No. 26-1722

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMANTHA STINSON, et al,

Plaintiffs-Appellees

v.

STATE OF ARKANSAS,

Intervenor-Appellant.

Appeal from the United States District Court
for the Western District of Arkansas
Case No. 5:25-CV-5127
The Honorable Timothy L. Brooks

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CHRISTIAN LAWMAKERS, THE AMERICAN HISTORY AND HERITAGE FOUNDATION, INC., AND LIBERTY COUNSEL, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici curiae, National Association of Christian Lawmakers, The American History and Heritage Foundation, Inc., and Liberty Counsel, Inc., hereby state that they are not-for-profit corporations that issue no stock and that none have any parent corporation or publicly held corporation that owns 10% or more of its stock.

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IDENTITIES AND INTERESTS OF AMICI PURSUANT TO FED. R. APP. P. 29[1]

The National Association of Christian Lawmakers (NACL) is an association of Christian elected officials and believers committed to transcending denominational boundaries in pursuit of the shared cause of God and Country. NACL seeks to advance Judeo-Christian values in the public space.

The American History and Heritage Foundation, Inc. (AHHF) is a 501(c)(3) non-profit organization dedicated to educating and informing the public about American history and heritage. AHHF donated the Ten Commandments Monument that was installed on the grounds of the Arkansas State Capital and donates Ten Commandments posters to schools across the State of Arkansas.

Liberty Counsel is a national civil liberties organization that provides education and legal representation on issues relating to religious liberty, the sanctity of human life, and the family. Liberty Counsel has an interest in ensuring that the Constitution and laws of the

[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

Republic maintain their intended meaning commonly understood at the time and in the context of their adoption, which includes the Ten Commandments in public schools. Liberty Counsel has been widely involved in Ten Commandments litigation, including briefing and arguing *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005) at the United States Supreme Court, and *ACLU of Kentucky v. Mercer County, Ky.*, 432 F.3d 624 (6th Cir. 2005) and *ACLU of Kentucky v. Grayson County, Kentucky*, 591 F.3d 837 (6th Cir. 2010) at the Sixth Circuit Court of Appeals, as well as numerous other cases involving the Ten Commandments and the display of other religious symbols in the public square. Most recently, Liberty Counsel represented Harold Shurtleff at the Supreme Court in the landmark decision of *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) that foreshadowed and caused the demise of the prior tests used to analyze Establishment Clause issues.

SUMMARY OF ARGUMENT

The Ten Commandments have played a crucial role in guiding American law and government from our Nation's founding. But a host of misguided (and now defunct) law and precedent, beginning with *Lemon v. Kurtzman*, 403 U.S. 602 (1971), took a constitutionally ungrounded

approach to governmental recognition of the Decalogue's historical significance. The Supreme Court, in *Stone v. Graham*, 449 U.S. 39 (1980), held that posting the Ten Commandments in schools violated the first prong of the so-called (and now defunct) *Lemon* test and accordingly struck down the law as purportedly violative of the Establishment Clause. Over two decades later, in what would become the Court's final affirmation of *Lemon*, the Supreme Court, in *McCreary County*, 545 U.S. 844, found that the "Foundations of American Law and Government Display" featuring the Ten Commandments along with other historical artifacts violated the Establishment Clause because of a prior religious purpose.

With the Court's Establishment Clause jurisprudence drifting from its original meaning, the Supreme Court began chipping away at its constitutionally dubious grounding. In what was perhaps the best description of the constitutionally defunct *Lemon* test, Justice Scalia opined that *Lemon* had become "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," and that *Lemon* "stalk[ed[our constitutional jurisprudence . . . frightening the little children and

[government] attorneys." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Recognizing the terror that *Lemon* begat, the Supreme Court finally began chipping away at its unconstitutional usage in *American Legion v. American Humanist Assoc.*, 588 U.S. 29 (2019), where the Court noted that *Lemon* "presents particularly daunting problems in cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." *Id.* at 50. There, the first step was taken towards a more originalist application of the Establishment Clause, where *Lemon* would be relegated to its rightful place in the dustbin of constitutional history and replaced by "application of a presumption of constitutionality for longstanding monuments, symbols, and practices." *Id.* at 52.

What *American Legion* began, *Shurtleff* continued. 596 U.S. 243 (2022). There, as Justice Gorsuch recognized, *Lemon* had "devolved into a kind of children's game" because "[t]he hard truth is, *Lemon*'s abstract and ahistoric test" was unworkable and unconstitutional. *Id.* at 279 (Gorsuch, J., concurring). The Court ultimately concluded that "*Lemon* had long since been exposed as an anomaly and a mistake." *Id.* at 281.

Then came *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), which represents the *coup de grace* for the constitutionally infirm *Lemon* test. There, the Court noted that it had "long ago abandoned *Lemon*" based on its "shortcomings" and "abstract and ahistorical approach to the Establishment Clause." *Id.* at 510. Again, the Court confirmed that the proper analysis requires "that the Establishment Clause must be interpreted by reference to historical practices and understandings," *id.*, which comes with it the concomitant "presumption of constitutionality" of government recognition of religious symbols. *American Legion*, 588 U.S. at 52.

American Legion was strike one. *Shurtleff* was strike two. *Kennedy* was strike three. *Lemon is out*, but instead of returning to the dugout, it has been entombed never to pick up its unconstitutional bat again.

In this case, Arkansas's law bears no resemblance to a founding-era religious establishment because it does not (1) exert control over the doctrine and personnel of the church; (2) mandate attendance in the church and punish people for failing to participate; (3) punish dissenting churches and individuals for their religious exercise; (4) restrict political participation by dissenters; (5) provide financial support for the church

in a way that prefers the established denomination over other churches; or (6) use the church to carry out certain civil functions by giving the established church a monopoly over a specific function. Nor does Arkansas's law require participation in the classroom by students or teachers in any way that would demand religious exercise. Arkansas merely requires a copy of the Ten Commandments to be posted in classrooms "for ceremonial, celebratory, or commemorative purposes." *American Legion*, 588 U.S. at 50, and therefore comes with it a presumption of constitutionality. *Id.* at 52.

Finally, the Free Exercise Clause also provides no form of relief for plaintiffs. Unlike in *Mahmoud v. Taylor*, teachers are not required or encouraged to offer religious instruction, and students need not recite or acknowledge the Ten Commandments. There is no substantial burden on religious exercise. And even if there was, the remedy under *Mahmoud* was not to prohibit the presence of the curriculum but provide an opt-out to those who wish not to participate.

LEGAL ARGUMENT

I. Ten Commandments caselaw before *Shurtleff* and *Kennedy*.

A. *Stone* and *McCreary* were decided upon the now extinct *Lemon* test and serve no purpose in this case.

The entirety of the Supreme Court's decision in *Stone* was based on the first prong of the *Lemon* test. *See Stone v. Graham*, 449 U.S. 39, 42–43 (1980) ("We conclude that [the statute] violates the first part of the *Lemon v. Kurtzman*, test, and thus the Establishment Clause of the Constitution."). In *McCreary*, the Supreme Court concluded its opinion with the following: "Historical evidence thus supports no solid argument for changing course (*whatever force the argument might have when directed at the existing precedent*)[.]" *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (emphasis added). Under *Lemon*, historical evidence held no weight, and the Supreme Court said as much.

For decades the Supreme Court interpreted the Establishment Clause's language to mean that government must completely separate from religion. This resulted in constitutionally dubious decisions impacting litigants and governments throughout the land, including the State of Arkansas here. *See, e.g.*, *Stinson v. Fayetteville Sch. Dist. No. 1*, 2026 WL 736964, at *7, *11 (W.D. Ark. Mar. 16, 2026).

1. *Stone v. Graham* was decided at the petition for certiorari stage without the benefit of briefing on the merits or oral argument.

a. *Stone* was an aberration of law and procedure to reach a predetermined result.

In its short, seven-paragraph opinion, decided at the petition for certiorari stage without the benefit of briefing or oral argument, the Supreme Court in *Stone* found that Kentucky's law violated the Establishment Clause based on just one criterion: the posting of the Ten Commandments did not have a secular purpose. *Stone*, 449 U.S. at 41–43. The Court came to this conclusion even though the State articulated a secular purpose—the role the Ten Commandments played in the development of western law—and the trial court found this secular purpose to be valid. *Id.* at 41–42.

This decision ran against a bevy of decisions where the Supreme Court gave great weight to both the trial court and the legislature's articulations of a secular purpose. *Id.* at 43 (Rehnquist, J., dissenting) ("The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence."); *id.* at 43–44 ("This Court regularly looks to legislative articulations of a statute's purpose in

Establishment Clause cases and accords such pronouncements the deference they are due.") (citations omitted).

This case was such a stark departure from the Court's law and procedure that it warranted the following conclusion from Justice Rehnquist: "I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky." *Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting). The lower courts' continued reliance on this aberration warrants reversal.

b. *Stone* not only misapplied the *Lemon* test, but it also totally ignored the history of the Ten Commandments.

Even if *Stone* was accurately decided under *Lemon*, which it was not, that is of no consequence *now*. Under the Court's current and constitutionally grounded history and traditions test from the *American Legion*, *Shurtleff*, and *Kennedy* triumvirate, Arkansas's posting of the Ten Commandments (or any other recognition of religious symbols) only violates the Establishment Clause if the practice would be considered a religious establishment under the history and traditions of the country. *See infra* Section II. Put simply: *Stone* and its constitutionally infirm

decision has—like the *Lemon* test upon which it was based—been relegated to the dustbin of constitutional history.

2. *McCreary* also misapplied *Lemon* by focusing on past alleged "taint" that permanently doomed the display at issue no matter subsequent corrective measures.

McCreary County, Kentucky thrice endeavored to produce a display including (among other documents) the Ten Commandments in an effort to comply with the commands of *Lemon*. *McCreary*, 545 U.S. at 851–56. The final version of the display included the Ten Commandments along with numerous other historical documents. *Id.* at 856. The County titled the display "The Foundations of American Law and Government Display," in which it sought to showcase the Ten Commandments—not as a religious symbol, but for the importance of the Ten Commandments in the Western legal tradition. *Id.*

Though the display analyzed in *McCreary* plainly included secular documents right next to the Ten Commandments, the Court struck it down on *Lemon*'s now-defunct "reasonable observer" standard. *See Shurtleff*, 596 U.S. at 282 n.9 (noting that *McCreary* majority based its decision on the "brain-spun *Lemon* test"). Based on the "reasonable observer avatar" game, *id.* at 279, the Court in *McCreary* held that

because the earlier displays did not include other documents than any display including the Ten Commandments would, in perpetuity, be viewed by the reasonable observer as based upon the prior versions that were religious. *McCreary*, 545 U.S. at 863, 866, 869–70, 872–73. In other words, the County's prior religious acts tainted their future conduct so as to render any future action surrounding this display void. *See id.* at 870 ("[T]he reasonable observer could not forget it."). This is the balderdash that *Lemon* begat, and why it was properly entombed.

a. *McCreary* was contrary to then-existing Supreme Court jurisprudence and a nearly identical Third Circuit case authored by Justice Alito.

Prior to ascending to the high bench, Justice Alito penned a Third Circuit opinion that was "indistinguishable" from recent Supreme Court cases in *ACLU of N.J. v. Schundler*, 168 F.3d 92 (3d Cir. 1999). *Schundler*'s facts are strikingly familiar. For thirty years, Jersey City erected a holiday display featuring a crèche and a menorah. *Schundler*, 168 F.3d at 95. After a group of plaintiffs led by the ACLU successfully enjoined the City's display, the City modified the display to include figures of Santa Clause, Frosty the Snowman, a sled, Kwanzaa symbols, and signs acknowledging—and celebrating—the cultural diversity of the

City. *Id.* at 95–96. Despite challenges based on the same reasoning as *McCreary*, then-Judge Alito noted that such displays of religious imagery must be analyzed with respect to the historical significance of religious events and symbols in the western world. *Schundler*, 168 F.3d at 100 (discussing *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny*)). He also rejected the argument that prior religious purpose tainted a modified display. *Id.* at 105. None of this analysis was taken into account in *McCreary*; the Court incomprehensibly found the display unconstitutional. 545 U.S. at 881.

b. *McCreary* was limited to the specific case and has never been applied to other identical Ten Commandments displays.

After *McCreary*, no court applied its reasoning to identical Ten Commandments displays. For example, just a few short months after *McCreary*'s decision, the Sixth Circuit in *ACLU of Kentucky v. Mercer County,* upheld the constitutionality of a "'Foundations of American Law and Government' [display] in the County Courthouse." 432 F.3d 624, 626 (6th Cir. 2005). This display was "identical in all material respects to the third and final display in *McCreary County*." *Id.* And, in 2010, the Sixth Circuit heard *ACLU of Kentucky v. Grayson County, Kentucky*, 591 F.3d

837 (6th Cir. 2010). Grayson County approved a request to put up a display called the "Foundations of American Law and Government Display." *Id.* at 841. If this sounds familiar, it should; it was the exact same display as in *McCreary* and *Mercer County*. *Grayson Cnty.*, 591 F.3d at 841 n.1 ("This display appears to match exactly the displays at issue in [*McCreary*] and [*Mercer*.]"). Again, the Sixth Circuit held that such a display did not violate the Establishment Clause. *Grayson Cnty.*, 591 F.3d at 856. Justice Scalia called this the "absurdity in practice" of the Court's decision, where some counties "have been ordered to remove the same display that appears in [other] courthouses[.]" *McCreary*, 545 U.S. at 907 (Scalia, J., dissenting) (emphasis added). Absurd indeed.

B. *Van Orden* acknowledged the religious nature of the Ten Commandments while affirming their historical significance in this country.

Enter *Van Orden v. Perry*, 545 U.S. 677 (2005), which merely added to the confusion begat by *Lemon*. There, another Ten Commandments display was at issue. Notably, *Van Orden* was argued and decided on the same day as *McCreary*. Did it reach the same conclusion? *No.*

When one analyzes the comparisons, the head-scratching only gets worse. One would think if *McCreary* and its display including multiple

nonreligious documents was deemed unconstitutional, then *Van Orden*—which involved a *stand-alone monument*, placed on the Texas State Capital grounds and donated by the Fraternal Order of Eagles, *id.* at 681–82—would have met a similar fate. *It didn't*. Instead, the Court looked at "the nature of the monument" and "our Nation's history," *id.* at 686, and concluded that though "the Ten Commandments are religious . . . [s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. The Court held that the stand-alone Ten Commandments monument did not violate the Establishment Clause. *Id.* at 690, 692.

C. *McCreary* is the last time the Supreme Court relied upon the *Lemon* test.

As Justice Thomas concluded, the Establishment Clause jurisprudence prior to the *American Legion*, *Shurtleff*, and *Kennedy* triumvirate had become "silly." *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (Thomas, J., concurring). No doubt he was correct. *McCreary* and *Van Orden* were both argued on March 2, 2005, and both decided on June 27, 2005. Both involved a display of the Ten Commandments. Yet the analysis and conclusions were not the same. *See*

McCreary, 545 U.S. at 881; *Van Orden*, 545 U.S. at 691–92. *McCreary* deployed *Lemon* to strike down the monument, and *Van Orden* used history and traditions to uphold the monument. *Van Orden*, 545 U.S. at 686. As Justice Gorsuch observed in *Shurtleff*, the juxtaposition of these two cases demonstrated that the Supreme Court had basically told courts, government officials, and litigants: "Good luck." 596 U.S. at 278.

II. *Lemon* has been overruled and relegated to its rightful demise, and replaced with one that focuses on history and traditions.

A. The Supreme Court unanimously rejected *Lemon* in *Shurtleff*.

In *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), the Court issued a unanimous decision recognizing that religious symbols and imagery do not violate the Establishment Clause. The principal opinion did not mention *Lemon* even once. The reason is simple: *American Legion* had already begun the process of embalming the *Lemon* corpse. *See American Legion v. American Humanist Assoc.*, 588 U.S. 29, 50–52 (2019) (noting that *Lemon* "presents particularly daunting problems in cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations," and that the new test would involve "application of a presumption of constitutionality for

longstanding monuments, symbols, and practices.") This is precisely what *Shurtleff* deployed.

Justice Gorsuch's concurrence took precise aim at *Lemon*, noting that its "seemingly simple test produced more questions than answers," 596 U.S. at 277, that it "ignored longstanding precedents," and "bypassed any inquiry into the [Establishment] Clause's original meaning." *Id.* at 277–78. Justice Gorsuch likened *Lemon* and its offshoots to a "children's game":

> Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for his reaction. How does he *feel* about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he *feels* it "endorses" religion. If so, game over.

Id. at 279. Fortunately, it is game over for *Lemon*, and this Court need not play it anymore.

In its place, "the primary question in Establishment Clause cases is whether the government's conduct 'accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Shurtleff*, 596 U.S.

at 283 (Gorsuch, J., concurring) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).

B. The Supreme Court relied on the unanimous decision in *Shurtleff* to put the final nail in *Lemon*'s coffin in *Kennedy v. Bremerton School District.*

"The shortcomings associated with [*Lemon*'s] ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that t[he] [Supreme] Court long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (citation modified). Emphasizing this point, the Court harkened back to its *Shurtleff* decision saying, "just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test." *Id.* at 535 (citing *Shurtleff*, 596 U.S. at 247–50).

In *Lemon*'s place the Court "instructed that the line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Id.* at 535–36 (cleaned up). This history-and-traditions analysis "has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence." *Id.* at

536 (cleaned up). Any case involving the constitutionality of religious symbols, imagery, or practices under the Establishment Clause must now be viewed in the constitutional light of the meaning of the Clause at the time of the founding.

C. Because *Lemon* has been overruled, there is nothing left of *Stone v. Graham*.

The procedural history of this case is curious. The district court agreed that *Lemon* has been overruled and no longer represents the proper framework for Establishment Clause cases. *Stinson*, 2026 WL 736964, at *7 (noting that the Supreme Court "disavowed the so-called '*Lemon* test'"). Yet, in the same breath, the district court held that *Stone*—which is unquestionably and solely based on the defunct *Lemon* test—remains intact. *It doesn't*.

The district court noted that "there is no reason to think the Supreme Court has thrown the baby out with the bathwater," *Stinson*, 2026 WL 736964, at *7, when it relegated *Lemon* to its constitutional tomb. But it plainly did just that. As Judge Ho aptly noted, "that isn't how we apply Supreme Court precedent":

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

> But under that rule, Asian children could still be subject to racial segregation in public schools. After all, the Supreme Court hasn't overturned *Gong Lum v. Rice*, 275 U.S. 78 (1927), by name, either.
>
> Of course, that isn't how we apply Supreme Court precedent. *Gong Lum* plainly rests on *Plessy v. Ferguson*, 163 U.S. 537 (1896)—just as *Stone* plainly rests on *Lemon*. And *Plessy* is no longer good law after *Brown v. Board of Education*, 347 U.S. 483 (1954)—just as *Lemon* is no longer good law after *Kennedy*.
>
> In short, *Plessy* is gone, so *Gong Lum* is gone. *See, e.g.*, *Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 862–63 (9th Cir. 1998) (noting that *Gong Lum* was "repudiated" in *Brown*). And so too here: *Lemon* is gone, so *Stone* is gone. We're not bound by *Stone* any more than we're bound by *Gong Lum*.

Roake v. Brumley, 170 F.4th 292, 302 (5th Cir. 2026) (Ho, J., concurring) (en banc) (per curiam).

And "[w]ith *Lemon* gone, there is nothing left of *Stone* to apply." *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 591 (5th Cir. 2026) (en banc). Simply put: contrary to the district court's conclusion, *Stone* was indeed thrown out with *Lemon*'s rancid bathwater.

III. Arkansas's law does not violate the Establishment Clause.

The Establishment Clause of the First Amendment to the United States Constitution reads, "Congress shall make no law respecting an establishment of religion[.]" U.S. Const. amend. I. This short clause

provides the basic question that decides any Establishment Clause issue: does the government's action constitute an establishment of religion? The drafters of this provision had recently declared the country's independence from England, which had an established Anglican religion. This "paradigm religious establishment" resulted in "state control over religious belief and practice, with dissent punished financially, politically, and criminally." *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 596 (5th Cir. 2026). Arkansas's requirement to post the Ten Commandments in schools, with zero requirement for any lessons pertaining to it, any official student recognition of its teachings, or punishment for any dissenter, is a far-cry from establishing any religion.

A. Under the Supreme Court's new test, the Court must focus on whether the law bears hallmarks of a founding-era establishment of religion, which Arkansas's law does not.

Despite the sea change in Establishment Clause jurisprudence begat by *American Legion*, *Shurtleff*, and *Kennedy*, some litigants and courts continue in their stubborn persistence that "if a practice does not fit within some historical tradition, it violates the Establishment Clause." *Nathan*, 173 F.4th at 606. Mistakenly, those courts and litigants base this approach on tangentially related legislative prayer cases that

evaluated the history and traditions of the practice itself. *See Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014); *Marsh v. Chambers*, 463 U.S. 783, 786–90 (1983). That strained corollary reasoning proves too much. The Court's holdings that a practice did not violate the Establishment Clause because they were within a founding-era tradition "do not stand for the *opposite* proposition—namely, that any modern practice *not* supported by a founding-era tradition *does* violate the Establishment Clause. No precedent supports that bizarre view." *Nathan*, 173 F.4th at 606–07. Bizarre indeed.

Instead, courts must decide whether the practice aligns with the "hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 537 (2022). Justice Gorsuch detailed six "hallmarks" of "found-era religious establishments" in his *Shurtleff* concurrence:

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established

> church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.

Shurtleff v. City of Boston, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131–81 (2003)). "Most of these hallmarks reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *id.* at 640 (Scalia, J., dissenting); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring)). "The analysis looks to the historical 'hallmarks of religious establishments,' such as legal compulsion to 'attend church' or 'engage in a formal religious exercise,'" rather than whether the practice itself was within the history and traditions. *Nathan*, 173 F.4th at 593 (quoting *Kennedy*, 597 U.S. at 537)).

The strictures of Arkansas's statute are very simple: each classroom must display a sixteen-inch by twenty-inch poster of the Ten Commandments "that is legible to a person with average vision from anywhere in the room[.]" 2025 Ark. Acts 573. *That's it.* There is no requirement that students or teachers salute the Ten Commandments. No requirement that teachers compel students to engage in any religious

exercise solemnizing the display. No requirement that teachers instruct students in the contents of the display. In fact, Arkansas's law does not even punish schools for failing to abide by the law and place the display on the walls. There are no consequences for dissenters. It simply must be hung in the classroom. No aspect of this law bears any resemblance to the historical hallmarks of religious establishments required to strike down this law.

B. There is a rich history of the Ten Commandments and Christian principles throughout public spaces and education.

1. The Ten Commandments have profoundly shaped American law and government.

"[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion . . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter from President John Adams to the Massachusetts Militia (Oct. 11, 1798), *in* 9 Works of John Adams 229 (C. Adams ed. 1971). President John Adams's words speak a truth the Supreme Court has acknowledged time and again: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *Marsh*, 463 U.S. at 792; *Lynch v.*

Donnelly, 465 U.S. 668, 675 (1984). There is no requirement to ignore that history, and there is no injury by Arkansas choosing to recognize it. Simply put: "Recognition of the role of God in our Nation's heritage" does not violate the Establishment Clause. *Van Orden*, 545 U.S. at 687.

The Ten Commandments themselves have played a major role in American life and government. The Decalogue is featured as a symbol of American law in many of the most famous buildings in Washington, D.C. *See Van Orden*, 545 U.S. at 688–89. Legislative and judicial buildings in Alabama, Georgia, Maine, Minnesota, New York, and Pennsylvania include the Ten Commandments. *See* Mark David Hall, *Proclaim Liberty Throughout All The Land: How Christianity Has Advanced Freedom and Equality for All Americans* 157 (2023). Additionally, courts have recognized that much of American law is based on the Ten Commandments. A North Carolina Supreme Court Justice declared:

> **[O]ur laws are founded upon the Decalogue**, not that every case can be exactly decided according to what is there enjoined, but we can never safely depart from this short, but great, declaration of moral principles, without founding the law upon the sand, instead of upon the eternal rock of justice and equity.

Comm'rs of Johnston Cnty. v. Lacy, 93 S.E. 482, 487 (N.C. 1917) (Walker, J., concurring) (emphasis added).

In *State v. Tampa*, the Supreme Court of Florida stated:

> A people unschooled about the sovereignty of God, the ten commandments and the ethics of Jesus, could never have evolved the Bill of Rights, the Declaration of Independence and the Constitution. There is not one solitary fundamental principle of our democratic policy that did not stem directly from the basis moral concepts as embodied in the Decalogue and the ethics of Jesus.

48 So.2d 78, 79 (Fla. 1950). The Florida high court continued saying that "No one knew this better than the Founding Fathers." *Id.*

In the education setting, the Ten Commandments were prevalent as well. In his expert report at the district court, Dr. Mark David Hall detailed ten Capital Laws that encompassed various Ten Commandments. *See* Mark David Hall Expert Report at 18, *Stinson*, 2026 WL 736964. These capital laws were required learning for children in the early colonies. *Id.* at 17. *The New England Primer* was studied by millions of children in early America, and it contained forty questions concerning the Ten Commandments. *Id.* at 19–20. These are but a few examples. Any contention that the Ten Commandments did not play a role in the development of American law and education from the founding era is simply false. Indeed, "acknowledgements of the role played by the

Ten Commandments in our Nation's heritage are common throughout America." *Van Orden*, 545 U.S. at 688.

2. The drafters of the First Amendment never intended to erase the Ten Commandments from school classrooms or public displays.

The Founding Fathers had great reverence for the Ten Commandments. John Adams, stated "If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free." John Adams, *The Works of John Adams, Second President of the United States* 9 (Charles Francis Adams ed., Vol. VI 1851).

John Jay spoke of the Ten Commandments when he said, "The moral, or natural law, was given by the sovereign of the universe to all mankind." John Jay, *The Correspondence and Public Papers of John Jay* 403 (Henry P. Johnston ed., Vol. IV 1893).

And William Findley declared that:

> [I]t pleased God to deliver on Mount Sinai a compendium of His holy law and to write it with His own hand on durable tables of stone. This law, which is commonly called the Ten Commandments or Decalogue, . . . is immutable and universally obligatory. . . . [and] was incorporated in the judicial law.

William Findley, *Observations on "The Two Sons of Oil"* 22–23, 36 (Pittsburgh: Patterson & Hopkins eds., 1812).

These men, having such admiration for the Ten Commandments, would never have intended for the restriction of their display in public schools. The Founders fought for freedom not from a passive placement of a religious text on the walls of public classrooms, but from a legal authority to punish dissenters of a particular religion. And to hold that these very drafters of the Establishment Clause would have understood it to prohibit the inclusion of the Ten Commandments, is an ahistorical and incorrect conclusion. Indeed, "it would be incongruous to interpret the Establishment Clause as imposing more stringent First Amendment limits on the states than the draftsman imposed on the Federal Government." *Van Orden*, 545 U.S. at 688.

C. Arkansas's law does not coerce students into fealty of the Christian religion.

1. Constitutional coercion means that a State demands subservience to a religion "by force of law and threat of penalty" which Arkansas clearly has not done.

Coercion has a curious (and constitutionally dubious) history in the relegated *Lemon* era. *See, e.g.*, *Lee*, 505 U.S. at 599 (finding a prayer at the outset of a high school graduation was coercive); *Santa Fe Indep. Sch.*

Dist. v. Doe, 530 U.S. 290, 313 (2000) (holding that a prayer over the loudspeaker at a high school football game was also coercive); *Stinson*, 2026 WL 736964, at *8 (finding the Ten Commandments poster coercive). Justice Scalia found these "psychological coercion" rulings to be "a sufficient embarrassment" and "incoherent." *Lee*, 505 U.S. at 636.

Now under the "hallmarks of religious establishments" approach, *Kennedy*, 597 U.S. at 537, the coercion test looks differently, too. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring). Arkansas's law does not contain any penalty for failing to follow and abide by its posting requirement. There is no law demanding fealty to any faith. There is no threat of political repercussions, criminal sanctions, or the like for refusing to post the Ten Commandments. Arkansas's law does not bear any hallmarks of historical coercion.

2. Passively posting the Ten Commandments in school classrooms does not coerce students or their parents into believing the tenets of the Christian faith.

While Justice Thomas's standard of coercion aligns best with the historical hallmarks of a religious establishment, even under a softer

coercion standard, Arkansas's law does not coerce students into religious fealty. In *Kennedy*, the Court framed the concern as "forc[ing] citizens to engage in 'a formal religious exercise[.]'" *Kennedy*, 597 U.S. at 537 (quoting *Lee*, 505 U.S. at 589).

Here, nobody is required or requested to participate in acknowledging, reciting, or learning the Ten Commandments. All that is required is for the Ten Commandments to be posted to the walls of public-school classrooms. 2025 Ark. Acts 573. *That's it.* As Justice Gorsuch said in *Kennedy*: "[S]ome will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But offense does not equate to coercion." 597 U.S. at 538–39 (citation modified).

IV. The Free Exercise Clause does not prevent Arkansas from posting the Ten Commandments in public schools.

A. Posting the Ten Commandments in a classroom does not substantially burden a student's free exercise of religion.

The Free Exercise Clause reads that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The Supreme Court has importantly recognized that "the right to free exercise, like other First Amendment rights, is not 'shed . . . at the

schoolhouse gate.'" *Mahmoud v. Taylor*, 606 U.S. 522, 545 (2025) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969)). Schools violate a person's free exercise rights when they "place unconstitutional burdens on religious exercise" and "'substantially interfere with the religious development' of children." *Mahmoud*, 606 U.S. at 545–46 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

In *Mahmoud*, the Supreme Court found the school's incorporation of deviant and sexually inappropriate curriculum to violate the Free Exercise Clause because it was "designed to 'disrupt' children's thinking about sexuality and gender[.]" *Mahmoud*, 606 U.S. at 529. Additionally, the Board "encourage[d] the teachers to correct the children and accuse them of being 'hurtful' when they express a degree of religious confusion." *Id.* at 555.

The active and intentional disruption in the religious views of young children present in *Mahmoud* is simply not present in a passive display of the Ten Commandments on the wall. Arkansas's law requiring the Ten Commandments to be posted on the classroom walls contains no teaching. There is no corresponding curriculum along with the posting of the Ten Commandments. Teachers may freely answer questions from

students however they would like. There is zero pressure from the State or the school for any teacher or student to abide by the strictures of the Ten Commandments.

In *Nathan*, the Fifth Circuit noted that, unlike in *Mahmoud* where the burden on religious exercise was "glaring," *Nathan*, 173 F.4th at 609, requiring the Ten Commandments to be posted on classroom walls imposes no burden, much less a substantial one: "No religious curriculum, no theistic lesson plans. All the law requires is a poster on a classroom wall. To be sure, Plaintiffs disagree with the poster's content, but that disagreement alone does not transform [the law] into religious coercion[.]" *Id.* Ultimately, "no case suggests that the mere presence of religious language in a school display is *ipso facto* religious coercion." *Id.* at 610. Just like in *Nathan*, there is no substantial burden on religious exercise here.

B. *Mahmoud v. Taylor* only requires an opt-out option for parents, not a total prohibition of the activity.

Even if Arkansas's law ran afoul of the Free Exercise Clause, which it does not, Plaintiffs' desired remedy of prohibiting the Ten Commandments posters is far more than what the Supreme Court demanded in *Mahmoud*. The Supreme Court's remedy in *Mahmoud* was

simply to require an opt-out clause; "[t]o abolish the lessons altogether . . . would be to 'micromanage the public school curriculum.'" *Nathan*, 173 F.4th at 610 (quoting *Mahmoud*, 606 U.S. at 568). The same was true in *Barnette*, where the school district sought to require students to salute the flag. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943). The Court did not ban the practice of saluting the flag but rather held that the State could not make the flag salute mandatory. *Id.* at 642.

In light of these precedents, the appropriate remedy is not to ban the Ten Commandments posters from the schools, but rather simply to provide an opt-out from participating in any religious exercise. The district court's conclusions to the contrary should be reversed.

CONCLUSION

"The line that courts and governments must draw between permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022). The district court "erred by failing to heed this guidance." *Id.* Its decision must therefore be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)(1)

I certify that the foregoing amici curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). In reliance on the word count feature of the word-processing system used to prepare the brief, Microsoft Word, the brief contains 6,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The foregoing amicus curiae brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced 14-point Century Schoolbook typeface.

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CERTIFICATE OF SERVICE

Pursuant to 8th Cir. R. 25A(e), I hereby certify that on June 5, 2026, I filed a true and correct copy of the foregoing Motion for Leave to File Amicus Brief via this Court's ECF filing system. Service will be effectuated by the Court electronic notification system on all counsel of record.

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