

No. 25-50695

**In the United States Court of Appeals
for the Fifth Circuit**

MARA NATHAN, RABBI, on behalf of herself and on behalf of her minor child, M.N.; VIRGINIA GALAVIZ EISENBERG, on behalf of herself and on behalf of her minor child, R.E.; RON EISENBERG, on behalf of himself and on behalf of his minor child, R.E.; SETH ETTINGER CANTOR, on behalf of himself and on behalf of his minor child, R.E.; SARAH ETTINGER, on behalf of herself and on behalf of her minor child, R.E.; ELIZABETH LEMASTER, on behalf of herself and on behalf of her minor children, K.L. & L.L.; CARAH HELWIG, on behalf of herself and on behalf of her minor children, J.P. & T.P.; ALYSSA MARTIN, on behalf of herself and on behalf on her minor child, H.B.M.; CODY BARKER, on behalf of himself and on behalf of his minor child, H.B.M.; LAUREN ERWIN, on behalf of herself and on behalf of her minor child, M.E.; REBEKAH LOWE, on behalf of herself and on behalf of her minor children, E.R.L. & E.M.L.; THEODORE LOWE, on behalf of himself and on behalf of his minor children, E.R.L. & E.M.L.; MARISSA NORDEN, on behalf of herself and on behalf of her minor children, E.N. & A.N.; WILEY NORDEN, on behalf of himself and on behalf of his minor children, E.N. & A.N.; JOSHUA FIXLER, RABBI, on behalf of himself and on behalf on his minor children, D.F., E.F., & F.F.; CYNTHIA MOOD, REVEREND, on behalf of herself and on behalf of her minor children, L.M. & C.M.; CHERYL REBECCA SMITH, on behalf of herself and on behalf of her minor child, L.P.J.; ARVIND CHANDRAKANTAN, on behalf of himself and on behalf of his minor children, V.C., M.C. & A.C.; ALLISON FITZPATRICK, on behalf of herself and on behalf of her minor children, C.F. & H.F.; MARA RICHARDS BIM, on behalf of herself and on behalf of 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; LAKE TRAVIS INDEPENDENT SCHOOL DISTRICT; DRIPPING SPRINGS INDEPENDENT SCHOOL DISTRICT; FORT BEND INDEPENDENT SCHOOL DISTRICT; CYPRESS FAIRBANKS INDEPENDENT SCHOOL DISTRICT; PLANO INDEPENDENT SCHOOL DISTRICT,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

REPLY BRIEF FOR APPELLANTS

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ARGUMENT IN REPLY

The Religion Clauses do not mandate hostility to religion. Resurrecting *Lemon*, Plaintiffs contend that the government may not “promote religious fealty or any religious belief” or “promote any . . . denominational belief or practice as favored or preferred.” Appellees’ Br. 42 (quoting ROA.298). They agree with the district court that the Texas Legislature could post any secular historical document or moral code on classroom walls, but documents with religious content are uniquely disfavored, no matter their historical or legal importance. *See Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 53 (2019) (noting the Ten Commandments’ “historical significance”).

But Plaintiffs identify no “historical analogy” between posting the Ten Commandments on classroom walls, *see* Appellees’ Br. 41-42, and any recognized characteristic of an established church at the Framing. Based on “historical practices and understandings,” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)), S.B.10 is not a law “respecting an Establishment of Religion,” U.S. Const. amend. I.

Plaintiffs’ contrary arguments mischaracterize sitting in a classroom displaying a poster of the Ten Commandments as “required participation in a religious exercise.” *Lee v. Weisman*, 505 U.S. 577, 594 (1992); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (involving “religious ceremony”); *see* Appellees’ Br. 32. But that comparison—the foundation on which Plaintiffs’ arguments rest—is facially untenable. S.B.10 does not involve “religious exercise,” much less coercion to engage in formal religious observance. *Kennedy*, 597 U.S. at 537.

Applying the historical understanding of the Establishment Clause does not “immunize practically any practice involving public-school religious indoctrination.” Appellees’ Br. 42. The Free Exercise Clause protects against laws that “substantially interfer[e] with the religious development” of children. *Mahmoud v. Taylor*, 606 U.S. 522, 546 (2025) (quoting *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 486 (2020) (alteration in original)). But the facts of this case—the passive presence of a poster on a classroom wall—fall far short of the coercive practices that the Supreme Court has held violate this right. *See id.* at 554-55 (discussing books “presented to young children by authority figures in elementary school classrooms” who were “encourage[d] . . . to correct the children and accuse them of being ‘hurtful’” when they expressed contrary religious views).

Plaintiffs’ theory that the Free Exercise Clause entitles them to remove materials that offend them from public-school classrooms (rather than merely to opt out of particular instruction) would radically reshape public education.

Plaintiffs have not demonstrated a likelihood of success on either their claims under the Establishment Clause or their claims under the Free Exercise Clause. Under a historical understanding, Plaintiffs lack standing to assert claims under the Establishment Clause. In any event, Plaintiffs have not satisfied the stringent standards for a facial challenge, and the preliminary injunction entered by the district court is overbroad. This Court should reverse.

I. Plaintiffs Failed to Demonstrate a Likelihood of Success on Their Claims that S.B.10 Violates the Establishment Clause.

A. Displaying the Ten Commandments in the classroom bears none of the recognized hallmarks of an establishment of religion.

Plaintiffs acknowledge that the constitutionality of S.B.10 must be evaluated “by reference to historical practices and understandings.” Appellees’ Br. 29 (quoting *Town of Greece*, 572 U.S. at 576). Under this test, Plaintiffs have not shown a likelihood of success on their claims that displaying the Ten Commandments in a classroom violates the Establishment Clause.

1. Plaintiffs do not carry their burden to show that S.B.10 imposes one of the hallmarks of a religious establishment.

As a threshold matter, two of this Court’s sister circuits have correctly held that a plaintiff bears the burden to prove that a challenged practice “align[s] with a historically disfavored establishmentarian practice.” *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023); see *Hilsenrath v. Sch. Dist. of the Chathams*, 136 F.4th 484, 491 & n.53 (3d Cir. 2025); see also Appellants’ Br. 29. Plaintiffs offer no compelling reason for this Court to depart from that conclusion.

Plaintiffs’ response (at 41) misreads *Bruen*, which shifts the burden to the government only “[w]hen the Second Amendment’s plain text covers an individual’s conduct.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022). By analogy to *Bruen*, Plaintiffs bore the initial burden to show that S.B.10 resembles a historically disfavored establishmentarian practice. If Plaintiffs satisfied that burden, Defendants could nonetheless attempt to justify S.B.10 as “a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political

change.” *Town of Greece*, 572 U.S. at 577. The district court erred by failing to hold Plaintiffs to their burden to show that S.B.10 resembles a “historically disfavored establishmentarian practice.” *Firewalker-Fields*, 58 F.4th at 122 n.7.

Plaintiffs acknowledge that they cannot identify an “analog in the eighteenth-century” for the practice of posting the Ten Commandments in public schools. Appellees’ Br. 29; *see also id.* at 41-42. They thus cannot show that the Establishment Clause’s text covers S.B.10. Although Plaintiffs contend that the hallmarks of an established church identified in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), (and adopted in *Kennedy*) are not “exhaustive,” Appellees’ Br. 38, they identify no other characteristic of an established church that they contend S.B.10 resembles. Plaintiffs turn instead to abstract principles: purported “concerns and principles animating the Religion Clauses,” Appellees’ Br. 42. Not only are the principles extrapolated by Plaintiffs inconsistent with actual historical practice, Appellants’ Br. 14, but this approach is error. This Court must apply the Constitution’s text, not inferences about principles animating the text.

Plaintiffs are incorrect to argue that Defendants waived any argument about proper interpretive methodology. Appellees’ Br. 42-44. Defendants have consistently disputed Plaintiffs’ interpretation of the Establishment Clause, including their erroneous focus on the purported “thought process behind the goals of the religion clauses.” ROA.1576. *Compare id. with* ROA.921-922 (discussing the historical hallmarks of established churches); ROA.1289-1294 (explaining “original understanding of the Establishment Clause”). As evidence of original public meaning, the

understanding of the Framers is certainly relevant.¹ But the meaning of the language controls, not the secret intent and goals of the drafters. *See* ROA.1289 (criticizing focus on “select texts by Thomas Jefferson and James Madison”).

2. The display of the Ten Commandments in the classroom does not coerce participation in religious exercise.

When they turn to history, Plaintiffs argue that S.B.10 involves “coercion,” which they contend is one of the “foremost hallmarks” of religious establishment. Appellees’ Br. 40.

But the Supreme Court has held only that the Establishment Clause prohibits “coercion along [the] lines” of religious observance and formal religious exercise:

[G]overnment may not, consistent with a historically sensitive understanding of the Establishment Clause, “make a religious observance compulsory.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Government “may not coerce anyone to attend church,” *ibid.*, nor may it force citizens to engage in “a formal religious exercise,” *Lee v. Weisman*, 505 U.S. 577, 589 (1992). No doubt, too, *coercion along these lines* was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.

Kennedy, 597 U.S. at 537 (emphasis added); *see also Town of Greece*, 572 U.S. at 586 (holding that the government may not compel a person “to support or participate in

¹ Plaintiffs erroneously cite Justice Kavanaugh’s concurrence in *United States v. Rahimi* as if it were the majority opinion. Appellees’ Br. 44. Regardless, Justice Kavanaugh’s explanation that the “*stated* intentions and understandings of the Framers and Ratifiers . . . may be strong evidence of meaning” is consistent with Defendants’ position. *United States v. Rahimi*, 602 U.S. 680, 719 (2024) (Kavanaugh, J., concurring) (emphasis added).

any religion or its exercise”). Plaintiffs err by discussing “coercion” in the abstract, rather than coercion to engage in religious exercise.

Nor does “offense” at exposure to the Ten Commandments “equate to coercion.” *Kennedy*, 597 U.S. at 537; *accord* Members of Congress Amicus Br. 19. Allowing “acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content.” *Town of Greece*, 572 U.S. at 587; *see also id.* (explaining that *West Virginia v. Barnette*, 319 U.S. 624 (1943), involved a circumstance where students were “compelled to join the expression or approve its content” with threats of expulsion if they refused). Plaintiffs’ authority is not to the contrary.

Lee exemplifies the prohibition on compelled religious exercise: “State officials direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies,” and student “attendance and participation in the state-sponsored religious activity [was] in a fair and real sense obligatory.” 505 U.S. at 586; *see also id.* at 587 (noting “a state-sponsored and state-directed religious exercise” and “formal religious observance”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (involving “coercing those present to participate in an act of religious worship”).

Schempp similarly involved “a religious ceremony” in a public school: “The trial court . . . found that such an opening exercise is a religious ceremony and was intended by the State to be so.” 374 U.S. at 223. The Supreme Court noted the

“pervading religious character of the ceremony” in the consolidated case, concluding that both “laws require religious exercises.” *Id.* at 224-25.²

These cases exemplify the mandated participation in formal religious observance that was a historical hallmark of an established church. *See Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

In contrast, the mere presence of a poster on the walls of a classroom does not “coerce” anything, much less constitute “religious exercise” or a “religious ceremony.” Plaintiffs’ response is a *non-sequitur*: “If hearing a lone graduation speaker recite a single invocation on a single day crosses the constitutional line barring coercion to engage in a ‘formal religious exercise,’ surely the permanent imposition of the Ten Commandments on students in every classroom for hundreds of days per year, pre-K-12, does too.” Appellees’ Br. 32. This does not follow: An invocation is a “religious exercise.” A poster is not.

Enforcing the historical understanding of the Establishment Clause will not, as Plaintiffs suggest, “immunize practically any practice involving public-school religious indoctrination.” Appellants’ Br. 42. The Free Exercise Clause protects against state interference with the religious development of children, but as detailed below, it protects against indoctrination, not posters on classroom walls.

² Nor does *Engel v. Vitale* support Plaintiffs. That case involved “compos[ing] official prayers” as part of “a religious program carried on by government.” 370 U.S. 421, 425 (1962). State control over the “form and content of prayer” was a core hallmark of religious establishment in England. *Id.* at 425-26; *see Shurtleff*, 596 U.S. at 286 (Gorsuch, J., concurring).

Far from resembling a hallmark of an established church, displaying the Ten Commandments in public-school settings—as Professor Hall’s testimony demonstrates—fits within the tradition of widespread usage of the Ten Commandments in pedagogical material from the colonial era to at least the early or middle 19th century. Appellants’ Br. 30-31. At a minimum, the long tradition of Ten Commandments displays in courthouses and state capitals across the nation represents an analogous practice indicating that displaying the Ten Commandments does not establish a state religion. Appellants’ Br. 30.

S.B.10 does not involve compelled participation in a formal religious exercise or any other hallmark of an established church. When the Establishment Clause is interpreted with “reference to historical practices and understandings,” *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece*, 572 U.S. at 576), Plaintiffs have not demonstrated a likelihood of success.

B. *Stone v. Graham* does not control.

Plaintiffs’ reliance on *Stone v. Graham* is misplaced. *Stone* rested on particular findings that the Kentucky legislature “had no secular legislative purpose” in enacting the statute at issue and thus that the statute violated *Lemon*. 449 U.S. 39, 41 (1980); *see also id.* at 43-44 (Rehnquist, J., dissenting) (criticizing the “summary rejection of a secular purpose articulated by the legislature and confirmed by the state court”).

Stone’s analysis did not rest on any coercive effect of the Ten Commandments or equate sitting in a classroom with a poster displaying the Ten Commandments to a religious exercise. Notably, when *Lee* lists cases regarding “coercive pressure in

the elementary and secondary public schools,” it does not include *Stone*. See 505 U.S. at 592 (citing cases). Nor did *Stone* itself use the term “coercion.” 449 U.S. at 42. Although *Stone* notes the possibility that children might “venerate and obey . . . the Commandments,” *id.*, its holding rests on the conclusion that the statute “had no secular legislative purpose,” *id.* at 41.

The Supreme Court has since rejected the proposition that any display of the Ten Commandments necessarily has only a religious purpose. See *Van Orden v. Perry*, 545 U.S. 677, 691 n.11 (2005) (plurality op.) (“[I]t is clear from the record that there is no evidence of such a [primarily religious] purpose in this case.”). *Van Orden* specifically indicates that *Stone* would not “extend to displays of the Ten Commandments that lack a ‘plainly religious,’ ‘pre-eminent purpose.’” *Id.*

In the wake of *Van Orden*, Plaintiffs are incorrect to rely on *Stone* for the principle that displays of the Ten Commandments necessarily have no secular purpose and have only a preeminently religious purpose. *Stone* merely restates *Lemon*: under that (abandoned) test, a statute that lacks a secular purpose violates the Establishment Clause.

But Plaintiffs do not argue that the “purpose” of S.B.10 renders it unconstitutional. See Appellees’ Br. 24 n.3 (stating that they do not argue that “S.B. 10’s religious purpose alone renders it unconstitutional”). Whether the Texas Legislature had a “secular purpose” is, according to Plaintiffs, irrelevant. Appellees’ Br. 24. This concession undercuts any reliance on *Stone*, which applies only to a statute with “no secular legislative purpose.” *Id.* at 41. Plaintiffs cannot simultaneously rely on

Stone’s application of *Lemon* without establishing the factual predicate of *Stone*’s analysis. Appellees’ Br. 24 n.3.

Stone thus presents no barrier to this Court analyzing S.B.10 under the modern Establishment Clause test based on “historical practices and understandings,” *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece*, 572 U.S. at 576), rather than under the long-abandoned test of *Lemon* applied in *Stone*.

Nor do Plaintiffs seriously grapple with the interaction of *Stone* and the test for facial challenges. Plaintiffs contend (at 21) that *United States v. Salerno* did not “invalidat[e] any prior pre-enforcement facial challenges,” but Defendants’ point is not that *Salerno* “invalidated” *Stone*—it is that under the governing law (including *Salerno*), Plaintiffs’ claims require them to “establish that no set of circumstances exists under which [S.B.10] would be valid.” 481 U.S. 739, 745 (1987). *Stone* did not address these requirements and thus cannot bind the Court on this point.

Finally, Plaintiffs do not deny that *Stone* does not bind this Court on jurisdictional issues. *See* Appellant’s Br. 36, 38-40. *Stone* does not establish that Plaintiffs have standing to assert their Establishment Clause claims, particularly now that the Supreme Court has rejected *Lemon*.

C. Accepting Plaintiffs’ arguments would improperly disfavor religion and religious expression.

Plaintiffs do not deny that under their interpretation, the Establishment Clause requires hostility to religious speech. As the district court held, the Texas Legislature could mandate the posting of any conceivable secular text or creed, but the Ten Commandments, despite their historical and legal significance, are tainted by their

religious content and must be excluded from classroom walls. Appellants’ Br. 36-38. Plaintiffs embrace the idea that the Establishment Clause is uniquely hostile to government religious speech. Appellees’ Br. 53.

The Supreme Court has rejected this view: “[H]ostility toward religion . . . has no place in our Establishment Clause traditions.” *Am. Legion*, 588 U.S. at 38. This is true both of government regulation of private speech and, as in *American Legion*, of monuments on public lands. The Establishment Clause does not require the government to “evince a hostility to religion by disabling [itself] from in some ways recognizing our religious heritage.” *Van Orden*, 545 U.S. at 684 (plurality op.).

Plaintiffs’ interpretation, in which the Legislature can mandate the posting of any secular document but may not display documents with religious content, no matter their historical and legal significance, manifests a hostility to religion that is inconsistent with Establishment Clause traditions.

D. S.B.10 does not manifest impermissible denominational preferences.

Citing the Supreme Court’s recent decision in *Catholic Charities*, Plaintiffs argue that S.B.10 independently violates the Establishment Clause by imposing a denominational preference. Appellees’ Br. 51. Despite complaining that S.B.10 “mandates a Protestant version of the Ten Commandments,” Appellees’ Br. 50, Plaintiffs do not suggest that an alternative version would be permissible.³ Their true theory is

³ Plaintiffs’ expert pointed to supposed differences between the text of the Ten Commandments favored by Jews, Protestants, and Catholics to argue that S.B.10 enshrined a Protestant version of the text. S.B.10 uses the same text as the Ten

that no version of the Ten Commandments may be posted—the denominational-preference argument simply repackages their primary Establishment Clause theory. See also National Council of Jewish Women Amicus Br. 14.

Unlike in this case, the law at issue in *Catholic Charities* specifically favored certain religious organizations with tax exemptions and excluded others “based on theological practices.” *Catholic Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 250 (2025). Likewise, *Larson v. Valente*, 456 U.S. 228 (1982), the primary case that *Catholic Charities* relied on, involved a law that exempted religious organizations from reporting requirements only if they raised a majority of their funds through member donations. These cases involved policies that offered “financial support” for certain churches based on theological differences—one of the historical hallmarks of an established church. *Shurtleff*, 596 U.S. at 286 (Gorsuch J., concurring); *Kennedy*, 597 U.S. at 537 n.5.

Commandments monument discussed in *Van Orden*, which the Eighth Circuit described as featuring “a nonsectarian version of the Ten Commandments.” *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 773 (8th Cir. 2005) (en banc).

Dr. Green’s notion that “thee” and “thou” demonstrate reliance on the King James Bible is demonstrably false: the 1898/1899 Catholic Douay-Rheims version of the Bible and the 1917 Jewish Publication Society version of the Tanakh both use “thee” and “thou.” ROA.1685-86. The same is true of Dr. Green’s assertion that the language regarding “graven images” conflicts with Catholic theology: the 1898/1899 Douay-Rheims version contains the same prohibition on making a graven image. ROA.1686. Dr. Green’s allegation that the use of “kill” rather than “murder” is contrary to Judaism ignores that some Jewish translations and catechisms used “kill” and many Protestant translations use “murder.” ROA.1688-89.

The financial-support line of cases has no bearing on government speech that aligns with particular religious traditions. *Accord Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (finding no free-speech violation when a city displayed a Ten Commandments monument but refused to display the monument proposed by a different religious group).

Nothing in *Catholic Charities* or *Larson* prevents the Texas Legislature from expressing its support for the principles embodied in the Ten Commandments—one of the foundations of our legal system—by requiring them to be posted in the classroom.

The Supreme Court has abandoned the inquiry into the sectarian nature of religious speech and activity because it is impossible to determine “what qualifies as generic or nonsectarian,” *Town of Greece*, 572 U.S. at 582, without an “unnecessary” and “offensive” inquiry “through a person’s or institution’s religious beliefs,” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.). Such an approach would require courts “to act as supervisors and censors of religious speech.” *Town of Greece*, 572 U.S. at 581. Asking whether an idea is “sectarian” frequently leads to actual impermissible denominational preferences, as evidenced by the district court’s conclusion that the Ten Commandments are impermissibly sectarian but that the Texas Legislature could compel the display of the Five Moral Precepts of Buddhism. ROA.1479.

As Defendants explained in their opening brief, the Ten Commandments are deeply significant beyond religious belief. Appellants’ Br. 5-9. Texas lawmakers highlighted the fact that the Ten Commandments stand for the rule of law and the

“foundations of our legal system,” *Am. Legion*, 588 U.S. at 53, for honoring America’s religious heritage, and for “shaping civic morality,” *id.* (identifying this as one of the “secular purposes” of the Ten Commandments display in *Van Orden*); Appellants’ Br. 5-9. None of these reasons involves denominational preference for Protestantism or Christianity over other faiths.

Plaintiffs continue to point to some remarks by legislators that expressed hope that S.B.10 would lead students to learn about the Christian God. Appellees’ Br. 25-26. But just because some legislators hoped that S.B.10 would have this effect does not mean that the Texas Legislature as a whole imposed a denominational preference for Christianity that establishes a state religion. Even under *Lemon*, this Court warned against using the fact that “[s]ome legislators may have religious motives” as a ground to “invalidate an act with an otherwise secular legislative purpose.” *Croft v. Governor of Tex.*, 562 F.3d 735, 743 (5th Cir. 2009).

And when analyzing purpose, courts must consider “the legislature as a whole” and cannot treat other legislators as “agents of the bill’s sponsor or proponents.” *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 689 (2021). Plaintiffs’ response fails to grapple with *Brnovich*. See Appellees’ Br. 27 (relying only on statements of the “sponsors and authors”).

Plaintiffs’ repackaging of their Establishment Clause claims under a denominational-preference theory does not change the nature of the inquiry. The sole question is whether, under historical practices and understanding, posting the Ten Commandments in a classroom constitutes an impermissible establishment of religion. As detailed above, it does not.

E. Under a correct understanding of the Establishment Clause, Plaintiffs lack standing.

Offended observer standing fell along with the Supreme Court’s abandonment of *Lemon*. Appellants’ Br. 38-40. Plaintiffs accuse Defendants of “confus[ing] standing with the merits,” Appellees’ Br. 67, but Defendants seek to disentangle the two. The error of conflating standing with the merits occurred when courts adopted offender observer standing to allow claims under *Lemon*. See Members of Congress Amicus Br. 9 (“[L]ower courts, including this one, reasoned that if the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue.”).

Plaintiffs’ standing theory—injury from offense at perceived government endorsement of religion—has no roots in general standing law. See Appellees’ Br. 68-69 (asserting that standing exists whenever there is “direct, unwelcome contact with, or exposure to, a governmental religious display or practice”). Mere offense does not give rise to standing, and with *Lemon*’s abandonment, the “gaping hole [offended observer standing] tore in standing doctrine in the courts of appeals should now begin to close.” *Am. Legion*, 588 U.S. at 87 (Gorsuch, J., concurring).⁴

⁴ Plaintiffs’ reliance on the Supreme Court’s exercise of jurisdiction in *American Legion* is misplaced. See Appellees’ Br. 68 (“[D]espite declining to apply *Lemon*, and notwithstanding Justice Gorsuch’s concurring opinion (which is what Defendants cite), the Court adjudicated the plaintiffs’ claims[.]”). The majority opinion does not discuss standing, and “[t]he mere fact that [a] case was entertained by this Court is no basis for considering it as authoritative on the jurisdictional issue.” *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137 n.2 (1947); cf. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (“[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect.”).

Plaintiffs’ alternative argument that standing exists because “S.B. 10 will coerce child-Plaintiffs into religious observance,” Appellees’ Br. 69, simply relabels “offense” as “coercion.” *See, e.g.*, Members of Congress Amicus Br. 14 (“Merely being offended by the display’s presence because of the family’s disagreement does not amount to coercion.”). S.B.10 concerns posters on classroom walls, not religious observance and not coercion. Not only do their claims fail on the merits, but Plaintiffs’ offense at exposure to the Ten Commandments does not give rise to standing to assert claims under the Establishment Clause.

II. Plaintiffs Failed to Demonstrate a Likelihood of Success on Their Claims Under the Free Exercise Clause.

Plaintiffs have not shown a likelihood of success on their claims that exposure to posters displaying the Ten Commandments would violate their rights under the Free Exercise Clause.

The parties agree that Plaintiffs’ free exercise claims are governed by *Mahmoud v. Taylor*, Appellants’ Br. 40-45, Appellees’ Br 54-61, which confirms that Plaintiffs have not shown likelihood of success on the merits. The passive display of materials on classroom walls bears no relationship to the instruction in *Mahmoud* “by authority figures” intended to “disrupt” children’s thinking. 606 U.S. at 536, 554. The right that Plaintiffs assert—to remove materials that offend their religious beliefs from a public-school classroom—likewise has no basis in Free Exercise jurisprudence.

A. *Mahmoud* forecloses Plaintiffs’ claims.

As Defendants explained in their opening brief, *Mahmoud*’s analysis turned on “the potentially coercive nature of classroom instruction”: the requirement that

teachers “instruct young children using storybooks that explicitly contradict their parents’ religious views,” and guidance documents that “encourage[d] the teachers to correct the children and accuse them of being ‘hurtful’ when they express a degree of religious confusion.” Appellants’ Br. 42 (quoting 606 U.S. at 555). These facts—direct instruction by teachers with the purpose and effect of changing children’s beliefs about sexuality—were crucial to the holding that the “instruction related to the storybooks will ‘substantially interfer[e]’ with the parents’ ability to direct the ‘religious development’ of their children.” *Mahmoud*, 606 U.S. at 554 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

Plaintiffs do not deny that none of those operative facts is present in this case. S.B.10 does not require instruction; it does not encourage teachers to “disrupt” children’s thinking; and it does not evince religious hostility. A poster displaying a deeply significant moral and historical document is worlds apart from the coercive, purposely disruptive instruction by authority figures in *Mahmoud*.

Plaintiffs argue that *Mahmoud* involved “just five storybooks, which would be used only periodically, spending the majority of the school-year on a shelf, out of sight,” Appellees’ Br. 57-58, whereas S.B.10’s posters will be seen daily. But *Mahmoud* does not hold that the books’ presence in the classroom violated the Free Exercise Clause—the burden on religious exercise came from “instruction related to the storybooks.” 606 U.S. at 554. There is no suggestion in *Mahmoud* that the books alone could violate the Free Exercise Clause, no matter how prominent their display.

Plaintiffs’ next argument (at 57) that the posters are constitutionally suspect because they contain “religious scripture” rather than “secular materials” is incorrect. *Mahmoud* does not suggest that secular instruction intended to disrupt children’s religious beliefs receives less scrutiny under the Free Exercise Clause. 606 U.S. at 555. Nor are Plaintiffs correct to characterize the Ten Commandments as purely “religious”: While the Commandments are religious, they have an “undeniable historical meaning.” *Van Orden*, 545 U.S. at 690 (plurality op.).

Finally, Plaintiffs assert that *Stone* forecloses a “‘silent vs. spoken’ distinction in matters of religious indoctrination in schools.” Appellees’ Br. 58. But *Stone* rests on the Kentucky statute’s lack of a “secular legislative purpose,” 449 U.S. at 41, not religious indoctrination, and its holding concerns the Establishment Clause, not the Free Exercise Clause. *See id.* at 42-43 (“We conclude that [the statute] violates the first part of the *Lemon v. Kurtzman*, test, and thus the Establishment Clause of the Constitution.”). *Stone* offers no support for Plaintiffs’ theory that the mere presence of materials in the classroom—as opposed to the coercive instruction present in *Mahmoud*—violates the right to free exercise by substantially interfering with parents’ religious upbringing of their children.

B. Plaintiffs request an unprecedented remedy under the Free Exercise Clause.

Plaintiffs do not deny that the remedy they seek—removal of allegedly offensive materials from a public-school classroom—is unprecedented in the Supreme Court’s Free Exercise Clause jurisprudence.

Previous decisions have held that the Free Exercise Clause provides a right to “opt out of a particular educational requirement.” *Mahmoud*, 606 U.S. at 568. Rather than ask to remove books from the classroom or change the lesson plan, the *Mahmoud* plaintiffs sought to opt out, which “would give the parents no substantive control over the curriculum.” *Id.* And the *Barnette* plaintiffs did not seek to remove the flag or prevent other students from reciting the pledge of allegiance, just the right not to participate. 319 U.S. at 630–31 (“[T]he refusal of these persons to participate . . . does not interfere with or deny rights of others to do so.”).

Plaintiffs do not deny that the expansion of the Free Exercise Clause they seek would significantly reshape public education. Although Plaintiffs’ challenge concerns the Ten Commandments, they offer no limiting principle. *See* Appellees’ Br. 58-59. Under Plaintiffs’ theory, any parent could challenge any poster, any book, or any aspect of the curriculum as burdening their religious practices, seeking not to opt out from instruction but to remove it from the classroom. The predictable result would be endless litigation, terminating only in bare classroom walls and empty shelves.

Plaintiffs draw the wrong inference when they reason that because an opt-out remedy would be “impracticable,” Appellees’ Br. 55, they must necessarily be entitled to remove classroom materials. The correct inference is that the unprecedented nature of the remedy Plaintiffs seek confirms that they do not have a likelihood of success on the merits of their free exercise claims.

The remedy in *Mahmoud* and *Barnette* also refutes Plaintiffs’ theory that children have a free exercise right not to stand out because of their religious beliefs.

Appellees’ Br. 59-60. Plaintiffs do not deny that opting out in *Mahmoud* and *Barnette*—in which children were visibly distinguished from their classmates based on religious belief—separated children from their peers far more than S.B.10. *Cf. Mahmoud*, 606 U.S. at 566 (rejecting the argument that permitting opt outs “would expose certain students to ‘social stigma and isolation’”). The right to “defen[d] or explai[n] . . . beliefs and practices,” Appellees’ Br. 60, is what the Free Exercise Clause protects, not what it protects against.

To the extent Plaintiffs speculate that harassment will occur in particular classrooms, the problem is with classroom management, not with S.B.10. No student should be exposed to “Nazi salutes or . . . jokes about the Holocaust in school,” Appellees’ Br. 60, but the suggestion that posting the Ten Commandments on classroom walls would increase this behavior is speculative at best, and such specific speculation hardly supports the broad facial challenge raised by Plaintiffs.

* * *

Plaintiffs assert precisely “the right to micromanage the public school curriculum” disclaimed in *Mahmoud*. 606 U.S. at 568. The Free Exercise Clause protects against potentially coercive classroom instruction by authority figures, not against posters of historically and legally significant documents on classroom walls, even if those posters conflict with some parents’ or students’ religious beliefs. Under *Mahmoud*, Plaintiffs have failed to show a likelihood of success.

III. Plaintiffs Failed to Demonstrate that S.B.10 Is Unconstitutional in Every Application.

The parties agree that Plaintiffs’ facial challenge requires them to show that “there is no set of circumstances under which [the implementation of S.B. 10] is constitutional.” Appellees’ Br. 18 (quoting *Croft v. Perry*, 624 F.3d 157, 164 (5th Cir. 2010) (alteration in original)). Plaintiffs have not carried their burden to show a likelihood of success of satisfying this requirement.

Rather than grapple with the strict facial-challenge standard, Plaintiffs rely almost entirely on *Stone*, arguing that it “facially struck down a nearly identical Kentucky statute.” Appellees’ Br. 65. But this argument conflates result with reasoning. *Stone* predates the Supreme Court’s explication of the distinction between facial and as-applied challenges in *Salerno* and naturally did not address *Salerno*’s requirement that “the challenger must establish that no set of circumstances exists under which the Act would be valid” to prevail on a facial challenge. 481 U.S. at 745. Plaintiffs cannot rely on *Stone* to satisfy a standard that *Stone* did not apply.

Plaintiffs argue that because S.B.10’s “minimum requirements provide sufficient details about how the Ten Commandments must be displayed,” this Court knows exactly what the displays will look like and can adjudicate their constitutionality on this basis. Appellees’ Br. 64-65. Plaintiffs dismiss as “purely speculative” and “irrelevant” the possibility that schools might incorporate S.B.10’s poster into a broader display providing additional context. Appellees’ Br. 65. But this uncertainty weighs against Plaintiffs: Facial challenges are disfavored because they “raise the risk of ‘premature interpretation of statutes on the basis of factually barebones

records.’” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

To be clear, Defendants contend that a poster of the Ten Commandments on an otherwise-blank wall does not violate the Establishment Clause, but even if it did, S.B.10’s minimum requirements do not prohibit schools from incorporating the Ten Commandments posters into broader displays regarding historical sources of law or moral principles from multiple traditions. The possibility that some teachers may choose to comply with S.B.10 in this way undermines Plaintiffs’ facial claims.

Plaintiffs also invoke *Mahmoud* for the proposition that they “need not wait for the damage to occur before filing suit.” Appellees’ Br. 66 (quoting *Mahmoud*, 606 U.S. at 559-60). But in *Mahmoud*, the Board provided “clear and undisputed instructions,” and the Supreme Court held that “if teachers act[ed] according to [those] instructions . . . a burden on religious exercise w[ould] occur.” 606 U.S. at 560. There is no similar clarity here, where the posters may (or may not) be incorporated into larger classroom displays.

And unlike in *Mahmoud*, Plaintiffs’ claims do not rest merely on teachers following instructions but also on speculation about how other children may react to the displays, *see, e.g.*, ROA.1996, 2009, 2018, and that teachers might instruct children about the Ten Commandments, *see, e.g.*, ROA.2017, 2018, 2026.⁵ These speculative

⁵ Amicus Texas American Federation of Teachers notes the potential for “discussion of topics which are not age appropriate and may be interpreted and explained to young children in a manner parents do not agree with.” Teacher Amicus Br. 5, 9-10. Nothing in S.B.10 requires teachers to answer theological questions from students rather than direct students to their parents.

possibilities “may be fertile ground for as-applied challenges to [S.B.10] if they occur,” but courts “should not engage in such speculation on a facial review of the law.” *Croft*, 562 F.3d at 750.

Even if S.B.10 could be unconstitutional in some applications, Plaintiffs have not shown a likelihood of success under the strict standard for facial challenges.

IV. The Injunction Is Overbroad.

Even if a preliminary injunction were proper, Plaintiffs do not defend the breadth of the injunction ordered by the district court. The preliminary injunction prevents Defendants from complying with S.B.10 in any classroom at any time. A poster in a school that Plaintiffs do not attend—or even in a classroom that Plaintiffs do not visit—does not inflict a cognizable injury on them. Appellants’ Br. 49-50. Preliminarily enjoining these posters goes beyond what is necessary to provide complete relief to Plaintiffs. *Trump v. CASA, Inc.*, 606 U.S. 831, 850 (2025).

Plaintiffs assert that “narrow[ing] the injunction would render that relief incomplete,” Appellees’ Br. 70-71, asserting that students “move between classrooms within their schools, and between schools within their districts,” Appellees’ Br. 63. But the occasional and “‘accidental’ encounters” hypothesized by Plaintiffs would, even under Plaintiffs’ theories, violate their rights under neither the Free Exercise Clause nor the Establishment Clause. Appellees’ Br. 64. Plaintiffs’ claims rest on the contention that continuous exposure to the Ten Commandments coerces religious exercise, not that any incidental exposure will inflict injury.

In any event, the district court did not make any findings that a narrower preliminary injunction would be unworkable or insufficient, ROA.1426-80, and any

burdens in compliance would fall on Defendants, not on Plaintiffs. As detailed in the amicus brief of State Senator Mayes Middleton, “[t]he plaintiffs are not injured and cannot be injured by displays of the Ten Commandments in buildings or classrooms that neither they nor their children will enter.” State Senator Amicus Br. 1; *see also id.* at 2-20.

At a minimum, the preliminary injunction should be narrowed to provide relief only to Plaintiffs and not enjoin Defendants from complying with S.B.10 throughout their entire districts.

CONCLUSION

This Court should reverse the district court’s order granting a preliminary injunction.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,077 words, excluding the parts of the brief exempted by Rule 32(f) and Fifth Circuit Rule 32.2, according to the word count of Microsoft Word. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Equity font.

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