No. 24-30706

United States Court of Appeals for the Fifth Circuit

DARCY ROAKE, REVEREND, ON BEHALF OF THEMSELVES AND ON BEHALF OF THEIR MINOR CHILDREN, ET AL..,
PLAINTIFFS-APPELLEES,

v.

CADE BRUMLEY, IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE SUPERINTENDENT OF EDUCATION; ET AL.,
DEFENDANTS-APPELLANTS.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, NOS. 3:24-CV-517, HON. JOHN W. DEGRAVELLES, PRESIDING

EN BANC BRIEF OF FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Roake v. Brumley, No. 24-30706:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the briefs of the parties, 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*:** Family Research Council does not have a parent corporation and is not publicly held.

Counsel for *Amicus*: Christopher Mills of Spero Law LLC.

/s Christopher Mills
Christopher Mills

Counsel for *Amicus Curiae*

November 12, 2025

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Family Research Council is a nonprofit research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC exists to affirm and promote the traditional family and the Judeo-Christian principles upon which this country is built. FRC provides resources and guidance for citizens and policymakers concerned about national policy as it relates to cultural morality. FRC believes that prohibiting displays of the Ten Commandments denies the historical facts of our religious heritage as a nation, and thus has a significant interest in this case.[1]

[1] No party's counsel authored this brief in whole or in part, and no person other than *amicus* contributed money to fund preparing or submitting it.

INTRODUCTION

Displaying the Ten Commandments in schools is constitutional because it does not coerce participation in a formal religious exercise. Under the original public meaning of the Establishment Clause, the relevant question in cases like this is whether the government has coerced individuals by force of law to participate in or otherwise support a formal religious exercise. A passive display of the Ten Commandments in a schoolroom is not a formal religious exercise. And the possibility that students might see the display and be bothered is not coercion by force of law. Neither element of the relevant establishment hallmark exists here, and Louisiana's law is therefore easily constitutional.

The district court ruled otherwise based primarily on the Plaintiffs' purported expert, a former litigator for the Plaintiffs' counsel who is now a law professor describing himself as a "separationist." This Court should reject this misuse of expert testimony. The meaning of the Establishment Clause is a question of law, and there is no dispute about the historical facts that the expert (selectively) presents. In no case has the Supreme Court relied on a purported expert to determine the original public meaning, much less one who believes (as this expert does) that "'objective facts' or 'historical truths' do not exist."

The expert's testimony also fails on its own terms. It recycles well-worn quotes from Madison and Jefferson to downplay the coercion requirement and

second-guess the Supreme Court's interpretation of an "establishment." That effort is both bad law (because it focuses on the intent of Founders who the expert elsewhere described as "atypical") and bad history (because it ignores everything else). This testimony is also irrelevant, since no matter what level of coercion is required, the passive display of the Ten Commandments is not a formal religious exercise.

The expert also disputes the Ten Commandments' influence and historical presence in schools—again contradicting the Supreme Court. But any tradition is irrelevant absent coercion to participate in a religious exercise. At any rate, the expert's out-of-court writings concede that the Ten Commandments "influenced the development of Western law of which the American legal system is part." And early American schools involved *instruction* about Christianity. As that instruction historically did not violate the Establishment Clause, passive displays certainly didn't—and don't—either. The Court should reverse.

ARGUMENT

I. The display of the Ten Commandments does not coerce participation in a formal religious exercise.

"[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (cleaned up). "The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect

the understanding of the Founding Fathers." *Id.* at 535–36 (cleaned up). The Supreme Court has thus looked to "coercion and certain other historical hallmarks of an established religion" in understanding the meaning of a prohibited "establishment." *Id.* at 537 n.5 (citing *Shurtleff v. City of Boston*, 596 U.S. 243, 284–87 (2022) (Gorsuch, J., concurring in judgment)).

All agree that the only "hallmark" conceivably relevant here focuses on "coercion" "to participate in 'a formal religious exercise.'" *Freedom From Religion Found., Inc. v. Mack*, 49 F.4th 941, 954 (5th Cir. 2022). Both parts of this hallmark are significant. "The *sine qua non* of an establishment of religion is actual legal coercion." *American Legion v. American Humanist Ass'n*, 588 U.S. 29, 75 (2019) (Thomas, J., concurring in judgment) (cleaned up). "[N]oncoercive supports for religion were not within the contemporary understanding of an establishment of religion." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 939 (1986) ("McConnell *Coercion*"). "At the founding, the coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *American Legion*, 588 U.S. at 75 (Thomas, J., concurring) (cleaned up) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). "'Coercion'" "is little different from compulsion." *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2358 n.9 (2025). So "[i]n an action claiming an unconstitutional establishment of religion, the plaintiff

must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding." *American Legion*, 588 U.S. at 75–76 (Thomas, J., concurring in judgment). And "offense does not equate to coercion." *Kennedy*, 597 U.S. at 539 (cleaned up).

That leads to the next question: compelled to do *what*? The Supreme Court "has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make *a religious observance* compulsory.'" *Id.* at 537 (emphasis added) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). "Government may not coerce anyone to attend church, nor may it force citizens to engage in a formal religious exercise." *Id.* (cleaned up); *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2144–46 (2003) ("McConnell *Establishment*") (noting "mandatory attendance at religious worship services in the state church" as an establishment hallmark (cleaned up)).

Echoing the Plaintiffs' expert, the district court here took "a broad view" of what "coercion" means, suggesting that it extends to government action that could lead to "some degree of proscription perhaps in public opinion." ROA.1718. That redefinition of "coercion" is not plausible. The Supreme Court recently held that "visible religious conduct" in school is not automatically "coercive on students." *Kennedy*, 597 U.S. at 540. Likewise, this Court has held that a "mere display on

public property" is "in no meaningful sense either a religious activity or coercive." *Briggs v. Mississippi*, 331 F.3d 499, 505 (5th Cir. 2003). If the law were otherwise, the Establishment Clause would "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious'"—precisely the meaning the Supreme Court has repeatedly *rejected*. *Kennedy*, 597 U.S. at 535 (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

Thus, the display of the Ten Commandments here is not coercive. They will not be "publicly broadcast or recited to a captive audience." *Id.* at 542. Their display "imposes no substantive requirement" on students. *Brown v. Gilmore*, 258 F.3d 265, 281 (4th Cir. 2001). Their "mere presence" "along [students'] path involves no coercion and thus does not violate the Establishment Clause." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring); *cf. Mahmoud*, 145 S. Ct. at 2387 n.5 (Sotomayor, J., dissenting) ("merely exposing children to concepts or ideas" is not coercive).

But "let us assume the very worst, that [every student] is 'subtly coerced' . . . to" see the display. *Lee*, 505 U.S. at 638 (Scalia, J., dissenting). "Even that half of the disjunctive does not remotely establish a 'participation' (or an 'appearance of participation') in a religious exercise." *Id.* A display on a wall is not a formal religious exercise. And its (potential) viewing by students is not mandatory participation in any such exercise. This display is nothing like the "establishment"

laws at the founding, like those requiring "that 'everie man and woman' must 'repaire unto the Church, to hear divine Service' twice a day upon the tolling of the bell," on penalty of whipping. McConnell *Establishment*, *supra*, at 2144.

A small, voiceless display of the Ten Commandments is nothing like the founding-era mandatory religious services. So even if students are somehow compelled to do something, it is not "to participate in divine services." *Id.* at 2146; *cf. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 876 (7th Cir. 2012) (Posner, J., dissenting) ("The idea that mere exposure to religious imagery, with no accompanying proselytizing, is a form of religious establishment has no factual support, as well as being implausible.").

Thus, under the historical approach required by the Supreme Court, "there is nothing unconstitutional in a State's . . . venerating the Ten Commandments" by placing them in a display in schools. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

II. The Plaintiffs' "expert" botches the law and history.

The district court relied heavily on a purported expert, holding that for the "reasons given by Plaintiffs' expert Dr. Steven K. Green, Plaintiffs have easily established a likelihood of success." ROA.1629. The court mentioned Green over 50 times in its opinion. This reliance was misplaced, for at least three reasons.

First, outsourcing First Amendment interpretation to a law professor—who previously litigated on behalf of Plaintiffs' ideological counsel—and his purported factual expertise is dubious. *Second*, Green's testimony is irrelevant. He focuses on Madison's and Jefferson's personal policy views, detached from what "establishment" means in the First Amendment. *Third*, Green's views about the Ten Commandments' influence—trying to contradict the U.S. Supreme Court and this Court—have nothing to do with an "establishment," either. Those views are wrong to boot. Green glosses over many early school lessons featuring the Ten Commandments by declaring them not sufficiently "prominent." And he has conceded in his out-of-court writings that "many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition."[2]

A. Courts should not rely on rejected legal argumentation disguised as expert opinion as evidence of original public meaning.

"The views of self-proclaimed experts do not 'shed light on the meaning of the Constitution.'" *United States v. Skrmetti*, 145 S. Ct. 1816, 1840 (2025) (Thomas, J., concurring) (quoting *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 273 (2022)). Yet here, the district court interpreted the Establishment Clause by deferring to the views of an ideological litigator-turned-law-professor who candidly identifies

[2] Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments As A Source of American Law*, 14 J.L. & Religion 525, 525 (2000).

as a "separationist[]."[3] He is entitled to that view, though the Supreme Court has disagreed with Green's position as *amicus* in *every* case cited on his faculty website.[4] Plaintiffs' counsel, Americans United for Separation of Church and State, employed Green for over a decade.[5] After decades of consistent losses for the separationist view at the Supreme Court, Americans United repackaged their former counsel's legal arguments and repurposed him below as a supposed fact expert in legal history. But "an expert may never render conclusions of law." *Goodman v. Harris Cnty.*, 571 F.3d 388, 399 (5th Cir. 2009). To avoid this rule, Americans United used Green as a mouthpiece for one-sided historical facts and out-of-context quotes from a couple Founders, then used those facts to make its usual legal arguments. This effort—using an "expert" to give a one-sided historical account "exalted status"—is highly dubious, both in principle and in execution. *Skrmetti*, 145 S. Ct. at 1841 (Thomas, J., concurring).

First, *amicus* is unaware of any Supreme Court decision that outsourced the original meaning of a constitutional provision like the Establishment Clause to an expert's opinion. Components of original public meaning are "of course in some sense factual." *United States v. Ayala*, 711 F. Supp. 3d 1333, 1352 (M.D. Fla. 2024)

[3] Steven K. Green, *The "Irrelevance" of Church-State Separation in the Twenty-First Century*, 69 Syracuse L. Rev. 27, 30 (2019).
[4] *See* Willamette University, https://perma.cc/VE4H-6ELW.
[5] *Id.*

(Mizelle, J.). But the original public meaning—and how that meaning applies in a case—is "a distinct *legal* question to which certain historical facts are merely relevant." *Id.* By analogy, "few people would suggest that [judges] must hear from a linguistics expert or a historian specializing in the practice of merchants before resolving a motion to dismiss in a contract dispute." *Id.* "Nothing differs about constitutional cases" like this one: "the relevant inquiries are *interpretive*" and "the questions at bottom are *legal*." *Id.*

The impropriety of expert opinion is especially obvious here, given that there is no significant debate about the underlying historical facts in Green's report. The debate is about the legal import of those facts. The district court had no need for Green to regurgitate historical snippets, and letting him do so as an "expert" gave his testimony unwarranted weight. *See, e.g.*, ROA.1770.

This type of historical regurgitation is especially suspect because expert testimony requires reliability. Fed. R. Evid. 702. But historian narratives tend to be unreliable; for many, "the past never fails to disappoint their presentist ideological agenda."[6] Take it from Green himself: "history is not objective," and "judges and lawyers must acknowledge that all historical accounts are selective and

[6] Randy Barnett, *Challenging the Priesthood of Professional Historians*, Volokh Conspiracy (Mar. 28, 2017), https://bit.ly/4oi6o4F.

interpretive—that 'objective facts' or 'historical truths' do not exist."[7] Thus, Green's testimony is highly dubious from the start. As shown next, it is also irrelevant to the legal question presented—and wrong.

B. The Plaintiffs' expert testimony about the Establishment Clause is irrelevant and wrong.

Green's testimony about the Establishment Clause is irrelevant because it does not purport to shed light on the original public meaning of that clause. Indeed, Green's expert report never quotes the text of that clause. And it identifies scant historical evidence about the meaning of that unidentified text. Rather, Green's testimony primarily consists of quoting two Founders—Madison and Jefferson—and assuming that cherry-picked policy views disconnected from passage of the First Amendment are conclusive as to its meaning. They are not. "The people ratified a text, not the private beliefs of Madison" "or anyone else." Amy Coney Barrett, *Listening to the Law* 202–03 (2025).

Green purports to identify various "concerns" by a couple Founders in which the First Amendment was supposedly "rooted." ROA.1861. To support this view, Green primarily plucks certain quotes from Madisonian writings made years before (and decades after) the First Amendment was enacted. ROA.1864–66, 1868. Green then asserts—without support—that "Madison's Virginia experience and his strong

[7] Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 Notre Dame L. Rev. 1717, 1730, 1733 (2006).

opposition to both governmental promotion of religion and governmental interference with religious exercise were indubitably a strong factor in his resolve to see the Religion Clauses enacted." ROA.1867. From there, Green purports to identify "the fundamental concerns and principles animating the Religion Clauses"—suggesting that the Clauses address all those "concerns and principles" and extend past coercion to proscribe mere "recommendation[s]." ROA.1867–68.

The problem with all this is that Madison's "resolve" is not the First Amendment's text. And no Founder's *intent* controls the meaning of that text. "The goal" of constitutional interpretation "is *not* to gaze into the minds of the framers to determine how they intended the Constitution to apply in particular circumstances." Barrett, *supra*, at 202. It is "to ascertain the original public meaning of" the text. *CFPB v. Cmty. Fin. Servs. Ass'n of America, Ltd.*, 601 U.S. 416, 438 (2024); *see Abbott v. Biden*, 70 F.4th 817, 829 (5th Cir. 2023). "[I]t is ultimately the provisions of" the Constitution "rather than the principal concerns of [its authors] by which we are governed." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020). "[S]uppositions about intentions or guesswork about expectations" lack relevance. *Id.* at 683; *see also Chiafalo v. Washington*, 591 U.S. 578, 592 (2020).

Once again, take it from Green himself: "persuasive evidence exists that the framers believed that constitutional interpretation should be drawn from the express language of the document, *not from the statements of those who drafted the*

language."[8] Put otherwise, "[i]ntentions without a basis in the text do not matter."[9] "[W]hat was said contemporaneously matters only insofar as it sheds light on what the text might mean."[10]

But Green "recounts events in the time-honored tradition of the historian less concerned about the meaning of legal text and more concerned with ideas," "steadfastly refrain[ing] from examining the original meanings of any constitutional provision."[11] Madison's original, broader version of the Establishment Clause was not adopted.[12] "[T]he limitations of a text—what a text chooses *not* to do—are as much part of its 'purpose' as its affirmative dispositions," and they "must be respected" by "reject[ing] the replacement or supplementation of text with purpose" or intent. Antonin Scalia & Bryan A. Garner, *Reading Law* 57–58 (2012).

Of course, Green's elevation of Madison's intentions is even worse than an ordinary intent-focused analysis. That is because Green appears to provide no statement by Madison about how he thought the Establishment Clause as it was enacted should function. Rather, Green quotes Madison's generalized concerns about religion and the state, including his support for disestablishing the Church of

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[8] Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 Creighton L. Rev. 761, 796 (2005) (emphasis added).
[9] Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 Const. Comment. 529, 536 (1998).
[10] *Id.* at 537.
[11] *Id.* at 539–40.
[12] *See Federalism and the Establishment Clause*, *supra* note 8, at 786.

England in Virginia. ROA.1865–66. But the Establishment Clause *protected* state establishments of religion—at a minimum, it did not get rid of them—confirming that Madison's "resolve" has little to do with what the First Amendment actually does. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 604–07 (2014) (Thomas, J., concurring in part and in judgment).

Likewise, Green says that Jefferson and Madison believed that "for the government even to recommend religious fealty is a violation of the principles of freedom of conscience." ROA.2357; *see* ROA.2360. But "even if more extreme notions of the separation of church and state can be attributed to Madison [or Jefferson], many of them clearly stem from arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society, rather than the principle of nonestablishment in the Constitution." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring) (cleaned up). No one could seriously argue that "just encouraging people to be religious" (ROA.2360; *see* ROA.1868) violates the *Establishment* Clause. "Madison did not suggest that the Establishment Clause put government out of the business of suasion; neither did anyone else in 1789." *American Jewish Cong. v. City of Chicago*, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting). "That is why the Congress that sent the Establishment Clause to the states thought it permissible simultaneously to call on President

Washington to issue a religious proclamation of thanksgiving." *Id.* And that is why Jefferson's Virginia disestablishment statute—referenced by Green, ROA.1866—has a preamble that "is itself an exercise in religious persuasion." *American Jewish Cong.*, 827 F.2d at 135 (Easterbrook J., dissenting). "Jefferson begins" with an acknowledgment to "Almighty God" who is "the holy author of our religion" and "Lord both of body and mind." *Id.* at 135–36. As Judge Easterbrook put it, "If all endorsement by the state of Christian beliefs is forbidden, then any state that today enacted Jefferson's Bill for Establishing Religious Freedom would be violating the Establishment Clause!" *Id.* at 136.

On top of that, Green himself has conceded that "Jefferson and Madison, the so-called godfathers of church and state separation," had a "'progressive idea of church and state'" that was "'somewhat atypical of the founding period.'"[13] So not only is Green elevating the personal policy views of a couple Founders above the text, he is elevating Founders who he concedes had *atypical* policy views. "[W]hy should [Madison's] opinion have controlling weight?" Barrett, *supra*, at 202. Atypical policy views shed no light on the original public meaning of the Establishment Clause.

[13] Sarah Bello, *Professor Steven Green Reflects on his Career, Forthcoming Books*, Willamette University (Dec. 8, 2023), https://perma.cc/K7NM-UAEU.

On top of *that*, "[s]ubsequent deeds and words of Jefferson and Madison look in both directions." *American Jewish Cong.*, 827 F.2d at 136 (Easterbrook, J., dissenting). "Jefferson declined to issue thanksgiving proclamations as President, though he signed treaties providing funds for religious activities"—specifically, "sending ministers to the Indians." *Id.* at 132–33, 136. "[W]hen designing a seal for the new Nation in 1776, Benjamin Franklin and Thomas Jefferson proposed a familiar Biblical scene—Moses leading the Israelites across the Red Sea." *Shurtleff*, 596 U.S. at 287 n.11 (Gorsuch, J., concurring in judgment). "President Jefferson allowed various religious groups to use the Capitol for weekly worship services." *Id.* "Both Jefferson and Madison signed bills providing funds for chaplains." *American Jewish Cong.*, 827 F.2d at 136 (Easterbrook, J., dissenting). And "Madison issued thanksgiving proclamations but viewed them as regrettable." *Id.* Madison thus recognized "that not every inroad on a principle is for that reason unconstitutional; he did not denounce his acts as unconstitutional by questioning their wisdom." *Id.*

As noted in Part I, *supra*, Green also suggests that the coercion proscribed by the Establishment Clause is a low bar, satisfied by virtually any governmental nod to religion. He selectively quotes an 1808 letter by Jefferson expressing opposition to a national religious proclamation on federalism grounds, suggesting that Jefferson believed that the First Amendment was concerned "with governmental action that could result in 'some degree of proscription perhaps in public opinion.'" ROA.1868.

But as other scholars have explained, this letter "is the only writing in this period" to suggest such a loose understanding of coercion, and "the fact that Jefferson felt compelled to justify his refusal by arguing that public disapproval might transform a recommendation into 'a law of conduct for those to whom it is directed' indicates that even Jefferson acknowledged the widespread distinction between recommendations and injunctions, albeit while trying to expand the latter's boundaries."[14] "Jefferson's view, however, was the minority."[15] And as already explained, this view cannot be squared with the Supreme Court's rejection of the "reasonable observer" "endorsement test." *Kennedy*, 597 U.S. at 534–35.

The Establishment Clause "does not include anything like" a standard under which "'religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Id.* at 535. In *Cantwell v. Connecticut*, the Supreme Court explained that the Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." 310 U.S. 296, 303 (1940); *contra* ROA.1868 (Green suggesting that coercion can exist "even without the backing of legal force"). In all events, even if coercion—or whatever other term for government action Green prefers—were as low a bar as he suggests, an Establishment Clause

[14] Mark Storslee, *History and the School Prayer Cases*, 110 Va. L. Rev. 1619, 1680 (2024).
[15] Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L.J. 1069, 1126 (1998).

violation requires compulsion to participate in religious activities. *See Kennedy*, 597 U.S. at 537 ("engage in 'a formal religious exercise'"); *Lee*, 505 U.S. at 598 ("attendance and participation in an explicit religious exercise"). A display on the wall of a government building does not by itself require any form of participation.

Green also quotes a letter from Madison in retirement about religious proclamations, ROA.1868, glossing over that those comments "are inconsistent with his actions during both the First Congress and as President" and "directly at odds with a letter Madison wrote on the subject five years after he left the Presidency."[16]

Of course, Green rejects originalism writ large "as subjective and activist."[17] He believes that "[h]istory should figure in constitutional interpretation as an aid to the pursuit of justice, not a constraint upon it"—whatever that might mean (and however "activist" that would be).[18] But it is settled that the original public meaning *is* the law. *E.g.*, *Bostock*, 590 U.S. at 674. Perhaps out of disdain for that reality, Green thus reverts to a mode of historical analysis that he roundly criticizes in his out-of-court writings. There, he says that "[t]he historical record is too amorphous and too easily misread or manipulated to resolve modern controversies."[19] He

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[16] Kevin D. Evans, *Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis*, 64 St. John's L. Rev. 41, 54 (1989); *see also* Lash, *supra* note 15, at 1125 (discussing Madison's distinction between violations of "spirit" versus "letter").
[17] *Bad History*, *supra* note 7, at 1737.
[18] *Id.* at 1733.
[19] *Id.* at 1719.

proclaims that "the very attempt to use history to *answer* current constitutional questions is a misuse of the historical craft."[20] He specifically criticizes "elevat[ing] Jefferson and Madison to semi-god status, making them the authoritative expositors on the meaning of nonestablishment."[21] He even says that "the ideal of church-state separationism was not the reality in nineteenth-century American culture."[22] *See also* McConnell *Coercion*, *supra*, at 933 (noting that a "rigorously separationist picture of the intentions and actions of the Founding Fathers [i]s seriously misleading as a matter of history").

Yet Green seems to have "f[allen] off the wagon of historical sobriety," cherry-picking a few statements, assuming that Madison and Jefferson "maintained an ever-present awareness of constitutional values and were forever consistent in applying those principles," and drawing broad-brush implications for the First Amendment.[23] "After warning against simply taking religious statements at face value and against isolating favorable quotes, Green does that very thing in support

[20] *Id.*
[21] *Id.* at 1720–21.
[22] *"Irrelevance" of Church-State Separation*, *supra* note 3, at 41.
[23] *Bad History*, *supra* note 7, at 1723, 1725; *see* ROA.1867–68; ROA.2372 (asserting "a broad consensus").

of his own position."[24] Green's testimony about the Establishment Clause is an "egregious example[] of bad history."[25]

* * *

Judge Easterbrook summarized the problem with Green's theory, trotted out here four decades later without improvement: "The ends Jefferson and Madison pursued are clear now as long ago. They wanted government, state and federal, to have nothing whatever to do with religion, pro or con," and "[t]hey took this view on the basis of considerations of political philosophy." *American Jewish Cong.*, 827 F.2d at 139 (dissenting op.). "But Madison did not propose, and the states did not ratify, a text that terminates all intercourse between church and state." *Id.* at 140. "The Establishment Clause expunges a certain kind of relationship, an 'establishment'—a term with meaning, denoting a relationship characterized by public funding and legal penalties." *Id.* "To say that a broader prohibition would achieve more of [Madison's] end in view is true but irrelevant, for it assumes away the character of the Establishment Clause as a rule—as a text binding judges today just the way it bound the Congress of 1792." *Id.* Neither judges nor historians should "drain constitutional terms of meaning in order to create grand generalities that [they] can imbue with [their] own elaborations on the purposes or directions these

[24] Gregg L. Frazer, *God and Man at Philadelphia*, Claremont Review of Books (Fall 2015), https://perma.cc/A293-XRFD.
[25] *Bad History*, *supra* note 7, at 1725.

terms imply." *Id.* The court's "function is not to pursue Madison's objective as far as it can be pushed"; "it is to enforce a text, the limits of which bind [courts] just as they do the political branches." *Id.*

In a conflict between "political and moral philosophies" and "constitutional history and text," "there can be but one winner." *Id.* Constitutional history and text require legal coercion to participate in a formal religious exercise, which the Plaintiffs cannot show.

C. The Plaintiffs' expert testimony about the Ten Commandments is irrelevant and wrong.

Green presents two opinions about the Ten Commandments—that they "are not a foundation of the American government or legal system" and that there is no "longstanding historical acceptance and practice of" their display in schools. ROA.1862. Both opinions are irrelevant. How often the Commandments were referenced in early American schools or how direct a line can be drawn between the Ten Commandments and specific U.S. legal texts has nothing to do with the critical legal question here—whether Louisiana's Ten Commandments displays coerce participation in a formal religious exercise. And each opinion is irrelevant and wrong on its own terms.

1. To begin, Green quibbles about how directly the Ten Commandments influenced specific U.S. legal texts. But he has conceded that "many of the principles contained in the Ten Commandments are fundamental to the Western legal

tradition."[26] According to Green, "[f]ew people, if any, would dispute that the Ten Commandments . . . inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is part."[27]

Yet in the district court, Green tried to manufacture disagreement with the Supreme Court's explanation that "[the Ten Commandments] have historical significance as one of the foundations of our legal system." *American Legion*, 588 U.S. at 53 (citing *Van Orden*, 545 U.S. at 688–90). According to Green, that statement was "just [Justice Alito's] opinion"; "many Justices of the Supreme Court," Green pronounced, "are not historians and . . . can often make overbroad, maybe not as completely accurate, historical conclusions." ROA.2377; ROA.2419; *see also* ROA.2376 (Green agreeing that his opinions are "inconsistent with [the Supreme Court's] statements and established law").

There is no daylight between the Supreme Court's statement and Green's own out-of-court acknowledgment that the Ten Commandments "have influenced the development of Western law of which the American legal system is part."[28] That acknowledgment also tracks this Court's own conclusion that the Ten Commandments have influenced "the civil and criminal laws of this country," as

[26] *Fount*, *supra* note 2, at 525.
[27] *Id.* at 525 & n.2.
[28] *Id.* at 525.

well as "ethics and the ideal of a just society." *Van Orden v. Perry*, 351 F.3d 173, 181 (5th Cir. 2003), *aff'd*, 545 U.S. 677 (2005).

Thus, Green commits the "fallacy of quibbling," "a form of equivocation" in which "the meaning of a term is changed as it changes hands, with a resultant argumentative distortion."[29] Green's expert testimony uses "foundation" to mean direct one-to-one textual derivation—if you can't match a specific commandment to a specific constitutional provision, there is no "foundation." Meanwhile, everyone else—and Green in his out-of-court writings—understands that the Ten Commandments are a "foundation" for Western legal traditions broadly, meaning they flowed through to influence American law.

"What the [C]ommandments stand for is" "the proposition that the moral order is ordained by God," and "to say that that's the basis of the Declaration of Independence and of our institutions is entirely realistic." Oral Arg. Tr. 34–35, *McCreary County v. ACLU*, 545 U.S. 844 (2005) (No. 03-1693) (Scalia, J.). The Declaration repeatedly "recognizes the presence of the Divine in human affairs," *Holy Trinity Church v. United States*, 143 U.S. 457, 467 (1892), "referr[ing] to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth"—a vision that "is the foundation upon which this Nation was built," *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting). As

[29] Ilan Wurman, *Law Historians' Fallacies*, 91 N.D. L. Rev. 161, 179 (2015).

the Supreme Court has explained, "[t]he 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." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963).

In any event, many of the connections between the Ten Commandments and American law are not so hard to spot. Green says that the Constitution does not "incorporate into its text any commandment or other provision tied to a biblical source." ROA.1872. Yet the Constitution provides that Sundays are "excepted" from the days counted for Presentment Clause purposes, U.S. Const. art. I, § 7, cl. 2, and Green has acknowledged "the religious function of Sunday laws."[30] *See Holy Trinity Church*, 143 U.S. at 470; *see also McGowan v. State of Md.*, 366 U.S. 420, 432–33 (1961).

And "most criminal laws" can be traced to the Ten Commandments. *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting); *compare* 1 William Blackstone, *Commentaries* *42 (explaining that "all human laws" depend on "the law of revelation" "found only in the holy scriptures"), *with* ROA.1871 (Green dubiously asserting that "Blackstone did not claim that the Ten

[30] Steven K. Green, *The Legal Ramifications of Christian Nationalism*, 26 Roger Williams U. L. Rev. 430, 455 (2021).

Commandments served as a basis for English law"). As John Adams put it, "If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of Heaven, they must be made inviolable precepts in every society before it can be civilized or made free." 6 *The Works of John Adams* 9 (Francis Adams, ed. 1851); *see also* John Quincy Adams, *Letters of John Quincy Adams to His Son on the Bible and Its Teachings* 61 (Auburn: James M. Alden, 1850) (describing the Ten Commandments as "laws essential to the existence of men in society," "most of which have been enacted by every nation which ever professed any code of laws").

In sum, the Ten Commandments played a foundational role in the Anglo-American legal tradition.

2. Green's testimony about the frequency of early Ten Commandment displays is also irrelevant and wrong. Even if the Ten Commandments had never been displayed in any school, it makes no difference—their passive display does not result in an "establishment" of religion. *See supra* Part I. Their display does not coerce participation in a formal religious exercise, so the State does not need any long history of display.

What's more, as Green admits, public schools did not exist at the Founding. ROA.1875. And Green believes that "it is wrong to consider state or local actions that occurred after the Establishment Clause's adoption in interpreting the Clause's meaning" "because 'the relevant historical practices are' only 'those conducted by

governmental units which were subject to the constraints of the Establishment Clause.'"[31] So by Green's logic, the presence—or absence—of the Ten Commandments in non-existent early state public schools is irrelevant. Yet Green and the district court used their supposed absence anyway to suggest that there was no "'widespread practice' of using the Ten Commandments in public schools that was common for the Founding-era." ROA.1778 (cleaned up). Besides being nonsensical (because public schools did not exist) and wrong (if one widens the inquiry to after the Founding), this commits the "fallacy of negative proof," which is "an attempt to sustain a factual proposition merely by negative evidence."[32] And even if early schools did not use the Ten Commandments—which Green's own evidence rebuts—that would not suggest that the founding generation believed that it lacked the constitutional ability to do so.[33]

Green's myopic focus on specific displays of the Ten Commandments is misplaced, anyway. What would matter—if the frequency of Ten Commandments displays mattered at all—is the existence of a "historical *analogue*, not a historical *twin*." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022). Or as Green put it in his out-of-court writings, "our use of the history of their time must

[31] *Amicus* Br. of Steven K. Green et al. 11, *Freedom from Religion Found. v. Mack*, No. 21-20279, 2021 WL 5754463 (5th Cir. Nov. 23, 2021).
[32] Wurman, *supra* note 29, at 180.
[33] *See id.* at 182.

limit itself to broad principles, not specific practices."[34] Neither the district court nor Green disputed the ubiquitous references to Christianity in schooling at the Founding, *see* ROA.1875, and the very idea of public education in America was conceived in the Christian tradition. In 1790, Samuel Adams wrote a letter outlining a vision of the new Republic rooted in virtue and self-governance. That vision, he explained, required "impressing the Minds of Men with the importance of educating their little Boys, and Girls," not merely in literacy or arithmetic, but in "the Study, and Practice of the exalted Virtues of the Christian system."[35] "Adams's ideas were not theoretical (or original); they were memorialized in the laws of the early Republic," and school curricula at that time "routinely incorporated religious and moral instruction."[36] *See* ROA.1881 n.70 (Green burying in a footnote that about 30% of the selections in a prominent early reader "were religious" in 1844).

Even considering only uses of the Ten Commandments, Green's testimony is once again the essence of quibbling. He quibbles about how many early reader lessons referenced the Ten Commandments, conceding that many did but opining that the references were not "prominent" or "significant"—without offering any

[34] *Federalism and the Establishment Clause*, *supra* note 8, at 797.
[35] 20 John Adams, *Legal Papers of John Adams* (Digital Edition) 418–19 (1790), https://perma.cc/YKN8-BCWX.
[36] Christian B. Edmonds, *Chipping Away at* Stone: *Rethinking the Establishment Clause After* Kennedy (Oct. 25, 2025) (unpublished manuscript at 50, 52), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5657911.

definition of how he decided what was "prominent" or "significant." ROA.1878–81. For instance, Green inexplicably finds it insignificant that "the most popular speller into the mid-nineteenth century" said that "the whole duty of man" is to "[f]ear God, and keep his commandments." ROA.1879. And Green reassures that only "a single entry" says that "God is the divine legislator. He proclaimed his ten commandments from Mt. Sinai." *Id.* It is unclear how many times the speller needed to repeat the point to make calling God "the divine legislator" significant.

As for McGuffey's *Readers* widely used in early public schools, Green says that initial editions "set out some version of the Ten Commandments" in "just one" lesson, while later editions tended to only "refer[] to a specific commandment, such as the prohibition on bearing false witness." ROA.1880. But all this just as easily *supports* the proposition that the Ten Commandments historically played a role in American education. Green's testimony is "bad history" all the way down. *See* Wurman, *supra* note 29, at 187 (noting the "fallacy of reversible reference"—"the use of evidence to prove a proposition when precisely the opposite proposition might also adequately explain the same evidence").[37]

Of note, these examples of early instruction on the Ten Commandments occurred in far more coercive contexts than a passive wall display. *See Mahmoud*,

[37] *See also Bad History*, *supra* note 7, at 1733 ("[A]ll historical accounts are selective and interpretive.").

145 S. Ct. at 2355 (emphasizing "the potentially coercive nature of classroom instruction"). Yet Green argues that classroom instruction on the Ten Commandments is "entirely *distinct*" from a mere display (ROA.1881)—missing that this distinction only undermines any suggestion that a display somehow establishes a religion. The long American tradition of religious references in schooling confirms that the district court erred in enjoining Louisiana's law.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

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