No. 25-50695

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RABBI MARA NATHAN, ON BEHALF OF HERSELF & HER MINOR CHILD, M.N.; VIRGINIA GALAVIZ EISENBERG & RON EISENBERG, ON BEHALF OF THEMSELVES & THEIR MINOR CHILD, R.E.; CANTOR SETH ETTINGER & SARAH ETTINGER, ON BEHALF OF THEMSELVES & THEIR MINOR CHILD, R.E.; ELIZABETH LEMASTER, ON BEHALF OF HERSELF & HER MINOR CHILDREN, K.L. & L.L.; CARAH HELWIG, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, J.P. & T.P.; ALYSSA MARTIN & CODY BARKER, ON BEHALF OF THEMSELVES & THEIR MINOR CHILD, H.B.M.; LAUREN ERWIN, ON BEHALF OF HERSELF & HER MINOR CHILD, M.E.; REBEKAH LOWE & THEODORE LOWE, ON BEHALF OF THEMSELVES & THEIR MINOR CHILDREN, E.R.L. & E.M.L.; MARISSA NORDEN & WILEY NORDEN, ON BEHALF OF THEMSELVES & THEIR MINOR CHILDREN, E.N. & A.N.; RABBI JOSHUA FIXLER, ON BEHALF OF HIMSELF AND HIS MINOR CHILDREN, D.F., E.F., & F.F.; REVEREND CYNTHIA MOOD, ON BEHALF OF HERSELF & HER MINOR CHILDREN, L.M. & C.M.; CHERYL REBECCA SMITH, ON BEHALF OF HERSELF & HER MINOR CHILD, L.P.J.; ARVIND CHANDRAKANTAN, ON BEHALF OF HIMSELF & HIS MINOR CHILDREN, V.C., M.C., & A.C.; ALLISON FITZPATRICK, ON BEHALF OF HERSELF & HER MINOR CHILDREN, C.F. & H.F.; & MARA RICHARDS BIM, ON BEHALF OF HERSELF AND HER MINOR CHILD, H.B.,

Plaintiffs-Appellees,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT; NORTH EAST INDEPENDENT SCHOOL DISTRICT; LACKLAND INDEPENDENT SCHOOL DISTRICT; NORTHSIDE INDEPENDENT SCHOOL DISTRICT; AUSTIN INDEPENDENT SCHOOL DISTRICT; LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT; DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT; HOUSTON INDEPENDENT SCHOOL DISTRICT; FORT BEND INDEPENDENT SCHOOL DISTRICT; CYPRESS FAIRBANKS INDEPENDENT SCHOOL DISTRICT; & PLANO INDEPENDENT SCHOOL DISTRICT

Defendants-Appellants.

UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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

MOTION

The Commonwealth of Kentucky and the States of Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Utah, and West Virginia (together, the amici States) respectfully move for leave to file their tendered amicus brief. This motion is unopposed.

As separate sovereigns, the amici States have a profound interest in the proper interpretation of the Establishment Clause of the First Amendment. For decades, that provision was distorted by the Supreme Court's three-part test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Too often, *Lemon*'s test led to "results more hostile to religion than anything a careful inquiry in the original understanding of the Constitution could contain." *See Shurtleff v. City of Boston*, 596 U.S. 243, 284 (2022) (Gorsuch, J., concurring in the judgment). In fact, some of the amici States had state laws enjoined under *Lemon*'s test. *See, e.g.*, *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (upholding injunction against Kentucky law requiring display of Ten Commandments on the state Capitol grounds).

Now that *Lemon* is no more, *Groff v. DeJoy*, 600 U.S. 447, 460 & n.7 (2023), the amici States write to provide their perspective on how the Court should treat a *Lemon*-driven precedent like *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). Amicus curiae Kentucky remembers *Stone* especially well, given that the Supreme Court there found that a Kentucky statute violates the Establishment Clause. In their tendered amicus

brief, the amici States offer three points about how to apply *Stone* here. First, they explain why *Stone*'s holding cannot sustain a facial challenge to Texas's law. Second, they recount how *Stone* became a vanishing precedent even before *Lemon* was abrogated. Third, they urge the Court not to extend, or even apply, *Stone* here given that *Lemon* has been overturned.

***

For these reasons, the amici States respectfully ask the Court to grant them leave to file their tendered amicus brief.

Dated: December 1, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2). This motion contains 325 words, including all headings, footnotes, and quotations, and excluding the parts of the response exempted under Fed. R. App. P. 32(f).

In addition, this motion complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Garamond font.

Dated: December 1, 2025

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Matthew F. Kuhn
Counsel for Amici States

CERTIFICATE OF SERVICE

I certify that on December 1, 2025, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

/s/ Matthew F. Kuhn
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No. 25-50695

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FOR THE FIFTH CIRCUIT

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Defendants-Appellants.

BRIEF OF KENTUCKY & 18 OTHER STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS

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INTERESTS OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The Commonwealth of Kentucky and the 18 undersigned States have a profound interest in the proper interpretation of the Establishment Clause of the First Amendment. For decades, that provision was distorted by the Supreme Court's three-part test from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). That test "ambitiously attempted to find a grand unified theory of the Establishment Clause." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 60 (2019) (plurality op.). Yet too often, *Lemon* led to "results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could contain." *See Shurtleff v. City of Boston*, 596 U.S. 243, 284 (2022) (Gorsuch, J., concurring in the judgment). Not only was *Lemon* "ahistorical," its test "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534, 537 (2022) (cleaned up) (citation omitted). With good reason, *Lemon*'s methodology for interpreting the Establishment Clause has been "abrogated." *Groff v. DeJoy*, 600 U.S. 447, 460 & n.7 (2023).

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

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

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

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

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

ARGUMENT

Texas offers several persuasive reasons why the preliminary injunction issued below should be reversed. The amici States focus on the district court's decision to apply *Stone*, which the court determined "remains good law and controlling in this case." *Nathan v. Alamo Heights Indep. Sch. Dist.*, --- F. Supp. 3d ---, 2025 WL 2417589, at *24 (W.D. Tex. Aug. 20, 2025). The amici States make three points about *Stone*. First, they explain that Texas's law can be applied in ways that differ from the situation considered in *Stone*. Second, they summarize how the Supreme Court cabined *Stone*'s scope even before *Lemon* was overturned. And third, they urge the Court not to extend *Stone*'s narrowed holding to this case but instead to apply the standard mandated by *Kennedy*.

I. Texas's law can be applied differently than the situation considered in *Stone*.

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

Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2).

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

The U.S. Supreme Court summarily reversed in a 5–4 per curiam opinion.[1] From beginning to end, the Court applied *Lemon*—in particular, its first prong. *Stone*, 449 U.S. at 40–43. *Stone* can be read no other way. As the Court summarized at the top of its decision: "We conclude that Kentucky's statute requiring the posting of the Ten

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

Commandments in public schoolrooms had no secular purpose, and is therefore unconstitutional." *Id.* at 41. So *Stone* was all about—and only about—*Lemon*.

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

It is apparent from *Stone* that the Court considered only a standalone display of the Ten Commandments along with the short explanatory statement mandated by Kentucky's law. As a result, *Stone* did not consider the constitutionality of a Ten Commandments display that was situated alongside other historical or legal documents. If

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

anything, *Stone* conveys that such a display would comport with the Establishment Clause, given *Stone*'s allowance of public schools using the Ten Commandments "in an appropriate study of history, civilization, ethics, comparative religion, or the like." *See id.* at 42. So taking *Stone* at its word, a standalone Ten Commandments display rests on different constitutional footing than a display situated alongside other historical or legal documents.

Texas's law can be applied in ways that differ substantially from the standalone Ten Commandments display considered in *Stone*. Although Texas's law requires a Ten Commandments display in "each classroom" of a "public elementary or secondary school," Tex. Educ. Code § 1.0041(a), nothing in the statute prohibits a public school from displaying the Ten Commandments as part of a larger display of historical or legal documents. Indeed, Texas's brief (at 11, 47–48) confirms that its law can be applied in exactly this way. So nothing in Texas's law prohibits a public school from displaying the Ten Commandments alongside other documents formative to modern law, like Blackstone's *Commentaries* or the Supreme Court's decision in *Marbury v. Madison*. In addition, although Texas's law does not require a short statement be included with each display like the law in *Stone*, nothing prevents a public school from including a more robust statement explaining the historical and legal importance of the Ten Commandments. Any of these hypothetical displays allowed under Texas's law would implicate *Stone*'s carve-out permitting the Ten Commandments to be used in public schools "in an appropriate study of history, civilization, comparative religion, or the like." 449 U.S. at 42.

The challengers to Texas's law might respond that, textually speaking, the Kentucky law considered in *Stone* likewise allowed these diverse displays. But that is beside the point. *Stone* did not consider those potential applications of Kentucky's law. That is likely because *Stone* arose before the Supreme Court's seminal decision setting a firm line between facial and as-applied challenges. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (holding that a facial challenge requires "no set of circumstances under which the Act would be valid"). Through modern eyes, *Stone* is best understood as resolving only an as-applied challenge to Kentucky's law—specifically, to a standalone Ten Commandments display. *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 882 (2005) ("[U]ntil *Salerno* uprooted the traditional orthodoxy, facial challenges were understood to include such context-specific challenges to general rules because as-applied challenges were defined in fairly narrow terms synonymous with claims of privilege.").

Understood this way, *Stone* at most could support an as-applied challenge to Texas's law. The challengers' burden in this facial challenge is to show that every way that a Texas public school might comply with the Ten Commandments law violates the Establishment Clause. *See Salerno*, 481 U.S. at 746; *accord Croft v. Perry*, 624 F.3d 157, 164 (5th Cir. 2010) ("Both we and the Supreme Court have recognized the difference between facial and as-applied Establishment Clause challenges."). Put differently, the challengers' decision to bring a facial challenge to Texas's law "comes at a cost." *See Moody v. NetChoice*, 603 U.S. 707, 723 (2024). That cost is that *Stone* is not dispositive. Even

accepting *Stone* on its terms, the decision does not require sustaining a facial challenge to a law like Texas's that allows Ten Commandments displays that are in line with *Stone*.

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

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

The narrowing of *Stone* began shortly after its issuance. Not even three years later, the Supreme Court rejected an Establishment Clause challenge to a state legislature's "practice of opening each legislative day with a prayer by a chaplain paid by the State." *Marsh v. Chambers*, 463 U.S. 783, 784, 795 (1983). The majority did not once cite *Stone*. Nor did it apply *Lemon*. Both failures drew the ire of the principal dissent. Invoking *Stone*, the dissent found it "self-evident" that the "'purpose' of legislative prayer is preeminently religious rather than secular." *Id.* at 797 & n.4 (Brennan, J., dissenting). As to *Lemon*, the dissent criticized the Court for "mak[ing] no pretense of subjecting Nebraska's practice of legislative prayer" to that "formal 'test[].'"[3] *Id.* at 796. In short, out of the gate, *Stone*'s holding and methodology carried no weight.

Things did not improve for *Stone* after *Marsh*. In *Lynch v. Donnelly*, the Supreme Court held that a municipality could display a "Nativity scene[] in its annual Christmas

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

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

The Supreme Court finished its narrowing of *Stone* in a pair of 2005 decisions, each of which considered a Ten Commandments display on public property. In the first decision, the Supreme Court characterized *Stone* as involving extreme facts: It was an "unusual case[]" in which there was either "an apparent sham" by the government or a secular purpose for the statute that was "secondary." *McCreary Cnty. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 865 (2005). As the Court saw it, *Stone* turned on the "isolated exhibition" of the Ten Commandments "not leav[ing] room even for an argument that secular education explained their being there." *Id.* at 867. *Stone*, the Court clarified, "did not purport to decide the constitutionality of every possible way the Commandments

might be set out by the government, and under the Establishment Clause detail is key."[4] *Id.* So under *McCreary County*, *Stone* stands at most for the limited proposition that a standalone Ten Commandments display can raise constitutional concerns. *Am. Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 634 (6th Cir. 2005) ("Whatever is left of *Stone* is limited to circumstances involving public displays of the Ten Commandments in isolation."). Indeed, although *McCreary County* considered three different Ten Commandments displays in a courthouse, it cited *Stone* only while considering the one in which the Ten Commandments were displayed alone. 545 U.S. at 868–73.

The second Supreme Court decision from 2005 hemmed in *Stone* even more. As noted above, in *Van Orden*, the Supreme Court rejected an Establishment Clause challenge to the placement of a monument of the Ten Commandments on the grounds of the Texas state Capitol. 545 U.S. at 681 (plurality op.). In so doing, the plurality found *Lemon* "*not useful* in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.* at 686 (emphasis added); *see also id.* at 703–04 (Breyer, J., concurring in the judgment) (likewise not relying on *Lemon*). It is hard to imagine a more direct repudiation of *Stone*'s methodology. To *Stone*, *Lemon* was everything. To *Van Orden*, *Lemon* was irrelevant to the constitutionality of a Ten Commandments display on public property.

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

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

Against this backdrop of Ten Commandments displays "common throughout America," the *Van Orden* plurality turned to *Stone*. And it made short work of the decision. *See Mercer Cnty.*, 432 F.3d at 634 (noting that *Van Orden* "simply dismissed *Stone* as inapplicable"). *Van Orden* did note that *Stone* arose in the "classroom context." 545 U.S. at 690 (plurality op.). But the plurality did not suggest that the Ten Commandments can never be displayed or used in public schools. *Stone* itself refutes such an implication. 449 U.S. at 42. Instead, the *Van Orden* plurality emphasized that nothing "suggest[s] that

Stone would extend to displays of the Ten Commandments that lack a 'plainly religious,' 'pre-eminent purpose.'" 545 U.S. at 691 n.11 (citation omitted). In other words, the *Van Orden* plurality dismissed *Stone* as a case in which the displays contained not even a hint of a secular purpose. *See id.* That can only be a rare circumstance. After all, in nearly the same breath, the *Van Orden* plurality held that "the Ten Commandments have an undeniable historical meaning" and that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690.

In the two decades since *McCreary County* and *Van Orden*, the Supreme Court has not cited *Stone* again in a majority decision. *Stone* simply goes unmentioned in the Court's modern Establishment Clause jurisprudence. This is true even when the Court discusses Ten Commandments displays. Most notably, *Stone* did not make an appearance in the governing decision in *American Legion*, despite the Court explaining that the Ten Commandments "have historical significance as one of the foundations of our legal system, and for largely that reason, they are depicted in the marble frieze in our courtroom and in other prominent buildings in our Nation's capital." 558 U.S. at 53.

As this summary shows, *Stone* did not fare well as a precedent even while *Lemon* was good law. *Stone*'s methodology for considering the constitutionality of a Ten Commandments display lost the day in *Van Orden*. *See* 545 U.S. at 686 (plurality op.); *id.* at 703–04 (Breyer, J., concurring in the judgment). And over time, *Stone* became a one-off decision that applied only in extreme circumstances. In the words of *McCreary County*,

Stone was an "unusual case[]" in which the "isolated exhibition [of the Ten Commandments] did not leave room even for an argument that secular education explained their being there." 545 U.S. at 865, 867. Thus, even while *Lemon* was on the books, *Stone* became a vanishing precedent.

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

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

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

The district court viewed *Stone* as "good law and controlling in this case." *Nathan*, 2025 WL 2417589, at *24. That conclusion fails on several levels. Even before *Lemon* was upended, the Supreme Court had hollowed out *Stone*. And in the context of this facial challenge, Texas's law is by no means a carbon copy of the law in *Stone*. As noted above, Texas's law allows a Ten Commandments display that is situated alongside other documents formative to American history and law. In other words, a Ten Commandments display in Texas need not look anything like the "isolated exhibition" in *Stone*. *See McCreary Cnty.*, 545 U.S. at 867.

These variations in how Texas's law could be applied prove up a simple point: *Stone* is not on all fours in the context of this facial challenge. To apply *Stone* to Texas's law would require *extending* the decision. The Court should decline to extend *Stone* to these new circumstances. Although a court of appeals cannot declare a Supreme Court decision to be overruled based on its weakened foundations, *Rodriguez de Quijas*, 490 U.S. at 484, this rule does not bind a circuit court to extend a discredited precedent like *Stone*. To the contrary, the "weakened foundations" of a Supreme Court decision "counsel[] against expanding [its] application." *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021); *accord Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 259 & n.11 (5th Cir. 2019).[5] As a result, the Court need not ignore *Stone*'s lack

[5] In a similar vein, several members of this Court have explained that courts "should resolve questions about the scope of [Supreme Court] precedents in light of and in the direction of the constitutional text and constitutional history." *Texas v. Rettig*, 993 F.3d

of jurisprudential footing. It should treat *Stone*'s status as a poorly reasoned outlier whose methodology has been discredited as a reason not to extend it. Rather than extend *Stone* an inch farther, the Court should apply the test mandated by *Kennedy*.

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

When the Supreme Court overruled *Lemon*, it rejected *Lemon*'s methodology for interpreting the Establishment Clause. In *Kennedy*, the Supreme Court weighed the lower court's reliance on *Lemon* "and *its progeny*." 597 U.S. at 534 (emphasis added). Of course, *Stone* is part of *Lemon*'s progeny, given that *Stone* is all about *Lemon*. And *Kennedy* swept broadly in rejecting *Lemon*'s application to any Establishment Clause challenge. As *Kennedy* put it, *Lemon* "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Id.* (cleaned up) (citation omitted). So *Kennedy* can only be understood as an across-the-board purge of *Lemon* from Establishment Clause jurisprudence. *American Legion* similarly discussed the intractable

408, 417 (5th Cir. 2021) (Ho, J., dissenting from the denial of rehearing en banc) (citation omitted); *accord City of Grants Pass v. Johnson*, 603 U.S. 520, 549–50 (2024).

problems with *Lemon* across "a great array of laws and practices." 588 U.S. at 49 (plurality op.); *accord Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014). These sweeping, categorical holdings about *Lemon*'s shortcomings cannot help but sweep up a case like *Stone* that rests only on *Lemon*. The same is true of *Kennedy*'s unambiguous directive that going forward courts applying the Establishment Clause "*must*" focus on our Nation's history. 597 U.S. at 535–36 (emphasis added). That broad mandate leaves no room for a *Lemon*-driven precedent like *Stone*. *See Firewalker-Fields v. Lee*, 58 F.4th 104, 121 n.5 (4th Cir. 2023) ("[I]t is now clear that *Lemon* and its ilk are not good law.").

CONCLUSION

The Court should reverse the preliminary injunction entered below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5). This brief contains 4,247 words, including all headings, footnotes, and quotations, and excluding the parts of the response exempted under Fed. R. App. P. 32(f).

In addition, this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Garamond font.

Dated: December 1, 2025

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CERTIFICATE OF SERVICE

I certify that on December 1, 2025, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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