No. 26-257

IN THE

Supreme Court of the United States

MARA NATHAN, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, M.N., ET AL.,

Petitioners,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PROFESSORS STEPHANIE H. BARCLAY, MARC O. DEGIROLAMI, RICHARD W. GARNETT, DENISE M. HARLE, JOHN PAUL KIMES, MICHAEL P. MORELAND, STEVEN D. SMITH, AND LAEL D. WEINBERGER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars who research, write, and teach about the First Amendment's Religion Clauses and issues of legal history and constitutional theory. They submit this brief in response to the petition for certiorari and the Brief of Professors Mark Storslee et al. as *Amici Curiae* in Support of Petitioners ("Professors Br."), to explain why review is unwarranted at this time and why allowing the questions this case presents to percolate further in the lower courts and legal scholarship will serve the sound development of Establishment Clause jurisprudence.

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[1] Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief. *Amici*'s institutional affiliations are provided for identification only. This brief reflects *amici*'s personal views and not the views of their institutions.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Court would benefit from allowing the constitutional questions this case presents to percolate in the lower courts and legal scholarship—and neither the petition itself nor the lone amicus brief supporting review justifies cutting that process short. Certiorari is particularly unwarranted here because the decision below faithfully applied this Court's decision in *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022), to hold that a Texas law requiring the Ten Commandments to be displayed in public-school classrooms bears none of the historical hallmarks and reflects none of the traditional practices of a religious establishment. That conclusion was correct and does not conflict with the decision of any other court of appeals. The Court should deny certiorari.

Just a few years ago, *Kennedy* closed the curtain on *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *Kennedy* made clear that the Establishment Clause must be interpreted by reference to historical practices and understandings. Jurists and legal scholars are now in the early stages of implementing, applying, and refining this historical test.

The decision below was the first time a court of appeals applied *Kennedy*'s historical test to a law requiring the Ten Commandments to be displayed in classrooms. The court carefully compared the Texas law (S.B. 10) to founding-era religious establishments and, just as importantly, resisted calls to conduct the analysis at a high level of abstraction. The decision below thus correctly avoided the flaws that beset *Lemon*'s abstract multifactor test and held that the

Texas law was not facially unconstitutional under the original meaning of the Establishment Clause.

Petitioners and their academic *amici* argue for a different approach to the Establishment Clause—one that would treat passive exposure to religious text in a classroom as a religious establishment, based on a high-level analogy to compulsory church attendance. Pet. 27-31; Professors Br. 11-12, 14-17. That approach has significant problems as a doctrine for implementing *Kennedy*'s historical analysis. If mere exposure to religious content in a compulsory-attendance setting were treated as forbidden "[c]ompell[ed] attendance at religious instruction," Professors Br. 7, unquestioned founding-era practices involving religion—such as the inclusion of the eye of Providence on the Great Seal of the United States, grand jury charges delivered by the first Justices of this Court, and this Court's traditional invocation—would have been unlawful establishments.

That approach would also invalidate countless other longstanding uses of religious language and imagery in American public life, including the recitation of the Pledge of Allegiance in public schools, the phrase "In God We Trust" on currency, and other religious displays. This Court has rightly rejected constitutional tests that use "broad abstract principles * * * to justify results that would have astonished those who framed and ratified" the Constitution. Samuel A. Alito, Jr., *So Ordered: An Originalist's View of the Constitution, the Court, and Our Country* 15 (2026); see *Town of Greece* v. *Galloway*, 572 U.S. 565, 575-77 (2014).

Faced with this irreconcilable tension, petitioners' *amici* retreat to a totality-of-the-circumstances inquiry in which context, function, and purpose determine whether a passive display constitutes a forbidden establishment. Professors Br. 16-18. That test replicates *Lemon* in all but name. *Kennedy* abandoned "estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion." 597 U.S. at 534. The approach offered by petitioners' *amici* would resurrect *Lemon* once more, like the "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

The serious flaws in the theories offered by petitioners and their *amici* confirm that further percolation is warranted. Courts and scholars have only begun working through vital issues about how to implement *Kennedy*'s historical inquiry—including the appropriate level of generality at which the elements of historical religious establishments should be analogized to contemporary practices and whether historical hallmarks of establishments are unified by any common principles, and if so, which ones. The answers to those questions are particularly important because the Establishment Clause is a categorical prohibition on government action, even for government interests of the highest order. The prudent course, therefore, is to allow work on these questions to continue.

Alongside their Establishment Clause question, petitioners include a tag-along free exercise question.

That issue, too, is unworthy of review. Petitioners assert a conflict with *Mahmoud* v. *Taylor*, 606 U.S. 522 (2025), but unlike the challengers there, petitioners here sought facial invalidation of a Texas law, not as-applied accommodations.

Intervention at this juncture would be premature. The better course is to allow lower courts and scholars to continue developing *Kennedy*'s historical analysis. The petition should be denied.

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI ON THE ESTABLISHMENT CLAUSE QUESTION.

Review of petitioners' Establishment Clause question is unwarranted for two reasons. First, debates over the proper implementation of *Kennedy*'s historical framework are still in their infancy, and this Court would benefit from allowing the doctrine to be further elaborated. Second, there is no urgent need for review because the court below correctly applied the original understanding of the Establishment Clause and no conflict among the courts of appeals has yet emerged.

A. Further Percolation Is Warranted.

This is not the right time for the Court to take up the Establishment Clause question presented here. *Kennedy* marked a pivotal moment, reorienting the Establishment Clause inquiry toward historical practices and understandings. But it left unresolved significant questions about how history and tradition should be measured against contemporary practices—methodological questions that lower courts and legal scholars have only begun to engage. Allowing that work to continue will produce a more developed body

of decisions and scholarship for this Court to draw on in future Establishment Clause cases.

1. *Kennedy* Refocused Establishment Clause Jurisprudence On History.

This Court's Establishment Clause jurisprudence is in a transformative period. In years past, the inquiry was formally (yet irregularly) governed by *Lemon* and its offshoots. *Lemon* attempted to fashion a "grand unified theory" for assessing Establishment Clause claims, asking whether a government action (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive government entanglement with religion. *Kennedy*, 597 U.S. at 534 (citation omitted); see *Lemon*, 403 U.S. at 612-13. Over time, that approach also "came to involve estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion." *Kennedy*, 597 U.S. at 534 (citing *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989)).

Lemon was frequently criticized by members of the Court as "a constitutional theory [with] no basis in the history of the amendment it seeks to interpret" that was "difficult to apply" and "yield[ed] unprincipled results." *Wallace* v. *Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); see also, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Those problems ultimately led the Court to reject *Lemon*'s approach to the Establishment Clause as "ambitiou[s]," "abstract," and "ahistorical." *Kennedy*, 597 U.S. at 534 (citation omitted).

In *Lemon*'s stead, the Court has clarified that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535 (citation omitted). The "line * * * between the permissible and the impermissible," the Court has explained, must "accord with history and faithfully reflec[t] the understanding of the Founding Fathers." *Id.* at 535-36 (citation and internal quotation marks omitted).

Under this historical paradigm, courts assessing whether contemporary government practices constitute unlawful establishments of religion have considered the "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy*, 597 U.S. at 537; see also *Town of Greece*, 572 U.S. at 609 (Thomas, J., concurring in part and concurring in the judgment) (framers of Fourteenth Amendment shared founding-era views of what constitutes an establishment). These historical hallmarks of an established church include:

- government exertion of control over doctrine and personnel in the established church;
- government-mandated attendance in the established church and punishment for failure to participate;
- government punishment of dissenting churches and individuals for their religious exercise;
- government restriction of political participation by religious dissenters;
- government financial support for the established church; and

- government use of the established church to carry out civil functions.

See *Shurtleff* v. *City of Boston*, 596 U.S. 243, 286-87 (2022) (Gorsuch, J., concurring in the judgment); see also *Kennedy*, 597 U.S. at 537 n.5. Formal establishment of a church thus was often accompanied by "forms of 'coerc[ion]' regarding 'religion or its exercise'" that compelled or controlled religious activity. *Shurtleff*, 596 U.S. at 286-87 (citation omitted); see also *Kennedy*, 597 U.S. at 537.

Dispelling the "chaos" introduced by *Lemon*'s infinitely manipulable test, the Court has now redirected the inquiry where it belongs—the essential attributes of an official religious establishment as historically understood. *Kennedy*, 597 U.S. at 534-36.

2. Courts And Scholars Have Only Begun Working Out How To Implement *Kennedy*'s Historical Framework.

While it is clear after *Kennedy* that courts must look to history to determine whether a government practice constitutes an unlawful religious establishment, important questions about how that analysis should be implemented remain unresolved. This Court would benefit from further percolation before taking up those questions.

Identifying the historical practices relevant to a constitutional inquiry provides a vital starting point for determining the applicable legal principles but does not finish the job. Rather, text-and-history analysis, often performed by legal scholars in the first instance, requires addressing how courts should draw analogies from historical practices to decide modern

cases. See *Vidal* v. *Elster*, 602 U.S. 286, 324 (2024) (Barrett, J., concurring in part).

Before this Court decides a case calling for the application of *Kennedy*'s historical framework, it would benefit from further development of implementing doctrines by lower courts and legal scholars. The need for that development is particularly acute with respect to (1) the appropriate level of generality at which to analogize contemporary facts to historical practices, and (2) whether there is a principle that unifies the historical hallmarks or traditional practices of religious establishments.

First, courts and scholars are in the early stages of articulating the appropriate level of generality at which historical practices should be analogized to contemporary practices. This Court would benefit from allowing further development of that issue.

Historical practices do not self-identify an appropriate level of generality at which courts should view them. In comparing historical practices to modern facts, some degree of judgment is required, and "reasonable minds sometimes disagree." *United States* v. *Rahimi*, 602 U.S. 680, 740 (2024) (Barrett, J., concurring). Sound implementing doctrine for the Establishment Clause should therefore provide guidance about this "exercise of judgment." Alito, *supra*, at 21.

But courts and scholars have only begun to explore and debate what that guidance should be. *Compare* Pet. App. 67a-72a (majority) (low level of generality), *with* Pet. App. 115a-125a (Ramirez, J., dissenting) (high level of generality). Indeed, scholarship on this issue is actively being developed. See, *e.g.*, Sherif Girgis, *Preexisting Rights: "History and Tradition" and*

Levels of Generality, 140 Harv. L. Rev. (forthcoming 2027); Stephanie H. Barclay, *Implementing the Establishment Clause* (2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7682742; Marc O. DeGirolami, *The Constitution of Practice: On Law and Tradition* 156-58 (2026).

For example, Professor Barclay emphasizes that a low level of generality is typically most useful in evaluating the hallmarks of religious establishments. She explains that *Kennedy* adopted "a constitutional construction of legal meaning * * * focusing on creating specific doctrinal tests from each of the six specific historical hallmarks of an Establishment" rather than adopting a "coercion test * * * at a high level of abstraction." Stephanie H. Barclay, *Tension Between Constitutional Meaning and Constitutional Construction*, 47 Harv. J.L. & Pub. Pol'y 613, 620-21 (2024). She also argues that focusing specifically on the six historical hallmarks rather than a broad principle abstracted from them is preferable "for the democratic legitimacy of the Court's construction of the constitutional text of the Establishment Clause" because it will avoid the type of "applications that likely diverged much more dramatically from expected applications of the text at the Founding." *Id.* at 621-22.

The academic *amici* supporting petitioners take a very different position, arguing that the hallmarks of religious establishments should be applied at a higher level of generality. Rather than assess whether, for example, the government controls doctrine in a particular church, the *amici* supporting petitioners contend that the hallmarks are implicated whenever there is "[c]ompell[ed] attendance at religious instruction."

Professors Br. 7. Petitioners' *amici* further define "religious instruction" at a high level of generality to include not only "formal participation in worship," but even visual exposure to religious language with no instruction or participatory obligations of any kind. *Id.* at 7-8, 15-17 (citation omitted).

These different approaches are the beginning of a jurisprudential debate this Court should allow to continue.

Second—and relatedly—courts and scholars working within the historical-hallmarks framework diverge on whether those hallmarks have a unifying principle, and if so, what that principle is. *Kennedy* confirmed that actual legal coercion was "among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment," but it simultaneously acknowledged that "[m]embers of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause." 597 U.S. at 537. Professor Christopher Lund has argued that the "essence" of a religious establishment is "the government deciding religious truth." Christopher Lund, *Favoritism, Coercion, and the Establishment Clause*, 122 Mich. L. Rev. 1303, 1307 (2024). Professors Mark Storslee and Michael Helfand have argued that government direction or control of religious opinion is the unifying principle. See Mark Storslee & Michael Helfand, *Government Religious Speech and the Establishment Clause*, 79 Vand. L. Rev. 417, 421-22 (2026). By contrast, Professor Barclay has rejected the idea that a single principle—whether coercion, conformity, or otherwise—can

"claim precedence over the lower-level purposes attached to each individual hallmark." Barclay, *Implementing the Establishment Clause*, *supra*, at 34-35; see also Marc O. DeGirolami, *The Tragedy of Religious Freedom* 189-96 (2013) (rejecting single-value or monistic theories of the Establishment Clause). Once again, this Court would benefit from further development from lower courts and scholars before assessing these competing perspectives.

In crafting an implementing doctrine to answer these and other questions, this Court must consider workability and democratic accountability. Barclay, *Implementing the Establishment Clause*, *supra*, at 23-25. As Professor Garnett has explained, without a principled implementing doctrine, Establishment Clause cases would be no better "resolved by judges through litigation than by citizens, officials, and legislators through politics." Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 Const. Comment. 273, 274-75 (2008).

Debates about how best to build on *Kennedy*'s foundation remain in a nascent stage. Legal scholars are only beginning to articulate different approaches based on historical materials and traditional practices, and few courts of appeals have weighed in. This Court would benefit from allowing those debates to mature and crystallize before taking up the issue.

3. There Is Particular Reason For Caution Before Taking Up Establishment Clause Implementation Issues.

Two additional issues counsel particular caution before the Court takes up Establishment Clause implementation questions.

First, the stakes for adopting a correct implementing doctrine are high. In Establishment Clause jurisprudence, proving an establishment is the whole ballgame. See Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 Iowa L. Rev. 2097, 2112 (2023); see also DeGirolami, *The Tragedy of Religious Freedom*, *supra*, at 189 (calling the Establishment Clause an "all-or-nothing" affair). In other areas of First Amendment jurisprudence, such as the Free Exercise or Free Speech Clause, an overly broad implementing doctrine at least has a safety valve: Even conduct within the ambit of one of those clauses may yield to a compelling state interest. See, *e.g.*, *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 541 (2021); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010). The Establishment Clause, however, contains no escape hatch. Before this Court chooses among candidate doctrines to implement the historical approach announced by *Kennedy*, it should allow those competing approaches to develop so that it can reliably assess the options.

Second, taking up this issue now could prematurely shut down a fruitful debate over establishment clauses in state constitutions. This Court's abandonment of *Lemon* has created more room for state courts to interpret their state constitutions' religion clauses.

State courts are beginning to grapple with these issues. Since *Kennedy*, Alaska, Hawaii, and Massachusetts have addressed whether their state establishment clauses prohibit policies that the federal Constitution permits. See, *e.g.*, *Dep't of Educ. & Early Dev.* v. *Alexander*, 566 P.3d 268 (Alaska 2025) (schooling programs); *Hilo Bay Marina, LLC* v. *State*, 575 P.3d 568 (Haw. 2025) (religious deed restriction); *Fitzmaurice* v. *City of Quincy*, 284 N.E.3d 335 (Mass. 2026) (statues of religious figures).

In these cases and others like them, state courts are working out how to implement their own establishment clauses—for example, whether to adopt *Lemon* or a historical approach, see, *e.g.*, *Hilo Bay*, 575 P.3d at 592-95; *Fitzmaurice*, 284 N.E.3d at 343-47. Those debates may yield useful insights about implementing doctrine in the establishment context, "allow[ing] the Court to learn from the States" to the benefit of this Court's own Establishment Clause jurisprudence. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 216 (2018).

B. There Is No Need For This Court's Intervention At This Time.

Review here is especially unwarranted because there is no need for it. Under the historical understanding of the Establishment Clause, the Fifth Circuit reached the correct conclusion that S.B. 10 displays none of the hallmarks or the traditional practices of a religious establishment. And there is no conflict among the courts of appeals over the Establishment Clause question.

1. The Decision Below Correctly Reflects The Establishment Clause's Historical Understanding.

While *amici* on this brief have emphasized different issues informing the appropriate level of generality to be used in assessing Establishment Clause challenges, see, *e.g.*, pp. 9-13, *supra*, they all agree that S.B. 10 bears none of the historical hallmarks that this Court has recently highlighted as characterizing an establishment of religion. S.B. 10:

- "does not regulate what any religious institution teaches, how it worships, or whom it employs";
- does not mandate church attendance;
- does not "punish[] dissenters" for their religious exercise or restrict their political participation;
- does not "compel financial support for religious institutions"; and
- does not use religious institutions for civil functions.

Pet. App. 68a; see pp. 8-9, *supra*. Indeed, petitioners "rely on none of these features of establishments to attack S.B. 10." Pet. App. 68a.

Instead, petitioners contend (at 29-30) that S.B. 10 resembles a historical establishment because it is supposedly coercive—students must attend school, and the law requires a passive display of the Ten Commandments there. But the court of appeals rightly rejected that argument. In *Kennedy*, this Court explained that the coercion characteristic of a religious

establishment consisted of forcing people to "attend church" or "engage in 'a formal religious exercise.'" 597 U.S. at 537 (citations omitted). S.B. 10 "does not compel any student to engage in formal religious exercise" or even to recite or affirm the Ten Commandments, much less as an act of worship. Pet. App. 69a. It "requires only that the Commandments be displayed on the classroom wall." Pet. App. 70a.

Petitioners' attempts to ground their challenge to S.B. 10 in history are unavailing. They contend (at 28) that the court of appeals ignored the role that government-dictated religious education supposedly played in historical establishments. But unlike the examples they proffer (at 28), S.B. 10 neither imposes a "religious curriculum" nor "demand[s] religious uniformity." On the contrary, S.B. 10 does not require any instruction about the Ten Commandments whatsoever, and it leaves students free to "disagree with the Commandments or ignore them or laugh at them" without fear of "penalty nor sanction, formal or informal." Pet. App. 68a.

Petitioners' academic *amici* likewise go astray in their attempts to analogize S.B. 10 to the historical hallmarks of religious establishments. They contend that "coerced religious instruction functioned as a core feature of religious establishment," and argue that their coercion test is satisfied because students must attend schools where they will see the Ten Commandments displayed on the walls. Professors Br. 11-12.

At such a "high level of abstraction," however, that coercion test "risks replacing [the] amorphous 'one-size-fits-all test'" from *Lemon* "with another." Barclay, *Tension Between Constitutional Meaning and*

Constitutional Construction, *supra*, at 620-21. Interpreting historical practices at such a lofty level of generality is bound to produce confusion and inconsistent results, and is thus unsustainable as a matter of history and tradition.

A case in point is the attempt by petitioners' *amici* to analogize S.B. 10 to English laws requiring the Ten Commandments to be hung in parish churches of the Church of England and the youth of the parish to be instructed in them. Professors Br. 9-10. Those laws reflected an establishment of religion because the government was dictating the church's actions—not because they happened to involve the Ten Commandments. See pp. 8-9, *supra*. A law requiring churches to post the national flag or a portrait of a political leader would equally reflect an establishment. S.B. 10 does nothing to impose on the operations or worship of churches, so it is nothing like the English laws petitioners' *amici* invoke. See Barclay, *Implementing the Establishment Clause*, *supra*, at 31.

Indeed, the historical record cuts the other direction, confirming that even unavoidable religious symbols and texts were not impermissible religious establishments. As Professor Chapman—one of petitioners' *amici*—has correctly acknowledged elsewhere, no one "ever claimed at the founding that the display of religious symbols was a form of religious establishment." Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience* 159 (2023). For example, the seal Congress adopted in 1782 features an eye of "Providence" under a Latin motto translating as "He [God] has favored our undertakings." U.S. Dep't of State Bureau of Public

Affairs, *The Great Seal of the United States* 4 (July 2003) (brackets in original), https://diplomacy.state.gov/wp-content/uploads/2022/10/Great-Seal-PDF.pdf. And there is "a long tradition of State and municipal seals and flags throughout our Republic that include religious symbols or mottos." *Freedom from Religion Found., Inc.* v. *County of Lehigh*, 933 F.3d 275, 284 (3d Cir. 2019). Citizens doing business with their government could not avoid these symbols. Yet on the theory of petitioners' *amici*, they could not even be posted on a classroom wall.

Similarly, verbal instruction with religious content given to grand juries was not considered an establishment at the founding. For example, while riding circuit in 1792, the Nation's first Chief Justice—John Jay—charged a Vermont grand jury that perjury was "an abominable Insult * * * to the divine Being" and that testimony is "given under those solemn obligations which an appeal to the God of Truth impose; and if oaths should cease to be held sacred, our dearest and most valuable Rights would become insecure." 2 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 284 (Maeva Marcus et al. eds., 1988) (emphasis omitted). Justices William Paterson, James Iredell, and William Cushing also gave charges calling on God's aid and blessing. See 3 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 60, 78, 312 (Maeva Marcus et al. eds., 1990). Those charges were replete with overt "religious instruction" and were delivered to a "captive audience" of grand jurors compelled to attend. Under the theory of petitioners' *amici*, that practice would be impermissibly coercive. Yet no one questioned whether the mere exposure to such language—even

from a Justice of this Court—constituted a religious establishment.

The same is true of this Court's own founding-era practices. "[U]nder John Marshall," this Court "opened its sessions with the prayer, 'God save the United States and this Honorable Court.'" *McCreary County* v. *ACLU*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (quoting 1 Charles Warren, *The Supreme Court in United States History* 469 (rev. ed. 1926)). That prayer could be said to convey "religious instruction"—that God exists, that He can save the United States and the Court, and that it is right to ask Him to do so. This prayer, moreover, was (and still is) imposed on a captive audience of litigants, attorneys, and the public. Yet no one thought the Marshall Court was erecting a forbidden establishment by adopting that practice.

That the rule of petitioners' *amici* would condemn these founding-era practices, and the traditions of religious expression they reflect, confirms it is untenable. "A proposed reading of history at a level of generality that would condemn a practice the founding generation widely accepted as constitutional is, for that reason, ruled out." Barclay, *Implementing the Establishment Clause*, *supra*, at 43; see also *Town of Greece*, 572 U.S. at 587 (the challenged practice "must be evaluated against the backdrop of historical practice"); DeGirolami, *The Constitution of Practice*, *supra*, at 107 ("As the Court put it in *Town of Greece v. Galloway*, 'it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.'").

The rule of petitioners' *amici* is equally inconsistent with the subsequent history of religion in American public life and would carry sweeping consequences. Under that rule, a "massive amount of material that is passively displayed at a school might be coercive." Lael Weinberger, *A Sensible Ruling*, World (May 4, 2026), https://wng.org/opinions/a-sensible-ruling-1777778560. A display of the Declaration of Independence might be constitutionally prohibited. The Declaration of Independence para. 1 (U.S. 1776) ("the laws of Nature and of Nature's God"). The use of government currency with religious messaging would also be forbidden. 31 U.S.C. § 5114(b) ("In God We Trust"). Recitation of the Pledge of Allegiance would need to end as well. 4 U.S.C. § 4 ("one Nation under God"). And schools might no longer be permitted to assign readings with religious content.

To avoid those unacceptable consequences, petitioners' academic *amici* veer away from focusing on history and retreat to an all-things-considered contextual approach. They insist (at 18) that ruling for petitioners would not endanger religious city-names, flags, or monuments in other settings because such public displays typically function to preserve "embedded features of a community's landscape" rather than to "proselytize or indoctrinate." They assert (at 18) that display of the Commandments may be permissible so long as they "sit alongside other texts to symbolize their legal significance." And they assure the Court (at 18) that schools may use the Ten Commandments and other religious content (like the Declaration or Pledge) in the classroom, "provided they do so through set policies designed in good faith to teach *about* religion or other topics."

That petitioners' *amici* must resort to these carve-outs reveals their approach is inadministrable. It boils down to a subjective inquiry into the context, purpose, and effect of religious displays. That would resurrect *Lemon* in all but name—bringing back an unpredictable test that plagued Establishment Clause jurisprudence for decades. See *Kennedy*, 597 U.S. at 534-35 (*Lemon* "invited chaos" and "created a 'minefield'" by calling for "examination of a law's purposes, effects, and potential for entanglement with religion," and "estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion" (citations omitted)).

The sounder approach is to keep the inquiry closely tethered to the specific practices associated with historical religious establishments. Historical religious establishments involve particular forms of legal coercion and control—a penalty for not complying with a preferred religious practice, compelled financial support, or control over doctrine and operations. See pp. 8-9, *supra*. S.B. 10 involves nothing similar.

Because the Fifth Circuit correctly determined that S.B. 10 does not impose an establishment of religion within the original understanding of the First Amendment, review of the first question presented is unwarranted at this time.

2. There Is No Conflict Among The Courts Of Appeals.

Review is especially unwarranted because ongoing debates about implementing *Kennedy* have yet to ripen into a conflict among the courts of appeals.

While petitioners suggest (at 25) that decisions by the Third and Fourth Circuits indicate post-*Kennedy* "confusion in the lower courts," those cases show the opposite. In applying *Kennedy* to ask whether petitioners had "prov[en] a set of facts that would have historically been understood as an establishment of religion," the court below expressly relied on the same test used by the Third and Fourth Circuits. Pet. App. 50a (quoting *Hilsenrath ex rel. C.H.* v. *Sch. Dist. of the Chathams*, 136 F.4th 484, 491 n.54 (3d Cir. 2025) (quoting *Firewalker-Fields* v. *Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023))). That is unity, not conflict.

Driving the point home, less than a year ago, this Court denied a petition raising the same supposed need for post-*Kennedy* guidance. The petition argued that the Third Circuit's hallmarks-based inquiry conflicted with other approaches and insufficiently protected public-school students from subtle religious coercion. See Pet. i-ii, 9-25, *Hilsenrath ex rel. C.H.* v. *Chathams Sch. Dist. Bd. of Educ.*, No. 25-256. This Court denied review. 146 S. Ct. 885 (2025) (mem.). The same result should follow here.

To be sure, important questions about how to implement *Kennedy*'s history-based Establishment Clause framework remain unresolved and potentially subject to disagreement. See Part I.A, *supra*; see also, *e.g.*, *Firewalker-Fields*, 58 F.4th at 122 n.8 (identifying "[o]pen questions," including "[w]hat kinds of evidence are relevant," "[w]hat kinds of evidence are the most useful," "[w]hich periods of history are relevant," and "which period is most important"). But because that incipient debate has not yet matured into a square conflict among the courts of appeals, this Court's intervention at this juncture is unnecessary.

Nor is this a speak-now-or-forever-hold-your-peace petition. As petitioners acknowledge (at 3), "[i]n the last two years, legislatures in two dozen states have either enacted or considered proposed laws regarding the display of the Ten Commandments in public schools." Given time, that legislative activity is likely to result in exactly the kind of percolation this Court traditionally favors before taking up an issue. Indeed, an Establishment Clause challenge to one of those laws has already reached the Eighth Circuit and is awaiting decision. See *Stinson* v. *Arkansas*, No. 26-1722 (8th Cir. argued Sep. 22, 2026). There is every reason to allow the lower courts to sort through these issues before weighing in.

II. THE COURT SHOULD DENY CERTIORARI ON THE FREE EXERCISE QUESTION.

Petitioners also ask the Court to review whether S.B. 10 on its face burdens parents' and children's religious exercise, asserting a conflict with *Mahmoud* v. *Taylor*, 606 U.S. 522 (2025). There is no sound reason to take up that question. As the court of appeals correctly held, the facial claim that petitioners bring against S.B. 10 differs fundamentally from the as-applied accommodations sought in *Mahmoud*. Pet. App. 87a.

In *Mahmoud*, parents of elementary school students alleged that their free exercise rights were violated by a school board's refusal to notify them when "LGBTQ+-inclusive" storybooks would be taught and by the board's denial of their request to have their children excused from that instruction. See *Mahmoud*, 606 U.S. at 543. This Court held that those practices impermissibly burdened the parents'

religious exercise and required the board to accommodate them by providing the parents with notice and the chance to excuse their children from such instruction in the future. *Id.* at 569.

Petitioners' case is entirely different. They ask the courts to facially invalidate a law requiring the Ten Commandments to be posted on classroom walls. Pet. App. 87a. Neither *Mahmoud* nor any other case supports that sweeping relief. The Free Exercise Clause demands a "precise analysis" focused on the "particular religious claimants" at issue. *Fulton*, 593 U.S. at 541 (citation omitted). As a result, free exercise remedies are tailored to "lift[] the burden from the objector" rather than to "strip the objectionable material from everyone else." Barclay, *Implementing the Establishment Clause*, *supra*, at 86. At oral argument in *Mahmoud*, counsel for the parents acknowledged that under strict scrutiny, parents "would always lose if they're trying to direct the school what to teach or tell other students what they must teach." Tr. of Oral Arg. at 18, *Mahmoud*, *supra* (No. 24-297). Petitioners seek exactly that forbidden remedy: removal of the displays for every student in every Texas classroom.

Petitioners' only response (at 36-37) is to argue that opting out "would be *impossible*" because S.B. 10 requires the Ten Commandments to be displayed in every classroom. But arguments that accommodation is impossible do not end the inquiry—they are tested under strict scrutiny. For example, the school board in *Mahmoud* argued that "individual principals and teachers could not accommodate the growing number of opt out requests without causing significant disrup-

tions." 606 U.S. at 538 (citation omitted). Prison officials likewise resisted accommodation as unworkable in *Holt* v. *Hobbs*, 574 U.S. 352 (2015), and *Ramirez* v. *Collier*, 595 U.S. 411 (2022). In each case the Court decided whether an accommodation was required anyway on an as-applied basis. Petitioners' choice to seek facial invalidation rather than an as-applied accommodation makes that inquiry impossible to conduct here.

The decision below does not conflict with *Mahmoud*, so there is no warrant for this Court to take up the free exercise question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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