2854. Because “Texas ha[d] treated its Capitol grounds monuments as representing the several strands in the State’s political and legal history,” the Court “[could not] say that Texas’[s] display . . . violates the Establishment Clause.” *id.* at 691-92, 125 S.Ct. 2854.

The Supreme Court noted, however, that “[t]here are, of course, limits to the display of religious messages or symbols.” *id.* at 690, 125 S.Ct. 2854. It distinguished Texas’s monument as a “far more passive use of [the Ten Commandments] than was the case in *Stone*, where the text confronted elementary school students every day.” *id.* at 691, 125 S.Ct. 2854; *see also id.* at 703, 125 S.Ct. 2854 (Breyer, J., concurring) (“The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state.”).

B

Louisiana argues that *Stone* is not controlling because it relies on *Lemon*, which is no longer good law, but even if *Stone* remains binding, it is distinguishable because

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(1) the displays in *Stone* stood alone, not alongside other documents as allowed by H.B. 71, and (2) Louisiana has a valid “secular historical and educational purpose” for displaying the Ten Commandments in classrooms. We disagree.

It is the Supreme Court’s “prerogative alone to overrule one of its precedents.” *Bosse v. Oklahoma*, 580 U.S. 1, 3, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016) (per curiam) (quoting *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001)). The Court has been clear: When one of its precedents “has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Although the Supreme Court set aside the *Lemon* test in *Kennedy*, see 597 U.S. at 534-36, 142 S.Ct. 2407, *Kennedy* did not overrule *Stone*. *Kennedy* does not mention *Stone* or purport to overrule the decisions (other than *Lemon*) on which *Stone* relies, i.e., *Schempp* or *Engel*. *Stone* remains good law and therefore controls, if it “direct[ly] appli[es].”¹⁹ *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917; see *Jusino v. Fed’n of Cath. Tchrs., Inc.*, 54 F.4th 95, 102 (2d Cir. 2022) (holding that *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 99 S.Ct. 1313, 59

19. At least one other circuit has cited to *Stone* with approval post-*Kennedy*. See *Hilsenrath ex rel. C.H. v. Sch. Dist. of Chatham*s, 136 F.4th 484, 492 n.65 (3rd Cir. 2025).

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L.Ed.2d 533 (1979) “remains good law notwithstanding its reliance . . . on *Lemon v. Kurtzman*” because *Kennedy* did not “overrule—or even mention—*Catholic Bishop*”). We conclude that it does.

Both H.B. 71 and the Kentucky statute require that the Ten Commandments be displayed (1) in every public school classroom in the state (2) on a poster subject to comparable minimum size requirements (3) with context statements purporting to describe the historical basis for each display and (4) as the central focus of the display. Both statutes (5) allow the posters to be financed by private contributions, (6) task the superintendent with implementing its mandates, and neither statute (7) actually integrates the Ten Commandments into an educational curriculum. *Compare* La. R.S. § 17:2124(B), *with Stone*, 449 U.S. at 39 n.1, 101 S.Ct. 192 (citing Ky. Rev. Stat. § 158.178 (1980)).

Under H.B. 71, public schools “may” display the Ten Commandments alongside the Mayflower Compact, Declaration of Independence, and the Northwest Ordinance—they are not *required* do so. La. R.S. § 17:2124(B)(4)(a). Conversely, H.B. 71 includes an express “minimum requirement that the Ten Commandments *shall* be displayed on a poster or framed document that is at least eleven inches by fourteen inches,” that “[t]he text of the Ten Commandments *shall* be the central focus” of the display, “and *shall* be printed in a large, easily readable font.” *Id.* at § 17:2124(B)(1) (emphases added). An H.B. 71

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display that meets the statute's minimum requirements is materially identical to the displays challenged in *Stone*.²⁰

Stone's reasoning is equally germane. In *Stone*, the Supreme Court deemed Kentucky's proffered secular purpose insufficient to survive constitutional muster because Kentucky did not integrate the Ten Commandments, an inherently religious text, into an educational curriculum "where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42, 101 S.Ct. 192 (citing *Schempp*, 374 U.S. at 225, 83 S.Ct. 1560). Posting the Ten Commandments on classroom walls therefore "serve[d] no . . . educational function." *Id.* The same is true of H.B. 71. The statute does not require that the Ten Commandments be integrated into a curriculum of study. On the contrary, under the statute's minimum requirements, the posters must be indiscriminately displayed in every public school classroom in Louisiana regardless of class subject-matter. *See* La. R.S. § 17:2124(B)(1). Louisiana insists, however, that unlike Kentucky, its Legislature has a valid "secular

20. Louisiana submitted twelve sample displays to the district court. These posters range in color, format, and subject matter. Some include the Ten Commandments alongside quotes and pictures of prominent figures like Speaker Mike Johnson, Justice Ruth Bader Ginsburg, Martin Luther King Jr., and Lin Manuel Miranda portraying Alexander Hamilton. The district court found that the samples fail to satisfy H.B. 71's minimum requirements because the Ten Commandments are not "printed in a large, easily readable font." We also note that the Ten Commandments are not the "central focus" of each display, and some displays include documents other than those permitted by H.B. 71.

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historical and educational purpose” for displaying the Ten Commandments in classrooms, which is reflected in the statute.²¹

“Courts are ‘normally deferential to a [legislative] articulation of a secular purpose.’” *Croft*, 624 F.3d at 166 (alteration in original) (quoting *Edwards*, 482 U.S. at 587, 107 S.Ct. 2573). But an alleged secular purpose “must be ‘sincere,’” and not “merely a ‘sham.’” *id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 64, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (Powell, J., concurring)). When “undertaking a ‘sham’ inquiry, we consider whether the challenged action furthers the particular purposes articulated by the legislature or whether the challenged action contravenes those avowed purposes.” *id.* (brackets omitted) (citing *Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999)).

Louisiana’s purported legislative purpose states:

It is the Legislature’s intent to apply the decision set forth by the Supreme Court of the United States in *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), to continue the rich tradition [of including the Ten Commandments in the education of our children] and ensure that the students in our public schools may understand and appreciate

21. We do not undertake this analysis to revive *Lemon*, but only for the limited purpose of deciding whether *Stone*’s facts and reasoning control.

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the foundational documents of our state and national government.

La. R.S. § 17:2124(A) (9).

Plaintiffs allege H.B. 71’s legislative history reveals additional signs of a “sham” legislative purpose:

- H.B. 71’s primary author and sponsor stated during a legislative debate: “It is so important that our children learn what God says is right, and what he says is wrong, and to allow [the Ten Commandments] to be displayed in our classrooms as a visual aid, I believe, especially in this day and time is so important.”²²
- In support of the bill, a co-author of the bill stated, “I really believe that we are lacking in direction. A lot of people, their children, are not attending churches. . . . We need to do something in the schools to bring people back to where they need to be.” Debate, at 15:17.
- H.B. 71’s primary author also stated, “You know, not all children . . . are taught right from wrong. . . . But I believe when I went to school, I learned . . . to know there was a God by reciting the Ten Commandments. . . . I knew what God said was

22. An Act Requiring the Display of the Ten Commandments in Public Schools, H.B. 71, 2024 Reg. Sess. (La. 2024), at 05:08, [https://house.louisiana.gov/HVideo/VideoArchivePlayer?v=house/2024/apr/0404 24 ED \[Debate\]](https://house.louisiana.gov/HVideo/VideoArchivePlayer?v=house/2024/apr/0404%20ED%20[Debate]).

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right, and what he said was wrong, . . . not all of us were taught that.” Debate, at 15:55.

- When asked how a Buddhist or Muslim student would interpret one of the Commandments, the bill’s author responded, “Well I’m not Buddhist or Muslim so I’m not really worried about defining it for them. . . . [The Ten Commandments] [are] a model for what’s God—it’s God’s law, and it’s universal law.” Debate, at 19:42.
- Another co-author and co-sponsor of H.B. 71 expressed his support for the law during debate by claiming that those who oppose it are waging an “attack on Christianity” and suggesting that it would provide a religious counterbalance to students’ secular education: “My wife is a Christian and if she was a teacher she would be asked to teach evolution which is in complete contradiction with the theory of creation that we believe out of the Bible. . . . I am a parent and am asking for this [bill].”

Citing these statements, the district court found that Louisiana’s avowed secular purposes were “implausible [and] inadequate.” *See Croft*, 624 F.3d at 167 (citation modified). These statements indeed “support a commonsense conclusion that a religious objective permeated the government’s action.” *Id*; *see Edwards*, 482 U.S. at 591-92, 107 S.Ct. 2573 (concluding that the “preeminent purpose of the [state legislature] was clearly to advance [a] religious viewpoint” based on statements

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by legislators and testimony presented during legislative hearings).

It is also unclear how H.B. 71 ensures that students in Louisiana public schools “understand and appreciate the foundational documents of [its] state and national government” when it makes displaying those “foundational” documents optional, and does not require that they also be printed in a large, easily readable font. La. R.S. § 17:2124(A)(9). When the Ten Commandments must be posted prominently and legibly, while the other “contextual” materials need not be visible at all, the disparity lays bare the pretext.

To the extent that Louisiana relies on *Van Orden* to justify displaying the Ten Commandments in classrooms, we have already explained that the public school classroom implicates certain protections that other contexts, like the Texas State Capitol grounds, does not. *See supra* Section IV(A). The Supreme Court said as much in *Van Orden*. *See* 545 U.S. at 690-91, 125 S.Ct. 2854 (“There are, of course, limits to the display of religious messages or symbols. . . . *Stone* . . . was a consequence of the ‘particular concerns that arise in the context of public elementary and secondary schools.’ . . . The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day.” (citations omitted)).

As in *Stone*, “[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to

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induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” 449 U.S. at 42, 101 S.Ct. 192. This “is not a permissible state objective under the Establishment Clause.” *id.*

Stone v. Graham is controlling. Under *Stone*, H.B. 71 is plainly unconstitutional. The district court did not err.

C

We also agree with the district court that, even if *Stone* were overturned tomorrow, H.B. 71 violates the Establishment Clause under *Kennedy*. Louisiana counters that the district court misapplied *Kennedy* because, under *Kennedy*, the threshold question in an Establishment Clause analysis is whether the challenged practice implicates historical hallmarks of religious establishments. We disagree.

As noted, *Kennedy* shed light on the proper standard for interpreting Establishment Clause claims, holding that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” 597 U.S. at 535, 142 S.Ct. 2407 (quotation marks omitted). “The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers.” *id.* at 536-37, 142 S.Ct. 2407 (citation modified) (citing *Galloway*, 572 U.S. at 577, 134 S.Ct. 1811; *Schempp*, 374 U.S. at 294, 83 S.Ct. 1560).

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The Supreme Court then addressed the district’s alternative argument—that the district’s actions were justified because it “would have been guilty of coercing students to pray” if it allowed the coach to continue publicly praying on school property. *id.* at 536, 142 S.Ct. 2407. Acknowledging that “coercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment,” the Court concluded there was insufficient evidence of coercion by the coach. *id.* at 537 & n.5, 142 S.Ct. 2407 (citing *Shurtleff v. City of Boston*, 596 U.S. 243, 285-88, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (Gorsuch, J., concurring) (examining the historical hallmarks of an established religion)). But *Kennedy* did not adopt these “hallmarks”²³ as the exclusive Establishment Clause test and the *Shurtleff* concurrence is nonbinding. *See Kennedy*, 597 U.S. at 536-37 & n.5, 142 S.Ct. 2407. Louisiana conceded as much before the district court.

We applied *Kennedy* and *Galloway in Freedom From Religion Foundation, Inc. v. Mack*. There, plaintiffs

23. The “hallmarks” of religious establishment include whether the government: (1) “exerted control over the doctrine and personnel of the established church”; (2) “mandated attendance in the established church and punished people for failing to participate”; (3) “punished dissenting churches and individuals for their religious exercise”; (4) “restricted political participation by dissenters”; (5) “provided financial support for the established church, often in a way that preferred the established denomination over other churches”; and (6) “used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.” *Shurtleff*, 596 U.S. at 286, 142 S.Ct. 1583 (Gorsuch, J., concurring) (citations omitted).

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challenged a Texas Justice of the Peace’s practice of opening his court with a prayer. *Mack*, 49 F.4th at 944. We looked to *Galloway*, in which the Supreme Court upheld a town’s practice of commencing its board meetings with a prayer, and we formulated the following standard to evaluate historical record evidence: Whether the challenged practice “fits within” or is “consistent with a broader tradition” at the time of the Founding or incorporation. *Id.* at 951. This analysis “depends on ‘original meaning and history,’ with particular attention paid to ‘historical practices.’” *Id.* (citing *Kennedy*, 597 U.S. at 535, 142 S.Ct. 2407); see *Galloway*, 572 U.S. at 577, 134 S.Ct. 1811 (“The Court’s inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”).

Applying *Kennedy* and *Mack* here, the district court framed the “broader tradition” as the use of the Ten Commandments in public education, and the challenged practice as “the permanent posting of the Ten Commandments in public[] school classrooms.” No one challenges that framing. Therefore, the question before us is whether the permanent posting of the Ten Commandments in public school classrooms fits within, or is consistent with, a broader tradition of using the Ten Commandments in public education.

Plaintiffs allege that “[t]here is no longstanding tradition of permanently displaying the Ten Commandments in public[] school classrooms in Louisiana or the United States more generally.” They also allege

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that “[H.B. 71] includes false statements relating to a purported history and connection between the Ten Commandments and government and public education in the United States,” including a “fabricated” quote by James Madison regarding this country’s “capacity . . . to govern ourselves according to the moral principles of the Ten Commandments.”

Accepting these allegations as true, the district court found that Plaintiffs adequately pleaded an Establishment Clause violation under *Kennedy*. We find no error.²⁴

V

Lastly, Louisiana challenges the preliminary injunction as erroneously granted and overbroad.

“We review the district court’s grant of [a] preliminary injunction for abuse of discretion, reviewing underlying factual findings for clear error and legal conclusions *de novo*.” *Harrison v. Young*, 48 F.4th 331, 339 (5th Cir. 2022).

A preliminary injunction is proper if Plaintiffs can show “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable harm absent the injunction, (3) that the harm [Plaintiffs] will suffer without the injunction outweighs the cost to comply with

24. Because neither we nor the Supreme Court have decided an Establishment Clause case involving the public school context since *Kennedy*, we assume without deciding that the historical framework formulated in *Mack* is applicable here, and cite *Mack* for this very limited purpose.

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the injunction, and (4) that the injunction is in the public interest.” *id.*

A

Louisiana argues that Plaintiffs are unlikely to succeed on the merits of their Establishment Clause claims for the same reasons asserted in its consolidated motion to dismiss: lack of subject matter jurisdiction and because H.B. 71 is constitutional under *Kennedy*.

The district court correctly found that Plaintiffs’ claims are ripe, they have shown standing to bring their Establishment Clause claims, and no defendant is entitled to sovereign immunity. The district court also found that H.B. 71 violates the Establishment Clause under *Stone*, which remains good law and controlling.

Under *Kennedy* and *Mack*, the district court determined that to succeed on the merits, Plaintiffs must show that the practice at issue—permanently displaying the Ten Commandments in public school classrooms—does not “fit[]within,” and is not “consistent with,” a broader tradition existing at the time of the founding. *Mack*, 49 F.4th at 950-51.

In support of their motion for a preliminary injunction, Plaintiffs presented the expert testimony of Dr. Steven Green, a religious and constitutional legal historian. Dr. Green testified that the public school system did not exist at the founding; rather, public education originated sometime around the late 1820s. Dr. Green also found no

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evidence that the Ten Commandments were permanently displayed in early American public schools. He testified that no state enacted a law allowing the display of the Ten Commandments in public schools until North Dakota did so in 1927, and that a court later struck down the statute. *See Ring v. Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980).

Dr. Green also testified about the books cited in H.B. 71's context statement. The *New England Primer*, whose initial publication predates the existence of the public school system, he explained, was primarily used in religious schools and private academies. The *McGuffey Readers* had six levels. About half referenced the Ten Commandments, and only sporadically (in approximately 4 lessons out of 200 lessons), and their prevalence lessened over time. He testified that most versions of Webster's *American Spelling Book* included no reference to the Ten Commandments. Citing his findings and a "lack of compelling counterevidence," he rebutted H.B. 71's declaration that "The Ten Commandments were a prominent part of American public education for almost three centuries," *see* La. R.S. § 17:2124(B)(3).²⁵ Louisiana did not present any expert testimony.

25. Louisiana contends that the H.B. 71 displays involve a "far more passive" use of the Ten Commandments than the books cited in the statute's context statement because the displays "will simply appear on a wall for students to observe or ignore as they wish." But "it is no defense to urge that the religious practice[] here may be [a] relatively minor encroachment[] on the First Amendment." *Schempp*, 374 U.S. at 225, 83 S.Ct. 1560.

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Based on Dr. Green’s testimony, the district court found a substantial likelihood that there is insufficient evidence of a broader tradition in place at the time of the founding, or within the history of public education, so as to justify H.B. 71.²⁶ This finding is not clearly erroneous.²⁷

26. Louisiana challenges the district court’s reliance on Dr. Green’s testimony. It accuses the court of improperly deferring to expert testimony to resolve constitutional issues. Indeed, “an expert may never render conclusions of law.” *Goodman v. Harris Cnty.*, 571 F.3d 388, 399 (5th Cir. 2009). But the legal issue presented—whether H.B. 71 violates the Establishment Clause—requires, on a motion for preliminary injunction, resolving fact issues about the Ten Commandments’ role in American history. See *Kennedy*, 597 U.S. at 534-37, 142 S.Ct. 2407; see also *Yoder*, 406 U.S. at 209, 92 S.Ct. 1526 (looking to a party’s “expert witnesses[,] scholars on religion and education, “in deciding a Free Exercise claim). The district court did not abuse its discretion by relying on “the historical record compiled by the parties” to determine whether the Ten Commandments fit within this country’s longstanding history and tradition. See *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 25 n.6, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). Separately but relatedly, we decline to address Plaintiffs’ argument that *Bruen* required Louisiana, not them, to carry the evidentiary burden in the historical analysis. We are satisfied that—even assuming the district court correctly assigned the burden—Plaintiffs have met it.

27. Louisiana separately argues that H.B. 71 is consistent with the broader tradition of displaying religious imagery on “public property.” It likens the H.B. 71 displays to the national seal, a proposed national seal featuring Moses, various state and municipal flags, and the “In God We Trust” motto featured on American currency. As the district court correctly concluded, under *Mack*, a court should not construe the relevant tradition too broadly. See *Mack*, 49 F.4th at 957 (“Accordingly, we ask whether Mack’s particular practice is consistent with [the] tradition [of

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The district court did not err in finding that Plaintiffs showed a substantial likelihood of success on the merits of their Establishment Clause claims.

B

As to the second element, a substantial threat of irreparable harm absent the injunction, Louisiana argues that Plaintiffs cannot show any harm because they do not know what the posters will look like and therefore

prayer before ‘deliberative bodies.’”). Not only does Dr. Green’s testimony establish that there is no “unbroken history” of displaying the Ten Commandments in public school classrooms, *Lynch*, 465 U.S. at 674, 104 S.Ct. 1355, but as we have made clear, *supra* section IV(A), the display of religious symbols in public classrooms is patently distinguishable from the display of religious imagery in government buildings. *See also Galloway*, 572 U.S. at 590, 134 S.Ct. 1811 (distinguishing *Galloway* from *Lee* where “the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student,” because legislative prayer did not present “an unconstitutional imposition as to mature adults, who ‘presumably’ are ‘not readily susceptible to religious indoctrination or peer pressure’”); *Am. Legion*, 588 U.S. at 51 n.16, 139 S.Ct. 2067 (dividing Establishment Clause cases “into six rough categories” including a category involving “religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies” and another category involving “religious expression in public schools”); *see also Edwards*, 482 U.S. at 583 n.4, 107 S.Ct. 2573 (noting that “a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted”).

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cannot know whether any poster will violate the First Amendment.

This argument fails for the same reasons Louisiana's ripeness argument fails. H.B. 71's minimum requirements provide sufficient details about how the Ten Commandments must be displayed. Plaintiffs have shown that those displays will cause an "irreparable" deprivation of their First Amendment rights. *See Elrod*, 427 U.S. at 373, 96 S.Ct. 2673.

C

The third element is whether the harm that Plaintiffs will suffer absent the injunction "outweighs the cost to comply with the injunction." *Harrison*, 48 F.4th at 339. "Where the State is appealing an injunction, its interest and harm merge with the public interest," the fourth element. *Book People*, 91 F.4th at 340-41.

Louisiana will "suffer[] the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* at 341 (citation omitted). But it does not have a genuine "interest in enforcing a regulation that violates federal law." *Id.* (citation omitted). On the contrary, "[i]njunctive protecting First Amendment freedoms are always in the public interest," *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012) (brackets and citation omitted), and courts must be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583-84, 107 S.Ct. 2573.

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The district court did not abuse its discretion by finding that Plaintiffs satisfied the preliminary injunction elements.

D

Finally, we reject Louisiana’s challenge to the district court’s order that the Superintendent and BESE-member defendants provide notice of the injunction to all Louisiana public and charter schools. Louisiana’s chief argument is that the notice provision is “an effort to achieve by other means an improper statewide injunction.” That argument falls because nothing would prohibit a statewide injunction under these circumstances. *See Rodgers v. Bryant*, 942 F.3d 451, 458-59 (8th Cir. 2019); *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (“The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation.” (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971))).

* * *

We AFFIRM the district court’s entry of a preliminary injunction and denial of Louisiana’s consolidated motion to dismiss as to Plaintiffs’ Establishment Clause claims.

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James L. Dennis, *Circuit Judge*, concurring:

I join the majority opinion in full. I write separately to offer two additional bases for affirming the district court’s judgment. First, the Plaintiffs have standing under settled Supreme Court precedents recognizing “offended observer” standing in Establishment Clause cases. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). Second, Louisiana vastly overstates both the holding and reach of *Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022). That decision did not undermine—much less overrule—*Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). Nor did it eliminate the component parts of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).¹

1. *Lemon* formalized a three-part test for evaluating Establishment Clause violations: state action is unconstitutional if it (1) lacks a secular legislative purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement between government and religion. 403 U.S. at 612-13, 91 S.Ct. 2105. Over time, courts interpreting the second prong began asking whether a “reasonable observer” would view the government’s challenged action an “endorsement” of religion, giving rise to the so-called “endorsement test.” *See, e.g., Cnty. of Allegheny v. Am. C.L. Union*, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

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I

Plaintiffs seeking to press claims in federal court face several hurdles, most basic among them the requirement that they have suffered an “injury in fact.” See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For more than six decades, however, the Supreme Court has recognized that personal exposure to objectionable religious expression by the government can satisfy that requirement when the claim arises under the Establishment Clause. This “offended observer” or “exposure” theory of standing permits plaintiffs to sue based on a substantial likelihood of encountering state-sponsored religious expression. See Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing & the Establishment Clause*, 7 *Charleston L. Rev.* 607, 607-08 (2013);² Christopher C. Lund, *A Defense of Offended Observer Standing Under the Establishment Clause*, 70 *Wayne L. Rev.* 111, 120-23 (2024). In this context, unwanted exposure operates as a proxy for the otherwise demanding injury-in-fact requirement. “There is [offended observer] standing where a plaintiff’s status has led to being personally

2. I agree with Professor Esbeck that the label “offended observer” is misleading because it implies a plaintiff’s injury is mere offense. Esbeck, *supra* at 608 n.3. “[T]he nature of the relevant harm is not emotional or psychological offense, nor is it the intensity of the offense.” *id.* “[T]he successful plaintiff is more than a mere observer, but one who disagrees with her government’s message.” *id.* On this account, the phrase “offended observer” serves as a rhetorical tool for governmental defendants used to trivialize Establishment Clause claims and to seek early dismissal for lack of standing. I use the term here only for clarity.

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exposed to her government’s religious expression, the message being one with which she disagrees, or she has had to assume a burden to avoid any such exposure.” Esbeck, *supra* at 633.

Louisiana contends that we are free to discard offended observer standing and adopt the minority view advanced by Justices Thomas and Gorsuch—that the Supreme Court has never recognized such standing and that the doctrine lacks any basis in law. *See, e.g., City of Ocala v. Rojas*, ___ U.S. ___, 143 S. Ct. 764, 215 L.Ed.2d 143 (2023) (Mem.) (Gorsuch, J., statement regarding denial of certiorari); *id.* at 765 (Thomas, J., dissenting from denial of certiorari); *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 79-89, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019) (Gorsuch, J., concurring in the judgment); *but see* Lund, *supra* at 132 (arguing that Justices Thomas and Gorsuch “treat[] standing as parasitic on the merits”); *cf. Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (“[S]tanding in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal.”). Louisiana is mistaken: the Supreme Court majority has long recognized and applied offended observer standing in Establishment Clause cases.

In *Lee v. Weisman*, Deborah Weisman, a public high school student, objected to the inclusion of a prayer service at her upcoming graduation. 505 U.S. at 584, 112 S.Ct. 2649. The Supreme Court held: “[A] live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an

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invocation and benediction will be conducted at her high school graduation.” *Id.* This is the High Court’s clear recognition of offended observer standing. Weisman would not have had standing if she were a student at a different school or in a different state. But her substantially likely future exposure to the government-ordered prayers gave her standing to sue. *Id.* at 596-97, 112 S.Ct. 2649. Lest there be any doubt, the Court’s standing theory did not depend on Weisman being more than an offended observer. Nowhere does *Lee* suggest that her standing arose from the school forcing or coercing her to pray. In fact, all nine Justices unanimously agreed on this issue; even the four dissenters, who emphasized that the school did not coerce Weisman to pray, did not question her standing. *Id.* at 637-40, 112 S.Ct. 2649.

Lee is not an anomaly. In *School District of Abington Township v. Schempp*, the Supreme Court treated standing similarly. 374 U.S. at 225 n.9, 83 S.Ct. 1560. There, the Schempp family challenged a Pennsylvania law requiring students to read the Bible at the beginning of each school day as a violation of the Establishment Clause. The Supreme Court declared the Bible reading unconstitutional, even though the students could be excused without penalty. As to standing, the Court held:

The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. . . .
Compare Doremus v. Board of Education, 342

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U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers.

Id.

Schempp is less explicit than *Lee*, but the Court clearly applied offended observer standing. Earlier in the opinion, the Court had already explained how the school's religious lessons "were read to [the Schempp children] at various times as part of the [school's] exercises" and "were contrary to the religious beliefs they held." *id.* at 208, 83 S.Ct. 1560. The Court then concluded the Schempp children were "directly affected" by the prayers in ways that "suffice[d] to give [them] standing to complain." *id.* at 225 n.9, 83 S.Ct. 1560. One sees the offended observer theory of standing both in *Schempp*'s self-characterization and its characterization of *Doremus*, where the Court held that plaintiffs lacked standing because the child's graduation had cut off the risk of future exposure. *Id.*; Lund, *supra* at 120-23; see also *Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State*, 454 U.S. 464, 487 n.22, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (explaining with approval that the students in *Schempp* had standing because they were "subjected to unwelcome religious exercises or [were] forced to assume special burdens to avoid them").

In my estimation, the Supreme Court has long approved offended observer standing. And as a court of

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appeals, we are not free to adopt the views of dissenting Justices over those of the Court's majority.³ Although our majority opinion does not rest on this ground, I am more than comfortable concluding that the Plaintiffs have offended observer standing to challenge H.B. 71 under the Establishment Clause.

II

On the merits of the Establishment Clause claim, Louisiana argues that we can ignore *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (which struck down a law like H.B. 71 for lacking a secular purpose), because *Stone* relied on *Lemon*, which Louisiana insists *Kennedy* fully abandoned. Today we correctly affirm the district court's ruling that *Stone* is controlling. Indeed, as the majority opinion explains, *Kennedy* does not mention *Stone* and "[i]t is the Supreme Court's 'prerogative alone to overrule one of its precedents.'" *Ante*, at 642 (quoting *Bosse v. Oklahoma*, 580 U.S. 1, 3, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016)).

3. Concomitantly, it would be most unusual to find that these Plaintiffs lack standing to challenge H.B. 71, a law that is virtually identical to the Kentucky law that the Supreme Court struck down over forty years ago in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). True enough, the Supreme Court did not expressly consider whether the *Stone* plaintiffs had standing. But "[w]hile we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was [approved] sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (citations omitted).

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But even setting aside our lack of authority to overrule *Stone*, I write further to highlight the scholarship of Professors Lupu and Tuttle, who argue that many courts and commentators have overstated *Kennedy*'s significance. See Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Clause Norms*, 100 Chi.-Kent L. Rev. (forthcoming 2025). In their view, *Kennedy* repudiated only the endorsement test—an offshoot of *Lemon*'s second prong (*supra* n.1)—and left intact the broader framework of Establishment Clause doctrine: the requirement of a secular legislative purpose, the prohibition on policies whose primary effect advances religion, and the concern about excessive entanglement between church and state. As they note, those principles “do not originate with *Lemon*,” and the Supreme Court has not repudiated them.

Take, for example, *Schempp*, the Court's seminal school prayer case decided nearly a decade before *Lemon*. There, the Supreme Court held that “to withstand the strictures of the Establishment Clause there must be a secular legislative purpose . . .” 374 U.S. at 222, 83 S.Ct. 1560 (first citing *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); and then citing *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)). That foundational holding still binds us. Unless *Schempp* and its origins are overruled—relief that Louisiana has not sought at any point in this litigation—the inquiry into the purpose of a state-sponsored religious display remains mandatory. Abandoning *Stone* would mark a first and striking step toward unraveling school

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prayer cases like *Schempp*, which rest on concerns about state-sponsored indoctrination of young, impressionable, and captive public-school students.

Louisiana's mistaken reliance on *Kennedy* as overruling *Stone* underscores the point. *Kennedy* turned not on state action, but on whether Coach Kennedy's personal post-game prayers were protected private speech. The Court concluded they were, and that the school district's Establishment Clause concerns could not justify restricting his free exercise. The Ten Commandments display at issue here, by contrast, is indisputably state action, undertaken for religious reasons. Still, Louisiana argues that *Kennedy* swept away *Lemon* entirely and, with it, *Stone*, replacing the existing framework with a singular focus on history and tradition.

That reading goes too far. True, *Kennedy* states that "this Court long ago abandoned *Lemon* and its endorsement test offshoot." 597 U.S. at 510, 142 S.Ct. 2407. But only the second part of that sentence is fully supported by the opinion itself. The only part of *Lemon* the Court addressed was the endorsement test. That is, whether a reasonable observer would perceive Coach Kennedy's prayers as government sponsorship of religion. *Kennedy* did not revisit the secular purpose requirement, the analysis of primary effects, or the concern with excessive entanglement. And again, these requirements predate *Lemon*. "*Lemon's* component parts thus remain alive, and function in a variety of contexts, even if citations to *Lemon* now will disappear." Lupu & Tuttle, *supra*.

Stone still stands. H.B. 71 falls.

**APPENDIX C — RULING AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF LOUISIANA,
FILED NOVEMBER 12, 2024**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 24-517-JWD-SDJ

DARCY ROAKE, *et al.*

v.

CADE BRUMLEY, *et al.*

Signed November 12, 2024

RULING AND ORDER

[Tables Intentionally Omitted]

I. Introduction

This matter is before the Court on four motions. The first is the *Motion for Preliminary Injunction* (Doc. 20) (“*Pls. MPI*”) brought by all Plaintiffs.¹ In response,

1. The plaintiffs in this action are: Reverend Darcy Roake and Adrian Van Young, on behalf of themselves and on behalf of their minor children, A.V. and S.V.; Reverend Mamie Broadhurst and Reverend Richard Williams, on behalf of themselves and on behalf of their minor child, N.W.; Reverend Jeff Sims, on behalf of himself and on behalf of his minor children, A.S., C.S. 1, and C.S.

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Defendant Orleans Parish School Board (“OPSB”) filed a *Rule 12(b)(1) Motion to Dismiss and Opposition to Motion for Preliminary Injunction* (Doc. 38) (“*OPSB MTD*”). The other defendants—all represented by the Louisiana Attorney General (“AG”) and including (1) Cade Brumley, the Louisiana State Superintendent of Education (“Brumley” or the “Superintendent”); (2) the members of the Louisiana State Board of Elementary and Secondary Education (“BESE”) (collectively, “BESE Members”);² and (3) the other schoolboards relevant to this action (the “School Board Defendants”)³ (collectively, “AG Defendants”)—filed a *Consolidated Motion to Dismiss, Opposition to Plaintiffs’ Motion for Preliminary Injunction, and Alternative Motion for Stay Pending Appeal* (Doc. 39) (“*AG Defs. MTD*”). Plaintiffs then filed

2; Jennifer Harding and Benjamin Owens, on behalf of themselves and on behalf of their minor child, A.O.; Erin Hawley and David Hawley, on behalf of themselves and on behalf of their minor children, A.H. and L.H.; Dustin McCrory, on behalf of himself and on behalf of his minor children, E.M., P.M., and L.M.; Gary Sernovitz and Molly Pulda, on behalf of themselves and on behalf of their minor child, T.S.; Christy Alkire, on behalf of herself and on behalf of her minor child, L.A.; and Joshua Herlands, on behalf of himself and on behalf of his minor children, E.H. and J.H.

2. The BESE Members include: Conrad Appel, Judy Armstrong, Kevin Berken, Preston Castille, Simone Champagne, Sharon Latten-Clark, Lance Harris, Paul Hollis, Sandy Holloway, Stacey Melerine, and Ronnie Morris.

3. The School Board Defendants include: the East Baton Rouge Parish School Board, the Livingston Parish School Board, the Vernon Parish School Board, and the St. Tammany Parish School Board.

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separate replies in support of their own motion and in opposition to *OPSB MTD* (Doc. 46) and *AG Defs. MTD* (Doc. 47). OPSB filed a reply in support of its motion, (Doc. 52), and AG Defendants did the same, (Doc. 54). The fourth motion is the AG Defendants' *Conditional Motion to Stay Preliminary Injunctive Relief Pending Appeal* (Doc. 40) ("*AG Defs. Motion to Stay*"), which Plaintiffs oppose, (Doc. 47). Oral argument on all of these motions was heard on October 21, 2024. (Docs. 78, 79.)

This case involves the constitutionality of House Bill No. 71, Act 676 ("H.B. 71" or the "Act"). This law provides in relevant part:

No later than January 1, 2025, each public school governing authority shall display the Ten Commandments in each classroom in each school under its jurisdiction. The nature of the display shall be determined by each governing authority with a minimum requirement that the Ten Commandments shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches. The text of the Ten Commandments shall be the central focus of the poster or framed document and shall be printed in a large, easily readable font.

H.B. 71(B)(1). The Act also mandates that a specific version of the Ten Commandments be used—a Protestant one contained in the King James Bible. (*See Expert Report of Steven K. Green, J.D., Ph.D. ("Green Report")* ¶¶ 50-51, Doc. 47-2.)

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The Act requires that the Decalogue be “displayed with a context statement.” H.B. 71(B)(3). This statement begins, “[t]he Ten Commandments were a prominent part of American public education for almost three centuries.” *Id.* Examples purportedly include *The New England Primer* from around 1688, *McGuffey Readers* written in the early 1800s, and textbooks published by Noah Webster. *Id.*

H.B. 71 further provides that a public-school governing authority is not required to spend its funds to purchase a display; rather, “[a] governing authority may spend its funds or donated funds to purchase the displays and may accept donated displays.” H.B. 71(B)(5).

The Act mandates that BESE “adopt rules and regulations . . . to ensure the proper implementation of” the law. H.B. 71(B)(6)(a). The Louisiana Department of Education must (1) “identify appropriate resources to comply with the provisions” of the Act “that are free of charge,” and (2) “[o]nce identified, . . . list the free resources on the department’s internet website.” H.B. 71(B)(6)(b). The law goes on to require the same for every public post-secondary education institution. H.B. 71(C).

In *Pls. MPI*, Plaintiffs seek to enjoin (1) all defendants from adopting any rules and regulations in accordance with the Act and from requiring that the Ten Commandments be displayed in every public-school classroom in Louisiana, and (2) the School Board Defendants from displaying the Ten Commandments in any public-school classroom. (Doc.

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20 at 1.)⁴ In sum, Plaintiffs argue that H.B. 71 violates the Establishment Clause and the Free Exercise Clause of the First Amendment. (*Id.* at 2.)

The AG Defendants respond with attacks on jurisdiction and the substance of Plaintiffs' claims. (Doc. 39-1.) Specifically, AG Defendants contend that Plaintiffs' claims should be dismissed under Federal Rule of Civil Procedure ("Rule") 12(b)(1) because (1) the claims are not ripe in that they require the further factual developments of (a) rules implementing the statute and (b) encounters with actual displays of the Ten Commandments; (2) Plaintiffs lack standing, purportedly in every way possible, though mainly because Plaintiffs have allegedly not yet suffered an injury-in-fact (for essentially the same reasons AG Defendants say the claims are not ripe); and (3) Defendants Brumley and the BESE Members are entitled to sovereign immunity because (a) *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), requires an *ongoing* violation of harm, not the risk of a future violation; and (b) these defendants lack the required connection to the Act's enforcement. (*Id.* at 10-11, 17-29.)

The Court has carefully considered these arguments and will deny *AG Defs. MTD*. First, "[i]ssues have been deemed ripe when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now." *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir.

4. All page citations are to record document page numbers, not internal page numbers.

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2010) (quoting *Simmonds v. INS*, 326 F.3d 351, 359 (2d Cir. 2003)). While context is critical in First Amendment cases, see *Staley v. Harris Cnty.*, 485 F.3d 305, 309 (5th Cir. 2007) (en banc), here, the Court has sufficient information about what the Ten Commandment displays will look like from the Act itself to determine whether the display is constitutional:

- (a) *what*: a specific Protestant version of the Ten Commandments contained in the King James Bible, as opposed to a Roman Catholic or Jewish version;
- (b) *when and where*: in “each public school,” in every “classroom in each school,” all year round, regardless of subject matter, and regardless of the age of the student;
- (c) *why*: purportedly for historical reasons, though, as will be explored below, this justification is undermined by the legislative history and fundraising efforts of the Governor;⁵ and

5. For example, Governor Landry sent a fundraising email to supporters in response to the filing of this challenge to H.B. 71 which urged them to help him “ADVANCE [] the Judeo-Christian values that this nation was built upon.” Patrick Wall, *Jeff Landry vows to defend ‘Judeo-Christian values’ after Ten Commandments lawsuit*, TIMES-PICAYUNE (June 25, 2024), https://www.nola.com/news/politics/jeff-landry-lawsuit-ten-commandments-judeo-christian/article_0555d6e6-3314-11ef-863e-1b07594ff87c.html. See also *Mealey v. Gautreaux*, No. 16-716, 2020 WL 515853, at *23 (M.D. La. Jan. 31, 2020) (deGravelles, J.) (“Courts have the

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- (d) *how*: with the “minimum requirements” that the Decalogue “shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches,” with the Ten Commandments as “the *central focus* of the poster or framed document” and “printed in a large, easily readable font,” and funded with either school funds or private donations. H.B. 71(B)(1) (emphasis added).

All of this is sufficient for this Court to find that the Act runs afoul of *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), and later cases without the need for further factual development. And Plaintiffs will endure considerable hardship if the Court delays a decision—specifically, a violation of their First Amendment rights. Ultimately, “one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (cleaned up). And “there is no need for [Plaintiffs] to wait for actual implementation

power to take judicial notice of the coverage and existence of newspaper and magazine articles.” (first citing *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (allowing judicial notice of the existence of newspaper articles); and then citing *Jackson v. Godwin*, 400 F.2d 529, 536 (5th Cir. 1968) (finding that newspapers and magazines allowed in a prison carried extensive coverage of riots to the point where the district court could take judicial notice of such coverage))). *See also Ieradi v. Mylan Lab’ys, Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000) (taking judicial notice of newspaper article).

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of the statute and actual violations of [their] rights under the First Amendment where the statute makes inappropriate government involvement in religious affairs inevitable.” *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996) (cleaned up).

Second, and for similar reasons, the Court finds that Plaintiffs have a personal stake in the outcome of the litigation sufficient to confer standing. AG Defendants maintain that Plaintiffs require a personal encounter with the offending display to sustain an injury, but this rests on a faulty premise. Courts have recognized that a plaintiff can have standing if injury is “actual or *imminent*, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (emphasis added) (cleaned up). For the reasons already given, these Plaintiffs face an *imminent* infringement of their First Amendment rights, one which will occur by January 1, 2025. And this encounter is real and not hypothetical or speculative, as the First Amendment violation will occur based on the minimum requirements described above. Moreover, Plaintiffs have shown that their injuries are fairly traceable to the conduct of each defendant based on the allegations of the *Complaint*, the language of the Act, and each defendant’s specific statutory duties. Finally, a favorable ruling by this Court will clearly redress their injuries by averting any constitutional violations that would otherwise occur. In short, Plaintiffs have standing.

Third, the Superintendent and BESE Members are not entitled to sovereign immunity. AG Defendants’

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arguments are flawed: (1) it is well established that *Ex parte Young* applies when there is a threat of future harm and not merely an ongoing violation, and, as stated above, here there is a risk of imminent First Amendment violations; and (2) contrary to AG Defendants' position, these defendants have a particular duty to enforce the Act, a willingness to do so, and the ability to compel and constrain others to obey the challenged law. *See Book People, Inc. v. Wong*, 91 F.4th 318, 335-36 (5th Cir. 2024) (citations omitted). Thus, for many of the same reasons the Court found standing, the Court also finds that Plaintiffs have satisfied the *Ex parte Young* exception as to Brumley and the BESE Members.

The Court also finds that AG Defendants' Rule 12(b)(6) motion must be denied. Preliminarily, Plaintiffs concede that they are making a facial challenge to the Act, so, under binding Fifth Circuit precedent, they must show that H.B. 71 is "unconstitutional in every application." *Croft v. Perry*, 624 F.3d 157, 164 (5th Cir. 2010). That is, Plaintiffs must show that "there is no set of circumstances under which" the display of the Ten Commandments is constitutional under the Act. *Id.*

But AG Defendants err in believing this standard ensures them total victory. These defendants ignore the fact that the Act establishes certain "minimum requirements" that the Ten Commandments "shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches," with the Decalogue as "the *central focus* of the poster or framed document" and "printed in a large, easily readable font." H.B. 71(A)

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(1) (emphasis added). Further, these posters must be “display[ed] . . . in each . . . classroom in each school under [the] jurisdiction” of each school board. *Id.* Thus, the question before the Court remains whether, as a matter of law, there is any constitutional way to display the Ten Commandments *in accordance with the minimum requirements of the Act.*

The Court finds that there is not. Specifically, the Act violates the Establishment Clause for two independent reasons.

First, H.B. 71 is impermissible under *Stone v. Graham*. Though *Stone* was based on the test established by *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which has since been abrogated, this District Court remains bound to follow *Stone* until the Supreme Court overrules it, provided *Stone* directly controls the case. *Stone* does so control; the unconstitutional law in *Stone* and H.B. 71 share the following similarities that make them legally indistinguishable:

- (a) both require that the Ten Commandments be displayed on the wall in every public elementary and secondary school classroom in the state;
- (b) the two laws impose comparable minimum size requirements for the display;
- (c) each statute contains a context statement purporting to describe the historical basis for the display;

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- (d) the two statutes allowed for financing by private contributions;
- (e) neither represented or represents “a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like,” *Stone*, 449 U.S. at 42, 101 S.Ct. 192; and
- (f) the Louisiana and Kentucky laws both single out the Decalogue for *central* display while declining to give preferential treatment to foundational documents like the U.S. Constitution, the Declaration of Independence, or the Magna Carta.

Just as in *Stone*, “[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments,” and that “is not a permissible state objective under the Establishment Clause.” *Id.* Subsequent cases do not undermine the application of *Stone* to this case; they strengthen it, particularly in their emphasis of the heightened First Amendment concerns in the public-school setting given the impressionability of young students and the fact that they are captive audiences. See *Van Orden v. Perry*, 545 U.S. 677, 690-91, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion) (citing *Edwards v. Aguillard*, 482 U.S.

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578, 583-84, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); and then citing *Lee v. Weisman*, 505 U.S. 577, 596-597, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)). *See also id.* at 703, 125 S.Ct. 2854 (Breyer, J., concurring) (citing, inter alia, *Lee*, 505 U.S. at 592, 112 S.Ct. 2649).

Second, even if *Stone* did not control, H.B. 71 would be unconstitutional under *Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022). The parties disagree somewhat on the appropriate standard, but a close reading of *Kennedy* and Fifth Circuit precedent shows that the standard remains whether the practice at issue “fits within” or is “consistent with a broader tradition.” *See id.* at 535-36, 142 S.Ct. 2407. Historical evidence is critical to this analysis. *See Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941, 951, 957 (5th Cir. 2022). Additionally, in looking at whether a particular practice is consistent with the tradition at issue, the Court must consider whether the practice is sectarian, discriminatory, or coercive. *See id.* at 958-59.

The Court finds that Plaintiffs have adequately pled an Establishment Clause claim post-*Kennedy*. The *Complaint* alleges that there was no broader tradition of using the Ten Commandments in public-school education at the time of the Founding or incorporation of the First Amendment. (*Compl.* ¶¶ 42, 162, Doc. 1.) Further, even if the practice at issue—posting the Ten Commandments in public-school classrooms—did fit within a broader tradition during those eras, the Act would still be unconstitutional; as pled, H.B. 71 fails to select historical documents generally and versions of the Decalogue specifically “without regard for

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belief,” *cf. Mack*, 49 F.4th at 958 (cleaned up), and so, as a result, the practice is discriminatory.

Most critically though, the Act’s mandatory practice is coercive. As Plaintiffs highlight, by law, parents must send their minor children to school and ensure attendance during regular school hours at least 177 days per year. (*Compl.* ¶¶ 69-70, Doc. 1 (citing La. R.S. §§ 17:221(A)(1)(c), 154.1(A)(1)).) The *Complaint* further alleges:

Permanently posting the Ten Commandments in every Louisiana public-school classroom—rendering them unavoidable—unconstitutionally pressures students into religious observance, veneration, and adoption of the state’s favored religious scripture. It also sends the harmful and religiously divisive message that students who do not subscribe to the Ten Commandments—or, more precisely, to the specific version of the Ten Commandments that H.B. 71 requires schools to display—do not belong in their own school community and should refrain from expressing any faith practices or beliefs that are not aligned with the state’s religious preferences. And it substantially interferes with and burdens the right of parents to direct their children’s religious education and upbringing.

(*Id.* ¶ 3.) Finally, the *Complaint* sets forth in detail all the ways these particular Plaintiffs are so affected by H.B. 71. (*See id.* ¶¶ 82-155.)

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Looking “holistic[ally]” at the Act, Louisiana law, and the facts as pled in the *Complaint* and as supported by Plaintiffs’ declarations, the Court finds that the Plaintiff parents and their minor children will suffer more than mere “subjective offense,” *Mack*, 49 F.4th at 958-59; rather, they face a “real and substantial likelihood of coercion,” *id.* at 959, because “in every practical sense,” they will be “compelled [to] attend[] and participat[e] in a religious exercise,” *Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407 (cleaned up). For these additional reasons, the Court finds that the Act violates the Establishment Clause.

Additionally, the Court finds that Plaintiffs have established a viable Free Exercise claim. First, they have sufficiently alleged that the Act burdens their “sincere religious practice[s]” and beliefs—with respect to both the faiths of these Plaintiffs and the rights of all parents to direct the religious upbringing of their children. *See Kennedy*, 597 U.S. at 525, 142 S.Ct. 2407 (citation omitted). (*See also Compl.* ¶¶ 82-155, Doc. 1.) Second, H.B. 71 is not neutral toward religion, and this is evident from the text of the statute, its effects, and the statements of lawmakers before and after the Act’s passage. Third, since the law is not neutral, it easily fails strict scrutiny analysis; even assuming AG Defendants had established a compelling interest (e.g., for education or history), there are any number of ways that they could advance an alleged interest in educating students about the Ten Commandments that would be less burdensome on the First Amendment than the one required by H.B. 71. For all these reasons, *AG Defs. MTD* will be denied on the Free Exercise claim.

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Having denied *AG Defs. MTD* in full, the Court will grant *Pls. MPI*. Plaintiffs have satisfied the four requirements necessary for injunctive relief. First, for all the reasons given in reference to *AG Defs. MTD*, and for the additional reasons given by Plaintiffs' expert Dr. Steven K. Green, Plaintiffs have easily established a likelihood of success on their Establishment Clause and Free Exercise claims. In sum, the historical evidence showed that the instances of using the Ten Commandments in public schools were too "scattered" to amount to "convincing evidence that it was common" at the time of the Founding or incorporation of the First Amendment to utilize the Decalogue in public-school education. *Cf. Mack*, 49 F.4th at 956-57. That is, the evidence demonstrates that the practice at issue does not fit within and is otherwise not consistent with a broader historical tradition during those time periods.

The other requirements for injunctive relief have been satisfied as well. Concerning the second, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Book People*, 91 F.4th at 341 (citation omitted). As to the third and fourth requirements (which merge for AG Defendants), while the State generally has an interest in the enforcement of its laws, (a) "neither the State nor the public has any interest in enforcing a regulation that violates federal law," and (b) "injunctions protecting First Amendment freedoms are always in the public interest." *Id.* (cleaned up). Accordingly, the Court will grant *Pls. MPI* and issue an order:

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- (1) finding H.B. 71 unconstitutional on its face and in all applications;
- (2) prohibiting AG Defendants from (a) enforcing H.B. 71; (b) adopting rules or regulations for the enforcement of H.B. 71; and (c) requiring that the Ten Commandments be posted in every public-school classroom in Louisiana in accordance with H.B. 71;
- (3) requiring AG Defendants to provide notice of this ruling to all Louisiana public elementary, secondary, and charter schools, and all public post-secondary education institutions; and
- (4) ordering Plaintiffs to post a bond in the nominal amount of \$100.

Next, *OPSB MTD* will be granted in part and denied in part. Specifically, Plaintiffs Roake and Van Young's children do not attend schools under the jurisdiction of the OPSB, so their claims against OPSB will be dismissed without prejudice for lack of standing. However, Plaintiffs Sernovitz, Pulda, and Herlands (individually and on behalf of their children) have established standing for their claims against this defendant, so *OPSB MTD* will be denied as to them.

Finally, for all the above reasons, the Court will deny *AG Defs. Motion to Stay* the injunction pending an appeal.

*Appendix C***II. The Named Plaintiffs**

Before turning to the various motions at issue, the Court will first look at the specific Plaintiffs bringing this action. The following allegations comes from the *Complaint* (Doc. 1), but these allegations are supported by the Plaintiffs' declarations submitted in conjunction with *Pls. MPI*. (Compare, e.g., *Compl.* ¶¶ 82-90, Doc. 1, with Roake Decl., Doc. 20-2.)

Plaintiff Reverend Roake is an ordained minister in the Unitarian Universalist Church, and her husband, Plaintiff Van Young, is a Reform Jew. (*Compl.* ¶ 82, Doc. 1.) The *Complaint* alleges they object to the Act “because the overtly religious classroom displays mandated by the law will promote, and forcibly subject their children to, religious scripture in a manner that violates the family’s religious beliefs and practices.” (*Id.* ¶ 83.) Reverend Roake’s faith, which she believes and teaches, holds that “forcing religious beliefs on individuals causes them significant spiritual, psychological, and emotional harm” and “conflicts with her commitment to religious tolerance and acceptance, which is fundamental to her practice as a Unitarian Universalist and minister.” (*Id.* ¶ 84.) Plaintiff Van Young has similar beliefs about evangelizing and religious tolerance. (*Id.*) Plaintiffs allege that Roake and Van Young have undertaken efforts to “guid[e] the spiritual development of their children, who are being raised in both the Unitarian Universalist and Jewish traditions,” and that they enrolled the children in public schools to receive a secular education. (*Id.* ¶ 85.) H.B. 71’s “mandatory religious displays will conflict with their spiritual beliefs

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and the spiritual values that they seek to instill in their children” by failing to provide the proper context for a Unitarian Universalist reading of the Decalogue, by not providing the Torah’s version of the text, and by “send[ing] the message” that the posted version is the “‘correct’ or superior version of religious doctrine” and will “constitute official rules that” the children must follow. (*Id.* ¶¶ 87-89.) The *Complaint* concludes its allegations with respect to these Plaintiffs:

As a result of these messages, Reverend Roake and Mr. Van Young believe that their children will be pressured to observe, venerate, and adopt the state’s preferred religious doctrine and to suppress expression of their own religious backgrounds and views at school. This religious coercion will harm their children spiritually and substantially interfere with, impede, and burden their children’s ability to conduct a free and responsible inquiry for truth and meaning and to decide, for themselves, what to believe when it comes to matters of faith.

(*Id.* ¶ 90.)

Similarly, Plaintiffs Erin and David Hawley and their minor children A.H. and L.H. attend the Unitarian Universalist church, where Mr. Hawley was the one-time church president. (*Id.* ¶ 114.) The *Complaint* details the various ways in which the Act coerces them; for instance:

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The ability to direct and guide their children in matters of faith and protect their children's ability to undertake a free and responsible search for truth and meaning is an essential aspect of the Hawleys' religious exercise. H.B. 71 will significantly interfere with and burden their ability to carry out this religious exercise.

(*Id.* ¶ 119.) Plaintiffs allege various other ways the state's mandated Decalogue conflicts with their beliefs, (*see id.* ¶¶ 120-22), many of which were highlighted above with Plaintiffs Roake and Van Young, (*see id.* ¶¶ 82-90). Additionally:

The Hawleys believe that the state's posting of these religious displays in every public-school classroom, untethered to any academic lesson, confers on the Ten Commandments the highest level of legitimacy—an official stamp of approval that will send the message to their children that the state-selected version of the Ten Commandments is the “correct” or superior religious doctrine, contrary to the family's [Unitarian Universalist] beliefs and practices. They also believe that, as a result of this message and the sheer ubiquity of the displays mandated by H.B. 71, their children will be pressured into religious observance, veneration, and adoption of this scripture, violating the family's faith tenets and interfering with, deterring, or preventing a free

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and responsible search for truth and meaning by their children.

[] The Hawleys further believe that H.B. 71 and the displays it mandates send a harmful message to them and their children that they are outsiders and not fully part of the school community because they do not believe in the state's official religious scripture. They believe that, because of this message, their children will be pressured to avoid or truncate their search for spiritual meaning and to suppress expression of their own spiritual beliefs and views at school.

(Id. ¶¶ 123-24.)

Likewise, Plaintiffs Reverend Mamie Broadhurst and Reverend Richard Williams are the parents of N.W., and they are Presbyterian ministers who “strongly believe,” in a way “rooted” in their religion's beliefs, “that scriptural matters and questions, including which version of scripture is correct and what it means, are far too sacred to place in the hands of government officials. They believe that these are issues that must be reserved for faith communities.” (*Id.* ¶¶ 91-93.) Broadhurst and Williams further believe that the government should not “interfere with the administration of God's Word or misappropriate God's authority,” but they claim the state has done just that “by placing its stamp of approval on one particular version of the Ten Commandments and mandating that this version be posted in every public-school classroom.” (*Id.* ¶ 93.) Plaintiffs

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allege that this “send[s] a message to all students,” including Broadhurst and Williams’s child, that “the government holds religious authority.” (*Id.*) Additionally, they believe that “[r]eceiving and navigating scripture, such as the Ten Commandments, within the context of their faith is critical to ensuring that N.W.’s understanding of the commandments aligns with Presbyterian teachings and values.” (*Id.* ¶ 94.) The *Complaint* alleges:

The Ten Commandments displays posted in N.W.’s classrooms will not only interfere with and undermine Reverend Broadhurst’s and Reverend Williams’s ability to guide N.W.’s religious education, but they will also create pressure for N.W. to accept and believe—contrary to the family’s Presbyterian faith—the overtly religious messages conveyed by them, including that the state has authority on theological or scriptural questions and that students who do not subscribe to the state’s official version of the Ten Commandments are lesser in status. This also will create pressure for N.W. to suppress expression, especially in school, of N.W.’s own religious beliefs on these issues and other religious questions or concerns raised by the religious displays.

(*Id.* ¶ 99.)

Plaintiff Reverend Jeff Sims is also an ordained Presbyterian minister, and he is the parent of three minors. (*Id.* ¶ 101.) The *Complaint* makes substantially

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similar allegations with respect to the effects on Sims as on Broadhurst and Williams. (*See id.* ¶¶ 101-07.)

Plaintiffs Jennifer Harding and Benjamin Owens are nonreligious and the parents of a minor child, A.O., who is an atheist. (*Id.* ¶ 109.) They believe that the Act's required displays "will promote, and forcibly subject their child to, religious scripture to which they and their child do not subscribe. In so doing, the displays will also usurp Ms. Harding's and Mr. Owens's parental role in directing their child's non-religious upbringing." (*Id.* ¶ 108.) The *Complaint* provides more details as to how their parental rights are interfered with and burdened, (*id.* ¶¶ 109-13), including that "H.B. 71's Ten Commandments displays will impose on A.O. one set of religious values and beliefs over their family's values, which are not based in religion." (*Id.* ¶ 111.) They "do not want the government to push religious morality on A.O. (*Id.*) Harding and Owens also believe the Act "increase[s] the pressure on A.O. to suppress expression of A.O.'s own nonreligious background and atheist views at school as well as pressure A.O. to observe, venerate, and adopt the state's preferred religious doctrine." (*Id.* ¶ 113.)

Plaintiff Dustin McCrory is an agnostic atheist who is raising his minor children, Plaintiffs E.M., P.M., and L.M., to be nonreligious. (*Id.* ¶ 126.) The *Complaint* raises similar concerns here as with Harding and Owens, (*see id.* ¶¶ 125-29), though the pleading adds:

Mr. McCrory will feel compelled to discuss the Ten Commandments with E.M., P.M.,

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and L.M. if the displays will be put in their classrooms. He does not wish to be forced to have this sensitive conversation with E.M., P.M., and L.M. about the Ten Commandments given their young age. He also opposes posting the mandated language of H.B. 71 because he believes that it addresses age-inappropriate religious content. For example, Mr. McCrory does not wish for his elementary-age children to be instructed by their school about the biblical conception of adultery.

(Id. ¶ 128.)

Likewise, Plaintiffs Christy Alkire and her minor plaintiff L.A. are also nonreligious. *(Id.* ¶ 141.) They raise similar concerns as to the other nonreligious plaintiffs. *(Id.* ¶¶ 140-45.) The *Complaint* adds here:

L.A. has already felt some pressure in school to be careful about exposing L.A.'s nonbelief to other students. L.A. believes that the religious displays mandated by H.B. 71 will increase the pressure on L.A. to suppress expression of L.A.'s own nonreligious background and nonreligious views at school as well as pressure L.A. to observe, venerate, and adopt the state's preferred religious doctrine.

(Id. ¶ 145.)

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Additionally, Plaintiffs Gary Sernovitz and Molly Pulda are Jewish and are raising their minor child T.S. in the Reform Jewish tradition. (*Id.* ¶ 130.) They regularly attend synagogue, and they are raising T.S. in the public-school system because of their strong belief in separating the child’s secular education from the child’s religious one, and to oversee the latter to ensure it complies with Jewish beliefs and practices. (*Id.* ¶ 130.) These plaintiffs object to the Act

because, among other reasons, it forcibly imposes on T.S. overtly religious classroom displays that are, in many ways, contrary to the family’s Jewish faith. Specifically, they believe that H.B. 71 (1) misappropriates a Jewish text, ripping it from its Jewish context, (2) selectively edits that text by altering its meaning and obscuring or erasing its Jewish significance, and (3) then mandates the display of the altered text to non-Jews, in violation of core Jewish tenets that oppose proselytizing. In so doing, the displays are likely to result in religious coercion of T.S. and usurp Mr. Sernovitz’s and Ms. Pulda’s parental roles in directing T.S.’s religious education, religious values, and religious upbringing.

(*Id.* ¶ 131.) These plaintiffs also object that:

H.B. 71’s characterization of the Ten Commandments as merely a “historically significant document” that reflects nothing

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more than the “function of civic morality to the functioning of self-government” improperly denies the sacred significance of the Ten Commandments to the Jewish faith. Indeed, Mr. Sernovitz and Ms. Pulda believe that this official version of the Ten Commandments obscures, and conflicts with, the Reform Jewish tradition on the history and meaning of the commandments.

[] Specifically, Mr. Sernovitz and Ms. Pulda do not believe that the Ten Commandments are a universal benign ethical guide. The language of H.B. 71 omits key biblical text after the first commandment that, they believe, makes this clear: In the book of Exodus, chapter 20, in the Torah, the words “I am the Lord Your God” are followed by “who brought you out of the land of Egypt, out of the house of bondage.” This clause is an important part of their Jewish understanding of the origins and purpose of the Ten Commandments, and omission of this text denies the commandments’ specific meaning in their Jewish faith. This omission is, for Mr. Sernovitz and Ms. Pulda, tantamount to an official, governmental erasure of the Jewish significance of the Ten Commandments.

(*Id.* ¶ 132-33.) As Reform Jews, these Plaintiffs believe that introducing the Decalogue to their minor child could be construed as trying to convey proper religious meaning

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and interpretation and that this “must occur in the context of the broader Reform Jewish tradition.” (*Id.* ¶ 134.)

Indeed, in the modern Jewish tradition, the Ten Commandments would rarely, if ever, be displayed on the walls of a *religious* classroom, as the commandments must be interpreted and reconciled with many other parts of the Torah and the interpretative body of work that has emerged over millennia to understand the Torah. In mandating such displays in the secular classroom, H.B. 71 interferes with Mr. Sernovitz’s and Ms. Pulda’s ability and right to address this religious doctrine with T.S. in a manner that complies with their faith.

(*Id.*) These Plaintiffs also view the mandated text as conflicting with Reform Jewish views of women and the equality between the sexes, and the mandatory displays interfere with these parents’ ability to teach their child that belief. (*Id.* ¶ 135.) As with the other parents, “[t]he ability to direct and guide their child in matters of faith is an essential aspect of Mr. Sernovitz’s and Ms. Pulda’s religious exercise[,]” and “H.B. 71 will significantly interfere with and burden their ability to carry out this religious exercise.” (*Id.* ¶ 136.) These include (1) “undermin[ing] and interfere[ing] with their ability to instill in T.S. what it means to be specifically Jewish and their ability to introduce and teach the Ten Commandments to T.S. in a manner that comports with other important Jewish tenets[,]” (*id.* ¶ 137); (2) making it so that T.S. “will likely face situations in which T.S. feels

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pressured to suppress expression of T.S.'s own Jewish background and beliefs, including the fundamental Jewish belief in tolerating and supporting the expression of all faiths[,]" (*id.* ¶ 138); and (3) "violat[ing] Jewish tenets that oppose proselytizing[,]" (*id.* ¶ 139).

Plaintiff Joshua Herlands is also Jewish and is raising his minor children, plaintiffs E.H. and J.H., within the Jewish tradition. (*Id.* ¶ 146.) Herlands makes similar objections as Sernovitz and Pulda, including the objection about missionizing and the fact that the display obscures important principles concerning interpretation of the Decalogue. (*Id.* ¶¶ 146-51.) Herlands also protests that the version of the Ten Commandments differs from the one contained in the Torah in significant ways. (*Id.* ¶¶ 151-52.) Herlands likewise alleges that the Act significantly interferes with his religious exercise of directing and guiding his children in matters of faith. (*Id.* ¶¶ 153-55.)

III. AG Defs. MTD: Rule 12(b)(1) Motion**A. Rule 12(b)(1) Standard**

In a Rule 12(b)(1) motion, a party may raise the defense of lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "Under Rule 12(b)(1), a claim is 'properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate' the claim." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (quoting *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)).

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“The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995)). “Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” *Id.* (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). But, “[a] motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief.” *Home Builders Ass’n of Miss.*, 143 F.3d at 1010; *see also Ramming*, 281 F.3d at 161 (citing *Home Builders Ass’n of Miss.* with approval).

There are two forms of Rule 12(b)(1) challenges to subject matter jurisdiction: “facial attacks” and “factual attacks.” *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). “A facial attack consists of a Rule 12(b)(1) motion unaccompanied by supporting evidence that challenges the court’s jurisdiction based solely on the pleadings.” *Harmouche v. Consulate Gen. of the State of Qatar*, 313 F. Supp. 3d 815, 819 (S.D. Tex. 2018) (citing *Paterson*, 644 F.2d at 523). In considering a “facial attack,” the court “is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true. If those jurisdictional allegations are sufficient the complaint stands.” *Paterson*, 644 F.2d at 523. Whereas, “[a] factual attack challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings—such as testimony and affidavits—may be considered.” *Harmouche*, 313 F. Supp. 3d at 819 (citing *Paterson*, 644 F.2d at 523). The “court

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is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (citation omitted). “[N]o presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Id.* When a factual attack is made, the plaintiff, as the party seeking to invoke jurisdiction, must “submit facts through some evidentiary method and . . . prov[e] by a preponderance of the evidence that the trial court does have subject matter jurisdiction.” *Paterson*, 644 F.2d at 523.

B. Ripeness**1. Parties’ Arguments**

AG Defendants claim that the “clearest dismissal ground is lack of ripeness.” (Doc. 39-1 at 18.) In sum, AG Defendants assert that (1) Plaintiffs claims are not fit for judicial decision, and (2) even if they were, dismissal would pose no hardship on the parties. (*Id.* at 18-21.)

As to the former, AG Defendants contend that Plaintiffs’ claims are contingent on events that may not occur as anticipated or at all. (*Id.*) These defendants primarily rely on *Staley v. Harris County*, where the Fifth Circuit allegedly found that a First Amendment challenge to a Ten Commandments display was not ripe because no decision had been made about the future display of the monument, so the Court could not undertake the fact-intensive and context-specific analysis required

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by the Supreme Court. (*Id.* at 18-19.) According to AG Defendants, Plaintiffs here face the same problem, as no defendant has taken steps to carry out or comply with H.B. 71 and no child has seen any display. (*Id.* at 19-20.) AG Defendants assert:

And so critical questions are currently unanswered: What would any display viewed by Plaintiffs' children actually look like? Would that display place the Ten Commandments in a certain context, and if so, what context? Where would the display be located in the classroom—by a teacher, on a side wall, on a back wall? How big would the display be? What would be included as part of the display? Would the same display appear in multiple classrooms, or would different classrooms have different versions? Will any particular school actually receive donated posters that a school opts to use? And these critical questions are compounded by the fact that there are countless ways a Defendant might comply with H.B. 71. . . .

(*Id.* at 19.)

AG Defendants then say, even if Plaintiffs could prove the first ripeness requirement, they fail the second because they face no hardship: (1) no legal rights or obligations are created by H.B. 71; (2) no plaintiff faces any imminent display (or, indeed, even know how the AG Defendants will comply with the law); and (3) there is no practical impediment to Plaintiffs filing suit once their children actually view the displays. (*Id.* at 20-21.)

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Plaintiffs dispute these arguments, asserting first that the case is fit for judicial decision. (Doc. 47 at 27.) Plaintiffs maintain that they will suffer serious, irreparable injury when the Act is implemented and that the harm is not hypothetical. (*Id.*) Additionally, this case does not depend on further factual development because it presents a purely legal issue: “Does the imposition of the Ten Commandments on the minor-child Plaintiffs, in accordance with the minimum statutory dictates of the Act, violate the First Amendment?” (*Id.* at 27-28.) Plaintiffs distinguish *Staley* on the grounds that *Staley* involved a Bible, not a Ten Commandments display, and that, more importantly:

Here, the legislature has already made a number of decisions regarding the Act’s mandatory, permanent displays, including where they will be posted (in every classroom in every public school, without exception); when they will be posted (no later than January 1, 2025); what the “central focus” will be (the state’s preferred, denominational version of the Ten Commandments); their size (no smaller than eleven by fourteen inches); and even how legible the commandments must be (printed in a “large, easily readable font”). *See generally* H.B. 71.

(*Id.* at 28-29.) “Displays posted in accordance with this statutory scheme will harm Plaintiffs and violate their rights.” (*Id.* at 29.) As to hardship, Plaintiffs primarily rely on the standing analysis, maintaining that the loss

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of their First Amendment freedoms, even briefly, will constitute irreparable injury. (*Id.*)

In reply, AG Defendants begin, “Plaintiffs seek to enjoin displays they have never seen, that have never been posted, and whose ultimate form(s) [AG] Defendants have not determined (if they will ever determine them at all).” (Doc. 54 at 8.) As to the first ripeness requirement, these defendants again hammer *Staley*, contending that, there, “the court knew exactly what the ‘Mosher monument’ entailed down to its inscription, the size of the open Bible on its façade, the details of its refurbishment, and the precise location of its display case in the courthouse[,]” yet the Court still found the display not ripe for review because no decision had been made about the context in which the monument would be displayed. (*Id.* at 8-9.) Moreover, AG Defendants contend that Plaintiffs cannot argue that the case presents a pure question of law, as that runs afoul of *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017); that is, Plaintiffs can have no standing without an encounter with the offending item. (Doc. 54 at 9.) Such caution is critical in the context of the Ten Commandments, says AG Defendants, where some displays are allowed and some are not. (*Id.*) AG Defendants assert:

So the problem persists that Plaintiffs have not seen an H.B. 71 display, nor does anyone know what any such display may look like—and there is no basis to believe that H.B. 71 displays will look anything like the standalone Ten Commandments displays at issue in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d

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199 (1980), *see* Defs.’ MTD 24-33 (illustrations of potential displays). *See* Ex. G, Faircloth Decl. ¶¶ 2-8 (collecting *Stone* displays). Under *Staley* and *Barber*, therefore, Plaintiffs’ claims are unfit for judicial decision.

(*Id.* at 9-10.)

As to hardship, AG Defendants again contend that Plaintiffs do not allege the type of harms required to constitute hardship for ripeness purposes; rather, they turn “the hardship inquiry [into] a mashup of Article III injury and [the] irreparable harm standard.” (*Id.* at 10.) AG Defendants then largely repeat their prior arguments. (*Id.*)

2. Applicable Law

“Under Article III of the Constitution, federal courts are confined to adjudicating ‘cases’ and ‘controversies.’” *Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 922 (5th Cir. 2017) (quoting *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000)). “And to be a case or controversy for Article III jurisdictional purposes, the litigation ‘must be ripe for decision, meaning that it must not be premature or speculative.’” *Id.* (first quoting *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002); and then citing *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (“The justiciability doctrines of standing, mootness, political question, and ripeness ‘all originate in Article III’s “case” or “controversy” language. . . .’” (omission in original)

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(quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006))). *See also Thomas*, 473 U.S. at 580, 105 S.Ct. 3325 (“[The] basic rationale” of the ripeness doctrine “is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.” (quoting *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977))). “In other words, ‘ripeness is a constitutional prerequisite to the exercise of jurisdiction.’” *Lower Colo.*, 858 F.3d at 922 (quoting *Shields*, 289 F.3d at 835).

“[R]ipeness is peculiarly a question of timing.” *Thomas*, 473 U.S. at 580, 105 S.Ct. 3325 (quoting *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). “[A] court must look at two factors to determine ripeness: (1) ‘the fitness of the issues for judicial decision’ and (2) ‘the hardship to the parties of withholding court consideration.’” *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm’n*, 70 F.4th 914, 930 (5th Cir. 2023) (quoting *Abbott Lab’ys*, 387 U.S. at 149, 87 S.Ct. 1507).

“First, a claim is ‘fit for judicial decision’ if it presents a pure question of law that needs no further factual development.” *Id.* (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987)). “So, if a claim is ‘contingent [on] future events that may not occur as anticipated, or indeed may not occur at all,’ the claim is not ripe.” *Id.* at 930-31 (quoting *Thomas*, 473 U.S. at 580-81, 105 S.Ct. 3325 (quotation omitted)).

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But, “[i]ssues have been deemed ripe when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now.” *Pearson*, 624 F.3d at 684 (quoting *Simmonds*, 326 F.3d at 359). “One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” *Thomas*, 473 U.S. at 581, 105 S.Ct. 3325 (quoting *Reg’l Rail*, 419 U.S. at 143, 95 S.Ct. 335 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923))).

Second, the Court must evaluate if Plaintiffs have “shown that hardship will result if court consideration is withheld at this time.” *Choice Inc.*, 691 F.3d at 715. The question is whether “the impact of the [laws] upon the [Plaintiffs] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.” *Abbott Lab’ys*, 387 U.S. at 152, 87 S.Ct. 1507. “An assessment of hardship often turns on a straight-forward prediction of the course events are likely to take.” 13B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3532.3 (3d ed. 2024). “Although it often is difficult to make secure predictions of the probable occurrence or severity of future injury in any particular case, there is nothing complicated about the process.” *Id.* Thus, for instance, in a case involving an abortion statute, the Fifth Circuit stated generally that “hardship [] inhere[s] in legal harms, such as the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being ‘force[d] . . . to

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modify [one's] behavior in order to avoid future adverse consequences.” *Choice Inc.*, 691 F.3d at 715 (quoting *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) (quoting *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 734, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998))).

“The assessment of hardship may be complicated, however, by the fact that some rights are more jealously protected than others.” *Wright & Miller, supra*, at § 3532.3. “When such rights are at issue, ripeness may require a lower probability and gravity of any predicted intrusion.” *Id.* First Amendment rights have been identified as one of those “accorded special ripeness treatment”:

First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill. Of course, not all First Amendment claims are ripe; at some point, claims of subjective chilling effect are put aside as too fanciful. Ripeness likewise may be denied if the plaintiff seems able to comply with a challenged regulation without significant cost, if the plaintiff has been able to defy the regulation without apparent loss, or if the desire to protect First Amendment values is offset by the risk that factual ignorance may jeopardize other important values.

Id.

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Plaintiffs point to several cases which confirm Wright & Miller's instruction that First Amendment rights are "accorded special ripeness treatment." *Id.* For instance, in *Book People*, the Fifth Circuit found that a booksellers' First Amendment challenge to a state-mandated book rating system was ripe, even though the state argued that the "regulatory scheme [was] not yet established." 91 F.4th at 334. The appellate court found that "the hardship to Plaintiffs would not be minimal, as the State contends," because "Plaintiffs allege[d] that complying with the law [would] cost valuable time and resources" and that, as to one book vendor, "compliance costs alone could put it out of business." *Id.*

Even more relevant here, in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), the Fifth Circuit evaluated whether a particular Louisiana statute violated the Establishment Clause. "The challenged provision . . . provide[d] that a school board may authorize the appropriate school officials to allow each classroom teacher to ask whether any student wishes to offer a prayer and, if no student volunteers, to permit the teacher to pray." *Id.* at 899. Though ripeness was not at issue, the Fifth Circuit noted that the parish "program [had] yet to be put into effect," so "the nature and extent of state involvement in religious activity [was] in some measure speculative at [that] time." *Id.* at 902. Nevertheless, "[w]hat [was] certain [was] that the statute itself ma[de] inappropriate governmental involvement in religious affairs inevitable." *Id.*

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The Fifth Circuit relied on *Karen B.* favorably in *Ingebretsen* to find that a plaintiff had standing to challenge a School Prayer Statute, even though the law had not yet been implemented. 88 F.3d at 278. The Fifth Circuit concluded, “There is no need for *Ingebretsen* to wait for actual implementation of the statute and actual violations of his rights under the First Amendment where the statute ‘makes inappropriate government involvement in religious affairs inevitable.’” *Id.* (quoting *Karen B.*, 653 F.2d at 902). The appellate court agreed with the district court that plaintiff had “clearly” shown “the sort of state involvement contemplated by *Karen B.*,” including (1) that “implementation of the statute would inevitably lead to improper state involvement in school prayer[;]” (2) that, “[u]nder the terms of the statute, the state or its representatives [would] inevitably be forced to decide who prays and which prayers qualify as nonsectarian and nonproselytizing[;]” and (3) that “[t]he state [would] also be in the position of punishing students who attempt to leave so as to avoid hearing the prayers.” *Id.*

As one district court said, “[t]he standard for constitutional ripeness mirrors the injury-in-fact requirement for standing.” *Schelske v. Austin*, 649 F. Supp. 3d 254, 278 (N.D. Tex. 2022) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 n.5, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). “Both stem from ‘Article III’s case-or-controversy requirement, which mandates that an “actual controversy” exist between the parties.’” *Id.* (quoting *DM Arbor Ct., Ltd. v. City of Hous.*, 988 F.3d 215, 218 n.1 (5th Cir. 2021) (quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160, 136 S.Ct. 663, 193

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L.Ed.2d 571 (2016))). Thus, the Fifth Circuit’s conclusion in *Ingebretsen* remains highly relevant to the instant issue.

3. Analysis

Having carefully considered the matter, the Court will deny *AG Defs. MTD* on this issue. In short, this matter is ripe for adjudication.

First, the Court agrees with Plaintiffs that this case involves a purely legal question: Does the law mandating that defendants display the Ten Commandments in the classrooms of Plaintiffs’ minor children, according to the minimum statutory requirements of the Act, violate the First Amendment? This issue is fit for judicial decision because it “would not benefit from any further factual development,” and “the court would be in no better position to adjudicate the issues in the future than it is now.” *Pearson*, 624 F.3d at 684. That is, regardless of what iterations of the displays AG Defendants are able to conjure up for purposes of their briefing, the fundamental requirements of the Act mandate that the displays occur in a specific time, place, and manner that contravene the First Amendment. Moreover, given the “fear of irretrievable loss” and the “inhibiting chill[ing]” of their First Amendment rights, *Wright & Miller, supra*, at § 3532.3, Plaintiffs would suffer a hardship if the Court delayed a decision until the Act was implemented, *see id.*; *Book People*, 91 F.4th at 334; *cf. Karen B.*, 653 F.2d at 902.

AG Defendants’ ripeness argument essentially boils down to a reliance on *Staley*, but the Court finds *Staley*

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distinguishable. That case dealt with a monument erected on courthouse property. *Staley v. Harris Cnty.*, 461 F.3d 504, 506 (5th Cir. 2006), *on reh'g en banc*, 485 F.3d 305 (5th Cir. 2007). The monument was built in 1953 by a Christian charity named Star of Hope Mission and “measure[d] two feet, six inches by three feet, and [was] four feet, five inches high.” *Id.* The death memorial was dedicated to an individual named William S. Mosher, who was a prominent Houston businessman and philanthropist. *Id.* The monument contained an open Bible on display in a glass case measuring twelve by sixteen inches. *Id.*

Because the monument face[d] the main entrance to the Courthouse, it [wa]s readily visible to attorneys, litigants, jurors, witnesses, and other visitors to the Courthouse. However, a passerby would have to walk up to the monument to observe that it contain[ed] a Bible and would have to stand in front of it to read the Bible.

Id. In 1995, a newly elected state district judge, who “campaign[ed] on a platform of putting Christianity back into government,” refurbished the monument, restored the Bible to the display case, and added a “red neon light outlining the Bible.” *Id.* at 507. After 1997, Star of Hope Mission “maintain[ed] the monument and turn[ed] the pages of the Bible.” *Id.*

The district court found this monument violated the Establishment Clause and ordered the Bible removed. *Staley*, 485 F.3d at 307. The Fifth Circuit initially affirmed

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but then granted rehearing en banc. *Id.* “[O]nly days before oral argument in [the] en banc case, the County removed the monument from the public grounds and placed it in storage, to permit the ongoing renovation of the Courthouse and its grounds.” *Id.* The Fifth Circuit thus found the case moot. *Id.*

In deciding this, the Fifth Circuit also determined that the case was not ripe for adjudication. *Id.* at 309. “[T]he County emphasize[d] that no decision has been made regarding when, where, or under what circumstances the monument will be displayed again in the future.” *Id.* at 308. Even though the county “specifically [] asserted that it [would] display the monument again after [] renovations [were] complete[d]” a few years later, the County argued that “the monument’s future [was] too speculative to determine whether the monument [would] violate the Establishment Clause in the future.” *Id.* at 307-08.

The Fifth Circuit agreed. *Id.* at 309. The en banc court explained that:

In determining the constitutionality of a religious display, the Supreme Court has made clear that “under the Establishment Clause detail is key.” *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867-68 [125 S.Ct. 2722, 162 L.Ed.2d 729] (2005) (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 [, 109 S.Ct. 3086, 106 L.Ed.2d 472] (1989) (“[T]he question is what viewers may fairly understand to be the purpose of

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the display. That inquiry, of necessity, turns upon the context in which the contested object appears”) (internal quotation marks and citation omitted)).

The importance of facts and context is evident from the respective outcomes in two recent Supreme Court decisions addressing the constitutionality of Ten Commandments displays. *See McCreary*, 545 U.S. at 844[, 125 S.Ct. 2722]; *Van Orden v. Perry*, 545 U.S. 677[, 125 S.Ct. 2854, 162 L.Ed.2d 607] (2005). In both *McCreary* and *Van Orden*, the issue before the Supreme Court was whether a Ten Commandments display violated the Establishment Clause. *See McCreary*, 545 U.S. at 850[, 125 S.Ct. 2722]; *Van Orden*, 545 U.S. at 681 [125 S.Ct. 2854]. The two cases, however, involved very different facts, and based on the specific facts and context of each case, the Supreme Court upheld the display in *Van Orden* but struck down the displays in *McCreary*. *See McCreary*, 545 U.S. at 881, 125 S.Ct. 2722; *Van Orden*, 545 U.S. at 692, 125 S.Ct. 2854.

Id. at 308. *See also id.* at 308-09 (discussing the specific factual and legal distinctions between *McCreary* and *Van Orden*). Turning to the facts of its own case, the *Staley* court determined:

[A]ny dispute over a probable redisplay of the Mosher monument is not ripe because there are

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no facts before us to determine whether such a redisplay might violate the Establishment Clause. Indeed, no decision has been made regarding any aspect of the future display of the monument. In the absence of this evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*. Thus, any claim that the Establishment Clause may be violated after the Courthouse and grounds have been renovated, is not ripe for review. *See United States v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (“A claim is not ripe for review if ‘it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.’” (citing *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (internal quotation marks omitted))).

Id. at 309.

Staley is distinguishable for several reasons. First, *Staley*, *Van Orden*, and *McCreary* all involved displays at courthouses, not schools. As *Staley* itself acknowledged, “[i]n [the *Van Orden*] opinion, the plurality distinguished the display from classroom Ten Commandments displays held unconstitutional in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam), noting a ‘far more passive use of those texts than was the case in *Stone*,’” *Staley*, 485 F.3d at 308 (quoting *Van Orden*, 545 U.S. at 691, 125 S.Ct. 2854), “where . . . the text confronted elementary school students every day,” *Van Orden*, 545

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U.S. at 691, 125 S.Ct. 2854. Moreover, in Justice Breyer’s concurring opinion in *Van Orden*, which the Fifth Circuit found controlling, *Staley*, 485 F.3d at 308-09, he explained that, “[t]he display [was] not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state,” *Van Orden*, 545 U.S. at 703, 125 S.Ct. 2854 (citing *Lee*, 505 U.S. at 592, 112 S.Ct. 2649; *Stone*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199). Thus, again, there are heightened concerns in this case that simply aren’t present in monuments cases.

Second, and equally important, the Act provides sufficient context concerning the placement of the Ten Commandments so that the Court can evaluate the Act’s constitutionality at this time. As described above, H.B. 71 requires a specific Protestant version of the Ten Commandments to be posted all year long, in “each public school,” in every “classroom in each school,” regardless of the subject matter or the age of the student, with the “minimum requirements” that the Decalogue “shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches,” with the Ten Commandments as “the *central focus* of the poster or framed document” and “printed in a large, easily readable font,” and obtained by either school “funds” or private donations, all by January 1, 2025. H.B. 71(B) (1), (5) (emphasis added). Thus, unlike *Staley*, where “no decision ha[d] been made regarding *any aspect* of the future display of the monument,” *Staley*, 485 F.3d at 309 (emphasis added), here, it *is* “known when, where, [and] under what circumstance” the Ten Commandments

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will be displayed in public schools, *id.* at 307, and the “pure question of law” to be addressed by this Court is whether the displays, as mandated by the State, violate the Establishment and Free Exercise Clauses of the First Amendment, *Braidwood Mgmt.*, 70 F.4th at 930 (citation omitted).

The Court also finds *Barber v. Bryant* distinguishable. There, plaintiffs challenged a Mississippi statute which prohibited the state government from discriminatory actions against persons who act in accordance with certain beliefs under specific circumstances. 860 F.3d at 350-51. The statute identified three particular “religious beliefs or moral convictions” which dealt with marriage being between a man and a woman, sexual relations being confined to marriage, and a person’s sex being immutable and “objectively determined by anatomy and genetics at time of birth.” *Id.* at 351 (quoting 2016 Miss. Law H.B. 1523 § 2). Section 3 of the act described the set of circumstances in which adverse state action was restricted; for example, “[r]eligious organizations are protected when they make decisions regarding employment, housing, the placement of children in foster or adoptive homes, or the solemnization of a marriage based on a belief listed in Section 2,” and “[b]usinesses that offer wedding-related services are protected if they decline to provide them on the basis of a Section 2 belief.” *Id.* (citation omitted).

Plaintiffs were Mississippi residents and two organizations that did not share the Section 2 beliefs. *Id.* They challenged the law as violating, inter alia, “the Establishment Clause because it endorse[d] specific

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religious beliefs. . . .” *Id.* at 352. “The district court issued a preliminary injunction against the implementation of H.B. 1523.” *Id.*

The Fifth Circuit determined that plaintiffs did not have standing and reversed. *Id.* at 350. Plaintiffs claimed they “suffered a stigmatic injury from the statute’s endorsement of the Section 2 beliefs,” but the appellate court explained:

“[T]he concept of injury for standing purposes is particularly elusive in Establishment Clause cases,” but we are not without guidance. [*Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)] (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)). In cases involving religious displays and exercises, we have required an encounter with the offending item or action to confer standing. *See id.*; *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (en banc) (addressing religious invocations). . . .

A plaintiff has standing to challenge a religious display where his stigmatic injury results from a “personal[] confront[ation]” with the display. *See Murray*, 947 F.2d at 150-51. For comparison, the caselaw offers some examples of such a confrontation. There is standing where a plaintiff personally encounters a religious symbol on his public utility bill. *Id.* at 150. Personally encountering a religious message on

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the currency a plaintiff regularly handles is also sufficient. But once that display is removed from view, standing dissipates because there is no longer an injury. *See Staley*[, 485 F.3d at 309]. The personal confrontation must also occur in the course of a plaintiff’s regular activities; it cannot be manufactured for the purpose of litigation. *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001).

Id. at 353-54.

The *Barber* plaintiffs attempted to analogize to the injury-in-fact law in religious-display cases, but the Fifth Circuit rejected the argument. *Id.* at 354. These plaintiffs made “no clear showing of a personal confrontation with Section 2: The beliefs listed in that section exist only in the statute itself.” *Id.* The appellate court concluded:

Just as an individual cannot “personally confront” a warehoused monument, he cannot confront statutory text. *See Staley*, 485 F.3d at 309. Allowing standing on that basis would be indistinguishable from allowing standing based on a “generalized interest of all citizens in” the government’s complying with the Establishment Clause without an injury-in-fact. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)]. That, we know, “cannot alone satisfy the requirements of Art. III without draining those

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requirements of meaning.” *Id.* The religious-display cases do not provide a basis for standing to challenge the endorsement of beliefs that exist only in the text of a statute.

Id. at 354.

Barber is not controlling, and this is clear by returning to first principles of standing, which, as will be discussed below, is connected to ripeness. “An injury sufficient to satisfy Article III must be ‘concrete and particularized’ and ‘actual or imminent, not “conjectural” or “hypothetical.”” *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (some internal question marks omitted)). “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a “substantial risk” that the harm will occur.” *Id.* (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5, 133 S. Ct. 1138, 1150 n.5, 185 L.Ed.2d 264 (2013) (emphasis deleted and internal quotation marks omitted)). Thus, in *Barber*, plaintiffs lacked standing because there could be no possible way of being confronted with the law at issue; “[t]he beliefs listed in that section exist only in the statute itself.” 860 F.3d at 354. Conversely, here, the risk of a future encounter by the Plaintiff children, who are required under the Act to attend classes with displays of the Ten Commandments and their statutorily “minimum requirements” by January 1, 2025, is “certainly impending,” and there is a “substantial risk that the harm will occur.” *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334; *see also Mack*, 49 F.4th at 949 (recognizing under *Barber* that, “[f]or a plaintiff to sue under the Establishment

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Clause, his ‘regular activities’ must prompt ‘personal confrontation’ with the challenged religious exercise,” but also recognizing that, “[w]hen a plaintiff seeks only prospective relief, he must show that future confrontation is substantially likely.” (first quoting *Barber*, 860 F.3d at 354; and then citing *Crawford v. Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371, 375-76 (5th Cir. 2021)).

Again, “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” *Thomas*, 473 U.S. at 581, 105 S.Ct. 3325 (cleaned up). Under *Ingebretsen*, “[t]here is no need for [Plaintiffs] to wait for actual implementation of the statute and actual violations of his rights under the First Amendment where the statute ‘makes inappropriate government involvement in religious affairs inevitable.’” 88 F.3d at 278. Because Plaintiffs have shown that the Act makes such involvement inevitable, and because the Plaintiffs will suffer hardship in the form of an infringement of their First Amendment rights if the Act is allowed to be implemented, this matter is ripe for decision.

C. Standing

1. Parties’ Arguments

AG Defendants assert, “[t]he same considerations tee up Plaintiffs’ lack of Article III standing.” (Doc. 39-1 at 21.) AG Defendants maintain that Plaintiffs fail each requirement for standing. (*Id.*)

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First, AG Defendants argue that Plaintiffs do not show a “concrete, particularized, actual or imminent injury-in-fact.” (*Id.*) Here, nothing has been done to implement H.B. 71, so Plaintiffs make only a facial attack on the law. (*Id.*) According to AG Defendants, *Barber* holds that there is no standing to challenge religious displays existing only in statutory text. (*Id.* at 21-22.) Additionally, Plaintiffs are advancing an alleged “offended observer standing,” which they lack because they have not been exposed to the challenged action. (*Id.* at 22.) First Amendment cases, say AG Defendants, require an encounter with the offending item, and Plaintiffs have not alleged an exposure to any display of H.B. 71. (*Id.* at 22-23.) Moreover, Plaintiffs cannot establish imminent harm because there has been no decision on how the Ten Commandments will be displayed, so there may be no concrete, particularized injury. (*Id.* at 23-24.) Further, Plaintiffs’ notion that they will be offended by any form the display takes runs afoul of *Barber*. (*Id.* at 23-24.)

Second, AG Defendants attack traceability. (*Id.* at 24.) Here, there is no allegation that the school boards and state officials somehow “caused” any harm resulting from H.B. 71; rather, Plaintiffs claim only unspecified harm from future H.B. 71 displays. (*Id.*) That is to say, the alleged harms are not linked to any defendant, which, AG Defendants say, is not surprising since no defendant took any action to implement the Act. (*Id.* at 24-25.) Further, Plaintiffs treat all defendants as a unified whole, but standing must be established for each defendant for each claim. (*Id.* at 25.)

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Third, Plaintiff fails to establish redressability. (*Id.* at 25-26.) In short, there is no injury for the Court to address. (*Id.*)

Finally, AG Defendants contend that Plaintiffs cannot manufacture standing solely because of the *Stone* decision. (*Id.* at 26.) *Stone* is not controlling, but, even if it were, Plaintiffs must still prove standing to establish jurisdiction. (*Id.*)

Plaintiffs respond that they satisfy all requirements for standing. (Doc. 47 at 18.) First, they have asserted sufficient injuries under the Supreme Court's ruling in *School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). (Doc. 47 at 18.) Their injuries are concrete and particularized. (*Id.*) Plaintiffs do not assert only "offended observer standing," as AG Defendants say, but rather:

As stated in the Complaint, the minor-child Plaintiffs will be subjected to a state-mandated, religiously preferential version of the Ten Commandments in every classroom, for at least 177 days every school year, for the entire remainder of their elementary and secondary public-school education. *Compl.* ¶¶ 70-77. Plaintiffs further allege that Defendants' imposition of this scripture will injure them by, among other harms, (1) promoting and forcibly subjecting the minor-child Plaintiffs to religious doctrine in a manner that violates and contradicts their families' religious or non-

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religious beliefs and practices, (2) pressuring the minor-child Plaintiffs to observe, meditate on, venerate, and adopt the state's preferred religious doctrine and to suppress expression of their own religious backgrounds and views at school, and (3) interfering and conflicting with the ability of the parent-Plaintiffs to direct their children's religious education and upbringing. *Supra* pp. 2-3.

(*Id.* at 18-19.)

Plaintiffs then attack AG Defendants' legal authority. (*Id.* at 19-20.) Plaintiffs say *Barber* is distinguishable because the statute at issue "had no effect on the *Barber* plaintiffs beyond the fact that they knew about the alleged endorsement." (*Id.* at 19 (citation omitted).) In *Barber*, there was no required confrontation with a religious display or exercise, which is not the case here. (*Id.* at 19.) "Furthermore, the Act has an obvious legal effect on Plaintiffs: It conditions their access to Louisiana's public schools on their acquiescence to unavoidable, state-mandated displays of scripture." (*Id.*) Defendant's reliance on *Doe v. Tangipahoa Parish School Board* is also misplaced, as, in that case, there was no evidence any plaintiff had been personally and directly subjected to the challenged practice of school-board prayers. (*Id.* at 20.) Here, conversely, the law will take effect by January 1, 2025, and each "minor-child Plaintiff will come into direct contact with the Act's displays." (*Id.*)

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Plaintiffs then contend that the future injuries are “certainly impending.” (*Id.*) Plaintiffs rely on *Ingebretsen*. (*Id.* at 21.) Again, “[a]n allegation of future injury” is adequate for purposes of Article III standing if the “threatened injury is certainly impending, or there is a substantial risk that the harm will occur.” (*Id.* (quoting *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334).) Plaintiffs then cite certain cases involving the Americans with Disabilities Act to support their position. (*Id.* at 21-22.) AG Defendants say no child will experience harm or a violation of rights, but, again, “the threatened harms to Plaintiffs will occur as a result of Defendants’ implementation of the Act’s minimum requirements alone.” (*Id.* at 22.)

As to traceability, Plaintiffs say this is not a proximate cause requirement, and, for each defendant, there need be only one plaintiff with standing to seek an injunction. (*Id.* at 22-23 (citations omitted).) Here, the BESE Members are required for oversight and governance of all public elementary and secondary schools in Louisiana, and the Act specifically requires BESE to adopt rules and regulations “to ensure the proper implementation of” the Act. (*Id.* at 23.) Additionally, “the State Superintendent of Education, Defendant Cade Brumley[,] is statutorily responsible for administering and implementing all policies and programs adopted by BESE,” so he shares in the responsibility for implementing the Act. (*Id.*) Finally, each School Board Defendant is pled to be a “public-school governing authority,” and they are required under the Act to display the Ten Commandments by January 1, 2025. (*Id.*) Each has jurisdiction over at least one school attended by at least one minor Plaintiff. (*Id.* at 23-24.) In sum:

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Because the Act requires the display of the Ten Commandments in every public school in the state, including the schools attended by the minor-child Plaintiffs, these allegations demonstrate that Plaintiffs' injuries are fairly traceable to the BESE Defendants and Superintendent Brumley, whose implementation responsibilities under the Act are statewide. . . . Similarly, because each School Board Defendant is required, under the Act, to display the Ten Commandments, Plaintiffs' injuries are fairly traceable to each Board that is the public-school governing authority for each of the minor-child Plaintiffs' schools.

(*Id.* at 25 (citations omitted).) As to AG Defendants' argument that the future harm is inadequate, Plaintiffs refer to the harm that will necessarily take place with the required implementation of the Act. (*Id.*)

Finally, Plaintiffs assert that AG Defendants' redressability argument is largely a reiteration of their injury-in-fact one. (*Id.* at 26.) But a favorable decision would protect children from unavoidable unconstitutional displays required by the Act, prevent religious coercion, and "shield[] them from an officially sponsored religious message that they are lesser in the eyes of the State because of their own religious or non-religious beliefs." (*Id.*) Moreover, "[i]t will also preserve the ability of the parent-Plaintiffs to direct their children's religious education and upbringing." (*Id.*)

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In reply, AG Defendants reiterate that Plaintiffs have not met their burden for standing. (Doc. 54 at 10.) First, they have not established a “concrete, particularized, and actual or imminent” injury-in-fact because (a) there can be no facial challenges for Establishment Clause claims and (b) they have suffered no encounter with any display. (*Id.* at 11.) AG Defendants maintain that *Schempp* and *Ingebretsen* do not trump *Barber*; in *Schempp*, the exercises were conducted in plaintiff’s classroom at the time suit was filed, and in *Ingebretsen*, the law made “inappropriate government involvement in religious affairs *inevitable*,” which, AG Defendants argue, is not the case here. (*Id.* at 11-12 (quoting *Ingebretsen*, 88 F.3d at 278).) The disability cases are also distinguishable. (*Id.* at 12.)

Moreover, Plaintiffs’ standing theory “require[s] guesswork as to how independent decisionmakers will exercise their judgment.” *Clapper*[], 568 U.S. at 413, 133 S.Ct. 1138]. No one has committed to donating displays (much less specific displays that could be analyzed for context) or the funds for such a display, so it is entirely speculative what sort of display (if any) a hypothetical donor may provide. Plaintiffs’ “theory of *future* injury” resulting from independent decisionmakers’ judgment “is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’” *Id.* at 401 [133 S.Ct. 1138] (quoting *Whitmore v. Arkansas*, 495

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U.S. 149, 158 [110 S.Ct. 1717, 109 L.Ed.2d 135] (1990)).

(*Id.* at 12.) Ultimately, “nothing prevents Plaintiffs from filing a new lawsuit if and when they actually suffer an Article III injury.” (*Id.* at 13.)

AG Defendants close with traceability and redressability. (*Id.*) As to the former, AG Defendants point to Plaintiffs’ argument that the traceability link will occur as soon as AG Defendants take actions. (*Id.*) These defendants then say that this is a concession that there is no injury traceable at the time they filed suit and that no link exists today. (*Id.*) As to redressability, AG Defendants again point to the injury-in-fact requirement to support their position. (*Id.*)

2. Applicable Law

“A proper case or controversy exists only when at least one plaintiff ‘establish[es] that [she] ha[s] standing to sue.’” *Murthy v. Missouri*, 603 U.S. 43, 144 S. Ct. 1972, 1985-86, 219 L.Ed.2d 604 (2024) (quoting *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); *Dep’t of Com. v. New York*, 588 U.S. 752, 766, 139 S.Ct. 2551, 204 L.Ed.2d 978 (2019)). A plaintiff “must show that [he or] she has suffered, or will suffer, an injury that is ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” *Id.* at 1986 (quoting *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (internal quotation marks omitted)). “These requirements help ensure that the plaintiff has

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‘such a personal stake in the outcome of the controversy as to warrant [his or her] invocation of federal-court jurisdiction.’” *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)).

“The plaintiff ‘bears the burden of establishing standing as of the time [he or she] brought th[e] lawsuit and maintaining it thereafter.’” *Murthy*, 144 S. Ct. at 1986 (first alterations by this Court; second by *Murthy*) (quoting *Carney v. Adams*, 592 U.S. 53, 59, 141 S.Ct. 493, 208 L.Ed.2d 305 (2020)). The Plaintiff “must support each element of standing ‘with the manner and degree of evidence required at the successive stages of the litigation.’” *Id.* (quoting *Lujan*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App’x 189, 195 (5th Cir. 2012) (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks and alterations omitted)). “At the preliminary injunction stage, then, the plaintiff must make a ‘clear showing’ that [he or] she is ‘likely’ to establish each element of standing.” *Murthy*, 144 S. Ct. at 1986 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (emphasis deleted)). “Where . . . the parties have taken discovery, the plaintiff cannot rest on ‘mere allegations,’ but must instead point to factual evidence.” *Id.* (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted)).

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Additionally, “standing is not dispensed in gross.” *Id.* at 1988 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021)). “That is, ‘plaintiffs must demonstrate standing for each claim that they press’ against each defendant, ‘and for each form of relief that they seek.’” *Id.* (quoting *TransUnion*, 594 U.S. at 431, 141 S.Ct. 2190). Thus, “for every defendant, there must be at least one plaintiff with standing to seek an injunction.” *Id.*

3. Analysis

Having carefully considered the matter, the Court will deny AG Defendants’ motion on this issue. In sum, Court finds that Plaintiffs have satisfied the three requirements for standing for each claim as to each defendant.

Preliminarily, the injury-in-fact and redressability requirements can be easily dispensed with. “To establish Article III standing, an alleged ‘injury in fact’ must be ‘concrete, particularized, and actual or imminent.’” *Consumer Data Indus. Ass’n v. Texas ex rel. Paxton*, No. 21-51038, 2023 WL 4744918, at *4 (5th Cir. July 25, 2023) (per curiam) (quoting *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138). Again, “[a]n allegation of future injury may establish standing if the threatened injury is ‘certainly impending or there is a substantial risk that the harm will occur.’” *Id.* (quoting *Driehaus*, 573 U.S. at 158, 134 S.Ct. 2334). As stated above, “[t]he standard for constitutional ripeness mirrors the injury-in-fact requirement for standing.” *Schelske*, 649 F. Supp. 3d at 278 (citing *Driehaus*, 573 U.S. at 157-58, 134 S.Ct. 2334). Here, the Court finds that the

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analysis provided above for ripeness applies with equal force to the injury-in-fact requirement, so this part of AG Defendants' motion will be denied.

The motion will also be denied as to the redressability requirement. “[T]o satisfy the third element of redressability[,] . . . the plaintiff must show that the requested relief, if provided, will likely redress the injury-in-fact.” *Hancock Cnty.*, 487 F. App’x at 195 (citations omitted). “To satisfy redressability, a plaintiff must show that ‘it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision.’” *Reule v. Jackson*, 114 F.4th 360, 368 (5th Cir. 2024) (quoting *Inclusive Cmty. Project, Inc. v. Dep’t of Treas.*, 946 F.3d 649, 655 (5th Cir. 2019) (emphasis in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000))). But, Plaintiffs are “not required to show that their requested relief would *certainly* redress their injuries; rather, they are required to show that their requested relief would *likely* (or substantially likely) redress their injuries.” *Hancock Cnty.*, 487 F. App’x at 197 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000); *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130). “Moreover, the proper focus of the redressability inquiry is not whether the relief is likely to be granted; rather, the focus is whether, assuming that the requested relief is granted, that relief will likely redress the plaintiffs’ injuries.” *Id.* (citing *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (en banc); *Rogers v. Brockette*, 588 F.2d 1057, 1063 (5th Cir. 1979) (“There must be a substantial probability that, if

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the court affords the relief requested, the plaintiffs' legal injuries will be remedied.") (internal quotation marks and ellipses omitted). Moreover, "[t]he relief sought needn't completely cure the injury, however; it's enough if the desired relief would lessen it." *Inclusive Cmty.*, 946 F.3d at 655 (citing *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014)). But, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

Here, it is highly likely that Plaintiffs' injuries to their First Amendment rights will be remedied by an injunction prohibiting the display of the Ten Commandments according to the minimum requirements of the Act and preventing the implementation of rules regarding same. Indeed, the Court agrees with Plaintiffs that AG Defendants' redressability argument boils down to a reiteration of their injury-in-fact position. As a result, *AG Defs. MTD* will be denied on this issue as well.

This leaves only traceability. To establish traceability, a plaintiff must show "that there is 'a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court[.]'" *Reule*, 114 F.4th at 367 (quoting *Bennett v. Spear*, 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). "Standing exists where the purported injury is connected to allegedly unlawful government conduct." *Id.* (citing *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 520 (5th Cir.

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2014)). Further, “[c]ausation . . . isn’t precluded where the defendant’s actions produce a ‘determinative or coercive effect upon the action of someone else,’ resulting in injury.” *Inclusive Cmtys.*, 946 F.3d at 655 (quoting *Bennett*, 520 U.S. at 169, 117 S.Ct. 1154). “Even though Article III requires a causal connection between the plaintiff’s injury and the defendant’s challenged conduct, it doesn’t require a showing of proximate cause or that ‘the defendant’s actions are the very last step in the chain of causation.’” *Id.* (quoting *Bennett*, 520 U.S. at 169, 117 S.Ct. 1154).

Here, the Court finds that Plaintiffs’ alleged injuries are fairly traceable to the action of each defendant. First, as to the BESE Members, the Act requires that “[t]he State Board of Elementary and Secondary Education shall adopt rules and regulations in accordance with the Administrative Procedure Act to ensure the proper implementation of this Section.” H.B. 71(B)(6)(a). This is consistent with the general powers BESE has over such schools under the Louisiana Constitution and the Louisiana Revised Statutes. *See* La. Const. art. VIII, § 3 (“The State Board of Elementary and Secondary Education . . . shall supervise and control the public elementary and secondary schools and special schools and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law.”); La. R.S. § 17:6(A)(10) (giving BESE the power, in the exercise of its “supervision and control” and “its budgetary responsibility,” to adopt “rules, regulations, and policies necessary or proper for

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the conduct of the business of the board”).⁶ All of this is plead in the *Complaint* as well. (*Compl.* ¶ 24, Doc. 1.)

Additionally, the Superintendent of Education, Defendant Cade Brumley, is empowered by law to “execute and implement those educational policies and programs which are under the supervision and control of the board.” La. R.S. § 17:21(A). Brumley “shall [also] administer and implement policies and programs adopted by the board and shall serve as the administrative head of the Department of Education.” *Id.* § 17:21(B)(1). One of his specific functions and duties is to “[i]mplement the policies and programs of the board and the laws affecting schools under the jurisdiction of the board.” La. R.S. § 17:22(3). Thus, as Plaintiffs allege, Brumley “is responsible for the implementation of all state laws that fall under the jurisdiction of the State Board of Elementary and Secondary Education, which includes H.B. 71.” (*Compl.* ¶ 21, Doc. 1.) Moreover, under the Act, the Louisiana Department of Education must (1) “identify appropriate resources to comply with the provisions” of the Act “that are free of charge” and,

6. *See also* La. R.S. § 17:6(A)(10) (“In the exercise of its supervision and control over the public elementary and secondary schools and special schools under its jurisdiction, and in the exercise of its budgetary responsibility for all funds appropriated or allocated by the state for public elementary and secondary schools and special schools placed under its jurisdiction, the board shall have authority to: . . . Adopt, amend, or repeal rules, regulations, and policies necessary or proper for the conduct of the business of the board.”).

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(2) “[o]nce identified, . . . list the free resources on the department’s internet website.” H.B. 71(B)(6)(b).

Lastly, Defendants do not seriously dispute that each School Board Defendant is, as alleged, “the governing authority” for its respective parish that serves in a “policymaking capacity” in each jurisdiction. *See* La. R.S. § 17:51 (“There shall be a parish school board for each of the parishes. . . .”); La. R.S. § 17:81(A)(1) (“Each local public school board shall serve in a policymaking capacity that is in the best interests of all students enrolled in schools under the board’s jurisdiction.”); La. R.S. § 17:1373 (“The parish school board is the governing body of all school districts created by it. . . .”). (*See also Compl.* ¶¶ 27-36, Doc. 1 (making these allegations at to the School Board Defendants for the parishes of East Baton Rouge, Livingston, Vernon, and St. Tammany).) Nor do AG Defendants argue that each parent plaintiff has plaintiff minors enrolled as students in public schools in these parishes.⁷ Nor can they argue that, under the Act, “[n]o later than January 1, 2025, each public school governing authority shall display the Ten Commandments

7. *See* Rev. Broadhurst Decl. ¶¶ 1–3, Doc. 20-4; Rev. Williams Decl. ¶¶ 1–3, Doc. 20-5; *Compl.* ¶ 10, Doc. 1; Sims Decl. ¶¶ 1–2, Doc. 20-6; *Compl.* ¶ 11, Doc. 1; Harding Decl. ¶ 1, Doc. 20-7; Owens Decl. ¶ 1, Doc. 20-8; *Compl.* ¶ 12, Doc. 1; Erin Hawley Decl. ¶¶ 1–2, Doc. 20-9; David Hawley Decl. ¶¶ 1–2, Doc. 20-10; *Compl.* ¶ 13, Doc. 1; McCrory Decl. ¶ 1, Doc. 20-11; *Compl.* ¶ 14, Doc. 1; Alkire Decl. ¶ 1, Doc. 20-14; *Compl.* ¶ 16, Doc. 1. The standing issues as to Plaintiffs Rev. Roake and Young, Sernovitz and Pulda, Herlands, and all of their minor children, (*see Compl.* ¶¶ 9, 15, 17, Doc. 1), will be addressed *infra* in the Court’s discussion of *OPSB MTD*.

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in each classroom in each school under its jurisdiction.”
H.B. 71(B)(1).

In the face of these allegations and the AG Defendants’ legal duties, AG Defendants’ arguments ring hollow. Contrary to their assertions, Plaintiffs do in fact link the alleged constitutional violations to each individual AG Defendant without treating them as a unified whole. Moreover, AG Defendants’ arguments that they have not caused any harm *yet* is merely a repackaging of their ripeness and injury-in-fact arguments.

Rather, the Court agrees with Plaintiffs that *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) is controlling. There, state officials contended that there was no traceability or redressability for Texas vote-by-mail statutes because “[a]cceptance or rejection of an application to vote by mail falls to local, rather than state, officials.” *Id.* at 399. The Fifth Circuit rejected this argument as to the Secretary of State, pointing to his statutory duty to “obtain and maintain uniformity in the application, operation, and interpretation of Texas’s election laws, including by ‘prepar[ing] detailed and comprehensive written directives and instructions relating to’ those vote-by-mail rules.” *Id.* (quoting Tex. Elec. Code § 31.003). Moreover, “the Secretary of State ha[d] the power to ‘take appropriate action to protect’ Texans’ voting rights ‘from abuse by the authorities administering the state’s electoral processes,’” which “include[d] the power to issue orders and, if necessary, seek a temporary restraining order, injunction, or writ of mandamus.” *Id.* at 399 & n.19 (first quoting Tex. Elec. Code

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§ 31.005(a); and then citing § 31.005(b)). Thus, the state officials failed to show that the plaintiffs lacked standing as to the Secretary of State. *Id.* However, they had shown that there was no standing as to Governor Abbott because the plaintiffs “pointed to nothing that outline[d] a relevant enforcement role for” him. *Id.* at 400.

Book People also supports Plaintiffs’ position. There, the law in question (“READER”) “require[d] school book vendors who want to do business with Texas public schools to issue sexual-content ratings for all library materials they have ever sold (or will sell), flagging any materials deemed to be ‘sexually explicit’ or ‘sexually relevant’ based on the materials’ depictions of or references to sex.” *Book People*, 91 F.4th at 324. “The State admit[ted] that the Agency Commissioner [in question] [was] empowered to enforce the Act against school districts, which mean[t] the school districts’ purchasing decisions are determined or coerced by the State through READER.” *Id.* at 331. The Fifth Circuit concluded that the First Amendment violations were fairly traceable to the Commissioner. *Id.* at 332-33. The Fifth Circuit cited as reasons:

To enforce READER, Commissioner Morath is required to collect ratings from vendors and post them on the Agency’s website. He has discretion to review vendors’ ratings, and if he does, he must notify vendors of the updated ratings and their duty to conform their rating to the Agency’s. He must then post the names of the vendors that don’t accept the Agency’s updated ratings on the Agency’s website.

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Id. Further, the Commissioner had “the authority to enforce § 35.003(d), which prohibit[ed] school districts from purchasing books from vendors who are on the noncompliance list, through a special investigation and sanctions.” *Id.* at 333. The appellate court concluded,

Because Commissioner Morath oversees the challenged process and because his actions are among those that would contribute to Plaintiffs’ harm, Plaintiffs’ injuries can be traced to the Commissioner’s enforcement of READER. If Commissioner Morath is enjoined, he cannot prohibit school districts from purchasing books from any vendors, either because the vendors did not initially provide ratings or because they refused to accept the Agency’s updated ratings. . . . [E]njoining the Commissioner from enforcing READER would free Plaintiffs from the injurious dilemma that READER creates: either submit unconstitutionally compelled ratings to the Agency at great expense or refuse to comply and lose customers and revenue.

Id. (cleaned up).

The same reasoning applies here. Plaintiffs have easily shown, through their extensive allegations and reference to statutory duties, how each AG Defendant will have a role to play in enforcing H.B. 71, which will directly lead to constitutional violations. *See Book People*, 91 F.4th at 332-33; *Tex. Democratic Party*, 961 F.3d at 399-400. They have thus satisfied this element of standing, particularly

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given the fact that “the injury must be *fairly* traceable to the challenged action of the defendant[s],” *Reule*, 114 F.4th at 367 (emphasis added), but it need not rise to the level of “proximate cause” or be the “very last step in the chain of causation,” *Inclusive Cmty.*, 946 F.3d at 655 (citation omitted).

In sum, Plaintiffs have demonstrated all three requirements for standing. As a result, *AG Defs. MTD* will be denied on this issue.

D. Sovereign Immunity for Brumley and the BESE Members

1. Parties’ Arguments

AG Defendants next assert that Defendants Brumley and BESE Members are entitled to sovereign immunity. (Doc. 39-1 at 26.) Each of these defendants is sued in his or her official capacity, so the suit is barred by the Eleventh Amendment. (*Id.* at 27.) Plaintiffs must rely on the *Ex parte Young* exception, but AG Defendants claim that Plaintiffs cannot satisfy those requirements. (*Id.*) First, Plaintiffs do not allege an ongoing violation of federal law, for all the reasons AG Defendants gave previously. (*Id.*)

Second, AG Defendants argue that Plaintiffs fail to allege that Brumley and the other BESE Members have the requisite authority to enforce H.B. 71. (*Id.*) That is, *Ex parte Young* requires that the “officer sued has some connection with the enforcement of the challenged act,” and, here, there is none. (*Id.* (cleaned up).) AG Defendants

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maintain that Brumley simply has a general duty to see that the laws are implemented, and this, they say, is insufficient. (*Id.* at 28.) Brumley has no duty to enforce the law through “compulsion or constraint” either, and this is also fatal. (*Id.*) Likewise, the BESE Members are just alleged to have general oversight and governance of all public and elementary schools in Louisiana. (*Id.*) While BESE Members have the authority to adopt rules and regulations, they have not done so yet, and the possibility they might in the future is not enough. (*Id.*) Again, there is no compulsion or constraint, so Plaintiffs’ claims are defective. (*Id.* at 28-29.)

Plaintiffs respond that they have satisfied the requirements of *Ex parte Young*. (Doc. 47 at 29.) Plaintiffs assert:

Here, the Act *specifically names* BESE and states that BESE “*shall* adopt rules and regulations in accordance with the Administrative Procedure Act to ensure the proper implementation of this Section.” H.B. 71A(4) (emphasis added); *see* Compl. ¶¶ 24-25. Those rules and regulations, in BESE’s own words, “have the force and effect of law.” Furthermore, as the Superintendent of Education, Defendant Brumley is statutorily “responsible for administering and implementing all policies and programs adopted by [BESE].” Compl. ¶ 19 (citing La. R.S. § 17:21 *et seq.*). Accordingly, BESE’s and Brumley’s “connection with the enforcement” of the Act

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goes well beyond a “general duty to see that the laws of the state are implemented” and is based on far more than the required “scintilla” of legal obligation required under *Ex Parte Young*. See [*Jackson v. Wright*, 82 F.4th 362, 367 (5th Cir. 2023)] (internal quotation marks omitted).

(Doc. 47 at 29-30.) The defendants here have never suggested they will not carry out their mandatory obligations under the Act, and they will necessarily take actions that result in constraint or compulsion when they exercise their duty to adopt and administer “rules and regulations . . . to ensure the proper implementation” of the law. (*Id.* at 30.) “The minor-child Plaintiffs will be forced to attend school and submit to unwanted and unconstitutionally coercive religious displays, and the parent-Plaintiffs will be forced to acquiesce to schools’ usurpation of their right to direct their children’s religious education.” (*Id.*) Plaintiffs rely on *Book People*, where the Fifth Circuit purportedly found that the Texas Education Agency commissioner had a sufficient connection to a certain law barring school districts from purchasing books from vendors that failed to place sexual-content ratings on library materials. (*Id.* at 30-31.)

Finally, Plaintiffs say AG Defendants cannot prevail by arguing that this is not an “*ongoing* violation of federal law,” as *Ex parte Young* allows suits based on imminent harm. (*Id.* at 31.) “Indeed, *Ex Parte Young* was itself a facial challenge to a state law, made prior to the law’s implementation and based on the plaintiffs’ alleged future

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injuries.” (*Id.* (citing *Ex parte Young*, 209 U.S. at 144, 28 S.Ct. 441 (“[T]he question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, *if enforced*, would take property without due process of law.” (emphasis added)))) Plaintiffs maintain that *Ex parte Young* does not require that there be an actual violation of law before a Plaintiff files suit; a threat of future enforcement is enough. (*Id.* at 31-32 (quoting *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999)).) Plaintiffs conclude, “Defendants’ reasoning would foreclose the relief granted by the Supreme Court to the *Ex Parte Young* plaintiffs and preclude any pre-enforcement challenges to state laws. Because courts have routinely recognized that the exception to sovereign immunity applies in pre-enforcement challenges, Defendants’ position must be rejected.” (*Id.* at 32 (footnotes omitted).)

In reply, AG Defendants reiterate that, under *Ex parte Young*, Plaintiffs cannot prevail because there is no ongoing violation of federal law. (Doc. 54 at 14.) Moreover, Plaintiffs cannot identify the requisite enforcement authority to invoke *Ex parte Young*’s “compulsion or constraint” requirement. (*Id.*) AG Defendants say:

The Fifth Circuit has repeatedly held that the “general duty to see that the laws of the state are implemented” is insufficient. Yet Plaintiffs retreat to the same allegations about BESE’s and Brumley’s generalized responsibilities to promulgate and implement rules concerning

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H.B. 71 that supposedly “will necessarily result in the constraint or compulsion of Plaintiffs.”

(*Id.* (citations omitted).)

According to AG Defendants, the Act just requires the Department of Education to “identify,” and “list,” “free [compliance] resources on the department’s internet website,” which is considerably different than *Book People*, where the Texas Legislature had the authority to compel and constrain the plaintiffs. (*Id.* at 15 (citations omitted). Thus, Brumley is entitled to sovereign immunity. (*Id.*)

As to the BESE Members, “there is no basis to think any rule they promulgate will necessarily compel or constrain anyone.” (*Id.*) For example, BESE has a rule about the “In God We Trust” motto that merely tells schools to adopt “policies and procedures that address . . . display of the national motto in each classroom in each school under its jurisdiction in accordance with R.S. [§] 17:262.” (*Id.* (citing La. Admin. Code § 28:337(B)(41)).)

2. Applicable Law

“Generally, ‘sovereign immunity bars private suits against nonconsenting states in federal court.’” *Book People*, 91 F.4th at 334 (quoting *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019)). “This bar also applies to suits like this one ‘against state officials or agencies that are effectively suits against a state.’” *Id.* (quoting *City of Austin*, 943 F.3d at 997). “Under the *Ex parte Young* exception to sovereign immunity, however, a plaintiff can

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seek prospective injunctive relief ‘against individual state officials acting in violation of federal law.’” *Id.* (quoting *City of Austin*, 943 F.3d at 997 (citation omitted)). “These state officials must ‘have some connection with the enforcement of the allegedly unconstitutional law.’” *Id.* (quoting *United States v. Abbott*, 85 F.4th 328, 337 (5th Cir. 2023) (internal quotation marks and citation omitted)).

“To satisfy the required enforcement connection, the state official must have a duty beyond ‘the general duty to see that the laws of the state are implemented.’” *Id.* at 335 (quoting *City of Austin*, 943 F.3d at 999-1000 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014))). “Rather, the official must have ‘the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.’” *Id.* (quoting *City of Austin*, 943 F.3d at 1000 (quoting *Morris*, 739 F.3d at 746)). “This analysis is “provision-by-provision”: The officer must enforce “the particular statutory provision that is the subject of the litigation.”” *Id.* (quoting *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022) (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020))). “We have defined ‘enforcement’ as ‘compulsion or constraint,’ so if the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation.” *Id.* (cleaned up).

“Plaintiffs need only show a ‘scintilla of enforcement by the relevant state official.’” *Id.* (quoting *Tex. Democratic Party*, 978 F.3d at 179 (internal quotation marks and citation omitted)). The Fifth Circuit has “noted that the

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Article III standing analysis and *Ex parte Young* analysis significantly overlap, such that a finding of standing tends toward a finding that a plaintiff may sue the official under the *Ex parte Young* exception.” *Id.* (cleaned up).

Additionally, “the inquiry into whether a suit is subject to the *Young* exception does not require an analysis of the merits of the claim.” *City of Austin*, 943 F.3d at 998 (citing *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 646, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)). “Rather, ‘a court need only conduct a “straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’”” *Id.* (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255, 131 S.Ct. 1632, 179 L.Ed.2d 675 (2011) (alteration in original) (quoting *Verizon*, 535 U.S. at 645, 122 S.Ct. 1753)). As one leading treatise explained:

The ongoing violation requirement is satisfied when a state officer’s enforcement of an allegedly unconstitutional state law is threatened, even if that threat is not yet imminent. [*Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 329-340 (4th Cir. 2001).] A threat that is sufficient to confer Article III standing . . . satisfies this element of *Ex parte Young*. [*Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (state attorney general’s threat of enforcement of no-political-speech buffer zone around polling locations satisfied *Ex parte Young*).] An Indian tribe’s challenge to the state’s application of Title VII against the tribe was

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cognizable under the *Ex parte Young* doctrine because the threats to tribal sovereignty, self-governance, and sovereign immunity posed by the investigations themselves were sufficiently imminent even if enforcement was uncertain. [*Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 56-66 (1st Cir. 2005).]

17A *Moore's Federal Practice—Civil* § 123.40 (Matthew Bender 3d ed. 2024).

Thus, for instance, in *Summit*, the Eleventh Circuit found:

Ex parte Young requires the allegation of an ongoing and continuous violation of federal law. This requirement does not mean that the enforcement of the allegedly unconstitutional state statute actually must be in progress against the particular plaintiffs initiating suit. Rather, . . . ongoing and continuous requirement merely distinguishes between cases where the relief sought is prospective in nature, *i.e.*, designed to prevent injury that will occur in the future, and cases where relief is retrospective. . . . Thus, where there is a threat of future enforcement that may be remedied by prospective relief, the ongoing and continuous requirement has been satisfied.

180 F.3d at 1338 (citations omitted).

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The Fifth Circuit recognized the balance here in *United States v. Abbott*. There, the appellate court found that *Ex parte Young* did not apply to allow an action against the governor because the order at issue “plainly delegate[d] all remaining enforcement discretion to DPS,” not the governor, who had “no ongoing authority over DPS.” 85 F.4th at 336. In doing so, the Fifth Circuit explained:

True, plaintiffs need not show that the Governor, like Attorney General Young, is so intent on bringing enforcement proceedings that he has, in violation of a court-issued injunction, obtained and served upon an individual plaintiff a court order mandating compliance with an allegedly unconstitutional state law; and only a stint in federal prison in contempt of court can stop him from instituting enforcement proceedings. *See Ex parte Young*, 209 U.S. at 126-27, 28 S.Ct. 441 []; [*Stewart*, 563 U.S. at 254, 131 S.Ct. 1632]. But plaintiffs do need to identify at least some enforcement action that the Governor will initiate for this court to enjoin. *See [Whole Woman’s Health v. Jackson*, 595 U.S. 30, 43, 142 S.Ct. 522, 211 L.Ed.2d 316 (2021)]. After all, we can only “enjoin named defendants from taking *specified* unlawful actions.” *See id.* at 44 [142 S.Ct. 522] (emphasis added).

Id.

*Appendix C***3. Analysis**

AG Defendants make two main arguments on this issue: (1) *Ex parte Young* requires ongoing harm, not the prospect of future harm, and (2) Brumley and the BESE Members lack the requisite connection to the Act. (Doc. 54 at 14-15.) In short, the Court finds neither argument convincing.

The first argument is easily dispensed with. *Moore's* and the other authorities listed above clearly demonstrate that *Ex parte Young* allows for threatened violations of federal law and not merely ongoing ones. *See Moore's, supra*, at § 123.40; *Summit*, 180 F.3d at 1338; *cf. Abbott*, 85 F.4th at 336. And for all the reasons given in the injury-in-fact discussion provided above, the Court finds that the threatened constitutional violations here are both imminent and substantial, not hypothetical or speculative. *See Book People*, 91 F.4th at 334-36 (linking standing and sovereign immunity analysis). Thus, AG Defendants cannot prevail on this ground.

They cannot prevail on their second ground either. In the traceability analysis above, this Court detailed the duties that the BESE Members and Superintendent have with respect to H.B. 71. In sum, BESE “shall adopt rules and regulations in accordance with the Administrative Procedure Act to ensure the proper implementation of this Section.” H.B. 71(B)(6)(a). Without question, that specific statutory directive goes beyond “the general duty to see that the laws of the state are implemented” and requires

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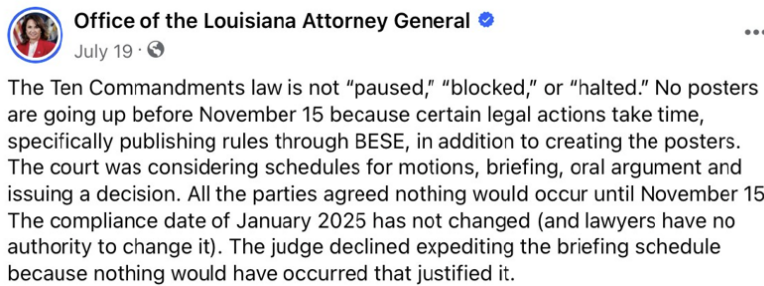
the BESE Members to “enforce the particular statutory provision that is the subject of the litigation.” *Book People*, 91 F.4th at 335 (cleaned up). By law, the BESE Members must compel the display of the Ten Commandments in classrooms, allegedly in violation of the First Amendment rights of Plaintiffs and their minor children. *See id.* Thus, contrary to AG Defendants’ position, an injunction against the BESE Members would stop a threatened violation of federal law. *See id.*

While a closer call, the Court also finds that Brumley is subject to the *Ex parte Young* exception. BESE is responsible for implementing the rules concerning the Ten Commandments displays under the Act, and the Superintendent of Education remains responsible for “[i]mplement[ing] the policies and programs of the board and the laws affecting schools under the jurisdiction of the board.” La. R.S. § 17:22(3). Thus, Plaintiffs have identified a specific duty of the Superintendent to enforce the Act and compel students to view the displays. As with the BESE Members, an injunction against the Superintendent would prevent the implementation of any regulations related to H.B. 71, thus preventing constitutional violations.

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Additionally, Plaintiffs have identified a willingness on the part of Brumley and BESE Members to enforce the statutes at issue. On July 19, 2024, the AG—who is counsel for Brumley and the BESE members—posted on her Facebook page:



(Slater Decl., Ex. B-2, Doc. 50-5 at 2.) Likewise, the AG announced on July 24:

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1:02 PM · Jul 24, 2024 · 1,541 Views

(Slater Decl., Ex. B-3, Doc. 50-6.) Meanwhile, BESE President Ronnie Morris testified that the Board’s statutory duty under the Act was to “adopt rules and regulations that will govern the proper implementation of the law[.]” (Morris Decl. ¶ 6, Doc. 39-3.) Thus, Plaintiffs

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have “demonstrated willingness” by the state officials “to exercise [their] dut[ies]” under the Act to adopt and implement rules requiring the posting of the Ten Commandments in every public-school classroom, all year long, according to the minimum requirements of H.B. 71. *Book People*, 91 F.4th at 335 (cleaned up).

The Court agrees with Plaintiffs that *Book People* is controlling. There, the Commissioner of the state agency that administered the book-rating system argued that he was entitled to sovereign immunity. *Book People*, 91 F.4th at 334-35. The state argued that the commissioner’s “only enforcement authority is over school districts and, if Plaintiffs are compelled to or constrained from doing anything, it is by school districts, not the State.” *Id.* at 335. The Fifth Circuit rejected this argument:

True, the enforcement here “is not the same type of direct enforcement found in *Ex Parte Young*, for instance, where the attorney general threatened civil and criminal prosecution.” [*Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 519 (5th Cir. 2017)]. But “such enforcement is not required.” [*Id.*; see also *City of Austin*, 943 F.3d at 1001.] Plaintiffs have identified specific actions that this court can enjoin: Commissioner Morath is ultimately responsible for collecting and posting the vendors’ lists of ratings, reviewing those ratings to determine whether a corrected rating is required, notifying vendors when their ratings are overridden, and posting lists

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of noncompliant vendors on TEA’s website. And he is responsible for ensuring that school districts comply with READER’s prohibition on buying material from vendors that violate this statute. [*See also supra* Part III.A.2; *Air Evac EMS*, 851 F.3d at 513-14 (“[T]here is significant overlap between standing and Ex Parte Young’s applicability.”).]

We agree with Plaintiffs that these acts “compel[] them to submit ratings with which they disagree,” and “constrain[] them from continuing to do business with school districts if they fail to submit the required ratings or decline to acquiesce in the State’s revised ratings.” That Commissioner Morath enforces the law through the school districts doesn’t change our analysis.

Id. at 335-36.

Similar reasoning applies here. The fact that H.B. 71 will be enforced through the School Board Defendants does not gainsay the role of the Superintendent and BESE Members in implementing and enforcing the Act. Like *Book People*, Plaintiffs have identified specific actions that can be enjoined against these defendants—namely, in the case of BESE Members, adopting rules and regulations to ensure the implementation of the Act, and, in the case of Brumley, implementing those regulations and policies. Thus, *Book People* shows why these defendants are not entitled to relief.

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At oral argument, AG Defendants reiterated a contention made in briefing: that Plaintiffs “do not (and cannot) challenge any such BESE rule or regulation [adopted to ensure the implementation of the Act], and that BESE ‘might in the future promulgate’ a rule is insufficient for *Ex parte Young* purposes.” (Doc. 39-1 at 28 (quoting *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 44, 142 S.Ct. 522, 211 L.Ed.2d 316 (2021)).)

But the Court finds *Jackson* distinguishable. There, abortion providers brought a pre-enforcement challenge against a newly-enacted law (S.B. 8) prohibiting an abortion where a physician detects a fetal heartbeat. *Jackson*, 595 U.S. at 35, 142 S.Ct. 522. The providers sought to enjoin, among others, the Texas attorney general, but the Supreme Court rejected the argument. *Id.* at 43-44, 142 S.Ct. 522. “While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners d[id] not direct this Court to any enforcement authority the attorney general possesses in connection with [the challenged law] that a federal court might enjoin him from exercising.” *Id.* at 43, 142 S.Ct. 522. “Maybe the closest the petitioners [came] [wa]s” identifying a state law that allows the attorney general to bring actions for civil penalties for violations of that subtitle (the Texas Occupational Code) or of a rule or order adopted by the Texas Medical Board. *Id.* at 44, 142 S.Ct. 522. But there was no such rule in place. *Id.* at 44, 142 S.Ct. 522. Writing for the majority, Justice Gorsuch then said,

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To be sure, some of our colleagues suggest that the Board might in the future promulgate such a rule and the attorney general might then undertake an enforcement action. *Post*, at 60-61, 142 S.ct. 522 (opinion of ROBERTS, C. J.) (citing 22 Tex. Admin. Code § 190.8(7) (West 2021)). But this is a series of hypotheticals and an argument even the petitioners do not attempt to advance for themselves.

Even if we could overcome this problem, doing so would only expose another. Supposing the attorney general did have some enforcement authority under S. B. 8, the petitioners have identified nothing that might allow a federal court to parlay that authority, or any defendant's enforcement authority, into an injunction against any and all unnamed private persons who might seek to bring their own S. B. 8 suits. The equitable powers of federal courts are limited by historical practice. *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 [59 S.Ct. 657, 83 L.Ed. 987] (1939). "A court of equity is as much so limited as a court of law." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (CA2 1930) (L. Hand, J.). Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may "lawfully enjoin the world at large," *ibid.*, or purport to enjoin challenged "laws themselves,"

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[*Whole Woman’s Health v. Jackson*, ___ U.S. ___, 141 S. Ct. 2494, 2495, 210 L.Ed.2d 1014 (2021)] (citing *California v. Texas*, 593 U.S. 659, 141 S. Ct. 2104, 2115-2116, 210 L.Ed.2d 230 (2021)).

Id.

The instant case is a far cry from *Jackson*. Here, Plaintiffs do not seek to enjoin the AG or the “world at large;” they are trying to enjoin specific state officials charged with adopting and implementing rules for the enforcement of an unconstitutional law. Further, in *Jackson*, the attorney general had no real enforcement power, whereas, here, the Court has identified the specific powers of the BESE Members and Superintendent which can be curbed through injunctive relief. Finally, and perhaps most critically, in *Jackson*, the majority concluded that it was a mere “series of hypotheticals” that (1) future rules would be promulgated (2) for which the attorney general could then bring actions for civil penalties. Conversely, here, the AG—who is the lawyer for these defendants—is on record, on multiple occasions, stating that, absent Court intervention, the Ten Commandments will be posted in classrooms according to the Act by January 2025. Thus, *Jackson* does not prevent the application of *Ex parte Young* in this case.

Again, “Plaintiffs need only show a scintilla of enforcement by the relevant state official,” and “the Article III standing analysis and *Ex parte Young* analysis significantly overlap, such that a finding of standing

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tends toward a finding that a plaintiff may sue the official under the *Ex parte Young* exception.” *Book People*, 91 F.4th at 335 (cleaned up). For all the above reasons, and particularly those described in the standing section, the Court finds that Plaintiffs have satisfied the requirements of the *Ex parte Young* exception and therefore *AG Defs. MTD* will be denied on this issue.

IV. Rule 12(b)(6) Standard

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Hamilton v. Dall. Cnty.*, 79 F.4th 494, 499 (5th Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937).

“To be plausible, the complaint’s [f]actual allegations must be enough to raise a right to relief above the speculative level.” *In re Great Lakes Dredge & Dock Co. LLC*, 624 F.3d 201, 210 (5th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). “In deciding whether the complaint states a valid claim for relief, we accept all well-pleaded facts as true and construe the complaint in the light most favorable to the plaintiff.” *Id.* (citing *Doe*

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v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008)). The Court does “not accept as true ‘conclusory allegations, unwarranted factual inferences, or legal conclusions.’” *Id.* (quoting *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007)). “A claim for relief is implausible on its face when ‘the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.’” *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937).

The Court’s “task, then, is ‘to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff’s likelihood of success.’” *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 854 (5th Cir. 2012) (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937)). “[A] claim is plausible if it is supported by ‘enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct].’” *Calhoun v. City of Hous. Police Dep’t*, 855 F. App’x 917, 919-20 (5th Cir. 2021) (per curiam) (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

Additionally, “[i]n determining whether a plaintiff’s claims survive a Rule 12(b)(6) motion to dismiss, the factual information to which the court addresses its inquiry is limited to (1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201.” *Inclusive Cmtys. Project, Inc. v. Lincoln*

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Prop. Co., 920 F.3d 890, 900 (5th Cir. 2019) (citations omitted). “Although a ‘court may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff’s claims,’ . . . the court need not do so.” *Brackens v. Stericycle, Inc.*, 829 F. App’x 17, 23 (5th Cir. 2020) (per curiam) (quoting *Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 (5th Cir. 2014)). See also *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (using permissive language regarding a court’s ability to rely on documents incorporated into the complaint by reference).

V. AG Defs. MTD; Rule 12(b)(6) Motion: The Establishment Clause Claim

AG Defendants next contend that Plaintiffs fail to sufficiently allege a violation of the Establishment Clause. (Doc. 39-1 at 29.) AG Defendants’ position boils down to the following: (1) because Plaintiffs make a facial challenge, they must demonstrate that the Act is unconstitutional in every application, which they cannot do; (2) *Stone* is no longer good law, and, even if it were, *Stone* is distinguishable; and (3) since *Stone* does not control, Plaintiffs must allege an Establishment Clause claim in accord with *Kennedy*, which they fail to do. The Court will take each of these arguments in turn.

*Appendix C***A. Facial Challenge****1. Parties' Arguments****a. AG Defendants' Original Memorandum (Doc. 39-1)**

AG Defendants assert that the first step is to characterize the nature of the claim. (Doc. 39-1 at 30.) Here, AG Defendants argue that Plaintiffs assert a facial attack on the Act, as Plaintiffs do not challenge any particular display implemented by H.B. 71. (*Id.*) Thus, say AG Defendants, Plaintiffs' claim is disfavored, and they must show "that there is no set of circumstances under which the implementation of H.B. 71 is constitutional." (*Id.* (cleaned up).) That is, the law must be "unconstitutional in every application." (*Id.* (cleaned up).) AG Defendants maintain that Plaintiffs fail to satisfy this standard. (*Id.* at 30-31.)

AG Defendants contend that H.B. 71 can be implemented "in countless ways that do not implicate [the] 'hallmarks of religious establishments'" set forth in *Kennedy*. (*Id.* at 31.) According to AG Defendants, Justice Gorsuch has laid out six specific such "hallmarks of religious establishment the framers sought to prohibit when they adopted the First Amendment[,]" most of which "reflect forms of 'coercion' regarding 'religion or its exercise.'" (*Id.* (cleaned up).) "Therefore, Plaintiffs' burden here is to plausibly allege that *every* potential display implementing H.B. 71 will violate the Establishment Clause because it falls within one of these historical

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hallmarks of religious establishments.” (*Id.* at 32 (citations omitted).)

AG Defendants argue that Plaintiffs cannot meet that burden. (*Id.*) To demonstrate this, AG Defendants have provided twelve “Illustrations” of ways that the Ten Commandments could be displayed in classrooms that would pass muster under the First Amendment. (*Id.* at 32-40.) Some purport to “explain the historical role that the Ten Commandments have played in American history, both in education and law”:

**AMERICAN PUBLIC EDUCATION:
A HISTORICAL PERSPECTIVE**


The History of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1688, The New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used in public schools throughout the United States for more than one hundred fifty years to teach Americans to read and contained more than forty questions about the Ten Commandments.

The Ten Commandments were also included in public school textbooks published by educator William McGuffey, a noted university president and professor. A version of his famous McGuffey Readers was written in the early 1800s and became one of the most popular textbooks in the history of American education, selling more than one hundred million copies. Copies of the McGuffey Readers are still available today.


The Ten Commandments also appeared in textbooks published by Noah Webster in which were widely used in American public schools along with America's first comprehensive dictionary that Webster also published. His textbook, The American Spelling Book, contained the Ten Commandments and sold more than one hundred million copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.


THE TEN COMMANDMENTS

I AM THE LORD THY GOD,
THOU SHALT HAVE NO OTHER GODS
BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF
ANY GRAVEN IMAGES,
THOU SHALT NOT TAKE THE NAME OF
THE LORD THY GOD IN VAIN,
REMEMBER THE SABBATH DAY, TO KEEP
IT HOLY.
HONOR THY FATHER AND THY MOTHER,
THAT THY DAYS MAY BE LONG UPON THE
LAND WHICH THE LORD THY GOD
GIVETH THEE.
THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS
AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY
NEIGHBOR'S HOME, THOU SHALT NOT
COVET THY NEIGHBOR'S WIFE, NOR HIS
MANSERVANT, NOR HIS MAIDSERVANT,
NOR HIS CATTLE, NOR ANYTHING THAT
IS THY NEIGHBOR'S.





**NOAH
WEBSTER**





**WILLIAM
MCGUFFEY**






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RELIGION'S ROLE IN AMERICAN LEGAL HISTORY



THE TEN COMMANDMENTS

I AM THE LORD THY GOD,
THOU SHALT HAVE NO OTHER GODS
BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF
ANY GRaven IMAGES,
THOU SHALT NOT TAKE THE NAME OF
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LAND WHICH THE LORD THY GOD
GIVETH THEE.
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THOU SHALT NOT COMMIT ADULTERY,
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS
AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY
NEIGHBOR'S HOUSE, THOU SHALT NOT
COVET THY NEIGHBOR'S WIFE, NOR HIS
MANSEVANT, NOR HIS MANSERVANT,
NOR HIS CATTLE, NOR ANYTHING THAT
IS THY NEIGHBOR'S.



The ORDINANCE of 1787

IN CONGRESS July 4, 1787
The Constitutional Convention of the United States


(Illustrations 1 & 2, Doc. 39-1 at 33.) Some might be used by elementary schools:

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**THE HOUSE OF REPRESENTATIVES
&
THE LAWGIVERS**

Twenty-three marble relief portraits hanging over the gallery doors of the House Chamber in the U.S. Capitol depict historical figures noted for their work in establishing the principles that underlie American law. Those lawgivers include notable figures like Hammurabi, Solon, and Thomas Jefferson. When the Speaker of the House assumes his position on the dais, he looks directly at yet another lawgiver, Moses. In fact, the Architect of the Capitol emphasizes that the 23 other lawgivers flanking the Chamber walls are oriented "so that all look towards the full-face relief of Moses in the center of the north wall."


**MOSES
THE LAWGIVER**



THE TEN COMMANDMENTS

I AM THE LORD THY GOD.
THOU SHALT HAVE NO OTHER GODS BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF ANY GRAVEN IMAGES.
THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN.
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY.
HONOUR THY FATHER AND THY MOTHER, THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE.
THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BE A FALSE WITNESS AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY NEIGHBOR'S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOR'S WIFE.
NOR HIS MANSEIN ANY.
NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBOR'S.

**SPEAKER
MIKE JOHNSON**




*The history of the Ten Commandments in American Public Education: The Ten Commandments were a central part of American public education for almost three centuries. Around the year 1910, The New England Primer became the first published American textbook and was the equivalent of a 100 page reader. The New England Primer was used in public schools throughout the United States for more than one hundred years. American public schools were the only places where the Ten Commandments were also required in public school textbooks published by the American Bible Society, a non-profit religious publisher and publisher. A survey of the Ten Commandments in American public schools was done in the early 1980s and as a result of the report published in the History of American Education, we have more than one hundred million copies. Copies of the Ten Commandments are still available today. The Ten Commandments also appear in textbooks published by the Bible Society in which were mostly used in American public schools along with American history textbooks. The Bible Society also publishes the Ten Commandments in its own publications. The American Bible Society, copyright © 1980. Commandments are available from the Bible Society either copies for use in public schools or for use in American public schools in the past 1000.


(Illustrations 4 & 5, Doc. 39-1 at 35.)

“Along the same lines, a school, teacher, or civic non-profit looking to donate displays may turn to Charlton Heston’s historic portrayal of Moses in *The Ten Commandments* and one of the clever songs from Lin-Manuel Miranda’s *Hamilton* for their fine art[s] classroom”:

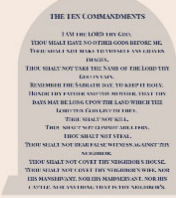
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“Since the beginning of time,
the world has known four
great documents, great
because of all the benefits to
humanity which came about as
a result of their fine ideals
and principles.”
-RUTH BADER GINSBURG






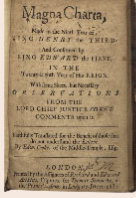
1689 English Bill of Rights



Ten Commandments



Declaration of Independence



Magna Carta

The history of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of elementary public education for almost three centuries, through the year 1980. The first English translation from the original Hebrew language into the authorized American version, and was the standard for a half century. The first English translation was made in public schools throughout the United States for more than 200 years of the same to each American to read and understand their own language about the Ten Commandments. The Ten Commandments were also included in public school textbooks published by McGraw-Hill Book Company, a school generally considered and preferred. A variety of the American Bible Society's numbers and articles in the early 1980s and for the rest of the 20th century. In the history of American education, asking more than one teacher and one student. Copies of the Ten Commandments are still available today. The Ten Commandments also appear in textbooks published by Holt Rinehart in which were widely used in American public schools along with America's first comprehensive dictionary that Webster also published. In textbooks, The American Spelling Book, can be read the Ten Commandments and still come from the original Hebrew text for use in public school classes and for use in home use. © 1987.

(Illustration 7, Doc. 39-1 at 37.) Alternatively, schools could “highlight civil rights leaders”:

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MLK & MOSES



LIKE MOSES HANDED DOWN THE LAW, MARTIN LUTHER KING JR. REQUIRED BIRMINGHAM CAMPAIGN VOLUNTEERS TO SIGN A COMMITMENT CARD CONSISTING OF TEN COMMANDMENTS.

TEN COMMANDMENTS FOR NON-VIOLENCE

MEDITATE DAILY ON THE TEACHINGS AND LIFE OF JESUS. REMEMBER ALWAYS THAT THE NON-VIOLENT MOVEMENT SEEKS JUSTICE AND RECONCILIATION - NOT VICTORY. WALK AND TALK IN THE MANNER OF LOVE, FOR GOD IS LOVE.
PRAY DAILY TO BE USED BY GOD IN ORDER THAT ALL MEN MIGHT BE FREE.
SACRIFICE PERSONAL WISHES IN ORDER THAT ALL MEN MIGHT BE FREE.
OBSERVE WITH BOTH FRIEND AND FOE THE ORDINARY RULES OF COLLETSY.
SEEK TO PERFORM REGULAR SERVICE FOR OTHERS AND FOR THE WORLD.
REFRAIN FROM THE VIOLENCE OF EIST, TONGUE, OR HEART.
STRIVE TO BE IN GOOD SPIRITUAL AND BODILY HEALTH. FOLLOW THE DIRECTIONS OF THE MOVEMENT AND OF THE CAPTAIN ON A DEMONSTRATION.

THE TEN COMMANDMENTS

I AM THE LORD THY GOD.
THOU SHALT HAVE NO OTHER GODS BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF ANY GRAVEN IMAGES.
THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN.
REMEMBER THE SABBATH DAY, TO KEEP IT HOLY.
HONOR THY FATHER AND THY MOTHER, THAT THY DAYS MAY BE LONG UPON THE LAND WHICH THE LORD THY GOD GIVETH THEE.
THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY.
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY NEIGHBOR'S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOR'S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBOR'S.

The history of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1830, The New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used in public schools throughout the United States for more than one hundred fifty years in one form or another. The Ten Commandments were also included in this textbook published by William McGuffey, a major textbook publisher and educator. In 1955, the National Education Association published a report on the Ten Commandments in the history of American education, which notes that they were included without comment. Copies of the McGuffey Reader are still available today. The Ten Commandments also appeared in textbooks published by McGraw-Hill, in which was added a note of explanation and a note to the teacher. The McGraw-Hill Reader was also published in 1955. The McGraw-Hill Reader was also published in 1955. The McGraw-Hill Reader was also published in 1955. The McGraw-Hill Reader was also published in 1955.



MARSHALL & MOSES



"OUR CONSTITUTION IS THE ENVY OF THE WORLD. AS IT SHOULD BE FOR IT IS THE GRAND DESIGN OF THE FINEST NATION ON EARTH."
- THURGOOD MARSHALL.

"MR. CIVIL RIGHTS," SOLICITOR GENERAL OF THE UNITED STATES, SUPREME COURT JUSTICE


"MR. MARSHALL BRANDISHED THE UNITED STATES CONSTITUTION THE WAY MOSES BRANDISHED THE TEN COMMANDMENTS."
- NEW YORK TIMES

THE TEN COMMANDMENTS
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THOU SHALT HAVE NO OTHER GODS BEFORE ME.
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THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN.
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THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY NEIGHBOR'S HOUSE.
THOU SHALT NOT COVET THY NEIGHBOR'S WIFE, NOR HIS MANSERVANT, NOR HIS MAIDSERVANT, NOR HIS CATTLE, NOR ANYTHING THAT IS THY NEIGHBOR'S.

The history of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1830, The New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used in public schools throughout the United States for more than one hundred fifty years in one form or another. The Ten Commandments were also included in this textbook published by William McGuffey, a major textbook publisher and educator. In 1955, the National Education Association published a report on the Ten Commandments in the history of American education, which notes that they were included without comment. Copies of the McGuffey Reader are still available today. The Ten Commandments also appeared in textbooks published by McGraw-Hill, in which was added a note of explanation and a note to the teacher. The McGraw-Hill Reader was also published in 1955. The McGraw-Hill Reader was also published in 1955. The McGraw-Hill Reader was also published in 1955.

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EVEN IMPORTANT MEN STUTTER



THE TEN COMMANDMENTS

I AM THE LORD THY GOD.
THOU SHALT HAVE NO OTHER GODS
BEFORE ME.
THOU SHALT NOT MAKE TO THYSELF
ANY GRaven IMAGES.
THOU SHALT NOT TAKE THE NAME OF
THE LORD THY GOD IN VAIN.
REMEMBER THE SABBATH DAY, TO KEEP
IT HOLY.
HONOR THY FATHER AND THY MOTHER,
THAT THY DAYS MAY BE LONG UPON
THE LAND WHICH THE LORD THY GOD
GIVETH THEE.
THOU SHALT NOT KILL.
THOU SHALT NOT COMMIT ADULTERY BY:
THOU SHALT NOT STEAL.
THOU SHALT NOT BEAR FALSE WITNESS
AGAINST THY NEIGHBOR.
THOU SHALT NOT COVET THY
NEIGHBOR'S HOUSE.
THOU SHALT NOT COVET THY
NEIGHBOR'S WIFE, NOR HIS
MANSERVANT, NOR HIS MAIDSERVANT,
NOR HIS CATTLE, NOR ANYTHING THAT
IS HIS NEIGHBOR'S.

**Stuttering
Strategies**

1. Slow rate
2. Full
breath
3. Stretch
speech
4. Pausing
and
chunking
5. Light
contacts



**King George VI
of Britain
struggled
with a speech
impediment.
He rose to
lead Britain
when it
counted most
despite his
stutter.**

The history of the Ten Commandments is described in the Bible. The Ten Commandments were a central part of Jewish public education for almost three centuries before the year 700. The New England Puritans brought the first published American textbooks and with the introduction of the public schools the New England Puritans saw need to publicize their Ten Commandments. The Bible is often the main text in the early years of the public schools. The Ten Commandments were also included in public school textbooks, and in the early 1900s, a model elementary grammar and arithmetic textbook, published by the McGraw-Hill Book Company, included the Ten Commandments. The Ten Commandments also appear in textbooks published by Holt, Rinehart & Winston, which were widely used in American public schools along with Aristotle's first complete translation of the Bible, also published by Holt, Rinehart & Winston. The American Spelling Book, published by the McGraw-Hill Book Company, also included the Ten Commandments and other parts of the Bible. The Ten Commandments were also included in the first American public schools in the year 1800.

(Illustrations 10 & 11, Doc. 39-1 at 38.) AG Defendants continue, “[a] school, teacher, or civil non-profit looking to donate displays also could explain the impact of non-profit organizations on legislative and litigation processes in a government class”:

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LEGAL NON-PROFITS IN ACTION

Nonprofit organizations are often some of the most powerful legal forces involved in cutting-edge legislation and litigation across the country, including high-profile First Amendment issues.

AMERICAN CIVIL LIBERTIES UNION
 “The ACLU today is the nation’s largest public interest law firm, with a 50-state network of staffed, autonomous affiliate offices.”

EDITORIAL: Satanists and ACLU target Ten Commandments

ACLU of Arkansas Files First Amendment Challenge to Ten Commandments Shrine on Capitol Grounds

ACLU sues Giles County over Ten Commandments display

ACLU sues Dixie County over 10 Commandments

FIRST LIBERTY
 “First Liberty Institute is the largest legal organization in the nation dedicated exclusively to defending religious liberty for all Americans.”

Victory! Oklahoma District Judge Says “Yes!” to Ten Commandments Monument

First Liberty Moves to Stop Attacks Against Ten Commandments Monument

First Liberty Testifies in Support of Texas Ten Commandments Bill

Arkansas Ten Commandments Monument Should Stand, Religious Liberty Law Firm Tells Court

*The history of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of American public education for almost two centuries. Around the year 2000, The New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used in public schools throughout New England. Copies for sale in their own homes from the year to their American for that and contained every line they contained about the Ten Commandments. The Ten Commandments were also included in public school textbooks published by publisher William McGuffey. A second series of primers and readers. A series of the Revised McGuffey Readers was written in the year 1836 and became one of the most popular textbooks in the history of American education, selling more than one hundred million copies. Copies of the McGuffey Readers are still available today. The Ten Commandments also appeared in textbooks published by other publishers in which were widely used in American public schools. American first grade textbooks contained the Ten Commandments and appeared in the textbooks. The American Spelling Book contained the Ten Commandments and appeared more than one hundred million copies for sale in public schools throughout the United States and was still available for sale in American public schools in the year 1975.

(Illustration 12, Doc. 39-1 at 39.) “Or, using many of the same headlines, a school, teacher, or civic non-profit may similarly highlight the impact of litigation on our governance by alluding to pop culture by invoking Internet memes”:

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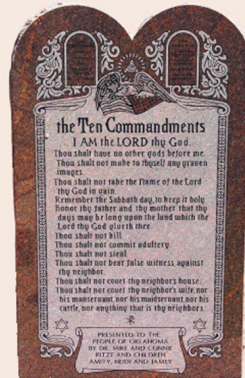
IMPORTANT SUPREME COURT CASES
VAN ORDEN V. PERRY

THE SUPREME COURT FOUND NO ESTABLISHMENT CLAUSE VIOLATION, WITH THE PLURALITY OPINION EMPHASIZING THAT "ACKNOWLEDGMENTS OF THE ROLE PLAYED BY THE TEN COMMANDMENTS IN OUR NATION'S HISTORY ARE COMMON THROUGHOUT AMERICA." THE COURT NOTED THAT MOSES AND THE COMMANDMENTS APPEAR IN THE SUPREME COURT COURTROOM AND THE GATES LINING THE COURTROOM, AND THE DOORS LEADING INTO THE COURTROOM.

THIS CASE ASKED WHETHER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT ALLOWS THE DISPLAY OF A MONUMENT INSCRIBED WITH THE TEN COMMANDMENTS ON THE TEXAS STATE CAPITOL GROUNDS.

THE MAIN DISSENT, JOINED BY JUSTICE GINSBURG AND TWO OTHER JUSTICES DISAGREED WITH THE COURT'S JUDGEMENT, BUT ACKNOWLEDGED THAT "A DISPLAY OF THE COMMANDMENTS ACCOMPANIED BY AN EXPOSITION OF HOW THEY HAVE INFLUENCED MODERN LAW WOULD MOST LIKELY BE CONSTITUTIONALLY UNOBJECTIONABLE." THE DISSENT ALSO RECOGNIZED THAT THE COMMANDMENTS COULD "BE INTEGRATED CONSTITUTIONALLY INTO A COURSE OF STUDY IN PUBLIC SCHOOLS."

NOTE: THIS IS THE VERSION OF THE TEN COMMANDMENTS UPLOADED IN VAN ORDEN, BUT ONE OF SEVERAL AMERICAN LEGION AND AMERICAN HUMANIST ASSOCIATION DIFFERENT VERSIONS OF THE TEXT OF THE TEN COMMANDMENTS. FOR EXAMPLE, THE CATHOLIC VERSION GENERALLY DOES NOT REFER TO "GODS IMAGES," AND THE TORONTO USES THE PHRASE "BY THE LORD YOUR GOD TO BROUGHT YOU OUT OF THE LAND OF EGYPT" OUT OF THE HOUSE OF SLAVERY.



The history of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1800, the New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used as a public school textbook throughout the United States for more than one hundred years to teach children to read and contained more than fifty questions about the Ten Commandments. The Ten Commandments were also included in public school textbooks published by publisher William McGuffey, a widely recognized and beloved author, a variety of the American McGuffey Readers were written from the early 1820s and for one of the most popular textbooks in the history of American education, and they were used in schools for over a hundred years. Copies of the McGuffey Readers are still available today. The Ten Commandments were approved for textbooks published by John Webster in which were widely used in American public schools along with America's first comprehensive dictionary that Webster also published. Webster's American Spelling Book, contained the Ten Commandments and used more than one hundred other copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

HOW DOES THE SUPREME COURT VIEW THE TEN COMMANDMENTS?

FOR BELIEVING JEWS AND CHRISTIANS, THE TEN COMMANDMENTS ARE THE WORD OF GOD HANDED DOWN TO MOSES ON MOUNT SINAI. BUT THE IMAGE OF THE TEN COMMANDMENTS HAS ALSO BEEN USED TO CONVEY OTHER MEANINGS. THEY HAVE HISTORICAL SIGNIFICANCE AS ONE OF THE FOUNDATIONS OF OUR LEGAL SYSTEM, AND FOR LARGELY THAT REASON, THEY ARE DEPICTED IN THE MARBLE FRIEZE IN OUR COURTROOM AND IN OTHER PROMINENT PUBLIC BUILDINGS IN OUR NATION'S CAPITAL.

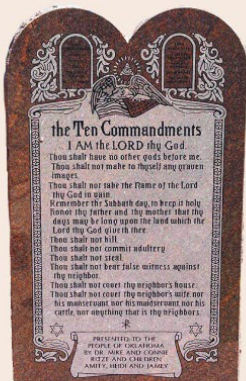
AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION

THIS COURT HAS SUBSCRIBED TO THE VIEW THAT THE TEN COMMANDMENTS INFLUENCED THE DEVELOPMENT OF WESTERN LEGAL THOUGHT.

VAN ORDEN V. PERRY DISSENT

A DISPLAY OF THE COMMANDMENTS ACCOMPANIED BY AN EXPOSITION OF HOW THEY HAVE INFLUENCED MODERN LAW WOULD MOST LIKELY BE CONSTITUTIONALLY UNOBJECTIONABLE. AND THE DECALOGUE COULD BE INTEGRATED CONSTITUTIONALLY INTO A COURSE OF STUDY IN PUBLIC SCHOOLS.

VAN ORDEN V. PERRY DISSENT



The history of the Ten Commandments in American Public Education: The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1800, the New England Primer became the first published American textbook and was the equivalent of a first grade reader. The New England Primer was used as a public school textbook throughout the United States for more than one hundred years to teach children to read and contained more than fifty questions about the Ten Commandments. The Ten Commandments were also included in public school textbooks published by publisher William McGuffey, a widely recognized and beloved author, a variety of the American McGuffey Readers were written from the early 1820s and for one of the most popular textbooks in the history of American education, and they were used in schools for over a hundred years. Copies of the McGuffey Readers are still available today. The Ten Commandments were approved for textbooks published by John Webster in which were widely used in American public schools along with America's first comprehensive dictionary that Webster also published. Webster's American Spelling Book, contained the Ten Commandments and used more than one hundred other copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

(Illustrations 14 & 15, Doc. 39-1 at 40.)

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AG Defendants assert:

As these few examples demonstrate, there are quite literally innumerable ways to comply with H.B. 71. From different topics, to different content, to different fonts, to different colors, to different sizes, to different orientations—the possibilities are endless. *See* Ex. A ¶ 13 (in addition to considering these illustrations, the Department of Education “will likely also consider other illustratives with different themes, content, formats, layouts, graphics, typography, color schemes, sizes, styles, interactive elements, spacing, borders, and headings”). And that sets aside a whole host of other questions about where schools and teachers actually place the posters, what size the posters are, whether each classroom may have a different poster, and so on.

(Doc. 39-1 at 40-41.) AG Defendants maintain that Plaintiffs must demonstrate that each of these displays reflects one of Justice Gorsuch’s six “historical hallmarks of an established religion.” (*Id.* at 41 (quoting *Kennedy*, 597 U.S. at 537 n.5, 142 S.Ct. 2407 (citing *Shurtleff v. City of Boston*, 596 U.S. 243, 286, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (Gorsuch, J., concurring); *Croft*, 624 F.3d at 164).) AG Defendants then go on to explain how a few particular illustrations they have provided do not violate Justice Gorsuch’s hallmarks. (*Id.* at 41-43.)

“At bottom, Plaintiffs’ Establishment Clause claim must be dismissed because Plaintiffs have not met—and

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cannot meet—the high standard for facial claims given the endless possibilities of H.B. 71 displays that may be implemented.” (Doc. 39-1 at 44.)

b. Plaintiffs’ Opposition (Doc. 47)

In response, Plaintiffs first argue that the standard AG Defendants advance—that Plaintiffs must prove “no set of circumstances” under which the Act is constitutional—has never been used by the Supreme Court in an Establishment Clause and Free Exercise Clause case and only once been used by the Fifth Circuit, in *Croft*. (Doc. 47 at 33.) But, even if this standard did apply, Plaintiffs would satisfy it. (*Id.*)

Plaintiffs maintain that AG Defendants’ approach ignores the terms of the statute, which is the proper focus for facial challenges. (*Id.* at 33-34.) Here, looking at the language of the statute itself, the Act is unconstitutional, and “displays of the Ten Commandments posted pursuant to, and in compliance with, that scheme will infringe Plaintiffs’ First Amendment rights—no matter the content of any individual display.” (*Id.* at 34.)

Whatever else may be included in any individual display, lawmakers have written the statute to ensure that, across the board, the Ten Commandments are the displays’ defining feature and that students’ attention will be drawn to them. Subjecting the minor-child Plaintiffs to permanent displays of a state-mandated, denominational version of the Ten

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Commandments in every classroom for the duration of their public-school education is, in and of itself, patently unconstitutional under *Stone* and any applicable First Amendment test.

(*Id.*) Thus, the Act is unconstitutional in every application. (*Id.*) AG Defendants' Illustrations do not comply with Act, nor would they be constitutional on an individual basis. (*Id.*) But, ultimately, the Illustrations are irrelevant because Plaintiffs are claiming that "no single implementation of the Act can be separated from its unconstitutional statutory scheme as a whole." (*Id.* at 34-35.)

c. AG Defendants' Reply (Doc. 54)

AG Defendants reply first:

None of Plaintiffs' counterarguments refute the obvious: Plaintiffs do not and cannot plausibly allege that every potential H.B. 71 display violates the Establishment Clause or their Free Exercise rights. . . . [A]s Defendants' illustrations demonstrate, there are endless ways to formulate H.B. 71-compliant displays that satisfy the Establishment Clause; indeed, all of them pass muster under the now-governing historical hallmarks test."

(Doc. 54 at 15.) AG Defendants maintain that *Croft* is binding precedent which "makes good sense" because it governs "most First Amendment facial challenges." (*Id.*

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at 16.) The Court must follow *Croft* and “explore the laws’ full range of applications . . . to decide, in this case, if there is no set of circumstances under which the implementation of H.B. 71 is constitutional.” (*Id.* (cleaned up).) Plaintiffs cannot prevail, AG Defendants say, even under *Lemon-era* cases because context matters and because the Court must evaluate the Government’s displays in their “full setting.” (*Id.* (citations omitted).) AG Defendants reiterate that Plaintiffs cannot demonstrate that every one of their illustrations violate the Establishment Clause. (*Id.* at 16-17.)

2. Law and Analysis

Plaintiffs do not seriously dispute that they make a facial attack, so the real question is: how does this affect their challenge to H.B. 71?

The issue is answered in part by *Croft*. There, plaintiffs were parents of minors who attended public schools. *Croft*, 624 F.3d at 161. They “challenge[d] the Texas pledge of allegiance, as amended to include the phrase ‘one state under God,’ and a provision of the Texas Education Code requiring students to recite the pledge daily.” *Id.*

On appeal, plaintiffs argued that there was no distinction between facial and as-applied challenges in Establishment Clause cases, so the government’s actions were to be reviewed solely under the various tests used by the Supreme Court to identify Establishment Clause violations. *Id.* at 163. That is, plaintiffs maintained that they need not meet the “heightened burden” of “showing [] unconstitutionality under all circumstances. . . .” *Id.*

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The Fifth Circuit rejected this argument. *Id.* at 163-64. The appellate court first explained that “[b]oth we and the Supreme Court have recognized the difference between facial and as-applied Establishment Clause challenges.” *Id.* at 163 (citations omitted). “In fact, [the Fifth Circuit has] . . . point[ed] out that ‘speculative possibilities may be fertile ground for as-applied challenges if they occur,’ but were inappropriate on facial review.” *Id.* (quoting *Croft v. Governor of Tex.*, 562 F.3d 735, 750 (5th Cir. 2009)).

“The Supreme Court has [] explained that where the ‘plaintiffs’ claim and the relief that would follow . . . reach beyond the particular circumstances of th[o]se plaintiffs,’ the plaintiffs must ‘satisfy our standards for a facial challenge to the extent of that reach.’” *Id.* at 164 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 194, 130 S. Ct. 2811, 2817 (2010)) (citing *United States v. Stevens*, 559 U.S. 460, 472-73, 130 S. Ct. 1577, 1587, 176 L.Ed.2d 435 (2010)). The Fifth Circuit concluded that the challenges were “clearly [] facial attack[s]” because “[n]one [were] limited to the ‘particular circumstances of [the] plaintiffs’” and because the relief sought was “that the pledge be invalidated in its entirety, not merely that it not be applied to them or their children.” *Id.*

Consequently, the circuit court concluded: “To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which either the language of the pledge or the requirement that children recite the pledge in classrooms is constitutional. If the plaintiffs successfully show either provision to be unconstitutional in every application, then that provision will be struck down as invalid.” *Id.*

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Similar reasoning applies here. Again, Plaintiffs do not seriously dispute that they mount a facial challenge, so, under *Croft*, they must prove the Act is “unconstitutional in every application” and that there is “no set of circumstances under which” the Ten Commandments could be posted in compliance with the Act that would be constitutional. *See id.* Plaintiffs lament that *Croft* is the only Establishment Clause case in the Fifth Circuit to reach this result, but *Croft* remains binding precedent that this Court must follow.

AG Defendants treat this as a kill shot. They maintain that they can comply with the Establishment Clause by surrounding the Ten Commandments with nonreligious matter no matter how outlandish that material might be. That is to say, AG Defendants believe they can constantly change their iterations, leaving potential challengers like Menelaus trying to seize and hold the ever shape-shifting Proteus until Proteus eventually tires and divulges the hero’s way off the island. *See* HOMER, *THE ODYSSEY* 135.391-142.644 (Robert Fagles trans., Penguin Books, 1997). Or, phrased another way, AG Defendants would have aggrieved parents and children play an endless game of whack-a-mole, constantly having to bring new lawsuits to invalidate any conceivable poster that happens to have the Decalogue on it.

AG Defendants overreach. Critically, they ignore the fact—both in briefing and in many of their Illustrations—that the Act contains certain “minimum requirements” that the Ten Commandments “shall be displayed on a poster or framed document that is at least eleven inches

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by fourteen inches,” with the Decalogue as “the *central focus* of the poster or framed document” and “printed in a large, easily readable font.” H.B. 71(B)(1). (emphasis added). Further, these displays must be posted in every “classroom in each school,” all year round, regardless of subject matter, and regardless of the age of the student. *Id.* Thus, the question is not whether the Biblical laws can ever be put on a poster; the issue is whether, as a matter of law, there is any constitutional way to display the Ten Commandments *in accordance with the minimum requirements of the Act.*

In short, the Court finds that there is not. First, *Stone* remains good law and is directly on point, and this Court is bound to follow it. Second, even putting *Stone* aside, for purposes of this Rule 12(b)(6) motion, Plaintiffs have adequately alleged that H.B. 71 fails to comply with the Establishment Clause analysis laid out in *Kennedy* and Fifth Circuit precedent.

B. *Stone v. Graham***1. Parties’ Arguments****a. AG Defendants’ Original Memorandum (Doc. 39-1)**

AG Defendants declare, “*Stone* is dead and inapposite.” (*Id.* at 47.) Specifically, they contend: (1) that *Stone* is no longer good law, and (2) that *Stone* has been narrowed by its own language and subsequent Supreme Court cases, all of which makes it distinguishable from “the myriad ways H.B. 71 may be implemented.” (*Id.*)

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As to the former, AG Defendants contend that *Stone* applied the test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), but the Supreme Court rejected the *Lemon* test in *Kennedy*. (*Id.* at 47-48.) That means: (1) *Stone* cannot be extended and is limited to the facts of its case, and (2) under the Supreme Court’s own precedent, the Court should treat *Stone* as bad law. (*Id.* at 48 (citations omitted).)

As to the latter, AG Defendants maintain that *Stone* is distinguishable. (*Id.*) The display in *Stone* was “plainly religious,” and *Stone* emphasized that “[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.” (*Id.* at 48-49 (quoting *Stone*, 449 U.S. at 41-42, 101 S.Ct. 192).) That is, there was “no educational function” in *Stone*. (*Id.* at 49 (quoting *Stone*, 449 U.S. at 42, 101 S.Ct. 192).) The Supreme Court has subsequently narrowed *Stone*, emphasizing that *Stone* did not decide the constitutionality of every possible display of the Ten Commandments and that *Stone* only applied to “plainly religious” displays with that “pre-eminent purpose.” (*Id.* (cleaned up).) For similar reasons, each Illustration provided by the AG Defendants lacks such a religious purpose, and their context reflects an educational one. (*Id.* at 49-50.) Thus, AG Defendants argue that, even if *Stone* is good law, the Court should uphold H.B. 71. (*Id.*)

*Appendix C***b. Plaintiffs' Opposition (Doc. 47)**

Plaintiffs respond that *Stone* remains binding and is dispositive. (Doc. 47 at 35.) “[O]nly the Supreme Court may overrule its precedents even where subsequent decisions or factual developments may appear to have significantly undermined the rationale for the earlier holding.” (*Id.* (quoting *Nat’l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549-50 (5th Cir. 2020) (alteration and internal quotation marks omitted)).) Lower courts may not ignore Supreme Court precedent unless the High Court itself so instructs. (*Id.*) Even if the continued validity of a Supreme Court decision is called into doubt, that case controls, and lower courts should leave it to the Supreme Court to overrule its own decisions. (*Id.* at 35-36.) AG Defendants point to *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), but that case (1) was unique because the Supreme Court was evaluating the case in the context of a Rule 60(b)(5) motion, and (2) in any event, reaffirmed the general rule that lower courts should not decide for themselves whether a Supreme Court decision remains good law. (Doc. 47 at 36-37.) Likewise, the federal Second Circuit has also rejected the position that all cases based on *Lemon* are no longer binding. (*Id.* at 37 (citing *Jusino v. Fed’n of Catholic Teachers, Inc.*, 54 F.4th 95, 102 (2d Cir. 2022), *cert. denied*, ___ U.S. ___, 143 S. Ct. 1056, 215 L.Ed.2d 280 (2023)).) Like the Second Circuit reasoned, *Kennedy* did not overrule *Stone* or even mention it, and, in any event, *Stone* also relied on *Schempp*, which, as *Van Orden* recognized, reflects the special treatment received by elementary and secondary schools. (*Id.* (citations omitted).)

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Additionally, AG Defendants' efforts to distinguish *Stone* are not persuasive. (*Id.*) Both cases involved a facial challenge to a law requiring the permanent display of the Ten Commandments in all classrooms. (*Id.* at 37-38.) Moreover, (1) neither statute required the commandments be displayed alone; (2) both statutes had minimum requirements for size; and (3) each statute was accompanied by a context statement. (*Id.*) Plaintiffs conclude:

Finally, as in *Stone*, the state's purpose here is plainly religious, with the principal author and sponsor of the Act explaining: "It is so important that our children learn what God says is right and what He says is wrong, and to allow [the Ten Commandments] to be displayed in our classrooms as a visual aid, I believe, especially in this day and time is so important." Compl. ¶ 79. The statutory scheme further belies [AG] Defendants' claim that the displays mandated by the Act have a "non-religious objective." Def. Br. at 41. The Act does not tie the displays to any existing, possibly relevant curriculum, such as world history or world religions, or to any curriculum at all. Pl. Br. at 23-24. It mandates the display of only one (purportedly) historical document, regardless of instructional context: the Ten Commandments. Even the Declaration of Independence, one of the most consequential documents in U.S history, does not get this special treatment. And the other core Founding documents, the Constitution and

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Bill of Rights, are nowhere to be found in the Act. That's because lawmakers had one aim: to impose the Ten Commandments on students in an effort to induce them to believe in and live by the state's preferred religious doctrine. See Pl. Br. at 6 (Governor Landry defending the Act by questioning, "[s]ince when did the Ten Commandments become a bad way to live your life?!").

(*Id.* at 38.) In sum, *Stone* is on point, and "[i]ndeed, the Act is more constitutionally egregious than the Kentucky statute because it adopts and prescribes a specific, denominational version of the Ten Commandments." (*Id.* at 39 (citations omitted).)

c. AG Defendants' Reply (Doc. 54)

AG Defendants begin their reply by emphasizing that Plaintiffs concede that the *Lemon* test has been abandoned and that *Lemon* was the primary basis for *Stone*'s holding. (Doc. 54 at 17.) Further, the Supreme Court's rejection of *Stone*'s underlying rationale should limit *Stone* to the facts of that case, not just because of *Kennedy* but also because of other cases from other circuits which predate *Kennedy*. (*Id.*)

AG Defendants argue *Stone* is distinguishable in two ways. "*First, Stone*, unlike this case, did not involve pre-enforcement adjudication of displays of unknown content[.]" and there were "15,000 framed copies' . . . 'in all classrooms in 55 counties,'" (*id.* (quoting *Stone v.*

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Graham, 599 S.W.2d 157, 159 (Ky. 1980) (Lukowsky, J., for reversal).) “The text of the Commandments ‘stood alone,’ with ‘no context that might have indicated an object beyond the religious character of the text.” (*Id.* (quoting *McCreary*, 545 U.S. at 867-68, 125 S.Ct. 2722).) Conversely, here, no decision has been made on what the displays will end up looking like, and the illustrations show there can be numerous pedagogical purposes. (*Id.* at 17-18.) AG Defendants say that “context matters, . . . [a]nd now that *Kennedy* has confirmed *Lemon*’s abrogation, *Stone* certainly does not apply to the kind of elaborate, creative, and diverse displays that H.B. 71 permits and [AG] Defendants might consider here.” (*Id.* at 18.)

Second, in *Stone*, Kentucky failed to provide a “secular legislative purpose” for their required displays, whereas, here, Louisiana has done so. (*Id.*) AG Defendants maintain that each display contains the three-paragraph long context statement explaining the historical and educational purpose of the law, and the Act itself cites historical sources to support those purposes. (*Id.* at 19 (citations omitted).) In *Stone*, Kentucky failed to provide those bases, and Courts should defer to the “secular purpose” advanced by the Legislature, even if some legislators did have a religious motive. (*Id.*) Thus, *Stone* is distinguishable and should not be extended. (*Id.*)

2. Law and Analysis

AG Defendants assert that “*Stone* is dead and inapposite.” (Doc. 39-1 at 47.) The Court will begin with an analysis of *Stone* before returning to AG Defendants’ arguments.

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In *Stone*, the Supreme Court found that “[a] Kentucky statute [which] require[d] the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State” violated the Establishment Clause. 449 U.S. at 39, 101 S.Ct. 192. That statute provided in full:

“(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

“(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: ‘The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.’

“(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.”

Id. at 40 n.1 (quoting 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980)).

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The High Court looked to the three-part test articulated by *Lemon*: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally[,] the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 40, 101 S.Ct. 192 (quoting *Lemon*, 403 U.S. at 612-613, 91 S.Ct. 2105 (citations omitted)). The Supreme Court found that the statute “had no secular legislative purpose[] and [was] therefore unconstitutional.” *Id.* at 41, 101 S.Ct. 192.

Kentucky argued that the statute did have such a purpose. The state pointed to the fact “that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: ‘The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.’” *Id.*

The Supreme Court rejected this argument, explaining that, “[u]nder this Court’s rulings, however, such an ‘avowed’ secular purpose is not sufficient to avoid conflict with the First Amendment.” *Id.* *Stone* relied upon *Schempp*, where the High Court found that “the daily reading of Bible verses and the Lord’s Prayer in the public schools” was unconstitutional, even though the school district argued “such secular purposes as ‘the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.’” *Id.* (quoting *Schempp*, 374 U.S. at 223, 83 S.Ct. 1560).

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After declaring that “[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature[,]”⁸ the Court then stated:

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District v. Schempp*, [374 U.S.] at 225 [83 S.Ct. 1560]. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter

8. The Supreme Court explained:

The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one’s parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5: 16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day. See Exodus 20: 1-11; Deuteronomy 5: 6-15.

Stone, 449 U.S. at 41-42, 101 S.Ct. 192.

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of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the “official support of the State . . . Government” that the Establishment Clause prohibits. 374 U.S. at 222 [83 S.Ct. 1560]; see *Engel v. Vitale*, 370 U.S. 421, 431 [82 S.Ct. 1261, 8 L.Ed.2d 601] (1962). . . . Moreover, while the actual copies of the Ten Commandments were purchased through private contributions, the state nevertheless expended public money in administering the statute. . . . Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for “it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.” *Abington School District v. Schempp*, *supra*, at 225 [83 S.Ct. 1560]. We conclude that § 158.178 (1980) violates the first part of the *Lemon v. Kurtzman*, test, and thus the Establishment Clause of the Constitution.

Stone, 449 U.S. at 42-43, 42 n.4, 101 S.Ct. 192. The Court also distinguished cases highlighted by the dissent as “involving state assistance to private schools” before concluding, “[t]he posting of the Ten Commandments on classroom walls has no such secular purpose.” *Id.* at 43, 101 S.Ct. 192 n.5.