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

APPENDIX VOLUME 2 OF 2
(Pages 243a–534a)

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TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 20, 2026. . . . . 1a

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 20, 2025 . . . . . 61a

APPENDIX C — RULING AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, FILED NOVEMBER 12, 2024 . . . . . 126a

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 21, 2026. . . . . 377a

APPENDIX E — LSA-R.S. 17:2124 . . . . . 528a

With that background, the Court returns to AG Defendants' argument that "*Stone* is dead and inapposite." (Doc. 39-1 at 47.) As to the former, AG Defendants do not seriously argue that *Stone* has been overruled; rather, they maintain in briefing that the Supreme Court has rejected *Lemon*, which was "the doctrinal foundation for *Stone*," and that, consequently, "this Court should treat *Stone* as bad law altogether." (*Id.* at 47-48, 101 S.Ct. 192.)

AG Defendants are only half right. Specifically, they are correct that the foundation of *Stone*—the *Lemon* test—has been abandoned. *See Kennedy*, 597 U.S. at 534-35, 142 S.Ct. 2407;[9] *Groff v. DeJoy*, 600 U.S. 447, 460, 143

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9. In *Kennedy*, Justice Gorsuch, writing for the majority, explained the Court's evolution on the *Lemon* test and why the Supreme Court "abandoned" it:

> [T]he "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. [*Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 139 S. Ct. 2067, 2079-81, 204 L.Ed.2d 452 (2019)] (plurality opinion); see also *Town of Greece v. Galloway*, 572 U.S. 565, 575-577 [134 S.Ct. 1811, 188 L.Ed.2d 835] (2014). The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. [*Cap. Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768-69, 768 n.3, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995)] (plurality opinion) (emphasis deleted). This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto, in

S.Ct. 2279, 216 L.Ed.2d 1041 (2023) (describing *Lemon* as "now abrogated" by *Kennedy*). The Court will discuss what replaced *Lemon infra*, but for present purposes, it is essential that *Kennedy* did not overrule *Stone*, or even mention it.

Why is that important? Because "[i]t 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

> which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'" *Good News Club v. Milford Central School*, 533 U.S. 98, 119 [121 S.Ct. 2093, 150 L.Ed.2d 151] (2001) (emphasis deleted). An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 [110 S.Ct. 2356, 110 L.Ed.2d 191] (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." [*Van Orden*, 545 U.S. at 699, 125 S.Ct. 2854] (BREYER, J., concurring in judgment). In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*, 596 U. S. at 247-50, 142 S. Ct. at 1587-1588; *id.*, at 262-63, 142 S. Ct. at 1595 (ALITO, J., concurring in judgment); *id.*, at 247-49, 249-52, 142 S. Ct. at 1587, 1588-1589 (opinion of GORSUCH, J.).

Kennedy, 597 U.S. at 534-35, 142 S.Ct. 2407.

U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001)). The High Court's "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Id.* (quoting *Hohn v. United States*, 524 U.S. 236, 252-53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)). "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). "This is true even if the lower court thinks the precedent is in tension with some other line of decisions." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 356 (5th Cir. 2024) (quoting *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023)).

Thus, even if the "doctrinal foundation of *Stone*" has been undermined, as AG Defendants argue, it remains binding precedent. *See Jusino*, 54 F.4th at 102 (finding that "[*NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 496, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979)] . . . remain[ed] good law notwithstanding its reliance . . . on *Lemon* [], which was overruled by the Supreme Court" because *Kennedy* "did *not* . . . overrule—or even mention—*Catholic Bishop*" and so, "unless and until the Supreme Court sees fit to overrule *Catholic Bishop* directly, it remain[ed] binding on this Court." (citation omitted)). In short, this Court must follow *Stone* if it "directly controls." *Rodriguez*, 490 U.S. at 484, 109 S.Ct. 1917.

Appendix C

Stone does directly control this case, as its facts and reasoning are on all fours. Again, H.B. 71 provides:

> 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.

The Act also requires that the Decalogue be "displayed with a context statement" which begins, "[t]he Ten Commandments were a prominent part of American public education for almost three centuries." Examples purportedly include, among other things, *The New England Primer* from around 1688, McGuffey *Readers* written in the early 1800s, and textbooks published by Noah Webster. H.B. 71 further states that a public-school governing authority is not required to spend its funds to purchase a display; rather, "[a] governing authority may spend donated funds to purchase the Ten Commandments or other historical documents provided for in [the Act] or may accept donated displays." *Id.*

Thus, the unconstitutional law in *Stone* and H.B. 71 share the following similarities: (1) both require that the

Ten Commandments be displayed on the wall in every public elementary and secondary school classroom in the state; (2) the two laws impose comparable minimum size requirements for the display; (3) each statute contains a context statement purporting to describe the historical basis for the display; (4) the two statutes allow for financing by private contributions; (5) neither 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 (citing *Schempp*, 374 U.S. at 225, 83 S.Ct. 1560); *see also generally* La. Student Standards: Social Studies (updated May 11, 2023), https://www.louisianabelieves.com/docs/;[10] and (6) the Louisiana and Kentucky laws both single out the Decalogue for *central* display (in the case of the Louisiana statute, central *focus*) while declining to give similar preferential treatment to foundational documents like the U.S. Constitution, the Declaration of Independence, or the Magna Carta. 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." *Stone*, 449 U.S. at 42, 101 S.Ct. 192.

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10. "[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) ("In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record." (citation omitted))).

Appendix C

AG Defendants attempt to distinguish *Stone* on a number of grounds by relying on *McCreary* and *Van Orden*. (Doc. 39-1 at 48-49.) But this position is undermined by a closer reading of the two cases and their relationship to *Stone*.

In *McCreary*, the Court found that various attempts to display the Ten Commandments on the walls of a courthouse violated the Establishment Clause. 545 U.S. at 858, 125 S.Ct. 2722. The *McCreary* Court said of *Stone*:

> *Stone* recognized that the Commandments are an "instrument of religion" and that, at least on the facts before it, the display of their text could presumptively be understood as meant to advance religion: although state law specifically required their posting in public school classrooms, their isolated exhibition did not leave room even for an argument that secular education explained their being there. 449 U.S. at 41, n.3 [, 101 S.Ct. 192] (internal quotation marks omitted). But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. [*County of Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086 (opinion of Blackmun, J.)] ("[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the

> contested object appears" (internal quotation marks and citation omitted)).

Id. at 867-68, 125 S.Ct. 2722. The High Court traced the evolution of three displays attempted by the counties and ultimately concluded that there was "ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display" and so upheld the preliminary injunction." *Id.* at 881, 125 S.Ct. 2722. In doing so, the Supreme Court rejected the counties' "argu[ment] that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions," explaining that "the history of the government's actions" was "perfectly probative evidence." *Id.* at 866, 125 S.Ct. 2722 (citing, inter alia, *Edwards*, 482 U.S. at 595, 107 S.Ct. 2573 (enquiry looks to "the historical context of the statute . . . and the specific sequence of events leading to [its] passage")).

AG Defendants also point to *Van Orden.* As explained above, there the Supreme Court upheld the placement of a Ten Commandments monument on the Texas Capital Grounds. *Van Orden*, 545 U.S. at 691-92, 125 S.Ct. 2854. The plurality opinion said of *Stone*:

> There are, of course, limits to the display of religious messages or symbols. For example, we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. [*Stone*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199]. In the classroom context, we found that the Kentucky statute

had an improper and plainly religious purpose. *Id.*, at 41 [101 S.Ct. 192]. As evidenced by *Stone's* almost exclusive reliance upon two of our school prayer cases, *id.*, at 41-42 [101 S.Ct. 192] (citing [*Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844], and [*Engel*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601]), it stands as an example of the fact that we have "been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," [*Edwards*, 482 U.S. at 583-584, 107 S.Ct. 2573]. Compare [*Lee*, 505 U.S. at 596-597, 112 S.Ct. 2649] (holding unconstitutional a prayer at a secondary school graduation), with *Marsh v. Chambers*, [463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983)] (upholding a prayer in the state legislature). Indeed, *Edwards v. Aguillard* recognized that *Stone*—along with *Schempp* and *Engel*—was a consequence of the "particular concerns that arise in the context of public elementary and secondary schools." 482 U.S. at 584-585 [107 S.Ct. 2573]. Neither *Stone* itself nor subsequent opinions have indicated that *Stone*'s holding would extend to a legislative chamber, see *Marsh v. Chambers, supra*, or to capitol grounds. . . . Nor does anything suggest that *Stone* would extend to displays of the Ten Commandments that lack a "plainly religious," "pre-eminent purpose," *id.*, at 41 [101 S.Ct. 192]. *See Edwards v. Aguillard, supra*, at 593-594 [107 S.Ct. 2573] ("[Stone] did not mean that no use could ever

> be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization"). Indeed, we need not decide in this case the extent to which a primarily religious purpose would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case.
>
> *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.* Indeed, Van Orden, the petitioner here, apparently walked by the monument for a number of years before bringing this lawsuit.

Van Orden, 545 U.S. at 690-91 & 691 n.11, 125 S.Ct. 2854 (plurality opinion) (emphasis added). Likewise, Justice Breyer's controlling concurrence said:

> 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. See, *e.g.*, [*Lee*, 505 U.S. at 592, 112 S.Ct. 2649]; [*Stone*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199]. This case also differs from *McCreary County*, where the

> short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. See [545 U.S. 844, 125 S. Ct. 2722, 2738-2740, 162 L.Ed.2d 729] (opinion of the Court). That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.

Van Orden, 545 U.S. at 703, 125 S.Ct. 2854 (Breyer, J., concurring).

This Court concludes that *Van Orden* and *McCreary* do not undermine Plaintiffs' position for two reasons. First, as *Stone* found, "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," 449 U.S. at 41, 101 S.Ct. 192, and that is certainly the case with H.B. 71. As the Fifth Circuit explained in *Croft*:

> Courts are normally deferential to a legislative articulation of a secular purpose. Nevertheless,

> we do review to ensure that the alleged secular purpose is the actual purpose, in other words, it must be sincere; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a sham, or merely secondary to a religious one. However, the statute need not have exclusively secular objectives to meet the sincerity standard; the touchstone is neutrality, and it is only when the government acts with the ostensible and predominant purpose of advancing religion that it violates the first prong of the *Lemon* test. Importantly, the eyes that look to purpose belong to an objective observer, and require no judicial psychoanalysis of a drafter's heart of hearts. In sum, openly available data must support a commonsense conclusion that a religious objective permeated the government's action. The purpose test is rarely . . . determinative.

624 F.3d at 166-67 (cleaned up). Here, Plaintiffs allege:

> These requirements are intended to, and will, ensure that students are more likely to observe, absorb, accept, and follow the Ten Commandments. For example, during the House Education Committee's debate, Representative Horton, the primary author and sponsor of the bill, explained: "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." Horton later told a reporter that she is only "concerned with our children looking and seeing what God's law is." Representative Sylvia Taylor, Horton's co-author and co-sponsor of H.B. 71, similarly stated: "I really believe that we are lacking in direction. A lot of people, their children, are not attending churches or whatever . . . So what I'm saying is, we need to do something in the schools to bring people back to where they need to be." And Representative Roger Wilder, another co-author and co-sponsor of H.B. 71, expressed his support for the law 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]."

(*Compl.* ¶ 79, Doc. 1.) AG Defendants do not dispute that these statements were in fact made. Additionally, the Court takes judicial notice of an article in the local paper stating that Governor Landry sent a fundraising email to supporters in response to the filing of this challenge to H.B. 71 urging 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.

Granted, the Fifth Circuit has noted, "[o]f course, if one legislator was motivated by a desire to advance religion, that is not enough to defeat other legislators' sincere interest in acknowledging the state's religious heritage; that '[s]ome legislators may have religious motives . . . does not invalidate an act with an otherwise secular legislative purpose.'" *Croft*, 624 F.3d at 167 n.4 (quoting *Croft*, 562 F.3d at 742-43 (citing *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 249, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990))). "Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate" a challenged act "because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Croft*, 562 F.3d at 743 (quoting *Mergens*, 496 U.S. at 249, 110 S.Ct. 2356).

But this case is far different than the one in *Croft*, where the law at issue merely included the phrase "one state under God" in the daily state pledge recited by Texas school children, and where the bill's sponsor merely wanted to mirror the federal pledge in the reference to God but not necessarily include other parts. *Croft*, 624 F.3d at 161-62. As the *Croft* court stated:

> Ultimately, the alleged secular purposes in mirroring the federal pledge and acknowledging the state's religious heritage are not so implausible or inadequate that they ought not be credited. Nor have the plaintiffs presented other evidence indicating that the secular purposes are a "sham" or "secondary" to some overriding legislative interest in coercing Texas's population into religious practice or reverence.

Id. at 167 (cleaned up). Conversely, here, H.B. 71's primary sponsor expressed a much more overtly religious and coercive *purpose*, which was echoed by the Governor, and which is evident on the face of H.B. 71. That is, in light of the requirements of H.B. 71 itself and the undisputed statements of its proponents as to its purpose, the Act's alleged secular purposes are "so implausible [and] inadequate that they ought not be credited." *See id.* (cleaned up).

All of this is not intended to show compliance with the now-defunct *Lemon* test. Rather, the above legislative history and statements support the conclusions that (1) here, any purported secular purpose was not sincere but rather a sham; (2) that, under *Stone*, H.B. 71 is "plainly religious in nature[;]" and (3) that, consequently, *Stone* is directly on point and controlling.

Second, as stated above, the two opinions in *Van Orden* discussed above both recognized the heightened First Amendment concerns in a public-school setting,

given the impressionability of young students and the fact that they are captive audiences. All of these concerns remain present with H.B. 71, regardless of whether this is a facial challenge or an as-applied one. While the Court of course must look at the context of the displays, *see Staley*, 485 F.3d at 308-309 (citing *Van Orden*, 545 U.S. at 700, 125 S.Ct. 2854 (Breyer, J., concurring) and *McCreary*, 545 U.S. at 874, 125 S.Ct. 2722), the Court has sufficient context, from both the language of the statute and the statements of lawmakers, to conclude that H.B. 71's minimum requirements for posting a specific version of the Ten Commandments in every classroom, all year round, regardless of subject matter of the class or the age of the student, which will certainly be seen by impressionable youths required to attend class, runs afoul of *Stone.*

In closing, the Court notes that, at oral argument, AG Defendants conceded that *Stone* remains binding on this Court, but they attempted to downplay and distinguish it by asserting that, unlike the displays in *Stone*, these posters are relatively small and unobtrusive and will be incorporated into the curriculum. But, as the Court pointed out at the hearing, the "minimum requirements" of the Act include that "[t]he 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) (emphasis added). The illustrative example provided by AG Defendants (which was made a part of the record) fails to satisfy those requirements, as the Decalogue was not "printed in a large, easily readable font." As to the latter argument, while the Court agrees—and Plaintiffs do not dispute—

that the Ten Commandments can be incorporated into a curriculum, for all the reasons given above, the Court finds that the Act's "minimum requirements" fail to do so in a constitutionally permissible manner.

For all these reasons, the Court finds that *Stone* remains binding on this Court and is controlling. Consequently, *AG Defs. MTD* will be denied with respect to the Establishment Clause claim.

C. *Kennedy v. Bremerton School District*

1. Parties' Arguments

a. AG Defendants' Original Memorandum (Doc. 39-1)

Again, 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." (Doc. 39-1 at 41 (first quoting *Kennedy*, 597 U.S. at 537 n.5, 142 S.Ct. 2407 (citing *Shurtleff*, 596 U.S. at 286, 142 S.Ct. 1583 (Gorsuch, J., concurring)); and then citing *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, 101 S.Ct. 192.)

AG Defendants also argue that, putting aside Plaintiffs' failure to satisfy the *Kennedy* hallmarks for all possible displays, H.B. 71 is also constitutional because of "the historical role of the Ten Commandments not only

in America, but also in American public education." (*Id.* at 45.) AG Defendants support this argument by quoting Supreme Court cases such as *Van Orden* and *American Legion v. American Humanist Ass'n*, 588 U.S. 29, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019). (*Id.*) AG Defendants then turn to the historical justification provided in the preamble to the Act, including the Ten Commandments' use in *The New-England Primer* and McGuffey *Readers.* (*Id.* at 45-46 (citations omitted).)[11] "To be sure, much of the 19th-century curricula were (lamentably) non-

11. AG Defendants explain:

> One example (of many) of how the Ten Commandments were used in public education is a story called *The Young Witness*, which appeared in *McGuffey's Readers.* William Holmes McGuffey, *McGuffey's Fourth Eclectic Reader* 207-210 (1920 rev. ed.) (available at https://tinyurl.com/5n64bcsu). That story described a nine-year-old girl who was called to testify at a criminal trial. The defendant's counsel sought to disqualify her on the ground that she "does not understand the nature of an oath." So, the judge asked her if she knew what the Bible was (she did) and whether she knew what would happen if she lied after placing her hand on the Bible and swearing to tell the truth. She replied that she would be sent to prison and she would never go to Heaven. "How do you know this," the judge asked. She took the Bible from him, turned to the Commandments, and explained, "Thou shalt not bear false witness against thy neighbor." So, the judge—moved by the sincerity of her belief and the seriousness with which she took her oath—found her competent to testify.

(Doc. 39-1 at 46.)

ecumenical," but "the 19th-century debates were about whether *more* or *different* religious instruction should be supported by the state, . . . not whether religious materials in schools could coexist with the principles of disestablishment[.]" (*Id.* at 46-47 (cleaned up).) Ultimately, AG Defendants say,

> [S]chools today act comfortably within historical norms when they take one aspect of the religious material long presented in schools—one that has 'an undeniable historical meaning,'—and display it passively and with context: not in textbooks, but on the wall; not to be read and tested on, but merely available to be viewed (with bemusement or admiration) as an aspect of legal, civic, and educational history.

(*Id.* at 47 (quoting *Van Orden*, 545 U.S. at 690, 125 S.Ct. 2854 (plurality opinion)).)

AG Defendants dispute Plaintiffs' position that any of the above illustrations are coercive, particularly in light of the forms of coercion described by *Kennedy.* (*Id.* at 43.) AG Defendants maintain:

> Plaintiffs' children are not required to do anything, nor does H.B. 71 require displays to be read, discussed, or even placed in an especially visible part of the classroom; they are simply passive displays. This case thus "looks very different from those in which [the Supreme] Court has found prayer" and devotional Bible

> reading "involving public school students to be problematically coercive." *Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407; *see* [*Schempp*, 374 U.S. at 206-07, 225, 83 S.Ct. 1560] (holding unconstitutional vocal, school-directed prayer and Bible reading at the beginning of each day).

(*Id.*) AG Defendants say children are not forced to participate in a religious activity here, because "there is no religious activity occurring and nothing is required of Plaintiffs' children." (*Id.* at 43-44.) Children may be offended, but AG Defendants maintain that, under *Kennedy*, "offense does not equate to coercion." (*Id.* at 44 (quoting *Kennedy*, 597 U.S. at 539, 142 S.Ct. 2407 (cleaned up)).)

Further, Plaintiffs' contention that the AG Defendants are adopting an official position is, to these defendants, implausible in light of the different illustrations provided above. (*Id.*) AG Defendants emphasize the contextualizing note to be included on all displays as mitigation. (*Id.*)

AG Defendants again conclude: "At bottom, Plaintiffs' Establishment Clause claim must be dismissed because Plaintiffs have not met—and cannot meet—the high standard for facial claims given the endless possibilities of H.B. 71 displays that may be implemented." (*Id.*)

b. Plaintiffs' Opposition (Doc. 47)

According to Plaintiffs, even if *Stone* did not end the analysis, H.B. 71 would be unconstitutional under

Kennedy. (Doc. 47 at 39.) Plaintiffs take issue with AG Defendants' argument that Justice Gorsuch's six hallmarks represent the only possible way that violations of the Establishment Clause can occur. (*Id.*)

> On the contrary, the *Kennedy* Court's Establishment Clause approach was not so circumscribed, commanding only that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 597 U.S. at 535, 142 S.Ct. 2407; *see also*, *e.g.*, [*Chambers*, 463 U.S. at 792, 103 S.Ct. 3330] (citing an "unambiguous and unbroken history" of legislative prayer as the reason for finding against an Establishment Clause violation); *Town of Greece v. Galloway*, 572 U.S. 565, 577, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) (reiterating that it is "*not* necessary to define the precise boundary of the Establishment Clause where history shows that the *specific practice* is permitted" (emphases added)).

(*Id.* at 39-40.)

Plaintiffs then turn to the history supporting their position. (*Id.* at 40.) Plaintiffs say the Founding Fathers would have taken issue with the State's efforts to establish an official government version of the Ten Commandments in a statute "that imposes religious teachings" on citizens.

(*Id.*) Relying on their expert, Dr. Steven K. Green,[12] Plaintiffs assert that these Framers believed the First Amendment was built on the principles that government should not take a position on religious doctrine and that it should not coerce or promote religious beliefs, on which the Founding Fathers took a broad view. (*Id.* at 40-41 (citing Green Report ¶¶ 13-32, Doc. 47-2).) Jefferson was concerned not only with "'fine & imprisonment'" but also with "government action that could result in 'some degree of proscription perhaps in public opinion.'" (*Id.* at 41 (quoting Letter from Jefferson to S. Miller, Jan. 23, 1808).) Madison agreed. (*Id.* (citing Green Report ¶ 21, Doc. 47-2).)

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12. Dr. Green's qualifications are discussed further in the Court's ruling on AG Defendants' *Motion to Exclude Putative Expert Testimony* (Doc. 53), which this Court denied, (Doc. 83). As stated in that ruling, Green earned a B.A. degree in History and Political Science, *Magna Cum Laude*, from Texas Christian University in 1978 where his minor was Religious Studies. (Green Report, Doc. 47-2 at 32.) He graduated from the University of Texas Law School in 1981, earning a J.D. degree. (*Id.*) In 1987, he received a Master's degree in American Religious History from the University of North Carolina, Chapel Hill and a Ph.D. in Constitutional History from the same university in 1997. (*Id.*) He is currently the Fred H. Paulus Professor of Law and Affiliated Professor of History and Religious Studies at Willamette University in Salem, Oregon, where he was also the Director of the Willamette Center for Religion, Law and Democracy from 2007 to 2020. (*Id.*) He has authored "seven books and more than fifty scholarly articles and book chapters" in the area of "the intersection of law, religion, and history." (*Id.* at 3; *see also id.* at 33-40.)

Plaintiffs then assert that "[t]he Ten Commandments do not form the basis of the U.S. legal system or government." (*Id.*) "Consistent with the leading Founders' general reproach toward government support for, or interference with, religion, neither the Constitution nor the Bill of Rights—the core foundational documents for the American legal system and government—mentions God, the Bible, or any commandment." (*Id.* (citing U.S. Const. & amends.; Green Report ¶ 29, Doc. 47-2).) The *Federalist Papers* make no mention either. (*Id.* at 41-42 (citing Green Report ¶ 31, Doc. 47-2).) After quoting Green, Plaintiffs point out, "With the exception of a few generic quotes from Supreme Court opinions, [AG] Defendants fail to offer any evidence demonstrating any influence of the Ten Commandments on the American legal system and government at the Founding." (*Id.* at 41-42.)

Plaintiffs next contend that the historical record shows no longstanding, widespread tradition of displaying the Ten Commandments permanently in classrooms in public elementary and secondary schools. (*Id.* at 42.) Plaintiffs rely on Green's expert report here. (*Id.*) For example, the Act cites the *New England Primer*, but Green explains that this "was used chiefly, if not exclusively, in *religiously* run schools" and "fell into disuse during the early decades of the nineteenth century, before the rise of public education." (*Id.* at 42.) Likewise, Plaintiffs maintain that while some versions of the McGuffey *Readers* contained lessons with the Ten Commandments in their entirety or that reference particular commandments, others did not. (*Id.* at 42-43.) Even when used, they were not a significant part of the texts, and the extent of their use compared to

other readings cannot be verified. (*Id.* at 43.) Regardless, references were largely eliminated from the *Readers* in later versions, and reliance on them tapered in the early twentieth century as public schools looked at other available options. (*Id.*) Ultimately:

> This limited history does not support the Act's expansive claim in the context statement that "[t]he Ten Commandments were a prominent part of American public education for almost three centuries," H.B. 71(B)(3), and the use of privately written textbooks with discrete passages referring to the commandments most certainly does not prove a longstanding, "unambiguous and unbroken" history of permanently displaying the Ten Commandment in public-school classrooms. See Pl. Br. at 8-10.

(*Id.*) Green also notes that there is an absence in the record of late 1800s surveys by the U.S. Commissioner of Education about "specific, routine practices of displaying the Ten Commandments in classrooms" or using them for instruction. (*Id.*) "Simply put, there is no 'evidence of a longstanding, let alone unbroken, historical acceptance and practice of widespread, permanent displays of the Ten Commandments in public schools.'" (*Id.*) Plaintiffs also assert that AG Defendants do not identify "a single piece of historical evidence specifically involving the Ten Commandments and schools, other than the use of the *New England Primer* and *McGuffey Readers*." (*Id.* at 44.) Rather, they rely primarily on general quotes about religion in public life pulled from *Van Orden* and

American Legion plurality opinions, neither of which deal with public schools. (*Id.*) And the displays are not presumptively constitutional, as AG Defendants contend. (*Id.*)

Plaintiffs next note that AG Defendants concede the Act mandates a particular, Protestant version of the Ten Commandments that does not comport with Catholic or Jewish faiths. (*Id.*) Instead, AG Defendants dispute that the Act takes an official position on religious matters or a side on a theological question and point to their many Illustrations as evidence. (*Id.* at 44-45.) Plaintiffs respond that they "take issue with the statutory regime in its entirety" and its mandate that only one specific version be posted in classrooms, despite the Supreme Court's holding that "one religious denomination cannot be officially preferred over another." (*Id.* at 45 (citing *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)).) AG Defendants' failure to address this argument (or to advance any compelling interest or narrow tailoring to satisfy strict scrutiny) amounts to a waiver. (*Id.*)

Plaintiffs then argue that "[t]he displays mandated by H.B. 71 are religiously coercive." (*Id.* at 45.) Plaintiffs maintain that AG Defendants' position rests on a faulty premise, namely, that the outcome depends on the content of specific displays. (*Id.*) "Rather, the Court must consider whether students will be religiously coerced under the mandatory provisions of the statutory scheme, which will subject students, including the minor-child Plaintiffs, to a state-approved, Protestant version of the Ten Commandments in every classroom for every day

of their public-school education." (*Id.*) AG Defendants contend that students don't have to do anything with the displays, but Plaintiffs respond that "[t]he Supreme Court has repeatedly recognized that children are particularly susceptible to religious indoctrination at school," because (1) "they are captive audiences to the state's religious messages" and (2) they are "vulnerable to the immediate impressions and judgments of their teachers and classmates if they" do not conform their conduct. (*Id.* at 45-46 (citing *Lee*, 505 U.S. at 593, 112 S.Ct. 2649; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000)).) Plaintiffs further state, "*Lee* is the seminal and binding Supreme Court precedent pertaining to religious coercion of students," but AG Defendants do not address or cite it. (*Id.* at 46.) AG Defendants also ignore the fact that students are "a quintessentially captive audience." (*Id.* (citing *Ingebretsen*, 88 F.3d at 279-80).) Thus, it is not implausible for Plaintiffs to plead that their "minor-child Plaintiffs will feel pressured to observe, meditate on, venerate, and adopt or obey the state's preferred religious doctrine." (*Id.*)

Plaintiffs then assert:

> Defendants' "illustrations," even if they were not irrelevant to Plaintiffs' facial challenge, would merely put a finer point on the matter, demonstrating that the State is deeply and bizarrely obsessed with imposing the commandments on students and will do whatever it can to shoehorn its preferred version of that religious doctrine into any number of displays.

> Whether schools decide to display one or more of Defendants' hypothetical posters, or use posters featuring other content, the common denominator, from classroom to classroom and school to school, will be the State's mandatory version of the Ten Commandments. Students will be acutely aware of the lengths to which the State has gone in ensuring that they encounter these displays in every classroom for nearly every minute of their school day, and students will reasonably feel religiously coerced by the State's desperate insistence that they take heed of the commandments. The Supreme Court effectively recognized this in *Stone*, holding that the only function served by such permanent and pervasive displays is "to induce . . . schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S. at 42, 101 S.Ct. 192.

(*Id.* at 46-47.) Additionally, AG Defendants argue that, unlike *Schempp*[,] here "there is no religious activity," but the Supreme Court has rejected this:

> In *Schempp*, the Court recognized that daily scriptural readings constituted "religious exercise," 374 U.S. at 224-25, 83 S.Ct. 1560; and in *Stone*, the Court held that it is not "significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*." 449 U.S. at 42, 101 S.Ct. 192. School-promoted religious activity is no less unconstitutional merely

> because it is silent. *See Wallace v. Jaffree*, 472 U.S. 38, 60-61, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (holding that state law improperly encouraged students to engage in silent prayer); Pl. Br. at 18.

(*Id.*) For all these reasons, Plaintiffs contend that the Act violates the Establishment Clause. (*Id.* at 47.)

c. AG Defendants' Reply (Doc. 54)

AG Defendants respond: "*Kennedy* instructs courts to look elsewhere—to the six hallmarks of religious establishments the framers sought to prohibit." (Doc. 54 at 19 (cleaned up).) According to AG Defendants, Plaintiffs cannot escape these hallmarks because the Fifth Circuit and this Court have decided Establishment Clause cases "with reference to them." (*Id.* at 19-20 (citations omitted).) "The hallmarks question is not whether a practice is itself old; it is whether the practice (old or new) fits within one of the historical 'hallmarks of an established religion.'" (*Id.* at 20 (quoting *Kennedy*, 597 U.S. at 537 & n.5, 142 S.Ct. 2407).) This requires an examination of what the "public understanding" of an establishment was "when the [provision] was adopted." *Id.* (quoting *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022)). Plaintiffs' expert fails to address the hallmarks, and, in any event, the Court should "reason[] by analogy" without the need of experts but rather perform "a commonplace task for any lawyer or judge." (*Id.* at 20 (citing *Bruen*, 597 U.S. at 28-29, 142 S.Ct. 2111).)

AG Defendants maintain that they need not show an "'unambiguous and unbroken' history of 'the *specific practice*' tracing back to the Founding. . . ." (*Id.* at 20-21 (citation omitted).) *Kennedy*, they argue, undertook no such analysis. (*Id.* at 21.)

According to AG Defendants, even if the Court adopted Plaintiffs' method of historical analysis, H.B. 71 is still constitutional. (*Id.*) AG Defendants refer to a seal proposed for the United States by Jefferson and Franklin that depicted "Moses leading the Israelites across the Red Sea," (*id.* (citing *Shurtleff*, 596 U.S. at 287 n.11, 142 S.Ct. 1583 (Gorsuch, J., concurring in judgment))), and there is a tradition of religious content in public schools, including the Ten Commandments, (*id.* (citing *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811; H.B. 71(B)(3))). AG Defendants argue that Plaintiffs' expert largely agrees with AG Defendants' historical assessment about the *New England Primer* and McGuffey *Readers*, despite the "nitpick[ing]." (*Id.*) In short, Green may think the Ten Commandments were not "prominent," but courts should not decide the sufficiency of "the historical analysis contained in documentary exhibits appearing on public grounds." (*Id.* at 21-22 (citation omitted).) Here, they contend, the Supreme Court has already reaffirmed the importance of the Ten Commandments on the legal system of this country. (*Id.* at 22 (citing *Van Orden*, 351 F.3d at 181; *Am. Legion*, 588 U.S. at 53, 139 S.Ct. 2067).)

AG Defendants take issue with Plaintiffs' reliance on *Lee* and its alleged prohibition on coercion in the school context. (*Id.*) AG Defendants maintain that *Kennedy*

states that *Lee* bars the government from "forcing citizens to engage in a formal religious exercise" such as reading the Bible or prayer. (*Id.* (cleaned up).) AG Defendants say that the Fifth Circuit has likewise prohibited only religious exercises or activity. (*Id.* (citations omitted).) AG Defendants continue:

> Meanwhile, neither the Supreme Court nor the Fifth Circuit has ever adopted the bizarre notion that being in the same room with passive religious symbols amounts to being coerced to engage in a religious exercise. Rather, the Justices have repeatedly taken as given the constitutionality of the Ten Commandments displays in buildings throughout our Nation's capital, *see Am. Legion*, 588 U.S. at 53 [139 S.Ct. 2067], even though citizens must walk by them on a daily basis and even sit beneath them in the Supreme Court's courtroom. The Fifth Circuit has upheld a "Latin cross with three crosslets" on a city seal, though the plaintiff was required to see it if he wanted to pay utility bills or visit the municipal building. *Murray*, 947 F.2d at 150. And if Plaintiffs were right, any student in any of the States or municipalities whose "seals and flags . . . include religious symbols or mottos" could demand that those flags be taken down from their classrooms. *Freedom From Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 284 (3d Cir. 2019); *see*, *e.g.*, *Am. Legion*, 588 U.S. at 55-56 & n.23, 139 S.Ct. 2067 (Maryland's flag includes "two crosses"); *Briggs v. Mississippi*,

> 331 F.3d 499, 503 (5th Cir. 2003) (upholding former Mississippi flag, which featured a symbol "frequently . . . described as . . . a St. Andrew's Cross"). That is not the law.

(*Id.* at 22-23.)

Larson is also distinguishable, argue AG Defendants, because that case involved a law imposing "*legal obligations* (registration and reporting requirements) on some religious organizations but not others. . . ." (*Id.* at 23.) The Supreme Court has also distinguished *Larson* and allowed a nativity scene on government property (in *Lynch v. Donnelly*, 465 U.S. 668, 687 n.13, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)) and a Latin cross on public land (in *Am. Legion*, 588 U.S. 29, 139 S.Ct. 2067). AG Defendants contend that H.B 71 used the King James version of the Ten Commandments because it was upheld in *Van Orden*. (*Id.*) AG Defendants close by arguing that facial challenges are hard to win, and, again, Plaintiffs have not shown that every application of H.B. 71 is unconstitutional. (*Id.* at 24.)

d. *AG Defs. Daubert Motion* (Doc. 53)

In AG Defendants' *Motion to Exclude Putative Expert Testimony* (Doc. 53) ("*AG Defs. Daubert Motion*"), AG Defendants argue, inter alia, that Plaintiffs' expert does not provide testimony that is relevant to the Establishment Clause claim. (Doc. 53-1 at 10-12.) While Plaintiffs' expert opinions bear more on *Pls. MPI* than *AG Defs. MTD*, where the sufficiency of the *Complaint*

controls, the parties' disagreement about the appropriate standard to apply is relevant to the instant analysis.

In *AG Defs. Daubert Motion*, these defendants contend:

> Whether Ten Commandments displays existed in public or private schools in prior centuries, or whether the Ten Commandments were taught in public or private schools, is not determinative of the relationship between today's displays and the historical hallmarks identified by the Supreme Court. Similarly, the history of a "*specific practice*" tracing back to the Founding, or the private "views of Madison and Jefferson" on the practice, are not "facts at issue" for purposes of Rule 702. Pls.' Reply & MTD Resp. 28-29, ECF 47; Green Rep. 7-10, 18-26. Of course, the longstanding prominent role of the Ten Commandments in American classrooms is of great *educational* relevance—presumably no one thinks schoolchildren should be kept intentionally ignorant of those historical facts—but here what is educationally relevant is not *legally* relevant.

(*Id.* at 11.)

AG Defendants maintain that "Plaintiffs' overall approach to their case" relies on "a misunderstanding of the relevant historical analysis." (*Id.*) According to AG Defendants, the Supreme Court provided the "historical

hallmarks of a religious establishment" in *Kennedy*, so that, now, this Court needs only to "determine whether a challenged modern practice displays any of those hallmarks, using the 'reasoning by analogy' that is 'a commonplace task for any lawyer or judge.'" *Id.* (quoting *Bruen*, 597 U.S. at 28-29, 142 S.Ct. 2111). The hallmarks were intended to give lower courts guidance so that they did not have to scour the historical record or look to experts. (*Id.* at 11-12 (citing *Shurtleff*, 596 U.S. at 285-86, 142 S.Ct. 1583 (Gorsuch, J., concurring in judgment)).)

AG Defendants close by urging that Plaintiffs do not dispute much of the history cited in the Act; rather, they only disagree that the presence of the Ten Commandments in those documents counts as "'prominent' or 'widespread.'" (*Id.* at 12.)

e. Plaintiffs' Opposition to *AG Defs. Daubert Motion* (Doc. 61)

Plaintiffs respond first that AG Defendants mischaracterize the "original meaning and history" test in *Kennedy.* (Doc. 61 at 19-22.) Plaintiffs claim that AG Defendants' efforts to reduce this standard to Justice Gorsuch's six hallmarks in the *Shurtleff* concurrence is unsupported by *Kennedy* or *Shurtleff* itself. (*Id.* at 19-20.)

Plaintiffs maintain that, "[w]hile Justice Gorsuch's *Shurtleff* opinion may be useful with respect to assessing the validity of certain challenged practices under the Establishment Clause, it does not purport to set forth the entire universe of permitted or prohibited

practices." (*Id.* at 20 (citing *Shurtleff*, 596 U.S. at 285, 142 S.Ct. 1583 (Gorsuch, J., concurring in judgment)).) "Rather, the opinion identifies 's*ome* helpful hallmarks [of establishment] that localities and lower courts can rely on.'" (*Id.* (quoting *Shurtleff*, at 285, 142 S.Ct. 1583).) Justice Gorsuch explained that "'founding-era religious establishments *often* bore certain other telling traits' that 'explain many of th[e] Court's Establishment Clause cases.'" (*Id.* (quoting *Shurtleff*, at 286, 142 S.Ct. 1583 (emphasis added)).)

Further, Plaintiffs argue, *Kennedy* does not require such a limited reading of the "original meaning and history" test. (*Id.*) According to Plaintiffs, *Kennedy* reaffirmed the standard in *Town of Greece v. Galloway* and stated that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" (*Id.* (quoting *Kennedy*, 597 U.S. at 535, 142 S.Ct. 2407 (quoting *Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811)).)

Plaintiffs maintain that *Town of Greece* demonstrates how this standard operates. (*Id.* at 20-21.) Plaintiffs say that the *Town of Greece* court examined the "specific practice" in question and asked whether it "accorded with history and reflected the Founders' understanding." (*Id.* (quoting *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811).)

> The Court held that the challenged legislative invocations were constitutional because there was an "'unambiguous and unbroken history of

more than 200 years . . . of opening legislative sessions with a prayer[,]'" which dates back to the First Congress and "'has become part of the fabric of our society.'" [*Town of Greece*, 572 U.S.] at 576 [134 S.Ct. 1811] (quoting [*Chambers*, 462 U.S. at 792, 103 S.Ct. 2706]). In other words, the practice "was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*; . . . As the Court recognized in *Town of Greece*, "sweep[ing] away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." 572 U.S. at 577, 134 S.Ct. 1811.

Defendants' insistence that the *Kennedy* Court's footnoted citation to Justice Gorsuch's *Shurtleff* concurrence somehow transforms and elevates his "hallmarks" passage—itself a nonexclusive treatment of *some* traits of religious establishment—into a binding, hard-and-fast checklist would effectively negate the Court's discussion of the "historical practices and understandings" analysis in *Kennedy* and *Town of Greece*. . . . Even the Court's short parenthetical explaining Justice Gorsuch's *Shurtleff* opinion makes clear that his treatment of this issue is not exhaustive, noting that he discusses "coercion and *certain other* historical hallmarks of an established religion."

> *See Kennedy*, 597 U.S. at 537 n.5, 142 S.Ct. 2407 (emphasis added).

(*Id.* at 21-22.)

Plaintiffs conclude by explaining how Green's testimony will be relevant; "[i]t will help the Court draw the line 'between the permissible and the impermissible' by elucidating historical facts that illuminate whether the challenged practice 'accor[ds] with history and faithfully reflec[ts] the understanding of the Founding Fathers.'" (*Id.* at 22, 142 S.Ct. 2111 (quoting *Kennedy*, 597 U.S. at 535-36, 142 S.Ct. 2407 (internal quotation marks omitted)).) After describing this, Plaintiffs then point out how AG "Defendants repeatedly rely on the historical significance of the Ten Commandments, especially their purported use in public school[,]" which undermines AG Defendants' position that the history is not relevant. (*Id.* at 23-25.)

f. Reply in Support of *AG Defs. Daubert Motion* (Doc. 63)

AG Defendants reply that, because the Green Report does not address Plaintiffs' burden under *Kennedy* or the six "hallmarks," it is irrelevant. (Doc. 63 at 9.) Plaintiffs claim that this Court should follow *Town of Greece*'s historical analysis of asking if the "specific practice" was engaged in at the Founding and continued as an "unambiguous and unbroken history," but (1) the *Kennedy* court did not undertake that analysis but rather looked to the hallmarks, and (2) Fifth Circuit caselaw after *Kennedy* has specifically rejected the idea that an "unambiguous

and unbroken history" is required. (*Id.* at 9-10 (cleaned up).)

AG Defendants also dispute the idea that they have the burden under the *Kennedy* test and rely on a Fourth Circuit case for this point. (*Id.* at 10-11 (citations omitted).) Otherwise, they claim, every government action would be presumptively unconstitutional until the government identified a specific historical practice to support it. (*Id.* at 11.)

Experts are also not required, say AG Defendants; that is clear from Justice Gorsuch's hallmarks test and the fact that the author did not rely on it in his opinions in *Kennedy* and *Shurtleff*. (*Id.* (citations omitted).) Even if historical analysis was required, none of the cases Plaintiffs cite relied on the use of expert testimony. (*Id.*) And, by Plaintiffs' line of reasoning, some of their arguments would also need a theological or scriptural scholar rather than a law professor specialized in history. (*Id.* at 11-12.)

2. Law and Analysis

Again, the Court found above that *Stone* controls and that the Act violates the holding of that case. On that ground alone, the Court could deny *AG Defs. MTD* with respect to the Establishment Clause claim.

But, even if the Court did examine this claim under the standards laid out by *Kennedy* and subsequent caselaw, *AG Defs. MTD* would again be denied. The Court

will begin by discussing the appropriate standard to be applied under *Kennedy* before applying that standard to the allegations of Plaintiffs' *Complaint.*

a. The Relevant Standard

Preliminarily, the parties dispute the appropriate standard to apply. AG Defendants maintain that the Court must evaluate and decide the issue based on Justice Gorsuch's six hallmarks, while Plaintiffs look to other standards endorsed by the Supreme Court.

Both sides somewhat miss the mark. This Court will first examine the case law before and after *Kennedy* and will then extrapolate some guiding principles.

i. Pre-*Kennedy*

Before *Kennedy*, "[t]he Supreme Court generally applied at least one of three tests under the Establishment Clause," *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525 (5th Cir. 2017) (citations omitted), though the High Court "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area[,]" *id.* at 525 n.9 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)). The first test, *Lemon*, was covered above. "Under [the second test,] the endorsement test, a '[g]overnment unconstitutionally endorses religion whenever it appears to take a position on questions of religious belief, or makes adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 525 n.11 (quoting *Ingebretsen*,

88 F.3d at 280). "The government creates this appearance when it conveys a message that religion is favored, preferred, or promoted over other beliefs." *Id.* (quoting *Ingebretsen*, 88 F.3d at 280). "Under [the third test,] the coercion test, unconstitutional coercion occurs where '(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.'" *Id.* at 525 n.12 (quoting *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999)).

That standard evolved somewhat in "legislative-prayer cases." *Id.* at 526. Specifically, the Fifth Circuit explained:

> [I]n *Marsh v. Chambers*, 463 U.S. 783, 784-85 [103 S.Ct. 3330, 77 L.Ed.2d 1019] (1983), a member of the Nebraska Legislature sued state officials, claiming that the practice of opening each session with a chaplain's prayer violated the Establishment Clause. The Court upheld the practice without applying any of the conventional tests, observing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786 [103 S.Ct. 3330].
>
> The Court revisited the issue in *Town of Greece v. Galloway*, [572 U.S. 565], 134 S. Ct. 1811, 1827-28 [188 L.Ed.2d 835] (2014), stating unequivocally that the legislative-prayer exception in *Chambers* extends to

> prayers delivered at town-board meetings. Those prayers, however, must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823. Moreover, "[t]he principal audience for these invocations is not . . . the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* at 1825.

McCarty, 851 F.3d at 525-26. But the Fifth Circuit also emphasized that "school-prayer cases" were treated differently:

> As distinguished from legislative-prayer cases, however, the Supreme Court, in school-prayer cases such as *Santa Fe Independent School District v. Doe*, 530 U.S. 290 [120 S.Ct. 2266, 147 L.Ed.2d 295] (2000), *Lee v. Weisman*, 505 U.S. 577 [112 S.Ct. 2649, 120 L.Ed.2d 467] (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 [109 S.Ct. 3086, 106 L.Ed.2d 472] (1989), has applied the conventional Establishment Clause tests. In *Weisman*, a graduation-prayer case, the Court, 505 U.S. at 592 [112 S.Ct. 2649], explained that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" and that "prayer exercises in public schools carry a particular risk" of unconstitutional coercion. The Court

> distinguished *Weisman* from *Chambers*, noting that the legislative-prayer exception does not apply in "the public school context." *Id.* at 597 [112 S.Ct. 2649]. In *ACLU*, the Court opined that "state-sponsored prayer in public schools" is "unconstitutional." [492 U.S. at 590 n.40, 109 S.Ct. 3086 (citing *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844)].

Id. at 526. Thus, in *McCarty*, "[t]he key question" was whether "whether [the] case [was] essentially more a legislative-prayer case or a school-prayer matter." *Id.*

Then, in 2022, the Supreme Court decided two cases: *Shurtleff* and *Kennedy.* In *Shurtleff*, the Supreme Court evaluated a decision by the city of Boston to refuse the petitioner's request to fly a Christian flag outside city hall, even though no request had before been denied. 596 U.S. at 247, 142 S.Ct. 1583. The Supreme Court found that "Boston's refusal to let Shurtleff and [his] Camp Constitution raise their flag based on its religious viewpoint 'abridg[ed]' their 'freedom of speech.'" *Id.* at 248, 142 S.Ct. 1583 (quoting U.S. Const. amend. I).

One of the issues raised in that case was the city's claim that it could not raise the religious flag because doing so would violate the Establishment Clause. *Id.* at 258, 142 S.Ct. 1583. The High Court rejected this argument, explaining, "[w]hen a government does not speak for itself, it may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'" *Id.* (quoting *Good News Club v. Milford*

Cent. Sch., 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001)). Since Boston denied petitioner's "request solely because the Christian flag he asked to raise 'promot[ed] a specific religion' . . . that refusal discriminated based on religious viewpoint and violated the Free Speech Clause." *Id.* at 258-59, 142 S.Ct. 1583.

Justice Gorsuch, joined by Justice Thomas, filed a concurring opinion attributing Boston's erroneous view of the Establishment Clause to *Lemon*, which, "instead of bringing clarity to the area, [] produced only chaos." *Id.* at 277, 142 S.Ct. 1583 (Gorsuch, J., concurring in judgment). Justice Gorsuch looked back at recent cases like *Town of Greece* and *American Legion*, both of which "direct[ed] and redirect[ed] the inquiry to original meaning as illuminated by history," before addressing two particular reasons why lower courts still erroneously applied *Lemon*. *Id.* at 283-87, 142 S.Ct. 1583. Relevant here:

> Second, it seems that *Lemon* may occasionally shuffle from its grave for another and more prosaic reason. By demanding a careful examination of the Constitution's original meaning, a proper application of the Establishment Clause no doubt requires serious work and can pose its challenges. *Lemon*'s abstract three-part test may seem a simpler and tempting alternative to busy local officials and lower courts. But if this is part of the problem, it isn't without at least a partial remedy. For our constitutional history contains some helpful hallmarks that localities and lower courts can rely on.

Appendix C

Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. See M. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2110-2112, 2131 (2003) (Establishment and Disestablishment). First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. See *id.*, at 2131-2181. Most of these hallmarks reflect forms of "coerc[ion]" regarding "religion or its exercise." [*Lee*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 []; *id.*, at 640 [112 S.Ct. 2649] (Scalia, J., dissenting); *Van Orden*, 545 U.S. at 693, 125 S.Ct. 2854 [] (THOMAS, J., concurring).

> These traditional hallmarks help explain many of this Court's Establishment Clause cases, too. . . . The thread running through these cases derives directly from the historical hallmarks of an establishment of religion—government control over religion offends the Constitution, but treating a church on par with secular entities and other churches does not. See Establishment and Disestablishment 2205-2208.

Id. at 285-87, 142 S.Ct. 1583. Justice Gorsuch ultimately concluded, "[t]his Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie." *Id.* at 288, 142 S.Ct. 1583.

ii. *Kennedy*

Kennedy came a month after *Shurtleff* and was authored by Justice Gorsuch. 597 U.S. 507, 142 S.Ct. 2407, 213 L.Ed.2d 755. There, the issue was whether a high school football coach's First Amendment rights were violated when he knelt at midfield after games to pray quietly. *Kennedy*, 597 U.S. at 512, 142 S.Ct. 2407. The Court evaluated the coach's claim under the Free Exercise Clause (which this Court will have more to say about below) before turning to the school district's argument that its conduct was justified to prevent an Establishment Clause violation. *Id.* at 532, 142 S.Ct. 2407.

In doing so, the Court discussed "the shortcomings" of the *Lemon* and endorsement test, described the Supreme Court's "unambiguous reject[ion] [of] a city's attempt to

censor religious speech" on those bases, *id.* at 533-35, 142 S.Ct. 2407 (citing *Shurtleff*, 142 S. Ct. at 1587-88; *id.* at 1595 (Alito, J., concurring in judgment); *id.* at 1587, 1588-89 (opinion of Gorsuch, J.)), and noted "[i]n the last two decades, th[e] Court ha[d] often criticized or ignored *Lemon* and its endorsement test variation," *id.* at n.4 (collecting cases). The Supreme Court then explained:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" *Town of Greece*, 572 U.S. at 576 [134 S.Ct. 1811]; see also *American Legion*, [] 139 S. Ct. at 2087 (plurality opinion). "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" *Town of Greece*, 572 U.S. at 577 [134 S.Ct. 1811] (quoting [*Schempp*, 374 U.S. at 294, 83 S.Ct. 1560] (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence." 572 U.S. at 575 [134 S.Ct. 1811]; see *American Legion*, [] 139 S. Ct. at 2087 (plurality opinion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 [] (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420 [81 S.Ct.

> 1101, 6 L.Ed.2d 393] (1961) (analyzing Sunday closing laws by looking to their "place . . . in the First Amendment's history"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680 [90 S.Ct. 1409, 25 L.Ed.2d 697] (1970) (analyzing the "history and uninterrupted practice" of church tax exemptions).

Id. at 535-36, 81 S.Ct. 1101.

The Supreme Court then rejected the district court's position that the coach coerced students to pray as being unsupported by the evidence. *Id.* at 536-37, 81 S.Ct. 1101. The Court first acknowledged the role coercion plays in Establishment Clause cases:

> To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 [] (1952). Government "may not coerce anyone to attend church," *ibid.*, nor may it force citizens to engage in "a formal religious exercise," [*Lee*, 505 U.S. at 589, 112 S.Ct. 2649]. No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. [See, e.g., *Lee*, 505 U.S. at 640-642, 112 S.Ct. 2649] (Scalia, J. dissenting); *Shurtleff*, 142

> S. Ct. at 1608-1610 (opinion of GORSUCH, J.) (discussing coercion and certain other historical hallmarks of an established religion); 1 Annals of Cong. 730-731 (1789) (Madison explaining that the First Amendment aimed to prevent one or multiple sects from "establish[ing] a religion to which they would compel others to conform"); M. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2144-2146 (2003).] Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. Compare *Lee*, 505 U.S. at 593 [112 S.Ct. 2649] with *id.*, at 640-641 [112 S.Ct. 2649] (Scalia, J., dissenting).

Id. at 536-37, 537 n.5, 81 S.Ct. 1101.

The Court concluded that "in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion." *Id.* at 537, 81 S.Ct. 1101. In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate." *Id.* at 538, 81 S.Ct. 1101. While some would have seen him pray, the Supreme Court advised, "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Id.* (quoting *Lee*, 505 U.S. at 590, 112 S.Ct. 2649).

> This Court has long recognized as well that "secondary school students are mature enough . . . to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250 [110 S.Ct. 2356] (plurality opinion). Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "[o]ffense . . . does not equate to coercion." *Town of Greece*, 572 U.S. at 589 [134 S.Ct. 1811] (plurality opinion).

Id. at 538-39, 81 S.Ct. 1101. Moreover, though the district argued that kids could be compelled to participate in the prayers, the Supreme Court rejected this stance: "There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers." *Id.* at 539, 81 S.Ct. 1101.

The Supreme Court then rejected the "District['s] suggest[ion] that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students." *Id.* at 540, 81 S.Ct. 1101. The High Court explained:

> Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone

> off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. . . . It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. See *Town of Greece*, 572 U.S. at 589 [134 S.Ct. 1811] (plurality opinion). It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee*, 505 U.S. at 590 [112 S.Ct. 2649]. We are aware of no historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion" in this way. *Zorach*, 343 U.S. at 314 [72 S.Ct. 679].

Id. at 540-41, 81 S.Ct. 1101. The Supreme Court then distinguished those cases in which public-school prayers were found to be coercive.

> Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee*, this Court held that school officials violated the Establishment Clause by "including [a] clerical membe[r]" who publicly recited prayers "as part of [an] official

> school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." 505 U.S. at 580, 598 [112 S.Ct. 2649]. In *Santa Fe Independent School Dist. v. Doe*, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. 530 U.S. 290, 294 [120 S.Ct. 2266, 147 L.Ed.2d 295] (2000). The Court observed that, while students generally were not required to attend games, attendance *was* required for "cheerleaders, members of the band, and, of course, the team members themselves." *Id.*, at 311 [120 S.Ct. 2266]. None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline. . . .

Id. at 541-42, 81 S.Ct. 1101. The Court concluded:

> Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity

> sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is *Reversed.*

Id. at 543-44, 81 S.Ct. 1101.

iii. Post-*Kennedy*

To this Court's knowledge, the Fifth Circuit has only interpreted one Establishment Clause claim in light of *Kennedy*, and that was in *Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941 (5th Cir. 2022). There, plaintiffs filed suit against a justice of the peace named Mack because he "open[ed] his court with a ceremony that include[d] a prayer." *Id.* at 944.

The Fifth Circuit began its analysis by "identify[ing] the legal standard." *Id.* at 950. Plaintiffs maintained that Mack had to show "that legislative prayer was supported by 'unambiguous and unbroken history of more than 200 years.'" *Id.* (quoting *Chambers*, 463 U.S. at 792, 103

S.Ct. 3330). The appellate court rejected this argument, explaining, "offering that language as a legal standard confuses a sufficient condition for a necessary one." *Id.* The Court instead turned to *Town of Greece v. Galloway*:

> [In *Town of Greece*], the Court asked whether the town's prayer practice "fit[] within," [572 U.S. at 577, 134 S.Ct. 1811], or was "consistent with the tradition of legislative prayer," *id.* at 578 [134 S.Ct. 1811]. Accordingly, the Court identified only three historical instances of sectarian prayer before concluding that the standard for consistency was satisfied. *See id.* at 578-79 [134 S.Ct. 1811].
>
> We follow the Court's lead. So we ask whether courtroom prayer is consistent with a broader tradition of public, government-sponsored prayer. *See* [*McCarty*, 851 F.3d at 527] (concluding that prayer before school board meetings was consistent with the broader tradition of "opening meetings of deliberative bodies with invocations").

Mack, 49 F.4th at 951.

The Fifth Circuit then looked at the four categories of historical evidence offered by plaintiffs: "*first*, the behavior of early federal judges and Justices in court-related proceedings; *second*, the in-court behavior of those judges and Justices; *third*, the in-court behavior of non-federal judges; and *fourth*, indirect evidence of the prevalence of courtroom prayer." *Id.* The Court explained:

> That evidence is relevant, if at all, because widespread practice around the Founding helps reveal an amendment's original public meaning. *See McDonald v. City of Chicago*, 561 U.S. 742, 769-70 [130 S.Ct. 3020, 177 L.Ed.2d 894] (2010). We address an incorporated amendment's application to a state, so we must also consider practice around the time of incorporation [in 1868]. *See id.* at 770-78 [130 S.Ct. 3020] Our analysis depends on "original meaning and history," with particular attention paid to "historical practices." [*Kennedy*, 142 S. Ct. at 2428] (quotation omitted).

Id. at 951 & n.7.

After undertaking this historical analysis (which included an examination of briefs filed by *amici*), *see id.* at 954-57, the Fifth Circuit ultimately determined that, though some of plaintiffs' criticism that Mack had provided "selective, acontextual 'law-office history' . . . ha[d] merit[,] . . . on the whole, Mack [had] identified enough evidence to satisfy the legal standard." *Id.* at 954. In doing so, the Court also "consider[ed] the two most prominent Establishment Clause tests previously used by the Supreme Court: 'the endorsement test[] and the coercion test.'" *Id.* (quoting *McCarty*, 851 F.3d at 525 (footnotes omitted)). But the appellate court emphasized:

> We do not suggest that those tests govern our overall analysis. History—not endorsement—matters. *Kennedy*, 142 S. Ct. at 2427-28. Here,

> we look to those tests for the limited purpose of deciding whether historical evidence is similar enough to the challenged practice to establish consistency.
>
> We do not, however, consider the *Lemon* test. Its long Night of the Living Dead, *Lamb's Chapel v. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 [113 S.Ct. 2141, 124 L.Ed.2d 352] (1993) (Scalia, J., concurring in the judgment), is now over, *Kennedy*, 142 S. Ct. at 2427. And it is too easily manipulated to shed light on history's relevance.

Id. at 954 n. 20.

After conducting this analysis, the Fifth Circuit found that it would "include the first and second categories of historical evidence in deciding whether courtroom prayer is consistent with the relevant tradition." *Id.* at 956. The appellate court rejected the third category, which consisted of "scattered instances of state-court prayer, some of which occurred before the Establishment Clause was incorporated against the states." *Id.* at 956-57. The appellate court found:

> The history cannot tell us about what "coexisted with the principles of disestablishment," *Chambers*, 463 U.S. at 786 [103 S.Ct. 3330], if the actors did not consider themselves bound by the principles of disestablishment. And, although it is clear that prayer happened in

> state courts, there is too little evidence too thinly spread to conclude that those prayers occurred regularly.

Id. at 957. The fourth category was likewise rejected, as "[i]t reflect[ed] the reality that courtroom prayer was at least conceivable to some Americans[,] [b]ut it [could not] independently establish anything with enough certainty." *Id.* Looking at all of this evidence, the Fifth Circuit summarized its findings:

> So, on the whole, we have convincing evidence that it was common for Founding-era Justices to preside over court-term-opening ceremonies at which chaplains delivered prayers. We have comparable evidence that those Justices also personally delivered short, ecumenical supplications in charges to grand jurors and, sometimes, in their judicial opinions. And we have a litany of short, ecumenical supplications that federal courts have recited from the Founding to the present.
>
> We conclude that, under the methodology of [*Town of Greece*], the evidence establishes that courtroom prayer "fits within," 572 U.S. at 577 [134 S.Ct. 1811], and is "consistent with the tradition," *id.* at 578 [134 S.Ct. 1811], of prayer before "deliberative bodies," *McCarty*, 851 F.3d at 527. Although, as the plaintiffs and their *amici* have pointed out, the probative value of each item is less, there are still far more

> instances than the Supreme Court considered sufficient to establish consistency. [*Town of Greece*], 572 U.S. at 578-79 [134 S.Ct. 1811].

Id.

The Fifth Circuit then "ask[ed] whether Mack's particular practice [was] consistent with that tradition." *Id.* In doing so, the Court addressed three arguments raised by plaintiffs as to "why that might not be so." *Id.*

First, these plaintiffs contended that "Mack's practice [] include[d] prayers that [were] often decidedly sectarian." *Id.* (internal quotations omitted). The Fifth Circuit found that any factual dispute here was "immaterial," as the "'content of the prayer is not of concern to judges.'" *Id.* (quoting *Town of Greece*, 572 U.S. at 581, 134 S.Ct. 1811 (quotation omitted)). "Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* (quoting *Town of Greece*, 572 U.S. at 582, 134 S.Ct. 1811).

> There is, however, a limiting principle: "If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," the invocations are inconsistent with the public-prayer tradition. [*Galloway*, 572 U.S.] at 583 [134 S.Ct. 1811]. Prayer must be "solemn and respectful in tone" and invite

> officials to "reflect upon shared ideals and common ends." *Id.*

Id. at 958. Plaintiffs failed to meet this burden, as "[a]t most, the plaintiffs' accounts [] show[ed] that the contents of the prayers delivered in Mack's courtroom are quite like the contents of the prayers in the historical record" and "[t]here [was] no suggestion that Mack's chaplains ha[d] preached damnation, denigration, or conversion." *Id.*

Second, the *Mack* plaintiffs argued that the justice of the peace "fail[ed] to maintain a policy of nondiscrimination," *id.* at 957, but the Fifth Circuit rejected this stance, *id.* at 958. While Mack was required to "maintain[] a policy of nondiscrimination," he did not need to "search" or attempt "to achieve religious balancing." *Id.* (quoting *Town of Greece*, 572 U.S. at 585-86, 134 S.Ct. 1811). The appellate court concluded:

> Mack maintains a policy of nondiscrimination so long as (1) members of any faith are free to participate in the JCC Program and (2) he selects prayer-givers from among those members without regard for belief. The plaintiffs have identified no evidence that suggests those elements are unsatisfied. So there is no material factual dispute on nondiscrimination.

Id.

Third, plaintiffs argued that Mack's practice was inconsistent with the above tradition because "courtroom

prayer inherently coerces attendees and that even if not, the specific attributes of Mack's prayer practice evince coercion." *Id.* at 957-58. "The coercion test asks whether the government obliged objectors to participate in 'a formal religious exercise.'" *Id.* at 954 (quoting *McCarty*, 851 F.3d at 525 n.12). The Fifth Circuit "turn[ed] once again to" *Town of Greece* and ultimately "assume[d], without deciding, that Justice Kennedy's approach in [*Town of Greece*] controls the coercion standard." *Id.* at 958-59.[13] The Fifth Circuit summarized that standard as follows:

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13. The Fifth Circuit recognized that "[t]he [*Town of Greece*] Court could not agree on the standard for showing that the government coerced religious exercise." *Id.* at 958 (citing *Kennedy*, 142 S. Ct. at 2429). The Fifth Circuit explained that there were "four opinions relevant to the question [of] whether Mack's practice [was] coercive," but the Court ultimately assumed that Justice Kennedy's controlled because:

> Where no majority opinion governs an issue, ordinarily we ask which position could sustain the Supreme Court's judgment "on the narrowest grounds," provided that "there is some common denominator upon which all of the Justices of the majority can agree." But there is no reason to decide whether Justice Kennedy's or Justice Thomas's approach is the narrower ground for decision because any practice deemed coercive under the latter approach will also be coercive under the former. So if a plaintiff's challenge fails under Justice Kennedy's approach, it "fails under either standard." *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 516 (6th Cir. 2017) (en banc). As we will explain, that is so here.

Mack, 49 F.4th at 959 (footnotes omitted).

> A three-Justice plurality, led by Justice Kennedy, recognized that objective evidence that a person has been treated differently from others, even if that difference is abstract, can show coercion. The plurality's approach is "fact-sensitive" and holistic. [*Town of Greece*], 572 U.S. at 587 [134 S.Ct. 1811]. But it emphasizes that subjective offense "does not equate to coercion." *Id.* at 589 [134 S.Ct. 1811]. Reports of subjective pressure to participate require "evidentiary support," such as indications that "leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invitation or quietly declined." *Id.* Courts must assess "whether coercion is a real and substantial likelihood." *Id.* at 590 [134 S.Ct. 1811].

Mack, 49 F.4th at 958-59.[14]

Applying this test, the Fifth Circuit rejected "plaintiffs' theory that courtrooms are inherently coercive [as] conflict[ing] with that test" because the Court was "not free to invent [its] own legal standard" given the "many factual similarities to *Town of Greece*" and the town-board meetings there. *Id.* at 960. The plaintiffs

14. Justice Thomas' "stricter coercion test . . . would recognize coercion only as compulsion of religious orthodoxy and of financial support by force of law and threat of penalty. In other words, the perception of subtle pressure or government endorsement doesn't count." *Mack*, 49 F.4th at 959 (cleaned up).

could also not rely on a "perceived *risk* of prejudice" because "[t]he plaintiffs must present evidence that any such perception is objectively reasonable—evidence from which we can conclude that 'coercion is a real and substantial likelihood.'" *Id.* The appellate court went on to analyze the "two categories of evidence[—]*first*, evidence regarding entry and exit from Mack's courtroom; and *second*, evidence concerning Mack's decisions in cases involving nonpraying litigants"—before concluding that "Mack's practice [was] noncoercive." *Id.* at 961.

In sum, the Fifth Circuit found that the "history, character, and context of Mack's ceremony show that it is no establishment" of religion. *Id.* (cleaned up). "To maintain a lawful prayer ceremony, Mack must ensure that (1) he has a policy of denominational nondiscrimination and that (2) anyone may choose not to participate and suffer no consequences. Mack has shown that the plaintiffs fail materially to dispute those elements." *Id.*

iv. Synthesizing the Above Law

Having considered the history and development of the recent Establishment Clause cases, the Court lays out the following principles it draws therefrom and will use in deciding this opinion.

First, while *Kennedy* did eliminate the *Lemon* and endorsement tests, its focus on history and tradition was consistent with cases that came before it like *Town of Greece*. *See Kennedy*, 597 U.S. at 535-36, 142 S.Ct. 2407 (relying in part on *Town of Greece*, 572 U.S. at 576, 134

S.Ct. 1811); *see also Mack*, 49 F.4th at 950-51. Under *Town of Greece* and *Kennedy*, as interpreted by *Mack*, the issue is whether the practice at issue "fits within" and is "consistent with a broader tradition." *See Mack*, 49 F.4th at 951 (quoting *Town of Greece*, 572 U.S. at 577-78, 134 S.Ct. 1811); *see also Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.6 (4th Cir. 2023) ("Identify the relevant tradition, then determine whether the challenged practice is in or out.").

Second, historical evidence is relevant because "widespread practice around the Founding helps reveal an amendment's original public meaning[,]" as does the practice "around the time of incorporation" in 1868. *See Mack*, 49 F.4th at 951 & n.7 (citation omitted). *See also id.* at 957 ("So, on the whole, we have *convincing evidence* that it was common for Founding-era Justices to preside over court-term-opening ceremonies at which chaplains delivered prayers. We have *comparable evidence* that those Justices also personally delivered short, ecumenical supplications. . . ." (emphasis added)). Again, the "analysis depends on 'original meaning and history,' with particular attention paid to 'historical practices.'" *Id.* at 951 (quoting *Kennedy*, 597 U.S. at 535, 142 S.Ct. 2407). The Fifth Circuit has relied on *amici* to shed light on the historical analysis, and, for the same reasons, the Court finds expert testimony on this issue relevant (though by no means dispositive). *See id.* at 951-57. The burden on this claim remains with the Plaintiff. *See Croft*, 624 F.3d at 164 (finding plaintiff asserting facial challenges under the Establishment Clause had the burden). *See also Firewalker-Fields*, 58 F.4th at 123 n.7 ("[T]he plaintiff has the burden of proving a set of facts that would have

historically been understood as an establishment of religion. That requires proving both a set of facts, like in all litigation, and proving that those facts align with a historically disfavored establishmentarian practice." (citing *Bruen*, 597 U.S. at 25 n.6, 142 S. Ct. at 2130 n.6)). Indeed, *Mack*'s reliance on *Town of Greece*'s analysis and its approach as a whole make clear that historical evidence is not only relevant but essential to resolving these motions.

Third, *Kennedy* did not limit Establishment Clause claims to Justice Gorsuch's six hallmarks found in his *Shurtleff* concurrence. *See Kennedy*, 597 U.S. at 536-37 & n.5, 142 S.Ct. 2407. In *Kennedy*, Justice Gorsuch used language indicating that his *Shurtleff* hallmarks were not an exhaustive list adopted by the Court. *See id.*[15] Moreover, *Kennedy* acknowledged that, "Members of

15. The *Kennedy* opinion's parenthetical explanation for Justice Gorsuch's *Shurtleff* concurrence specifically stated that it "discuss[ed] coercion and *certain other* historical hallmarks of an established religion[.]" 597 U.S. at 537 n.5, 142 S.Ct. 2407 (emphasis added) (citing *Shurtleff*, 596 U.S. at 284-87, 142 S. Ct. at 1608-1610 (Gorsuch, J., concurring)). Moreover, in *Kennedy*, the Court recognized that "coercion *along the[] lines*" of certain types recognized by the Supreme Court, such as the prohibition on the government from "coerc[ing] anyone to attend church," *id.* at 537, 142 S.Ct. 2407 (quoting *Zorach*, 343 U.S. at 314, 72 S.Ct. 679), or "forc[ing] citizens to engage in 'a formal religious exercise,'" *id.* (quoting *Lee*, 505 U.S. at 589, 112 S.Ct. 2649), were "*among* the *foremost* hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment[,]" *id.* (emphasis added) (citing, inter alia, *Shurtleff*, 596 U.S. at 284-87, 142 S. Ct. at 1608-1610 (Gorsuch, J., concurring)).

this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause." *Id.* at 537, 142 S.Ct. 2407 (comparing *Lee*, 505 U.S. at 593, 112 S.Ct. 2649, with *id.*, at 640-41, 112 S.Ct. 2649 (Scalia, J., dissenting)). *Kennedy* did not attempt to resolve that uncertainty and disagreement. Finally, even AG Defendants acknowledged at oral argument that Justice Gorsuch's six hallmarks are not an exhaustive set of criteria for determining the viability of an Establishment Clause claim.

Fourth, *Mack* provides general guidance within the Fifth Circuit for determining (a) what the relevant tradition is and (b) whether a particular practice was consistent with the tradition at issue. As to the former, the Court must take heed "not to steer between Scylla and Charybdis—/ only a razor-edge between the devil and deep blue sea. . . ." VIRGIL, THE AENEID 125.789-90 (Robert Fagles trans., Penguin Books, 2008). That is to say, the Court must not construe the tradition too broadly (e.g., as the Ten Commandments in all of public life at the time of the Founding or Incorporation) or too narrowly (e.g., as exclusively the posting of the Decalogue according to the minimum requirements of the Act during that time). Rather, just as *Mack* identified the relevant tradition as "a broader tradition of public, government-sponsored prayer," *Mack*, 49 F.4th at 951, so too does this Court characterize the "broader tradition" as the use of the Ten Commandments in public-school education. While AG Defendants advanced at oral argument a different

framing of the broader tradition,[16] the Court agrees with their characterization of the relevant practice as: the permanent posting of the Ten Commandments in public-school classrooms. Again, the question is whether there was a "widespread practice" or whether the practice was "common for Founding-era" public schools. *See Mack*, 49 F.4th at 951, 957. Evidence is insufficient if there are only "scattered instances" or "too little evidence too thinly spread to conclude that [the practice] occurred regularly." *See id.* at 957.

Fifth, again, *Mack* also provides general guidance as to whether a particular practice is consistent with the tradition at issue. One (but not the only) way a practice may be inconsistent is when it is sectarian; that is, the practice "denigrate[s] nonbelievers or religious minorities, threaten damnation, or preach conversion" rather than be "solemn and respectful in tone" and inviting others "to reflect upon shared ideals and common ends." *Id.* at 958 (quoting *Town of Greece*, 572 U.S. at 583, 134 S.Ct. 1811). Additionally, the practice must "maintain[] a policy of nondiscrimination." *Id.* at 958 (quoting *Town of Greece*, 572 U.S. at 585, 134 S.Ct. 1811). The government does so by ensuring that "members of any faith are free to participate in the [] [p]rogram" and, in the context of public prayer, ensuring that the government "selects prayer-givers from among [its] members without regard for belief." *Id.*

16. AG Defendants argued that the broader tradition in which Plaintiffs must fit their challenge was Justice Gorsuch's six hallmarks. For the reasons given above, this Court disagrees.

Sixth, under *Kennedy* and *Mack*, a particular practice can also be inconsistent with the broader historical tradition because it coerces religious exercise. As a general matter, the analysis is "'fact-sensitive' and holistic." *Mack*, 49 F.4th at 958-59 (quoting *Town of Greece*, 572 U.S. at 587, 134 S.Ct. 1811). "[S]ubjective offense 'does not equate to coercion.'" *Id.* (quoting *Town of Greece*, 572 U.S. at 589, 134 S.Ct. 1811). A plaintiff can show coercion with "objective evidence that [he] has been treated differently from others, even if that difference is abstract. . . ." *Id.* at 959 (citing *Town of Greece*, 572 U.S. at 587, 134 S.Ct. 1811). The key questions are "whether coercion is a real and substantial likelihood," *id.*, and whether "anyone may choose not to participate and suffer no consequences," *id.* at 961.

Seventh, in the public-school context, the Establishment Clause is not violated by "*any* visible religious conduct" by a teacher or coach, as that would reflect a "hostilit[y] to religion" that is prohibited. *Kennedy*, 597 U.S. at 540-41, 142 S.Ct. 2407. But, coercion has been found in the public-school context where "the school ha[s] 'in every practical sense compelled attendance and participation in' a 'religious exercise.'" *Id.* at 541-42, 142 S.Ct. 2407 (quoting *Lee*, 505 U.S. at 580, 598, 112 S.Ct. 2649); *see also id.* (citing *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 294, 311, 120 S.Ct. 2266). Students cannot be a "captive audience" or "required or expected to participate." *See id.* Ultimately, as Justice Breyer said in *Van Orden*, in distinguishing a display of the Ten Commandments on courthouse grounds from the display in classrooms in *Stone*, the "government must exercise particular care in

separating church and state . . . on the grounds of a public school . . . given the impressionability of the young. . . ." *Van Orden*, 545 U.S. at 703, 125 S.Ct. 2854 (Breyer, J., concurring in judgment) (citing *Lee*, 505 U.S. at 592, 112 S.Ct. 2649). And, as *Lee* stated:

> [T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . . Our decisions in *Engel* [] and [*Schempp*] recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. See [*County of Allegheny*, 492 U.S. at 661, 109 S.Ct. 3086] (KENNEDY, J., concurring in judgment in part and dissenting in part). What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

505 U.S. at 592, 112 S.Ct. 2649.

b. Analysis

Having carefully considered the allegations of the *Complaint* and accepting them as true at the Rule 12(b)(6) phase—which the Court must do—the Court

finds that Plaintiffs have adequately pled a violation of the Establishment Clause under *Kennedy*. As a result, *AG Defs. MTD* will be denied on this issue.

With respect to history, Plaintiffs allege:

> There is no longstanding tradition of permanently displaying the Ten Commandments in public-school classrooms in Louisiana or the United States more generally. Indeed, for nearly half a century, it has been well settled that the First Amendment forbids public schools from posting the Ten Commandments in this manner. *See Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980)

(*Compl.* ¶ 2, Doc. 1; *see id.* ¶ 45.) The *Complaint* also maintains that "[t]he Act includes false statements relating to a purported history and connection between the Ten Commandments and government and public education in the United States[,]" such as the quote allegedly attributed to James Madison, which Plaintiffs claim "is fabricated" and was never said by Madison "in any of his public or private writings or in any of his speeches." (*Id.* ¶¶ 42-44.)[17]

Even if there were a broader tradition, Plaintiffs also sufficiently allege that the practice is not consistent with

17. The Court notes that Green's testimony that this Madison quote was fabricated was uncontradicted and, indeed, unchallenged by AG Defendants.

any tradition by being discriminatory and coercive.[18] Concerning discrimination, the *Complaint* demonstrates—"by the nature of the mandatory displays themselves, the history of H.B. 71," and statements of purpose made by various lawmakers—"that the state's main interest in enacting and implementing H.B. 71 is the imposition of religious beliefs on public-school children." (*Compl.* ¶ 55, Doc. 1.) Moreover,

> H.B. 71 is not neutral with respect to religion. By design, it expressly requires the display of religious scripture—the Ten Commandments—in every public-school classroom, and it requires a specific, state-approved version of that scripture to be posted, taking sides on theological questions regarding the correct content and meaning of the Decalogue.

(*Id.* ¶ 56.) This Act requires this despite the fact that many Louisianians (like the Plaintiffs) (a) do not subscribe to the

18. The Court passes on the question of whether the Act is sectarian. Specifically, the Court need not address whether H.B. 71's mandatory display of "the first part of the Commandments concern[ing] 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," *Stone*, 449 U.S. at 42, 101 S.Ct. 192 (citing Exodus 20: 1-11; Deuteronomy 5: 6-15), are inconsistent with historical practices by "denigra[ting] nonbelievers or religious minorities, threaten[ing] damnation, or preach[ing] conversion" rather than inviting students to "reflect upon shared ideals and common ends," *Mack*, 49 F.4th at 958 (citation omitted). While Plaintiffs make numerous allegations of the extent to which they feel so denigrated, it is unnecessary to resolve this issue in this ruling.

specific version of the Ten Commandments listed in the Act; (b) are not religious and do not agree with any version of the Decalogue; or (c) believe in other religions (such as Hinduism, Buddhism, and Taoism) that "generally do not consider the commandments to be part of their belief system." (*Id.* ¶¶ 57-62.) The *Complaint* also highlights that H.B. 71 requires a version of the Ten Commandments that many Protestants use and that this is inconsistent with versions recognized by Jews or Catholics. (*Id.* ¶¶ 63-67.) Ultimately, while the Act need not "search or try to achieve religious balancing," *Mack*, 49 F 4th at 958 (cleaned up), as pled, H.B. 71 fails to select both historical documents generally and versions of the Ten Commandments in particular "without regard for belief," *cf. id.*, and is thus discriminatory as a matter of law.

Additionally, Plaintiff adequately pleads that the Act is coercive. The *Complaint* concisely summarizes this assertion as follows:

> 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.

(*Compl.* ¶ 3, Doc. 1.)

Plaintiffs elaborate in detail on these allegations. The *Complaint* correctly references the fact that, by law, parents must send their minor children to school and ensure attendance during regular school hours at least 177 days per year. (*Id.* ¶¶ 69-70 (citing La. R.S. §§ 17:221(A)(1)(c), 154.1(A)(1)).) Further, as stated above, many children and their families do not subscribe to this version of the Ten Commandants, or any version. (*Id.* ¶¶ 72-75.) "Under H.B. 71, each of these children will be forcibly subjected to the state's official version of the Ten Commandments for nearly every hour that they are in school," which, cumulatively, amounts to at least 2,124 minimum number of school days from age six to eighteen. (*Id.* ¶¶ 76-77.) Plaintiffs also highlight certain requirements of the Act—that the Decalogue be the "central focus," in a certain size, and printed in "large, easily readable font"—before asserting, "[t]hese requirements are intended to, and will, ensure that students are more likely to observe, absorb, accept, and follow the Ten Commandments." (*Id.* ¶¶ 78-79.) That, indeed, is what the authors of the Act intended.[19]

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19. Again, the *Complaint* alleges:

> For example, during the House Education Committee's debate, Representative Horton, the primary author

Appendix C

The *Complaint* recounts the legislative history (which this Court quoted above) before concluding that, "[a]s a result of the displays mandated by H.B. 71, students who do not subscribe to the state's official version of the Ten Commandments—including minor-child Plaintiffs—will" (1) "be pressured into religious observance, veneration, and adoption of this religious scripture;" and (2) "will feel pressure to avoid fully expressing or practicing their own faiths and religious beliefs or nonreligious beliefs in

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> and sponsor of the bill, explained: "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." Horton later told a reporter that she is only "concerned with our children looking and seeing what God's law is." Representative Sylvia Taylor, Horton's co-author and co-sponsor of H.B. 71, similarly stated: "I really believe that we are lacking in direction. A lot of people, their children, are not attending churches or whatever . . . So what I'm saying is, we need to do something in the schools to bring people back to where they need to be." And Representative Roger Wilder, another co-author and co-sponsor of H.B. 71, expressed his support for the law 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]."
>
> (*Compl.* ¶ 79, Doc. 1.)

view of their peers, teachers and other school staff." (*Id.* ¶¶ 79-81.) After describing in detail the specific ways each of the named Plaintiffs will be harmed by H.B. 71, (*see* Section II, "The Named Plaintiffs," *supra* (citing generally *Compl.* ¶¶ 82-155, Doc. 1)), the *Complaint* concludes this point by stating:

> As a result of the Ten Commandments displays mandated by H.B. 71, Louisiana students—including minor-child Plaintiffs—will be unconstitutionally coerced into religious observance, veneration, and adoption of the state's favored religious scripture, and they will be pressured to suppress their personal religious beliefs and practices, especially in school, to avoid the potential disfavor, reproach, and/or disapproval of school officials and/or their peers.

(*Compl.* ¶ 160, Doc. 1.)

Having considered Louisiana's laws (including the challenged Act and those dealing with mandatory attendance) and having evaluated the above allegations in light of the "fact-sensitive" and "holistic" inquiry required by the Fifth Circuit in *Mack*, the Court finds that these plaintiffs' concerns rise far beyond "subjective offense"; rather, Plaintiffs have shown a real and substantial likelihood of coercion, 49 F.4th at 958-59, particularly given the fact that, in the school context, coercion has been found where "the school has in every practical sense compelled attendance and participation in a religious

exercise," *Kennedy*, 597 U.S. at 541-42, 142 S.Ct. 2407 (cleaned up) (relying upon *Lee*, 505 U.S. at 580, 598, 112 S.Ct. 2649, and *Sante Fe Indep. Sch. Dist.*, 530 U.S. at 311, 120 S.Ct. 2266); *cf. Mack*, 49 F.4th at 961 (stressing that, to be constitutional, "anyone may choose not to participate and suffer no consequences."). Each of the Plaintiffs' minor children will be forced "in every practical sense," through Louisiana's required attendance policy, to be a "captive audience" and to participate in a religious exercise: reading and considering a specific version of the Ten Commandments, one posted in every single classroom, for the entire school year, regardless of the age of the student or subject matter of the course. And, despite the differences among the Plaintiffs' religious beliefs (be they Unitarian Universalist, Reform Jewish, Presbyterian, or atheist/agnostic), the common threads are (1) that the required posting of the Decalogue conflicts with specific parts of their faith, and (2) that one of those articles of faith, shared by nearly all Plaintiff parents, is raising their children in accordance with their own beliefs and values. Considering the totality of the circumstances, the Court finds that the Act and its requirements are coercive and inconsistent with the history of First Amendment and public education.

In sum, Plaintiffs have sufficiently alleged that the Act violates the Establishment Clause because it does not fit within and is not consistent with a broader tradition in place at the time of the Founding or incorporation. Moreover, even if there were a broader tradition in play, the practice mandated by the Act would be inconsistent with that tradition because it is discriminatory and

coercive. For all these reasons, *AG Defs. MTD* on this issue will be denied.

VI. AG Defs. MTD: Rule 12(b)(6) Motion: The Free Exercise Clause Claim

A. Parties' Arguments

1. AG Defendants' Original Memorandum (Doc. 39-1)

AG Defendants assert that the *Complaint* is implausible with respect to the Free Exercise claim for three reasons. (Doc. 39-1 at 50.) First, "it defies common sense to say that students will feel any alleged pressure if they happen to view" one of the Illustrations offered by AG Defendants such as Illustration 13, "Memes and Law," or Illustration 6, concerning *Hamilton* and Charlton Heston's *The Ten Commandments*. (*Id.* at 50-52.) "[S]eeing Lin-Manuel Miranda's clever spin on the Ten Commandments may prompt an observer to watch *Hamilton*, but it would not burden their religion or force them to change it any more than it would coerce a student to duel." (*Id.* at 52.)

Second, AG Defendants argue:

> More fundamentally, the Free Exercise Clause is not implicated here. As its name suggests, the Free Exercise Clause protects only religious *exercise*—believing, professing, and engaging in "conduct motivated by religious belief." *Church of Lukumi Babalu Aye, Inc. v. City of*

> *Hialeah*, 508 U.S. 520, 543, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). And nothing in the Free Exercise Clause obligates the State to "comport with the religious beliefs of particular citizens," or "demand[s] that the Government join in [their] chosen religious practices." *Bowen v. Roy*, 476 U.S. 693, 699-700, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986).

(*Id.*) AG Defendants maintain that the nonreligious Plaintiffs are not exercising religion at all, so their Free Exercise claim must fail. (*Id.* at 53.) Others complain of "objecting to" or being "offended" by H.B. 71, but, AG Defendants claim, this too does not constitute an exercise of religion. (*Id.*) Ultimately, "the Free Exercise Clause does not compel government to affirm Plaintiffs' chosen religious practices." (*Id.* at 53 (citing *Bowen*, 476 U.S. at 699, 106 S.Ct. 2147).)

> In reality, Plaintiffs' Free Exercise claim boils down to a redux of their Establishment Clause coercion theory—but this time characterized as a substantial burden on their religious exercise. To be sure, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson v. Makin*, 596 U.S. 767, 778, 142 S.Ct. 1987, 213 L.Ed.2d 286 (2022) (citation omitted). But the government "do[es] not engage in impermissible coercion merely by *exposing* constituents to [something] they would rather not hear and in which they need

> not participate." *Town of Greece*, 572 U.S. at 590, 134 S.Ct. 1811 (emphasis added). Nor does "[o]ffense . . . equate to coercion." *Kennedy*, 597 U.S. at 539, 142 S.Ct. 2407 (quoting *Town of Greece*, 572 U.S. at 589, 134 S.Ct. 1811). That is no less true in classrooms where, "[i]f no religious *activity* is at issue, any speculation as to whether students might feel pressured to participate is irrelevant." *Beaumont Indep. Sch. Dist.*, 240 F.3d at 470 (emphasis added).

(*Id.*)

AG Defendants look to case law for comparable situations. First, they analogize to students objecting to the Pledge of Allegiance; schools cannot force a student objecting on the basis of religion to recite the Pledge or stand, but hearing the Pledge does not cause any Free Exercise violation. (*Id.* at 53-54 (citations omitted).) Additionally, AG Defendants say this case is like the motto "In God We Trust," which also is permissible. (*Id.* at 54.) These defendants conclude this point by saying that, while the State cannot force religious objectors to participate in a religious exercise, "non-participatory exposure is not" forbidden; though students may opt out of specific activities, "they do not have a right to remove content from the curriculum (or the classroom wall) because the presence allegedly offends them." (*Id.*)

Third, AG Defendants say that Plaintiffs cannot demonstrate that the Act is "not neutral or generally applicable." (*Id.* (quoting *Kennedy*, 597 U.S. at 525, 142

S.Ct. 2407).) "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." (*Id.* at 54-55 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (citations omitted)).) Here, H.B. 71 does not restrict anything and is not "intolerant of religious beliefs." (*Id.* (citations omitted).) "If anything, it is exceedingly *tolerant* of beliefs across faith traditions that espouse the Ten Commandments, by urging education about the role of the Ten Commandments in Louisiana, America[], and world history." (*Id.* at 55.) According to AG Defendants, any argument that the State is being intolerant of other faiths would contradict the Supreme Court's Establishment Clause cases, like *Van Orden* and *American Legion*, which upheld the display of the Latin Cross. (*Id.*) Thus, H.B. 71 is neutral as contemplated by the Supreme Court. (*Id.*)

Further, they claim the Act is generally applicable. (*Id.*) Indeed, AG Defendants maintain that Plaintiffs do not argue otherwise. (*Id.* at 55-56.)

2. Plaintiffs' Opposition (Doc. 47)

Plaintiffs respond that AG Defendants' argument about their allegedly innocuous illustrations are a "red herring that prove[s] nothing other than the extraordinary efforts that public schools might make to infuse scripture into their classrooms, draw students' attention to it, and pressure them into observing, meditating on, venerating, and living by its faith tenets." (Doc. 47 at 48.) According to Plaintiffs, AG Defendants concede that the Free

Exercise Clause prohibits direct and "indirect coercion and penalties on the free exercise of religion, not just outright prohibitions." (*Id.* (quoting *Carson v. Makin*, 596 U.S. 767, 778, 142 S.Ct. 1987, 213 L.Ed.2d 286 (2022)).) Despite this, AG Defendants maintain that the Act is merely "non-participatory exposure" to "unwelcomed content." (*Id.* (quoting Doc. 39-1 at 45).) But:

> That characterization does not reflect the wide-ranging, all-pervading nature of the statutory regime, which capitalizes on the State's compulsory-education laws . . . and the coercive school context . . . to impose on students constant and unavoidable displays of the Ten Commandments—the State's preferred version, no less—that will follow them throughout their educational journeys.

(*Id.* at 48-49.)

Plaintiffs also take issue with the analogies AG Defendants draw upon from case law. For example, AG Defendants rely on *Town of Greece* to support their position that the Act imposes mere "offense," but Plaintiffs respond:

> [T]he Court's assessment of coercion there was premised wholly on the fact that the objectors were "mature adults" who voluntarily attended government meetings and were "free to enter and leave with little comment and for any number of reasons." *Town of Greece*, 572 U.S.

> at 590 [134 S.Ct. 1811] (quoting *Lee*, 505 U.S. at 597, 112 S.Ct. 2649). The minor-child Plaintiffs, by contrast, are students who are compelled by law to attend school and are under the thumb of State control while there—a distinction recognized by the Court itself in *Town of Greece*. *Id.* at 590-91 [134 S.Ct. 1811] (citing *Lee*, 505 U.S. at 597, 112 S.Ct. 2649). According to the Court, "[s]hould nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy[,]" and "should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed." *Id.* at 590 [112 S.Ct. 2649]. It is an entirely different story for children, who are "readily susceptible to religious indoctrination or peer pressure." *See id.* (internal quotation marks omitted).

(*Id.* at 49.)

Likewise, AG Defendants' reliance on Pledge of Allegiance cases fails. (*Id.*) There, courts have emphasized that the students were confronted with secular conduct, whereas, here, the activity is religious. (*Id.*) Moreover, there, students could opt out, which they cannot do here. (*Id.* at 49-50.) The same goes for AG Defendants' hypothetical challenge to evolution lessons or homework on world affairs, both of which involve secular instruction, not religious scripture. (*Id.* at 50.) Again, there is simply no right to opt out of or avoid the displays mandated by

the Act, and, in any event, the State's curriculum does not mention the Ten Commandments or tie them to same. (*Id.*)

> In sum, the Act cannot be constitutionally implemented because its mandatory, permanent displays of the Ten Commandments in every classroom will "effectively induce [] schoolchildren to meditate upon the Commandments during the school-day." *See City of Elkhart v. Books*, 532 U.S. 1058, 1061, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001) (Rehnquist, C.J., dissenting from denial of certiorari); *see also Van Orden*, 545 U.S. at 690-91, 125 S.Ct. 2854 (plurality opinion). The Act provides no path for objectors to opt out, and the permanent, ubiquitous nature of the displays offers no relief from them. As a result, students will be coercively indoctrinated in the State's favored religious beliefs and concomitantly pressured to suppress their own religious beliefs and practices at school. That is anathema to the "freedom of conscience and worship" that the Free Exercise Clause embraces. *See Lee*, 505 U.S. at 591, 112 S.Ct. 2649; Pl. Br. at 20-22.

(*Id.* at 50-51.) In sum, Plaintiffs argue they have shown a sufficient burden on their religious practice, "including but not limited to the coercive effect the Act's displays will have on the minor-Plaintiffs' expression and practice at school, and the Act's interference with the parent-Plaintiffs' right to direct the religious education and upbringing of their children." (*Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)).)

Plaintiffs also contend that the Act is not religiously neutral. (*Id.* at 50, 52.) Plaintiffs maintain that the relevant factors for determining neutrality under the Free Exercise Clause include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." (*Id.* at 52 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 638, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018) (internal quotation marks omitted)).) Plaintiffs maintain that the "lack of neutrality" is "evident from its text" and "is two-fold: (1) The Act mandates the display of explicitly religious doctrine, and (2) the particular text of the religious doctrine prescribed by the Act is Protestant." (*Id.*) This is particularly clear given the fact that many Plaintiffs do not adhere to these commandments, either generally or to the particular version at issue. (*Id.*) Further, "[t]he legislative history also evinces legislators' deviation from neutrality." (*Id.*) Plaintiffs then recount some of the statements from legislators supporting this. (*Id.* at 52-53.)

AG Defendants cannot "evade what is obvious from the text of the Act itself and its legislative history" by relying on *Van Orden*. (*Id.* at 53.) The setting in *Van Orden* was "wildly different" from this one, and, in that case, "the government there did not mandate the creation of the display or select and approve its denominationally preferential text," whereas, "[h]ere, the State went out of its way to require public-school displays of the commandments and to select, vote on, and officially approve the specific text to be used. . . ." (*Id.*)

Plaintiffs argue that, as a result of the above analysis, AG Defendants then have the burden of satisfying strict scrutiny. (*Id.*) They claim that AG Defendants fail to advance a compelling interest in "subjecting students—for nearly every minute of the school day, year after year—to religiously preferential displays of scripture in order to show children 'what God's law is.'" (*Id.*) Moreover, even if there were an educational or historical interest, the law lacks narrow tailoring because "BESE could simply update its own curricular standards, which currently omit any mention of the commandments . . . and address the commandments objectively through 'an appropriate study of history, civilization, ethics, comparative religion, or the like.'" (*Id.* at 53-54 (quoting *Stone*, 449 U.S. at 42, 101 S.Ct. 192).)

3. AG Defendants' Reply (Doc. 54)

In reply, AG Defendants reiterate their assertion that the Free Exercise claim is merely an effort to "repackage" Plaintiffs' Establishment Clause claim. (Doc. 54 at 24.) AG Defendants first argue, "Plaintiffs fail to cite a single case in which a court has held passive religious symbolism to violate the Free Exercise Clause. That is because mere non-participatory exposure to objectionable speech does not violate the Free Exercise Clause." (*Id.*) As with the Pledge of Allegiance, they say, objectors have the right to opt out, but not the right to stop it. (*Id.*) Though Plaintiffs maintain they cannot opt out, here "there is nothing for students to opt out *from*." (*Id.*) Students are required to recite the pledge, but, here, they need not do anything with the displays mandated by H.B. 71. (*Id.*)

Additionally, AG Defendants' legal authority cannot be written off on the grounds that the action there involved "secular conduct." (*Id.* at 25.)

> The Free Exercise Clause does not depend on whether the *government's action* is religious; it depends on whether the *plaintiff's* religious conduct is impermissibly burdened. Moreover, just as the Pledge has "secular purposes" even as it "acknowledg[es] . . . religious heritage," *Croft*, 624 F.3d at 167, so too the Ten Commandments "have both a religious and secular message," *Van Orden*, 351 F.3d at 180.

(*Id.*)

Moreover, AG Defendants argue that, even if it were possible that a Ten Commandments display could rise to the level of coercion, their Illustrations do not. (*Id.*) "Unlike the bare-bones display in *Stone*, displays showcasing the Ten Commandments alongside other historical documents, legal context, and pop-culture references can have no conceivable tendency to coerce students to 'read, meditate upon, [or] perhaps to venerate and obey, the Commandments.'" (*Id.* (quoting *Stone*, 449 U.S. at 42, 101 S.Ct. 192).)

Lastly, AG Defendants maintain that, if religious exercise is implicated, H.B. 71 should be subject to rational-basis review because it is neutral and generally applicable. (*Id.*) They say the case relied upon by Plaintiffs involved "government officials disparaging the claimant's

religion and penalizing its religious exercise under state law." (*Id.* (cleaned up).) AG Defendants contend that Plaintiffs' real argument is that any "'explicitly religious'" display of a "'particular' faith tradition is 'presumptively unconstitutional,'" but that this cannot be squared with the fact that the same version of the Ten Commandments was allowed by *Van Orden*. (*Id.* at 25-26 (quoting Doc. 47 at 41).) AG Defendants conclude:

> H.B. 71 does not "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. It does not provide "a mechanism for individualized objections" on religious or non-religious bases. *Fulton*, 593 U.S. at 533, 141 S.Ct. 1868 (quotation omitted). And its "design" does not demonstrate "deliberate[] disrespect[]" for any faith. *Am. Legion*, 588 U.S. at 64 [139 S.Ct. 2067]. Thus, strict scrutiny does not apply. Plaintiffs have forfeited any argument that H.B. 71 would fail under rational-basis review. The Court should thus dismiss Count II for failure to state a claim.

(*Id.* at 26.)

B. Law and Analysis

"The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion." *Fulton*, 593 U.S. at 532, 141

S.Ct. 1868. "[T]he Free Exercise . . . Clause[] of the First Amendment . . . protects religious exercises, whether communicative or not. . . ." *Kennedy*, 597 U.S. at 523, 142 S.Ct. 2407 (citations omitted).

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye*, 508 U.S. at 532, 113 S.Ct. 2217 (citations omitted). This "Clause[] requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005).

"[A] plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy*, 597 U.S. at 525, 142 S.Ct. 2407 (citation omitted). "Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* (citation omitted).

Having carefully considered the matter, 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. *See id.* As summarized above, the *Complaint* describes in detail all of the ways in which the mandatory display of the Ten Commandments in H.B. 71 conflicts with and burdens the sincere beliefs of the Unitarian Universalist, Presbyterian, agnostic or atheist, and Reform Jewish Plaintiffs. (*See* Section II, "The Named Plaintiffs," *supra* (citing generally *Compl.* ¶¶ 82-155, Doc. 1).) Specifically, the Act is at odds with, inter alia, (a) Unitarian Universalist, agnostic, and atheist views about proselytizing and the Ten Commandments generally; (b) Reform Jewish tradition as to the particular content of this specific version of the Decalogue and the need to instruct about it in the context of that tradition; and (c) Presbyterian teachings on the display of the Ten Commandments by secular authorities. (*See id.*)

Additionally, there is another sincerely held religious practice that the Act burdens. For over fifty years, the Supreme Court has recognized "traditional concepts of parental control over the religious upbringing and education of their minor children. . . ." *Yoder*, 406 U.S. at 231, 92 S.Ct. 1526. That is, there is a "fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education" and "to direct the religious upbringing of their children." *Id.* at 232-33, 92 S.Ct. 1526. *See also id.* at 234, 92 S.Ct. 1526 ("[W]e hold . . . the First and Fourteenth Amendments prevent the State from compelling [the Amish parent] respondents to cause their children to attend formal high school to age 16."). H.B. 71 violates this principle; as the *Complaint* alleges, the Act "substantially interferes with and burdens the right of parents to direct their children's religious

education and upbringing." (*Compl.* ¶ 3, Doc. 1.) Thus, Plaintiffs have established a burden on their sincerely held religious beliefs.

The Court also easily rejects AG Defendants' argument that the Act is neutral. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 U.S. at 533, 141 S.Ct. 1868 (citing *Masterpiece Cakeshop*, 584 U.S. at 636-39, 138 S. Ct. at 1730-1732; *Church of Lukumi Babalu Aye*, 508 U.S. at 533, 113 S.Ct. 2217).

"There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct." *Church of Lukumi Babalu Aye*, 508 U.S. at 533, 113 S.Ct. 2217. "To determine the object of a law, [the Court] must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.*

But, "[f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534, 113 S.Ct. 2217. "The Free Exercise Clause bars even subtle departures from neutrality on matters of religion." *Masterpiece Cakeshop*, 584 U.S. at 638, 138 S.Ct. 1719 (cleaned up). "The Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion

or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'" *Id.* at 638-39, 138 S.Ct. 1719 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 547, 113 S.Ct. 2217).

Thus, "[a]part from the text, the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye*, 508 U.S. at 535, 113 S.Ct. 2217. "To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination." *Id.* (citations omitted). But the laws at issue cannot "disclose an object remote from these legitimate concerns. The designs of [the] law[]" cannot "accomplish[] . . . a religious gerrymander, an impermissible attempt to target" the Plaintiffs "and their religious practices." *Id.* (cleaned up).

Additionally, "[f]actors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop*, 584 U.S. at 639, 138 S.Ct. 1719 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 540, 113 S.Ct. 2217). "These objective factors bear on the question of discriminatory object." *Church of Lukumi Babalu Aye*, 508 U.S. at 540, 113 S.Ct. 2217 (citing *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 n.24, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)).

Here, the Court finds that H.B. 71 is not neutral toward religion. As stated throughout this opinion, the Act requires the display of a specific Protestant version of the Decalogue. Again, this required display conflicts with the religious views of Unitarian Universalists, agnostics, atheists, Presbyterians, and Reform Jewish parents, particularly about proselytizing, the Ten Commandments (both generally and this version), and the role of the secular authorities. (*See Compl.* ¶¶ 82-155, Doc. 1.) AG Defendants argue that H.B. 71's version of the Decalogue is identical to the one upheld in *Van Orden*, but (a) as the plurality pointed out, that case was a "far more passive use of those texts than was the case in *Stone*," where students were captive audiences, *Van Orden*, 545 U.S. at 691, 125 S.Ct. 2854 (plurality opinion), and, (b) the specific context of that particular, single display made it acceptable, part of which context included 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," *id.* at 703, 125 S.Ct. 2854 (Breyer, J., concurring in judgment) (citations omitted).

Additionally, the legislative history confirms that the Act "proceed[ed] in a manner intolerant of religious beliefs." *Fulton*, 593 U.S. at 533, 141 S.Ct. 1868. Again, the Act's primary author and sponsor, Rep. Dodie Horton, declared of H.B. 71 in the Louisiana House Chamber, "I'm not concerned with an atheist. I'm not concerned with a Muslim. I'm concerned with our children looking and seeing what God's law is." La. House Reg. Sess. (Apr. 10, 2024), at 47:42, https://house.louisiana.

gov/H_Video/VideoArchivePlayer?v=house/2024/apr/0410_24_24RS_Day16; *see also* La. State Legislature (Sept. 16, 2024), https://www.legis.la.gov/legis/BillInfo.aspx?s=24rs&b=HB71 (describing Rep. Horton as "primary" author). Rep. Horton also stated during the House Education Committee debate on the bill: "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." La. House Educ. Comm. (Apr. 4, 2024), at 5:08, https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2024/apr/0404_24_ED.3. Representative Sylvia Taylor, another author of H.B, 71, similarly said, "I believe that we are lacking in direction. A lot of people, their children, are not attending churches or whatever. . . . So what I'm saying is, we need to do something in the schools to bring people back to where they need to be." *Id.* at 15:15; La. State Legislature (Sept. 16, 2024), https://www.legis.la.gov/legis/BillInfo.aspx?s=24rs&b=HB71 (describing Rep. Taylor as another author). And all of this must be seen in the context of (1) the fact that AG Defendants offer little from the legislative history to rebut Plaintiffs, and (2) the Governor's statement in response to this challenge to H.B. 71 that supporters should help him "ADVANCE [] the Judeo-Christian values that this nation was built upon." Wall, *supra*, at note 5. Thus, in addition to the Act's plain language and effects, H.B. 71's legislative history confirms that the law's "departures from neutrality on matters of religion" are more than "subtle." *Masterpiece Cakeshop*, 584 U.S. at 638-39, 138 S.Ct. 1719 (cleaned up);

see also Church of Lukumi Babalu Aye, 508 U.S. at 540-42, 113 S.Ct. 2217 (noting in its finding of no neutrality that "[t]he minutes and taped excerpts of the June 9 session . . . evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice.").

Since the Act is not neutral, the Court turns to the next phase of the analysis. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of Lukumi Babalu Aye*, 508 U.S. at 546, 113 S.Ct. 2217. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests." *Id.* (citations omitted). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.*

Here, AG Defendants failed to satisfy these requirements. Even assuming that H.B. 71 advanced a compelling interest (e.g., for educational or historical value), the Act is unquestionably not "narrowly tailored in pursuit of those interests." *Id.* (citations omitted). There are any number of ways that the State 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 the Act, including but not limited to: (1) posting the laws for a designated amount of time (i.e., days or hours) rather than

every day, all year around; (2) displaying them only when the students reach a particular age (like one in which they are able to read and understand the elevated language of the King James version of the Bible and to discuss or at least consider the sensitive issue of adultery); (3) using them in relevant course curricula (like social studies or world religions), rather than any subject matter, regardless of pertinence (like trigonometry, biology, and even gym class); or (4) having one single display at school (like the monument in *Van Orden*) rather than countless posters in every single classroom at the institution regardless of the subject taught. In short, H.B. 71 is not narrowly tailored, so it must fall under the Free Exercise Clause. *See id.* ("The absence of narrow tailoring suffices to establish the invalidity of the ordinances." (citation omitted)).

The Court also rejects AG Defendants' arguments that (1) the Act is not coercive; (2) this case is no different than those involving issues like the Pledge of Allegiance, where students can opt out; and (3) that, at heart, Plaintiffs are really themselves showing a hostility to any religion by trying to suppress it. All of these arguments were addressed above in reference to the Establishment Clause. In short, the Act is coercive to students, and, for all practical purposes, they cannot opt out of viewing the Ten Commandments when they are displayed in every classroom, every day of the year, every year of their education. As the Supreme Court recognized 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[,]" *Stone*, 449 U.S. at 42, 101 S.Ct. 192,

and this is particularly true considering the "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.

AG Defendants complain that Plaintiffs merely "repackage" their arguments about the Establishment Clause; but, this position ignores the fact that "the [two] Clauses appear in the same sentence of the same Amendment[,]" and "[a] natural reading of that [Amendment] would seem to suggest the Clauses have complementary purposes, not warring ones where one Clause is always sure to prevail over the others." *Kennedy*, 597 U.S. at 533, 142 S.Ct. 2407 (cleaned up). The same reasoning applies here.

In sum, the Court finds that Plaintiffs have stated a viable Free Exercise claim. As a result, *AG Defs. MTD* will be denied on this issue.

VII. Pls. MPI

A. Parties' Arguments

Plaintiffs move for a preliminary injunction seeking the following relief:

> Plaintiffs pray that this Court: preliminarily enjoin (1) all Defendants and their officers, agents, affiliates, subsidiaries, servants, employees, successors, and all other persons or entities in active concert or privity or

> participation with them, from adopting rules or regulations in accordance with, or otherwise enforcing, House Bill No. 71, Act No. 676, and from requiring that the Ten Commandments be displayed in every public-school classroom in Louisiana; and (2) the School Board Defendants and their officers, agents, affiliates, subsidiaries, servants, employees, successors, and all other persons or entities in active concert or privity or participation with them from displaying the Ten Commandments in any public-school classroom. Plaintiffs further pray that this Court issue an order directing Defendants Brumley and the members of the Louisiana State Board of Elementary and Secondary Education to provide a copy of any preliminary injunction granted to all Louisiana public elementary, secondary, and charter schools, and all public post-secondary education institutions.

(Doc. 20 at 3.) They also maintain that the requirement of posting a bond should be waived because (1) the injunction seeks non-monetary relief; (2) "the gravity of interest is great"; and (3) AG Defendants cannot show a likelihood of harm or loss if the injunction is granted. (*Id.* at 3 n.1 (citations omitted).)

Plaintiffs argue that they satisfy the four requirements for a preliminary injunction. (*See* Doc. 20-1.) They have established a substantial likelihood of relief, for all the reasons given above. (*See also id.* at 12-29.) Where First Amendment plaintiffs make this showing, the other

injunction factors are typically presumed. (*Id.* at 29.) Further, Plaintiffs have shown irreparable injury because of the violation of their First Amendment freedoms. (*Id.*) Plaintiffs also contend that the public interest and balance of potential harms weigh in their favor; there is no harm because the preliminary injunction merely preserves the status quo, and the public interest would be served by preventing the violation of their constitutional rights. (*Id.* at 29-30.)

AG Defendants oppose the motion. (Doc. 39-1 at 56.) They argue first that, if the Court grants their motions to dismiss, *Pls. MPI* should be denied as moot. (Doc. 39-1 at 56.)

But, if the Court denies *AG Defs. MTD*, then, AG Defendants argue, the Court should still deny *Pls. MPI.* (*Id.*) First, for all the reasons they give above, AG Defendants contend that Plaintiffs are unlikely to succeed on the merits, either from jurisdictional defects or from a failure to state a claim. (*Id.*)

Second, these defendants assert that Plaintiffs will not suffer irreparable harm if an injunction is not granted. (*Id.* at 57.) AG Defendants again reiterate the above arguments for this issue as well. (*Id.*)

Third, AG Defendants assert that the equities and public interest weigh in their favor. (*Id.*) The State and its citizens will suffer if their statute is not implemented, and it is inequitable to grant an injunction when AG Defendants must decide how to comply with H.B. 71 before the January 1, 2025, implementation deadline. (*Id.*)

Fourth, AG Defendants attack the request for an order that Brumley and the BESE Members provide a copy of the preliminary injunction to all Louisiana public elementary, secondary, and charter schools and all public post-secondary institutions. (*Id.*) AG Defendants say State officials should not be "coopt[ed] . . . for that purpose," and, in any event, the injunction should not apply to all schools in Louisiana since Plaintiffs only chose to sue a small number of Defendants. (*Id.* at 57-58.)

Plaintiffs reply that each relevant factor weighs in favor of a preliminary injunction. (Doc. 47 at 54.) First, for all the reasons they advance above, Plaintiffs have shown a likelihood of success on the merits. (*Id.*) Second, the loss of First Amendment freedoms constitutes irreparable injury, and Plaintiffs have shown that loss. (*Id.*) Third, Plaintiffs stress that injunctions protecting First Amendment freedoms serve the public interest, and any harm AG Defendants will suffer is outweighed by the facts that (a) the statute violates federal law and (b) the other injunction requirements weigh in Plaintiffs' favor. (*Id.* at 54-55.)

B. Law and Analysis

A plaintiff must demonstrate four requirements to obtain a preliminary injunction:

> 1) a substantial likelihood of success on the merits; 2) a substantial threat that he will suffer irreparable injury if the injunction is not issued; 3) that the threatened injury to him outweighs

> any damage the injunction might cause to the state and its citizens; and 4) that the injunction will not disserve the public interest.

Ingebretsen, 88 F.3d at 278 (citing *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (citations omitted)).

Here, Plaintiffs have satisfied all of these requirements. The Court will address each of them in turn.

1. Substantial Likelihood of Success

First, for all the reasons given above, Plaintiffs have shown a substantial likelihood of success on the merits. The Court's approach in resolving the merits of Plaintiffs' claims was summarized above, and it need not be repeated in full here.

In short, the Court must determine whether the practice at issue "fits within" and is "consistent with a broader tradition." *See Mack*, 49 F.4th at 951 (cleaned up). Historical evidence is critical because "widespread practice around the Founding helps reveal an amendment's original public meaning," as does the practice "around the time of incorporation" in 1868. *See id.* (citations omitted). The question is whether there was a "widespread practice" or whether the practice was "common for [the] Founding-era. . . ." *See id.* at 951, 957. Evidence is insufficient if there are only "scattered instances" or "too little evidence too thinly spread to conclude that [the practice] occurred regularly." *See id.* at 956-57.

Additionally, a practice can be inconsistent with a tradition by being discriminatory or by coercing religious exercise. *Id.* at 958. As to the former, the government must ensure that "members of any faith are free to participate in the [] [p]rogram" and that it acts "without regard for belief." *See id.* As to coercion, the analysis is "fact-sensitive and holistic," *id.* at 958-59 (cleaned up); the key questions are "whether coercion is a real and substantial likelihood," *id.* at 959 (citation omitted), and whether "anyone may choose not to participate and suffer no consequences," *id.* at 961. Coercion has been found in the public-school context where "the school ha[s] 'in every practical sense compelled attendance and participation in' a 'religious exercise.'" *Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407 (citation omitted). Students cannot be a "captive audience" or "required or expected to participate." *See id.* at 542, 142 S.Ct. 2407. Again:

> [T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Lee, 505 U.S. at 592, 112 S.Ct. 2649 (citations omitted).

As stated above, the broader tradition at issue is the use of the Ten Commandments in public education. The Court finds that there is insufficient evidence of such a broader tradition to justify H.B. 71. Indeed, none of the primary documents offered by AG Defendants—*The New England Primer*, the McGuffey *Readers* from the 1800s, or Noah Webster's *The American Spelling Book* (Faircloth Decl., Exs. G-8 through G-18, Docs. 59-9 through 59-19)—reflect any sort of tradition of permanently displaying the Decalogue in public-school classrooms at the time of the Founding or of incorporation.

On this key question of whether the practice at issue fits within a broader tradition existing at the time of the founding, Plaintiffs offered the testimony of Dr. Steven K. Green which the Court heard at the hearing on October 21, 2024. The Court found Green to be highly qualified and concluded that he utilized an adequate and standard methodology used by historians. (*See* Ruling on *AG Defs. Daubert Motion*, Doc. 83.) The Court had the opportunity to judge his demeanor and finds that the witness was credible and his testimony on this issue was well supported and persuasive. The Court rejects the AG Defendants' charge of bias. The Court notes that not only did the AG Defendants fail to offer contrary or competing expert testimony on this critical issue, but they also failed to seriously challenge any of Green's substantive opinions on the merits of this issue.

Green testified that, at the time the U.S. Constitution and First Amendment were drafted, *public* schooling was essentially nonexistent. (Green Report ¶ 34, Doc.

47-2; Green Decl. ¶ 5, Doc. 47-1 (affirming contents of report).) Green explained that education at the time of the Founding occurred in private academies or through tutors and generally had a strong religious component due to the dominance of clergy as teachers. (Green Report ¶ 34, Doc. 47-2.) Quasi-public-school prototypes existed in New England, but they required parents to pay a rate, were largely taught by clergy, and primarily had a religious purpose of making Christians. (*Id.*) Early textbooks like *The New England Primer* were chiefly designed to inculcate religious fealty. (*Id.*) Thus, as Green opined, practices in these schools provide little insight into public education and the Ten Commandments. (*Id.*) Green further stated that there is a lack of evidence that these schools permanently displayed the Ten Commandments on classroom walls. (*Id.*)

Green also said that publicly operated and funded "common schools" developed in the early 1800s. (*Id.* ¶ 35.) After discussing these schools, Green concluded: "Looking more specifically at the Ten Commandments, the evidence for a longstanding historical practice and acceptance of widespread and permanent displays of the Ten Commandments in public-school classrooms does not exist." (*Id.* ¶ 39.) Moreover, as will be explored below, Green looked at the AG Defendants' tendered evidence and found:

> [A]s a matter of historical methodology and analysis, the common schools' use of these *Readers* or Webster's *Spelling Book*, standing alone, does not prove H.B. 71's broad assertion

> that the "Ten Commandments were a *prominent* part of American public education for almost *three* centuries." Nor does it demonstrate a longstanding historical acceptance of an entirely *distinct* practice—permanently displaying the Ten Commandments in public-school classrooms.

(*Id.* ¶ 44.)

Green relied on other evidence to support his conclusion that there was no longstanding, widespread use of the Ten Commandments in public education by focusing on the lack of evidence supporting the permanent displaying of the Ten Commandments in public-school classrooms. (*Id.* ¶ 45.) First, Green believed that, as a historian, since there was "substantial religious turmoil and conflict that arose from the incorporation of prayer and Bible reading into some common schools," he would have expected to see a similar response if undue emphasis was placed on *Readers* lessons involving the Ten Commandments or permanently displaying them. (*Id.*) But, only two of the above reported cases involved the Ten Commandments, and neither involved displaying them on classroom walls. (*Id.* (citing *Commonwealth v. Cooke*, 7 Am. L. Reg. 417-26 (Mass. 1859); *Pfeiffer v. Bd. of Educ.*, 118 Mich. 560, 77 N.W. 250 (1898)).) The Court notes that only the former case took place around the time of incorporation.

Second, surveys conducted by the U.S. Commissioner of Education in the 1880s and 1890s "did not reflect any specific, routine practice of displaying the Ten

Commandments in classrooms or otherwise using them in instruction." (*Id.* ¶ 46.)

Third, Green examined a popular nineteenth-century legal treatise—Thomas Cooley's *Constitutional Limitations*. (*Id.*) Each edition of Cooley's treatise contained information about religious liberty and religious exercises in public schools. (*Id.*) And there was no reference in this treatise to the posting of the Ten Commandments or their use in public-school curricula. (*Id.*)

Fourth, to Green's knowledge, "no state law specifically permitted or mandated the posting of the Ten Commandments in public schools prior to 1927." (*Id.* ¶ 47.) The first state law specifically allowing the display of the Decalogue was in 1927 in North Dakota, but that was struck down in 1980. (*Id.* ¶ 47 & n.76.)

Considering this evidence, Green concluded:

> Based on all the factors discussed above, *supra* ¶¶ 34-47, and the lack of compelling counterevidence, it is my expert judgment that the Ten Commandments were *not* "a prominent part of American public education for almost three centuries," as H.B. 71 claims. Nor more specifically, in my expert opinion, is there evidence of a longstanding, let alone unbroken, historical acceptance and practice of widespread, permanent displays of the Ten Commandments in public schools.

(*Id.* ¶ 48.)

Green also rebutted the historical evidence offered by AG Defendants. By way of background, the Act contains certain legislative findings and declarations. H.B. 71(A). After setting forth some general history about the role of the Ten Commandments in public life,[20] the Act declares, "[i]ncluding the Ten Commandments in the education of our children is part of our state and national history, culture, and tradition." H.B. 71(A)(4)-(5). The context statement for the Act then provides the basis for AG Defendants' historical evidence:

> 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

20. This includes: (a) the Supreme Court's upholding of the display in *Van Orden*; (b) the Louisiana Legislature's enacting of Act No. 602 of its 2006 Regular Session, which provided "for the secretary of state to publish the Ten Commandments and other historically significant documents for posting in court houses and other public buildings to address 'a need to educate and inform the public as to the history and background of American and Louisiana law;'" and (c) the Supreme Court's recognition in *American Legion* that the Ten Commandments "have historical significance as one of the foundations of our legal system" and the Court's alleged ruling that the display of Ten Commandments on public property could have "'multiple purposes'" such as "'historical significance'" and representing a "'common cultural heritage.'" H.B. 71(A)(1)-(3) (quoting, inter alia, *American Legion*, 588 U.S. at 53-54, 139 S.Ct. 2067).

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 [] 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.

H.B. 71(B)(3).

But Green systematically dismantled this purported historical evidence and its conclusions. Green's conclusions about the *New England Primer* and education before the nineteenth century were given above and need not be repeated here. (*See also* Green Report ¶ 34, Doc. 47-2.) Again, Green explained in his report that publicly operated and funded "common schools" developed in the early 1800s. (*Id.* ¶ 35.) Massachusetts was the first state to mandate universal "non-sectarian" public education, and its board of education, led by Horace Mann, eliminated doctrinal religious instruction but retained the use of the Bible to inculcate "universal" Christian morals. (*Id.*) The Bible was read without "note or comment," to "let the Bible speak for itself." (*Id.*) Other states followed suit, offering liberal education with some "nonsectarian" religious activities like prayer and Bible reading. (*Id.*)

Green highlighted though, how even these activities were "deeply controversial and not universality accepted;" for instance, the use of the Protestant King James Bible drew opposition from Catholics and Jews. (*Id.* ¶ 36.) Green provided some details on that conflict in the 1840s, including the Philadelphia "Bible riots" as well as the following:

> In 1840, the nation's Catholic bishops issued a pastoral letter denouncing the use of the King James Bible and Protestant-biased textbooks, such as the McGuffey *Reader*: "We can scarcely point out a book in general use in the ordinary schools . . . wherein covert and insidious efforts are not made to misrepresent our principles, to

> distort our tenets, to vilify our practices, and to bring contempt upon our Church."

(*Id.*)

Green also documented about thirty reported decisions between 1850 and 1960 involving challenges to public-school religious exercises. (*Id.* ¶ 37.) Green said this demonstrates that practices were not universally permitted or accepted. (*Id.*) One of these was from 1854, and three were in the 1880s. (*Id.* ¶ 37 n.59.) Green also highlighted other evidence supporting the conclusion that, in the late nineteenth century, the prevalence of religious exercises in schools declined significantly. (*Id.* ¶ 38.)

Green then turned to the Act's context statement itself and asserted:

> [E]xamining these sources [(i.e., the *New England Primer*, the McGuffey *Readers*, and Webster's *American Spelling Book*)] and their use in more detail, it is my conclusion that the evidence cited in H.B. 71 does not support the broad assertion that "the Ten Commandments were a prominent part of American public education for almost three centuries."

(*Id.* ¶ 40.) First:

> [T]he *New England Primer*, which first appeared around 1690 and was republished into the early nineteenth century, had the central

> purpose of inculcating religious fealty along sectarian, Calvinist lines—"the primer was a codification of primary religious creed." But the *Primer* was used chiefly, if not exclusively, in *religiously* run schools, and, importantly, it fell into disuse during the early decades of the nineteenth century, before the rise of public education. Thus, as a matter of historical methodology and analysis, it does not represent a precedent for, or provide evidence of, later practices in *public* schooling.

(*Id.* ¶ 41.)

Additionally, Green testified that "H.B. 71 also misrepresents or overstates matters considerably with respect to the other texts it cites." (*Id.* ¶ 42.) For example:

> Noah Webster's *American Spelling Book*, first published in 1783, was the most popular speller into the mid-nineteenth century. However, as an early leader in the nonsectarian reform movement, Webster was opposed to a religiously infused curriculum, and his spellers made only occasional references to "commandments." For example, the 1839 edition of his speller includes only one mention of the commandments: "Fear God, and keep his commandments, for this is the whole duty of man." Similarly, the 1863 *Speller* states in a single entry: "God is the divine legislator. He proclaimed his ten commandments from Mt. Sinai." Significantly,

> the words "commandment" or "commandments" do not appear in the book's 1795, 1808, 1822, 1843, 1848, 1857, 1866, 1880, and 1908 editions.

(*Id.*) As to the McGuffy *Readers*, Green stated:

> The McGuffey *Readers*, written and compiled by Presbyterian minister William McGuffey, were also used in many common schools throughout much of the nineteenth century. McGuffey wrote various *Readers* for grades one through six, with numerous editions that were published into the early twentieth century. While some early editions and versions of the *Readers* set out some version of the Ten Commandments as part of a reading lesson, it was just one of dozens of lessons available to students and teachers. For example, the 1853 edition of McGuffey's *Eclectic Second Reader* included 105 separate lessons, with only one lesson focusing on the "The Ten Commandments," listed last, starting at page 216. Many other editions and versions did not reproduce the Ten Commandments verbatim, making only sporadic reference to a specific commandment, such as the prohibition on bearing false witness, as part of a lesson or story. And references to the Ten Commandments in other editions and versions were even more attenuated. The 1853 edition of the *Third Reader*, for instance, included an extract from the Sermon on the Mount: "Whosoever, therefore, shall break one

of these least commandments . . . shall be least in the kingdom of heaven." The 1857 edition of the *Fifth Reader* stated that "the commandment of the Lord is pure, enlightening the eyes." Even then, references to a "commandment" were minimal when compared to the numerous lessons (up to 200, depending on the edition) included in each book. Still other editions and versions of McGuffey's *Readers*, especially later ones, did not include any reference to a "commandment."

[ ] In sum, the Ten Commandments, even when used or referred to in McGuffey's *Readers*, were not a significant aspect of the texts, and the extent to which common-school teachers may have relied on those particular readings and spelling lessons, as opposed to the dozens of others available in the same book, cannot be verified. Moreover, references to the commandments were largely eliminated in later versions of the *Readers*; and, while the *Readers* were used in many common schools from their initial publication through the early twentieth century, reliance on them tapered as public schools turned to myriad other available options. It follows that, as a matter of historical methodology and analysis, the common schools' use of these *Readers* or Webster's *Spelling Book*, standing alone, does not prove H.B. 71's broad assertion that the "Ten Commandments were a *prominent*

> part of American public education for almost *three* centuries." Nor does it demonstrate a longstanding historical acceptance of an entirely *distinct* practice—permanently displaying the Ten Commandments in public-school classrooms.

(*Id.* ¶¶ 43-44.) Considering this evidence, Green again concluded, "Based on all the factors discussed above, *supra* ¶¶ 34-47, and the lack of compelling counterevidence, it is my expert judgment that the Ten Commandments were *not* 'a prominent part of American public education for almost three centuries,' as H.B. 71 claims." (*Id.* ¶ 48.)

Green's testimony at the hearing confirmed the conclusions of his Report. Most significant to the Court, Green elaborated on how scattered and infrequent the references to the Decalogue were in the McGuffey *Readers*. Specifically, Green emphasized footnote 69 of his report:

> I conducted word searches though digitized editions of the books available through online resources, including Early American Imprints, Evans Digital Collection, the HathiTrust digital service, the Internet Archive, and Project Gutenberg. The editions and versions I reviewed included all six levels of the *Readers* with edition dates ranging from 1844 to 1920 (a total of 36 books). The word "commandment" or "commandments" occurred primarily in the Third and Fourth *Readers* and varied between

> one to three references per book out of 100-200 lessons per book. As noted above, some editions, such as the 1853 edition of the *Second Reader*, included a lesson on the Ten Commandments or other references to the commandments, but many later editions did not. For example, a search of the 1866 and 1880 Second *Reader*, as well as a sampling of the First, Fifth, and Sixth Readers between 1865 to 1901, uncovered no references to a "commandment" or "commandments."

(*Id.* ¶ 43 n. 69.) Green acknowledged on cross the presence of the Ten Commandments in certain *Readers* (such as those from 1825, 1836, and 1879), but he responded that isolated examples must be judged in the context of the larger historical record; otherwise, the forest is lost for the trees. Again, the Court heard Green's testimony and found it convincing, logical, and consistent with the Court's own review of the evidence.

In sum, the Court finds that the historical records show only "scattered instances" that are "too little evidence too thinly spread to conclude that [the practice] occurred regularly." *See Mack*, 49 F.4th at 957. That is to say, the limited examples offered by AG Defendants do not show a "widespread practice" of using the Ten Commandments in public schools that was "common for [the] Founding-era" or at the time of incorporation. *See id.* at 951, 957. Consequently, 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" of using the Decalogue in public-school education, *id.* at 951, so Plaintiffs have shown a substantial likelihood of success on the merits on their Establishment Clause claim.

Further, even if there was sufficient evidence to show that this practice fit within a broader tradition of using the Ten Commandments in public schools, Plaintiffs have still demonstrated a substantial likelihood of success on their Establishment Clause and Free Exercise Clause claims. The declarations of the named Plaintiffs are nearly identical to the allegations of the *Complaint*, summarized above.[21] This testimony confirms, inter alia, Plaintiffs' religious or nonreligious beliefs, the manner in which the Act substantially burdens those beliefs, and the ways in which Act is inconsistent with any historical tradition by being discriminatory and coercive.[22] The

21. *See* Rev. Roake Decl., Doc. 20-2; Van Young Decl., Doc. 20-3; *Compl.* ¶¶ 9, 82–90, Doc. 1; Rev. Broadhurst Decl., Doc. 20-4; Rev. Williams Decl., Doc. 20-5; *Compl.* ¶¶ 10, 91–100, Doc. 1; Sims Decl., Doc. 20-6; *Compl.* ¶¶ 11, 101–107, Doc. 1; Harding Decl., Doc. 20-7; Owens Decl., Doc. 20-8; *Compl.* ¶¶ 12, 108–113, Doc. 1; Erin Hawley Decl., Doc. 20-9; David Hawley Decl., Doc. 20-10; *Compl.* ¶¶ 13, 114–124, Doc. 1; McCrory Decl., Doc. 20-11; *Compl.* ¶¶ 14, 125–129, Doc. 1; Sernovitz Decl., Doc. 20-12; Pulda Decl., Doc. 20-13; *Compl.* ¶¶ 15, 130–139, Doc. 1; Alkire Decl., Doc. 20-14; *Compl.* ¶¶ 16, 140–145, Doc. 1; Herlands Decl., Doc. 20-15; *Compl.* ¶¶ 17, 146–155, Doc. 1.

22. The Court also notes that Green provided extensive testimony about the ways in which the Ten Commandments as adopted by H.B. 71 are Protestant and religiously exclusive. (Green Report ¶¶ 49-56, Doc. 47-2; Green Decl. ¶ 5, Doc. 47-1 (affirming contents of report).) Green highlights how the King James version

legislative history, also detailed above, further supports the point that H.B. 71 is not neutral but is in fact coercive and discriminatory. And for all the reasons given above, AG Defendants have failed to satisfy the requirements of strict scrutiny on the Free Exercise claim. Consequently, for these additional reasons, Plaintiffs have shown a substantial likelihood of success on the merits.

2. The Other Requirements for Injunctive Relief

As to the second requirement, "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Book People*, 91 F.4th at 340-41 (quoting *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012)); *see also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2024) (same). "Indeed, the Supreme Court has said that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Book People*, 91 F.4th at 341 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). *See also Ingebretsen*, 88 F.3d at 280 (same). Thus, Plaintiffs have shown irreparable injury.

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of the Decalogue, as used in *Van Orden* and H.B. 71, is inconsistent in various ways with the Jewish and Catholic versions. (Green Report ¶¶ 53-55, Doc. 47-2), and much of this coincides with the testimony of the named Plaintiffs, summarized above.

As to the third and fourth requirements, "Plaintiffs' risk of irreparable harm must be weighed against any injury the State would sustain. Where the State is appealing an injunction, its interest and harm merge with the public interest." *Book People*, 91 F.4th at 341 (citations omitted). On the one hand, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* (citations omitted). But "neither [the State] nor the public has any interest in enforcing a regulation that violates federal law." *Id.* (citation omitted). "Indeed, '[i]njunctions protecting First Amendment freedoms are always in the public interest.'" *Id.* (quoting *Opulent Life Church*, 697 F.3d at 298 (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006))). *See also Ingebretsen*, 88 F.3d at 280 (holding that where a law violates the First Amendment, "the public interest was not disserved by an injunction preventing its implementation"). Thus, "[b]ecause Plaintiffs are likely to succeed on the merits of their First Amendment claim, the State and the public won't be injured by an injunction of a statute that likely violates the First Amendment." *Book People*, 91 F.4th at 341.

In sum, all four requirements for injunctive relief weigh in Plaintiffs' favor. As a result, the Court will grant *Pls. MPI.*

3. Remaining Issues Related to Pls. MPI

Additionally, Plaintiffs seek an order compelling the Superintendent and BESE Members to serve this ruling on all schools in the state. AG Defendants contend that

this "coopts" them and that Plaintiffs should be charged with this task.

In short, the Court agrees with Plaintiffs. The Court has ruled that the Act is facially unconstitutional. That is, H.B. 71 is unconstitutional in all applications. As a result, the Act cannot be enforced throughout the state. While AG Defendants do not have to serve each school with a copy of this ruling, they certainly will be ordered to provide notice to all schools that the Act has been found unconstitutional, particularly since the burden on AG Defendants to accomplish this task is minimal.

The sole remaining question is whether Plaintiffs need to post bond. "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c).

"[T]he amount of security required pursuant to Rule 65(c) 'is a matter for the discretion of the trial court. . . .'" *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (quoting *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)).

> Accordingly, the judge usually will fix security in an amount that covers the potential incidental and consequential costs as well as either the losses the unjustly enjoined or restrained party will suffer during the period the party is

> prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained.

Wright, Miller, and Kane, *supra*, at § 2954.

"Indeed, it has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant." *Id.* Likewise, the Fifth Circuit has ruled that "the court 'may elect to require no security at all.'" *Kaepa*, 76 F.3d at 628 (quoting *Corrigan Dispatch*, 569 F.2d at 303). And other courts have found that no security, or only nominal security, would be required for violations of First Amendment rights. *See Abdullah v. Cnty. of St. Louis*, 52 F. Supp. 3d 936, 948 (E.D. Mo. 2014) ("Given the constitutional issues at stake here[,] [including under the First Amendment,] and taking into account plaintiff's status as employee of a not-for-profit entity, I will set the bond in the amount of $100."); *United Food & Com. Workers Loc. 99 v. Brewer*, 817 F. Supp. 2d 1118, 1128 (D. Ariz. 2011) ("There is no realistic likelihood that Defendants will be harmed by being enjoined from enforcing a law that constitutes viewpoint discrimination in violation of the First Amendment on its face. No bond will be required.").

For the same reasons—the lack of any real harm shown by AG Defendants from being unable to enforce an unconstitutional law; the significant First Amendment issues successfully raised by Plaintiffs; and Plaintiffs'

status as parents of minors in schools—the Court will require only a nominal bond in the amount of $100.

VIII. OPSB MTD

A. Relevant Background and Parties' Arguments

The Court now turns to *OPSB MTD*. By way of background, the *Complaint* alleges that certain plaintiffs have minor children who attend school in the "NOLA Public School System"—specifically, Plaintiffs Reverend Roake and Van Young (parents of A.V. and S.V.), Sernovitz and Pulda (parents of T.S.) and Herlands (parent of E.H. and J.H.). (*Compl.* ¶¶ 9, 15, 17, Doc. 1.) However, OPSB argues that it "directly runs only two public schools," neither of which are attended by these Plaintiffs' children. (Doc. 38-1 at 3.) Rather, these children attend charter schools; specifically, Roake and Van Young's children go to the International School of Louisiana, a Type 2 charter school authorized by BESE, and the other children go to Willow School, a Type 3B charter school authorized by OPSB. (*Id.* at 3 (citing Illarmo Decl., Doc. 38-2).)

The basis for *OPSB MTD* is that "[these] Plaintiffs lack Article III standing to sue OPSB in this action because of the separate legal identities, autonomy, independence, and compliance obligations of the charter schools that Plaintiffs' children attend." (*Id.* at 9.) Charter schools have "autonomous operations and governance," and they "exercise clear autonomy and independent operational decision making over school programming, instruction, curriculum, materials, [and] texts." (*Id.*) As

to the specific schools at issue, again, the International School is authorized by BESE, and:

> Although the OPSB is the authorizer for the Willow School, this does not negate the separate juridical identity of the public corporation that operates the Willow School, the independence and autonomy of the Willow School as a charter school, or the statutory immunity OPSB enjoys for the conduct of any charter school it authorizes.

(*Id.* at 9-10.) Thus, OPSB asserts, Plaintiffs' injuries are not traceable to any conduct by OPSB. (*Id.* at 10.) Further, Plaintiffs fail redressability because "[e]njoining OPSB from displaying the Ten Commandments in either of its two direct[ly] run public schools would not redress any alleged injury suffered by Plaintiffs and their children" in the two charter schools. (*Id.* at 11.) Finally, OPSB argues that it is redundant to the other parties in this case. (*Id.*)

In response, Plaintiffs concede that the parents with children attending the International School (Roake and Van Young) lack standing *as to OPSB.* (Doc. 46 at 7 n.7.) But, Plaintiffs argue that BESE is the proper party for these Plaintiffs and that BESE is already a defendant in this action. (*Id.*) Further, Plaintiffs maintain that OPSB is not entitled to dismissal entirely because there is standing for those other parents with children at the Willow School. (*Id.*)

Plaintiffs contend they satisfy the traceability and redressability requirements based on "[t]he plain text of the Act, state charter-school laws, OPSB's own policies, and OPSB's Charter School Operating Agreements[.]" (*Id.* at 5.) As to the Act, H.B. 71 provides that "each public school governing authority" must display the Ten Commandments, and OPSB is the governing authority of Willow School. (*Id.* at 13.) "OPSB's own policies, meanwhile, repeatedly affirm that OPSB-authorized charter schools are 'under its jurisdiction.'" (*Id.*)

Plaintiffs highlight that traceability is not a proximate-cause requirement. (*Id.* at 14.) "As the Supreme Court has held, while 'it does not suffice if the injury complained of is the result of the independent action of some third party not before the court, . . . that does not exclude injury produced by determinative or coercive effect upon the action of someone else.'" (*Id.* (quoting *Bennett*, 520 U.S. at 169, 117 S.Ct. 1154).) Plaintiffs rely on the facts and holding of *Bennett* to support their position before asserting, "[a]s in *Bennett*, OPSB wields a 'powerful coercive effect' on its charter schools' compliance with legal requirements." (*Id.* at 14-15 (quoting *Bennett*, 520 U.S. at 169, 117 S.Ct. 1154).) Plaintiffs base this on the facts that:

(a) "Louisiana law requires OPSB to monitor charter schools' compliance with both state law and the terms of OPSB's Charter School Operating Agreements," (*id.* at 15 (citing, inter alia, La. R.S. § 17:10.7.1 and § 17:3992));

(b) "OPSB policy requires the school district to 'oversee each charter school's compliance with its operating agreement, federal and state laws and regulations and School Board policy,'" and "the Charter School Operating Agreement with the Willow School and other charter schools repeatedly affirms that charter schools must follow the law[,]" (*id.* at 16); and

(c) "OPSB monitors charter schools for compliance with the Operating Agreement and applicable laws, including numerous provisions of state law, from which charter schools are not exempt, as enumerated in La. R.S. § 17:3996(B)," and OPSB can take corrective action, including "to deny or limit renewal of the charter or to revoke it entirely," (*id.* at 16-17).

Moreover, Plaintiffs explain that charter-school autonomy has limits, and, as such, institutions must still comply with the law. (*Id.* at 17.) While OPSB has immunity from "civil liability" for "damages" under La. R.S. § 17:3993(A), it is not immune from injunctive or other equitable relief like that asserted here. (*Id.* at 17 n.17.) Ultimately, OPSB can exercise "coercive control" over the charter schools, so the traceability requirement is satisfied. (*Id.* at 17.)

Plaintiffs also maintain that the redressability requirement is satisfied. (*Id.* at 18.) They assert:

> An injunction will prohibit OPSB from carrying out its legal obligations—confirmed in state law, [OPSB] policy, and the Willow School Charter Agreement—to ensure that the school attended by three minor-child Plaintiffs complies with the Act. And, as set forth in state law, [OPSB] policy, and OPSB's Charter School Operating Agreement, OPSB has the plain authority and legal duty to ensure that the three minor-child Plaintiffs' school complies with federal law (as determined by this court) and any injunction entered against [OPSB]. Indeed, under the Willow School Charter Agreement any injunction entered against OPSB prohibiting the display of the Ten Commandments will automatically bind the school. *Supra* p. 6 (noting provision in Operating Agreement that "Charter School shall adhere to the requirements of any and all consent decrees and court orders imposed upon Charter School and/or OPSB").

(*Id.*) Thus, the injury is redressable. (*Id.*)

Plaintiffs close by arguing that OPSB is not redundant in this suit, as it "does not 'simply stand in the shoes' of the State Defendants." (*Id.* at 19.) For all these reasons, Plaintiffs contend that *OPSB MTD* must be denied. (*Id.* at 20.)

OPSB replies first by emphasizing Plaintiffs' concession about the International School and then by returning to the issue of autonomy:

> The Willow School "is governed by the Advocates for Arts-Based Education (AABE) Board" which "has an important role in advancing the school's mission by setting policies, supervising the activities of the Corporation, and adopting positions on issues of substance related to the purposes of the Corporation." [*See* School Governance, The Willow School New Orleans, https://www.willowschoolnola.org/page/school-governance (last visited 8-28-24).] Although OPSB is involved in limited aspects of the Willow School's administration, OPSB's responsibilities are more holistic in nature and do not concern daily governance issues such as what posters should or should not be displayed in charter school classrooms.

(Doc. 52 at 1-3.) Thus, says OPSB, "the Charter School Agreement between OPSB and AABE actually affirms the Willow School's independence to control its daily operations." (*Id.* at 3.) OPSB quotes Section 1.9 of the Charter School Agreement, entitled "Operational Autonomy," which provides in relevant part:

> **[T]he local school board [OPSB] shall not impede the operational autonomy of a charter school under its jurisdiction in the areas of school programming, instruction, curriculum, materials and texts,** yearly school calendars and daily schedules, hiring and firing of personnel, employee performance management and evaluation,

> terms and conditions of employment, teacher or administrator certification, salaries and benefits, retirement, collective bargaining, budgeting, purchasing, procurement, and contracting for services other than capital repairs and facilities construction.

(*Id.* at 3-4 (emphasis by OPSB).) Further, OPSB says that, under Section 9.10 of the Charter School Agreement, AABE, as charter operator, is responsible for complying with all federal and state law. (*Id.* at 4.) OPSB also cites to Louisiana Act No. 334 of 2024, which amended La. R.S. § 7:3972(A) ("Act 334"), in support of its argument that charter schools have "operational autonomy[,]" which includes "autonomy necessary to manage its educational programming and daily operations." (*Id.* (quoting La. R.S. § 17:3991(C)(7)).) This is reinforced by Section 1.9 of the Charter Agreement. (*Id.* at 4-5.)

OPSB then argues that, based on this autonomy, Plaintiffs fail to establish traceability. (*Id.* at 5.) Plaintiffs' harm must be "trace[able] to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court[.]" (*Id.* (quoting *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 (emphasis omitted)).) Plaintiffs' injuries are "too conjectural or hypothetical" because their "existence depends on the decisions of third parties[.]" (*Id.* (quoting *Little*, 575 F.3d at 540).)

"Here, Plaintiffs' alleged harm, if any, would be directly attributable to the governing authority of the

Willow School, and not the authority of OPSB. . . . Simply put, it is the Willow School's responsibility, contractually, legally, and practically, to enforce—or not to enforce—H.B. 71." (*Id.* at 6.) Even if OPSB could take corrective action, this just shows how "extremely far removed" Plaintiffs' injuries are from OPSB's power: "Should OPSB hypothetically, in the future, decide to take some unspecified corrective action against the Willow School, it would only do so after the Willow School decided if and how it was going to enforce H.B.71, which has not even taken effect yet." (*Id.*)

Finally, OPSB says that Plaintiffs fail to establish redressability. (*Id.* at 7.) Even if Plaintiffs prevail, OPSB lacks "the authority to enforce or not enforce H.B. 71 against the Willow School. At the very least, OPSB would have to work with the board of the Willow School to implement any ruling by the Court." (*Id.*) Again, this is because of the charter school's "operational autonomy in its daily governance." (*Id.*)

B. Law and Analysis

Preliminarily, Plaintiffs have conceded that the parents with children attending the International School (Roake and Van Young) lack standing as to OPSB. (Doc. 46 at 7 n.7.) As a result, their claims against OPSB will be dismissed without prejudice. However, the Court notes, as Plaintiffs do, that the International School is authorized by BESE, who is a party to this action. (Illarmo Decl. ¶ 10, Doc. 38-2.) BESE makes no argument that Roake and Van Young lack standing against BESE here, and,

even if BESE did, for the reasons which follow, such an argument would be meritless.

The Court laid out the requirements for standing *supra.* In short, 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.'" *Murthy*, 144 S. Ct. at 1986 (citation omitted). OPSB disputes only the second and third requirements.

For the second, 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*, 520 U.S. at 167, 117 S.Ct. 1154). But "[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).

The Court finds that the Plaintiffs with children in Willow School have established traceability as to OPSB. The Act provides that, "[n]o later than January 1, 2025,

each public school governing authority shall display the Ten Commandments. . . .[,]" H.B. 71(B)(1), and charter schools are not exempt from this requirement, *see id.* (amending La. R.S. § 17:3996(B)(72)).

Louisiana law establishes that the OPSB is the "public school governing authority" for purposes of the Act. For example, state law provides, "[i]n order to determine quality standards for all schools and intervene appropriately in instances when student needs are not being met, *the local superintendent* shall: . . . (2) *Monitor* and *require corrective actions* by a charter school with respect to compliance with board policy, *state law*, or terms of the charter contract." La. R.S. § 17:10.7.1(F)(2) (emphasis added). Another Revised Statute provides:

> A school charter may be revoked by the authority that approved its charter upon a determination by an affirmative vote of at least a majority of the local board membership or upon the affirmative vote of a majority of the members of the State Board of Elementary and Secondary Education, whichever approved the charter, that the charter school or its officers or employees did any of the following: . . . (4) Violated any provision of law applicable to a charter school, its officers, or employees.

La. R.S. § 17:3992(C)(4).

All of this is consistent with the OPSB Policy. For instance, a policy entitled "School Board Chartering Authority" provides:

> [OPSB] has adopted the following criteria as mandatory elements of all charter *Operating Agreements* executed by the School Board. . . .
>
> 2. Autonomy—Each charter school shall have complete autonomy over all areas of school operation as set forth in each school's Operating Agreement, *as long as such operations are in compliance with all applicable federal, state, and municipal laws and regulations.* Areas of school autonomy shall include, but not be limited to, the following:
>
> > A. School programming, instruction, curriculum, materials and texts; . . .

(Slater Decl., Ex. A-2, Doc. 51-3 at 6 (emphasis added).) Another policy on "Oversight and Evaluation of Charter Schools" states, "[t]he School District shall oversee each charter school's compliance with its operating agreement, federal and state laws and regulations and School Board policy." (Slater Decl., Ex. A-6, Doc. 51-7 at 2.)

These policies also show OPSB's enforcement authority. "At any point in a school year, a school may be deemed noncompliant" and subject to "the process for corrective action," which includes different notice levels. (*Id.* at 2-3.) Another provision says,

> The Superintendent may revoke a school's operating agreement during its charter term for the following reasons, as identified in statute

> and/or the terms of the school's operating agreement:
>
> 1. Material violation of the operating agreement; [or] . . .
>
> 4. Egregious and/or consistent violation of federal, state or local laws or School Board policies;

(*Id.* at 8-9.)

All of this demonstrates that, despite the general independence and autonomy of charter schools, OPSB still maintains the power to "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). And this is particularly true since traceability "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.* (cleaned up).

OPSB makes much of the broad "operational autonomy" for charter schools under the recently enacted Act 334. But, as Plaintiffs point out, OPSB omits a key part of that definition:

> "Autonomy" means that unless mutually agreed upon by the chartering authority and charter school, *or otherwise required or prohibited by law*, the charter school shall have independent

> operational decision making authority in the areas including but not limited to:
>
> (a) School programming, instruction, curriculum, materials, texts, calendars, and schedules. . . .

La. S.B. No. 350, Act No. 334 (May 28, 2024) (emphasis added). Thus, charter-school autonomy is still circumscribed by state and federal law, and, based on the above statutes and policies, OPSB still retains control over Willow School to require or prevent the posting of the Ten Commandments according to this Court's interpretation of federal and state law. Thus, Plaintiffs have shown traceability.

They have also shown redressability. Here, 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 (citations omitted). "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.* (citations omitted). Further, "[t]he relief sought needn't completely cure the injury, however; it's enough if the desired relief would lessen it." *Inclusive Cmtys.*, 946 F.3d at 655 (citation omitted).

For all the reasons given above, the Court finds that the relief Plaintiffs seek (an injunction against OPSB to prevent the posting of the Ten Commandments in Willow School) would "likely (or substantially likely) redress their injuries." *Hancock Cnty.*, 487 F. App'x at 197 (cleaned up). OPSB complains that it is redundant to the other defendants, but this just underscores the fact that Plaintiffs need not obtain complete relief from OPSB. *See Inclusive Cmtys.*, 946 F.3d at 655.

In sum, the Court finds that Plaintiffs Sernovitz and Pulda (on behalf of T.S.) and Herlands (on behalf of E.H. and J.H.) have demonstrated standing for their claims against OPSB, and the *OPSB MTD* will be denied as to them. However, this motion will be granted as to Roake and Van Young, and their claims against OPSB (individually and on behalf of their minor children) will be dismissed without prejudice.

IX. AG Defs. Motion to Stay

A. Parties' Arguments

AG Defendants argue in the alternative that, if the Court is not inclined to dismiss the suit, and if the Court is inclined to grant an injunction, the Court should order a stay pending appeal. (Doc. 39-1 at 58.) AG Defendants again incorporate all the arguments summarized above. (*Id.*) They then assert that: (1) they are likely to succeed on the merits; and (2) the equities and public interest favor a stay, since Plaintiffs have identified no ongoing or imminent harm. (*Id.*)

Plaintiffs respond that any stay at this juncture is premature; the Court has not ruled on anything, and there has been no appeal. (Doc. 47 at 55.) "By filing their motion before any ruling has issued, Defendants improperly deny Plaintiffs the benefit of reviewing and relying on this Court's reasoning and ultimate decision in connection with any opposition that Plaintiffs may file to a stay motion, should they prevail on their preliminary-injunction motion." (*Id.*)

Plaintiffs then contend that, if the Court were to consider the stay issue, then AG Defendants' motion should fail for the same reasons advanced in the support of *Pls. MPI.* (*Id.*) "The standard for stay pending appeal overlaps substantially with the standard for a preliminary injunction." (*Id.* at 55-56 (citing *Louisiana v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021) (per curiam)).) Thus, if the Court grants *Pls. MPI*, it will have found that Plaintiffs are likely to succeed on the merits, that Plaintiffs will suffer irreparable harm, and that an injunction serves the public interest. (*Id.* at 56.)

B. Law and Analysis

"Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken: (1) an interlocutory or final judgment in an action for an injunction. . . ." Fed. R. Civ. P. 62(c). "While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond

or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d).

Having carefully considered the matter, the Court will deny AG Defendants' request for a stay. Preliminarily, several courts have recognized that a request to stay an injunction pending appeal is premature until an actual notice of appeal has been filed. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1241 (C.D. Cal. 2007) ("The Court agrees with Plaintiffs that StreamCast's motion for a stay pending appeal pursuant to Rule 62(c) is premature. . . . Once the Court finalizes the terms of a permanent injunction, and an appeal is taken, StreamCast can renew its request." (citing *Nikon, Inc. v. Ikon Corp.*, No. 89-6044, 1992 WL 398440, at *3 (S.D.N.Y. Dec. 18, 1992) ("In the absence of a pending appeal, a request for relief under Rule 62(c) is premature."))); *see also Gregory v. Baucum*, No. 16-103, 2018 WL 10096597, at *1 (N.D. Tex. Feb. 23, 2018) ("Defendant [] also requests a stay pending appeal of the denial of his motion for summary judgment to the . . . Fifth Circuit. As there is no appeal currently pending, Defendant['s] . . . Motion to Stay . . . is DENIED, without prejudice to his right to re-urge that Motion should he file a notice of appeal.").

Nevertheless, even assuming AG Defendants' request was ripe, it would be denied on the merits.

> When analyzing a request to stay a district court's preliminary injunction, we are to consider the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.
>
> *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 [] (2009)). Likelihood of success and irreparable injury to the movant are the most significant factors. *Id.*

Becerra, 20 F.4th at 262.

For all the reasons given above, the Court finds that (1) AG Defendants have not made a strong showing that they are likely to succeed on the merits; (2) they will not be irreparably harmed absent a stay, given the Court's finding that the Act violates the First Amendment; (3) a stay will substantially injure Plaintiffs and expose them to further constitutional violations; and (4) the public interest lies in maintaining an injunction to prohibit the enforcement of the State's unconstitutional Act. Indeed, the Court agrees with Plaintiffs that it would be logically inconsistent to grant AG Defendants this relief after granting *Pls. MPI*, and AG Defendants acknowledged at oral argument that they filed this motion primarily to preserve the issue on appeal. Accordingly, *AG Defs. Motion to Stay* will be denied.

X. Conclusion

Accordingly,

IT IS ORDERED that the *Consolidated Motion to Dismiss, Opposition to Plaintiffs' Motion for Preliminary Injunction, and Alternative Motion for Stay Pending Appeal* (Doc. 39) brought by all defendants other than the Orleans Parish School Board—specifically, Defendants Cade Brumley, Conrad Appel, Judy Armstrong, Kevin Berken, Preston Castille, Simone Champagne, Sharon Latten-Clark, Lance Harris, Paul Hollis, Sandy Holloway, Stacey Melerine, Ronnie Morris, East Baton Rouge Parish School Board, Livingston Parish School Board, Vernon Parish School Board, and St. Tammany Parish School Board—is **DENIED**.

IT IS FURTHER ORDERED that the Plaintiffs' *Motion for Preliminary Injunction* (Doc. 20) is **GRANTED.** The Court finds that House Bill No. 71, Act No. 676, is **FACIALLY UNCONSTITUTIONAL and UNCONSTITUTIONAL IN ALL APPLICATIONS.** As a result, AG Defendants and their agents shall be prohibited from (1) enforcing H.B. 71; (2) adopting rules or regulations for the enforcement of H.B. 71; and (3) requiring that the Ten Commandments be posted in every public-school classroom in Louisiana in accordance with H.B. 71.

IT IS FURTHER ORDERED that Defendants Brumley and BESE Members shall be responsible for providing notice of this order and H.B. 71's

unconstitutionality to all Louisiana public elementary, secondary, and charter schools, and all public post-secondary education institutions.

IT IS FURTHER ORDERED that Plaintiffs shall post a bond in the amount of $100 within five (5) days of this ruling.

IT IS FURTHER ORDERED that the *Rule 12(b)(1) Motion to Dismiss and Opposition to Motion for Preliminary Injunction* (Doc. 38) filed by the Defendant Orleans Parish School Board is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** as to Plaintiffs Roake and Van Young, and their claims against OPSB (individually and on behalf of their minor children A.V. and S.V.) will be **DISMISSED WITHOUT PREJUDICE** for lack of standing. In all other respects, the *OPSB MTD* is **DENIED**.

IT IS FURTHER ORDERED that the *Conditional Motion to Stay Preliminary Injunctive Relief Pending Appeal* (Doc. 40) filed by AG Defendants is **DENIED**.

Signed in Baton Rouge, Louisiana, on November 12, 2024.

/s/ John W. deGravelles
JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 21, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-50695

MARA NATHAN, RABBI, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, M.N.; VIRGINIA GALAVIZ EISENBERG, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, R.E.; RON EISENBERG, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILD, R.E.; SETH ETTINGER, CANTOR, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILD, R.E.; SARAH ETTINGER, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, R.E.; ELIZABETH LEMASTER, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILDREN, K.L. & L.L.; CARAH HELWIG, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILDREN, J.P. & T.P.; ALYSSA MARTIN, ON BEHALF OF HERSELF AND ON BEHALF ON HER MINOR CHILD, H.B.M.; CODY BARKER, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILD, H.B.M.; LAUREN ERWIN, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, M.E.; REBEKAH LOWE, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILDREN, E.R.L. & E.M.L.; THEODORE LOWE,

Appendix D

ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, E.R.L. & E.M.L.; MARISSA NORDEN, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILDREN, E.N. & A.N.; WILEY NORDEN, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, E.N. & A.N.; JOSHUA FIXLER, RABBI, ON BEHALF OF HIMSELF AND ON BEHALF ON HIS MINOR CHILDREN, D.F., E.F., & F.F.; CYNTHIA MOOD, REVEREND, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILDREN, L.M. & C.M.; CHERYL REBECCA SMITH, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, L.P.J.; ARVIND CHANDRAKANTAN, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, V.C., M.C. & A.C.; ALLISON FITZPATRICK, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILDREN, C.F. & H.F.; MARA RICHARDS BIM, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, H.B.,

Plaintiffs-Appellees,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT; NORTH EAST INDEPENDENT SCHOOL DISTRICT; LACKLAND INDEPENDENT SCHOOL DISTRICT; NORTHSIDE INDEPENDENT SCHOOL DISTRICT; LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT;

Appendix D

DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT; FORT BEND INDEPENDENT SCHOOL DISTRICT; CYPRESS FAIRBANKS INDEPENDENT SCHOOL DISTRICT; PLANO INDEPENDENT SCHOOL DISTRICT,

Defendants-Appellants.

Filed April 21, 2026

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:25-CV-756

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

STUART KYLE DUNCAN, *Circuit Judge*, joined by ELROD, *Chief Judge*, and JONES, SMITH, WILLETT, HO, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*:*

INTRODUCTION

A Texas law (S.B. 10) requires public schools to display a copy of the Ten Commandments in classrooms. We consider whether that law violates the Establishment or Free Exercise Clause of the First Amendment.

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* Judges Willett, Ho, and Oldham join all except Part III of this opinion.

Appendix D

Plaintiffs are Texans of various religious backgrounds with minor schoolchildren. They sue on two grounds. First, they claim the law is an "establishment of religion." Second, they claim the law burdens religious exercise by coercing their children to reverence the Commandments. A district court agreed with both claims and enjoined the law, relying on our decision in a similar Louisiana case. *See Roake v. Brumley* (*Roake Panel*), 141 F.4th 614 (5th Cir.), *vacated*, 154 F.4th 329 (5th Cir. 2025) (mem.).

We agreed to hear the Louisiana case en banc and the Texas case alongside it. We have since dismissed the Louisiana case as unripe. *See Roake v. Brumley* (*Roake En Banc*), 170 F.4th 292, 300 (5th Cir. 2026) (en banc) (per curiam). Because of differences between the statutes, however, the Texas case is ripe and we can decide it.

We conclude the Texas law does not violate either the Establishment Clause or the Free Exercise Clause. Here is a summary of our reasons.

First, the Establishment Clause. Plaintiffs primarily claim we are bound by *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam), which invalidated a similar Kentucky law decades ago. We disagree. *Stone* applied an analysis—the "*Lemon* test"—which confounded courts for decades. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Mercifully, the Supreme Court jettisoned *Lemon* and its offspring some years ago. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (recognizing the Court has

"abandoned *Lemon*"). With *Lemon* extracted, there is nothing left of *Stone.*

In place of *Lemon*, courts now ask a question rooted in the past: does the law at issue resemble a founding-era religious establishment? Answering that question requires delving into historical sources and scholarship. These show that, in the late 18th century, an "establishment of religion" was a familiar institution: a polity's official church or religion. The paradigm was the Church of England. Over half the states had establishments when the First Amendment was adopted, and the remnants of those establishments persisted for decades.

Establishments were formed by a web of laws. Typical elements were laws compelling attendance at the official church; laws controlling doctrine, worship, and governance; laws punishing dissenters; laws exacting religious taxes; and laws deploying churches for public functions. Establishments in the colonies and states took various forms, but all shared at least some of these hallmarks. And when the states dismantled their establishments—the last falling in 1833—they repealed the laws that had created them.

S.B. 10 looks nothing like a historical religious establishment. It does not tell churches or synagogues or mosques what to believe or how to worship or whom to employ as priests, rabbis, or imams. It punishes no one who rejects the Ten Commandments, no matter the reason. It levies no taxes to support any clergy. It does not co-opt churches to perform civic functions. These are the kinds

of things "establishments of religion" did at the founding. S.B. 10 does none of them.

Plaintiffs counter that, like historical establishments, S.B. 10 is "coercive" because it pressures children to honor the Ten Commandments. Not so. S.B. 10 requires no religious exercise or observance. Students are neither catechized on the Commandments nor taught to adopt them. Nor are teachers commanded to proselytize students who ask about the displays or contradict students who disagree with them.

Most importantly, the "coercion" characteristic of religious establishments was government pressure to engage in religious worship. That's why establishments prescribed liturgies and punished those who skipped them. S.B. 10 is far from that. It puts a poster on a classroom wall. Yes, Plaintiffs have sincere religious disagreements with its content. But that does not transform the poster into a summons to prayer.

Because the Texas law has none of the elements of a founding-era establishment of religion, the district court erred in ruling that the law violates the Establishment Clause.

Second, the Free Exercise Clause. Plaintiffs rely heavily on the Supreme Court's decision in *Mahmoud v. Taylor*, 606 U.S. 522, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025). But, instead of supporting Plaintiffs, that decision shows why their claims fail.

Appendix D

In *Mahmoud*, a school district designed a compulsory curriculum to "disrupt" students' beliefs about sexuality and gender. *Id.* at 528-29, 145 S.Ct. 2332. Teachers were to inform students that their religious views on these topics were "hurtful, perhaps even hateful" and that their parents' views were wrong. *Id.* at 553, 145 S.Ct. 2332. No opt outs were permitted. *Id.* at 543, 145 S.Ct. 2332. The Supreme Court ruled the school violated the parents' right to direct their children's religious upbringing. *See id.* at 529-30, 145 S.Ct. 2332.

S.B. 10 bears no resemblance to the oppressive curriculum in *Mahmoud.* As noted, S.B. 10 authorizes no religious instruction and gives teachers no license to contradict children's religious beliefs (or their parents'). No child is made to recite the Commandments, believe them, or affirm their divine origin. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

To Plaintiffs, merely exposing children to religious language is enough to make the displays engines of coercive indoctrination. We disagree. The curriculum in *Mahmoud* went far beyond books sitting silently on classroom shelves. Those materials were deployed by teachers with lesson plans designed to subvert children's religiously grounded views on marriage and gender. S.B. 10 authorizes nothing of the sort.

Because Plaintiffs fail to show that S.B. 10 substantially burdens their right to religious exercise, their Free Exercise claims must be dismissed.

Accordingly, we REVERSE the district court's judgment, VACATE the preliminary injunction, and RENDER judgment dismissing Plaintiffs' Establishment and Free Exercise claims.

I. Background

In June 2025, the Texas Legislature enacted S.B. 10, which requires public elementary and secondary schools to display in each classroom a "durable poster or framed copy of the Ten Commandments." TEX. EDUC. CODE ANN. § 1.0041(a) (West 2025). The poster or copy must measure "at least 16 inches wide and 20 inches tall," use an easily readable typeface, and be "display[ed] in a conspicuous place." *Id.* § 1.0041(a), (b)(1)-(2). The display must include only the following text:

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.

Appendix D

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.

Id. § 1.0041(c).

Texas schools can acquire the displays in two ways. First, they must accept compliant, privately donated displays that "do[] not contain any additional content." *Id.* § 1.0041(d)(1), (d)(1)(B). Second, they "may, but [are] not required to," purchase compliant displays "using district funds." *Id.* § 1.0041(e). S.B. 10 was set to go into effect on September 1, 2025.

Shortly after S.B. 10's passage, parents of various religious backgrounds ("Plaintiffs") sued several Texas school districts ("Defendants") on behalf of themselves and their minor children. Plaintiffs claimed S.B. 10 facially violated the Establishment and Free Exercise Clauses and sought a preliminary injunction. Defendants moved to dismiss based on lack of ripeness and standing and for failure to state a claim.

Following a two-day hearing, the district court issued a creative[1] opinion denying Defendants' motion to dismiss

1. For example, the opinion contains section headings such as "Eternity Is a Long Time," "Diversity of Homo Sapiens Religious and Life After Death Beliefs," and "Grace and Torture," *Nathan v. Alamo Heights Indep. Sch. Dist.*, 795 F. Supp. 3d 910, 917-18 (W.D. Tex. 2025); quotations from musicians Kenny Chesney and Sonny and Cher, *id.* at 917 & n.7, 920 & n.22; photographs of Adolf

and granting a preliminary injunction. *See Nathan*, 795 F. Supp. 3d at 948-49.

As to the Establishment claim, the district court followed our court's since-vacated panel decision, *Roake Panel*, 141 F.4th 614, which ruled that a Louisiana law requiring Ten Commandments displays in public classrooms constituted a religious establishment. *See Nathan*, 795 F. Supp. 3d at 939-48; *Roake Panel*, 141 F.4th at 639-46. Specifically, the court held that the Texas law lacked a secular purpose and therefore ran afoul of *Stone v. Graham*. *See Nathan*, 795 F. Supp. 3d at 939-42. Alternatively, the court held the law was invalid under *Kennedy*, because the court discerned no "broader tradition of using the Ten Commandments in public education." *Nathan*, 795 F. Supp. 3d at 942.

As to the Free Exercise claim, the court held the law likely undermined Plaintiffs' parental rights and coerced their children into religious observance. *Id.* at 947-48.

After finding Plaintiffs met the preliminary-injunction standard, the court enjoined S.B. 10's implementation. *Id.* at 948-49. In its conclusion, the court suggested Texas could instead require the posting of "lessons of behavior," such as the "Five Moral Precepts of Buddhism" or sayings

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Hitler and Charlton Heston, *id.* at 922, 928; and the finding that "Children can be cruel," *id.* at 948. The opinion concludes with a prayer: "For those who disagree with the Court's decision and who would do so with threats, vulgarities[,] and violence, Grace and Peace unto you. May humankind of all faiths, beliefs[,] and non-beliefs be reconciled one to another. Amen." *Id.* at 949.

from the book *All I Really Need to Know I Learned in Kindergarten. Id.* at 948; *see* ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1986).

Defendants appealed and sought initial en banc hearing. Our court subsequently granted en banc rehearing in *Roake* and, soon after, granted Defendants' motion for initial en banc hearing. *See Roake*, 154 F.4th at 332; *Nathan v. Alamo Heights Indep. Sch. Dist.*, 157 F.4th 713, 714 (5th Cir. 2025) (mem.) (per curiam). The two cases were consolidated for argument.

II. Standard of Review

We review the district court's ruling on the motion to dismiss *de novo. Norsworthy v. Hou. Indep. Sch. Dist.*, 70 F.4th 332, 336 (5th Cir. 2023). We accept all well-pled facts as true and construe the complaint in the light most favorable to the plaintiff. *Ibid.* "However, we do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ibid.* (quotation omitted).

"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*." *United States v. Abbott*, 110 F.4th 700, 708 (5th Cir. 2024) (en banc) (alteration in original) (quotation omitted); *see also* 28 U.S.C. § 1292(a)(1). "When a district court applies incorrect legal principles, it abuses its discretion." *Little v. Llano County*, 138 F.4th 834, 841 (5th Cir. 2025) (en banc) (quotation omitted), *cert. denied*, ___ U.S. ___, 146 S. Ct. 886, 223 L.Ed.2d 274 (2025) (mem.).

III. Justiciability

The district court ruled that Plaintiffs had standing to bring a pre-enforcement facial challenge to S.B. 10 and that the challenge was ripe. *Nathan*, 795 F. Supp. 3d at 931-32, 943. On appeal, Defendants contest standing but not ripeness. We consider both issues because they are jurisdictional. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("[E]very federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction. . . ." (alteration in original) (quotation omitted)).

A. Standing

"To have standing to sue in federal court, a plaintiff must show he has suffered an injury traceable to the defendant which the court's judgment would likely redress." *Deanda v. Becerra*, 96 F.4th 750, 755 (5th Cir. 2024). In pre-enforcement challenges, "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 v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). Because "standing is not dispensed in gross," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021), Plaintiffs must show standing for each claim.

1. Establishment Clause Standing

The concept of harm in Establishment Clause cases is "particularly elusive." *Barber v. Bryant*, 860 F.3d 345,

353 (5th Cir. 2017) (quoting *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). Direct harm and offense are the two competing theories. Direct harm occurs when the government allegedly coerces religious practice, such as requiring public-school students to pray. *See Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Offended-observer standing, by contrast, finds injury in the offense a plaintiff perceives from the religious content of government action. *See Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 37, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019) (plaintiffs claiming "they [were] offended by the sight of the memorial [cross] on public land").

Plaintiffs have standing under the first theory, so we need not consider the second. They allege direct harm because Texas requires their children to attend school in classrooms where the Ten Commandments will be posted, which Plaintiffs claim coerces religious observance. Future encounters between their children and the displays are thus "likely, if not certain." *Lee v. Weisman*, 505 U.S. 577, 584, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).[2] We conclude Plaintiffs have standing to pursue their Establishment Clause claims.

2. Free Exercise Clause Standing

To pursue a Free Exercise claim, "a plaintiff must allege that his or her own 'particular religious freedoms are infringed.'" *Littlefield v. Forney Indep. Sch. Dist.*,

2. We therefore need not address Defendants' argument that the concept of offended-observer standing is no longer valid.

268 F.3d 275, 292 n.25 (5th Cir. 2001) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). Parents may assert that the government has undermined their right to direct their children's "religious upbringing" by "substantially interfering with the[ir] religious development." *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 218, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). And students, of course, may assert that their own right to religious exercise has been infringed. *See Mahmoud*, 606 U.S. at 546, 145 S.Ct. 2332 (government violates children's free-exercise rights by abridging their ability to "hold religious beliefs of all kinds" (quoting *Kennedy*, 597 U.S. at 524, 142 S.Ct. 2407)). Accordingly, "[s]tudents and parents may challenge unconstitutional actions in the public schools that directly affect the students." *Littlefield*, 268 F.3d at 283 n.7.

Under these principles, Plaintiffs have standing to pursue their Free Exercise claims. On the parents' part, they allege that they disagree with the religious content of the displays and that the law will therefore burden their right to direct their children's religious upbringing. *See Mahmoud*, 606 U.S. at 546-47, 145 S.Ct. 2332; *Yoder*, 406 U.S. at 213-14, 92 S.Ct. 1526. On the children's part, Plaintiffs allege children may feel pressured to adopt or reverence the Commandments to avoid disfavor from peers or school officials. *See Schempp*, 374 U.S. at 224 n.9, 83 S.Ct. 1560.

In sum, Plaintiffs have standing to pursue both their Establishment and Free Exercise Clause challenges.

B. Ripeness

"[W]e 'must be convinced that the claim in question is ripe, even if neither party has raised the issue.'" *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012) (quoting *Urban Devs. LLC v. City of Jackson*, 468 F.3d 281, 292 (5th Cir. 2006)); *see also*, *e.g.*, *Trump v. New York*, 592 U.S. 125, 131, 141 S.Ct. 530, 208 L.Ed.2d 365 (2020) (per curiam) ("[T]he case must be 'ripe'—not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotation omitted)). Ripeness turns on "(1) the fitness of the issues for judicial decision[,] and (2) the hardship to the parties of withholding court consideration." *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 930 (5th Cir. 2023) (quotations omitted).

First, fitness. Plaintiffs' facial challenge is fit for decision because "it presents a pure question of law that needs no further factual development." *Ibid.* Everything needed to resolve their claims is in the statutory text. S.B. 10 mandates the displays' "only" content, Tex. Educ. Code Ann. § 1.0041(a)-(c) (West 2025), prescribes their size, *id.* § 1.0041(b)(2), and requires they be posted "in a conspicuous place" where they can be read "from anywhere in the classroom," *id.* § 1.0041(a), (b)(1). So, if S.B. 10 went into effect, students would encounter the same display, of the same size, with the same words, in a conspicuous classroom location. Plaintiffs' challenge thus presents a "pure question of law" needing no "further factual development" because the displays' nature, style, and effect will be the same wherever a student encounters them. *Braidwood Mgmt.*, 70 F.4th at 930.

Second, hardship. "[T]here is a fair amount of overlap between Article III standing requirements and the ripeness analysis." *Ibid.* A concrete and impending injury usually satisfies ripeness's hardship prong. *See*, *e.g.*, *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) ("[T]he ripeness inquiry focuses on whether *an injury that has not yet occurred is sufficiently likely to happen* to justify judicial intervention." (emphasis added)). It does here: Plaintiffs have adequately alleged injury, and thus hardship, because Texas requires both school attendance and the Commandments' display, which their children are likely to encounter.

This conclusion is consistent with our en banc decision in *Roake*, which held that a facial challenge to Louisiana's Ten Commandments statute was unripe. *Roake En Banc*, 170 F.4th at 298-300. Louisiana's statute differs from Texas's in three key ways. First, Louisiana requires the "nature of the display" to "be determined by each governing authority." La. Stat. Ann. § 17:2124(B)(1) (2024). Texas, by contrast, delegates no local discretion for any of the display's components. Second, Louisiana specifies that local displays may (or may not) incorporate other historical documents, such as "the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance." *Id.* § 17:2124(B)(4). Texas, by contrast, mandates that displays "include only" the provided text of the Commandments. Tex. Educ. Code Ann. § 1.0041(b)(1) (West 2025); *see also id.* § 1.0041(d)(1)(B) (privately donated displays must "not contain any additional content"). Third, the Louisiana law does not specify where displays must appear, *see Roake Panel*, 141

F.4th at 630 & n.6, whereas Texas requires posting them in "a conspicuous place" so they can be easily read. Tex. Educ. Code Ann. § 1.0041(a) (West 2025). So, while the Louisiana law lets local governing authorities shape the displays' critical contextual details, the Texas law settles those details in the statute.

In sum, unlike Louisiana's law, S.B. 10 establishes a uniform display requirement we can evaluate as a matter of law without further factual development. Plaintiffs' challenge is therefore ripe.

IV. Establishment

Defendants argue that, in ruling S.B. 10 violates the Establishment Clause, the district court erred in two main respects. First, they contend the court applied a test from *Stone v. Graham* and *Lemon v. Kurtzman*—whether the law has a "secular purpose"—which the Supreme Court has since abrogated. Second, they contend the court's backup analysis was flawed. The court asked whether S.B. 10 fits within a tradition of posting the Commandments in public schools. Wrong question, Defendants argue. Following more recent precedent, the court should have asked whether the Texas law has any elements of a founding-era religious establishment.

Our analysis proceeds as follows. First, we address whether the secular-purpose test from *Stone* and *Lemon* remains good law. The answer is no: The Supreme Court has explicitly abandoned that test, along with the rest of *Lemon* and its offshoots, such that *Stone* is now an empty

vessel. Indeed, to say we must keep applying *Stone* (as do Plaintiffs and our dissenting colleagues) would be to ignore *Lemon*'sabrogation. Second, we consider what the proper Establishment Clause analysis is today. The answer is that courts now ask whether a challenged law bears hallmarks of a founding-era establishment of religion. Finally, we apply that analysis and conclude that displaying the Ten Commandments in public-school classrooms bears no resemblance to a historical establishment.

A. The Supreme Court has abrogated *Lemon*.

By targeting S.B. 10's lack of a "secular purpose," Defendants contend the district court applied an analysis that has been overruled by the Supreme Court. Not so, counter Plaintiffs: The district court applied *Stone*, which also involved a Ten Commandments display and which the Supreme Court has not overruled by name. We agree with Defendants. Explaining why requires briefly discussing the evolution of Establishment Clause jurisprudence.

1. *Lemon*'s Demise

In 1971, the Supreme Court decided *Lemon v. Kurtzman*, which for decades would provide a framework for analyzing the Establishment Clause. What came to be known as the "*Lemon* test" asked (1) whether a law has "a secular legislative purpose," (2) whether its "principal or primary effect . . . neither advances nor inhibits religion," and (3) whether it "foster[s] an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105 (quotation omitted).

Lemon's career was not a success. "'[I]nstead of bringing clarity to' the Supreme Court's Establishment Clause jurisprudence, '*Lemon* produced only chaos.'" *Hilsenrath ex rel. C.H. v. Sch. Dist. of Chathams*, 136 F.4th 484, 490 (3d Cir. 2025) (alteration in original) (quoting *Shurtleff v. City of Boston*, 596 U.S. 243, 277, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022) (GORSUCH, J., concurring in the judgment)), *cert. denied*, ___ U.S. ___, 146 S. Ct. 885, 223 L.Ed.2d 274 (2025) (mem.). The test led to a "garble" of results, with courts reaching conflicting decisions on whether, for instance, governments could display nativity scenes and menorahs, or whether a city seal could include a religious symbol.[3] Famously, dueling Supreme Court decisions allowed states to supply religious schools with books but not maps, leading then-Senator Daniel Moynihan to quip, "What about atlases?"[4]

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3. *Shurtleff*, 596 U.S. at 278 & nn.1-3, 142 S.Ct. 1583 (GORSUCH, J., concurring in the judgment) (discussing *Lynch v. Donnelly*, 465 U.S. 668, 671-72, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573, 578-79, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (nativity scenes); *Skoros v. New York*, 437 F.3d 1, 3-4 (2d Cir. 2006) and *Kaplan v. Burlington*, 891 F.2d 1024, 1025-26, 1030-31 (2d Cir. 1989) (menorahs); *Murray*, 947 F.2d at 149 and *Harris v. Zion*, 927 F.2d 1401, 1402 (7th Cir. 1991) (city seals)).

4. *Compare Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), *with Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000). *See also* Jeffrey Rosen, *Lemon Law*, THE NEW REPUBLIC (Mar. 28, 1993), https://newrepublic.com/article/73764/lemon-law [https://perma.cc/WU7M-E5RC].

Indeed, whether *Lemon* was still the law was a mystery for years. The Court would deploy it in some cases, while seeming to forget it in others. *See*, *e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in the judgment).[5] In 2022, the Court finally buried the hatchet: it announced it had "long ago abandoned *Lemon*." *Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407. Also "abandoned," the Court explained, was *Lemon*'s "offshoot," known as the "endorsement test." *Ibid.* A year later, the Court confirmed *Lemon* had been "abrogated." *Groff v. DeJoy*, 600 U.S. 447, 460, 143 S.Ct. 2279, 216 L.Ed.2d 1041 (2023).

Our court has likewise recognized *Lemon*'s demise. Following the Supreme Court's direction, we held that "[w]e do not . . . consider the *Lemon* test" because "[i]ts

5. *See also Am. Legion*, 588 U.S. at 49, 139 S.Ct. 2067 ("In many cases, this Court has either expressly declined to apply the test or has simply ignored it."). Others, including this court, have observed the same thing. *See Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525 (5th Cir. 2017) (SMITH, J.); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) (SMITH, J.) (criticizing the "confusing and confused Establishment Clause jurisprudence" under the "tripartite *Lemon* analysis"); *see also* Gerard V. Bradley, *The Death and Resurrection of Establishment Doctrine*, 61 DUQ. L. REV. 1, 1 (2023) ("[Secularism] is (was) the beating heart of *Lemon* and the ground-norm of the church-state corpus it animated for decades. It was incompatible with our history and traditions and current practices."); Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 515-31 (1990).

long Night of the Living Dead is now over." *Freedom from Religion Found., Inc. v. Mack*, 49 F.4th 941, 954 n.20 (5th Cir. 2022) (citations omitted).

To sum up: "*Lemon* and its progeny," *Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407, have been "abandoned," *ibid.*, "abrogated," *Groff*, 600 U.S. at 460, 143 S.Ct. 2279, and their reign "is now over," *Mack*, 49 F.4th at 954 n.20. This means that, when analyzing Establishment Clause claims, courts do 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. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105.

2. Without *Lemon*, *Stone* disappears.

How, then, did the district court justify applying *Lemon*'s defunct secular-purpose test? Answer: it claimed to apply not *Lemon* but *Stone*. *See Nathan*, 795 F. Supp. 3d at 939, 942-43. The *Roake* district court and the now-vacated *Roake* panel took the same view. *See Roake v. Brumley*, 756 F. Supp. 3d 93, 116, 160-70 (M.D. La. 2024), *vacated*, 170 F.4th 292 (5th Cir. 2026); *Roake Panel*, 141 F.4th at 643-45. Plaintiffs continue to insist on this distinction: "*Stone*, not *Lemon*." *See also Roake En Banc*, 170 F.4th at 302-07 (DENNIS, J., dissenting). They are mistaken.

To see why, just read *Stone*. It was a seven-paragraph opinion issued in 1980, nine years after *Lemon*. Here's the entire second paragraph:

> This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:
>
> > "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.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971) (citations omitted).
>
> If a statute violates any of these three principles, it must be struck down under the Establishment Clause. 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.

Stone, 449 U.S. at 40-41, 101 S.Ct. 192. Unmistakably, *Stone* depended entirely on *Lemon* and nothing but *Lemon.* Remove the three-part *Lemon* test, and *Stone*'s reasoning vanishes. It follows that *Stone* is one of *Lemon*'s "progeny" that has been "abrogated." *Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407; *Groff*, 600 U.S. at 460, 143 S.Ct. 2279.

Evidently sensing this problem, the now-vacated *Roake* panel tried to distance itself from *Lemon* by dropping this cryptic footnote: "We 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." 141 F.4th at 643 n.21. That makes no sense. The panel applied *Lemon*'s first prong—if that does not "revive *Lemon*," what would? And *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.

The *Roake* panel also suggested that *Stone* relied on other precedents besides *Lemon*—specifically, *Abington Township v. Schempp* and *Engel v. Vitale*—and so, for that reason, *Stone* somehow survives *Lemon*'s abrogation. *Roake Panel*, 141 F.4th at 642; *see also id.* at 652-53 (DENNIS, J., concurring) (similar). Not so. Again, read *Stone.* It relied on *Schempp* only to support its secular-purpose holding (*Lemon*'s first prong), *see Stone*, 449 U.S. at 41, 101 S.Ct. 192, and on *Engel* only to support the pedestrian point that there was state action, id. at 42 101 S.Ct. 192. Those passing cites cannot alter the fact that *Stone* was *Lemon* all the way down. If there were any doubt, here is *Stone*'s concluding sentence: "We conclude that § 158.178 (1980) 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.

3. Courts cannot apply Stone without applying bad law.

Plaintiffs contend *Stone* and its secular-purpose test are still good law, notwithstanding *Lemon*'s abrogation. We disagree.

First, Plaintiffs argue the Supreme Court has not overruled *Stone* by name. The Supreme Court's prerogative to overrule its own precedent, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), is a principle we scrupulously honor.[6] But Plaintiffs misunderstand how the principle applies here. *Stone* does not merely "rest on reasons rejected in *some other line of decisions*," *ibid.* (emphasis added); instead, it is part of *Lemon*'s "progeny" that the Supreme Court has affirmatively "abandoned" and "abrogated." *Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407; *Groff*, 600 U.S. at 460, 143 S.Ct. 2279. With *Lemon* gone, there is nothing left of *Stone* to apply.

Plaintiffs miss the sea change caused by *Lemon*'s abrogation. Over fifty years ago, *Lemon* unveiled "a grand unified theory" for the Establishment Clause that would cut across all kinds of cases. *See Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407 (quotation omitted).[7] For that reason,

6. *See*, *e.g.*, *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023) (en banc) ("Our job, as an inferior court, is to adhere strictly to Supreme Court precedent, whether or not we think a precedent's best days are behind it."); *Ass'n of Club Execs. of Dall., Inc. v. City of Dallas*, 83 F.4th 958, 965 (5th Cir. 2023) ("[W]hether to overrule or modify [a case] is the High Court's business, not ours.").

7. *See*, *e.g.*, *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (publicly funded remedial instruction in religious schools), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Meek*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (publicly provided guidance, speech, and hearing services at parochial schools); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (teaching of creationism in public schools).

the Court did not merely overrule *Lemon*, but also its "progeny" and its "offshoot[s]" such as the reasonable-observer test. *Ibid.* And, to make its intentions perfectly clear, the Court confirmed that a strikingly different historical approach would govern all Establishment Clause cases going forward. *See id.* at 535-36, 142 S.Ct. 2407; *see also infra* Part IV.B. (discussing historical approach). The notion that we must nonetheless continue to apply any part of *Lemon* flies in the face of those explicit directives.

If Plaintiffs' view prevailed, we would be applying *Lemon*'s dead letter far into the future. For instance, *Kennedy* involved a coach's prayer after a football game. *Id.* at 514-15, 142 S.Ct. 2407. Presumably, all would concede that *Lemon* no longer applies in football-game-prayer cases. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (addressing prayer broadcast before high-school football games). What about other cases? *Lemon* applied far and wide.[8] *Kennedy* did not tick off every one of those cases and denounce their use of *Lemon.* Must we keep applying the abrogated *Lemon* test in each one until the Supreme Court tells us not to? To ask the question is to answer it.

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8. *See, e.g.*, *County of Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (nativity scene on public property); *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (moment of silence in public schools); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (nonsectarian subsidy program to higher learning institutions); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (maintenance and repair grants for religious schools).

Furthermore, *Kennedy*'s treatment of Establishment Clause precedent shows no intent to preserve *Lemon*. Quite the contrary. For instance, *Kennedy* discussed *Santa Fe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295, the football-game-prayer case. 597 U.S. at 541-42, 142 S.Ct. 2407. Although *Santa Fe* cited *Lemon*, *Kennedy* explicitly frames it as a coercion case and says nothing about *Lemon*. *Kennedy*, 597 U.S. at 541-42, 142 S.Ct. 2407; *see also id.* at 570 142 S.Ct. 2407 (SOTOMAYOR, J., dissenting) (noting majority "recast[s] . . . *Santa Fe* as solely concerning coercion"). *Kennedy* also discussed *Lee v. Weisman*, which cited *Lemon* but did not apply it. *See Lee*, 505 U.S. at 644, 112 S.Ct. 2649 (SCALIA, J., dissenting) (explaining the majority "demonstrate[d] the irrelevance of *Lemon* by essentially ignoring it"). And, like *Santa Fe*, *Kennedy* discussed *Lee* as a case about "problematically coercive" school prayer. *Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407.[9]

In short, there is no plausible way to read *Kennedy* as somehow preserving *Lemon* for certain cases. As discussed, *Kennedy* definitively announced the *Lemon* test had been "abandoned." *Id.* at 534, 142 S.Ct. 2407. That was the last nail in *Lemon*'s coffin. Because we do not have the option of ignoring the Supreme Court's express directives, we cannot continue applying *Lemon*.

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9. Even less can be said for *Lamb's Chapel* and *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), which *Kennedy* cited in passing for points unrelated to *Lemon*. *See Kennedy*, 597 U.S. at 523, 142 S.Ct. 2407 (citing *Widmar* to show that free speech provides "overlapping protection" for religious expression); *id.* at 543, 142 S.Ct. 2407 (citing *Lamb's Chapel* and *Widmar* for proposition that "phantom constitutional violations" do not justify infringing free speech).

Finally, Plaintiffs argue that *Lemon*'s abrogation does not affect *Stone* because the Supreme Court separately reaffirmed *Stone* in two 2005 decisions, *McCreary County v. ACLU* and *Van Orden v. Perry. See McCreary County v. ACLU*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005); *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005). We again disagree.

Those cases addressed Establishment Clause challenges to a Ten Commandments display in a Kentucky courthouse (*McCreary*) and a Ten Commandments monument at the Texas Capitol (*Van Orden*). A splintered Court invalidated the Kentucky display, *McCreary*, 545 U.S. at 881, 125 S.Ct. 2722, but upheld the Texas monument, *Van Orden*, 545 U.S. at 692, 125 S.Ct. 2854. *McCreary* merely rehearsed *Stone*'s application of *Lemon*'s secular-purpose prong, *see* 545 U.S. at 859-69, 125 S.Ct. 2722, and declined to abandon that test, *see id.* at 861-63, 125 S.Ct. 2722. The controlling *Van Orden* opinion distinguished *Stone* because the display there was in a public school, not at a state capitol. *See Van Orden*, 545 U.S. at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment).[10]

Neither decision has any effect on our analysis here. *McCreary* confirmed that *Stone* applied *Lemon*'s secular-purpose prong, and neither *McCreary* nor *Van Orden* suggested that *Stone* had any other basis. *See McCreary*, 545 U.S. at 859, 125 S.Ct. 2722 (explaining "*Stone* found

10. "JUSTICE BREYER's concurrence is the controlling opinion in *Van Orden*." *Staley v. Harris County*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (en banc).

a predominantly religious purpose in the government's posting of the Commandments"). And, most importantly, both cases were decided years before *Kennedy* announced that the *Lemon* test was abrogated.[11]

* * *

After decades of confusion, the Supreme Court finally confirmed *Lemon*'s demise. Plaintiffs ignore the 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.

We agree with Defendants that the district court erred in applying *Lemon*'s abrogated secular-purpose test.

B. Courts now analyze Establishment Clause challenges in light of founding-era religious establishments.

In addition to discarding the *Lemon* test, *Kennedy* instructed courts how to analyze Establishment Clause claims going forward.

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11. Nor did CHIEF JUSTICE REHNQUIST's plurality opinion in *Van Orden* somehow reimagine *Stone* as a "coercion" decision. To the contrary, REHNQUIST's separate opinion confirms that *Stone* was based on *Lemon*'s purpose prong. *See* 545 U.S. at 690, 125 S.Ct. 2854 (REHNQUIST, C.J.) (plurality opinion) ("In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose." (citing *Stone*, 449 U.S. at 41, 101 S.Ct. 192)). In any event, a nonprecedential four-Justice plurality cannot somehow transform *Stone* from a *Lemon*-based decision into a coercion case.

The 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." *Kennedy*, 597 U.S. at 535-36, 142 S.Ct. 2407 (citation modified). The analysis looks to the historical "hallmarks of religious establishments," such as legal compulsion to "'attend church'" or "engage in 'a formal religious exercise.'" *Id.* at 537, 142 S.Ct. 2407 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952); *Lee*, 505 U.S. at 589, 112 S.Ct. 2649).[12] As two sister circuits have explained, *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"? *Hilsenrath*, 136 F.4th at 491 n.54 (quoting *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023)).

In the following sections, we flesh out the historical analysis *Kennedy* demands. We then apply it to S.B. 10.

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12. *See also Kennedy*, 597 U.S. at 537 & n.5, 142 S.Ct. 2407 (discussing "coercion along these lines," *id.* at 537, 142 S.Ct. 2407, and noting "certain other historical hallmarks of an established religion," *id.* at 537 n.5 142 S.Ct. 2407); *Shurtleff*, 596 U.S. at 277, 142 S.Ct. 1583 (Gorsuch, J., concurring in the judgment); 1 Annals of Cong. 730-31 (1789) (Madison); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2144-46 (2003) [hereinafter McConnell, *Establishment*].

Appendix D

1. The Text of the Establishment Clause

The First Amendment states in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

The key phrase—"an establishment of religion"—was readily understandable to founding-era citizens. *See District of Columbia v. Heller*, 554 U.S. 570, 576-77, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (relying on a phrase's "[n]ormal meaning . . . known to ordinary citizens in the founding generation"). The reason is simple. At the time, establishments were "a familiar institution." McConnell, *Establishment, supra* note 12, at 2107.[13] Someone on the streets of 1789 Boston, reading that phrase, would have instantly thought of the Church of England, the colonial established churches, or the current state establishments—in other words, a polity's official church or religion. *Ibid.*

This is what founding-era Americans meant by "establishments of religion." That meaning is reflected in contemporary dictionaries. For instance, Samuel

13. *See generally* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 9-34 (5th ed. 2022) [hereinafter WITTE, RELIGION]; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-33 (1998) [hereinafter AMAR, BILL OF RIGHTS]; LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 5, 11 (2d ed. 1994) [hereinafter LEVY, ESTABLISHMENT CLAUSE].

Johnson referred to a church's being "*established* in all its forms by an ordinance of the lords and commons." *Establish*, Samuel Johnson, A Dictionary of the English Language (4th ed. 1773) [https://johnsonsdictionaryonline.com/1773/establish_va].[14] It is also how people used the term. For instance, John Leland, the 18th century Baptist preacher—pondering "[w]hat were, and still are the causes that ever there should be a state establishment of religion"—answered: "over-fondness for a particular system or sect. . . . gave rise to the first human establishment of religion, by Constantine the Great." John Leland, The Rights of Conscience Inalienable, and Therefore Religious Opinions Not Cognizable By Law 16 (New-London, T. Green & Son 1791).[15]

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14. *See also Establishment*, Noah Webster, American Dictionary of the English Language 594 (1828) [https://heinonline.org/HOL/P?h=hein.lbr/ adeniex0001&i=684] ("The episcopal form of religion, so called in England.").

15. *See generally* Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 539-45 (2019) (discussing founding-era uses of "establishment of religion") [hereinafter Barclay, *Original Meaning*]; *see also*, *e.g.*, Henry J. Caner, A Candid Examination of Dr. Mayhew's Observations on the Charter and Conduct of the Society for the Propagation of the Gospel in Foreign Parts 38 (1763) ("[T]he Church of England is beyond controversy established in all his Majesty's colonies and plantations. . . .").

At one level, then, the Clause's text is straightforward. It bars Congress[16] from enacting laws regarding[17] a legal[18] institution well known in the founding era. That

16. The Supreme Court has held that the Clause also applies to the States. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Murdock v. Pennsylvania*, 319 U.S. 105, 108, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). We therefore need not enter the long-running debate on whether incorporating the Clause made sense considering its central purpose of preventing federal interference with state establishments. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49-51, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 & n.4, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (Thomas, J., concurring); *see also* Amar, Bill of Rights, *supra* note 13, at 32-42; Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 17-27 (1995).

17. That is the most straightforward reading of the term "respecting." *See Respecting*, Noah Webster, American Dictionary of the English Language 697 (1830) ("[r]egarding; having regard to; relating to"). Scholars disagree about how to read "respecting." *See, e.g.*, Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 Federalist Soc'y Rev. 26, 31-39 & n.42 (2021) [hereinafter Esbeck, *Establishment Clause*]; Witte, Religion, *supra* note 13, at 114-21. We need not pick sides in those somewhat esoteric debates. Even if "respecting" means something slightly broader than "regarding" (which we do not decide), it would not affect the outcome. *See infra* Part IV.C (concluding Ten Commandments display has no element of a historical establishment).

18. When the Constitution elsewhere uses "establish" or "establishment," the term refers to creating an institution by law. *See* U.S. Const. pmbl. ("We the People . . . in Order to . . . *establish* Justice . . . do ordain and *establish* this Constitution for the United States of America."); *id.* art. II, § 2 ("Appointments . . .

sets the parameters of our inquiry. 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. *See Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407; *Hilsenrath*, 136 F.4th at 491 n.54; *Firewalker-Fields*, 58 F.4th at 122 n.7. That is a familiar task. Courts often decide whether modern practices fall within the original public meaning of constitutional phrases—for instance, "search and seizure," "keep and bear arms," "Recess of the Senate," or "Officers of the United States."[19]

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which shall be *established* by Law"); *id.* art. III, § 1 ("such inferior courts as the Congress may . . . ordain and *establish*"); *id.* art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the *Establishment* of this Constitution between the States so ratifying the Same." (emphases added)); *see also* Marc O. DeGirolami, *Establishment As Tradition*, 133 YALE L.J.F. 372, 377-82 (2023) (discussing Constitution's uses of "establishment" and stating that "'an establishment' refers to a concrete legal or political institution and the laws and practices appurtenant to it").

19. *See*, *e.g.*, *United States v. Jones*, 565 U.S. 400, 404-05, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (asking whether police's "physically occup[ying] private property for the purpose of obtaining information. . . . would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted"); *Heller*, 554 U.S. at 573, 576-620, 128 S.Ct. 2783 (asking whether "prohibition on the possession of usable handguns in the home" violated the "individual right to keep and bear arms" as understood by "ordinary citizens in the founding generation"); *NLRB v. Noel Canning*, 573 U.S. 513, 526-38, 57, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (original meaning of "Recess of the Senate"); *Buckley v. Valeo*, 424 U.S. 1, 124-31, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (original meaning of "Officers of the United States").

Admittedly, though, our task in this case has added complexity. Like certain phrases in the Constitution,[20] an "establishment of religion" denotes a relic of the past: the last state establishment was dismantled in 1833. McConnell, *Establishment, supra* note 12, at 2126 (discussing Massachusetts disestablishment). "It has been so long—about [190] years—since any state in the United States has had an established church that we have almost forgotten what it is." *Id.* at 2107.[21] Accordingly, in the following sections we consider historical evidence from the founding era to fill out the contours of the phrase "establishment of religion." *See*, *e.g.*, *Heller*, 554 U.S. at 579-605, 128 S.Ct. 2783.

2. The Church of England

For the founding era, the paradigm religious establishment was the Church of England. While only a sketch is possible here, the founding generation well understood the components of this establishment.

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20. *See*, *e.g.*, U.S. Const. art. I, § 8, cl. 11 (empowering Congress to "grant Letters of Marque and Reprisal"); *id.* art. I, § 9, cl. 3 (prohibiting "Bill[s] of Attainder"); *id.* art. III, § 3, cl. 2 (providing "no Attainder of Treason shall work Corruption of Blood").

21. *See also* Nathan S. Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 2 (2023) [hereinafter Chapman & McConnell, Agreeing to Disagree]. *See generally* Disestablishment and Religious Dissent: Church-State Relations in the New American States (1776-1833) (Carl H. Esbeck & Jonathan J. Den Hartog eds. 2019) [hereinafter State Disestablishments].

Appendix D

The "Anglican establishment" emerged in the early sixteenth century when Parliament renounced papal authority and declared King Henry VIII "the only supreme head in earth of the Church of England." Act of Supremacy 1534, 26 Hen. 8, c. 1 (Eng.). As part of his "spiritual authority," the king was empowered to reform and redress all "errors, heresies, [and] abuses" to increase "virtue in Christ's religion" for the "pleasure of Almighty God." *Ibid.* In effect, the Crown gained absolute civil authority over ecclesiastical governance.

At the king's direction, Parliament wielded this authority to control all aspects of the Anglican establishment and the religious practices of its people. For example, Parliament prescribed official forms of worship and attendance at Anglican services, on pain of fines for parishioners and loss of church office for clergy.[22] Dissenters—Catholics and dissenting Protestants—were barred from holding civil and military offices.[23] Churches and clergy were funded by compulsory exactions.[24] And churches performed public functions such as recordkeeping and poor relief, with ecclesiastical courts

22. Act of Uniformity 1559, 1 Eliz., c. 2 (Eng.); Act of Uniformity 1662, 14 Car. 2, c. 4 (Eng.). *See generally* 1 William Blackstone, Commentaries *364-83; Norman Doe, The Legal Framework of the Church of England: A Critical Study in a Comparative Context 161-66 (1996).

23. Corporation Act 1661, 13 Car. 2, c. 1 (Eng.); Test Act 1673, 25 Car. 2, c. 2 (Eng.); Test Act 1678, 30 Car. 2, c. 1 (Eng.).

24. Easter Offerings and Tithes Act 1548, 2 & 3 Edw. 6, c. 13 (Eng.); 1 William Blackstone, Commentaries *380-82.

exercising jurisdiction over matters such as marriages and burials.[25]

By the eighteenth century, English law recognized the Church of England as a legally established institution of civil government. According to Blackstone, the church had become an integral part of the public legal system, whose rights, privileges, and authority were established by statute and enforced by civil authority. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *364-83. The result was state control over religious belief and practice, with dissent punished financially, politically, and criminally. In the minds of founding-era Americans, this was a paradigm religious establishment.

3. Colonial and Early State Constitutions

Two types of religious establishments emerged concurrently in the colonies. The Anglican establishment captured the south, while a Congregationalist or Puritan establishment pervaded the north.[26]

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25. Poor Relief Act 1601, 43 Eliz., c. 2 (Eng.); 3 WILLIAM BLACKSTONE, COMMENTARIES *86-103 (describing jurisdiction of ecclesiastical courts).

26. To be clear, the colonial establishments were not monolithic. Pennsylvania, Delaware, New Jersey, and Rhode Island never had a formal establishment. *See* McConnell, *Establishment, supra* note 12, at 2110-11. And Pennsylvania and Rhode Island specifically protected religious dissenters. *See* Plantation Agreement at Providence (1640), *reprinted in* 8 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 353, 354 (William F. Swindler ed., 1979); William Penn, Frame of Government of

Appendix D

In the southern colonies (Virginia, Maryland, South Carolina, North Carolina, and Georgia), the Church of England was established by law under the English model.[27] These colonial establishments thus wielded similar power over religion as the Anglican establishment did in the motherland.

Consider the Virginia colony. Its 1606 charter instructed the colony to "provide that the Word and Science of God be preached, planted, and used . . . according to the rites and doctrine of the Church of England." SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 75 (1902) [hereinafter COBB, RELIGIOUS LIBERTY]. And for the next "179 years . . . the Anglican (or Episcopal) Church was the Established Church of Virginia." PIERCE MIDDLETON, ANGLICAN VIRGINIA: THE ESTABLISHED CHURCH OF THE OLD DOMINION 1607-1786, at 6 (1954).

What resulted would have been familiar from the English experience: government control over religious practice and belief. For example, the local vestry governed "the levyes and assessments for building and repayring the churches, and chappells, provision for the poore, maintenance of the minister, and such other necessary

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Pennsylvania (1683), *reprinted in* 8 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS, *supra*, at 261. Even so, they still "had religious tests for office, blasphemy laws, and the like." McConnell, *Establishment, supra* note 12, at 2111.

27. *See* STATE DISESTABLISHMENTS, *supra* note 21, at 97-105 (North Carolina), 139-43 (Virginia), 181-88 (South Carolina), 227-33 (Georgia), 309-13 (Maryland); *see also* McConnell, *Establishment, supra* note 12, at 2115.

duties for the more orderly manageing of all parociall affaires. . . ." *Id.* at 32-33 (discussing Vestry Act of 1661-1662). The Church of England governed doctrine and liturgy. *Id.* at 147 ("In the seventeenth century after 1643, it was unlawful for persons to assemble publicly for worship except according to the *Prayer Book* and liturgy of the Established Church."). Laws also required "church attendance under penalty of a fine, and . . . parents to bring their children to the parish priest for baptism." *Ibid.* Dissenters were not tolerated. In response to an influx of Quakers, the colony passed legislation barring them from office, from having their children baptized, and from holding religious meetings. *Id.* at 145-46.

The same was true in other southern colonies. For instance, in 1704, South Carolina formally established the Church of England, mandated the Book of Common Prayer in worship, barred dissenters from serving in the legislature, and paid clergy out of public funds.[28] Maryland established the Church of England in 1692, imposing a coercive regime similar to Virginia's. COBB, RELIGIOUS LIBERTY, *supra*, at 386-87. And while Georgia was more tolerant than other southern colonies, it still established

28. McConnell, *Establishment, supra* note 12, at 2177; *see also* JOHN WESLEY BRINSFIELD, RELIGION AND POLITICS IN COLONIAL SOUTH CAROLINA 23-24 (1983); Act for the Establishment of Religious Worship in this Province, According to the Church of England, and for the Erecting of Churches for the Publick Worship of God, and also for the Maintenance of Ministers and the Building Convenient Houses for Them (1704), *reprinted in* 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692-1734 (John D. Cushing ed., 1978); Church Act of 1706, 2 S.C. Stat. 284-89.

the Church of England in 1758 and taxed parishioners to support it. STATE DISESTABLISHMENTS, *supra* note 21, at 230-31. All colonies with establishments—including those in the North—commissioned their churches for various civil functions, including education and poor relief.[29]

Although the northern colonies refused to establish Anglicanism, their localized Puritan (or Congregationalist) establishments retained many of the same features as the southern Anglican establishments.

Religious uniformity was achieved through civil power.[30] When Connecticut established its General Court, for example, its "Duty" was resolved as follows: "1st, To provide for the maintenance of the purity of religion, and to suppress the contrary; 2d, To declare, publish, and establish . . . the laws for holiness and righteousness which God had made and given to us in the Scriptures." COBB, RELIGIOUS LIBERTY, *supra*, at 283. Under such authority, dissenters faced severe punishments, ranging from limits on voting or legislative service[31] to whatever a magistrate

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29. McConnell, *Establishment, supra* note 12, at 2169.

30. *E.g.*, COBB, RELIGIOUS LIBERTY, *supra*, at 173 (observing that, in 1635, the Massachusetts General Court gave "the magistrates power over the Churches themselves" to ensure "uniformity and prevent all diversities in ecclesiastical polity"), 282-85 (similar in Connecticut).

31. ALBERT EDWARD MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 304-07 (1905) (discussing Massachusetts's limiting the vote to publicly testifying members of official church).

decided—be it "fine, banishment, or 'otherwise.'"[32] In some colonies, Quakers were not even permitted.[33]

Parishioners faced similar, albeit milder coercion. Each northern colony required local parishioners to support the church through compulsory taxation.[34] And parishioners who failed to attend religious services were fined.[35] Taken together, even northern colonists with no direct exposure to the Church of England would have experienced many of its defining features.

Although the colonial establishments became more tolerant of dissenters as independence approached, their essence remained unchanged. The original state constitutions reflect as much. Far from rejecting establishments, many states preserved the core components

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32. Cobb, Religious Liberty, *supra*, at 285 (Connecticut).

33. *E.g.*, *id.* at 287 (Connecticut law stating that "Quakers shall not be suffered in this jurisdiction").

34. McConnell, *Establishment, supra* note 12, at 2152-53; State Disestablishments, *supra* note 21, at 120 (discussing how New York's Ministry Act of 1693 imposed taxes "for the support of 'a good sufficient Protestant ministry'"), 330 (noting, as of 1717, "each [Connecticut] parish was 'to grant and levy such rates and taxes on the inhabitants for the support of ministry and schools'"), 353 (similar for New Hampshire); Cobb, Religious Liberty, *supra*, at 169-70 (similar for Massachusetts).

35. *E.g.*, Cobb, Religious Liberty, *supra*, at 177 (Massachusetts), 284-85 (Connecticut).

of their establishments, such as public financial support for the official church, regulation of religious institutions, and religious qualifications for civic participation.[36] Most explicit was South Carolina, whose 1778 Constitution declared that "the Christian Protestant religion" was "the established religion," requiring religious societies to subscribe to enumerated articles of faith to receive legal recognition. S.C. Const. of 1778, art. XXXVIII, *reprinted in* Poore, State Constitutions, *supra* note 36, at 1626.

All told, "nine of the thirteen colonies had established churches on the eve of the Revolution, and about half the states continued to have some form of official religious establishment when the First Amendment was adopted." McConnell, *Establishment, supra* note 12, at 2107 (first citing Levy, Establishment Clause, *supra* note 13, at 5, 11; then citing Amar, Bill of Rights, *supra* note 13, at 32-33).

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36. *See, e.g.*, Md. Const. of 1776, art. XXXIII, *reprinted in* Benjamin Perley Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 819 (2d ed. 1878) [hereinafter Poore, State Constitutions] (empowering legislature to levy taxes "for the support of the Christian religion"); Mass. Const. of 1780, pt. I, art. III, *reprinted in* Poore, State Constitutions, *supra*, at 957 (requiring towns to financially support "public Protestant teachers of piety, religion, and morality"); Pa. Const. of 1776, § 10 (requiring legislators to affirm belief in God and to "acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration"); Del. Const. of 1776, art. 22, *reprinted in* Poore, State Constitutions, *supra*, at 276 (similar); N.C. Const. of 1776, art. XXXII, *reprinted in* Poore, State Constitutions, *supra*, at 1413 (similar); S.C. Const. of 1778, art. XXXVIII (requiring established churches to affirm five state-sanctioned articles of faith).

4. Disestablishment

The First Amendment did not touch any of the existing state establishments. It was commonly understood that the new federal government's powers did not include interfering with those establishments.[37] Nevertheless, over the course of about 60 years (1773-1833), the nine state establishments were legally dismantled—"disestablished"—by the states themselves. This process sheds considerable light on the founding-era understanding of establishment. *See generally* CHAPMAN & MCCONNELL, AGREEING TO DISAGREE, *supra* note 21, at 42-73; STATE DISESTABLISHMENTS, *supra* note 21, at 97-202, 225-48, 309-72, 399-424.

During this period, states enacted constitutional provisions that repealed laws compelling church attendance, prescribing modes of worship, and exacting religious taxes. North Carolina's new 1776 Constitution was illustrative:

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37. *See*, *e.g.* WITTE, RELIGION, *supra* note 13, at 99 ("It was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government. . . . Federal power over religion was simply not considered part of this new constitutional calculus."); AMAR, BILL OF RIGHTS, *supra* note 13, at 32 ("The Establishment Clause did more than prohibit Congress from establishing a national church. Its mandate . . . prohibited the national legislature from interfering with, or trying to *dis*establish, churches established by state and local governments."); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 106 n.40 (2002) (concluding the same).

Appendix D

> That there shall be *no Establishment of any one Religious Church in this State* in Preference to any other; neither shall any Person, on any Pretence whatsoever, be *compelled to attend any Place of Worship*, contrary to his own Faith or Judgment; nor be *obliged to pay for the Purchase of any Glebe, or the building of any House of Worship or for the Maintenance of any Minister or Ministry*, contrary to what he believes right, or has voluntarily and personally engaged to Perform; but all Persons shall be at *Liberty to exercise their own Mode of Worship*. . . .

N.C. Const. of 1776, art. XXXIV (emphases added).[38] Other state constitutions simply declared the former establishment repealed (New York, 1776)[39] or omitted the establishmentarian elements in a previous constitution (South Carolina, 1790).[40]

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38. Georgia (1798), Connecticut (1818), and Massachusetts (1833) enacted similar provisions in their constitutions. *See* Ga. Const. of 1798, art. IV, § 10; Conn. Const. of 1818, art. VII §§ 1-2; Mass. Const. of 1833, amend. XI.

39. *See* N.Y. Const. of 1776, art. XXXV (declaring "all such parts of the said common law, and all such of the said statutes and acts aforesaid . . . as may be construed to establish or maintain any particular denomination of Christians or their ministers . . . hereby are, abrogated and rejected").

40. *Compare* S.C. Const. of 1790, art. VIII, §§ 1-2, *with* S.C. Const. of 1778, art. XXXVIII.

Appendix D

Other states (New Hampshire, 1819; Virginia, 1779, 1786-87; Maryland, 1810) disestablished via statute or a combination of constitutional and statutory measures.[41] Most famous of these efforts was in Virginia, where George Mason's 1779 bill repealed the Church of England's authority to collect taxes, followed by passage of Thomas Jefferson's 1786 Statute for Religious Freedom. Jefferson's statute provided that

> We the General Assembly of Virginia do enact, that *no man shall be compelled to frequent or support any religious Worship place or Ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief*, but that all men shall be free to profess, and by argument to maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

A Bill for Establishing Religious Freedom, 18 June 1779, in 2 The Papers of Thomas Jefferson 545-47 (Julian P. Boyd ed., 1950) (emphasis added). The next year, Virginia

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41. *See* State Disestablishments, *supra* note 21, at 139-80 (Virginia), 309-26 (Maryland), 351-72 (New Hampshire); *id.* at 354 ("In 1819 dissenters won perhaps their greatest victory when the legislature of New Hampshire passed the Act of Toleration, removing the authority of towns to compel citizens to contribute tax dollars to a religious organization.").

rescinded the General Assembly's authority over the Episcopal Church.[42]

This evidence of disestablishment powerfully illuminates what the founding generation understood establishments to be. The states knew what laws comprised their establishments, and they knew how to repeal them. Accordingly, "[s]tate disestablishment provisions clarify the sort of laws the Establishment Clause prohibited the federal government from enacting." CHAPMAN & MCCONNELL, AGREEING TO DISAGREE, *supra* note 21, at 73. Namely, those were "laws conditioning civil or political privileges on religious belief or affiliation; laws compelling church attendance or tithes; laws interfering with church doctrine, governance, or administration; and laws authorizing a religious group to perform vital civic functions for the state." *Id.* at 73-74.

5. Summary

Returning to where we began, the Supreme Court has now confirmed that courts must interpret the Establishment Clause with reference to its original public meaning and our Nation's historical practices. *See Kennedy*, 597 U.S. at 535-36, 142 S.Ct. 2407 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 575-77, 134 S.Ct.

42. *See* STATE DISESTABLISHMENTS, *supra* note 21, at 146, 164, 170. Finally, the four states that never had formal establishments (New Jersey, Delaware, Rhode Island, and Pennsylvania) either did nothing in this period, or else they codified provisions along the lines of the disestablishing states. *See id.* at 25-96; *see also*, *e.g.*, N.J. CONST. of 1776, arts. 18-19.

1811, 188 L.Ed.2d 835 (2014)) (explaining Clause "must be interpreted by reference to historical practices and understandings," "the understanding of the Founding Fathers," and "original meaning and history" (internal quotations omitted)). The foregoing historical sketch[43] discusses evidence relevant to delineating the Clause's central focus—the institution known to the founding generation as an "establishment of religion."

The leading scholar in the area—whose work on this precise point the Supreme Court has relied on, *see Kennedy*, 597 U.S. at 537 n.5, 142 S.Ct. 2407—has categorized the evidence into elements or "hallmarks" of founding-era establishments. Those include (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. *See* McConnell, *Establishment, supra* note 12, at 2131-81. Other scholars have drawn similar conclusions from the historical record,[44] and Supreme

43. It is necessarily only a sketch. It would be impossible to canvass the entire historical record in a judicial opinion. That is why books, law-review articles, and original sources exist, which we have cited throughout.

44. *See* Esbeck, *Establishment Clause, supra* note 17, at 35 (identifying five overlapping characteristics of founding-era establishments); Barclay, *Original Meaning, supra* note 15, at 535-36, 538, 541, 548, 556 (identifying four overlapping characteristics). *See generally* Stephanie H. Barclay, *The Religion*

Court decisions have relied on such indicia to define an establishment.[45]

To be sure, these elements are only helpful analytical signposts. The lodestar for applying the Clause remains what the Supreme Court held in *Kennedy*—namely, that a challenged law must be measured against the standard of founding-era religious establishments.

C. Application: Texas's law bears none of the hallmarks of a founding-era religious establishment.

Defendants argue Plaintiffs failed to show that S.B. 10's displays would have historically been understood as an establishment of religion. We agree.

Clauses After Kennedy v. Bremerton School District, 108 Iowa L. Rev. 2097, 2103-09 (2023); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. Pa. J. Const. L. 585, 605-23 (2006); Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 Hofstra L. Rev. 475, 481-90 (2004); Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 Marq. L. Rev. 705, 725-49 (2025); Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111 (2020).

45. *See*, *e.g.*, *Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407 (coercion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (restricting political participation by dissenters and requiring religious proclamations from public officials); *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (coercing church attendance); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) (granting churches monopolistic control over civil functions).

1. S.B. 10 looks nothing like a founding-era establishment.

At the outset, we note that S.B. 10 plainly lacks the features of founding-era establishments. For example, whereas establishments commonly punished dissenters through fines, taxes, and legal disabilities, *see supra* Part IV.B., S.B. 10 does none of those things. If students disagree with the Commandments or ignore them or laugh at them, S.B. 10 imposes neither penalty nor sanction, formal or informal. And S.B. 10 obviously does not regulate what any religious institution teaches, how it worships, or whom it employs—as establishments often did. *See supra* Part IV.B.

Nor does S.B. 10 compel financial support for religious institutions. True, S.B. 10 permits using public funds to procure displays. TEX. EDUC. CODE ANN. § 1.0041(e) (West 2025). But it neither requires such funding nor compels anyone to pay for the displays. This is again a far cry from historic religious establishments, which typically relied on forced exaction of religious taxes to support churches and clergy. *See Everson*, 330 U.S. at 10 n.8, 67 S.Ct. 504 ("Almost every colony exacted some kind of tax for church support."). For their part, Plaintiffs rely on none of these features of establishments to attack S.B. 10.

2. S.B. 10 does not coerce religious exercise or observance.

Plaintiffs' principal argument is that S.B. 10 resembles historic establishments because it is coercive. Specifically,

they claim that displaying scripture in a classroom—especially scripture phrased as "commandments"—is inherently coercive to children who are required by law to attend school. While we do not doubt the sincerity of Plaintiffs' objections to the displays, we disagree that merely displaying religious text in a classroom coerces students in the way that founding-era establishments coerced dissenters. The two are worlds apart.[46]

Kennedy explained that the "coercion" characteristic of establishments consisted of forcing people to "attend church" or "engage in 'a formal religious exercise.'" 597 U.S. at 537, 142 S.Ct. 2407 (quoting *Lee*, 505 U.S. at 589, 112 S.Ct. 2649); *see also ibid.* ("[T]his Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make religious observance compulsory.'" (quoting *Zorach*, 343 U.S. at 314, 72 S.Ct. 679)). Today, the state would erect something like an establishment if, for example, it mandated schoolchildren recite scripted prayers or join in corporate worship. *See Hilsenrath*, 136 F.4th at 492-93 (explaining "[h]istory and precedent . . . make clear that schools may not 'force [students] to engage in a formal religious exercise'" (quoting *Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407)).

The problem for Plaintiffs' coercion argument, however, is that S.B. 10 does not compel any student to engage in formal religious exercise. The law does not

46. In a separate section below, we address the analytically distinct argument that the displays coerce schoolchildren in violation of the Free Exercise Clause. *See infra* Part V.

require students to "recite the Ten Commandments as an act of worship," or to affirm them at all. *Hilsenrath*, 136 F.4th at 492. Nor does it mandate students pray, adopt any faith, or engage in any other "unmistakably religious exercises" like "devotional reading and recitation of the Holy Bible." *Abington*, 374 U.S. at 307, 83 S.Ct. 1560 (GOLDBERG, J., concurring). The law requires only that the Commandments be displayed on the classroom wall. The mere fact that the displays use religious language does not convert them into a call to prayer. "[N]ot all school activities touching on religion amount to 'formal religious exercise.'" *Hilsenrath*, 136 F.4th at 492 (quoting *Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407).

Moreover, 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. To the contrary, it appears that no one "ever claimed at the founding that the display of religious symbols was a form of religious establishment." CHAPMAN & MCCONNELL, AGREEING TO DISAGREE, *supra* note 21, at 159.[47] Indeed, it would be a shock to discover that the Establishment Clause is implicated merely by the government's use of religious language, imagery, or symbols.

In our country, religious placenames dot the landscape and religious mottos, symbols, and flags adorn countless

47. *See also* Barclay, *Original Meaning, supra* note 15, at 509-10 (finding no evidence that "government display of religious symbols" was a concern with respect to founding-era establishments).

public buildings.[48] Our national anthem contains the line, "In God is our trust," a version of which is our national motto and appears on our currency.[49] The Ten Commandments themselves feature in displays in the Supreme Court, the Capitol, the Jefferson Building, the National Archives, the Department of Justice, the Ronald Reagan Building, the House of Representatives, and the courthouse housing the D.C. Circuit and the District Court for the District of Columbia. *Van Orden*, 545 U.S. at 688, 125 S.Ct. 2854 (REHNQUIST, C.J.) (plurality opinion). The

48. One study found over 800 cities with biblical placenames. John Leighly, *Biblical Place-Names in the United States*, 27 NAMES: A J. ON ONOMASTICS 46, 47 (1979). A more recent article counted over 1,000. Rafael Medoff, *Why American Towns Take Biblical Names*, JEWISH NEWS SYNDICATE (Feb. 20, 2023), https://www.jns.org/why-american-towns-take-biblical-names/ [https://perma.cc/GJ8C-RJE5]. Moreover, six state seals and seven state flags include religious sayings or imagery. *See* Seals, STATE SYMBOLS USA, https://statesymbolsusa.org/categories/state-seal [https://perma.cc/PL8H-SHLJ] (Arizona, Colorado, Connecticut, Florida, Mississippi, South Dakota); Flags, STATE SYMBOLS USA, https://statesymbolsusa.org/categories/state-flag [https://perma.cc/3JK4-ST5F] (Alabama, Connecticut, Florida, Georgia, Maryland, Mississippi, South Dakota).

49. *See* 36 U.S.C. § 301 (making "the Star-Spangled Banner . . . the national anthem"); *id.* § 302 ("'In God We Trust' is the national motto."); 31 U.S.C. § 5112(d)(1) (requiring coins to have the inscriptions "In God We Trust" and "E Pluribus Unum"); An Act To Provide for the Safe-Keeping of the Acts, Records, and Seal of the United States, and for Other Purposes, ch. 14, § 2, 1 Stat. 68, 68 (1789) (conveying to State Department right to use the Great Seal—featuring the phrase "Annuit Coeptis" or "God Favors Our Undertakings"—which appears on passports and the one-dollar bill).

fanciful notion that these uses of public religious language or symbolism have anything to do with a founding-era establishment cannot be taken seriously.[50]

Plaintiffs bore the burden of showing that the S.B. 10 displays would have been understood as a founding-era establishment. *See Hilsenrath*, 136 F.4th at 491 & n.54 (citing *Firewalker-Fields*, 58 F.4th at 122 n.7). They failed to do so. Plaintiffs' doubtlessly sincere objections to the displays do not equate to the "coercion" characteristic of historic religious establishments. While they contain religious text, the displays do not pressure anyone to engage in religious exercise or observance.

3. S.B. 10 does not commit "denominational discrimination."

Alternatively, Plaintiffs argue that S.B. 10 violates the Establishment Clause because it engages in "denominational discrimination" by adopting what they call the "Protestant version" of the Ten Commandments. We reject this argument for several reasons.

To begin with, S.B. 10 adopts the same text of the Ten Commandments as in *Van Orden*. *Compare* Tex. Educ. Code Ann. § 1.0041(c) (West 2025), *with Van Orden*, 545 U.S. at 707, 736, 125 S.Ct. 2854 (Stevens, J., dissenting)

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50. *See*, *e.g.*, 3 Joseph Story, Commentaries on the Constitution § 1874 (1833) ("An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.").

(text of Commandments). As discussed, *Van Orden* upheld the constitutionality of a Ten Commandments monument outside the Texas Capitol. *See id.* at 698-705, 125 S.Ct. 2854 (BREYER, J., concurring). In fact, the *Van Orden* challengers made precisely the same argument as today's Plaintiffs: namely, that the Texas monument "adopt[ed] the Protestant version of the Ten Commandments." Petitioner's Reply Brief at 8-10, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 27, at *8-10. Yet this argument had no impact on the decision, and a majority of the Court did not even mention it.

The four-Justice plurality referred only to "the Ten Commandments," taking no note of which version appeared on the monument. *See Van Orden*, 545 U.S. at 681, 688-91, 125 S.Ct. 2854 (REHNQUIST, C.J.) (plurality opinion). JUSTICE BREYER's controlling opinion described the version only as a "nonsectarian text" created after "consultation with a committee composed of members of several faiths." *Id.* at 701, 125 S.Ct. 2854 (BREYER, J., concurring). Plaintiffs dismiss this as dicta that does not analyze the monument's text. Dicta or not, it shows that neither the plurality nor the controlling opinion took up the same argument Plaintiffs make here.

Ironically, only JUSTICE STEVENS's dissent (joined by JUSTICE GINSBURG) accepted the denominational argument. Noting the "many distinctive versions of the Decalogue" whose "differences may be of enormous religious significance," he argued that, "[i]n choosing to display this version . . . Texas tells the observer that the State supports this side of the doctrinal religious debate."

Id. at 717-18, 125 S.Ct. 2854 (STEVENS, J., dissenting). So, when Plaintiffs' argument was last proposed to the Supreme Court regarding the identical text of the Ten Commandments, only two dissenting Justices referenced it; the other seven ignored it.

Second, Plaintiffs misunderstand the line of decisions that forbid the government from "officially prefer[ring] one religious denomination over another." *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) (quoting *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)). Under those cases, the government cannot privilege certain religions over others when imposing burdens or granting benefits. *See id.* at 248-49, 145 S.Ct. 1583 (discussing doctrine). The principle comes into play when, for instance, the government allows Catholics and Protestants, but not Jehovah's Witnesses, to worship in a park. *See Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 97 L.Ed. 828 (1953). Or when a state grants a charitable tax exemption to some religious groups, but not others, based on theological criteria. *See Cath. Charities*, 605 U.S. at 249, 145 S.Ct. 1583 (invalidating exemption available only to religious groups that "engaged in proselytization or limited their services to fellow [co-religionists]").

But this principle has no application to government use of religious language or symbolism. *See Lynch*, 465 U.S. at 687 n.13, 104 S.Ct. 1355 (declining to apply denominational preference cases to city crèche). Nor could it. Consider the cities of Corpus Christi, San Francisco, Los Angeles,

San Diego, Santa Fe, San Jose, St. Augustine, and Sacramento, to name just a few. Do those names represent "denominational discrimination"? Or take our national motto. *See* 36 U.S.C. § 302 ("In God We Trust"). Does it show "favoritism" for monotheism over polytheism?

You get the point. If the rule against "denominational favoritism" applies in this area, all religious language and symbolism will have to be scoured from public life. While some constitutions have achieved this feat, ours is not one of them.[51]

Finally, Plaintiffs' argument would require us to make a theological judgment wholly unsuited to a federal court.

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51. *Compare* CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 124 (1936) ("In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens."), *and* CONSTITUTION OF OCTOBER 4, 1958 art. 1 (Fr.) ("France shall be an indivisible, secular, democratic and social Republic."), *with* Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS 228, 229 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854) ("Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other."), *and* Abraham Lincoln, Address at the Dedication of the Gettysburg National Cemetery (Nov. 19, 1863), *in* 9 COMPLETE WORKS OF ABRAHAM LINCOLN 209, 209 (John G. Nicolay & John Hay eds., Francis D. Tandy Co. 1905) (1894) ("[T]hat this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth.").

Appendix D

The parties and their *amici* make detailed scriptural arguments for why S.B. 10's version of the Commandments aligns better with Protestant, Catholic, or Jewish traditions. Not being a court of ministers, bishops, or rabbis, we have no business opining on these matters and no competence to do so.

For instance, Plaintiffs assert "S.B. 10's rendition of scripture . . . conflicts with Jewish and Catholic articulations of the Decalogue." One *amicus* argues the text omits a "critical and recurring theme in Judaism" concerning the "Jewish understanding of the Commandments as God's Covenant with the Israelites." Br. of National Council of Jewish Women at 17. These differences, they claim, also affect Christian debates because S.B. 10's version "would prohibit the veneration of icons, a practice which is common in Catholic and Eastern Orthodox traditions." *Id.* at 18. For their part, Defendants draw different theological lessons from the text. They cite Catholic and Jewish translations to show that S.B. 10's alleged "reliance on the King James Bible is demonstrably false." And they argue any icon-veneration conflict is illusory because the Catholic Douay-Rheims translation "contains the same prohibition on making a graven image" as the King James.[52]

52. Similarly, one *amicus* in *Roake* (which was argued with this case and concerns the same issues) argues S.B. 10's text is not a Protestant version because "there is little disagreement among Jewish and Christian traditions as to the overall substance of the Ten Commandments" despite differences in the "placement of textual pauses and thought-breaks." Br. for Director for the Conscience Project and Professor Mark David Hall at 13.

These matters of theology and scriptural interpretation lie beyond our ken. Federal courts are not competent to decide questions of "ecclesiastical law and religious faith," *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729, 20 L.Ed. 666 (1871), nor to settle "controversies over religious doctrine," *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hall Mem'l Presbyterian Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *see also McRaney v. N. Am. Mission Bd.*, 157 F.4th 627, 638 (5th Cir. 2025) ("[C]ourts must take care to avoid resolving underlying controversies over religious doctrine.") (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 751 n.10, 140 S.Ct. 2049, 207 L.Ed.2d 870 (2020)) (quotation omitted). Nor can courts act as "arbiters of scriptural interpretation." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

Yet that is the role Plaintiffs would have us assume here—adjudicating the theological *bona fides* of S.B. 10's version of the Commandments. We would have to decide, for example, whether the text wrongly omits Jewish understandings of God's covenant or picks a side in the Catholic and Protestant debate over icons. While this case does not present an internal dispute over religious matters, *cf. McRaney*, 157 F.4th at 647-54, resolving the disagreement would strand us in the same dangerous waters. If we were so foolish as to accept this invitation, our very decision would ironically violate the Establishment Clause by presuming to decide a religious question.[53]

53. *See Presbyterian Church in U.S.*, 393 U.S. at 449, 89 S.Ct. 601 ("First Amendment values are plainly jeopardized" if courts decide "controversies over religious doctrine and practice"); *Our*

Plaintiffs, in other words, have made us an offer we can only refuse.

In sum, we reject Plaintiffs' argument that S.B. 10 engages in "denominational discrimination" in violation of the Establishment Clause.

4. Plaintiffs' "tradition" argument is meritless.

Finally, Plaintiffs offer their own historical argument. They contend S.B. 10 violates the Establishment Clause because there is insufficient evidence of a tradition of public schools using the Ten Commandments or displaying them in a classroom. In support, they largely rely on the conclusions of their "expert" witness. We reject this argument.

Plaintiffs derive this tradition argument from cases about "legislative prayer"—*i.e.*, prayers by chaplains or ministers before government bodies. *See Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); *Town of Greece*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835. As those cases explain, such prayer "has long been understood as compatible with the Establishment Clause" because it was "practiced by Congress since the

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Lady of Guadalupe, 591 U.S. at 737, 140 S.Ct. 2049 (explaining that the First Amendment allows religious adherents "to decide for themselves, free from state interference, matters of . . . faith and doctrine"); *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976) (explaining that "religious controversies are not the proper subject of civil court inquiry").

framing of the Constitution." *Town of Greece*, 572 U.S. at 575, 134 S.Ct. 1811 (citing *Marsh*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019). If a modern prayer "fits within" that venerable tradition, it does not violate the Clause. *Id.* at 577, 134 S.Ct. 1811.

From those cases, Plaintiffs would distill a broad test: if a practice does not fit within some historical tradition, it violates the Establishment Clause. That does not follow. The legislative prayer cases teach only that the Establishment Clause cannot be read to sweep away a longstanding religious practice publicly approved by those who wrote the First Amendment. *See id.* at 576, 134 S.Ct. 1811 (observing "the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment").[54] They do not stand for the *opposite* proposition—namely, that any modern practice *not* supported by a founding-era tradition *does* violate the Establishment Clause. No precedent supports that bizarre view.

The correct analysis, as the Supreme Court has explained, is to ask whether a challenged law shares the

54. *See also Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811 ("*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."); *id.* at 602, 134 S.Ct. 1811 (ALITO, J., concurring) (explaining "[t]his Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause" (citation omitted)).

"hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407; *see also Hilsenrath*, 136 F.4th at 491 n.54 (asking whether plaintiffs have "prov[en] a set of facts that would have historically been understood as an establishment of religion"). That analysis—in sharp contrast to Plaintiffs' vague appeal to "tradition"—involves sifting the historical record to discern the original public meaning of "an establishment of religion." That is what we have done here.

One final note. In resolving this claim, the district court engaged in a practice one seldom sees in constitutional adjudication. It allowed "experts" in religion and legal history to opine whether there was a tradition of using the Commandments in American schools. The *Roake* district court did the same, and the now-vacated *Roake* panel approved the practice, affirming as "not clearly erroneous" the "findings" based on "expert" testimony. *Roake Panel*, 141 F.4th at 648 & n.26.

This practice is mistaken. "[A]n expert may never render conclusions of law." *Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009). Yet that appears to be what the district court let happen here. Those experts are law professors who write books and law-review articles.[55] But so do other law professors. As judges, we

55. *See*, *e.g.*, Steven K. Green, Inventing a Christian America: the Myth of the Religious Founding (Oxford Univ. Press 2015); Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 Baylor L. Rev. 505 (2021); The Forgotten Founders on Religion and Public Life (Daniel L.

read their work and may find it helpful. We also review the historical sources ourselves. What we cannot do, however, is outsource to "experts" our Article III duty to decide questions of law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).[56]

What the founding generation understood as an establishment of religion is a legal question to be decided by a court, not a "fact" question to be decided by experts, no matter how credentialed. To be sure, courts must make a determined effort to grasp the relevant history bearing on that legal question. *Hilsenrath*, 136 F.4th at 491 ("This kind of historical inquiry requires serious work." (citation omitted)); *McDonald v. City of Chicago*, 561 U.S. 742, 803, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring) (noting "[h]istorical analysis can be difficult").

Driesbach, Mark David Hall & Jeffrey H. Morrison eds., 2009); Mark David Hall, *America's Founders, Religious Liberty, and the Common Good*, 15 U. ST. THOMAS L.J. 642 (2019); Mark David Hall & Andrea Picciotti-Bayer, *Ten Commandments in the Public Square and Public Schools*, 34 WM. & MARY BILL RTS. J. 175 (2025).

56. Plaintiffs' expert, Dr. Steven Green, provides an example of the risk of appointing someone as an expert in "legal history," as opposed to simply assessing his scholarly work on its own merits. For instance, in *Roake*, Dr. Green asserted in an affidavit that the "historical record" contradicts the claim that "the Ten Commandments 'have historical significance as one of the foundations of our legal system.'" Yet, years earlier, he wrote in a law journal that "[i]t is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition." Steven Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & RELIGION 525, 525 (2000).

See generally Heller, 554 U.S. at 592-95, 600-03, 605-19, 128 S.Ct. 2783. They do so by consulting articles, books, and historical sources and bringing their own independent judgment to bear on them—not by appointing an "expert," whose "findings" are insulated by clear-error review on appeal.[57]

* * *

In sum, we conclude that S.B. 10 bears none of the hallmarks of a founding-era establishment of religion and therefore does not facially violate the Establishment Clause.

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57. Plaintiffs would rely on this practice to resolve "fact issues" about the Ten Commandments' role in American history. But they confuse the kind of facts experts can help determine (so-called "adjudicative facts") from facts that are decided by courts (so-called "legislative facts"). *See, e.g.*, *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (distinguishing "'legislative facts,' which . . . bear on the justification for legislation, as distinct from facts concerning the conduct of parties in a particular case ('adjudicative facts')" (citing Fed. R. Evid. 201(a))). As Judge Posner has explained, "Only adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of [a challenged law]." *Ibid. See also N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 25 n.6, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022) ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies."); *United States v. Skrmetti*, 605 U.S. 495, 530-31, 145 S.Ct. 1816, 222 L.Ed.2d 136 (2025) (THOMAS, J., concurring) ("The views of self-proclaimed experts do not 'shed light on the meaning of the Constitution.'" (quoting *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 272-73, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022))).

V. Free Exercise

We turn to the district court's ruling that S.B. 10 facially violates the Free Exercise Clause. *See Nathan*, 795 F. Supp. 3d at 943, 947-48.

Defending that ruling, Plaintiffs contend the Ten Commandments displays coerce students to venerate "state-imposed and state-selected scripture" and undermine parents' rights to form their children's religious views. Defendants take the opposite view. They contend the displays do not coerce students to do or believe anything and do not authorize teachers to subvert their parents' religious teaching.

The right to freely exercise religion is not "shed . . . at the schoolhouse gate." *Mahmoud*, 606 U.S. at 545, 145 S.Ct. 2332 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). A public school may violate that right by "plac[ing] unconstitutional burdens on [a student's] religious exercise," *ibid.*, or by "substantially interfer[ing] with the [student's] religious development," *id.* at 546, 145 S.Ct. 2332 (quoting *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526). The question before us is whether S.B. 10 represents such an imposition on the consciences of Texas students or parents. The answer is no.

The parties agree that a key precedent is the recent decision in *Mahmoud v. Taylor*. In that case, a school district introduced into elementary curricula "'LGBTQ+-inclusive' storybooks. . . . designed to 'disrupt' children's

thinking about sexuality and gender." *Id.* at 528-29, 145 S.Ct. 2332. The books taught, for instance, that "same-sex marriage should be accepted by all as a cause for celebration," *id.* at 551, 145 S.Ct. 2332, and "encourage[d] children" to abandon the view that "sex and gender are inseparable," *id.* at 552, 145 S.Ct. 2332. To think otherwise, students were warned, would be "hurtful, perhaps even hateful." *Id.* at 553, 145 S.Ct. 2332.

Nor did the books sit silently on school shelves. Teachers "incorporate[d] the new texts into the curriculum" and led "classroom discussion[s]" about them. *Id.* at 535, 145 S.Ct. 2332. Teachers were also trained to respond to student questions. If asked about same-sex unions, they were to say: "Two men who love each other can decide they want to get married." *Id.* at 536, 145 S.Ct. 2332. If students expressed views linking sex to biology, teachers were to respond: "That comment is hurtful." *Ibid.* If students asked about "transgenderism," teachers were to explain: "When we're born, people make a guess about our gender and label us boy or girl based on our body parts. Sometimes they're right and sometimes they're wrong." *Ibid.* (internal quotations omitted). Parents objecting to these lessons could not opt their children out. *Id.* at 543, 145 S.Ct. 2332.

The Supreme Court held the curriculum violated parents' Free Exercise rights because it was designed to subvert children's religiously formed beliefs about sexuality and gender. *Id.* at 529-30, 145 S.Ct. 2332. The lessons were coercive, the Court explained, because they "correct[ed]" children against "their parents' religious

views" while also accusing "them of being 'hurtful' when they express[ed] a degree of religious confusion." *Id.* at 555, 145 S.Ct. 2332. "Such instruction 'carrie[d] with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.'" *Ibid.* (quoting *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526).

Measured against *Mahmoud*, S.B. 10 falls far short of transgressing the Free Exercise Clause. The Texas law creates no religious curriculum designed to shape children's beliefs or subvert their parents' teaching. Teachers are not required or encouraged to offer religious reflections on the Ten Commandments. Nor are they told to proselytize students who ask about the displays or disagree with the Commandments. Nor are they given lesson plans instructing that certain students (say, atheist, nontheist, polytheist, or agnostic students) are to be told their beliefs are "hurtful" or "hateful." *Id.* at 553, 145 S.Ct. 2332.

This means the core of a free-exercise violation—a substantial burden on religious belief or practice—is missing. *See*, *e.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 555-58, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021) (ALITO, J., concurring in the judgment) (surveying history of free-exercise jurisprudence). In *Mahmoud*, that burden was glaring: "instruction" challenging religiously formed beliefs about sex was "presented to young children by authority figures in elementary school classrooms." 606 U.S. at 554, 145 S.Ct. 2332. S.B. 10 does nothing like that. No religious curriculum, no theistic lesson plans.

All the law requires is a poster on a classroom wall. To be sure, Plaintiffs disagree with the poster's content, but that disagreement alone does not transform S.B. 10 into religious coercion—and certainly not into the compulsory sex re-education program invalidated in *Mahmoud*.

Plaintiffs nonetheless insist S.B. 10 is *worse* than the regime in *Mahmoud* because it supposedly subjects children to "scripture nearly every hour they are in school." We disagree. Plaintiffs' hyperbolic argument ignores *Mahmoud*. The Court emphasized that the indoctrination there went "far beyond mere 'exposure'" to objectionable ideas—the school board "specifically encouraged teachers to reinforce th[e] [books'] viewpoint and to reprimand any children who disagree." *Id.* at 556, 145 S.Ct. 2332. Again, we have nothing like that here. S.B. 10 neither requires nor authorizes the correction of anyone's beliefs.

Plaintiffs' premise appears to be that any "religious" or "scriptural" content in the display is, by definition, coercive for free exercise purposes. That is not the law. The proper inquiry is whether the display religiously coerces a child or undermines parental rights to direct a child's religious upbringing. *See id.* at 546-47, 145 S.Ct. 2332; *see also Yoder*, 406 U.S. at 218, 92 S.Ct. 1526; *Barnette*, 319 U.S. at 626-33, 63 S.Ct. 1178; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532-36, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). But no case suggests that the mere presence of religious language in a school display is *ipso facto* religious coercion.

At oral argument, Plaintiffs' counsel seemed to retreat from the implications of that position. When asked whether a public school could display the Declaration of Independence—with its appeals to "Nature's God," "Creator," the "Supreme Judge of the world," and "divine Providence"—counsel agreed it could. O.A. Rec. at 48:35-49:25. Counsel gave the same answer as to Lincoln's Second Inaugural, whose overtly religious conclusion quotes Psalm 19. O.A. Rec. at 49:25-50:19. *See* Abraham Lincoln, *Second Inaugural Address*, National Constitution Center (Mar. 4, 1865), https://constitutioncenter.org/the-constitution/historic-document-library/detail/abraham-lincoln-second-inaugural-address-1865 [https://perma.cc/X746-85BF] ("[A]s was said three thousand years ago, so still it must be said 'the judgments of the Lord are true and righteous altogether'" (quoting *Psalm* 19:9 (King James))).

But Plaintiffs' counsel avoided taking a position on perhaps the most dramatic consequence of their argument: its impact on the Pledge of Allegiance. Countless public schools—including Texas's—open the day with students' reciting the Pledge. O.A. Rec. at 51:50-52:10; *see* Tex. Educ. Code Ann. § 25.082(b)(1)-(2) (West 2017). On Plaintiffs' view, though, how could the Pledge continue? If students are coerced merely by seeing scripture in a classroom poster, as Plaintiffs claim, what about witnessing their classmates daily recite, "one Nation, under God"? To be sure, no student can be made to recite the Pledge. *See Barnette*, 319 U.S. at 642, 63 S.Ct. 1178. But Plaintiffs' view would plainly require abolishing the Pledge for everyone. In response to this, counsel could only say, "that's obviously not this case." O.A. Rec. 52:10-22;

see also id. 53:39-53:46 ("I don't think deciding this case consistent with *Stone* controls that result.").

That leads us to the final anomaly of Plaintiffs' free exercise argument—the remedy. Plaintiffs want the displays removed altogether. *Mahmoud* did not do that, however. Parents were permitted only to opt their children out of the lessons. To abolish the lessons altogether, the Court underscored, would be to "micromanage the public school curriculum." *Mahmoud*, 606 U.S. at 568, 145 S.Ct. 2332. The same was true for the Court's famous *Barnette* ruling: students were allowed to opt out of the flag salute, but the Court did not order West Virginia to strip all classrooms of the American flag. *See* 319 U.S. at 642, 63 S.Ct. 1178.

Plaintiffs here ask us to go beyond *Mahmoud* and *Barnette.* They seek the "right to micromanage" what Texas schools hang on classroom walls. But neither *Mahmoud* nor *Barnette* supports, let alone compels, that remedy, and Plaintiffs point to no other support.

In sum, Plaintiffs have failed to show that S.B. 10 imposes a substantial burden on their free exercise rights.

CONCLUSION

We REVERSE the district court's judgment, VACATE the preliminary injunction, and RENDER judgment dismissing Plaintiffs' Establishment and Free Exercise claims.

Appendix D

JAMES C. HO, *Circuit Judge*, concurring:

I join in all but Part III, for the reasons stated earlier this year in *Roake v. Brumley*, 170 F.4th 292, 300 (5th Cir. 2026) (en banc) (HO, J., concurring in the judgment). In sum, we can vacate the preliminary injunction on the merits—and uphold Ten Commandments displays in public schools under the Constitution—without addressing Plaintiffs' theory of standing or requiring any factual context to affirm the displays. No challenge to either Texas or Louisiana law could possibly succeed, because neither law comes close to imposing either an establishment of religion or a prohibition on the free exercise thereof, as originally understood by the Founders or articulated by any governing Supreme Court precedent.

Our Founders didn't just permit religion in education—they presumed that there would be religion in education. Indeed, they firmly believed that our Constitution wouldn't work without a religious people. *See*, *e.g.*, *id.* at 303-04 (collecting quotes). As President George Washington observed in his farewell address to the nation:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. . . . Let it simply be asked: Where

> is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.
>
> It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric? Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

George Washington, *Farewell Address*, Sep. 17, 1796, *in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 205, 212 (1897).

I'm pleased that the court today upholds Texas law and delighted to concur in all but Part III.

Appendix D

ANDREW S. OLDHAM, *Circuit Judge*, joined by WILLETT, *Circuit Judge*, concurring in part:

I agree with the majority that the district court's injunction must be reversed. I further agree that, if the case is justiciable, Texas's Ten Commandments law does not violate the Constitution. Fourteen members of the court find that the case is justiciable, so the merits are before the en banc court. On the merits, I agree with the majority opinion in full.

I nevertheless write separately to express my reservations about justiciability. It is not obvious to me that these plaintiffs have 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. What's more, the plaintiffs chose to bring a facial, pre-enforcement challenge against Texas's law. That's the hardest challenge to make out. And plaintiffs fell far short of carrying their burden here.

I

This case is a textbook offended observer case. The plaintiffs' complaint objects to the fact that "the Act [is] designed to, and will, ensure that students are more likely to **observe**, absorb, accept, follow, and live by the religious directives in the Ten Commandments." ROA.78 (emphasis added). It alleges the displays will "send a marginalizing message" and pressure school children to "**observe**, mediate on, venerate, and follow the

state's favored religious text." ROA.82 (emphasis added). Various plaintiffs call the text "deeply **offensive**." ROA.86 (emphasis added); ROA.89 (same). 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.

That is wrong. Article III limits the "judicial Power" to the resolution of "Cases" and "Controversies." U.S. CONST. art. III. This power is a limited one. Article III authorizes courts only to "adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885). A court may not offer freestanding proclamations about the Constitution, principles of law, or the rights of parties not before the court. Instead, courts may only answer questions of law "as a necessity in the determination of [a] real, earnest and vital controversy." *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 36 L.Ed. 176 (1892). If a court does anything else, it is exercising a power that "is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48 (1851). Thus, the judicial power is limited to actual disputes between parties.

An actual dispute means plaintiffs must have a "personal stake" in an underlying case. *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). This personal stake means plaintiff must have a concrete,

particularized, and actual or imminent injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). That requirement, the Court has explained, protects the separation of powers in our constitutional system. *Id.* at 559-60, 112 S.Ct. 2130.

The plaintiffs in this suit lack that personal stake. For one, Article III requires that courts assess whether the alleged injury to the plaintiff has a "close relationship" to a harm traditionally recognized as providing a basis for suit in American courts. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021). And there is no historical comparator to offended-observer standing. *See American Legion v. American Humanists Ass'n*, 588 U.S. at 80, 139 S.Ct. 2067 (GORSUCH, J., concurring in the judgment); *TransUnion*, 594 U.S. at 425, 141 S.Ct. 2190 (listing historic harms). Indeed, the opposite is true: "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle] III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986).

What's more, offended-observer standing cannot be reconciled with the separation of powers. Legislatures take action when citizens are offended; courts do not. Legislatures respond to social trends and political campaigns; courts do not. Courts, by contrast, are limited by the case-or-controversy requirement. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130. And "Article III standing . . . enforces the Constitution's case-or-controversy

requirement." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). Without standing, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Precedent also forecloses the plaintiffs' claims. The only Supreme Court case considering a similar claim found that there was no standing. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). In *Valley Forge*, the plaintiffs protested the government's decision to transfer property to a religious college. *Id.* at 468, 102 S.Ct. 752. So they sued, based on information they obtained through a news release. *Id.* at 469, 102 S.Ct. 752. But the Court rejected that claim, reasoning that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not an injury-in-fact sufficient to confer standing. *Id.* at 485, 102 S.Ct. 752.

Thus, it is little surprise that a chorus of judges from across the country have rejected offended-observer standing. *See American Legion*, 588 U. S. at 80-83, 139 S.Ct. 2067 (2019) (GORSUCH, J., concurring in the judgment) (noting that the doctrine "has no basis in law," and is "deeply inconsistent . . . with many longstanding principles and precedents."); *City of Ocala v. Rojas*, ___ U.S. ___, 143 S. Ct. 764, 766, 215 L.Ed.2d 143 (2023) (THOMAS, J., dissenting from denial of certiorari); *Kondrat'yev v. City*

of Pensacola, 949 F.3d 1319, 1335 (11th Cir. 2020) (NEWSOM, J., concurring); *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1175 (11th Cir. 2018) (NEWSOM, J., concurring), *cert. granted, judgment vacated*, 588 U.S. 917, 139 S.Ct. 2772, 204 L.Ed.2d 1153 (2019); *Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941, 949 (5th Cir. 2022) (SMITH, J.); *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (EASTERBROOK, C.J.); *Barnes-Wallace v. San Diego*, 530 F.3d 776, 795 (9th Cir. 2008) (KLEINFELD, J., dissenting); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 497 (6th Cir. 2004) (BATCHELDER, J., dissenting); *Penkoski v. Bowser*, 486 F. Supp. 3d 219, 231 (D.D.C. 2020) (MCFADDEN, J.). These judges recognize that the Supreme Court has never blessed the theory of standing that the plaintiffs today present.

*

At bottom, offended-observer standing contravenes our constitutional structure, Supreme Court precedent, and common sense.

II

But that is not the only problem with the plaintiffs' claims. Plaintiffs sought facial, pre-enforcement relief. Achieving success in that posture is the legal equivalent of converting a 7-10 split.[1]

1. For those affected by the decline of civic activities like bowling, *cf.* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000), a 7-10 split is the hardest spare to make.

Appendix D

Facial challenges are an uphill battle. They require a plaintiff to show that there is no set of circumstances under which a law can be validly applied. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). That is a difficult task, since a "statute may be invalid as applied to one state of facts and yet valid as applied to another." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (quotation omitted). That's one reason why the Supreme Court has instructed that facial challenges are "disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); *see also United States v. Texas*, 97 F.4th 268, 313-14 (5th Cir. 2024) (Oldham, J., dissenting) (making the same point).

One reason facial challenges are disfavored is that they require courts to engage in a guessing game about possible valid applications, which is a tricky task. *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). A court could mistakenly "strike down" duly-enacted legislation just because a judge could not think of every hypothetical scenario to which the statute could apply. *See ibid.*; *but see* Jonathan F. Mitchell, *The Writ of Erasure Fallacy*, 104 Va. L. Rev. 933, 935-36 (2018) (explaining federal courts cannot "strike down" statutes as unconstitutional). And adjudicating hypothetical cases can be tough to reconcile with both the prohibition on hypothetical jurisdiction, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and also the prohibition on advisory opinions, *see Correspondence of the Justices, in* William Baude,

ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67-69 (8th ed. 2025). These problems explain the Supreme Court's caution that facial challenges "carr[y] too much promise of premature interpretatio[n] of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 608-09, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (citation modified).

But the plaintiffs here add to the difficulty because they bring a pre-enforcement challenge. Historically, that was also hard to do. It was not until *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), that pre-enforcement challenges became something other than the exception, STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1136-37 (2d ed. 1985). But even in more recent years, the Court has made it difficult to bring a challenge before States have even attempted to enforce the law. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497-504, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (disallowing a pre-enforcement facial challenge because there was insufficient evidence about how the challenged law would be enforced). That's because adjudicating these hypothetical situations "run[s] the risk of embroiling the federal courts in the adjudication of an abstract controversy with untold numbers of hypothetical and unforeseen permutations." *Texas*, 97 F.4th at 314 (OLDHAM, J., dissenting). So, any plaintiff's pre-enforcement challenge faces a hard road.

These plaintiffs ask us to *combine* a facial and pre-enforcement challenge. Doing so requires us to consider

whether these plaintiffs with a hypothetical injury about a hypothetical sign might ever face a hypothetical situation where the law is constitutional.[2] As that string of hypotheticals suggests, that claim is bound to fail.[3]

*

Plaintiffs have no basis to invoke the federal judicial power merely because they are offended by a holy text that

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2. True, Texas's law describes what the displays look like, how big they are, and where they must sit. TEX. EDUC. CODE ANN. § 1.0041(a)-(c). And true, the displays have gone into effect in non-enjoined districts. *See* Press Release, Attorney General of Texas, Attorney General Ken Paxton Instructs Texas Schools to Display the Ten Commandments in Accordance with Texas Law (August 25, 2025), https://perma.cc/WR7C-5P96. But none of that changes the fact that the plaintiffs in this suit challenged what were then non-existent, hypothetical displays. The record before this court is devoid of information about the signs that will purportedly injure the plaintiffs—unsurprising given that no such signs exist. That dearth of information shows why courts have rarely countenanced and upheld facial, pre-enforcement challenges like this one.

3. Such issues bleed into a third potential problem with the plaintiff's claims: ripeness. We recently explained that a challenge to a similar law in Louisiana was unripe. *See Roake v. Brumley*, 170 F.4th 292, 300-01 (5th Cir. 2026) (en banc). Ripeness "focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993). If offended observers are not really injured in the first place, we need not intervene to protect their rights. *Ibid.* And if these plaintiffs have never even seen the signs they hope to challenge, there is every indication their claims are not ripe, either. *See Roake*, 170 F.4th at 300-01.

is a cornerstone of Western civilization. Fourteen members of the en banc court disagree with my justiciability concerns, however. And if we have jurisdiction as my esteemed colleagues find, then I agree wholeheartedly with Judge Duncan on the merits and join all but Part III of the majority opinion. Perhaps one day the Supreme Court will clarify that offended observer standing has no place in our constitutional order. But until that day, I suppose there is some solace in the fact that parents and students of *all* stripes can invoke the powers of federal courts to combat ideological indoctrination in schools. *Cf. Mahmoud v. Taylor*, 606 U.S. 522, 544, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025).

Appendix D

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

The Supreme Court long ago held that a statute nearly identical to S.B. 10 violates the Establishment Clause. But apart from that established precedent, which only it can overrule, the Supreme Court has long emphasized "the heightened concerns with protecting freedom of conscience from subtle coercive pressure" in public schools, where classroom requirements that threaten to coerce students "to support or participate in religion" implicate a "foremost hallmark of religious establishment." It has also held that the Free Exercise Clause protects against classroom requirements that threaten to "impose upon children a set of values and beliefs that are hostile to their parents' religious beliefs" and "pressure" children to "conform." Because legislation requiring the permanent fixture of religious rules in public-school classrooms, with no "educational function," violates these most basic First Amendment principles, I respectfully dissent.

I. The Establishment Clause

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)). It ordains that no

* JUDGE RICHMAN joins Part I of this opinion with the exception of footnote 6 and Part I.B.2. JUDGE HAYNES joins Part I.A of this opinion.

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. *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *see also Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("Providing public schools ranks at the very apex of the function of a State."). 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 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 Supreme 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 (citation modified) (alterations in original) (quoting *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231, 68 S.Ct. 461, 92 L.Ed. 649 (1948)). 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. *See id.* at 583, 107 S.Ct. 2573.

A. ***Stone v. Graham*** **directly controls.**

The Supreme Court's decision in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), is a model of its "vigilan[ce] in monitoring compliance with the Establishment Clause in [public] schools." *See id.* at 583-84, 107 S.Ct. 2573. In *Stone*, the Court struck down a Kentucky statute that required all "public elementary and secondary school[s]" to post "durable, permanent

cop[ies] of the Ten Commandments," measuring "sixteen (16) inches wide by twenty (20) inches high," in every classroom. 449 U.S. at 39-40, 39 n.1, 101 S.Ct. 192 (quoting Ky. Rev. Stat. § 158.178(1) (1980)). The statute also required each display to feature "a notation concerning" its purportedly secular purpose. *Id.* at 39 n.1, 101 S.Ct. 192 (quoting Ky. Rev. Stat. § 158.178(2) (1980)).

In evaluating the plaintiffs' Establishment Clause challenge to the statute, the Supreme Court looked to the then-applicable test derived from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). *Id.* at 40, 101 S.Ct. 192. Under the *Lemon* test, (1) the challenged statute "must have a secular legislative purpose," (2) the statute's "principal or primary effect must be one that neither advances nor inhibits religion," and (3) "the statute must not foster an excessive government entanglement with religion." *Id.* (citation modified) (quoting *Lemon*, 403 U.S. at 612-613, 91 S.Ct. 2105).

The Supreme Court held that, under *Lemon*'s first prong, the secular purpose described in the Kentucky statute was "not sufficient to avoid conflict with the First Amendment." *Id.* at 41, 101 S.Ct. 192.

> The *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.* The Commandments do not confine

> themselves to arguably secular matters. . . . 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.

Id. at 41-42, 101 S.Ct. 192 (emphasis added). The Court also emphasized the Kentucky statute's coercive effect:

> 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. 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.

Id. at 42, 101 S.Ct. 192 (citation modified) (emphasis added).

It was not "significant that the Bible verses involved in [*Stone* were] merely posted on the wall, rather than read aloud." *Id.* (distinguishing *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), and *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), both of which held that policies

requiring prayer readings in public schools violated the Establishment Clause). Nor did it "matter that the posted copies of the Ten Commandments [were] financed by voluntary private contributions," because "the mere posting" of the Ten Commandments "under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." *Id.* (quoting *Schempp*, 374 U.S. at 222, 83 S.Ct. 1560). As a result, the Supreme Court "conclude[d] that [the Kentucky statute] violate[d] the first part of the *Lemon* . . . test, and thus the Establishment Clause." *Id.* at 42-43, 101 S.Ct. 192.

The Kentucky statute in *Stone* and S.B. 10 are substantively identical. Both require that the Ten Commandments be permanently displayed in every public elementary and secondary school classroom in the state using comparable minimum size requirements, and that the displays be financed by private donations. *Compare* Tex. Educ. Code § 1.0041, *with* Ky. Rev. Stat. § 158.178 (1980). Although, unlike the Kentucky statute, S.B. 10 does not require any accompanying notation about the display's purpose, this is not significant to the analysis under *Stone.* It held the Kentucky statute violated the Establishment Clause *despite* the notation—not *because* of it. *See Stone*, 449 U.S. at 42, 101 S.Ct. 192. And, as with the Kentucky statute, S.B. 10 does not require that the Ten Commandments be "integrated into the school curriculum." *See id. Stone* is on all fours with this case, and under *Stone*, S.B. 10 violates the Establishment Clause.

Appendix D

1. The Supreme Court has not overruled *Stone*.

No Supreme Court decision has overturned *Stone*. It is well-established that 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) (citation modified); *see also Lefebure v. D'Aquilla*, 15 F.4th 650, 660 (5th Cir. 2021) ("[T]he only court that can overturn a Supreme Court precedent is the Supreme Court itself."). It "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000). Rather, "the Supreme Court abrogates its cases with a bang." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 405-06 (5th Cir. 2020) ("Because *McDonald* has direct application in this case, the Court of Appeals should follow it, leaving to the High Court the prerogative of overruling its own decisions." (citation modified)).

"If a precedent of [the Supreme] Court 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). Inferior courts also "should [not] conclude [the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136, 143 S.Ct. 2028, 216

L.Ed.2d 815 (2023) (criticizing a lower court for treating a Supreme Court decision as being "implicitly overruled," as lower courts should follow controlling precedent even if it "is in tension with some other line of decisions" (citation modified)).

This court regularly abides by these principles. *See*, *e.g.*, *United States v. Hernandez*, 159 F.4th 425, 427 n.1 (5th Cir. 2025) (per curiam) ("[W]e lack the authority to recognize 'implicit' overruling by the [Supreme] Court of its precedent."); *Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194, 206 n.11 (5th Cir. 2021) (en banc) ("[E]ven if . . . we could confidently predict *Free Enterprise Fund*'s impending demise, we would still have to follow it. . . ."); *Nat'l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549-50 (5th Cir. 2020) (per curiam) ("[T]he factual underpinning of the controlling Supreme Court decision has changed, but that does not grant a court of appeals license to disregard or overrule that precedent.").[1] Even when governing Supreme Court cases "heavily rel[y] on cases" that have since been "overruled" or had "their reasoning" "seriously called . . . into question," those governing cases "remain controlling law." *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021). Put

1. *See also United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014) (noting that this court "may not blaze a new constitutional trail simply" because certain "authorities impliedly undermine" binding Supreme Court authority (citation modified)); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 474 n.2 (5th Cir. 2001) (JOLLY, J., dissenting on the question of standing) (observing that, under *Rodriguez de Quijas*, "we cannot blithely assume . . . the [Supreme] Court['s] inten[t]").

simply, "[o]ur job, as an inferior court, is to adhere strictly to Supreme Court precedent, whether or not we think a precedent's best days are behind it." *United States v. Vargas*, 74 F.4th 673, 683 (5th Cir. 2023).

Without any case demonstrating that the Supreme Court has exercised its lone "prerogative" to overturn *Stone, Bosse*, 580 U.S. at 3, 137 S.Ct. 1, this court continues to be bound by that case even if it "is in tension with some other line of decisions," *Mallory*, 600 U.S. at 136, 143 S.Ct. 2028, and even if, as Defendants argue, "more recent cases" may appear to "overrule" *Stone* "by implication." *See Agostini*, 521 U.S. at 237, 117 S.Ct. 1997.

2. The Supreme Court has continued to recognize *Stone*'s viability even while sidestepping *Lemon*.

Following *Stone*, the Supreme Court applied *Lemon* variably in Establishment Clause cases. *Compare McCreary Cnty. v. ACLU*, 545 U.S. 844, 881, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (applying *Lemon* and finding an Establishment Clause violation where the Ten Commandments were displayed in Kentucky courthouses), *with Van Orden v. Perry*, 545 U.S. 677, 692, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion) (declining to apply *Lemon* and finding no Establishment Clause violation where the Ten Commandments were displayed at the Texas State Capitol). In *Van Orden*, a plurality of the Court cast doubt on *Lemon*. *See* 545 U.S. at 685-86, 125 S.Ct. 2854 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause

jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."). It opted to instead apply an analysis "driven . . . by our Nation's history." *See id.*[2]

In *Van Orden*, despite applying a historical approach instead of *Lemon*, the plurality cited *Stone* as a "limit[] to the display of religious messages or symbols" and "an example" of the Court's "vigilan[ce] in monitoring compliance with the Establishment Clause in . . . schools." *Id.* at 690-91, 125 S.Ct. 2854.[3] "The placement of the Ten Commandments monument on the Texas State Capitol grounds," *Van Orden* explained, is "*a far more passive*

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2. JUSTICE BREYER took a similar approach in his controlling concurring opinion. *Van Orden*, 545 U.S. at 700, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment). Rather than apply *Lemon*, he concluded the display was constitutional based on "consideration of the basic purposes of the First Amendment's Religion Clauses themselves." *Id.* at 703-04, 125 S.Ct. 2854.

3. Members of the Supreme Court have often observed the distinct operation of the Establishment Clause in the *Stone* context. *See*, *e.g.*, *McCreary*, 545 U.S. at 908, 125 S.Ct. 2722 (SCALIA, J., dissenting) ("If, as discussed above, the Commandments have a proper place in our 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)).

use of those texts than was the case in *Stone*." *Id.* at 691, 125 S.Ct. 2854 (emphasis added). This is because "[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." *Id.* at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment) (citing *Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *Stone*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d). And, unlike in *Van Orden*, "the text" of the Ten Commandments in *Stone* "confronted elementary school students *every day*." *Id.* at 691, 125 S.Ct. 2854 (plurality opinion) (emphasis added).

Van Orden recognized *Stone*'s viability, notwithstanding *Lemon*, given the special "concerns that arise in the context of public elementary and secondary schools." *Id.* (quoting *Edwards*, 482 U.S. at 585, 107 S.Ct. 2573).[4]

3. *Kennedy v. Bremerton School District* did not overturn *Stone*.

Despite the fact that no Supreme Court decision has expressly overturned *Stone*, Defendants assert that it is no longer good law because *Kennedy v. Bremerton School*

4. *See also* 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, 615 (2025) (observing that, "[s]ignificantly, the *Van Orden* plurality distinguished *Stone v. Graham* on grounds that speak directly to the" context of state legislation requiring Ten Commandments displays in classrooms).

District, 597 U.S. 507, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022), "abandoned" *Lemon*.

In *Kennedy*, a high school football coach "lost his job . . . because he knelt at midfield after games to offer a quiet prayer of thanks." 597 U.S. at 512-13, 142 S.Ct. 2407. The coach argued that the school district's actions violated the First Amendment's Free Speech and Free Exercise Clauses. *Id.* at 520, 142 S.Ct. 2407.

The Supreme Court initially concluded that the coach's speech was protected under the First Amendment. *Id.* at 524-31, 142 S.Ct. 2407. The burden therefore shifted to the school district to show that its actions were nevertheless warranted. *Id.* at 531-32, 142 S.Ct. 2407. To meet its burden, the school district maintained that "its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause" because, under "*Lemon* and its progeny," a "reasonable observer could conclude that the government ha[d] endorsed religion." *Id.* at 532-34, 142 S.Ct. 2407 (citation modified). The Supreme Court disagreed, explaining that it "long ago abandoned *Lemon* and its endorsement test offshoot." *Id.* at 534, 142 S.Ct. 2407. As in *Van Orden*, it instead applied a history-based approach to the Establishment Clause:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." "[T]he line" that courts and governments "must draw between the permissible and the

> impermissible" has to "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers." An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "exception" within the "Court's Establishment Clause jurisprudence."

Id. at 535-36, 142 S.Ct. 2407 (citation modified) (alterations in original) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 575-77, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014)).

Applying this framework, the Court explained that the "government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory.'" *Id.* at 537, 142 S.Ct. 2407 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952)). Nor may it "coerce anyone to attend church," *id.* (citation modified), or "force citizens to engage in 'a formal religious exercise.'" *Id.* (quoting *Lee*, 505 U.S. at 589, 112 S.Ct. 2649). The Court also held that "*coercion along these lines* was among the *foremost hallmarks of religious establishments* the framers sought to prohibit when they adopted the First Amendment." *Id.* (emphasis added). Because the coach's actions in *Kennedy* did not involve this kind of "problematic[] coerci[on]," the Court concluded the Establishment Clause was not implicated. *Id.* at 539-42, 142 S.Ct. 2407.

Although *Kennedy* "abandoned *Lemon* and its endorsement test offshoot," it did not cite, much less purport to "abandon" or overturn, *Stone*—despite the

opportunity to do so. *See id.* at 534, 142 S.Ct. 2407.[5] This court must follow Supreme Court precedent even if that "precedent . . . appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917. As a result, this court is bound by *Stone* regardless of whether it applied *Lemon*—i.e., "appears to rest on reasons rejected in" *Kennedy*—because *Stone* "has direct application in" this case. *See id.*[6]

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5. The Court has spoken with clarity in other contexts. *Compare Kennedy*, 597 U.S. at 534, 142 S.Ct. 2407 (stating only that the Supreme Court had "long ago abandoned *Lemon*"), *with W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled. . . ."), *and Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist.*, 411 U.S. 345, 350 n.8, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) ("Insofar as former decisions . . . may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling.").

6. Notably, *Stone* also relied on *Schempp* and *Engel*, two cases that pre-dated *Lemon* by several years. *See Stone*, 449 U.S. at 41-42, 101 S.Ct. 192. And as Judge Dennis has explained, *Schempp*'s "foundational principle"—that "a law must have a secular legislative purpose to withstand the strictures of the Establishment Clause"—continues to "bind[] us" because *Kennedy* did not address *Schempp* or "the secular-purpose requirement." *Roake v. Brumley*, 170 F.4th 292, 307 (5th Cir. 2026) (Dennis, J., dissenting); *see also* Lupu & Tuttle, *supra* note 4, at 619-20 (observing *Stone*'s continued vitality because, among other things, the "requirements pertaining to purpose and effects do not originate with *Lemon*").

Nor did *Kennedy* purport to overturn the full extent of *Lemon*'s "progeny."[7] In fact, *Kennedy* itself relied on *Lemon*'s progeny. *See id.* at 541-42, 142 S.Ct. 2407. It distinguished the factual circumstances in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). *Id. Santa Fe* held, in accordance with *Lemon*, that a school policy of prayer before football games violated the Establishment Clause because "the simple enactment of this policy, with the *purpose* and *perception of school endorsement* of student prayer, was a constitutional violation." 530 U.S. at 314-16, 120 S.Ct. 2266 (emphasis added). *Kennedy* also distinguished *Lee v. Weisman*, in which the Court explicitly rejected the invitation to "reconsider" *Lemon*. *Lee*, 505 U.S. at 587, 112 S.Ct. 2649. Similar to *Santa Fe, Lee* held that a school policy that permitted clergy members to recite prayers at school graduations was unconstitutional. *Id.* at 586-87, 112 S.Ct. 2649.

Although *Kennedy* characterized *Santa Fe* and *Lee* as cases where the Supreme Court found state action "to be problematically coercive," it did not purport to provide an exhaustive list of *Lemon*-era cases that fall under that category. *See Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407. Notably, *Stone* too rested on problematic coercion: it held that "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be

7. The only direct reference to *Lemon*'s "progeny" in *Kennedy* is its recognition that that the school district and Ninth Circuit had "relied on *Lemon* and its progeny." 597 U.S. at 534, 142 S.Ct. 2407. *Groff v. DeJoy* also did not speak to *Lemon*'s progeny—it simply acknowledged that *Lemon* had been "abrogated." 600 U.S. 447, 460, 143 S.Ct. 2279, 216 L.Ed.2d 1041 (2023).

to *induce* the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[8] *Stone*, 449 U.S. at 42, 101 S.Ct. 192 (emphasis added); *see also* Lupu & Tuttle, *supra* note 4, at 620 (noting that *Stone*, like the school prayer cases, "hinged to a concern about state-sponsored religious indoctrination of young, impressionable, and captive audiences"). *Kennedy* did not directly overrule *Stone*, and "we lack the authority to recognize [an] 'implicit' overruling" of all of *Lemon*'s "progeny," especially where the Supreme Court itself continues to rely on those cases. *See Hernandez*, 159 F.4th at 427 n.1; *see also Pizza Hut L.L.C. v. Pandya*, 79 F.4th 535, 542 (5th Cir. 2023) ("[T]he Supreme Court has been careful to instruct lower courts not to read new pronouncements as overruling any related precedent.").

Even accepting Defendants' position that *Kennedy*'s critique of *Lemon* indicates *Stone*'s eventual downfall, they essentially invite this court to "get ahead of the Supreme Court and read tea leaves to predict where it might end up." *See United States v. Mecham*, 950 F.3d 257, 265 (5th Cir. 2020). But we are to "follow [the Supreme Court's] precedents even when," as Defendants suggest, "we don't expect the Court itself to do so." *United States v. Cockerham*, 162 F.4th 500, 510 (5th Cir. 2025) (Ho, J., concurring).[9]

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8. To "induce" is "to move by persuasion or influence." *Induce*, Merriam-Webster Dictionary, https://perma.cc/QEX7-7QGJ.

9. Defendants argue that, even if *Stone* remains good law, it does not control the outcome of this case because, unlike *Stone*, the "legislative history demonstrates that the Texas Legislature had

Whatever the fate of *Stone* may be, "as an inferior court," we must "adhere strictly to" it until the Supreme Court says otherwise. *See Vargas*, 74 F.4th at 683. And under *Stone*, S.B. 10 is unconstitutional.[10]

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numerous secular purposes in passing S.B.10." This court need not delve into the purpose behind S.B. 10. The Supreme Court has already held that "[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.*" *Stone*, 449 U.S. at 41, 101 S.Ct. 192 (emphasis added). Defendants also assert that holding that S.B. 10 violates the Establishment Clause results in a rule of law that disfavors religion and religious expression. As the Supreme Court has explained, "[n]othing . . . could be more wrong." *Engel*, 370 U.S. at 433-35, 82 S.Ct. 1261. "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435, 82 S.Ct. 1261.

10. In addition to the district court in this case, every other district court to independently consider whether statutes requiring the permanent display of the Ten Commandments in public schools are constitutional has concluded that *Stone* remains binding and dispositive. *See Stinson v. Fayetteville Sch. Dist. No. 1*, No. 5:25-Cv-5127, 2026 WL 736964, at *7 (W.D. Ark. Mar. 16, 2026) (permanently enjoining enforcement of an Arkansas statute similar to S.B. 10); *Ringer v. Comal Indep. Sch. Dist.*, 809 F. Supp. 3d 672, 681 (W.D. Tex. 2025) (preliminarily enjoining enforcement of S.B. 10 as to numerous Texas school districts); *Roake v. Brumley*, 756 F. Supp. 3d 93, 116-17 (M.D. La. 2024) (preliminarily enjoining enforcement of a Louisiana statute similar to S.B. 10),

B. S.B. 10 is also unconstitutional under *Kennedy*'s history-based approach.

Stone is dispositive. But even if it was not, S.B. 10 independently violates the Establishment Clause under *Kennedy*.

1. *Kennedy* reaffirmed that the Establishment Clause prohibits religious coercion.

Defendants assert that, under *Kennedy*, there "are six identified 'hallmarks' of religious establishments that the Establishment Clause was adopted to prohibit," and if a challenged practice does not "resemble" one of these hallmarks, there is no constitutional violation. Plaintiffs assert that *Kennedy* only held that the Establishment Clause prohibits religious coercion, and that it did not adopt six particular hallmarks.

Kennedy made clear that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings'" and that the analysis must "focus[] on original meaning and history." 597 U.S. at 535-36, 142 S.Ct. 2407 (quoting *Galloway*, 572 U.S. at 576, 134 S.Ct. 1811). Under that history-based approach, the Court held "*coercion* . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.* at 537, 142 S.Ct. 2407 (emphasis added).

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aff'd, 141 F.4th 614 (5th Cir. 2025), *rev'd en banc*, 170 F.4th 292 (5th Cir. 2026) (concluding only that the dispute was not ripe).

Kennedy specifically placed "coercion along the[] lines" of that found in *Lee* among those "foremost hallmarks." *See Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407. *Lee*, which undisputedly remains binding, concerned an Establishment Clause challenge to a school district policy that "permitted" principals to "invite" clergy members to recite prayers at graduations. 505 U.S. at 580, 112 S.Ct. 2649. Attendance at graduation was "voluntary" and not "a condition for receipt of [a] diploma." *Id.* at 583, 586, 112 S.Ct. 2649. Participation in the "prayer" was also a "choice" for attendees. *Id.* at 591, 112 S.Ct. 2649. In the context of a school graduation—which the Court found is "analogous to the classroom setting" and carries a "heightened" risk of "subtle coercive pressure"—*Lee* concluded the policy inflicted "public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the [prayers]." *Id.* at 592-93, 596, 112 S.Ct. 2649. "This pressure, though subtle and indirect, [could] be as real as any overt compulsion." *Id.* The policy, therefore, "put school-age children who objected" to the prayers "in an untenable position." *Id.* at 590, 112 S.Ct. 2649. They were placed "in the dilemma of participating [in the prayers], with all that implies, or protesting." *Id.* at 593, 112 S.Ct. 2649. *Lee* held "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position," because the "government may not coerce anyone to support or participate in religion or its exercise." *Id.* at 587, 593, 112 S.Ct. 2649.

Kennedy and *Lee* are consistent with a long line of cases that have "observed" the "heightened concerns with

protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *See id.* at 592, 112 S.Ct. 2649 (collecting cases); *see also Galloway*, 572 U.S. at 590, 134 S.Ct. 1811 (distinguishing cases arising in the public-school context from cases concerning "mature adults"); *Mahmoud v. Taylor*, 606 U.S. 522, 554-55, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025) ("[W]e have recognized the potentially coercive nature of classroom instruction of this kind. . . . Young children . . . are often impressionable and implicitly trust their teachers." (citation modified)); *Edwards*, 482 U.S. at 583-84, 107 S.Ct. 2573 ("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."). The threat of "indirect coercion," the Court has explained, "may not be limited to the context of schools, *but it is most pronounced there.*" *Lee*, 505 U.S. at 592, 112 S.Ct. 2649 (emphasis added). "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.* This is because, in the public-school context, 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." *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573 (emphasis added).

The Supreme Court has focused on these precise features, which are unique to the "classroom context," *Van Orden*, 545 U.S. at 690, 125 S.Ct. 2854 (plurality opinion), to distinguish the display of the Ten Commandments on public grounds from their display "on the grounds of a public school." *See id.* at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment). It has likewise highlighted the "[i]nherent differences between the public school system and a session of a state legislature"—the "influence and force" in the school context is "far greater." *Lee*, 505 U.S. at 596-97, 112 S.Ct. 2649. In short, the Supreme Court's "decisions . . . require [this court] to distinguish the public school context" when evaluating Establishment Clause claims. *Id.* at 597, 112 S.Ct. 2649.[11]

2. *Kennedy* did not cabin the Establishment Clause to six exclusive "hallmarks."

Defendants assert that *Kennedy* adopted an exclusive "hallmarks" test based on JUSTICE GORSUCH's concurrence in *Shurtleff v. City of Boston*, 596 U.S. 243, 142 S.Ct. 1583, 212 L.Ed.2d 621 (2022), and that S.B. 10 is constitutional because it does not implicate any of these specific hallmarks.

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11. Unlike other government buildings where the Ten Commandments are displayed, like the Supreme Court and National Archives, school is an "inherently . . . instructional setting," where "students' emulation of teachers as role models and . . . susceptibility to peer pressure . . . raise[s] special concerns regarding state interference." *See Lee*, 505 U.S. at 643, 112 S.Ct. 2649 (SCALIA, J., dissenting).

In a footnote, *Kennedy* cited, among other opinions and authorities, a portion of JUSTICE GORSUCH's *Shurtleff* concurrence "discussing coercion and certain other historical hallmarks of an established religion." *Kennedy*, 597 U.S. at 537 n.5, 142 S.Ct. 2407 (citing *Shurtleff*, 596 U.S. at 285-86, 142 S.Ct. 1583 (GORSUCH, J., concurring in the judgment)). The hallmarks discussed by JUSTICE GORSUCH are: 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 in the judgment).[12]

The Supreme Court, however, did not directly quote or apply the six specific hallmarks outlined in the non-binding *Shurtleff* opinion, much less adopt them as the exclusive Establishment Clause test.[13] Instead, the Court

12. Notably, JUSTICE GORSUCH emphasized that "[m]ost of these hallmarks reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'" *Shurtleff*, 596 U.S. at 286, 142 S.Ct. 1583 (GORSUCH, J., concurring in the judgment) (alterations in original) (quoting *Lee*, 505 U.S. at 587, 112 S.Ct. 2649).

13. No other circuit has held that the hallmarks from JUSTICE GORSUCH's *Shurtleff* concurrence represent the exclusive

cited the *Shurtleff* concurrence only to help illustrate that "*coercion* . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407 (emphasis added).[14]

Establishment Clause test. In *Firewalker-Fields v. Lee*, the Fourth Circuit declined to undertake the Establishment Clause analysis in the first place, instead remanding the issue so that the district court could "take the first pass at addressing the new [*Kennedy*] framework." 58 F.4th 104, 121-22 (4th Cir. 2023). And although the Third Circuit in *Hilsenrath on behalf of C.H. v. School District of Chathams* evaluated an Establishment Clause claim by referencing the hallmarks, it also acknowledged that "*Shurtleff* did not enumerate an exhaustive list" of Establishment Clause violations. 136 F.4th 484, 491 & n.54 (3d Cir. 2025). Notably, consistent with *Kennedy*, its analysis largely focused on *coercion*. *See id.* at 491-92.

14. As one scholar put it, under *Kennedy*, "[c]ourts reviewing state Ten Commandments mandates should . . . ask whether the challenged law shares the coercive structure of historical religious establishments," such as whether the practice "confront[s] a captive audience," compels those with sincere religious beliefs "to respond in a manner that reveals those beliefs," and "occur[s] in a setting where social consequences might attach to dissent." Paul E. McGreal, *Ten Commandments Cases: Learning from Reformation Coercion*, 124 Mich. L. Rev. Online 69, 83 (2026); *see also* Nathan S. Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 156 (2023) [hereinafter Chapman & McConnell, Agreeing to Disagree] (noting *Kennedy* "did not greenlight acts that have coercive effect, and it left in full force the principles of [the school prayer cases]").

3. S.B. 10 is "problematically coercive."

Here, S.B. 10 requires the permanent display of the Ten Commandments in all public-school classrooms. These displays—required to be visible to students "from anywhere in the classroom"—are not passive. *See* TEX. EDUC. CODE § 1.0041(b)(1). The Supreme Court has already explained that if they "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." *Stone*, 449 U.S. at 42, 101 S.Ct. 192. To argue otherwise ignores the unique context of placing religious scripture in public-school classrooms where, "given the impressionability of the young, government must exercise particular care in separating church and state." *See Van Orden*, 545 U.S. at 703, 125 S.Ct. 2854 (BREYER, J., concurring in the judgment); *see also Lee*, 505 U.S. at 597, 112 S.Ct. 2649 ("Our decisions . . . require us to distinguish the public school context."); CHAPMAN & MCCONNELL, AGREEING TO DISAGREE, *supra* note 14, at 145 ("Schools are an inherently coercive environment. Attendance is compulsory, alternatives are costly, and the atmosphere is one of obedience."). It also ignores the self-evident nature of the Ten Commandments: they "command" the reader to follow certain directives. Those directives are largely religious in nature.[15] "[I]mpressionable" schoolchildren,

15. For example, the version of the Ten Commandments required by S.B. 10 states: "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"; and "Remember the Sabbath day, to keep it holy." TEX. EDUC. CODE § 1.0041(c).

who are subject to the State of Texas's "great authority and coercive power" and who often "emulate[e] [their] teachers as role models," *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573, will undoubtedly read these Commandments and feel—at the least—"subtle coercive pressure" to venerate or obey them. *See Lee*, 505 U.S. at 592, 112 S.Ct. 2649.

The "subtle coercive pressure" Texas students will feel is precisely the type that *Lee* identified and that *Kennedy* labeled "problematic[]" under the Establishment Clause. *See Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407. And S.B. 10 implicates a far greater risk of putting students "who object[]" to the Ten Commandments "in an untenable position." *See Lee*, 505 U.S. at 590, 112 S.Ct. 2649. Unlike *Lee*, which concerned prayer only at a graduation ceremony that students were not required to attend or participate in, students' attendance at school is mandatory, and they will be subjected to religious scripture *all day every day*—with no educational function. As "commandments," that religious scripture is also inherently coercive, more so than the "nonsectarian" invocations and benedictions in *Lee* that focused on "inclusiveness and sensitivity." *See id.* at 581-82, 112 S.Ct. 2649 (citation modified).[16]

16. Requiring the permanent fixture of the Ten Commandments in classrooms is also far different, and far more coercive, than requiring students to recite the Pledge of Allegiance, which includes the phrase "under God." To begin, Texas students are permitted to opt out of reciting the Pledge—uttered only once per day, *see* TEX. EDUC. CODE § 25.082(c), whereas S.B. 10 does not allow students to opt out of confronting the Ten Commandments—day in and day out. And, as this court has

"[T]he State may not, consistent with the Establishment Clause, place primary and secondary school children in [the] position" of reading and venerating the Ten Commandments, "with all that implies," or "protesting." *See id.* at 593, 112 S.Ct. 2649.[17] To avoid this "dilemma," *id.*, parent-Plaintiffs will be forced to incur the costs of sending their children to private school, or avoid school altogether and risk fines and prosecution under Texas's compulsory attendance laws. *See* TEX. EDUC. CODE §§ 25.085, 25.093.[18] But "[p]ublic education is a public benefit, and the government cannot 'condition' its 'availability' on parents' willingness to accept a burden on their [First Amendment rights]." *Mahmoud*, 606 U.S. at 530, 145 S.Ct. 2332 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017)). If the graduation prayer

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described it, the Pledge is "nonsectarian" and "patriotic," with a "minimal" "religious component." *See Croft v. Perry*, 624 F.3d 157, 164-66, 170 (5th Cir. 2010) (concerning the Pledge to the Texas flag, which includes a reference to "God" that "was designed to mirror the [one] found in the [P]ledge of [A]llegiance to the United States flag"). S.B. 10's Protestant—i.e., sectarian—version of the Ten Commandments, by contrast, is plainly religious scripture untethered to educational or patriotic function.

17. For example, "a Catholic student viewing the Protestant version of the Ten Commandments faces the . . . dilemma" of "acquiesc[ing] to" what they sincerely believe is "theological error or speak[ing] up and mark[ing] themselves as different." McGreal, *supra* note 14, at 78.

18. In this way, S.B. 10 also implicates the *Shurtleff* hallmarks by "punish[ing] dissent[ers]." *See Shurtleff*, 596 U.S. at 286, 142 S.Ct. 1583 (GORSUCH, J., concurring in the judgment).

in *Lee* is "problematically coercive," it cannot follow that the permanent fixture of the Ten *Commandments* in all public-school classrooms is not. *See Kennedy*, 597 U.S. at 541, 142 S.Ct. 2407.

The coercive impact of S.B. 10 is also in no way mitigated by the fact that Texas students will *read* the scripture rather than *hear* it. *See Stone*, 449 U.S. at 42, 101 S.Ct. 192 ("Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud. . . ."). To argue otherwise is to suggest that the students in *Schempp* and *Lee* could simply cover their ears during the prayer recitations to avoid a constitutional issue. But just as *Schempp* held that a school-prayer statute violated the Establishment Clause notwithstanding students' ability to "absent" themselves, 374 U.S. at 207, 83 S.Ct. 1560, and just as *Lee* acknowledged that, despite the *appearance* of voluntariness, "participation in the state-sponsored religious activity [was] in a fair and real sense obligatory," 505 U.S. at 586, 112 S.Ct. 2649, S.B. 10 is not absolved of coercive effect simply because the displays are silent and students can supposedly look away.[19] Importantly, forced recitation of religious scripture is not the mark of an Establishment Clause violation. *See*, *e.g.*, *id.* at 591, 112 S.Ct. 2649 (finding an Establishment Clause violation even

19. *See* McGreal, *supra* note 14, at 79-80 (observing that, because students objecting to the Ten Commandments based on sincerely held religious beliefs "view the display as communicating religious error," to "suggest[] students merely 'look away' asks them to affirm a false teaching that the government has presented as religious truth").

where students' participation in prayer was a "choice").[20] It is whether the challenged state action carries the "risk" of "coerc[ing] anyone to support or participate in religion or its exercise." *See id.* at 587, 592, 112 S.Ct. 2649; *see also Shurtleff*, 596 U.S. at 286, 142 S.Ct. 1583 (GORSUCH, J., concurring in the judgment) (observing that "coercion regarding religion or its exercise" encompasses "founding-era religious establishments" (citation modified)). It does not matter whether this threatened coercion is "overt." *Lee*, 505 U.S. at 593, 112 S.Ct. 2649. Especially in the distinct public-school context, "subtle and indirect" pressure "can be as real as any overt compulsion." *Id.*[21]

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20. *See also* Lupu & Tuttle, *supra* note 4, at 636 ("A legal requirement that students recite the Ten Commandments is unnecessary to show a violation. Repetitive and conspicuous exposure to a sacred text, at the state's insistence, is enough.").

21. Because S.B. 10 violates the Establishment Clause under *Stone* and *Kennedy*, whether the statute also implicates unconstitutional denominational preference is not substantively addressed here. But, as JUDGE HIGGINSON explained in his dissenting opinion in *Roake*, and as expanded upon in his dissenting opinion in this case, "the Supreme Court has been especially vigilant against denominational discrimination inside the schoolhouse gate." *Roake*, 170 F.4th at 309 (HIGGINSON, J., dissenting). And legislation requiring the permanent fixture of a state-selected Protestant version of the Ten Commandments in all public schools "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 disestablishment imperative." *Id.* at 310-11, 311 n.10 (explaining that "the No Religious Test Clause's fundamental purpose was to put all sects on the same footing" (citation modified)).

Because Plaintiffs "will be . . . induce[d] . . . to read, meditate upon, [and] perhaps to venerate and obey, the Commandments," *Stone*, 449 U.S. at 42, 101 S.Ct. 192, which implicates a "foremost hallmark[] of religious establishment," *Kennedy*, 597 U.S. at 537, 142 S.Ct. 2407, S.B. 10 facially violates the Establishment Clause.[22]

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22. Nor does "history show" that requiring the Ten Commandments to be posted in all public-school classrooms "is permitted" under the Establishment Clause, or that this practice "could coexist with the principles of disestablishment and religious freedom." *See Galloway*, 572 U.S. at 577-78, 134 S.Ct. 1811 (citation modified); *cf. Yoder*, 406 U.S. at 232, 92 S.Ct. 1526 (observing instead that "[t]he history and culture of Western civilization reflect a strong tradition of *parental* concern for the nurture and [religious] upbringing of their children," which is "established beyond debate as an enduring American tradition" (emphasis added)). After all, "[p]ublic education was virtually nonexistent at the time the Constitution was adopted." *Edwards*, 482 U.S. at 583 n.4, 107 S.Ct. 2573; *see also Schempp*, 374 U.S. at 238, 83 S.Ct. 1560 (BRENNAN, J., concurring) ("[T]he structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an 'establishment' offer little aid to decision."); *Morse v. Frederick*, 551 U.S. 393, 411, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (THOMAS, J., concurring) (noting "public education" did not "proliferate[]" until "the early 1800's" (citing WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND" 11-12 (2005))). And, as Plaintiffs allege and the record evidence supports, there is no longstanding tradition of permanently displaying the Ten Commandments in public-school classrooms, nor were they otherwise a historically prominent part of early American

II. The Free Exercise Clause

"The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice. . . ." *Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). The Supreme Court has also "long recognized the rights of parents to direct the religious upbringing of their children," which—under the Free Exercise Clause—is "violated by government policies that substantially interfere with the religious development of children." *Mahmoud*, 660 U.S. at 546, 145 S.Ct. 2332 (citation modified).

The government, however, "is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable." *Id.* at 564, 145 S.Ct. 2332. Where a "burden on religious exercise is found," courts generally ask two questions. *Id.* First, is "the burdensome policy . . . neutral and generally applicable[?]" *Id.* Second, if the policy is not neutral, can the policy survive strict scrutiny? *Id.* Notably, courts can bypass the first question and proceed

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public education. *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) ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties."); *Yoder*, 406 U.S. at 209, 92 S.Ct. 1526 (relying on expert testimony by "scholars on religion and education" in a religious liberty case). Because—in addition to being problematically coercive under *Kennedy*—the permanent posting of the Ten Commandments in public-school classrooms does not fit within a broader founding-era tradition, S.B. 10 violates the Establishment Clause.

directly to the strict scrutiny analysis where the policies "'substantially interfer[e] with the religious development' of the parents' children" and "pose 'a very real threat of undermining' the religious beliefs and practices that the parents wish to instill in their children." *See id.* at 564-65, 145 S.Ct. 2332 (alteration in original) (quoting *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526).

In *Mahmoud*, a school board approved five "'LGBTQ+-inclusive' texts for use in the . . . curriculum" for elementary school students. 606 U.S. at 533, 145 S.Ct. 2332. The board did not permit students to opt out, causing several parents to challenge the "no-opt-out policy" under the Free Exercise Clause. *Id.* at 537-39, 543, 145 S.Ct. 2332. The Supreme Court held that the policy "substantially interfere[d] with the religious development of [the plaintiffs'] children" because the books were "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected." *Id.* at 550, 145 S.Ct. 2332. According to the Court, the books' contents "impose[d] upon children a set of values and beliefs that [were] 'hostile' to their parents' religious beliefs" and pressured children to conform. *Id.* at 554, 145 S.Ct. 2332 (quoting *Yoder*, 406 U.S. at 211, 92 S.Ct. 1526). The "danger to the free exercise of religion" presented by the books was "exacerbated by the fact that [they would] be presented to young children by authority figures in elementary school classrooms." *Id.* at 554, 145 S.Ct. 2332 (citation modified).

Given the "character" of the burden, *Mahmoud* proceeded directly to the strict scrutiny inquiry—

bypassing the question of whether the board's policy was neutral and generally applicable. *Id.* at 565, 145 S.Ct. 2332. Although the Court credited the board's assertion of a compelling interest—avoiding classroom disruptions—it found that the "no-opt-out policy" was not "necessary to serve that interest." *Id.* at 566, 145 S.Ct. 2332. Because the policy could not survive strict scrutiny, the Supreme Court granted a preliminary injunction requiring the board to allow opt-outs. *Id.* at 569, 145 S.Ct. 2332.

A. S.B. 10 substantially burdens Plaintiffs' religious exercise.

S.B. 10 requires the permanent display of religious scripture in every classroom. The displays implore specific *religious* directives—e.g., "[t]hou shalt have no other gods before me"—that, as in *Mahmoud*, are "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected." *See id.* at 550, 145 S.Ct. 2332. The displays also "carry with them a very real threat of undermining the religious beliefs that the parents wish to instill in their children" because they "impose upon children a set of values and beliefs that are hostile to their parents'." *See id.* at 553-54, 145 S.Ct. 2332 (citation modified). And, as *commandments*, the displays clearly "exert upon children a psychological pressure to conform to [the displays'] specific viewpoints." *See id.* at 554, 145 S.Ct. 2332 (citation modified). As a result, the displays mandated by S.B. 10 substantially burden Plaintiffs' religious exercise because they "interfere with [the] student[s'] religious upbringing[s]." *See id.* at 547, 145 S.Ct. 2332.

This burden is not diminished simply because S.B. 10 does not require the Ten Commandments to be integrated into the curriculum. Significantly, the books in *Mahmoud* were not overtly religious—they were about "sexuality and gender." *See id.* at 529, 145 S.Ct. 2332. As a result, their mere presence on a shelf *could not* reasonably conflict with the plaintiffs' sincerely held religious beliefs—the issue was necessarily how the books were integrated into instruction. By contrast, the Ten Commandments are plainly religious, and their contents are—by their very nature—plainly instructive. As the Supreme Court put it, "[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." *Stone*, 449 U.S. at 42, 101 S.Ct. 192 (emphasis added). "Only by air-brushing the record can [Defendants] claim that the [Commandments] . . . are just about exposure. . . ." *See Mahmoud*, 606 U.S. at 556, 145 S.Ct. 2332. In any event, "[w]hether or not a requirement or curriculum could be characterized as 'exposure' is not the touchstone for determining whether" a Free Exercise Clause violation has occurred. *See id.* "The question . . . is whether the educational requirement or curriculum at issue would substantially interfere with the religious development of the child or pose a very real threat of undermining the religious beliefs and practices the parent wishes to instill in the child." *Id.* (citation modified). As discussed, S.B. 10's requirements clear that threshold.

Nor is it significant that Plaintiffs are not only seeking to "opt out" of a particular educational requirement. *Mahmoud* does not limit the Free Exercise Clause to

that kind of relief. And importantly, S.B. 10 provides no practicable means for students to opt out. The Ten Commandments are required to be posted in every classroom of every public school during every hour of every day of the school year. The scripture will either be posted (in accordance with S.B. 10) or not (in violation of S.B. 10). As a result, there is no meaningful way for a student to opt out, as there was in *Mahmoud*, other than to "forgo" the "public benefit" of public school or face consequences under compulsory attendance laws. *See id.* at 561, 145 S.Ct. 2332. But, as discussed, "the government cannot condition" the "availability" of public school "on parents' willingness to accept a burden on their religious exercise." *Id.* (citation modified).

B. Defendants have not satisfied strict scrutiny.

Because the "character" of the burden that S.B. 10 imposes is "of the same character as that imposed in" *Mahmoud*, the next step is to apply strict scrutiny regardless of whether the statute is neutral and generally applicable. *See id.* at 564, 145 S.Ct. 2332. Under strict scrutiny, "the government must demonstrate that 'its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.'" *Id.* (quoting *Kennedy*, 597 U.S. at 525, 142 S.Ct. 2407).

Defendants do not even attempt to articulate a compelling government interest to satisfy strict scrutiny. But even if they had advanced a compelling interest, such as education or history, Defendants would fail strict scrutiny under the narrow tailoring prong. As the

Supreme Court has already found, "[p]osting of religious texts on the wall serves no such educational function." *Stone*, 449 U.S. at 42, 101 S.Ct. 192. And "[t]his is not a case" where, for instance, "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." *See id.* (citing *Schempp*, 374 U.S. at 225, 83 S.Ct. 1560).

* * *

The displays required by S.B. 10 threaten to "undermin[e] the religious beliefs that parents wish to instill in their children" and "pressure" students "to conform," and Defendants have not satisfied strict scrutiny. *See Mahmoud*, 606 U.S. at 553-54, 145 S.Ct. 2332 (citation modified). As a result, Plaintiffs have established a Free Exercise Clause violation.

III. Conclusion

Because S.B. 10 is facially unconstitutional under the Establishment and Free Exercise Clauses, I would affirm the district court's entry of a preliminary injunction and denial of Defendants' motion to dismiss. I respectfully dissent.

Appendix D

LESLIE H. SOUTHWICK, *Circuit Judge*, joined by RICHMAN, GRAVES, HIGGINSON, DOUGLAS and RAMIREZ, *Circuit Judges*, dissenting:*

Despite the thoroughness and erudition of the majority opinion, I disagree with it. The dissents by my colleagues, JUDGES HIGGINSON and RAMIREZ, also deserve commendation, but I find myself unable to join either in full. Thus, I write separately to explain my reasons for dissenting.

What is not part of my dissent is a rejection of the importance of searching for faith. Religion, though, is a matter of the mind and the heart. Faith cannot flourish when it is forced. A poem voices my concern and, I humbly offer, that of the First Amendment:

> The livid lightnings flashed in the clouds;
> The leaden thunders crashed.
> A worshipper raised his arm.
> "Hearken! hearken! The voice of God!"
>
> "Not so," said a man.
> "The voice of God whispers in the heart
> So softly
> That the soul pauses,
> Making no noise,
> And strives for these melodies,
> Distant, sighing, like faintest breath,
> And all the being is still to hear."

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* JUDGES HIGGINSON, DOUGLAS, and RAMIREZ join Parts I and II of this opinion. JUDGES RICHMAN and GRAVES join Part II B.

Stephen Crane, *The Black Riders and Other Lines*, Lines xxxix (1895), *reprinted in* THE COLLECTED POEMS OF STEPHEN CRANE 41, 41 (Wilson Follett ed., 1930). Like any effective poetry, these lines can give different meaning to different readers at different times. In this opinion, they capture for me that government promotion of religion in every classroom is simulated lightning and thunder, compulsorily seen and heard.

Despite my opening commentary, I have not forgotten that this is a judicial opinion. Poems and sentiments about faith do not control. Precedents and constitutional text do. My principal objection to the majority opinion is that it finds a recent Supreme Court precedent to be more sweeping in its discard of prior precedent than I do, that precedent being *Kennedy v. Bremerton School District*, 597 U.S. 507, 142 S. Ct. 2407, 213 L.Ed.2d 755 (2022). The *Kennedy* opinion made clear that we no longer apply a test from one earlier precedent, the appropriately named *Lemon* test that I will discuss momentarily. The difficulty is that the *Lemon* test was a fusion of First Amendment caselaw, binding together the holdings of several lines of cases to create a definitive test for Establishment Clause cases. In my view, the test was disassembled, and one part discarded—but other parts of what had been fused remain usable.

My objective here is to sift through the Establishment Clause jurisprudence left by *Kennedy* and determine what still applies. The sifting leads me to conclude that, under still-binding Supreme Court precedent, the Texas statute here is violative of the Establishment Clause. The

Supreme Court may change the law further, but it has not done so yet. This inferior-court judge concludes we are doing so. That is not our role.

I. Pre-*Lemon* Principles of the Establishment Clause

One source of ambiguity is that the Supreme Court did not clearly and in one decision formally bury *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). It was more like a death by a thousand—or at least numerous—slowly administered cuts. Finally, the Supreme Court declared that it "long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy*, 142 S. Ct. at 2427 (citing *American Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 139 S. Ct. 2067, 2079-81, 204 L.Ed.2d 452 (2019) (plurality opinion)). The Court did reaffirm the precedents that had "instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (quotation marks omitted) (first quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); and then citing *American Legion*, 139 S. Ct. at 2079-81 (plurality opinion)). Other than requiring the use of history, *Kennedy* did not specify how it left the law after abrogating *Lemon.* In my view, the best reading of the case is that it abandoned *Lemon*'s "grand unified theory" and overruled the endorsement test, but it left standing the rest of the Court's Establishment Clause caselaw and the command to let history guide the inquiry. *See id.* at 2427-28 (quoting *American Legion*, 139 S. Ct. at 2101 (GORSUCH, J., concurring in judgment)).

Appendix D

Of importance in understanding what remains from prior caselaw, the Court portrayed its holding in *Kennedy* as consistent with its recent (and some not so recent) opinions, recognizing its gradual overruling of the good-intentions-gone-astray *Lemon* precedent. *Kennedy*, 142 S. Ct. at 2428 n.4 ("In the last two decades, this Court has often criticized or ignored *Lemon* and its endorsement test variation."). In this sense, the Court did not create a new test but insisted it was formally abandoning a derelict precedent for the test that had functionally replaced it in the last few decades.

Now, a close look at *Lemon*. That opinion is best understood as the glue that bound together several different principles in a failed experiment to form one test for Establishment Clause cases. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105; *see Kennedy*, 142 S. Ct. at 2427. *Kennedy*, though, dissolved that glue and replaced *Lemon* with history as one lodestar, but it never discarded the principles that *Lemon* bound together. *See Kennedy*, 142 S. Ct. at 2427-29 (explicitly abolishing only the endorsement test). Certainly, *Kennedy* overruled *Lemon* and any progeny that rested on the unified *Lemon* test. My disagreement with the majority comes from the fact that a directly-on-point precedent about the Ten Commandments did not principally rely on *Lemon*'s uniform-test progeny, but on its progenitors. *See Stone v. Graham*, 449 U.S. 39, 41-43, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). *Kennedy* said nothing about the cases that predated *Lemon*, and I find no indication in *Kennedy* that the Court was discarding the entirety of its Establishment Clause law when it said

that one opinion and its offspring had been "long ago abandoned." *Kennedy*, 142 S. Ct. at 2427.

The school prayer cases—which I see as largely resolving the case before us and on which *Stone* primarily relied—are still good law. The *Kennedy* majority cites *American Legion* for the proposition that *Lemon* has been abandoned over time. *Id.* The majority here recognizes *American Legion* as good law but fails to mention that *American Legion* did not cast doubt on the secular purpose requirement that stems from the school prayer cases. In its opinion, the *American Legion* Court engaged with the facts on terms of secular purpose. *American Legion*, 139 S. Ct. at 2080-85. It held that a 32-foot-tall Latin cross in Bladensburg, Maryland, constructed in 1925 to honor local service-members who had died in what was then known as the Great War, had accrued a sufficiently secular meaning over the years to defeat an Establishment Clause challenge. *Id.* at 2077, 2080-85. The Court distinguished between "established" displays and "new" displays, reasoning that established displays become more secular in purpose the more embedded they are in a community, whereas new displays retain their religious character. *See id.* at 2085. Importantly, the majority sought to show that the Bladensburg Cross did not violate the Establishment Clause because that specific cross had gained substantial secular meaning, not that it was defensible *as* a religious symbol. *Id.* at 2082-85.

Further, the Court in *American Legion* divided its Establishment Clause cases into six categories; the majority's reasoning was largely confined to the category

of "religious references or imagery in public monuments." *Id.* at 2081 n.16. For the fourth, and much different, category, "religious expression in public schools," the Court cited two of the school prayer cases as paradigmatic examples. *Id.* (first citing *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); and then citing *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)). *Schempp* is the quintessential secular purpose case. *Schempp*, 374 U.S. at 222, 83 S.Ct. 1560. The Court did not engage with the school prayer cases other than according them a place in its taxonomy, recognizing a secular purpose case's continuing status as good law. *See American Legion*, 139 S. Ct. at 2080. The Court's engaging in a sort of "secular purpose" reasoning, citing to *Schempp*, and leaving the school prayer cases otherwise alone all show that the Supreme Court did not mean to dismantle all its other Establishment Clause precedents even while it deposed *Lemon*. *Id.* at 2080-81 & n.16.

In the other case the *Kennedy* majority cites as an exemplar of its historical approach, the Court held that any legitimate Establishment Clause test "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811. The Court relied heavily on prior precedent holding that Nebraska's longstanding and unbroken practice of opening legislative sessions with a religious invocation did not run afoul of the Establishment Clause. *Id.* at 575-85, 134 S.Ct. 1811 (discussing *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983)). The Court in its

Town of Greece opinion held that the brief prayer at issue had a "permissible ceremonial purpose," as its "purpose and effect [were] to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers." *Id.* at 591, 134 S.Ct. 1811 (plurality opinion). The "principal audience" of the invocations was the "lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* at 587, 134 S.Ct. 1811.

The historical pedigree of legislative prayer was certainly the focus of *Town of Greece*, but the Court nonetheless observed that a showing of "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose" could potentially "establish a constitutional violation" in a legislative prayer case. *Id.* at 585, 134 S.Ct. 1811 (majority). The Court thus examined the purpose of the town's policy and found it to be an acceptable one, demonstrating that conduct with its origin in religion can find a place in public life and even further the community's civic values. *See id.* at 591, 134 S.Ct. 1811 (plurality opinion).

Aside from one cursory reference, the *Kennedy* Court did not refer to the principles contained within *Lemon*. *See Kennedy*, 142 S. Ct. at 2427. This is easy to explain. There was simply no occasion to engage with them. The Court determined that Kennedy was a private citizen performing a private prayer, so there was scant need to contend with any threat of excessive entanglement with religion. *Id.* at 2429. Similarly, a non-secular purpose is

perfectly proper for a private citizen, and there was no need to determine whether a primary effect of the prayer was to further religion because, again, Kennedy's prayers were silent and private. *See id.*

I will summarize. *Kennedy* stated that *Lemon*'s "'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause" had been abandoned by the Court long ago, with *Kennedy* being the first time a majority of the Court declared abandonment in one opinion. *Id.* at 2427-28 (quoting *American Legion*, 139 S. Ct. at 2080 (plurality opinion)). *Kennedy* relied on prior Supreme Court cases in determining whether the school district's permitting Kennedy's conduct was constitutional under the Establishment Clause. *See id.* at 2430-32. Those cases that discarded *Lemon*, then, acknowledged and left alive the secular purpose requirement—indeed, they reinforced its vitality.

My understanding of this caselaw is that the Supreme Court has not overruled decades of precedent predating *Lemon*, but rather has dictated that *both* our history of religious expression and the Court's precedents matter. Here, the historical evidence is, at best, inconclusive about these types of religious displays in public schools. There is hardly the same quantum or quality of evidence here as there was in *Marsh*, *Town of Greece*, or *American Legion*. This dearth of historical evidence does not allow us to ignore still-effective Supreme Court precedent and construct a new jurisprudence of the Establishment Clause from the ground up based on what we see as the

best understanding of what an establishment of religion meant historically.[1]

I now explain what I find remains of prior precedent after the Supreme Court disassembled the unitary *Lemon* approach.

II. Applying the Doctrine

a. Secular Purpose

The requirement that laws have a secular purpose is deeply embedded in Establishment Clause precedent. *See Schempp*, 374 U.S. at 222, 83 S.Ct. 1560; *see also Town of Greece*, 572 U.S. at 585, 134 S.Ct. 1811 (suggesting that, without actions that "betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation"); *id.* at 587, 590-91, 134 S.Ct. 1811 (plurality opinion) (explaining that remarks possessed a "permissible ceremonial purpose" of setting lawmakers' "mind[s] to a higher purpose," which "thereby eases the task of governing," at

1. When considering historical evidence helpful to interpreting the Second Amendment, the Supreme Court mentioned scholarly uncertainty as to whether the relevant history was from the Founding era when the amendment was written and ratified or from the Reconstruction era when the Fourteenth Amendment was written and ratified. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 2138, 213 L.Ed.2d 387 (2022). The Court found no need to resolve the question in light of the similarity of the evidence from both periods. *Id.* In my analysis, the specific time period here is also irrelevant but for different reasons.

least when the audience is composed of "mature adults"); *American Legion*, 139 S. Ct. at 2082-85 (explaining the purpose and meaning of the Bladensburg Cross monument had become sufficiently secular over time).

In essence, the school prayer cases established that state action with the purpose of "the advancement or inhibition of religion . . . exceeds the scope of legislative power as circumscribed by the Constitution." *Schempp*, 374 U.S. at 222, 83 S.Ct. 1560. This does not mean, though, that religious motivation may not be part of the reason for a governmental decision if a secular purpose dominates. *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). The Supreme Court has instructed us to be "particularly vigilant in monitoring compliance with the Establishment Clause" in the primary and secondary school context. *Van Orden v. Perry*, 545 U.S. 677, 691, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)). This is because of the considerable influence schools exert over impressionable young minds and the "involuntary[iness]" of their attendance. *Aguillard*, 482 U.S. at 584, 107 S.Ct. 2573.

The precedent most clearly on point is *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). In *Stone*, Kentucky passed a materially similar law to the one before us, though one that had a stronger claim to a secular purpose, requiring that every public school classroom contain a Ten Commandments display above a context statement that invoked the Commandments' "secular application" as the "fundamental legal code of

Western Civilization and the Common Law of the United States." *See id.* at 39 n.1, 101 S.Ct. 192 (citation omitted). Texas's law, by contrast, forbids any context statement, and it requires that the Commandments be "legible to a person with average vision from anywhere in the classroom." TEX. EDUC. CODE § 1.0041(b)(1).

Texas contends that *Kennedy* overruled *Stone* by overruling *Lemon.* Even though *Stone* cited *Lemon*, the question of *Stone*'s validity turns on whether it depended on *Lemon* for its holding or if it applied the secular purpose principle despite its references to *Lemon. See Stone*, 449 U.S. at 40, 43, 101 S.Ct. 192 (citing *Lemon*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). Outside of quoting the *Lemon* test—the then-operative "grand unified theory" of Establishment Clause law, *Kennedy*, 142 S. Ct. at 2427 (citation omitted)—the *Stone* majority opinion's sole reference to *Lemon* clarified that the Kentucky statute "violate[d] the first part of the *Lemon* . . . test," *i.e.*, the secular purpose requirement. *Stone*, 449 U.S. at 43, 101 S.Ct. 192. Texas makes no persuasive argument that this is an application of the abandoned *Lemon* test in its own right, nor can it. As I explain above, the individual pieces of the Supreme Court's Establishment Clause jurisprudence have not been discarded, only the endorsement test and the *Lemon* test's aggregation of principles. The mere fact that the Court cited the broader test to apply the narrower principle does not doom *Stone.* The Court's citation to *Lemon* was rote—the reasoning for *why* the Kentucky law violated the Establishment Clause rested entirely on *Schempp* and *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d

601 (1962). *Stone*, 449 U.S. at 41-42, 101 S.Ct. 192; *see Van Orden*, 545 U.S. at 690-91, 125 S.Ct. 2854 (plurality opinion) (describing *Stone*'s "almost exclusive reliance upon two . . . school prayer cases"). Because *Stone* rested on good law, it was not abrogated along with *Lemon*.

Since I believe *Stone* has outlived *Lemon*, I apply it here. The Supreme Court has twice held violative of the Establishment Clause "a text of the Commandments as distinct from any traditionally symbolic representation, [standing] alone." *McCreary County v. Am. C.L. Union of Ky.*, 545 U.S. 844, 868, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005). If the displays in *Stone* and *McCreary* were not even "arguably secular," Texas cannot support a secular purpose here. *See id.* The displays, by Texas's own admission, are not a part of an educational program, nor will they serve any specific curricular purpose. *See Schempp*, 374 U.S. at 225, 83 S.Ct. 1560. Texas's only evidence of a secular purpose comes from several statements from individual legislators. The Court in *Stone*, however, did not hold that the displays violated the secular purpose requirement because legislators had made comments that revealed the religious motivations behind the statute; rather, the Court emphasized that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is," on its face, "plainly religious in nature." *Stone*, 449 U.S. at 41, 101 S.Ct. 192. In fact, the Court stated that "no legislative recitation of a supposed secular purpose c[ould] blind [it] to that fact," given the imperative and distinctly religious nature of the prefatory phrase and the first four Commandments in particular. *Id.* at 41-42, 101 S.Ct. 192; *McCreary*, 545 U.S.

at 869, 125 S.Ct. 2722 (holding that a "religious object is unmistakable" when the text comprises of a "religious statement dealing with religious obligations and morality subject to religious sanction").

This led the Court to the conclusion that, 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." *Stone*, 449 U.S. at 42, 101 S.Ct. 192. Under binding Supreme Court precedent, that purpose is not "a permissible state objective under the Establishment Clause." *Id.* Absent an abandonment not just of *Lemon* but also of the secular purpose standard that predated it, I would hold that *Stone* by itself or other precedents that insist on a secular purpose dispose of this case.

b. Coercion similar to school prayer

The following is an alternative but related reason to find S.B. 10 unconstitutional. The Supreme Court has held that public-school-sponsored prayers, or prayers at events where attendance is mandatory or quasi-mandatory, violate the Establishment Clause.[2] Of course, posting the Ten Commandments on classroom walls is not identical to prayer, but the same analysis applies if similar coercion results both from the display and from a school-sponsored prayer.

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2. *Engel v. Vitale*, 370 U.S. 421, 430-31, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *Schempp*, 374 U.S. at 222-23, 83 S.Ct. 1560; *Lee v. Weisman*, 505 U.S. 577, 586-87, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-313, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

The school prayer cases not only establish that "there must be a secular legislative purpose" for our laws, but also that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Schempp*, 374 U.S. at 221-22, 83 S.Ct. 1560 (quoting *Engel v. Vitale*, 370 U.S. 421, 431, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962)).

There certainly is "disagree[ment] on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause" in the Supreme Court's caselaw. *Kennedy*, 142 S. Ct. at 2429. As the majority in the present case states, there is no question that the Supreme Court left untouched two of its more recent school prayer cases. Because these cases have not been overruled or abandoned, we are obligated to determine whether posting the Ten Commandments involves more or less coercion than in those—we are not free to disregard the type of coercion the Court has viewed as problematic in favor of a narrower understanding of coercion. *See Lee*, 505 U.S. at 593, 112 S.Ct. 2649; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-13, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

The *Kennedy* Court's coercion analysis did not undermine, but indeed reinforced, the longstanding view of coercion: The Court held that there was no coercion because Kennedy's prayers were private and silent, unlike in *Lee* and *Santa Fe*, where student participation was

mandatory or practically so, and students were a "captive audience."[3] *Kennedy*, 142 S. Ct. at 2431-32.

I apply the guidance from this caselaw to determine whether this schoolroom display is coercive. A variety of factors have been identified for this fact-sensitive inquiry. The "State exerts great authority and coercive power through mandatory attendance requirements," amplified by "children's susceptibility to peer pressure" in the school environment and their perception of school figures as role models. *Aguillard*, 482 U.S. at 584, 107 S.Ct. 2573; *Santa Fe*, 530 U.S. at 311-12, 120 S.Ct. 2266. In the school context, the state may not exert "coercive pressure" on students to conform with state-approved religious views, even if that pressure is "subtle and indirect." *Lee*, 505 U.S. at 592-93, 112 S.Ct. 2649. Both "public pressure" and "peer pressure" are considered, as the "government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.* at 592-94, 112 S.Ct. 2649 (citing school prayer cases).

Here, there is coercion in the sense described by the school prayer cases. States are selective with the

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3. The *Town of Greece* Court engaged in a similar coercion analysis. *Town of Greece*, 572 U.S. at 586-90, 134 S.Ct. 1811 (plurality opinion). A plurality distinguished two school prayer cases, *Lee* and *Santa Fe*, emphasizing that those cases require a close reading of the facts and paying attention to the fact that the town board meetings largely involved "mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'" *Id.* at 590, 134 S.Ct. 1811 (quoting *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330).

instructions they require to be posted in classrooms—they do so only when the state wants those instructions followed. Brief for Baptist Joint Committee for Religious Liberty et al. as Amici Curiae in Support of Plaintiffs-Appellees at 22, *Roake v. Brumley*, No. 24-30706, 2026 WL 482555 (2026). One *amicus* argues students "will be confronted with the State's religious instruction every minute of every day and cannot 'opt out' from this pervasive messaging," which is "*more* pervasive than the limited amounts of prayer found unconstitutional" in the school prayer cases, lasting "a few minutes or less." *Id.* at 23. Maybe not continuously "confronted," but students will have the display visible all day in every classroom. The *Lee* Court recognized that requiring students to stand and be silent at a graduation worked a "subtle and indirect" coercion, that was "as real as any overt compulsion." *Lee*, 505 U.S. at 593, 112 S.Ct. 2649. What the Texas statute requires here is at least as coercive.

Texas argues that, to be improper, the coercion must pressure students to engage in a "formal religious exercise," and here there is no compulsion of this sort. Texas's understanding of the coercion test, though, overlooks the *Kennedy* Court's nod to *Santa Fe*, in which there was no coercion actually to pray, just a prayer broadcast "'over the public address system' before each football game."[4] *Kennedy*, 142 S. Ct. at 2431-32 (quoting

4. In *Santa Fe*, the Court observed that there was coercion in being seen as participating in group prayer, an "act of religious worship." 530 U.S. at 312, 120 S.Ct. 2266. Yet, the reason why that specific "act of religious worship" was unconstitutional is because it attempted to "exact religious conformity" and "enforce a religious

Santa Fe, 530 U.S. at 294, 120 S.Ct. 2266). A broadcast prayer for which no active participation is required is comparable on the coercion axis from posted religious commandments.[5] Indeed, the Court in *Santa Fe* urged that "[l]aw reaches past formalism," finding a coercive effect for students whose presence was not formally compelled and who would merely be forced to listen to, and be seen to respect, a prayer from the public announcement system. *Santa Fe*, 530 U.S. at 310-312, 120 S.Ct. 2266 (quoting *Lee*, 505 U.S. at 595, 112 S.Ct. 2649).

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orthodoxy" using the "machinery of the State." *Id.* (alteration in original) (quoting *Lee*, 505 U.S. at 592, 112 S.Ct. 2649). In this sense, the fact that a formal religious exercise was involved was just the means by which "orthodoxy" was enforced in that case.

5. A useful contrast is to one of this court's opinions analyzing a pledge of allegiance. *See Croft v. Perry*, 624 F.3d 157, 170 (5th Cir. 2010). In that case, Judge E. Grady Jolly for the court wrote that adding "under God" to the Texas pledge of allegiance did not result in coercion because a pledge of allegiance is not a "prototypical religious activity"—rather, "the pledge's effect remain[ed]" essentially "patriotic," as its "religious component [was] minimal and, when contextualized, clearly understandable as an acknowledgement of the state's religious heritage." *Id.* The reading of the Commandments, though, is such a "prototypical religious activity." The Commandments come from scripture and are without question—and indeed, much more forceful and significant because they are—religious in character. Posting the Commandments on the classroom wall does not have a patriotic effect in the same way that an "acknowledgement of the state's religious heritage" in a pledge does. *Id.* The Commandments' effect, rather, will be "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).

These principles, the Supreme Court's command to be alert to coercion in the public-school setting, and the Court's acknowledgement of the existence of coercion when a religious display in the classroom "confront[s] elementary school students every day," all convince me that coercion arises from the posted Ten Commandments in every classroom. *Van Orden*, 545 U.S. at 691, 125 S.Ct. 2854 (plurality opinion). CHIEF JUSTICE REHNQUIST, in the *Van Orden* plurality opinion, had no difficulty distinguishing the schoolroom setting from the grounds of a state capitol. *Id.* at 691-92, 125 S.Ct. 2854. That passive use outdoors, adjacent to a state capitol, did not require anyone to view the Biblical Commandments other than fleetingly, much different than requiring school children every school day in every classroom to view them.

To my eyes and ears, if a prayer heard but ignored can be coercive, then the posting of explicitly religious text in a place where it can be seen in every classroom is more coercive. *See* TEX. EDUC. CODE § 1.0041(b)(1). Indeed, the Court has rejected the argument that merely ignoring religious expression is a sufficient cure for an Establishment Clause violation. *Lee*, 505 U.S. at 592-93, 112 S.Ct. 2649. Because we are bound by Supreme Court precedent until further indication, and S.B. 10 bears the same degree of coercive effect as the school prayer cases, I would hold that the school prayer cases resolve this case on coercion grounds.

Lastly, the majority invokes *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), asserting that S.B. 10 requires

no compulsion or forced act rising to a violation of the First Amendment, only the passive presence of the display in the classroom. The majority elides the crystalline core of *Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178. When Texas places a copy of the Ten Commandments in prime position in every public classroom across the state, it edges precariously close to creating a religious orthodoxy in the classroom.

The particular need for enforcing the Establishment Clause in the school context is that "[f]amilies 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 parents' or children's religious beliefs. *Aguillard*, 482 U.S. at 584, 107 S.Ct. 2573. By placing the "power, prestige[,] and financial support of the government . . . behind a particular religious belief," Texas exerts an "indirect coercive pressure" on students to conform and not to stray. *Engel*, 370 U.S. at 430-31, 82 S.Ct. 1261. Regardless of whether "to most believers" this "may seem nothing more than a reasonable request," it is nevertheless improper for Texas "to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592, 112 S.Ct. 2649.

I would hold that, under current caselaw, the displays are improperly coercive in violation of the Establishment Clause. I respectfully dissent.

Appendix D

HAYNES, *Circuit Judge*, dissenting:

I dissent from the majority opinion. I agree with Judge Ramirez's dissent section 1.A that addresses the Establishment Clause via the case of *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam). Because that case clearly makes S.B. 10 an unconstitutional statute, I simply stop there. We must follow the Supreme Court, and that is what the opinion *Stone* shows.

Appendix D

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

The Framers intended disestablishment of religion, above all to prevent large religious sects from using political power to impose their religion on others. Yet Texas, like Louisiana, seeks to do just that, legislating that specific, politically chosen scripture be installed in every public-school classroom. Our court accommodates their unconstitutional request, supplanting decades of Supreme Court precedent merely because of a single decision the majority deems outdated. In doing so, the majority defies foundational First Amendment concepts, ignores the harms students will face, and usurps parents' rights to determine the religious beliefs they wish to instill in their own children.

I wrote earlier, in the companion case from Louisiana, that the Constitution prohibits religious orthodoxy in public schools. *See Roake v. Brumley*, 170 F.4th 292, 307-11 (5th Cir. 2026) (HIGGINSON, J., dissenting). My opposition to a state taking on the role of faith leader applies with the same force for Texas. I write today to respond further and to emphasize three constitutional priorities: non-discrimination among religions, the Supreme Court's constitutional solicitude for students, and, above all, the right of parents to control the faith guidance of their children.[1]

1. I gratefully join the principal dissent by JUDGE RAMIREZ, as well as the aligning dissent by JUDGE SOUTHWICK. Both make fundamental points against religious coercion in classrooms, prohibited by Supreme Court precedent we should, and indeed must, respect.

As I understand our country's history, many forebears fled government religious persecution. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) ("Nothing but the most telling of personal experiences in religious persecution suffered by our forebears could have planted our belief in liberty of religious opinion any more deeply in our heritage." (citation omitted)). In turn, the Framers prohibited political religious commands, both in the original Constitution through the No Religious Test Clause, and then doubly in the Bill of Rights through the First Amendment, mandating non-establishment and equal treatment for different faiths. The Supreme Court has guarded this First Amendment genius, fostering religious liberty and freedom of conscience for centuries, without societal discord, because of our collective understanding that public schools cannot indoctrinate children with religious views that a political majority favors. *See Stone v. Graham*, 449 U.S. 39, 42, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) ("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 of private devotion, it is not a permissible state objective under the Establishment Clause.").

Nonetheless, according to the majority, Texas's open promotion of one religion must stand because courts do not issue "theological judgment[s]." That is true but courts

do issue constitutional ones.[2] Because the Constitution prohibits any branch of government, state or federal, from issuing a theological judgment, a court's function is to adjudicate that violation of our founding principles. When a political branch overreaches to establish religion and constrain liberty of conscience, courts have the power—and, more importantly, the duty—to say no.

On the majority's theory, state legislatures may make their own theological decisions—commanding reverence to biblical scripture they select—without any guardrails because courts are disempowered from discharging our constitutional duty to protect individuals from governmental intrusion into religion. The majority reasons that the Establishment Clause only prohibits a government "burden" or "benefit" to a chosen faith but does not extend to government selection of preferred religious "language or symbolism."[3] Thus, according to

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2. In fact, this was the Supreme Court's reminder, just last year. In *Mahmoud v. Taylor*, the Court said that we should not "confuse our country with those in which laws enacted by a parliament or another legislative body cannot be challenged in court. . . . Here, the Bill of Rights and the doctrine of judicial review protect individuals who cannot obtain legislative change. The First Amendment protects the parents' religious liberty, and they had every right to file suit to protect that right." 606 U.S. 522, 563, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025).

3. The majority crafts this benefit/burden distinction to avoid recent, unanimous, and binding caselaw. *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 145 S.Ct. 1583, 221 L.Ed.2d 881 (2025). In doing so, the majority necessarily ignores the obvious benefit that Texas confers on religions that adhere to the King James Version of the Ten Commandments, now displayed in every classroom across Texas.

the majority, when the government speaks or displays, but avoids a benefit or burden, it apparently may inculcate. *Contra Schempp*, 374 U.S. at 221-22, 83 S.Ct. 1560 (discussing the "wholesome neutrality" of government sentiment towards religion that the Establishment Clause demands, which forbids the government from "all[ying] itself with one particular form of religion").

"The clearest command of the Establishment Clause is that the government may not officially prefer one religious denomination over another." *Cath. Charities*, 605 U.S. at 247, 145 S.Ct. 1583 (internal quotation marks omitted and alteration adopted) (quoting *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)). The majority's reduced Establishment Clause would allow state governments to evangelize by affixing a crucifix—or a mezuzah, or a statue of Buddha, etcetera, to the exclusion of other symbols—purchased with state funds, in every classroom. This proposition runs counter to history and precedent. For example, in *Illinois ex rel. McCollum v. Board of Education*, the Supreme Court explained that the division between church and state as applied to school funding has been long and widely understood, as "strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.'" 333 U.S. 203, 220, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (opinion of FRANKFURTER, J.) (citation omitted).

And with political "language" exempt, public officials and teachers apparently may proselytize so that non-

adherents—like Jewish children, Muslim children, Hindu children, Buddhist children, or Native American children with different belief systems, or non-believers altogether[4]—receive Protestant scripture, the very fear that inter-faith groups, in amici consensus, have cogently voiced. *See* En Banc Br. of Nat'l Council of Jewish Women et al. as Amici Curiae, at 5-7, 13-22 (No. 25-50695). The Framers shared Plaintiffs' and amici's fear of government elevating a single denomination. As Thomas Jefferson wrote, "[t]he bill for establishing religious freedom" was meant to provide "universal" protection for people of all faiths, as evidenced by an attempt to insert a reference to Jesus Christ that "was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the M[uslim], the H[indu], and [the non-believer] of every denomination." Thomas Jefferson, *Autobiography* (1821), *in* 5 THE FOUNDERS' CONSTITUTION 85, 85 (Philip B. Kurland & Ralph Lerner eds., 1987) (terms updated but denominations maintained from original). Throughout our history, the Supreme Court has consistently enforced the First Amendment's "prohibition on denominational preferences" because "the fullest realization of true religious liberty requires that government refrain from favoritism among sects." *Cath. Charities*, 605 U.S. at 248, 145 S.Ct. 1583 (internal quotation marks omitted) (quoting *Larson*, 456 U.S. at 245-46, 102 S.Ct. 1673); *see also McCollum*, 333 U.S. at 212, 68 S.Ct. 461 (opinion of the Court) ("For the First Amendment rests upon the

4. This list is clearly not exhaustive, and my concerns extend to any parent and child who do not venerate the King James Version of the Ten Commandments.

premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

These concerns have special prominence in the public-school context. The Supreme Court has guarded against the discriminatory and coercive effects that result from government-authorized religion most strictly when it enters the schoolhouse door. Despite the majority's characterization, *Lemon* and *Stone* were neither the beginning nor the end of Supreme Court law against government attempts to infuse religion in our nation's classrooms.

For example, in 1948, the Supreme Court held that the First and Fourteenth Amendments prohibit states from "utiliz[ing] its tax-supported public school system in aid of religious instruction." *McCollum*, 333 U.S. at 204-05, 68 S.Ct. 461. In a concurring opinion, four Justices specifically recognized the threat that Establishment Clause violations pose to the sanctity of schools, because "[t]he modern public school derived from a philosophy of freedom reflected in the First Amendment."[5] *Id.* at 214, 68 S.Ct. 461 (opinion of FRANKFURTER, J.). The Justices further articulated a principle that is as true today as it was then: "The public school is at once the symbol of our democracy and the most pervasive means for

5. *See also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("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.").

promoting our common destiny." *Id.* at 231, 68 S.Ct. 461. Accordingly, there is "no activity of the State" in which it is "more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.* Thus, the Supreme Court saw in 1948 what the Framers saw at our country's founding; society writ large, and schools most especially, cannot foster a democratic society without respecting its "heterogenous" makeup. *Id.* at 216, 68 S.Ct. 461. In observing that public schools' secular education reflected "a recognition of the need of a democratic society to educate its children . . . in an atmosphere free from pressures," the concurring Justices also honored schools as "the most powerful agency for promoting cohesion among a heterogeneous democratic people," making it all the more important to keep "entanglement in the strife of sects" away. *Id.* at 216-17, 68 S.Ct. 461; *see also Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.").

In the decades that followed, the Supreme Court time and again has explicitly affirmed what the majority seeks to deny: schools are places where coercion permeates easily, and, as such, there are "heightened concerns" for protecting students' "freedom of conscience from subtle coercive pressure." *Lee*, 505 U.S. at 592, 112 S.Ct. 2649; *see also Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) ("The State exerts

great authority and coercive power through" public schools "because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."). Last year, in *Mahmoud v. Taylor*, the Court again reiterated this truth. Schools, and the educators within them, are entrusted with a most special duty, one that is dissimilar from other governmental operations, because schools "implicate[] direct, coercive interactions between the State and its young residents." *Mahmoud*, 606 U.S. at 557, 145 S.Ct. 2332.

The majority denies the inherently coercive pressure of posting Texas's chosen scripture in every classroom. With no answer to this government interference with students' and parents' First Amendment rights, the majority diverts to examples that are utterly dissimilar. For one, it is baffling that the "[m]ost dramatic" consequence, to the majority, is what would happen to the pledge of allegiance should Plaintiffs prevail. To me, the most serious consequences are the harm to students made to feel different or pressured to venerate scripture they do not believe in and the infringement on their parents' rights to direct their faith upbringing. I am happy to reassure the majority that the pledge is not imperiled. The pledge is not a set of biblical commandments. The pledge is not said in every minute of every day of every class. A nondenominational reference to God in the pledge is more similar to the mention of God in the Declaration of Independence. It is at once an expression of humility and a reflection of hope that mankind fulfills a higher

purpose.[6] Moving from the sublime to the ridiculous, the majority also seems fearful that "religious placenames" that dot our country, like St. Louis, might be in jeopardy. Twenty years ago, CHIEF JUSTICE REHNQUIST recognized that elementary school students cannot be "confronted" by the Ten Commandments every day, whereas a monument of the Commandments on government property "is a far more passive use of the text." *Van Orden v. Perry*, 545 U.S. 677, 691, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plurality opinion). Schools are unique, and we are fortunate that the Supreme Court gives them distinctive First Amendment protection, forbidding any denominational preferences that intrude on students' and parents' rights.

* * *

The compulsory public-school setting magnifies the harm of a government choosing, elevating, and even empowering one religion over others. Texas's installment of the King James Version of the Ten Commandments in every classroom harms impressionable students and

6. *See Engel v. Vitale*, 370 U.S. 421, 435 n.21, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) ("There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State [] has sponsored in this instance.").

deprives parents of their fundamental right to govern their children's religious upbringing.

First, with the injection of religion at every turn in their learning environment, students will face real consequences. The majority has no answer to the distress children will face, as expressed by Plaintiffs and amici alike. *See*, *e.g.*, En Banc Br. of Tex. Freedom Network et al. as Amici Curiae, at 13-18 (25-50695). Instead, the majority declares no fewer than six times, but never with supporting caselaw, that there must be punishment for there to be a First Amendment violation. *Contra Schempp*, 374 U.S. at 225, 83 S.Ct. 1560 ("The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, as quoted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 65, 67 S.Ct. 504, 91 L.Ed. 711 (1947))). Thankfully, the Supreme Court, unlike our court, recognizes the consequences that lie waiting when students of all backgrounds, and all religions, are confronted with the reminder that they are different—so different that they are not included in the sole religion their school and government celebrate. *See Engel*, 370 U.S. at 431, 82 S.Ct. 1261 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573 ("Students in such institutions are impressionable and their attendance is involuntary."); *Lee*,

505 U.S. at 592, 112 S.Ct. 2649 ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."); *id.* at 593, 112 S.Ct. 2649 ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.").

Thus, similar to the harm from school prayers, students in Texas will be reminded that the "conspicuous"[7] religious text following them from math class to theater class is different from religious sentiments they hear at home or in a sacred place of worship.[8] *See*, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) ("School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are

7. Tex. Educ. Code Ann. § 1.0041(a) (West 2025).

8. Scholars often make points with more background and eloquence than I do. Relating to this issue, Professor Paul McGreal has observed, "When a student sincerely objects to a Ten Commandments display, they are not simply objecting to an aesthetically displeasing poster or a problematic political message. Instead, they confront a government message that endorses particular religious teachings as worthy of permanent display. Every day they enter the schoolhouse, they must choose between their religious conscience and full participation in the classroom." Paul E. McGreal, *Ten Commandments Cases: Learning from Reformation Coercion*, 124 Mich. L. Rev. Online 69, 80 (2026).

nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring))).[9]

Second, the school environment amplifies state action. The majority deflects from binding Supreme Court precedent by claiming students are not being "taught to adopt" the Ten Commandments. Yet, it simultaneously offers no imagination of what Texas is doing by imposing a religious text in classrooms. The obvious truth, which we know as well as students do, is that the purpose of public schools is education. School materials, including displays, are intentionally placed in school for their enrichment value, meant to shape our nation's youth.

The Supreme Court has emphasized that not all challenges related to school classrooms are created equal, and that courts must "consider the specific context in which the instruction or materials at issue are presented." *Mahmoud*, 606 U.S. at 550, 145 S.Ct. 2332. Here, there is

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9. Justice Gorsuch has been perceptively protective too, recognizing the weight and consequence of making students feel they are outsiders. In *Haaland v. Brackeen*, he discussed the historical example of governmental support of "Indian boarding schools," which targeted "destroying tribal identity and assimilating Indians into broader society," and "prohibited children from . . . engaging in customary cultural or religious practices." 599 U.S. 255, 298-300, 143 S.Ct. 1609, 216 L.Ed.2d 254 (2023) (Gorsuch, J., concurring).

no curricular context to explain the posting of this chosen scripture.[10] One logical question then follows: what is the purpose of mandating that every public-school classroom across Texas display Protestant scripture? School materials—whether on the walls or on the bookshelves—convey a message. *See*, *e.g.*, *Mahmoud*, 606 U.S. at 550, 145 S.Ct. 2332 ("Like many books targeted at young children, the books are unmistakably normative. They are clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected."). A religious text "confront[ing] [] school students every day," *Van Orden*, 545 U.S. at 691, 125 S.Ct. 2854, is an even more obvious religious infringement than the books *Mahmoud* considered. The materials at issue in *Mahmoud* were "'LGBTQ+-inclusive' storybooks," which did not directly convey a religious message, but instead included messages that contradicted parents' asserted religious views. *Mahmoud*, 606 U.S. at 533, 145 S.Ct.

10. Notably, as Judge Hardiman wrote, in a decision favorably citing *Stone*, an introductory lesson on Islam in a world cultures course was permissible because it was "presented in an academic rather than devotional context." *Hilsenrath ex rel. C.H. v. Sch. Dist. of Chathams*, 136 F.4th 484, 493 (3d Cir.), *cert. denied*, ___ U.S. ___, 146 S. Ct. 885, 223 L.Ed.2d 274 (2025). Here, the Ten Commandments is not being presented in the context of a social studies class "to introduce students to the fundamental tenets of a major world religion." *Id.* at 492 (citing *Stone*, 449 U.S. at 42, 101 S.Ct. 192). Instead, Texas's chosen religious text, representative of only a narrow group of religious sects' beliefs, will confront students with its scriptural force in every classroom from chemistry to yearbook, and in every grade, for as long as students are under Texas's instruction.

2332. The purpose of placing the King James Version of the Ten Commandments in every classroom is its religious directive, irreconcilable with the First Amendment.[11]

Classrooms are critical places of learning and enrichment. If placed in every classroom, the scripture becomes part of that learning, as intended by Texas's government.[12] Texas children will naturally examine these posters and be left to reflect on the fact that one religion—different from the one they observe in their home, their synagogue, their mosque, or other place of worship—was selected to be in their school as a representation of what? An expectation of a model student? A good citizen? A properly devout person? The majority insists that students will not be "catechized," but forgets their curiosity. Surrounded by the Ten Commandments displays, students will wonder about "the LORD"; they will wonder about "other gods"; they will wonder about "graven images"; they will wonder about "kill[ing]";

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11. Regardless, the Supreme Court has prohibited similar pervasive use of biblical text in schools because "the place of the Bible as an instrument of religion cannot be gainsaid." *Schempp*, 374 U.S. at 224, 83 S.Ct. 1560; *see also* Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Norms*, 100 Chi.-Kent L. Rev. 601, 620 (2025) ("[T]he character of the Commandments, combined with the prominence of the text in the posting, puts a far greater burden on the state to undo the obvious inference that they are being displayed for religious reasons.").

12. *See*, *e.g.*, En Banc Br. of Tex. Freedom Network et al., at 11-13, 21-22 (quoting legislators discussing S.B. 10); En Banc Br. of Nat'l Council of Jewish Women et al., at 26-28 (same).

they will wonder about "adultery"; they will wonder about "covet[ing]" a neighbor's wife. TEX. EDUC. CODE ANN. § 1.0041(c); *Exodus* 20:2-17 (King James). Teachers inevitably will be asked to answer these questions, but Texas parents did not entrust public-school teachers with the spiritual education of their children. It is a parent's right to have these conversations—not inside the classroom, absent their input, but with their children, present at home.

* * *

Texas's defiance of the First Amendment displaces parents. Parents, not politicians, have the right to lead their children's religious development.[13] Yet the majority now gives Texas that choice and command. Here again, the Supreme Court understands what our court does not. It is "the liberty of parents and guardians to direct the upbringing and education of children under their control"—"rights guaranteed by the Constitution." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *see also Wisconsin v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (explaining that government-authorized religious infringements pose "a very real threat of undermining" the religious beliefs that parents hope to instill in their children and, likewise, of undermining parents' rights); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 753-54, 140 S.Ct.

13. As President Grant said, "Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions." *The President's Speech at Des Moines*, 22 CATH. WORLD 433, 435 (1876).

2049, 207 L.Ed.2d 870 (2020) ("[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.").

In my opinion, there is irony in the majority's contention that Plaintiffs here ask our court to go beyond *Mahmoud*, when in fact, it is the majority today that goes beyond. In *Mahmoud*, the school materials at issue were non-religious books that parents deemed contradictory to their values; here, the material is the exact text of the King James Version of the Ten Commandments. 606 U.S. at 533-35, 145 S.Ct. 2332. In *Mahmoud*, the disputed books were, at most, to be referenced in a classroom lesson; here, the Ten Commandments are to be conspicuously displayed in every classroom, every hour of the school day. *Id.* at 535-36, 145 S.Ct. 2332. Most striking, in *Mahmoud*, the Supreme Court still allowed parents to pull their children out of the lesson; yet, here, our court offers no relief at all—parents must simply abide. *Id.* at 569, 145 S.Ct. 2332. Texas's new law requires the compulsory observance the Supreme Court prohibits. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536-37, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) ("To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory.'" (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952))); *Lee*, 505 U.S. at 596, 112 S.Ct. 2649 ("It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and

benefits as the price of resisting conformance to state-sponsored religious practice.").

Many parents "have no choice but to send their children to a public school." *Morse v. Frederick*, 551 U.S. 393, 424, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (ALITO, J., concurring). Until today, this reality never meant that parents also have no choice but to accept government-chosen religious scripture that will surround their children. Stated simply, "the right of parents 'to direct the religious upbringing of their' children would be an empty promise if it did not follow those children into the public school classroom." *Mahmoud*, 606 U.S. at 547, 145 S.Ct. 2332. If schools across Texas must display this scripture, then today our court ordains that empty promise.

APPENDIX E — LSA-R.S. 17:2124

§ 2124. Historical documents; displays; legislative intent; historical context; donations

Effective: June 19, 2024

A. The legislature finds and declares all of the following:

(1) In 2005, the Supreme Court of the United States recognized that it is permissible to display the Ten Commandments on government property in *Van Orden v. Perry,* 545 U.S. 677, 688 (2005).

(2) In 2006, the Legislature enacted Act No. 602 of the 2006 Regular Session of the Legislature which provided for the secretary of state to publish the Ten Commandments and other historically significant documents for posting in courthouses and other public buildings to address "a need to educate and inform the public as to the history and background of American and Louisiana law".

(3) In 2019, the Supreme Court of the United States further recognized that the Ten Commandments "have historical significance as one of the foundations of our legal system..." in *American Legion v. American Humanists Association,* 588 U.S. 29, 53 (2019), and the court also ruled that the displaying of the Ten Commandments on public property may have "multiple purposes" such as "historical significance" and represent a "common cultural heritage". Id. at 54.

(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. History records that James Madison, the fourth President of the United States of America, stated that "(w)e have staked the whole future of our new nation ... upon the capacity of each of ourselves to govern ourselves according to the moral principles of the Ten Commandments".

(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 of the United States in *Van Orden v. Perry,* 545 U.S. 677, 688 (2005).

(7) The Mayflower Compact of 1620 was America's first written constitution and made a Covenant with Almighty God to "form a civil body politic". This was the first purely American document of self-government and affirmed the link between civil society and God.

(8) The Northwest Ordinance of 1787 provided a method of admitting new states to the Union from the territory as the country expanded to the Pacific. The Ordinance "extended the fundamental principles of civil

and religious liberty" to the territories and stated 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".

(9) 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 (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.

(10) The Supreme Court of the United States acknowledged that the Ten Commandments may be displayed on local government property when a private donation is made for the purchase of the historical monument. *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460 (2009).

(11) It is the intention of the legislature that this Section shall not create an unfunded mandate on any public school governing authority. The school boards are encouraged to use documents that are printed and made available to the schools free of charge.

B. (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.

(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.

Appendix E

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."

(3) The Ten Commandments shall be displayed with a context statement as follows:

"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."

(4) A public school may also display the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance, as provided in R.S. 25:1282, along with the Ten Commandments.

(5) This Section shall not require a public school governing authority to spend its funds to purchase displays. In order to fund the displays free of charge, the school public governing authority shall do either of the following:

(a) Accept donated funds to purchase the displays.

(b) Accept donated displays.

(6)(a) The 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.

(b) The state Department of Education shall identify appropriate resources to comply with the provisions of this Section that are free of charge. Once identified, the department shall list the free resources on the department's internet website.

C. (1) No later than January 1, 2025, each public postsecondary education management board shall require each institution under its jurisdiction to display the Ten Commandments in each classroom on the institution's campus. At a minimum, 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.

(2) The text shall read as provided in Paragraph (B)(2) of this Section.

(3) This Subsection does not require a public postsecondary education management board or any public postsecondary education institution to spend its funds to purchase such displays. An institution or management board or governing authority may spend donated funds to purchase the Ten Commandments or other historical documents provided for in this Section or may accept donated displays.