No. 24-30706

United States Court of Appeals for the Fifth Circuit

Darcy ROAKE, Reverend, on behalf 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, Reverend, 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.,

Plaintiff-Appellee,

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 the LSBESE; Preston Castille, in his official capacity as a member of LSBESE; Simone Champagne, in her official capacity as a member of the LSBESE; Sharon Latten-Clark, in her official capacity as a member of the LSBESE; Lance Harris, in his official capacity as a member of LSBESE; Paul Hollis, Louisiana State Board of Elementary and Secondary Education; Sandy Holloway, in her official capacity as a member of the LSBESE; Stacey Melerine, in her official capacity as a member of the LSBESE; Ronnie Morris, in his official capacity as a member of the LSBESE; East Baton Rouge Parish School Board; Livingston Parish School Board; Vernon Parish School Board; St. Tammany Parish School Board,,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:24-CV-517

EN BANC BRIEF OF *AMICI CURIAE* AMERICA FIRST POLICY INSTITUTE & PASTOR LORENZO SEWELL SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

GARRETT GREENE*
**COUNSEL OF RECORD*
LEIGH ANN O'NEILL
NICK WANIC
TYLER COCHRAN
AMERICA FIRST POLICY INSTITUTE
1455 Pennsylvania Ave., N.W, Suite 225
Washington, DC 20004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Constitutions and Statutes

Other Resources

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to those already listed in the parties' briefs, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees
Darcy Roake
Adrian Van Young
Mamie Broadhurst
Richard Williams
Jeff Sims
Jennifer Harding
Benjamin Owens
David Hawley
Erin Hawley
Dustin McCrory
Gary Sernovitz
Molly Pulda
Christy Alkire
Joshua Herlands

Attorneys for Plaintiffs-Appellees
Jonathan K. Youngwood
Nora Ahmed
Patrick Elliott
Samuel Troxell Grover
Alex J. Luchenister
Daniel Mach
Charles Andrew Perry
Heather Weaver

Defendants-Appellants
Cade Brumley
Conrad Appel
Judy Armstrong
Kevin Berken
Preston Castille
Simone Champagne
Sharon Latten-Clark
Lance Harris
Paul Hollis
Sandy Holloway
Stacey Melerine

Ronnie Morris
East Baton Rouge Parish School Board
Livingston Parish School Board
Vernon Parish School Board
St. Tammany Parish School Board
Orleans Parish School Board

Attorneys for Defendants-Appellants
Jorge Benjamin Aguinaga
Joseph Charles Davis
Zachary Faircloth
Benjamin Fleshman
Kelsey Flores
Caitlin Ann Huettemann
Eric C. Rassbach
Amanda Leigh Salz

Amici Curiae
American Atheists, Incorporated
Conscience Project
Foundation for Moral Law
Professor Mark David Hall
Professor Lorianne Updike Toler
America First Policy Institute
Fraternal Order of Eagles
State of Kentucky
State of Alabama
State of Arkansas
State of Florida
State of Idaho
State of Iowa
State of Indiana
State of Mississippi
State of Missouri
State of Montana
State of Nebraska
State of Ohio
State of South Carolina

State of South Dakota
State of Tennessee
State of Texas
State of Utah
State of West Virginia
American Atheists (Terminated)
National Council of Jewish Women
Bend the Arc: A Jewish Partnership of Justice
Central Conference of American Rabbis
Hadassah, The Women's Zionist Organization of America, Incorporated
Hindus for Human Rights
Interfaith Alliance
Jewish Council for Public Affairs
Jewish Women International
Keshet
Men of Reform Judaism
Muslims for Progressive Values
Rabbinical Assembly
Sadhana: Coalition of Progressive Hindus
Sikh Coalition
Society for Humanistic Judaism
Truah
Union for Reform Judaism
Women of Reform Judaism
Women's Rabbinic Network
Zioness Movement
Baptist Joint Committee for Religious Liberty
Evangelical Lutheran Church in America
General Synod of the United Church of Christ
Reverend Jihyun Oh, Clerk of the General Assembly of the Presbyterian Church
Reverend Sean W. Rowe, Presiding Bishop of the Episcopal Church

Attorneys for Amici Curiae
Geoffrey Thomas Blackwell
Andrea M. Picciotti-Bayer
John Allen Eidsmoe
Talmadge Butts

Joseph Carl Cecere, Jr.
Michael Berry
Gene C. Schaerr
Justin Miller
Matthew F. Kuhn
Lindsay Claire Harrison
James R. McGuire
Brian Raphel

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that Amicus Curiae America First Policy Institute is a non-stock, nonprofit corporation, has no parent companies, and no person or entity owns it or any part of it.

Respectfully submitted,

/s/ *Garrett Greene*
Garrett Greene
Attorney of Record for *Amicus Curiae*

IDENTITY AND INTEREST OF THE *AMICI CURIAE*[1]

Pastor Lorenzo Sewell is the senior pastor of 180 Church in Detroit, Michigan, a non-denominational, gospel-centered congregation committed to serving families, mentoring youth, and strengthening civic character through faith-informed community engagement. Pastor Sewell has spoken and led prayer at major national civic gatherings and regularly ministers on the importance of religious freedom and religious values as a cornerstone of American life. Pastor Sewell knows that the United States was built upon the religious liberty our forefathers secured; that Americans should never be coerced to adopt a creed; and that a government that suppresses religion surrenders its own integrity. He has often reminded his congregants and audiences alike that America is a "City on a Hill, and that our freedom of religion makes America great and a truly special place in the world."

As a national religious leader, Pastor Sewell sees daily how moral formation rooted in Judeo-Christian values equips young people for citizenship and leadership. He believes schools must acknowledge our

[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Nation's religious heritage—including the historical and moral significance of the Ten Commandments—and can and should do so without coercing belief or worship. He supports the longstanding distinction between passive acknowledgment of religion and compelled religious exercise, and he urges this Court to apply the non-coercion principles that safeguard both the freedom to believe and the freedom not to believe.

For Pastor Sewell, America's strength has always been moral as well as political. He teaches that true leadership flows from character, not power, and that "when leaders humble themselves before God, nations are lifted." He views this case as part of that moral calling, preserving the freedom to acknowledge the divine foundations of American liberty so that, in his words, "our land may remain bright with freedom's holy light."

America First Policy Institute ("AFPI") is a 501(c)(3) non-profit, non-partisan research institute dedicated to advancing policies that put the American people first. Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that

American workers, families, and communities are the key to our country's success.

AFPI's leadership includes many former leaders of the United States government. AFPI's leaders and members alike appreciate that our country was founded on Judeo-Christian principles and that those principles are reflected throughout U.S. history in our laws and, as relevant here, in public education.

AFPI believes that the court below erred when it held that Louisiana's law calling for the Ten Commandments to be displayed in public school classrooms violated the Establishment Clause of the U.S. Constitution. The Ten Commandments are foundational to the American system of government and have been a cornerstone of American society, including in public education.

INTRODUCTION

AFPI submits this *amicus curiae* brief in support of Appellees to clarify the history and tradition of the Religion Clauses and how such history permits the passive display of the Ten Commandments in public school classrooms. The District Court and the panel's ruling fall into the ahistorical, unconstitutional trap of reading the Establishment Clause as guaranteeing freedom *from* religion.

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .*

U.S. CONST. amend. 1, cl. 1. The Religion Clauses were adopted to secure the freedom of religious Americans to live out their faith without state interference, not to insulate citizens from the mere presence of religion in public life. The Founders understood a free people could and should acknowledge the religious sources of their moral and civic order while firmly rejecting any form of governmental coercion in matters of belief or worship. Properly interpreted, the First Amendment protects citizens from compelled religious exercise—not from the Nation's longstanding practice of recognizing the religious heritage that shaped its laws and institutions.

This Court should therefore follow in the footsteps of our Nation's history and tradition of religious liberty and overturn the panel's previous decision affirming the District Court's preliminary injunction.

ARGUMENT

I. The Religion Clauses of the Constitution Were Ratified for the Benefit of Religious Americans.

The Founders included in the Bill of Rights the protections outlined in the Religion Clauses *for the benefit* of religion. The liberal, free exercise of religion and the independence of religious institutions were priorities for a "religious people" who "presuppose[d]" the existence of a "Supreme Being" and were concerned with "[g]uarantee[ing] the freedom to worship as one chooses." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). In fact, the Religion Clauses' religio-centric conception of religious liberty has frequently been recognized by the Supreme Court. *See Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892) ("[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."); *Zorach*, 343 U.S. at 313-14 ("When the state encourages religious instruction or cooperates with religious authorities. . .it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to

their spiritual needs."); *Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 213 (1963) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.").

> [*T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any. . .Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause. . .Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.*

Lynch v. Donnelly, 465 U.S. 668, 673, 675 (1984) (Burger, C.J., delivered the opinion of the Court holding a small town's display of the nativity did not offend the Constitution). *See also* Warren E. Burger, BYU Forum Address, Oct. 30, 1979 (published by Brigham Young University Press) ("Religious liberty is not a gift of government. It is a condition government must respect and protect, for it predates the state and gives life to the very freedoms the Constitution secures."); Warren E. Burger, The Bill of Rights—A Charter for Freedom, ABA Bicentennial Series (1987) ("The First Amendment was framed not to drive religion out of

public life but to ensure that the state would never command the conscience or prescribe the articles of a citizen's faith.").

a. The Religion Clauses Are Complementary.

The Religion Clauses are not in any way a concession by an indifferent, skeptical, or agnostic elite.[2] And more importantly, the religious liberty contemplated by the First Amendment of the Constitution was not included to protect individuals, society, or the state *from* religion.[3] Rather, "the vision underlying the First Amendment's religious-liberty provisions is that freedom of religious belief and exercise is a fundamental, natural right that precedes the social compact of government and one with which government rightfully possesses no power to interfere." Michael Stokes Paulsen, *Freedom for Religion*, 133 YALE L.J. FORUM 404 (2023). *See also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (held the Constitution guarantees religious institutions "independence from secular control or manipulation, in short, power to decide for

[2] This is what some have called the "modern" view of religious liberty. *See* Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. ISS. 5 1159 (2013).

[3] This is what some have called the "post-modern" view of religious liberty. *See id.*

themselves, free from state interference, matters of church government as well as those of faith and doctrine."). Accordingly, the Religion Clauses are complementary: working in tandem to protect the "free and autonomous" exercise of religion from the dual threats of state impairment and state control. Paulsen, *supra*, at 407. *See also Kedroff*, 344 U.S. at 116; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("The Free Exercise Clause commits government itself to religious tolerance. . ."). Understanding this original perspective adopted by the Framers is essential to properly interpreting and applying the Religion Clauses today.

Some may argue such a religio-centric conception of religious liberty is wholly alien to the First Amendment. According to this line of thinking, the Religion Clauses are separate units, that while related protect different liberties. This approach seems to be the one favored by this Court in its previous opinion on the matter at issue. *See Roake v. Brumley*, 141 F.4th 614, 640 (5th Cir. 2025) ("The Establishment Clause was intended to erect a wall of separation between Church and State. . . At a minimum, the Establishment Clause ordains that no federal or state government can pass laws which aid one religion, aid all religions, or

prefer one religion over another.") (internal quotations omitted). However, such an antagonistic approach disregards Supreme Court precedent. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 532-33 (2022) (held while rejecting the argument that a desire to avoid an Establishment Clause violation was the kind of interest that trumped a citizens' free exercise rights that "[i]t is true this Court and others refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment. . .A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others."). *See also Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15 (1947).

b. Our Nation's History and Tradition of Religious Liberty Demonstrates a Prioritization of Religious Belief.

A religio-skeptic approach also neglects our Nation's history and tradition of religious liberty. Not only was an analysis of history and tradition a key factor in the lower court's opinion, *Roake v. Brumley*, 756 F.Supp.3d 93, 206-07 (M.D. La. 2024), but it has been an important element in a number of recent, groundbreaking Supreme Court decisions,

especially concerning the Religion Clauses. *See Kennedy*, 597 U.S. at 535-36; *Carson v. Makin*, 596 U.S. 767, 788-89 (2022); *Espinoza v. Mont. Dept. of Rev.*, 591 U.S. 464, 480-83 (2020). *See also N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 21 (2022) (relying on founding-era scholarship, 19th-century cases, and post-Civil War discussions and legal commentaries to determine the bounds of the Second Amendment); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (holding non-textual rights claims must be "deeply rooted in this Nation's history and tradition" and in accordance with "ordered liberty"). *See also* William Baude and Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW AND HIST. REV. 809 (2019) ("Today's law reflects the accumulation of past law, including statutes validly passed and doctrines validly applied, but only so long as each of them can be traced back to the law of the Founding."); J. Joel Alicea, *Bruen Was Right*, 174 U. PA. L. REV. 13 (2025) (describing history and tradition as a two-step test: a plain text inquiry and then the use of historical background to assess the conclusions derived from textual analysis).

The Supreme Court's long-standing canons of judicial interpretation demonstrate substantial weight must be given to our

Nation's traditions surrounding religion and religious liberty. *See Everson*, 330 U.S. at 33-34 ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America. . .") (Rutldege, J., dissenting); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet, an unbroken practice. . .[undertaken] openly and by affirmative state action. . .is not something to be lightly cast aside."); *Marsh v. Chambers*, 463 U.S. 783, 787 (1983) (held prayers opening legislative sessions do not violate the Establishment Clause because it is deeply embedded in history and tradition); *Town of Greece v. Galloway*, 572 U.S. 565, 575-76 (2014) ("Practices of long age and endurance can illuminate the forgotten meaning of an unclear phrase."). Such deference

to our national religious traditions is therefore no less appropriate in the instant case.

i. Thomas Jefferon's Views on the Religion Clauses Are Not Dispositive.

An examination of our Nation's history and tradition of religious liberty establishes two camps of understanding represented by James Madison and Thomas Jefferson respectively. Madison defined religion as the "duty we owe to our Creator, and the manner of discharging it." James Madison, *Memorial and Remonstrance Against Religious Assessments*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/museum/historic-document-library/detail/james-madison-memorial-and-remonstrance-against-religious-assessments-1785 (last accessed Nov. 5, 2025). The presence of "duty" is noteworthy because this is a concept that appears and reappears throughout the historical record.[4] Moreover, defining religion as a "duty" speaks to how Madison conceived of religious liberty. Madison advocated

[4] *See generally* THE FOUNDERS ON GOD AND GOVERNMENT (Daniel L. Dreisbach, Mark D. Hall, & Jeffry H. Morrison eds., 2004) *and* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING (Daniel L. Dreisbach and Mark David Hall, eds., 2009).

for a "jurisdictional division" between religion and the state. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990). Madison's vigorous advocacy for this position was based not on the broad interests of society, but on the specific demands "religion" makes on the conscience. *Id.* Madison believed man's duty to his Creator was "precedent, in both order of time and degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments, [Ca. 20 June] 1785*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last accessed Jul. 4, 2024). In Madison's view, the necessity of religious liberty came in protecting man's allegiance to the "Universal Sovereign" as much, if not more, than protecting man's right to believe as he will.[5]

[5] *Id.* This is not to say the formation of religious opinions is not an aspect of religious liberty. Rather, Madison understands religious liberty to encompass more than mere religious opinions. *See* JOHN WITTE JR., JOEL A. NICHOLS, AND RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 66-67 (2022) (Argues religious liberty contains two guaranties: a right to be left alone to choose one's religious beliefs and a right to act publicly on those beliefs). This more extensive meaning of religious liberty reveals Madison's belief that government's demand for allegiance is not absolute. A perspective affirmed by the Supreme Court in *Girouard v. United States*. 238 U.S. 61, 69 (1946) (holding "the victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State").

Jefferson, on the other hand, had a different perspective. Jefferson applied religious liberty to a more diverse array of groups than perhaps any other Founding Father: stating that included under religious liberty's mantle of protection, was "the Jew and the Gentile, the Christian, and Mahometan, the Hindoo, and infidel of every denomination." *Image 22 of Thomas Jefferson, July 27, 1821, Autobiography Draft Fragment, January 6 through July 27*, Library of Congress, https://www.loc.gov/resource/mtj1.052_0517_0609/?sp=22&st=text (last visited Jul. 3, 2024). Yet Jefferson had a much stricter application of religious liberty in practice, affirming a strong belief-action distinction whereby religious liberty protected man's religious "opinions" but not any opposition to "social duties" so caused by these "opinions."[6] Thomas Jefferson, *To the Danbury Baptist Association, 1 January 1802,* FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006 (last visited Jul. 3, 2024). In other words, Jefferson believed religious

[6] The peculiarity of Jefferson's beliefs on this issue should come as no surprise given his frequent antagonism toward organized religion. MILES SMITH, RELIGION & REPUBLIC: CHRISTIAN AMERICA FROM THE FOUNDING TO THE CIVIL WAR 32-39 (2024).

liberty protected a person's right to hold whatever beliefs they chose, but he did not think it protected conduct that conflicted with a citizen's basic social responsibilities or duties.

ii. The State Constitutions from the Founding Era Favor a Madisonian Conception of Religious Liberty.

Jefferson's view appears to have been a minority opinion in early America.[7] Accordingly, Jefferson's subjective interpretation of the Religion Clauses cannot be dispositive. *See Wallace v. Jaffree*, 472 U.S. 38, 92, 108 (1985) (Arguing Jefferson's "wall of separation" letter was a "less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment" and attributing his views to Madison and the Bill of Rights is erroneous.) (Rehnquist, J., dissenting). The peculiarity of Jefferson's views are further demonstrated by the language of the religious liberty clauses in the various state constitutions codified during the Revolutionary period. These early state constitutions,

[7] *Cf.* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 249 (CLYDE N. WILSON ED. 1999) ("liberty of conscience in matters of religion consists in the absolute and unrestrained exercise of our religious opinions, and duties, in that mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatsoever").

which served as templates for the federal Bill of Rights, belie any widespread acceptance of Jefferson's views.

From 1776 to 1780 eleven of the thirteen newly independent states adopted constitutions, eight of which would include provisions protecting religious liberty.[8] New York guaranteed "[t]he free exercise and enjoyment of religious profession and worship…shall forever, hereafter be allowed…Provided, That the liberty of conscience…shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[9] N.Y. Const. art. XXXVIII (1777). Georgia had a similar provision guaranteeing free exercise "provided it be not repugnant to the peace and safety of the State." Ga. Const. art. LVI (1777). New Hampshire likewise guaranteed a citizen could worship God "in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the

---

[8] *See* N.Y. Const. art. XXXVIII (1777); S.C. Const. art. VIII, § 1 (1790); Ga. Const. art. LVI (1777); N.H. Const. art. V (1784); De. Declaration of Rights and Fundamental Rules §§ 2, 3 (1776); Md. Declaration of Rights, art. XXXIII (1776); Mass. Const., art. II (1780); N.J. Const. art. XVIII (1776); N.C. Const., art. XIX (1776); Pa. Const., art. II (1776); Va. Declaration of Rights § 16 (1776). *See also* Northwest Ordinance (1787), NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/northwest-ordinance (last visited July 4, 2024).

[9] The exact same language was adopted by South Carolina. *See* S.C. Const. art. VIII, § 1 (1790).

public peace, or disturb others, in their religious worship." N.H. Const. art. V (1784). Other provisions, like those of Delaware, Maryland, and Massachusetts, along with the Northwest Ordinance, all afforded protections to worship with provisos carving out exceptions for acts that disturbed the peace, safety, or worship of others. De. Declaration of Rights and Fundamental Rules §§ 2, 3 (1776); Md. Declaration of Rights, art. XXXIII (1776); Mass. Const., art. II (1780); Northwest Ordinance (1787), NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/northwest-ordinance (last visited July 4, 2024). New Jersey, North Carolina, Pennsylvania, and Virginia,[10] on the other hand, all protected free exercise without stated exceptions. N.J. Const. art. XVIII (1776); N.C. Const., art. XIX (1776); Pa. Const., art. II (1776); Va. Declaration of Rights § 16 (1776).

These state constitutions demonstrate that "religion," while related to matters of conscience, was frequently understood in terms of the satisfaction of affirmative duties. Therefore, these constitutions show

[10] Virginia's understanding of religious liberty has consistently been given pride of place at the Supreme Court when interpreting the Religion Clauses of the First Amendment. *See Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Davis v. Beason*, 133 U.S. 333, 342-43 (1890); *Everson*, 330 U.S. at 13.

that generally—in favor of a Madisonian conception—religious liberty in the years preceding the framing of the Constitution meant not just protection for religious opinions, but for one's ability to live out their religious beliefs. This Madisonian conception of religion is also reflected in how religious liberty was generally understood among the people.

iii. A Madisonian Conception Was the Common Understanding of Religious Liberty Among the People.

Many early Americans, having come to the New World to escape religious persecution in Europe, understood religious liberty to entail more than mere freedom to form religious opinions. For instance, William Penn defined religious liberty as "not only a mere liberty of the mind . . . but the exercise of ourselves in a visible way of worship . . . that if we neglect . . . we sin and incur divine wrath." William Penn, *The Great Case of Liberty of Conscience, in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 43 (Daniel L. Dreisbach and Mark David Hall, eds., 2009) (internal quotations omitted). Penn had a robust understanding of how the free exercise of religion restrained government action. Penn identified both the coercion of unwanted duties and the

hindrance of the execution of one's affirmative duties as violative of the natural right to religious liberty. *Id*. at 44. Similar formulations of religious liberty can be found throughout the works of philosophers that influenced the Founding era such as Thomas Hobbes and John Locke.[11] This religio-centric conception of religious liberty is also found in the influential *Cato's Letters*,[12] the writings of prominent Baptist minister Isaac Backus,[13] and in numerous political sermons.[14]

---

[11] *See* Thomas Hobbes, *Leviathan, in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 41-42 (Daniel L. Dreisbach and Mark David Hall, eds., 2009); John Locke, *A Letter on Toleration, in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 47-50 (Daniel L. Dreisbach & Mark David Hall, eds., 2009).

[12] Cato's Letters: Letter 66, *"Arbitrary Government proved incompatible with true Religion, whether Natural or Revealed," in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 58 (Daniel L. Dreisbach & Mark David Hall, eds., 2009). Cato's Letters were incredibly influential political essays from the Founding Era. According to some estimates, roughly half of all private libraries in colonial America had a bound edition of the collected essays. Dan Sanchez, *Cato's Letters Explained "The Glorious Principles of Liberty" to the American Founders*," FOUNDATION FOR ECONOMIC EDUCATION, https://fee.org/articles/cato-s-letters-explained-the-glorious-principles-of-liberty-to-the-american-founders/ (last accessed Nov. 5, 2025).

[13] Isaac Backus, *An Appeal to the Public for Religious Liberty, in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 206, 211 (Daniel L. Dreisbach & Mark David Hall, eds., 2009). Backus was an influential Baptist minister known for his passionate advocacy for religious liberty and the disestablishment of state churches in New England. *See* ISAAC BACKUS, CHURCH HISTORY OF NEW ENGLAND FROM 1620 TO 1804 (1844). *See also* JOHN M. MECKLIN, THE STORY OF AMERICAN DISSENT (1934); T.B. MASTON, ISAAC BACKUS: PIONEER OF RELIGIOUS LIBERTY (1962).

[14] *See generally* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730-1805 (1991).

iv. The Draft History of the Religion Clauses Reiterates a Madisonian Conception of Religious Liberty.

Finally, the draft history of the Constitution reiterates the importance of both action and the sacred to the Constitution's conception of religious liberty. Five of the seven initial amendment proposals sent by states called for specific protections for religious liberty. McConnell, *supra*, at 1480. Demonstrably then, religious liberty was an issue the Framers took incredibly seriously and whose protection would not have been left to happenstance. Such commitment is demonstrated by the First Amendment's extensive drafting process.

The First Amendment went through numerous drafts speaking to both the Founders' intent and the meaning of the final text. The initial draft, authored by Madison, stated "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretence, infringed." 1 ANNALS OF CONG. 434 (June 8, 1789) (proposal of James Madison, June 8, 1789). The language of Madison's proposal is further evidence of a religio-centric conception of religious liberty. By using "free" and "equal," Madison's

proposal implies religious liberty is not only entitled to equal protection but to an "absolute measure of protection apart from mere government neutrality." McConnell, *supra*, at 1481. Additionally, the absolute terms deployed concerning infringement indicate religious liberty requires religious belief and practices be protected against even incidental infringements, again affirming a religio-centric conception of religious liberty. *Id*. at 1482.

Madison's proposal was not debated by the Select Committee who instead proposed their own shorter version, which shared much of the same language. *See* 1 ANNALS OF CONG. 729 (Aug. 15, 1789) ("no religion shall be established by law, nor shall the equal rights of conscience be infringed."). This updated proposal was rejected by the House of Representatives over concerns the Select Committee's version of the Establishment Clause would disestablish state churches. McConnell, *supra*, at 1482.[15] The House then adopted a formulation proposed by

[15] These concerns illustrate another important aspect of the Religion Clauses' conception of religious liberty. Namely, until the ratification of the Fourteenth Amendment and the Establishment Clause's subsequent incorporation against the states, the Establishment Clause not only prohibited the establishment of a national religion but prohibited the federal government from disestablishing state churches. *See generally* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); *Note, Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992); William K. Lietzau, *Rediscovering the*

Fisher Ames which read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 ANNALS OF CONG. 766 (proposal of Fisher Ames, Aug. 20, 1789). A slightly altered version of the amendment would be sent to the Senate where they too, without any record of debate, considered various versions of the Religion Clauses. *See* McConnell, *supra*, at 1483-84. The Senate would ultimately settle on a formulation that stated, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion. . ." 2 BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (Bernard Schwartz ed., 1971). This version of the Religion Clauses would likewise be rejected by the House before a Conference Committee—of which Madison was a member—proposed the version of the Religion Clauses that would finally be ratified. McConnell, *supra*, at 1484.

While many of these drafts include only minor stylistic edits, one key takeaway from the various drafts of the Religion Clauses of the First

---

Establishment Clause: Federalism and the Rollback of Incorporation, 39 DEPAUL L. REV. 1191 (1990); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

Amendment is the initial drafts favored "rights of conscience" instead of "free exercise" while later drafts featured both "rights of conscience" and "free exercise" before ultimately "rights of conscience" was dropped. *Id.* at 1481-84; U.S. CONST. amend. I. "Rights of conscience" and "free exercise" were frequently used interchangeably,[16] however, there are differences between the two terms which should inform this Court's interpretation of how the Framers conceptualized "religion" and religious liberty. First, both Samuel Johnson's and Noah Webster's dictionaries show "exercise" denotes willful action while "conscience" is conceived of, essentially, as a faculty of the mind. *Compare Conscience*, A DICTIONARY OF THE ENGLISH LANGUAGE (1792) ("the knowledge or faculty by which we judge of the goodness or wickedness or our own actions; private thoughts"); *Conscience*, A DICTIONARY OF THE ENGLISH LANGUAGE (1868) ("the faculty which decides on the lawfulness or unlawfulness of our actions and affections) *with Exercise*, A DICTIONARY OF THE ENGLISH LANGUAGE (1792) ("labour of the body; practice; outward performance; act

[16] In fact, the Georgia Charter of 1732 was the only legal document that made an explicit distinction between "rights of conscience" and "free exercise." *See generally* McConnell, *supra*. *See also* Penn, *supra*, at 43 ("By liberty of conscience, we understand not only a mere liberty of the mind. . .but the exercise of ourselves in a visible way of worship. . .").

of divine worship whether publick [sic] or private"); *Exercise,* A DICTIONARY OF THE ENGLISH LANGUAGE (1867) ("act of exercising; exertion; application; performance; practice"). Second, it is more probable "free exercise" would result in conflicts with the state, thereby requiring special protection whereas the state cannot genuinely compel a change of beliefs. After all, as Madison indicated in his definition, "religion" is a matter of dueling allegiances to the demands made on individuals by the city of God and by the city of man.

Finally, "rights of conscience" are not limited to judgments on issues of faith while "free exercise," in the context of the First Amendment, specifically applies to the "free exercise" of religion. These distinctions and the decision to choose "free exercise" for the final draft of the First Amendment implies the exclusion of "rights of conscience" was an intentional move to explicitly grant religious beliefs special protections over and against other kind of beliefs. *See Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). After all, the Constitution says nothing of protecting free exercise based on beliefs deriving from philosophy, ideology, or core values, all of which are terms and concepts with which the Founders were familiar. *See* THE DECLARATION OF INDEPENDENCE, ¶.

2 (U.S. 1776) ("We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.").

Nearly all the historical materials equate "religion" with beliefs in and duties owed to a sacred extrapersonal authority. Undoubtedly, the frequent invocation of terms like "Universal Sovereign" or "Providence" as opposed to "God" reflect a common trend to use non-theistic terms. This may be a concerted effort to ensure religious liberty for non-theistic religions was secured. *See* McConnell, *supra*, at 1493 n.430. However, the use of non-theistic terms is by no means an attempt to secularize the religious underpinnings that were the driving forces behind the Founders' conception of religious liberty. Therefore, the sum of our Nation's history and tradition point to an enshrinement in the First Amendment of the Constitution of a Madisonian conception of religious liberty over a Jeffersonian one. Meaning, the Constitution has a religio-centric conception of religious liberty.

v. The Religion Clauses Single Out Religion for Special Treatment.

This religio-centrism is further demonstrated by the fact religion is singled out for special treatment in the First Amendment. In many ways, while religious liberty is for everyone, the Religion Clauses are for the religious alone. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 47 (1996); Justin Collings & Anna Bryner, *Defining Religion and Accommodating Religious Exercise*, 99 IND. L.J. 515, 534 (2024); Paulsen, *supra* note 3, at 1189, 1195. Such preferential treatment for religion should be unsurprising since the Founding Fathers considered religious faith essential to the success of the American experiment. *See* John Adams, *From John Adams to Massachusetts Militia, 11 October 1798*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/99-02-02-3102 (last accessed Nov. 9, 2025) ("Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other."); George Washington, *Washington's Farewell Address 1796*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/washing.asp (last accessed Nov. 9, 2025) ("Of the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.").

This special treatment is evidenced by the very nature of the Religion Clauses, as the plain text clearly privileges choices made on behalf of religion over those made on behalf of other motivations. The Supreme Court has found, at times, the Religion Clauses require payments be made to religious persons, but the same cannot be said for the irreligious. *See generally Frazee v. Ill. Dept. Emp't Sec.*, 489 U.S. 829, 833 (1989) (held unemployment benefits could not be denied to someone refusing to work based on religious convictions even if not part of an established religious sect); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (held unemployment benefits could not be withheld from someone who was discharged for refusing to work on their Sabbath); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (held unemployment benefits could not be withheld from someone who terminated their employment on the basis of their religious convictions); *Sherbert v. Verner*, 374 U.S. 398 (1963) (held unemployment benefits could not be withheld from someone who had refused employment that would require them to work on their Sabbath). Similarly, the Supreme Court has carved out exceptions for religious persons concerning certain public education requirements while explicitly declining to extend that

privilege to the non-religious. *See Yoder*, 406 U.S. at 215-16 (held compulsory school attendance law violated Amish parents' free exercise rights). And finally, the Supreme Court has protected the internal affairs of churches from government interference in ways secular associations are not protected. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (held the ministerial exception was an affirmative defense for sectarian schools against employment discrimination law); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020) (*aff'd Hosanna-Tabor*).

Ultimately, the panel's decision to uphold the District Court's preliminary injunction is at odds with our Nation's history and tradition of religious liberty and should be overturned accordingly.

II. The Establishment Clause Requires Coercion Not Merely Recognition and Does Not Permit Government Hostility Toward Religion.

The Louisiana Ten Commandments law bears none of the hallmarks of establishment because it is in no way legally coercive. State coercion of participation in religious activity is the standard by which the Establishment Clause should be judged in accordance with our Nation's history and tradition of religious liberty. *See Shurtleff v. City of Boston*,

596 U.S. 243, 286 (2022) (Gorsuch, J., concurring); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 75 (2019) ("The *sine qua non* of an establishment of religion is actual religious coercion.") (Thomas, J., concurring in judgment); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RSRV. L. REV 795, 843 (1993) ("Government may not, through direct legal sanction or as a condition of some other right, benefit, or privilege, require individuals to engage in acts of religious exercise, worship, expression, or affirmation, nor may it require individuals to attend or give their direct, personal financial support to a church or religious body or ministry.). Practically, the coercion standard necessitates some sort of compelled action, not merely government speech that may cause offense and may or may not cause students to feel pressured into participating. *Compare West Virginia v. Barnette*, 319 U.S. 624, 629 (1943) (held a law compelling students to salute and pledge allegiance to the flag violated their First Amendment rights) *with Town of Greece*, 572 U.S. at 599 ("offense does not equate to coercion"); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 479 (5th Cir. 2001) (*en banc*) ("any speculation as to whether students might feel pressured to participate is irrelevant"). *See also* Michael Stokes Paulsen & Luke

Paulsen, THE CONSTITUTION: AN INTRODUCTION 301 (2015) (Speech, including the display of symbols, is not usually thought coercive. Folks can say or express what they want. . .Speech, without anything more, does not force others to agree with the speaker or to act in any way.).

The Louisiana Ten Commandments law merely mandates the passive display of the Ten Commandments, *La. Act No. 676, 2024 Leg., Reg. Sess*. (June 19, 2024), distinguishing it from something like mandated school prayers or devotional Bible readings. *See Schempp*, 374 at 203 (held school-sponsored Bible readings and recitation of the Lord's Prayer was unconstitutional). It does not require students or teachers to affirm, venerate, or worship according to the Ten Commandments. It does not even require the displays to be read, discussed, or otherwise incorporated into daily classroom activities. The Establishment Clause prohibits compulsory religious exercise, but it does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of religion." *Kennedy*, 597 U.S. at 535 (internal quotations omitted). This is especially true for practices deeply rooted in history and tradition or with a secular significance. *See Am. Legion*, 588 U.S. at 53 ("[T]he 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 on other prominent public buildings in our Nation's capitol."); *Cnty. of Allegheny v. Am. Civ. Lib. Union*, 492 U.S. 573, 652 (1989) ("[A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law.") (Stevens, J., concurring in part and dissenting in part). *See also* JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT 4 (1987); STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 25 (1982); John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, B.Y.U. L. REV. 611, 619 (2002). Additionally, banning the passive display of the Ten Commandments could evince an unconstitutional hostility toward religion. *Am. Legion,* 588 U.S. at 56 ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away reference to the divine will strike many as hostile to religion."); *Carson*, 596 U.S. at 781 (holding the government's interest in separating church and state "more fiercely" than

the Federal Constitution demands does not eliminate the requirement for neutrality in handling religious matters).

Because the panel's decision moves beyond the protective language of the First Amendment and instead chills religious speech in favor of the misunderstood idea that people ought to be protected *from* religion, its holding is incompatible with the restraints on state hostility to religion enshrined in the Constitution.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be REVERSED.

November 12, 2025.

Respectfully submitted,

*s / Garrett Greene**
Garrett Greene
Counsel of Record
Leigh Ann O'Neill
Nick Wanic
Tyler Cochran
America First Policy Institute
1455 Pennsylvania Ave NW
Suite 225
Washington, DC 20004
(703) 637-3690
ggreene@americafirstpolicy.com
loneill@americafirstpolicy.com
nwanic@americafirstpolicy.com
tcochran@americafirstpolicy.com

Counsel for amici curiae
Pastor Lorenzo Sewell and
America First Policy Institute

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the foregoing brief was electronically filed with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Undersigned counsel further certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s / Garrett Greene**
Garrett Greene
Counsel of Record
Leigh Ann O'Neill
Nick Wanic
Tyler Cochran
America First Policy Institute
1455 Pennsylvania Ave NW
Suite 225
Washington, DC 20004
(703) 637-3690
ggreene@americafirstpolicy.com
loneill@americafirstpolicy.com
nwanic@americafirstpolicy.com
tcochran@americafirstpolicy.com

Counsel for amici curiae
Pastor Lorenzo Sewell and
America First Policy Institute

RULE 32(g) CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,486 words, not including the items excluded by Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word. Undersigned counsel further certifies that this brief complies with typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in Microsoft Word Using 14-point Century Schoolbook font.

*s / Garrett Greene**
Garrett Greene
Counsel of Record
Leigh Ann O'Neill
Nick Wanic
Tyler Cochran
America First Policy Institute
1455 Pennsylvania Ave NW
Suite 225
Washington, DC 20004
(703) 637-3690
ggreene@americafirstpolicy.com
loneill@americafirstpolicy.com
nwanic@americafirstpolicy.com
tcochran@americafirstpolicy.com

Counsel for amici curiae
Pastor Lorenzo Sewell and
America First Policy Institute