
United States Court of Appeals

for the

Fifth Circuit

Case No. 24-30706

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.,

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 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 (BATON ROUGE)

**BRIEF FOR *AMICI CURIAE* DIRECTOR FOR THE
CONSCIENCE PROJECT AND PROFESSOR
MARK DAVID HALL IN SUPPORT OF APPELLANTS**

ANDREA PICCIOTTI-BAYER, ESQ.
Attorney for Amici Curiae
1350 Beverly Road, Suite 115
McLean, Virginia 22101
(571) 201-6564



CERTIFICATE OF INTERESTED PARTIES

Roake, et al. v. Brumley, et al, (No. 24-30706)

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following persons and entities, in addition to those listed in the briefs of the parties and other amici curiae, 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.

Amicus Curiae: The Conscience Project is a non-profit entity with no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

Counsel: Andrea Picciotti-Bayer of The Conscience Project

Respectfully Submitted,

/s/ ANDREA PICCIOTTI-BAYER, ESQ.
ANDREA PICCIOTTI-BAYER, ESQ.
Attorney for Amici Curiae
1350 Beverly Road, Suite 115
McLean, Virginia 22101
(571) 201-6564

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INTEREST OF *AMICI CURIAE*¹

THE CONSCIENCE PROJECT advances freedom of conscience and the right to practice one's faith free from interference by the government through public education that includes insightful commentary and legal analysis as well as in filing *amicus* briefs in key religious freedom cases.

MARK DAVID HALL is a Professor in Regent University's Robertson School of Government, Director of Religious Liberty in the States, Senior Fellow at the Center for Study of Law and Religion at Emory University, and Senior Fellow at Baylor University's Institute for Studies of Religion. He is an expert in the history of religious liberty and church-state relations in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the nation's inception, religious language and images have been woven into public life. And since the mid-twentieth century, monuments and plaques bearing the Ten Commandments have stood on land and in buildings owned by all levels of government. These practices inform what the Court has recently emphasized: the Establishment Clause must be interpreted by reference to history and tradition.

¹ All parties have consented to the filing of this brief. No party or parties counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Relying on faulty legal analysis and ignoring the overwhelming historical evidence, the three-judge panel erred in *Roake v. Brumley*, 141 F.4th 614 (5th Cir. June 20, 2025) (vacated), when it held that the passive display of the Ten Commandments in Louisiana public school classrooms would violate the Establishment Clause. Such noncoercive displays do not reflect any of the historical hallmarks of religious establishment. To the contrary, they are entirely consistent with the history and tradition of public religious displays in America, and excluding their display because of their religious origins would evince a hostility to religion that offends the general nondiscrimination principles of the Constitution.

ARGUMENT

I. COURTS MUST CONSIDER HISTORY AND TRADITION IN LIGHT OF ORIGINAL MEANING WHEN EVALUATING ESTABLISHMENT CLAUSE CLAIMS.

The Establishment Clause is best understood through the prism of history and tradition. See Mark David Hall and Andrea Picciotti-Bayer, *Ten Commandments in the Public Square and Public Schools*, 34 WILLIAM AND MARY BILL OF RIGHTS JOURNAL 7-13 (Oct. 2025) (forthcoming). As Justice Hugo Black explained, the "meaning and scope of the First Amendment" have been interpreted in "light of its history and the evils it was designed forever to suppress." *Everson v. Board of Ed.*, 330 U.S. 1, 14–15 (1947).

This proposition has been widely embraced by Supreme Court justices across the ideological spectrum, including those who viewed the Constitution's meaning as changing over time. See Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OREGON LAW REVIEW 563-614 (2006). Justice William Brennan, for example, asserted that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

As Justice Kavanaugh recently explained the relevant principle, the reason for making history an interpretive anchor, particularly when it comes to broadly stated principles in the Bill of Rights, is that the alternative entails a court that "implement[s] its own policy judgments" about the underlying right. *United States v. Rahimi*, 602 U.S. 680, 714 (2024) (Kavanaugh, J., concurring). More specifically, a court must engage in constitutional interpretation in such cases "by examining text, pre-ratification and post-ratification history, and precedent." *Id.* This operative central principle is an originalist one: "The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood." *Id.* at 715.

There have, of course, been fluctuations in the Supreme Court's holdings on the Establishment Clause over the years, but some are a product of a "history of religious establishment relied on by the Court" that was "radically incomplete and often misleading." NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, *AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE*, 5–6 (2023). For too long, that distorted interpretation pitted the Establishment Clause against the Free Exercise Clause and led to unfounded judicial hostility toward religion—trends that more recent decisions have been correcting. See e.g., *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 494–96 (2020) (Thomas, J., concurring); CHAPMAN & MCCONNELL, *supra*, at 3–5, 188.

The Court's distortions resulted from reliance on the ahistorical test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its "endorsement test offshoot," which the more recent Court has accordingly rejected in favor of "[a]n analysis focused on original meaning and history." *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 534–36 (2022). Tellingly, even during the era of the endorsement test, five justices on the Court agreed in *Van Orden v. Perry*, 545 U.S. 677 (2005), that a granite monument commemorating the Ten Commandments on the Texas State House grounds did not violate the Establishment Clause, though another five-justice majority in *McCreary County v. American Civil Liberties Union of Ky.*, 545

U.S. 844 (2005), decided the same day, found framed copies of the Ten Commandments in Kentucky courthouses to be unconstitutional.

As *Kennedy* made clear, the *Lemon* and endorsement tests have given way to a requirement "that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 597 U.S. at 535 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2013)). See also *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 19, 61 (2019) (plurality opinion); *Shurtleff v. City of Boston*, 596 U.S. 243, 287-88 (2022) (Gorsuch, J., concurring). Critics of *Kennedy* argue that courts now run the risk of licensing previously unconstitutional religious favoritism while undermining the Establishment Clause's core purpose of protecting religious pluralism. See, e.g., Andrew M. Koppelman & Michael Judah, *The New Establishment Clause Hallmarks Test: Sources and Distortions*, NORTHWESTERN PUB. L. RESEARCH PAPER No. 25-41 (July 24, 2025). This critique, however, misconstrues *Kennedy's* methodology: the Court anchors constitutional interpretation in objective historical evidence rather than subjective policy preferences and manipulable balancing tests, thereby constraining rather than expanding judicial discretion. A historical approach offers a nuanced framework that "gives distinct meaning to a variety of historical hallmarks relevant to what was viewed as an established religion at the founding." Stephanie H. Barclay, *The Religion Clauses After Kennedy v. Bremerton School District*, 108 IOWA L. REV. 2097, 2104 (2023).

When considering whether there is a historic and substantial tradition, courts should look for comparables, not necessarily clone copies. See e.g., *Espinoza*, 591 U.S. at 480 (“no comparable ‘historic and substantial’ tradition supports Montana’s decision to disqualify religious schools from government aid.”); *Rahimi*, 602 U.S. at 730 (Barrett, J., concurring) (“To be *consistent* with historical limits, a challenged regulation need not be an updated model of a historical counterpart. Besides, imposing a test that demands overly specific analogues has serious problems.” (italics in original)).

II. HISTORICAL SUPPORT FOR PUBLIC RELIGIOUS DISPLAYS

In *Everson*, both Justice Black, in his majority opinion, and Justice Rutledge, in his dissent, sought to interpret the Establishment Clause in light of the founders' views. Both erred by primarily focusing on select texts by Thomas Jefferson and James Madison and concluding that the First Amendment requires the strict separation of church and state. See MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING?: SEPARATING MODERN MYTH FROM HISTORICAL TRUTH, 57–120 (2019); Mark David Hall, *Madison's Memorial and Remonstrance, Jefferson's Statute for Religious Liberty, and the Creation of the First Amendment*, 3 AMERICAN POLITICAL THOUGHT 32–63 (Spring 2014); Mark David Hall, *Jeffersonian Walls and Madisonian Lines*, at 563–614. America's founders

understood the Establishment Clause to prohibit the creation of a national church, but not to require a religion-free public square.

A. A Wall of Separation?

In 1802, Thomas Jefferson wrote to the Danbury Baptist Association suggesting that the First Amendment created a "wall of separation between Church & State." DANIEL L. DREISBACH & MARK DAVID HALL, *SACRED RIGHTS OF CONSCIENCE*, 528 (2009). The letter was first referenced by the Supreme Court in the Free Exercise Clause case of *Reynolds v. United States*, 98 U.S. 145 (1879), but lay dormant with respect to the Supreme Court's Establishment Clause jurisprudence until *Everson*. DREISBACH & HALL, *SACRED RIGHTS OF CONSCIENCE*, 533–34.

As appealing as the wall metaphor is to contemporary separationists and to the panel, see *Roake v. Brumley*, 141 F.4th 614, 640 (5th Cir. June 20, 2025) (vacated), it obscures far more than it illuminates. Jefferson did not help draft or ratify the First Amendment, so his understanding of it should not be privileged. See e.g., *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 980 F.3d at 1079-80 (5th Cir. 2020) (Oldham, J., dissent from denial of rehearing *en banc*). As well, the letter was a profoundly political document, not a principled statement of Jefferson's constitutional views. Indeed, the metaphor did not originate with Jefferson, and he is recorded as using it only once in his life. DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE*, 21–22 (2002). Further, in his

public life, Jefferson did not act as if there was a wall of separation between church and state—certainly not one that prohibited any recognition of religion in the public square. Hall and Picciotti-Bayer, *supra*, at 20-30.

In 1776, the Continental Congress appointed Benjamin Franklin, John Adams, and Thomas Jefferson to a committee to begin the process of creating a national seal. Jefferson proposed one with the images of:

Pharaoh sitting in an open chariot, a crown on his head & a sword in his hand, passing through the divided waters of the Red Sea in pursuit of the Israelites: rays from a pillar of fire in the cloud, expressive of the divine presence & command, reaching to Moses who stands on the shore &, extending his hand over the sea, causes it to overwhelm Pharaoh.

Id. at 229. Jefferson's motto for the new Nation would have been: "Rebellion to tyrants is obedience to God." *Id.* He "later suggested it as an alternative motto for the Great Seal of Virginia, and he later added it to his personal seal." DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT, 138 (2000).



Jefferson's proposed national seal was drawn by Benjamin J. Lossing and originally published in the July 1856 issue of Harpers' NEW MONTHLY MAGAZINE and portrayed a miraculous event involving the prophet Moses. According to Exodus 19–20, it was Moses who received the Ten Commandments from God on Mount Sinai. It thus seems unlikely that Jefferson would have a principled objection to a state erecting a monument commemorating the Ten Commandments or putting posters of them in school classrooms.

As governor of Virginia, Jefferson encouraged "the good people of this commonwealth" to set apart a day for "public and solemn thanksgiving and prayer to Almighty God" and urged "ministers of religion to meet their respective societies . . . to assist them in their prayers, edify them with their discourses, and generally to perform the sacred duties of their function, proper for the occasion." See DREISBACH, THOMAS JEFFERSON, 138–39. He also drafted bills stipulating when the governor could appoint "days of public fasting and humiliation, or thanksgiving DREISBACH & HALL, SACRED RIGHTS OF CONSCIENCE, 251–52.

Unlike Washington, Adams, and Madison, Jefferson did not issue formal calls for prayer when he was president. Yet in more than one speech he invited his audiences to pray. Jefferson closed his second inaugural address by asking his listeners to "join with me in supplications, that he [the "Being in whose hands we

are, who led our forefathers, as Israel of old"] will enlighten the minds of your servants . . ." *Id.* at 530.

When he was president, Jefferson regularly worshipped in the Capitol and, in addition, "made executive-branch buildings—the Treasury and the War Office—available for church services." James Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, THE WILLIAM AND MARY QUARTERLY, 56 (Oct. 1999). After he retired from the presidency, Jefferson "resumed his earlier habit of worshiping in the Albemarle County Courthouse." *Id.* at 788.

Jefferson's private letters make it clear that he was not an orthodox Christian, and his public arguments and actions demonstrate that he favored a stricter separation between church and state than virtually any other founder. Yet even Jefferson did not attempt to remove religion from the public square. And what Jefferson did not completely exclude, most founders embraced.

B. The First Federal Congress and President Washington

When the first federal Congress met in 1789, one of its first acts was to agree to appoint and pay congressional chaplains. Shortly after doing so, it reauthorized the Northwest Ordinance, which holds that "Religion, Morality, and knowledge being necessary to good government and the happiness of mankind,

Schools and the means of education shall forever be encouraged." DREISBACH & HALL, SACRED RIGHTS OF CONSCIENCE, 471–73, 238.

Significantly, on the day after the House approved the final wording of the Bill of Rights, Elias Boudinot, later president of the American Bible Society, proposed that Congress ask the president to recommend a day of public thanksgiving and prayer. Founding Father Roger Sherman "justified the practice of thanksgiving, on any signal event, not only as a laudable one in itself, but as warranted by a number of precedents in holy writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion; and he would agree with the gentleman who moved the resolution." DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791 11: 1500–1501 (Linda Grant De Pauw et al. eds., 1972). The House approved the motion and appointed Boudinot, Sherman, and Peter Silvester of New York to a committee to consult senators about the matter. The Senate concurred with the House, and Congress requested that President Washington issue his famous 1789 Thanksgiving Proclamation. DREISBACH & HALL, SACRED RIGHTS OF CONSCIENCE, 453–54; see also *Van Orden v. Perry*, 545 U.S. 677, 686–87 (2005).

The founding and early national eras reveal almost no support for the proposition that America's founders desired to build a high and impregnable wall of separation between church and state. To be sure, many had concluded that states should not have official, established churches, and they were against government coercion in matters of faith. But none understood the Establishment Clause to prohibit civic officials from incorporating religious language or symbols into public buildings and monuments. See *Shurtleff v. City of Boston*, 596 U.S. 243, 287-88 (2022)(Gorsuch, J., concurring).

C. A Protestant Version of the Ten Commandments?

In the mid-twentieth century, "Minnesota Judge E. J. Ruegemer proposed that the Ten Commandments be widely disseminated as a way of combating juvenile delinquency." *Am. Legion*, 588 U.S. at 53. He formed a committee to develop a "version of the Ten Commandments which was not identifiable to any particular religious group." *Card v. City of Everett*, 520 F.3d 1009, 1012 (9th Cir. 2008). He eventually partnered with Cecil B. DeMille and the Fraternal Order of Eagles to help place granite monuments inscribed with the Ten Commandments throughout the United States. *Id.* at 1012–13. See also SUE A. HOFFMAN, IN SEARCH OF GOD AND THE TEN COMMANDMENTS: ONE PERSON'S JOURNEY TO PRESERVE A SMALL PART OF AMERICA'S GOD-GIVEN VALUES AND FREEDOMS, 76–79 (self-published, 2014).

Ruegamer's committee attempted to create a version of the Ten Commandments that could not be identified with any particular tradition, but after the first monuments were erected "people who were not Catholic or Lutheran were quick to point out that the numbering sequence was inconsistent with their religious background." *Id.* at 71. Although English translations of the original Hebrew text differ in the placement of textual pauses and thought-breaks, there is little disagreement among Jewish and Christian traditions as to the overall substance of the Ten Commandments. Nevertheless, the Eagles responded by altering the way in which the Commandments were presented to overcome "any possible objection to the version of the Ten Commandments." *Id.* at 73. The most significant change involved removing the numbers before each commandment. Most post-1958 Ten Commandments monuments include this version of the text—including the monuments at issue in *Van Orden v. Perry*, 545 U.S. 677 (2005), and the text to be used on posters in Louisiana classrooms under H.B. 71 (hereinafter "Louisiana text"). La. R.S. § 17:2124(A)(6).

Because the lines of this text are not numbered, it is possible to read them with thought-breaks in different places. For instance, a Jewish citizen may read the line, "Remember the Sabbath day, to keep it holy," as the Fourth Commandment, while a Catholic might read it as the Third Commandment. Similarly, one could

understand the phrase "Thou shalt not take the name of the Lord thy God in vain" to be either the Second or the Third Commandment.

Presentations of the Ten Commandments are usually drawn from Exodus 20: 1-17, but in no display of which we are aware is the chapter copied verbatim. This is certainly true with the version in question. In the following verses, the language retained in the Louisiana text is in bold.

For instance, the King James 1611 version begins:

And God spake all these words, saying, **I am the LORD thy God**, which have brought thee out of the land of Egypt, out of the house of bondage. **Thou shalt have no other gods before me** (Exodus 20:1–3).

Whereas the Catholic Douay-Rheims 1899 American edition begins:

And the Lord spoke all these words: **I am the Lord thy God**, who brought thee out of the land of Egypt, out of the house of bondage. **Thou shalt not have strange gods before me** (Exodus 20:1–3).

The Jewish Publication Society's 1917 translation of these verses reads:

And God spoke all these words, saying: **I am the LORD thy God**, who brought thee out of the land of Egypt, out of the house of bondage. **Thou shalt have no other gods before Me.** (Exodus 20: 1-3).

The Louisiana text condenses these verses as follows:

I AM the LORD thy God
Thou shalt have no other gods before me

Appellees' proffered expert Professor Steven K. Green contended that one can tell that the Louisiana text is taken from the King James version of the Bible because it "uses the words 'Thou,' which we don't use very often these days unless

you're reading from the King James Bible." ROA.2391 (Green Testimony at 67).

But all three versions quoted above use the word "Thou."

There is no doubt that editorial decisions were made, and Professor Green may well be correct that a Jewish version of the Ten Commandments extracted from Exodus 20 would contain the language about God's role in rescuing His people from Egypt in the First Commandment. ROA.875 (Green Report at 28).

Similarly, Professor Green may be correct that some Catholic translations do not warn against making "graven images," see ROA.876 (Green Report at 29), although the Catholic Douay-Rheims version utilized above does. Professor Green's error may stem from his reliance on an article by Paul Finkelman rather than comparing English versions of Exodus 20 that would have been readily available to drafters of the text in question in the 1950s. Interestingly, Finkelman characterizes the text of the Texas Ten Commandments monument as "Lutheran," see Paul Finkelman, *The Ten Commandments on Courthouse Laws and Elsewhere*, 73 FORDHAM LAW REVIEW 1486 (2005), rather than "Protestant," as Green claims. ROA.873-74 (Green, Report at 26–27). Of course, Lutherans are Protestants, but they list the Commandments with the same numbering system as Catholics.

The Douay-Rheims version cited above is not an outlier with respect to using the language "graven image." The 1921 edition of *A catechism of Christian doctrine. No. 3 / prepared and enjoined by order of the Third Plenary Council of*

Baltimore—the classic American Catholic catechism, originally approved in 1885 and which remained the default catechism until the 1994 English translation of *The Catechism of the Catholic Church*, includes in the First Commandment the requirement that "thou shall not make to thyself a graven image" (p. 254). The current English translation of the Catechism contains virtually identical language: "You shall not make for yourself a graven image" (505). Both explain that Catholics have long (since at least the Second Council of Nicaea (787)) distinguished between, in the words of the 1921 catechism, "images if they are made to be adored as gods, but it does not forbid the making of them to put us in mind of Jesus Christ, His Blessed Mother, and the saints." (Q 1211, p. 273).

As additional evidence of the text's "Protestantism," Professor Green argues that H.B. 71's directs "Thou shalt not kill" whereas the Jewish version admonishes, "You shall not murder." Primary sources such as the *Catechism for younger children: designed as a familiar exposition of the Jewish religion*, the classic catechism for Jewish children by Isaac Leeser originally published in Philadelphia in 1839 Question 62 asks, "What is the Sixth Commandment?" The answer is "Thou shall not kill." (p. 108). The answer is identical in later editions as well.

The distinction between killing and murdering is hardly one made only by Jewish citizens. The English Standard Version of the Bible, translated by mostly Protestant scholars and published by Crossway in 2001, renders this

Commandment as "You shall not murder." With the exception of pacifistic Christians in the early church and smaller Christian denominations and sects such as the Quakers, Amish, and Mennonites, most Christians understand the commandment to prohibit the taking, again in the words of the 1921 catechism, "the life of an innocent person," but not a life "in self-defense," "a just war," or a "lawful execution of a criminal" (Q 1275, 1276, p. 287).

Much like Judge Ruegamer and company, see *Card*, 520 F.3d at 1012, the goal of those drafting H.B. 71 was to adopt a version not readily identifiable to any particular religious group. In fact, the United States Court of Appeals for the Eighth Circuit found that a monument with this text in question contains "a nonsectarian version of the Ten Commandments." *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 773 (2005); see also Brief of the Fraternal Order of Eagles as *amicus curiae* in Support of Respondents. *Van Orden*, 2005 WL 263789, 2005 U.S. S. Ct. Briefs LEXIS 134 (Supreme Court of the United States January 31, 2005), 5–9. Appellees' expert gives no good reason to doubt this conclusion.

D. Ten Commandments as a Source of Law

In H.B. 71, Louisiana notes the Court's acknowledgment that the Ten Commandments are "one of the foundations of our legal system." La. R.S. § 17:2124(A)(3) (quoting *Am. Legion*, 588 U.S. at 53). Appellees' expert asserts

that this is "contradicted by the historical record," ROA.858 (Green Report at 11), although in an earlier law review article Green wrote that "[i]t is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition . . . of which the American legal system is part." See Steven Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 13 THE JOURNAL OF LAW AND RELIGION 525 (2000).

Professor Green may well have changed his mind, but it is indisputable that many civic leaders and jurists have viewed the Ten Commandments as a foundation of American law. To give just a few of many possible examples, John Quincy Adams wrote to his son that:

The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained many statutes adapted to that time only, and to the particular circumstances of the nation to whom it was given; but many others were of universal application—laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws.

See DANIEL L. DREISBACH, *READING THE BIBLE WITH THE FOUNDING FATHERS*, 46 (2016). In 1997, the House of Representatives recognized that "the Ten Commandments set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society." H.CON.RES. 31, 105TH CONG. (1997–1998).

In attempting to prove that the Ten Commandments are not a source of American law, Professor Green makes the remarkable assertion that "Puritans believed they were bound by the New Testament, rather than the Old Testament." See ROA.859 (Green Report at 12). This is simply false. Calvinists—including the American Puritans—took Levitical law seriously, and it had a major impact upon their societies and laws. See ERIC NELSON, *THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF POLITICAL THOUGHT* (2010); DAVID D. HALL, *A REFORMING PEOPLE* (2011).

The influence of the Ten Commandments on American law is particularly evident with respect to legislation concerning the Ten Commandments' admonition to "Remember the sabbath day, to keep it holy" (Exodus 20:8). Colonial and State legislatures regularly prohibited work on Sunday. Indeed, 49 of 50 states retained such statutes as late as 1961 when they were found to be constitutionally permissible. *McGowan v. Maryland*, 366 U.S. 420, 420-543 (1961).

Although Professor Green asserts that it is significant that the Ten Commandments were not cited at the Constitutional Convention or the ratification debates, see ROA.862-63 (Green Report at 16-17), he neglects to note that the Constitutional Convention met every day of the week except Sunday, Hall and Picciotti-Bayer, *supra*, at 65 (citing I–II *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1911)), and that the delegates assumed that

Congress would not conduct business on Sunday. See Article I, Section 7, Clause 2 of the United States Constitution.

E. Ten Commandments in Public Schools

In H.B. 71, Louisiana requires that the Ten Commandments be displayed with a "context statement" that rightly notes that the Commandments have long been a prominent part of American public education. While Professor Green correctly notes that "[e]ducation at the time of the Founding occurred in *private* academies or through tutors and generally had a strong religious component due to the dominance of clergy as teachers," ROA.865 (Green Report at 18), this does not undermine Louisiana's claim.

Schools in the founding era were not generally run by governments. Nevertheless, public authorities in New England required young people to be educated. Teachers or tutors often utilized editions of the *New England Primer* that included the Ten Commandments. The 1777 edition of the *Primer*, for instance, included the entire Westminster Shorter Catechism, which contains 40 questions (41–81) concerning the Ten Commandments. See THE NEW ENGLAND PRIMER IMPROVED: FOR THE MORE EASY ATTAINING THE TRUE READING OF ENGLISH: TO WHICH IS ADDED THE ASSEMBLY OF DIVINES AND MR. COTTON'S CATECHISM (1777). The Ten Commandments also appear in editions of other commonly used textbooks such as *McGuffey's Readers* and in *The American Spelling Book*.

Colonies like Massachusetts Bay specifically required parents to ensure that their children and apprentices learn how to read and have "knowledge of the Capital laws." DREISBACH & HALL, SACRED RIGHTS OF CONSCIENCE, 94. These laws were replete with references to biblical laws and included citations to the Hebrew Scriptures. Moreover, the colony required masters of families to "catechize their children and servants in the grounds & principles of Religion." *Id.* Other New England colonies had similar statutes.

Such measures reflected the Founders' general conviction that moral formation—grounded in religion—was essential to republican citizenship. Samuel Adams, for example, observed in correspondence to his cousin John Adams that "Divines, and Philosophers, Statesmen and Patriots [should] unite their endeavours to renovate the Age by impressing the Minds of Men with the importance of educating their little Boys, and Girls—of inculcating in the Minds of Youth the fear, and Love of the Deity . . . in short of leading them in the Study, and Practice of the exalted Virtues of the Christian system." Samuel Adams to John Adams, (October 4, 1790) in 20 LEGAL PAPERS OF JOHN ADAMS (Digital Edition) 419.

The integration of religion and education by the government can also be seen during the founding era and beyond. As the Court in *Espinoza* observed, "[i]n the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones." 591 U.S. at 480. In

addition to local and state support of religious schools, "early federal aid (often land grants) went to religious schools." *Id.* at 480-81. And when the first federal Congress reauthorized the Northwest Ordinance in 1789, it held that "Religion, Morality, and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged." DREISBACH AND HALL, *SACRED RIGHTS OF CONSCIENCE*, 238. Similarly, the federal government routinely partnered with Christian missionaries to run and teach in schools for Native Americans. See Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME LAW REVIEW 701, 677–748 (2020); see also HENRY WARNER BOWDEN, *AMERICAN INDIANS AND CHRISTIAN MISSIONS*, 191-221 (1981). It is inconceivable that such schools would not teach the Ten Commandments—not just as a matter of history, but as religious truth.

When states finally became directly involved in running public schools, they certainly had textbooks that included or taught about the Ten Commandments at their disposal. For example, they were listed in WILLIAM H. MCGUFFEY, *MCGUFFEY'S ECLECTIC READER* 216-17 (W.B. Smith & Co., Cin., 1840) and biblical passages (including portions of the Ten Commandments) are often quoted, paraphrased, and described without citations in NOAH WEBSTER, *THE AMERICAN*

SPELLING BOOK 43-46, 49-51, 57, 62, 64, 72-73, 81-82, 103-04, 157-68 (Cushing & Jewett, Balt., 1825).

Indeed, one of the major goals of government-run schools was to inculcate morality, including through religious texts. Horace Mann of Massachusetts, sometimes called the father of the public school system, emphasized that a nonsectarian public school "earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and, in receiving the Bible, it allows it to do what it is allowed by no other system—to *speak for itself*." See STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA, 262 (2010) (emphasis in original).

To Roman Catholics, this was a very Protestant way of teaching religion. See e.g., *Espinoza*, 591 U.S. at 502-04 (Alito, J., concurring) (noting objection of Catholic and other religious groups and families to what was considered "religious programming" of common schools). So, too, was the common practice of using the King James version of the Bible rather than the Douay-Rheims version favored by Catholics. When Catholics objected to funding what they considered to be Protestant schools and asked for a share of state funds or that the Douay-Rheims Bible be read to their children, they were accused of being "sectarian." On more than one occasion, such requests were met with violence. See HALL, PROCLAIM LIBERTY, 117–40; *Espinoza*, 591 U.S. at 504 (Alito, J concurring).

The insistence on utilizing the King James Version of the Bible in public schools led to conflicts well into the twentieth century and eventually prompted some states to remove Bible teaching and religious exercises from public schools. Nevertheless, the point remains that there is a long history and tradition of reading and teaching about the Bible in American schools -- from the early colonies to the 1960s.

When the Supreme Court in *Schempp* declared devotional exercises in public schools to be unconstitutional, justices made it clear that "[t]he holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history." 374 US 203, 300 (1963) (Brennan, J., concurring); see also 374 U.S. at 225; Hall and Picciotti-Bayer, *supra*, at 55.

III. H.B. 71 IS CONSISTENT WITH RECENT SUPREME COURT PRECEDENT AND FAIRNESS PRINCIPLES.

Appellees successfully convinced the panel that Supreme Court precedent is on their side. See *Roake*, 141 F.4th at 642. But they rely on precedent from an era when the Court misunderstood and trivialized religion. In 1980, the Supreme Court in *Stone v. Graham*, 449 U.S. 39 (1980), applied the now-discredited *Lemon* test to strike down a law similar to Louisiana's. It is noteworthy that the justices did not hear oral arguments in this case and that the decision was a *per curiam* opinion.

One of the four dissenters, then-Justice William Rehnquist, argued that "The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin." *Id.* at 45–46. He observed that Kentucky lawmakers rightly recognized that the Ten Commandments "have had a significant impact on the development of secular legal codes of the Western World." *Id.* at 45. He also crucially asserted that "The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional." *Id.* at 44.

Stone's inapplicability is clear on two levels. First, the decision came during the Court's most separationist period, when even Justice Sandra Day O'Connor's endorsement test had not yet been proposed in *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring). The Court later pared back this hostility. See *Agostini v. Felton*, 521 U.S. 203 (1997), *overruling Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The difference under the endorsement test was illustrated by the Court reaching different outcomes on the same day in 2005 regarding the Ten Commandments displays in *McCreary County* and *Van Orden*.

The Sixth Circuit explained *Stone's* inapplicability as follows:

The *McCreary County* majority rejected the notion that *Stone* controls simply because the Ten Commandments are involved. 125 S. Ct. at 2737-38 ("*Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government"). In fact, *McCreary County* cites *Stone* for support only in its discussion of the Counties' original standalone display.

ACLU of Kentucky v. Mercer County, 432 F.3d 624, 634 (6th Cir. 2005), *reh'g denied*, 446 F.3d 651 (6th Cir. 2006). That court did not endorse *Stone*'s reasoning in its analysis of the counties' second or third displays. The *Van Orden* plurality simply dismissed *Stone* as inapplicable. See *Van Orden*, 125 S. Ct. at 2864, n.11 (plurality opinion). Whatever is left of *Stone*, if anything, is limited to circumstances involving public displays of the Ten Commandments in isolation. *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 634 (6th Cir. 2005). Additionally, *Kennedy* made clear that not only the *Lemon* test has been abrogated, but also its "endorsement test offshoot." 597 U.S. at 534.

Freed from the limitations of *Lemon* and its progeny, the Court has upheld displays of religious images and language on public property. Take, for example, *American Legion*, where the Court concluded that the Bladensburg Cross, a massive 32-foot Latin Cross World War I Memorial that stands on public property in Maryland, did not violate the Establishment Clause. 588 U.S. at 30. Justice Samuel Alito noted that a Cross had significance in addition to being a Christian symbol, and that the passage of time "imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning." *Id.* He pointed to the Ten Commandments to bolster his point: "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 in the marble frieze in our courtroom and in other prominent public buildings in our Nation's capital." *Id.* at 53. Justice Clarence Thomas added that the *sine qua non* of an establishment is "actual coercion," not mere exposure. *Id.* at 75 (Thomas, J., concurring in judgment).

Granted, courts should be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." See *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987). But unlike Bible readings or mandatory prayer, H.B. 71 requires only a display. Students are not compelled to recite them, study them, look at them, or do anything else with them; nor are teachers required to read them aloud to their pupils. See e.g., *Mahmoud v. Taylor*, 145 S.Ct. 2332, 2355-56 (2025) (noting coercive nature of mandatory and scripted instruction); 145 S.Ct. at 2386 (Sotomayor, J., dissenting) (observing that the Court in *Kennedy* did not consider students' "mere exposure to concepts inconsistent with one's religious beliefs" to be a form of "coercion" under the Establishment Clause); *Barber v. Bryant*, 860 F.3d 345, 353 (5th Cir. 2017).

Excluding the Ten Commandments from schools because they have religious in addition to historical significance would itself be discriminatory. In *Trinity Lutheran v. Comer*, the Court ruled unconstitutional Missouri's exclusion of churches from public benefit programs, calling it "odious" to the Constitution. 582 U.S. 449, 467 (2017). Similarly, in *Espinoza* the Court struck down Montana's exclusion of religious schools from tuition aid, explaining that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." 591 U.S. at 487; see also *id.* at 491 (Thomas, J., concurring) (asserting that "the modern view, which presumes that States must remain both completely separate from and virtually silent on matters of religion to comply with the Establishment Clause, is fundamentally incorrect.").

Kennedy reinforced that "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" 597 U.S. at 538 (quoting *Lee v. Weisman*, 505 U.S. 577, 509 (1992)). And *American Legion* warned against weaponizing the Establishment Clause to erase religion from public life. 588 U.S. at 56 ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as hostile to religion.").

And finally, any reliance on *Mahmoud* to justify striking down H.B. 71 would be in error. *Mahmoud* protected religious parents' right to opt their young children out of mandatory instruction using a collection of LGBTQI+ storybooks. The Court did not mandate the removal of the books. Banning the display of the Ten Commandments would not uphold neutrality but instead offend nondiscrimination principles.

CONCLUSION

In light of the aforementioned, we urge this Court to reverse the lower court's injunction.

Respectfully Submitted,

/s/ ANDREA PICCIOTTI-BAYER, ESQ.
ANDREA PICCIOTTI-BAYER, ESQ.
Attorney for Amici Curiae
1350 Beverly Road, Suite 115
McLean, Virginia 22101
(571) 201-6564

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2025 a true and correct copy of the foregoing Brief for Amici was served via electronic filing with the Clerk of Court and all registered ECF users.

November 12, 2025

/s/ ANDREA PICCIOTTI-BAYER, ESQ.
ANDREA PICCIOTTI-BAYER, ESQ.

CERTIFICATE OF COMPLIANCE

This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word. Excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6494 words.

/s/ ANDREA PICCIOTTI-BAYER, ESQ.
ANDREA PICCIOTTI-BAYER, ESQ.