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.

ROXANNE CRIBBS RINGER, ON BEHALF OF HERSELF
AND ON BEHALF OF HER MINOR CHILD, E.R., et al.,
Petitioners,

v.

COMAL 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 IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether displaying the Ten Commandments—a document with historical significance as one of the foundations of our legal system—in public school classrooms constitutes a prohibited establishment of religion under the Establishment Clause, as understood in light of historical practices and understandings.

2. Whether the Free Exercise Clause requires schools to remove materials from classrooms that parents contend are inconsistent with their religious beliefs, even though the materials are not used in instruction.

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INTRODUCTION

The Ten Commandments "have historical significance as one of the foundations of our legal system." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 53 (2019). This Court's "opinions, like [its] building, have recognized the role the Decalogue plays in America's heritage." *Van Orden v. Perry*, 545 U.S. 677, 689 (2005) (plurality op.) (citation omitted). While the Commandments "are religious," they "have an undeniable historical meaning." *Id.* at 690.

Because of their importance to America's history and heritage, the Texas Legislature determined that schoolchildren should be familiar with the Ten Commandments and enacted Senate Bill 10 (S.B.10), requiring public schools to post donated copies of the *Van Orden* version in each classroom. Much like the national motto—"In God We Trust"—displayed in a conspicuous place in each school building, Tex. Educ. Code § 1.004, these copies of the *Van Orden* text are passive displays that students are not compelled to worship, venerate, memorize, or interact with in any way. The posters merely expose students to the Ten Commandments in the same way that students who do not recite pledges of allegiance will still hear their classmates recite "one Nation under God" and "one state under God." *See* Tex. Educ. Code § 25.082(b) (citing 4 U.S.C. § 4; Tex. Gov't Code § 3100.101).

This Court "long ago abandoned *Lemon* and its endorsement test offshoot," *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022), and has instead directed "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings,'" *id.* at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

Stone v. Graham, on which petitioners rely, applied *Lemon*'s purpose prong to summarily reverse a decision of the Supreme Court of Kentucky based on this Court's finding that the Kentucky legislature "had no secular legislative purpose" in "requiring the posting of the Ten Commandments in public schoolrooms." 449 U.S. 39, 41 (1980) (per curiam). *Stone* was abandoned along with *Lemon* and, in any event, would not directly control.

One of *Lemon*'s key defects was that it "led to 'differing results' in materially identical cases." *Kennedy*, 597 U.S. at 534. *Lemon*'s purpose prong required analyzing how an "objective observer" would understand a statute's "text, legislative history, and implementation." *McCreary Cnty. v. Am. C. L. Union of Ky.*, 545 U.S. 844, 862 (2005). Identical statutes might have had different purposes, depending on "their context," "the contemporaneous legislative history," "the historical context," and "the specific sequence of events leading to [their] passage." *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987)).

Under the governing Establishment Clause test, a poster of the Ten Commandments on a public-school classroom wall is not a recognized hallmark of an established church. *Kennedy*, 597 U.S. at 537 n.5, 540 n.6. And treating these posters as "coercive" for purposes of the Establishment Clause or Free Exercise Clause stretches the word beyond its ordinary meaning and would invite countless future religious objections to classroom materials.

In *Mahmoud v. Taylor*, this Court recognized that the Free Exercise Clause allowed parents to opt out of "potentially coercive" classroom instruction in which teachers would "instruct young children using

storybooks that explicitly contradict their parents' religious views." 606 U.S. 522, 554–55 (2025). The parents did not seek to remove the books from the classroom. Holding that the Free Exercise Clause compels the removal of books and posters, rather than allowing parents to opt out of particular instruction, would significantly reshape public education.

There is no circuit split, and even if this Court were inclined to engage in error correction, there is no error to correct. Although further guidance on the hallmarks test for the Establishment Clause may be warranted in the future, this Court should allow further percolation in the courts of appeals. Similar cases are pending, and there is no reason that this Court should depart from its usual practice and address these issues without the benefit of reasoned decisions from other courts of appeals.

Among other factors, the recent election in Texas renders this case a particularly poor vehicle. The incoming Texas Attorney General has publicly stated that he "will not defend" the challenged law,[1] likely depriving this Court of an adversarial presentation. *Cf. City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015) (dismissing a question presented as improvidently granted for lack of "an adversary presentation").

The petition for writ of certiorari requests splitless error correction on an issue that warrants further percolation in the lower courts. The petition should be denied.

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[1] Jack Fink, *Democratic candidates for Texas AG call state's school choice program, Ten Commandments law unconstitutional*, CBS News (Apr. 20, 2026), https://perma.cc/E8TB-NW5C.

STATEMENT OF THE CASE

A. Background

1. "For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings." *Am. Legion*, 588 U.S. at 53. Far from having only religious import, "the Ten Commandments . . . have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in [the Supreme Court's] courtroom and in other prominent public buildings in our Nation's capital." *Id.*

The Ten Commandments "served as a foundation for the formation of both English Common Law and the Napoleonic Code, which together laid the foundation for American jurisprudence." *Books v. City of Elkhart*, 235 F.3d 292, 312 (7th Cir. 2000) (Manion, J., concurring in part and dissenting in part). Blackstone, for example, explains that in proscribing *mala in se* crimes such as murder, theft, and perjury, a legislature "acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts." 1 William Blackstone, Commentaries 54. Lord Coke described Moses as "the first reporter or writer of law in the world." *Calvin's Case*, (1608) 77 Eng. Rep. 377, 382, 391-92 (Ct. of Exchequer Chamber). Echoing this historical pedigree, a depiction of Moses holding the Ten Commandments appears in the frieze of the U.S. Supreme Court. *See* Off. of the Curator, Sup. Ct. of the U.S., Courtroom Friezes: South and North Walls (Aug. 9, 2021), https://perma.cc/BJV5-3GLL (explaining Moses's role as one of the "great lawgivers of history").

Numerous scholars have noted the influence of the Ten Commandments on the American legal system. *See* Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspectiv*e, 35 Emory L.J. 777, 789 (1986) (discussing the influence of the Ten Commandments and arguing that "our law is rooted in a common religious tradition"); John T. Noonan, Jr., *The Believer and the Powers That Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government* 4 (1987) ("Little doubt exists that, despite the great variety of views on the dating, numbering, and exact meaning of the Ten Commandments, they have been the most influential law code in history."); John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 B.Y.U. L. Rev. 611, 636 (2002) (arguing that displaying the Ten Commandments "simultaneously presents several underlying policies deeply ingrained in the character of American Common Law").

Although he denies that the Ten Commandments are a source of American law, petitioners' expert acknowledges that "[i]t is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition" and that by "inform[ing] our notions of right and wrong," they "have influenced the development of Western law of which the American legal system is part." Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J.L. & Religion 525, 525 (2000).

The Ten Commandments have come to symbolize the rule of law itself. In 1997, the United States House of Representatives recognized that "the Ten Commandments have had a significant impact on the development

of the fundamental legal principles of Western Civilization" and "set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society." H.R. Con. Res. 31, 105th Cong. (1997); *see also* Ken Starr, *Religious Liberty in Crisis: Exercising Your Faith in an Age of Uncertainty* 17 (2021) (explaining that the Ten Commandments have "taken on historical significance to society in a more general, nonreligious sense" and "stand not only as sacred text, but also as culture-shaping principles guiding the formation of laws that bind us all").

Recognizing this rich historical tradition, E.J. Ruegemer, a Minnesota judge responsible for many Ten Commandments displays around the country, including the display at the Texas Capitol, ROA.25-50695.955; App. 72a, believed that "if troubled youths were exposed to one of mankind's earliest and long-lasting codes of conduct, those youths might be less inclined to break the law," ROA.25-50695.955.

2. The Texas Legislature enacted S.B.10 to require public schools to post donated copies of the *Van Orden* text of the Ten Commandments:

The Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

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

Remember the Sabbath day, to keep it holy.

> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
>
> Thou shalt not kill.
>
> Thou shalt not commit adultery.
>
> Thou shalt not steal.
>
> Thou shalt not bear false witness against thy neighbor.
>
> Thou shalt not covet thy neighbor's house.
>
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Tex. Educ. Code § 1.0041(c) (formatting in original). The Legislature used the text that appears on the Ten Commandments monument outside the Texas Capitol, upheld by this Court in *Van Orden*. *See* 545 U.S. at 707 (Stevens, J., dissenting) (listing this text).[2]

The full text of the Ten Commandments is found in Exodus 20 and Deuteronomy 5. The *Van Orden* text is an abridgment, and petitioners introduced no evidence

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[2] Petitioners' repeated assertion that the *Van Orden* text is "drawn from the King James Bible," Pet. 1, 11, 13, is incorrect and appears to be based on their expert's association of the word "thou" with the King James Version. *See* ROA.25-50695.1855 (quoting Dr. Green's expert report in *Roake*, which opined that the Louisiana text was drawn from the King James Version because it "uses the wor[d] 'Thou,' which we don't use very often these days unless you're reading from the King James Bible"). Respondents identified numerous other translations that use the same pronouns. *Id.* Petitioners' assertion that the *Van Orden* text is linked to "particular Protestant denominations," Pet. 31, is equally incorrect.

that any denomination uses this text in worship or otherwise considers it authoritative.

The *Van Orden* text was developed by the "Fraternal Order of Eagles, a private civic (and primarily secular) organization," that "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). The Order "consult[ed] with a committee composed of members of several faiths in order to find a nonsectarian text." *Id.*

As petitioners note, Pet. 13, different religious traditions number the Commandments differently. The nonsectarian *Van Orden* text thus omits numbers and, in fact, includes twelve separate lines following "The Ten Commandments."

The poster displaying the Ten Commandments must (1) be exhibited in a "conspicuous place" in the classroom, (2) "be at least 16 inches wide and 20 inches tall," and (3) contain font "in a size and typeface that is legible to a person with average vision from anywhere in the classroom." Tex. Educ. Code § 1.0041(a), (b)(1)-(2). Although the poster itself cannot include other content, *id.* § 1.0041(b)(1), S.B.10 does not prohibit teachers, schools, or school districts from including the poster within a larger display of historical or educational materials.

Public schools may, but are not required to, purchase posters using district funds. *Id.* § 1.0041(e). If a classroom does not have a poster, the school must "accept any offer of a privately donated poster or framed copy of the Ten Commandments" that meets S.B.10's requirements. *Id.* § 1.0041(d)(1).

S.B.10 does not require teachers to discuss the meaning or interpretation of the Ten Commandments with students or use the Ten Commandments in instruction.

3. S.B.10 was intended to "restore the history and tradition of the Ten Commandments in our state and our nation" and to "remind students all across Texas of the importance of a fundamental foundation of American and Texas law." ROA.25-50695.1901. The Texas House Committee on Public Education's bill analysis explained that "S.B. 10 seeks to remind students all across Texas of the importance of the Ten Commandments as a fundamental foundation of American and Texas law." House Comm. on Pub. Educ., Bill Analysis, Tex. S.B.10, 89th Leg., R.S. (2025).

The Legislature also recognized the Ten Commandments' moral significance. S.B.10's author explained that "every child needs to see on the wall that it's wrong to kill, it's wrong to steal, [and] that you're supposed to respect and honor your parents." Debate on Tex. S.B.10 on the Floor of the Senate, 89th Leg., R.S. at 3:14:52-3:15:07 (Mar. 18, 2025), https://perma.cc/LLL7-9B4E (statement of Senator King). The Lieutenant Governor stated that "placing the Ten Commandments in our public school classrooms" will "ensure our students receive the same foundational moral compass as our state and country's forefathers." Tex. Lt. Gov. Dan Patrick, Statement on the Passage of Senate Bill 10—Placing the Ten Commandments in Schools (Mar. 18, 2025), https://perma.cc/4YWY-XKDU.

B. Procedural History

1. *Nathan*

Before S.B.10 took effect, the *Nathan* petitioners—Texas parents whose children attend public schools in

eleven school districts[3]—filed suit on behalf of themselves and their minor children, contending that S.B.10 violates the Establishment Clause and the Free Exercise Clause. App. 202a.

They allege that the posters will cause their children to "be unconstitutionally coerced into religious observance, meditation, veneration, and adoption of the state's favored religious scripture" and "be pressured to suppress expression of their personal religious and nonreligious beliefs and practices, especially in school, to avoid the potential disfavor, reproach, and/or disapproval of school officials and/or their peers." App. 227a-228a.

After the district court granted a preliminary injunction prohibiting display of the Ten Commandments, App. 250a, respondents appealed, and the Fifth Circuit granted a motion for initial hearing *en banc* and held a consolidated oral argument with a case involving a similar Louisiana law, App. 31a.[4]

In an opinion authored by Judge Duncan, the Fifth Circuit vacated the preliminary injunction and rendered judgment dismissing the claims. App. 28a. After rejecting respondents' standing arguments, App. 33a–35a, and

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[3] Only nine school districts were appellants in the Fifth Circuit because two, Austin Independent School District and Houston Independent School District, are not represented by the Office of the Attorney General of Texas. ROA.25-50695.1536. Austin ISD was dismissed from the case, ROA.25-50695.1424.

[4] The en banc court held that the *Roake* case was not ripe. *Roake v. Brumley*, 170 F.4th 292, 300 (5th Cir. 2026) (en banc) (per curiam). Louisiana has filed a conditional petition for writ of certiorari, which remains pending before this Court. *See* Conditional Petition for Writ of Certiorari, *Brumley v. Roake*, No. 25-1360 (U.S. May 21, 2026).

holding that the claim was ripe, App. 35a–37a, the decision first concludes that "applying *Stone* [*v. Graham*] . . . would be to ignore *Lemon*'s abrogation," App. 38a; *see also* App. 43a ("Unmistakably, *Stone* depended entirely on *Lemon* and nothing but *Lemon*.").

Following this Court's direction in *Kennedy*, the Fifth Circuit considered S.B.10 "in light of founding-era religious establishments." App. 49a. After examining "historical evidence from the founding era," App. 54a, the Fifth Circuit concluded that the *Nathan* petitioners "failed to show that S.B. 10's displays would have historically been understood as an establishment of religion," App. 67a. The law "lacks the features of founding-era establishments" such as "punish[ing] dissenters through fines, taxes, and legal disabilities." App. 68a. Displaying religious text in a classroom does not coerce students in the way that founding-era establishments coerced dissenters because it does not require students to "attend church" or "engage in a formal religious exercise." App. 69a (quoting *Kennedy*, 597 U.S. at 537). The *Nathan* petitioners did not "identif[y] a shred of founding-era evidence equating the government's use of religious text, displays, or symbols with an establishment of religion." App. 70a.

With respect to the free exercise claim, the Fifth Circuit held that the passive display of posters on the classroom wall was not a "substantial burden on religious belief or practice," and was thus unlike the instruction at issue in *Mahmoud*, 606 U.S. at 554. App. 84a. Nor does this Court's precedent give parents "the 'right to micromanage' what Texas schools hang on classroom walls." App. 87a.

The en banc court thus vacated the preliminary injunction and rendered judgment dismissing petitioners' claims. App. 87a.

2. *Cribbs Ringer*

The *Cribbs Ringer* petitioners are Texas parents whose children attend public schools in fourteen school districts. App. 4a.[5] They sued roughly one month after the district court granted the preliminary injunction in *Nathan*. App. 6a, 171a. The district court granted a preliminary injunction holding that S.B.10 likely violates the Establishment Clause. App. 18a.

Respondents appealed, and on May 29, 2026, a panel summarily reversed and directed the district court to render judgment dismissing the claims because of the en banc decision in *Nathan*. App. 3a.

[5] Two school districts, Arlington ISD and McAllen ISD, were not represented by the Office of the Attorney General of Texas and "agreed to be bound" by any preliminary injunction the district court entered. App. 4a n.1.

REASONS FOR DENYING THE PETITION

I. The Petition for Writ of Certiorari Seeks Error Correction with No Error Apparent.

In *Kennedy v. Bremerton*, this Court directed that the Establishment Clause, like other provisions of the Constitution, must be interpreted with "reference to historical practices and understandings." 597 U.S. at 535 (quoting *Town of Greece*, 572 U.S. at 576). "The 'shortcomings' associated with [*Lemon*'s] '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." *Id.* at 534 (quoting *Am. Legion*, 588 U.S. at 48–49 (plurality op.)).

Petitioners urge this Court to summarily reverse the Fifth Circuit because it followed this Court's instructions to evaluate Establishment Clause challenges based on history and original public meaning, rather than following *Lemon*'s application in *Stone v. Graham*. Pet. 21. Not only is summary reversal unwarranted, but there is no error for this Court to correct.

A. *Stone v. Graham* applies *Lemon*'s purpose prong and fell with *Lemon*.

1. Petitioners read *Stone v. Graham* as establishing a general prohibition holding, at all times and circumstances, that "posting the Ten Commandments in public-school classrooms violates the Establishment Clause." Pet. i; *see also* Pet. 24 (describing *Stone* as prohibiting "public-school classroom displays").

They are incorrect. *Stone*'s holding concerns a particular Kentucky statute and *Lemon*'s requirement that to be permissible under the Establishment Clause, a

statute "must have a secular legislative purpose." *Stone*, 449 U.S. at 40 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971)). The holding is unambiguous: "We conclude that [the law in question] violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution." *Id.* at 42-43; *see also* App. 43a ("*Stone* depended entirely on *Lemon* and nothing but *Lemon*."). Even if *Stone* were interpreted to hold that any posting of the Ten Commandments in public schools violates the *Lemon* test, the second half of this holding—that a violation of the *Lemon* test constitutes a violation of the Establishment Clause—has been squarely rejected by this Court. *Kennedy*, 597 U.S. at 534. This Court criticized the Ninth Circuit's reliance on "Lemon *and its progeny*." *Id.* (emphasis added). With *Lemon* "long ago abandoned," *id.*, *Stone*'s holding that "violat[ing] the first part of the *Lemon v. Kurtzman* test" also violates the Establishment Clause has necessarily been abandoned as well. 449 U.S. at 43.

Every aspect of *Stone*'s analysis concerns the "purpose" of the Kentucky Act: "We conclude that Kentucky's statute . . . had no secular legislative purpose[.]" *Id.* at 41; *see also id.* at 41 (rejecting the trial court's findings regarding the law's "'avowed' purpose"). Then-Justice Rehnquist, in dissent, expressed concern with "[t]he Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court," which was "without precedent in Establishment Clause jurisprudence." *Id.* at 43 (Rehnquist, J., dissenting). Petitioners quote the majority's suggestion that children might "read, meditate upon, perhaps to venerate and obey" the posters, Pet. 25 (quoting *Stone*, 449 U.S. at 42), but *Stone* did not hold that such an *effect* would violate the Establishment Clause. Applying

Lemon, *Stone* held that these activities are "not a permissible state *objective* under the Establishment Clause." *Id.* at 42 (emphasis added).

"*Stone* was *Lemon* all the way down," App. 44a, and is "part of *Lemon*'s 'progeny'" that this Court "has affirmatively 'abandoned' and 'abrogated.'" App. 45a (quoting *Kennedy*, 597 U.S. at 534; *Groff v. DeJoy*, 600 U.S. 447, 460 (2023)).

2. The unusual nature of *Lemon*'s purpose test confirms that the decisions below correctly followed *Kennedy* rather than *Stone.* One of *Lemon*'s defects was that it "led to 'differing results' in materially identical cases." *Kennedy*, 597 U.S. at 534. Even if *Stone* had not fallen along with *Lemon*, it did not "directly control."

Lemon's purpose prong required analyzing, from the perspective of an "objective observer," a statute's "text, legislative history, and implementation." *McCreary Cnty.*, 545 U.S. at 862 (citation omitted). Because text is only one consideration among many, statutes with identical text might well have been found to have different purposes, depending on "their context," "the contemporaneous legislative history," "the historical context," and "the specific sequence of events leading to [their] passage." *Id.* (quoting *Edwards*, 482 U.S. at 594–95).

McCreary County explains that "*Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government." 545 U.S. at 867. *Stone* held that, "*at least on the facts before it*, the display of [the Ten Commandments] could presumptively be understood as meant to advance religion." *Id.* (emphasis added).

Applying *Lemon*'s purpose test consistent with *Stone* would have required far more than comparing the text of the Texas and Kentucky statutes. Determining the Texas Legislature's purpose would have required evaluating the statute's context, its legislative history, the historical context, and sequence of events leading to the law's passage. *Stone* could never have "directly controlled" within the meaning of this Court's precedent. At most, *Stone* could provide guidance regarding the application of *Lemon*'s purpose prong. But determining whether another statute shared the impermissible purpose of the Kentucky statute would have required a full analysis of all the relevant context under *Lemon* and *McCreary County*.

Below, the *Nathan* petitioners disclaimed any intention to rely on "legislative purpose" or "argue that S.B. 10's religious purpose alone renders it unconstitutional." Appellees' Br. 24 n.3, No. 25-50695. The *Cribbs Ringer* petitioners similarly did not discuss legislative purpose. ROA.25-51045.187; ROA.25-51045.1081. Having abandoned *Stone*'s predicate—that an allegedly impermissible purpose rendered S.B.10 unconstitutional under *Lemon*—petitioners could not rely on *Stone*.

Moreover, *Stone* predated this Court's explication of the distinction between facial and as-applied challenges in *United States v. Salerno*, 481 U.S. 739 (1987). *Stone* did not address the requirement that "the challenger must establish that no set of circumstances exists under which the Act would be valid" to prevail on a facial challenge to a law, *id.* at 745, petitioners' burden in this case.

3. Petitioners rely on the principle that the courts of appeals must follow a case from this Court that "directly controls," even if it "appears to rest on reasons rejected

in some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989). *Rodriguez* illustrates this principle: in interpreting the Securities Act of 1933, the courts of appeals were required to follow this Court's interpretation of the same statute in *Wilko v. Swan*, 346 U.S. 427 (1953).

Petitioners' other examples follow this pattern. *Jusino v. Federation of Catholic Teachers, Inc.*, 54 F.4th 95 (2d Cir. 2022), adhered to this Court's interpretation of the National Labor Relations Act in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In *Childs v. Webster*, 168 F.4th 1020 (7th Cir. 2026), the Seventh Circuit applied this Court's interpretation of the Religious Land Use and Institutionalized Persons Act in *Cutter v. Wilkinson,* 544 U.S. 709 (2005).

Petitioners identify no precedent for the approach they urge this Court to take: reviewing the constitutionality of a newly enacted state statute under the purpose prong of the long-abandoned *Lemon* test rather than this Court's current jurisprudence. Their suggestions of a conflict are incorrect.

The decision below[6] follows this Court's guidance by asking whether the Texas statute is "consistent with [this Court's] First Amendment precedents," *Thompson v. Hebdon*, 589 U.S. 1, 6 (2019) (per curiam), rather than applying *Lemon*'s purpose test.

Lemon—including its purpose prong—has been "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). This Court

[6] "Decision below" refers to the en banc decision at App. 22a–168a.

should reject petitioners' invitation to resurrect it for the purpose of reviewing Texas's law.

In the alternative, even if this Court had not already abrogated *Stone* along with *Lemon*, if this Court were to grant certiorari, it should expressly overrule *Stone* and reiterate that all Establishment Clause challenges must be considered with "reference to historical practices and understandings," *Kennedy*, 597 U.S. at 535, rather than any part of the *Lemon* test.

B. The decision below did not err in its analysis of the Establishment Clause.

Even assuming that the Establishment Clause should be incorporated against the States, App. 52a n.16, applying this Court's test, the decision below carefully compares a poster on the classroom wall to "historically disfavored establishmentarian practice." *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023); *Hilsenrath v. Sch. Dist. of the Chathams*, 136 F.4th 484 (3d Cir. 2025).

1. Petitioners fault the Fifth Circuit for "fail[ing] to consider the critical role that government-dictated religious education historically played in religious establishments and the Founders' rejection of that practice through the Establishment Clause." Pet. 28. But petitioners never raised this argument below. Rather than engaging seriously with the historical attributes of established churches, petitioners declared that "[t]he applicable post-*Lemon* Establishment Clause inquiry here simply asks whether the challenged statute is religiously coercive." Appellees' Br. 36, No. 25-50695.

Petitioners disclaimed any attempt "to prove that a challenged practice is 'relevantly similar' to a *particular* [historical] practice." Appellees' Br. 40–41, No. 25-50695.

Their arguments below focused on alleged "coercion," not religious education. App. 68a ("Plaintiffs' principal argument is that S.B. 10 resembles historic establishments because it is coercive.").

Although claims, not arguments, must be preserved, *Yee v. City of Escondido,* 503 U.S. 519, 534–35 (1992), this Court is a "court of review, not of first view," *Cutter*, 544 U.S. at 718, n.7. Petitioners' new arguments about religious education should be raised and considered by courts of appeals before being addressed by this Court.

After surveying the history of established churches, App. 50a–67a, the Fifth Circuit addressed petitioners' coercion arguments and correctly concluded that "merely displaying religious text in a classroom" does not "coerc[e] students in the way that founding-era establishments coerced dissenters." App. 69a.

This Court recognized that historical establishments involve coercion to "attend church" or "engage in 'a formal religious exercise.'" *Kennedy*, 597 U.S. at 537 (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)); *see also Town of Greece*, 572 U.S. at 586 (plurality op.) (stating that the government may not compel a person to "participate in any religion or its exercise"); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (holding that the government may not "make a religious observance compulsory").

Lee v. Weisman exemplifies the prohibition on compelled religious exercise: "State officials direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools," and student "attendance and participation in the state-sponsored religious activity [was] in a fair and real sense obligatory." 505 U.S. at 586.

Schempp similarly involved "a religious ceremony" in the public school. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963); *see also id.* at 224 (noting the "pervading religious character of the ceremony"). "[T]he laws require religious exercises[.]" *Id.* at 224; *accord id.* at 225 ("religious exercises").

But "S.B. 10 does not compel any student to engage in formal religious exercise." App. 69a. "No teacher is directed to teach the text. No student must learn or recite it. No examination tests assent. No penalty attaches to ignoring it. The text simply hangs on the wall." Stephanie Barclay, *Implementing the Establishment Clause* 41 (Nov. 9, 2026), https://tinyurl.com/bdhkxjvk. And even if students take offense at being exposed to these posters, "[o]ffense . . . does not equate to coercion." *Kennedy*, 597 U.S. at 539 (quoting *Town of Greece*, 572 U.S. at 589 (plurality op.)).

2. Petitioners and their amici now contend that the posters resemble the historical practice of religious education as a feature of an established church. Pet. 28. But the historical practices they identify involved actual instruction. There is no "instruction" associated with the Ten Commandments—they are simply displayed as a passive poster on classroom walls.

Rather than religious instruction, the Fifth Circuit correctly analyzed S.B.10 as "the government's use of religious text, displays, or symbols." App. 70a. "[R]eligious placenames dot the landscape and religious mottos, symbols, and flags adorn countless public buildings." App. 70a.

Amici's historical evidence that "[r]eligious establishments" displayed the Ten Commandments on church buildings or "employed the Ten Commandments to

instruct children," Amicus Br. 9–10, is both unsurprising and unhelpful to petitioners. Evidence of "compel[led] attendance at religious instruction," Amicus Br. 7, and displays of the Ten Commandments inside of churches do not support the conclusion that displays of the Ten Commandments in public spaces would have been understood as a hallmark of an established religion. As Professor Stephanie Barclay recently explained, the fact that the Ten Commandments "hung above the altar of the established church" does not demonstrate "that a government may not display a text or symbol in its own buildings." Barclay, *supra* at 31.

3. The Fifth Circuit also correctly rejected petitioners' theory that the Legislature's use of the *Van Orden* text constitutes a denominational preference. App. 72a. Petitioners invited the court to address complex theological issues that will almost assuredly go unnoticed in public school classrooms. *See* App. 75a–76a (noting the question of whether the Ten Commandments prohibit the veneration of icons). The Fifth Circuit properly declined this invitation. App. 76a–77a ("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.").

Notably, petitioners do not propose an alternative version of the Ten Commandments that the Legislature should have used. In their view, because of potential theological differences between denominations, the Ten Commandments may not be displayed at all. Their position would remove religion from the public square.

4. Not only does displaying the Ten Commandments not resemble a recognized hallmark of an established church, but it is consistent with historical practices. *See*

ROA.25-51045.960–966. The widespread usage of the Ten Commandments in pedagogical material from the colonial era to at least the early or middle 19th century demonstrates that teaching students about the Ten Commandments and the principles they exemplify would not have been seen as state establishment of religion. *Id.*

Moreover, one of the organic documents of the United States, the Northwest Ordinance of 1787, encouraged the teaching of religion in schools: "Religion, morality and knowledge, being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, art. III, 1 Stat. 50, 52 (1789).

There is also emerging evidence regarding the role of federal agencies in encouraging the use of religious materials in the classroom during the period of the adoption of the Fourteenth Amendment. Professor Josh Blackman recently identified evidence that during Reconstruction the Freedmen's Bureau, "a federal government agency, headed by military chaplains, worked with religious groups to establish schools in the South, and the curriculum in those classes included bible readings and prayers."[7] "The Freedmen schools, which were managed and funded by the federal government, proactively incorporated the Bible into the curriculum." *Id.* Instructions for these schools in Texas specifically called for the school day to "commence with either the singing of an

[7] Josh Blackman, The Establishment Clause at the Second Founding, Civitas Outlook (Oct. 13, 2026), https://perma.cc/JH38-3LK6.

appropriate hymn, or prayer, or the reading of the Scriptures."[8]

To the extent that the mid-19th Century is the appropriate time to consider the original public meaning of the Establishment Clause as applied to the States, this evidence strongly suggests that the display of the Ten Commandments would not have been considered an impermissible establishment of religion.

5. An alternative holding would improperly disfavor religion and religious viewpoints. "[H]ostility toward religion . . . has no place in our Establishment Clause traditions." *Am. Legion*, 588 U.S. at 38. The Establishment Clause does not require the government to "evince a hostility to religion by disabling [itself] from in some ways recognizing our religious heritage." *Van Orden*, 545 U.S. at 684. "[N]o constitutional requirement . . . makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach*, 343 U.S. at 314.

Petitioners would allow any secular historical or moral document to be displayed on classroom walls. *See* App. 249a (district court suggesting posting (1) "lessons of behavior from many cultures melded into the American motto of 'E pluribus unum[;]'" (2) exhortations to "[d]o unto others as you would have them do unto you," "[b]e kind[,]" and "[b]e respectful[;]" or (3) lessons from, "All I Really Need to Know I Learned in Kindergarten"). But despite their undeniable historical and cultural significance, *see Am. Legion*, 588 U.S. at 53 ("one of the foundations of our legal system"), under the district

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[8] Texas Education, Monthly Form Reports, Monthly Reports from Teachers and Subassistant Commissioners, 1865–Apr. 1867, part 4, https://tinyurl.com/434ebzrb.

court's rule, the Ten Commandments cannot be displayed solely because of their religious aspects. Such a censorship regime—which demands that public schools remove the religious aspects of our nation's history—finds no support in the Religion Clauses but rather conflicts with them.

Petitioners' contention that the Constitution disfavors historical documents with religious aspects "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

C. The decision below did not err in its analysis of the Free Exercise Clause.

Petitioners argue that S.B.10 violates the Free Exercise Clause under this Court's decision in *Mahmoud*. Pet. 32. But the passive display of materials on classroom walls "is nothing like," App. 84a, the instruction "by authority figures" intended to "disrupt" children's thinking at issue in *Mahmoud*, 606 U.S. at 554, 536. And the remedy petitioners seek—to remove allegedly offensive materials from a public school classroom—has no basis in Free Exercise jurisprudence.

1. *Mahmoud*'s analysis turned on "the potentially coercive nature of classroom instruction," *i.e.*, the requirement that teachers "instruct young children using storybooks that explicitly contradict their parents' religious views" and "encourage[d] the teachers to correct the children and accuse them of being 'hurtful' when they express a degree of religious confusion." 606 U.S. at 555. These facts—direct instruction by teachers with the purpose and effect of changing children's beliefs about sexuality—were crucial to this Court's holding that the

"instruction related to the storybooks will 'substantially interfer[e]' with the parents' ability to direct the 'religious development' of their children." *Id.* at 554 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

The decision below correctly recognizes that there is nothing similar at issue in this case. "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." App. 84a.

Not only did *Mahmoud* not extend the Free Exercise Clause to regulate classroom displays, but the plaintiffs in that case made clear that they sought only to opt out of particular instruction, not to remove books from the classroom. At oral argument before this Court, counsel for the *Mahmoud* students acknowledged that the students had not argued that mere "exposure" to the books would "be a burden in that case." Tr. of Oral Arg. 9, No. 24-297; *see also id.* (Justice Sotomayor: "[H]aven't we made very clear that the mere exposure to things that you object to is not coercion?").

The decision below correctly recognized that "no case suggests that the mere presence of religious language in a school display is ipso facto religious coercion." App. 85a; *see also id.* ("[D]isagreement alone does not transform S.B. 10 into religious coercion—and certainly not into the compulsory sex re-education program invalidated in *Mahmoud*."). Comparing the facts of this case to the facts of *Mahmoud* confirms that petitioners have not asserted a viable facial challenge claim under the Free Exercise Clause.

2. Nor is the remedy sought by petitioners consistent with this Court's free exercise precedent. The Free

Exercise Clause provides a right to "opt out of a particular educational requirement." *Mahmoud*, 606 U.S. at 568. Students have a similar right to "remai[n] passive during a flag salute ritual." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

But petitioners do not seek to opt out of particular instruction (there is none). Petitioners instead demand the removal of posters. The contrast with *Mahmoud* is sharp. At oral argument, counsel for the students expressly disclaimed this theory: "[N]o student . . . has the right to tell the school what to teach or to tell other students what they have to learn." Tr. of Oral Arg. 17, No. 24-297. The *Barnette* plaintiffs similarly did not seek to "strip all classrooms of the American flag," App. 87a, or prevent other students from reciting the pledge. *See also* Barclay, *supra* at 88 ("The relief that vindicates a free-exercise burden lifts the burden from the objector; it does not strip the objectionable material from everyone else.").

The expansion of the Free Exercise Clause urged by petitioners would significantly reshape public education and lead federal courts to "micromanage the public school curriculum," precisely what this Court disclaimed in *Mahmoud*, 606 U.S. at 568. Petitioners offer no limiting principle. Under their theory, any parent could challenge any poster, any book, or any aspect of the curriculum as burdening their religious practices, seeking not to opt out but to remove it from the classroom. The predictable result would be endless litigation, terminating only in bare classroom walls and shelves.

Petitioners contend that an opt-out remedy would be "impossible." Pet. 37. But this merely underscores the unprecedented nature of their claims. The Free Exercise

Clause protects the right of children to opt out of coercive instruction, not the right to control what is taught to their peers or displayed in classrooms. Applying *Mahmoud*, the decision below correctly ordered dismissal of the Free Exercise claim.

* * *

There is neither any circuit split nor any misapplication of this Court's precedent that might warrant review. The petition seeks only error correction with no error apparent.

II. Further Percolation Is Warranted.

A. The Fifth Circuit is the first circuit to address this issue in the wake of *Kennedy v. Bremerton*. Several other States—Alabama, Georgia, Indiana, Mississippi, North Dakota, South Carolina, South Dakota, Tennessee, and Utah—have enacted laws requiring or authorizing the posting of the Ten Commandments in classrooms,[9] and the Eighth Circuit is currently reviewing a district court's final order permanently enjoining a similar Arkansas law. *Stinson v. Fayetteville Sch. Dist. No. 1*, No. 26-1722 (8th Cir., argued Sept. 22, 2026). Future vehicles will present themselves for this Court to address the issue.

This Court should follow its ordinary practice and allow multiple courts of appeals to consider the issue before granting review: "Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a

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[9] *See* Ala. Act No. 2026-428, Ga. Code § 20-3-41.3, Ind. Code § 36-1-16-2, Miss. Code § 29-5-105, N.D. Cent. Code § 15.1-09-33.35, S.C. Code § 10-1-168, S.D. Codified Laws § 13-24-17.1, Tenn. Code § 49-6-2010, 2026 Utah Laws Ch. 435 (S.B. 268).

difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). This Court ordinarily allows "difficult issues to mature through full consideration by the courts of appeals." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). This practice allows the lower courts to eliminate "subsidiary, but still troubling, arguments" and thus "vastly simplif[y] [this Court's] task." *Id.*

This Court would also benefit from allowing courts to consider the variations in these laws. Louisiana, for example, requires the display of the Ten Commandments to be accompanied by a context statement. App. 37a. This Court should allow the lower courts to assess the variations in these laws and how those variations might impact the analysis under the Religion Clauses. If this Court adopts a more nuanced position—that public school displays of the Ten Commandments are neither always permitted nor always prohibited—the full variety of state laws will aid in this Court's analysis.

B. Moreover, this Court has only recently refocused the Establishment Clause on history and tradition, *Kennedy*, 597 U.S. at 535, and its analysis would benefit from additional scholarly consideration of the issues before granting certiorari. Professor Blackman recently noted that there has been limited scholarship regarding "the status of religion in schools during the second founding when the Establishment Clause was arguably extended to the states." Blackman, *supra* n.7. According to Professor Blackman, recently digitized documents from the Freedmen's Bureau show that this federal agency established schools with a curriculum that included "bible readings and prayers." *Id.*

These materials underscore that important questions concerning the Establishment Clause remain the subject of ongoing research. As courts and scholars continue to examine newly available historical sources, the body of historical evidence bearing on the Establishment Clause will expand. Allowing that process to continue in the wake of *Kennedy* will provide this Court with a fuller account of the historical practices and understandings.

Future vehicles will present themselves, and even if this Court intends to address the issue, its decisional process will be aided by waiting for further percolation.

III. This Case Is a Poor Vehicle.

This case presents a poor vehicle for this Court's review of the issue because the underlying claims are facial, (largely) pre-enforcement challenges, rather than as-applied challenges to a specific display.

The results of the recent election also indicate that if this Court were to grant review, it would be unlikely to receive adversarial briefing. It is unclear whether and how the newly elected Attorney General of Texas would defend the challenged law.

A. *Nathan* was filed before any petitioner encountered a single Ten Commandments poster, and the *Cribbs Ringer* petitioners sued when their school districts were only beginning to implement the law. Some parents alleged only that their school districts would soon be displaying the Ten Commandments in classrooms, *e.g.*, ROA.25-51045.229, or expressed willingness to post the displays, ROA.25-51045.286. Even those parents who alleged that Ten Commandments posters were posted in their children's classrooms provided scant details about the displays. *E.g.*, ROA.25-51045.233.

The "constitutional issues" are thus presented to this Court "in highly abstract form," which counsels against certiorari. *Rescue Army v. Mun. Court of City of Los Angeles*, 331 U.S. 549, 575 (1947).

There are also significant jurisdictional issues. In *Roake*, the Fifth Circuit held that the plaintiffs' claims were unripe until the displays were contextualized. In that case, the Fifth Circuit held that it could not evaluate the constitutionality of the displays in the abstract, but needed to review them in light of not only "the full content of the displays themselves," but also "how prominently the displays will appear, what other materials might accompany them, or how—if at all—teachers will reference them during instruction." *Roake*, 170 F.4th at 298. Many of the same issues are present here. Although Texas does not require contextualization for its Ten Commandments displays, neither does its law prohibit it. This Court's review would be far better served by being able to analyze a particular display in a specific classroom rather than an abstract law.

Moreover, petitioners' theories of injury involve speculation about the actions of third parties not before the court, including teachers and other classmates. For instance, several *Cribbs Ringer* petitioners declared that displaying the Ten Commandments is "likely to lead to peer-on-peer harassment, ostracism, and social isolation" for their children, or "create a structure for teachers and school administrators to inject other religious beliefs into the classroom." *See, e.g.,* ROA.25-51045.230, 235, 265-66. The *Nathan* petitioners similarly speculate that teachers might explain to their young students the meaning of concepts such as "adultery and coveting." *See, e.g.*, ROA.25-50695.106, 110-11, 115. But standing cannot rely on speculation about future injuries. *Clapper*

v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013); *Murthy v. Missouri*, 603 U.S. 43, 72 (2024).

If this Court were to grant review of the Establishment Clause issue in this context, the question of offended observer standing would also be presented. Although the en banc majority rejected respondents' arguments, App. 33a, Judge Oldham's concurrence correctly recognizes that petitioners' claims "hinge on the mistaken premise that individuals can sue because they are offended—a proposition that is wrong as a matter of Constitutional structure and Supreme Court precedent." App. 90a; *see* ROA.25-50695.86 (describing the injury as a likelihood of observing "deeply offensive" content). But "[w]ith *Lemon* now shelved," "the anomaly of offended observer standing, and the gaping hole it tore in standing doctrine in the courts of appeals" is now "close[d.]" *Am. Legion*, 588 U.S. at 87 (Gorsuch, J., concurring).

The en banc majority concluded that offended-observer standing was not at issue because petitioners alleged that the State "coerces religious practice." App. 33a. But the opinion later recognizes, correctly, that the law does not involve coercion. *See* App. 72a ("Plaintiffs' doubtlessly sincere objections to the displays do not equate to the 'coercion' characteristic of historic religious establishments."). Standing is not a semantic exercise and cannot be acquired simply by labeling offense at exposure to a display as "coercion."

If this Court were to grant certiorari, it would need to address these jurisdictional issues before reaching the merits.

B. The facial challenge also weighs against certiorari. Petitioners' decision to bring facial challenges "comes at a cost." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723

(2024). "[F]acial challenges threaten to short circuit the democratic process" by preventing duly enacted laws from being implemented in constitutional ways. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). A plaintiff must "establish that no set of circumstances exists under which the [law] would be valid" or "that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal quotation marks omitted).

Even if this Court were inclined to review the merits of the display of the Ten Commandments in a public school, it should do so in the context of an as-applied challenge to particular display (rather than a facial challenge in a pre-enforcement posture). In such a proceeding, this Court would have the benefit of a better-developed factual record, avoid the standing and ripeness issues created by the pre-enforcement posture (including speculation about third parties), and be able to review the constitutionality of a particular display in context.

C. Finally, the recent election makes these cases a particularly poor vehicle for this Court's review. The results have drawn into question whether, if this Court were to grant certiorari, this proceeding would retain the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The newly elected Attorney General of Texas, set to assume office in January 2027, has publicly stated that he will not defend the law at issue: "I will not defend the

legislature's passage of a requirement that schools place the Ten Commandments in classrooms[.]"[10]

If the Court were to grant review, the new Attorney General appears to be unwilling to defend Texas law, leaving this Court to decide significant Establishment Clause and Free Exercise Clause issues without the benefit of "an adversary presentation" from those responsible for the State's enforcement of the law. *Sheehan*, 575 U.S. at 610 (dismissing a question presented as improvidently granted for lack of "an adversary presentation"). Nor can undersigned counsel anticipate what future counsel for respondents might perceive to be a "misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2.

In "unusual and urgent circumstances," this Court has relied on "adversarial presentation of the issues . . . by the participation of *amici curiae* prepared to defend with vigor the constitutionality of the legislative act." *United States v. Windsor*, 570 U.S. 744, 760 (2013). But no such urgency is presented in this case. Nor has any party intervened that might defend the constitutionality of the law. *See id.* at 761 ("BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."). Other vehicles will present themselves for this Court to address the issue, and this Court should wait for a petition in which it will be assured of adversarial presentation.

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[10] Fink, *supra* n.1.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari.

If the Court were to grant certiorari, it should also grant Louisiana's Conditional Petition for Writ of Certiorari in *Brumley v. Roake,* No. 25-1360.

Respectfully submitted.

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November 10, 2026