No. 24-30706

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DARCY ROAKE, REVEREND, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, REAL PARTY IN INTEREST A.V., REAL PARTY IN INTEREST S.V.; ADRIAN VAN YOUNG, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, REAL PARTY IN INTEREST A.V., REAL PARTY IN INTEREST S.V.; MAMIE BROADHURST, REVERED, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST N.W.; RICHARD WILLIAMS, REVEREND, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST N.W.; JEFF SIMS, REVEREND, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST A.S., REAL PARTY IN INTEREST C.S. 1, REAL PARTY IN INTEREST C.S. 2; JENNIFER HARDING, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST A.O.; BENJAMIN OWENS, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST A.O.; DAVID HAWLEY, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, REAL PARTY IN INTEREST A.H., REAL PARTY IN INTEREST L.H.; ERIN HAWLEY, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, REAL PARTY IN INTEREST A.H., REAL PARTY IN INTEREST L.H.; DUSTIN MCCRORY, ON BEHALF OF THEMSELVES AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST E.M., REAL PARTY IN INTEREST P.M., REAL PARTY IN INTEREST L.M.; GARY SERNOVITZ, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST T.S.; MOLLY PULDA, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILD, REAL PARTY IN INTEREST T.S., CHRISTY ALKIRE, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, REAL PARTY IN INTEREST L.A.; JOSHUA HERLANDS, ON BEHALF OF HIMSELF AND ON BEHALF OF HIS MINOR CHILDREN, REAL PARTY IN INTEREST E.H., REAL PARTY IN INTEREST J.H.,

Plaintiffs-Appellees,

v.

CADE BRUMLEY, IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE SUPERINTENDENT OF EDUCATION; CONRAD APPEL, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION (LSBESE); JUDY ARMSTRONG, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE LSBESE; KEVIN BERKEN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; PRESTON CASTILLE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; SIMON

CHAMPAGNE, IN HER OFFICIAL CAPACITY AS A MEMBER OF LSBESE; SHARON LATTEN-CLARK, IN HER OFFICIAL CAPACITY AS A MEMBER OF LSBESE; LANCE HARRIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; PAUL HOLLIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; SANDY HALLOWAY, IN HER OFFICIAL CAPACITY AS A MEMBER OF LSBESE; STACY MELERINE, IN HER OFFICIAL CAPACITY AS A MEMBER OF LSBESE; RONNIE MORRIS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF LSBESE; EAST BATON ROUGE PARISH SCHOOL BOARD; LIVINGSTON PARISH SCHOOL BOARD; VERNON PARISH SCHOOL BOARD; ST. TAMMANY PARISH SCHOOL BOARD,

Defendants/Appellants.

BRIEF OF KENTUCKY & 17 OTHER STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Amici States are governmental parties. Under Fifth Circuit Rule 28.2.1, a supplemental certificate of interested persons is not required.

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INTERESTS OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The Commonwealth of Kentucky and the 17 undersigned States have a profound interest in the proper interpretation of the Establishment Clause of the First Amendment. For decades, that provision was distorted by the Supreme Court's three-part test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). That test "ambitiously attempted to find a grand unified theory of the Establishment Clause." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 60 (2019) (plurality op.). Yet too often, *Lemon* led to "results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could contain." *See Shurtleff v. City of Boston*, 596 U.S. 243, 284 (2022) (Gorsuch, J., concurring in the judgment). Not only was *Lemon* "ahistorical," its test "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534, 537 (2022) (cleaned up) (citation omitted). With good reason, *Lemon*'s methodology for interpreting the Establishment Clause has been "abrogated." *Groff v. DeJoy*, 600 U.S. 447, 460 & n.7 (2023).

This appeal concerns how to treat a Supreme Court decision that applied *Lemon*'s now-discarded test. That dated decision, which amicus curiae Kentucky remembers all too well, is *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). There, the Supreme Court tersely concluded that a Kentucky statute requiring the posting of the Ten Commandments in public-school classrooms violates the Establishment Clause. *Id.* at 40–43. There is no dispute that *Stone* turned on *Lemon*. As *Stone* put it, "[w]e conclude that

[Kentucky's law] violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution." *Id.* at 42–43.

The amici States write to explain why *Stone* does not support a preliminary injunction as to Louisiana's law. Even before *Lemon* was overruled, the Supreme Court had narrowed *Stone* so that it stood for only a sliver of a proposition. Now that *Lemon* has been abrogated, the Court should not extend *Stone*'s reasoning to Louisiana's law, which differs in meaningful respects from the law in *Stone*. When the Supreme Court overruled *Lemon*, it discarded that case's methodology for interpreting the Establishment Clause. In *Lemon*'s place, the Supreme Court "instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535 (citation omitted). That approach—not *Stone*—is the proper way to judge the constitutionality of Louisiana's law.

That approach must account for the reality that "acknowledgements [on public property] of the role played by the Ten Commandments in our Nation's heritage are common throughout America." *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) (plurality op.). More to the point, the Ten Commandments "have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in [the Supreme Court's] courtroom and other prominent public buildings in our Nation's capital." *Am. Legion*, 588 U.S. at 53. To be sure, the Decalogue has religious significance for many Americans. But a "close look" at our Nation's history reveals that "[n]o one at the time of the founding [was] recorded as arguing that the use

of religious symbols in public contexts was a form of religious establishment." *Shurtleff*, 596 U.S. at 287 (Gorsuch, J., concurring in the judgment).

ARGUMENT

Louisiana offers several persuasive reasons why the preliminary injunction issued below should be reversed. The amici States focus on the district court's and the panel's decision to apply *Stone*, which both courts concluded is binding and indistinguishable from this case. *Roake v. Brumley*, 756 F. Supp. 3d 93, 116 (M.D. La. 2024); *Roake v. Brumley*, 141 F.4th 614, 642–45 (5th Cir. 2025), *vacated by* 154 F.4th 329. The amici States make three points about *Stone*. First, they explain how the statute in *Stone* differs from Louisiana's law. Second, they summarize how the Supreme Court cabined *Stone*'s scope even before *Lemon* was overturned. And third, they urge the Court not to extend *Stone*'s narrowed holding to this case but instead to apply the standard mandated by *Kennedy*.

I. The law in *Stone* differs from Louisiana's law.

Stone arose in the Bluegrass State. In 1978, a Democratic legislator from Louisville introduced, and the Kentucky General Assembly passed, the statute that prompted the case. ROA.1245–47. That law, which remains on the books, instructs a Kentucky state official "to ensure that a durable, permanent copy of the Ten Commandments [is] displayed on a wall in each public elementary and secondary school classroom in the Commonwealth." Ky. Rev. Stat. § 158.178(1). The law also directs that each display contain the following text in "small print below the last commandment": "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental

legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2). Louisiana's brief (at 62) provides a representative picture of a Ten Commandments display used in Kentucky in the lead up to *Stone*. ROA.1334.

Shortly after the law's passage, Kentucky's Attorney General issued a legal opinion allowing private parties to donate Ten Commandments displays to public schools. *In re Honorable Edward L. Fossett*, OAG 78-605, 1978 WL 26724, at *2 (Aug. 28, 1978). By the time *Stone* made it to Kentucky's high court, a private foundation had reportedly "financed 15,000 framed copies [of the Ten Commandments] which ha[d] been placed in all classrooms in 55 counties and in some classrooms in 48 other counties." *Stone v. Graham*, 599 S.W.2d 157, 159 (Ky. 1980) (Lukowsky, J., for reversal); *see also* ROA.1245–47. Kentucky's courts upheld the Ten Commandments law. After a state trial court found the law constitutional, the Supreme Court of Kentucky affirmed by an equally divided vote. 599 S.W.2d at 157 (per curiam). (The vote was equally divided because a Justice recused due to his previous role as the Kentucky Attorney General who issued the above-described legal opinion.)

The U.S. Supreme Court summarily reversed in a 5–4 per curiam opinion.[1] From beginning to end, the Court applied *Lemon*—in particular, its first prong. *Stone*, 449 U.S. at 40–43. *Stone* can be read no other way. As the Court summarized at the top of its

[1] Two of the dissenters would have granted certiorari and given the case plenary consideration. *Stone*, 449 U.S. at 43 (Burger, C.J., Blackmun, J., dissenting).

decision: "We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular purpose, and is therefore unconstitutional." *Id.* at 41. So *Stone* was all about—and only about—*Lemon*.

In applying *Lemon*, *Stone* rejected Kentucky's "'avowed' secular purpose," expressed through the statutorily required statement at the bottom of each Ten Commandments display. *Id.* The Court summarily declared that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."[2] *Id.* The Court, however, qualified that it was not holding that the Ten Commandments can never be displayed or discussed in public schools. It emphasized that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42. At the end of its decision, the Court returned to *Lemon*, reiterating that Kentucky's law "violates the first part of the *Lemon v. Kurtzman* test, and thus the Establishment Clause of the Constitution." *Id.* at 42–43.

As this summary shows, *Stone* tailored its analysis to Kentucky's law. That matters because Louisiana's law differs in key respects. True, Louisiana's law requires a Ten Commandments display in each public-school classroom in the Pelican State.

[2] In dissent, then-Justice Rehnquist pointed out that the Court's declaration about Kentucky's alleged purpose has "no support beyond [the Court's] own *ipsie dixit*." *Stone*, 449 U.S. at 43 (Rehnquist, J., dissenting).

La. Rev. Stat. § 17:2124(B)(1), (C)(1). But it gives "each public school governing authority" latitude to determine "[t]he nature of the display." *Id.* at (B)(1). That is unlike Kentucky's law, which provides for a "durable, permanent copy of the Ten Commandments" and nothing else. *See* Ky. Rev. Stat. § 158.178(1). It follows that the Ten Commandments displays in Louisiana need not look anything like the Decalogue-only displays in *Stone*, especially in the context of this facial challenge to Louisiana's law. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

The mockups in Louisiana's brief (at 7–9) show some of the (many) ways that public schools can comply with its law. For example, the statute permits a Ten Commandments display that explains the Supreme Court's post-*Stone* decision in *Van Orden*, which rejected an Establishment Clause challenge to the placement of a Ten Commandments monument on Texas's Capitol grounds. As written, Louisiana's law also permits a display that compares the Ten Commandments to other documents formative to modern law, like Blackstone's *Commentaries* and the Supreme Court's decision in *Marbury v. Madison*. Any of these hypothetical displays would fit within *Stone*'s carve-out allowing the Ten Commandments to be used in public schools "in an appropriate study of history, civilization, comparative religion, or the like." 449 U.S. at 42.

Louisiana law also requires a three-paragraph "context statement" to be part of every Ten Commandments display. La. Rev. Stat. § 17:2124(B)(3). That required statement provides concrete examples of the Ten Commandments being "a prominent part of American public education for almost three centuries." *Id.* Such a detailed

explanation is unlike the general sentence that Kentucky's statute required to be printed in "small print" at the foot of each display. Ky. Rev. Stat. § 158.178(2). In this way, Louisiana's law does more to convey the educational function of each Ten Commandments display. On top of that, Louisiana's law empowers public schools to make a Ten Commandments display part of a larger display including "the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance." La. Rev. Stat. § 17:2124(B)(4).

For all these reasons, even accepting *Stone* on its terms, the decision does not require sustaining a facial challenge to a law like Louisiana's that allows Ten Commandments displays that are fully in line with *Stone*.

II. While *Lemon* was good law, *Stone* became an outlier.

Even before the Supreme Court overturned *Lemon*, *Stone* did not age well as a judicial precedent. Following *Stone*, the Supreme Court distinguished it again and again, each time giving it less reach.

The narrowing of *Stone* began shortly after its issuance. Not even three years later, the Supreme Court rejected an Establishment Clause challenge to a state legislature's "practice of opening each legislative day with a prayer by a chaplain paid by the State." *Marsh v. Chambers*, 463 U.S. 783, 784, 795 (1983). The majority did not once cite *Stone*. Nor did it apply *Lemon*. Both failures drew the ire of the principal dissent. Invoking *Stone*, the dissent found it "self-evident" that the "'purpose' of legislative prayer is preeminently religious rather than secular." *Id.* at 797 & n.4 (Brennan, J., dissenting). As

to *Lemon*, the dissent criticized the Court for "mak[ing] no pretense of subjecting Nebraska's practice of legislative prayer" to that "formal 'test[].'"[3] *Id.* at 796. In short, out of the gate, *Stone*'s holding and methodology carried no weight.

Things did not improve for *Stone* after *Marsh*. In *Lynch v. Donnelly*, the Supreme Court held that a municipality could display a "Nativity scene[] in its annual Christmas display." 465 U.S. 668, 670–71, 687 (1984). Whereas *Stone* treated *Lemon* as the end-all-be-all, *Lynch* countered that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* at 679. In fact, the Court admitted that in two recent cases (one of which was *Marsh*) it "did not even apply the *Lemon* 'test.'" *Id.* As to *Stone*, *Lynch* understood the case to stand for the slim proposition that the Ten Commandments displays there were problematic because they "were posted purely as a religious admonition" or "were motivated wholly by religious considerations." *Id.* at 679, 680. Taking *Lynch* at its word, *Stone* governs only if the posting of the Ten Commandments is "wholly" or "purely" motivated by religious considerations. Any secular rationale—even in part—suffices to distinguish *Stone*.

The Supreme Court finished its narrowing of *Stone* in a pair of 2005 decisions, each of which considered a Ten Commandments display on public property. In the first decision, the Supreme Court characterized *Stone* as involving extreme facts: It was an

[3] Later decisions have underscored that *Marsh* declined to apply *Lemon*. *E.g.*, *Am. Legion*, 588 U.S. at 60 (plurality op.) (noting that in *Marsh* "the Court conspicuously ignored *Lemon* and did not respond to Justice Brennan's argument in dissent that the legislature's practice could not satisfy the *Lemon* test").

"unusual case[]" in which there was either "an apparent sham" by the government or a secular purpose for the statute that was "secondary." *McCreary Cnty. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 865 (2005). As the Court saw it, *Stone* turned on the "isolated exhibition" of the Ten Commandments "not leav[ing] room even for an argument that secular education explained their being there." *Id.* at 867. *Stone*, the Court clarified, "did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key."[4] *Id.* So under *McCreary County*, *Stone* stands at most for the limited proposition that a standalone Ten Commandments display can raise constitutional concerns. *Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 634 (6th Cir. 2005) ("Whatever is left of *Stone* is limited to circumstances involving public displays of the Ten Commandments in isolation."). Indeed, although *McCreary County* considered three different Ten Commandments displays in a courthouse, it cited *Stone* only while considering the one in which the Ten Commandments were displayed alone. 545 U.S. at 868–73.

The second Supreme Court decision from 2005 hemmed in *Stone* even more. As noted above, in *Van Orden*, the Supreme Court rejected an Establishment Clause challenge to the placement of a monument of the Ten Commandments on the grounds of the Texas state Capitol. 545 U.S. at 681 (plurality op.). In so doing, the plurality found

[4] The Supreme Court made a similar point about *Stone* nearly 20 years earlier. *Edwards v. Aguillard*, 482 U.S. 578, 593–94 (1987) (observing that *Stone* "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization").

Lemon "*not useful* in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.* at 686 (emphasis added); *see also id.* at 703–04 (Breyer, J., concurring in the judgment) (likewise not relying on *Lemon*). It is hard to imagine a more direct repudiation of *Stone*'s methodology. To *Stone*, *Lemon* was everything. To *Van Orden*, *Lemon* was irrelevant to the constitutionality of a Ten Commandments display on public property.

Rather than apply *Lemon*, the *Van Orden* plurality focused on "the nature of the monument" and "our Nation's history." *Id.* at 686. In undertaking this analysis, the Court pointed out the obvious: "[A]cknowledgements [on public property] of the role played by the Ten Commandments in our Nation's heritage are *common throughout America*." *Id.* at 688 (emphasis added). In fact, the Court noted that the Ten Commandments are displayed several places in its own building. The Decalogue appears with Moses in the Supreme Court's "own Courtroom"; it "adorn[s]" the gates on both sides of the Courtroom and the "doors leading into the Courtroom"; and "Moses . . . sits on the exterior east facade of the building holding the Ten Commandments tablets." *Id.* And the Supreme Court's building is no exception when compared to other government buildings in our Nation's capital. *Id.* at 689 ("Similar acknowledgements can be seen throughout a visitor's tour of our Nation's Capital."). The Supreme Court later affirmed that "[i]n *Van Orden* and *McCreary*, no Member of the Court thought that these depictions [of the Ten Commandments] are unconstitutional." *Am. Legion*, 588 U.S. at 53.

Against this backdrop of Ten Commandments displays "common throughout America," the *Van Orden* plurality turned to *Stone*. And it made short work of the decision. *See Mercer Cnty.*, 432 F.3d at 634 (noting that *Van Orden* "simply dismissed *Stone* as inapplicable"). The district court and the panel here countered that the *Van Orden* plurality noted that *Stone* arose in the "classroom context." 545 U.S. at 690. But the *Van Orden* plurality did not suggest that the Ten Commandments can never be displayed or used in public schools. *Stone* itself refutes such an implication. 449 U.S. at 42. Instead, the *Van Orden* plurality emphasized that nothing "suggest[s] that *Stone* would extend to displays of the Ten Commandments that lack a 'plainly religious,' 'pre-eminent purpose.'" 545 U.S. at 691 n.11 (citation omitted). In other words, the *Van Orden* plurality dismissed *Stone* as a case in which the displays contained not even a hint of a secular purpose. *See id.* That can only be a rare circumstance. After all, in nearly the same breath, the *Van Orden* plurality held that "the Ten Commandments have an undeniable historical meaning" and that "[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.

In the two decades since *McCreary County* and *Van Orden*, the Supreme Court has not cited *Stone* again in a majority decision. *Stone* simply goes unmentioned in the Court's modern Establishment Clause jurisprudence. This is true even when the Court discusses Ten Commandments displays. Most notably, *Stone* did not make an appearance in the governing decision in *American Legion*, despite the Court explaining that the Ten

Commandments "have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent buildings in our Nation's capital." 558 U.S. at 53.

As this summary shows, *Stone* did not fare well as a precedent even while *Lemon* was good law. *Stone*'s methodology for considering the constitutionality of a Ten Commandments display lost the day in *Van Orden*. *See* 545 U.S. at 686 (plurality op.); *id.* at 703–04 (Breyer, J., concurring in the judgment). And over time, *Stone* became a one-off decision that applied only in extreme circumstances. In the words of *McCreary County*, *Stone* was an "unusual case[]" in which the "isolated exhibition [of the Ten Commandments] did not leave room even for an argument that secular education explained their being there." 545 U.S. at 865, 867. Thus, even while *Lemon* was on the books, *Stone* became a vanishing precedent.

III. Now that *Lemon* has been abrogated, *Stone* should not be applied here.

Although *Stone* had little import before *Lemon* was overruled, *Stone* has no applicability here now that *Lemon* is no more. The Supreme Court left no doubt that *Lemon* has been "abrogated." *Groff*, 600 U.S. at 460 & n.7. Over three years ago, the Court emphasized that it "long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy*, 597 U.S. at 534. Going forward, *Lemon* is no longer an appropriate test to interpret the Establishment Clause. *Freedom from Religion Found., Inc. v. Mack*, 49 F.4th 941, 954 n.20 (5th Cir. 2022) (citing *Kennedy* for the conclusion that *Lemon*'s "long Night of the Living Dead is now over." (internal citation omitted)).

That *Lemon* has been abrogated raises the question of how to treat a Supreme Court precedent like *Stone* that rests on *Lemon* and nothing else. No doubt, this Court cannot itself overrule a Supreme Court precedent. Some action by the Supreme Court is required. To quote the well-known rule, "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

The district court and the panel applied this rule to conclude that *Stone* "directly" controls here. 756 F. Supp. 3d at 116; 141 F.4th at 642 (citation omitted). That conclusion fails on several levels. Even before *Lemon* was upended, the Supreme Court had hollowed out *Stone*. And Louisiana's law is by no means a carbon copy of the law in *Stone*, especially in the context of this facial challenge. As noted above, unlike Kentucky's statute, Louisiana's law expressly gives school officials discretion to fashion the "nature of the display." La. Rev. Stat. § 17:2124(B)(1). In other words, a Ten Commandments display in Louisiana need not look anything like the "isolated exhibition" in *Stone*. *See McCreary Cnty.*, 545 U.S. at 867. In fact, Louisiana's law specifically allows school officials to include a Ten Commandments display as part of a larger display of historical documents. La. Rev. Stat. § 17:2124(B)(4). And unlike the "implausible disclaimer" in statutorily mandated "small" text at the bottom of the displays in *Stone*, *McCreary Cnty.*, 545 U.S. at 869, Louisiana's law requires a three-paragraph "context

statement" that situates the historical use of the Ten Commandments "as a prominent part of American public education for almost three centuries," La. Rev. Stat. § 17:2124(B)(3).

All these differences prove up a simple point: *Stone* is not on all fours here. To apply *Stone* to Louisiana's law would require *extending* the decision. The Court should decline to extend *Stone* to these new circumstances. Although a court of appeals cannot declare a Supreme Court decision to be overruled based on its weakened foundations, *Rodriguez de Quijas*, 490 U.S. at 484, this rule does not bind a circuit court to extend a discredited precedent like *Stone*. To the contrary, the "weakened foundations" of a Supreme Court decision "counsel[] against expanding [its] application." *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021); *accord Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 259 & n.11 (5th Cir. 2019).[5] As a result, the Court need not ignore *Stone*'s lack of jurisprudential footing. It should treat *Stone*'s status as a poorly reasoned outlier whose methodology has been discredited as a reason not to extend it. Rather than extend *Stone* an inch farther, the Court should apply the test mandated by *Kennedy*.

[5] In a similar vein, several members of this Court have explained that courts "should resolve questions about the scope of [Supreme Court] precedents in light of and in the direction of the constitutional text and constitutional history." *Texas v. Rettig*, 993 F.3d 408, 417 (5th Cir. 2021) (Ho, J., dissenting from the denial of rehearing en banc) (citation omitted); *accord City of Grants Pass v. Johnson*, 603 U.S. 520, 549–50 (2024).

Although the Court need not decide whether *Stone* remains good law in the context of this facial challenge, the best view is that the Supreme Court has in fact overturned *Stone*. To be sure, the Supreme Court has not said the magic words "*Stone* is overruled." The Supreme Court, however, left no question as to *Lemon*'s demise. As of 2022, the Supreme Court had "long ago abandoned *Lemon*." *Kennedy*, 597 U.S. at 534. And the year after, the Supreme Court confirmed that *Lemon* is "abrogated." *Groff*, 600 U.S. at 460 & n.7.

When the Supreme Court overruled *Lemon*, it rejected *Lemon*'s methodology for interpreting the Establishment Clause. In *Kennedy*, the Supreme Court weighed the lower court's reliance on *Lemon* "and *its progeny*." 597 U.S. at 534 (emphasis added). Of course, *Stone* is part of *Lemon*'s progeny, given that *Stone* is all about *Lemon*. And *Kennedy* swept broadly in rejecting *Lemon*'s application to any Establishment Clause challenge. As *Kennedy* put it, *Lemon* "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Id.* (cleaned up) (citation omitted). So *Kennedy* can only be understood as an across-the-board purge of *Lemon* from Establishment Clause jurisprudence. *American Legion* similarly discussed the intractable problems with *Lemon* across "a great array of laws and practices." 588 U.S. at 49 (plurality op.); *accord Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014). These sweeping, categorical holdings about *Lemon*'s shortcomings cannot help but sweep up a case like *Stone* that rests only on *Lemon*. The same is true of *Kennedy*'s unambiguous directive that going forward courts applying the Establishment Clause "*must*" focus on our Nation's

history. 597 U.S. at 535–36 (emphasis added). That broad mandate leaves no room for a *Lemon*-driven precedent like *Stone*. *See Firewalker-Fields v. Lee*, 58 F.4th 104, 121 n.5 (4th Cir. 2023) ("[I]t is now clear that *Lemon* and its ilk are not good law.").

CONCLUSION

The Court should reverse the preliminary injunction entered below.

Dated: November 12, 2025

Respectfully submitted,

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I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5). This brief contains 4,166 words, including all headings, footnotes, and quotations, and excluding the parts of the response exempted under Fed. R. App. P. 32(f).

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Dated: November 12, 2025

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I certify that on November 12, 2025, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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