

No. 26-1829

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONNA CAVE, et al,

Plaintiffs-Appellees,

THE SATANIC TEMPLE, et al.,

Intervenor-Appellees,

v.

COLE JESTER, in his official capacity as the Secretary of State
of Arkansas,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

Case No. 4:18-cv-342

The Honorable Kristine G. Baker

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

Mathew D. Staver

Horatio G. Mihet

Daniel J. Schmid

LIBERTY COUNSEL

P.O. Box 540774

Orlando, FL 32854

(407) 875-1776

court@LC.org

hmihet@LC.org | dschmid@LC.org

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amici curiae, National Association of Christian Lawmakers, Inc., 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.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS	ii
IDENTITIES AND INTERESTS OF AMICI PURSUANT TO FED. R. APP. P. 29.....	1
SUMMARY OF ARGUMENT	2
LEGAL ARGUMENT	6
I. Permanent monuments, including the Ten Commandments monument at issue here, are government speech that are entitled to a presumption of constitutionality.....	6
II. Ten Commandments caselaw before <i>Shurtleff</i> and <i>Kennedy</i> is defunct to the extent it is based on <i>Lemon</i>	8
A. <i>Stone</i> and <i>McCreary</i> were decided upon the now extinct <i>Lemon</i> test and serve no purpose here.	9
1. <i>Stone v. Graham</i> was decided at the petition for certiorari stage without the benefit of briefing on the merits or oral argument.....	10
a. <i>Stone</i> was an aberration of law and procedure to reach a predetermined result.	10
b. <i>Stone</i> not only misapplied <i>Lemon</i> , but it also totally ignored the history of the Ten Commandments.....	12
2. <i>McCreary</i> also misapplied <i>Lemon</i> by focusing on past alleged “taint” that permanently doomed the display at issue no matter subsequent corrective measures.	13
a. <i>McCreary</i> was contrary to then-existing Supreme Court jurisprudence and a nearly identical Third Circuit case authored by Justice Alito.....	14
b. <i>McCreary</i> was limited to the specific case and has never been applied to other identical Ten Commandments displays.....	15
B. <i>Van Orden</i> acknowledged the religious nature of the Ten Commandments while affirming their historical significance in this country.....	16
C. <i>McCreary</i> is the last time the Supreme Court relied upon the <i>Lemon</i> test.	18
III. <i>Lemon</i> has been overruled and replaced with a test that focuses on history and traditions.....	19
A. The Supreme Court unanimously rejected <i>Lemon</i> in <i>Shurtleff</i>	19

B. The Supreme Court put the final nail in <i>Lemon</i> 's coffin in <i>Kennedy v. Bremerton School District</i>	20
C. Because <i>Lemon</i> has been overruled, there is nothing left of <i>Stone v. Graham</i> or <i>McCreary County</i>	22
IV. Arkansas's Display Act does not violate the Establishment Clause.	24
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.	24
B. There is a rich history of the Ten Commandments and Christian principles throughout public spaces.	28
C. Arkansas's law does not coerce anyone into fealty of the Christian religion.	31
CONCLUSION	33
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(g)(1)	34
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

Cases

<i>ACLU of Ky. v. Grayson Cnty., Ky.</i> , 591 F.3d 837 (6th Cir. 2010)	2, 15, 16
<i>ACLU of Ky. v. Mercer Cnty., Ky.</i> , 432 F.3d 624 (6th Cir. 2005)	2, 15
<i>ACLU of N.J. v. Schundler</i> , 168 F.3d 92 (3d Cir. 1999)	14, 15
<i>Am. Legion v. Am. Humanist Assoc.</i> , 588 U.S. 29 (2019)	passim
<i>Bd. of Educ. of Kiryas Joel Vill. v. Grumet</i> , 512 U.S. 687 (1994)	9
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	23
<i>Cave v. Jester</i> , 2026 WL 916187 (E.D. Ark. Mar. 31, 2026)	passim
<i>Comm’rs of Johnston Cnty. v. Lacy</i> , 93 S.E. 482 (N.C. 1917)	29
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2002)	18
<i>Gong Lum v. Rice</i> , 275 U.S. 78 (1927)	23
<i>Ho v. S.F. Unified Sch. Dist.</i> , 147 F.3d 854 (9th Cir. 1998)	23
<i>Keller v. State Bar of Cal.</i> , 496 U.S. 1 (1990))	7
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022)	passim
<i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993)	4
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992)	26, 32
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	3
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	25, 29
<i>McCreary Cnty., Ky. v. ACLU of Ky.</i> , 545 U.S. 844 (2005)	passim
<i>Nathan v. Alamo Heights Indep. Sch. Dist.</i> , 173 F.4th 576 (5th Cir. 2026) (en banc)	passim
<i>Pleasant Grove v. Summum</i> , 555 U.S. 460 (2009)	2, 6, 8
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	23
<i>Roake v. Brumley</i> , 170 F.4th 292 (5th Cir. 2026) (en banc) (per curiam)	23
<i>Shurtleff v. City of Boston</i> , 596 U.S. 243 (2022)	passim
<i>Stone v. Graham</i> , 449 U.S. 39 (1980)	3, 10, 11, 12
<i>Town of Greece v. Galloway</i> , 572 U.S. 565 (2014)	20, 25, 32
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005)	passim
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952)	28

Statutes

Ark. Code Ann. §22-3-221 passim

Other Authorities

- Arkansas Secretary of State Self Guided Grounds Tour, *available at*
https://www.sos.arkansas.gov/uploads/2025_grounds_tour.pdf..... 28
- John Adams, *The Works of John Adams, Second President of the United States* (Charles Francis Adams ed., Vol. VI 1851) 30
- John Jay, *The Correspondence and Public Papers of John Jay* (Henry P. Johnston ed., Vol. IV 1893) 30
- Mark David Hall, *Proclaim Liberty Throughout All The Land: How Christianity Has Advanced Freedom and Equality for All Americans* (2023)..... 29
- Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003)..... 26
- William Findley, *Observations on “The Two Sons of Oil”* (Pittsburgh: Patterson & Hopkins eds., 1812) 30

**IDENTITIES AND INTERESTS OF AMICI
PURSUANT TO FED. R. APP. P. 29¹**

The National Association of Christian Lawmakers, Inc. (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 Capitol 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

There is nothing unconstitutional, unlawful, or controversial about the State of Arkansas recognizing what has been permissible government speech since at least *Pleasant Grove v. Summum*, 555 U.S. 460 (2009). Thus, the only question then becomes whether the Display Act and Ten

Commandments Monument violate the Establishment Clause. Contrary to the district court's conclusion, *they don't*. 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 struck down the law as purportedly violative of the Establishment Clause. Over two decades later, in what would become the Court's final use 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 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 “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 it 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, relegating *Lemon* 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. 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. 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.

Here, Arkansas’s Display Act bears no resemblance to a founding-era religious establishment because it does not coerce anything. Arkansas merely decided to place the donated Ten Commandments monument on its Capitol grounds “for ceremonial, celebratory, or commemorative purposes.” *American Legion*, 588 U.S. at 50, and is therefore presumed constitutional. *Id.* at 52. Indeed, contrary to the district court’s conclusions, *Cave v. Jester*, 2026 WL 916187, *8 (E.D. Ark. Mar. 31, 2026) (suggesting that Arkansas’s Display Act does not provide “any explanation” about the monument), the Display Act specifically states that its purpose is to place a monument on the Capitol Grounds “commemorating the Ten Commandments.” Ark. Code Ann. §22-3-221(b)(1). There is nothing unconstitutional about that.

LEGAL ARGUMENT

I. Permanent monuments, including the Ten Commandments monument at issue here, are government speech that are entitled to a presumption of constitutionality.

There is nothing unconstitutional, unlawful, or controversial about the State of Arkansas recognizing what has been recognized and permissible government speech since at least *Pleasant Grove v. Summum*, 555 U.S. 460 (2009). For one, “[t]he Free Speech Clause

restricts government regulation of private speech, *it does not regulate government speech*,” such as the government accepting a donation and assuming ownership of a monument and displaying it as *its own speech*. *Id.* at 467 (emphasis added). As a matter of settled law, Arkansas “may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message.” *Id.* at 468. Simply put, and contrary to Appellees’ contentions here, “*forum analysis does not apply to the installation of permanent monuments on public property*,” *id.* at 480 (emphasis added), and no one—including the satanists—has a right to demand that their own speech stand side-by-side with a government’s own chosen message. “If every citizen were to have a right to insist that no one paid with public funds express a view with which he disagreed . . . the process of government as we know it [would be] radically transformed.” *Id.* at 468 (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990)).

It is fundamental to our system and republican form of government that the “government has to say something, and a First Amendment heckler’s veto of any forced contribution to raising the government’s voice

in the marketplace of ideas would be out of the question.” *Id.* (cleaned up). This is precisely what Arkansas has decided here. As the district court acknowledged, the Ten Commandments monument at issue here “is government speech” because “the Display Act specifies . . . that the Ten Commandments monument is to be placed on the State Capitol grounds as a permanent monument that *becomes the property of the State* . . . regardless of whether private parties sponsor or paid for the monument.” *Cave v. Jester*, 2026 WL 916187, *37 (E.D. Ark. Mar. 31, 2026) (emphasis added). Thus, the placement of the Ten Commandments monument and its acceptance as government property render the Display Act and the monument indistinguishable from and wholly constitutional under *Pleasant Grove*. 555 U.S. at 470 (“Permanent monuments displayed on public property typically represent government speech,” because “[g]overnments have long used monuments to speak to the public.”).

II. Ten Commandments caselaw before *Shurtleff* and *Kennedy* is defunct to the extent it is based on *Lemon*.

Because Arkansas’s Display Act demonstrates that the Ten Commandments Monument at issue here is government speech, a conclusion with which the district court’s agreed, *Cave v. Jester*, 2026 WL

916187, *37 (E.D. Ark. Mar. 31, 2026), the only relevant question becomes whether that speech somehow violates the Establishment Clause of the First Amendment.² *It does not.* Contrary to the district court’s conclusions, *id.* at 38, *Lemon is dead* and has no application to the review of government monuments. The Display Act and the Ten Commandments Monument are constitutional under binding precedent. The district court’s reliance on dead precedent is incorrect, clearly erroneous, and must be reversed.

A. Stone and McCreary were decided upon the now extinct Lemon test and serve no purpose here.

The district court relied heavily upon *Stone* and *McCreary* as a basis to find that the Ten Commandments monument and the Display Act violated the Establishment Clause. *Cave*, 2026 WL 916187, at *39–41. The entirety of the Supreme Court’s decision in *Stone* was based on

² Of course, Plaintiffs raise an Equal Protection claim as well, but that claims fails for the same reasons as the Establishment Clause claim because “the Religions Clauses . . . and the Equal Protection Clause as applied to religion all speak with one voice.” *Bd. of Educ. of Kiryas Joel Vill. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Conner, J., concurring). Indeed, “[w]ho really thinks [it] could be the law” that the government’s speech does not violate the Establishment Clause but does violate the Equal Protection Clause. *American Legion*, 588 U.S. at 81–82 (Gorsuch, J., concurring).

the first prong of *Lemon*. *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.

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 here. *See, Cave*, 2026 WL 916187.

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.

Though the district court opined that it was “not aware that the United States Supreme Court has overruled *Stone*,” *Cave*, 2026 WL

916187, at *36, its precedential value is nadir. In its short, seven-paragraph opinion, decided at the petition for certiorari stage without the benefit of briefing or argument, the Court in *Stone* found that Kentucky’s law violated the Establishment Clause based on just one criterion: the posting of the Ten Commandments lacked 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).

Stone was such a stark departure that Justice Rehnquist opined: “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 district court’s continued reliance on this aberration warrants reversal. In fact, contrary to the district court’s statement, *Stone* has been “abandoned” by the Supreme Court such that it is “now an empty vessel,” *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 588 (5th Cir. 2026) (en banc), and “***courts cannot apply Stone without applying bad law.***” *Id.* at 591 (emphasis original).

b. *Stone* not only misapplied *Lemon*, 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 display of the Ten Commandments and its Display Act authorizing it 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 III. Put simply: *Stone*’s constitutionally infirm analysis has—like *Lemon*—been relegated to the dustbin of constitutional history. Indeed, “[w]ith *Lemon* gone, there is nothing left of *Stone* to apply.” *Nathan*, 173 F.4th at 591.

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 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 an 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. *Id.* at 95. After the ACLU successfully enjoined the City’s display, the City modified the display to include figures of several nonreligious displays and signs acknowledging

and celebrating the City’s cultural diversity. *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. *Id.* at 100. 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*, 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*, 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*. *Id.* at 841 n.1 (“This display appears to match exactly the displays at issue in [*McCreary*] and [*Mercer*.]”). Again, the Sixth Circuit held that the display did not violate the Establishment Clause. *Id.* 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

Capitol grounds, *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.

How, then, could the district court ignore that a stand-alone display of the Ten Commandments held constitutional in *Van Orden* did not dispositively control the disposition here of Arkansas’s display—even before the modern era of Establishment Clause jurisprudence? The mere passage of time. *Cave*, 2026 WL 916187, at *42 (distinguishing *Van Orden* by claiming that “[m]ost notably here, the Ten Commandments Monument is new”). But, age alone does not warrant a finding that a Ten Commandments display, which is placed—by order of the Display Act—“on the State Capitol grounds where there are other monuments,” Ark. Code Ann. §22-3-221(b)(2)(B), is somehow wholly different than the virtually identical monument at issue in *Van Orden*, which was likewise

was surrounded by numerous other displays and monuments. 545 U.S. at 681. The district court’s dismissal of *Van Orden* in favor of the defunct *Lemon* and its similarly defunct progeny was erroneous and mandates reversal.

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 (2002) (Thomas, J., concurring). No doubt he was correct. *McCreary* and *Van Orden* were argued on the same day, decided on the same day, and involved a Ten Commandments display. Yet the analysis and conclusions were different. 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. In essence, under prior jurisprudence, “[a] display of the Ten Commandments on government

property also violates the Establishment Clause, except when it does not.” *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting). That was the definition of “arbitrariness” and was “entirely unpredictable.” *Id.* Good luck, indeed. But that era is now gone along with its “wildly divergent outcomes.” *Id.*

III. *Lemon* has been overruled and replaced with a test 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 unanimously recognized 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. *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* 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 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). “[J]ust 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 under the Establishment Clause must now be viewed in the constitutional meaning of the Clause at the time of the founding.

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

The procedural history of this case is curious. The district court agreed that *Lemon* was abrogated by *Kennedy*, but held that it was nevertheless required to begin (and end) its analysis with application of *Lemon*. *Cave*, 2026 WL 916187, at *37–38 (“the Court will begin its analysis by analyzing the Display Act under *Lemon* because the United States Supreme Court has not expressly overruled *Lemon*.”) The district court held that *Stone*—which was solely based on *Lemon*—remains good law. *It doesn’t*.

The district court then proceeded to analyze the Display Act and the Ten Commandments monument under *Lemon*, *McCreary*, and *Stone* as though *American Legion*, *Kennedy*, and *Shurtleff* had never happened. *Cave*, 2026 WL 916187, at *39–40. But, when the Supreme Court relegated *Lemon* to its constitutional tomb—all of the precedents that were based upon *Lemon* became equally worthless. 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).

“With *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). The same is true of *McCreary*—even under the district court's rationale—because *McCreary* too was based on *Lemon*. See *Cave*, 2026 WL 916187, at *36 (noting that *McCreary* was based entirely on *Lemon*). Contrary to the district court's conclusion, *Stone* and *McCreary* were indeed thrown out with *Lemon*'s rancid bathwater.

IV. Arkansas’s Display Act does not violate the Establishment Clause.

The Establishment Clause reads, “Congress shall make no law respecting an establishment of religion[.]” U.S. Const. amend. I. 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 Display Act and its requirement to post the Ten Commandments on the State Capitol grounds is a far-cry from establishing religion under the founding-era understanding of that term.

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 “founding-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 Display Act are very simple: “The Secretary of State shall permit and arrange for the placement on the State Capitol grounds of a suitable monument *commemorating the Ten Commandments . . .*” Ark. Code Ann. §22-3-221(b)(1) (emphasis added). It provides that the monument be designed, constructed, and placed by

private funds, Ark. Code Ann. §22-3-221(b)(2)(A), and importantly states that it shall be “placed on the State Capitol grounds where there are other monuments.” Ark. Code Ann. §22-3-221(b)(2)(B).

Notably, this is the same as in *Van Orden*. The monument there, as here, was provided and paid for by private groups. *Compare* 545 U.S. at 681–82, *with* Ark. Code Ann. §22-3-221(b)(2). The Ten Commandments display provided for by the Display Act was to be placed in the area where other monuments and displays commemorating Arkansas history were located. *Compare* 545 U.S. at 681 (noting that the Texas Capitol grounds included 17 monuments and 21 historical markers), *with* Ark. Code Ann. §22-3-221(b)(2)(B) (requiring monument to be placed with other displays and monuments). Identically to the Texas monument at issue in *Van Orden*, Arkansas’s Ten Commandments display is surrounded on the Capitol Grounds by 16 monuments. *Compare* 545 U.S. at 681 (17 monuments including Ten Commandments), *with* *Cave*, 2026 WL 916187, at *21 (noting that the Ten Commandments Monument is one of 17 monuments on Arkansas’s Capitol grounds.”).

Despite the virtually identical composition of displays on the Capitol grounds of Arkansas and Texas, the district court nevertheless

found that the Ten Commandments monument here was “isolated from other monuments” and had “no visual relationship to any other monument.” *Cave*, 2026 WL 916187, at *42. This is incorrect factually and irrelevant legally. The historic War Prisoners’ Marker is immediately next to the Ten Commandments, separated by mere feet, *see* Arkansas Secretary of State, Self-Guided Grounds Tour of the Arkansas State Capitol 4–5, 8, 10 (2025),³ and is within close proximity to several other monuments. Additionally, it is irrelevant legally. A stand-alone cross, which is “undoubtedly a Christian symbol,” does not violate the Establishment Clause. *American Legion*, 588 U.S. at 66. A stand-alone Ten Commandments monument, which is “[o]f course . . . religious,” but included among others on the same capitol grounds, does not violate the Establishment Clause. *Van Orden*, 545 U.S. at 690. Arkansas’s monument does not either.

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

“We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *Marsh*, 463

³ *See* Arkansas Secretary of State Self Guided Grounds Tour, *available at* https://www.sos.arkansas.gov/uploads/2025_grounds_tour.pdf.

U.S. at 792; *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). There is no requirement to ignore that history, and no constitutional infirmity by recognizing it in the Display Act. 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 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. *E.g.*, *Comm’rs of Johnston Cnty. v. Lacy*, 93 S.E. 482, 487 (N.C. 1917) (“**[O]ur laws are founded upon the Decalogue.**” (Walker, J., concurring) (emphasis added)). 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. The Supreme Court itself is

adorned with the Ten Commandments, *American Legion*, 588 U.S. at 88 (Gorsuch, J., concurring), as is the Justice Department and the National Archives, “mere steps from where [the Supreme Court] sits.” *Id.*

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: 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 same men would never have intended for the restriction of their display in public spaces. The Founders understood the

Establishment Clause to prohibit legal authority to punish dissenters of a particular religion, not to prohibit the passive inclusion of the Ten Commandments. Any other understanding is both ahistorical and incorrect. In fact, it is one that has been explicitly rejected by the Supreme Court. *American Legion*, 588 U.S. at 53 (“For believing Jews and Christians, the Ten Commandments are the word of God handed down to Moses on Mount Sinai, but the image of the Ten Commandments has also been used to convey other meanings. *They have historical significance as one of the foundations of our legal system*, and for largely that reason, they are depicted on the marble frieze in our courtroom and in other prominent public buildings in our Nation’s capital.”). 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 anyone into fealty of the Christian religion.

Under the “hallmarks of religious establishments” approach, which is now the law, *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 anything of the kind. The Display Act simply states that Arkansas will display the Ten Commandments to commemorate its history along with the numerous other monuments on the Capitol grounds. Arkansas’s law does not bear any hallmarks of historical coercion. Indeed, “this religious display does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion. Therefore, the [display] is clearly constitutional.” *American Legion*, 588 U.S. at 73–74 (Thomas, J., concurring).

Simply put, the Display Act does not “force citizens to engage in ‘a formal religious exercise[.]’” *Kennedy*, 597 U.S. at 537 (quoting *Lee*, 505 U.S. at 589). All that is required is for the Ten Commandments to be posted to the Capitol grounds. Ark. Code Ann. §22-3-221(b)(1). *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).

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 be reversed.

Dated: July 29, 2026.

Respectfully submitted,

/s/ Daniel J. Schmid

Mathew D. Staver

Horatio G. Mihet

Daniel J. Schmid

LIBERTY COUNSEL

P.O. Box 540774

Orlando, FL 32854

(407) 875-1776

court@LC.org

hmihet@LC.org | dschmid@LC.org

Attorneys for Amici Curiae

**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 6,498 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.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

Pursuant to 8th Cir. R. 25A(e), I hereby certify that on July 29, 2026, I filed a true and correct copy of the foregoing Brief via this Court's ECF filing system. Service will be effectuated by the Court electronic notification system on all counsel of record.

/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Amici Curiae