

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

SAMANTHA STINSON, on behalf of herself & her minor children, A.R.S. &
A.W.S., *et al.*,
Plaintiffs-Appellees,

v.

FAYETTEVILLE SCHOOL DISTRICT NO. 1, *et al.*,
Defendants,

STATE OF ARKANSAS
Intervenor-Appellant.

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:25-cv-05127 (Hon. Timothy L. Brooks)

**BRIEF OF KENTUCKY AND 17 OTHER STATES AS
AMICI CURIAE SUPPORTING INTERVENOR-APPELLANT AND REVERSAL**

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INTERESTS OF AMICI CURIAE¹

The Commonwealth of Kentucky and the 17 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 sustain.” *See Shurtleff v. City of Boston*, 596 U.S. 243, 284 (2022) (Gorsuch, J., concurring in the judgment). Not only was *Lemon*’s test “ahistorical,” it “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

¹ The amici States file this brief without consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

Commandments in public-school classrooms violates the Establishment Clause. *Id.* at 40–43. There can be no dispute that *Stone* turned entirely 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 permanent injunction as to Arkansas’s law. Even before *Lemon* was abrogated, the Supreme Court had narrowed *Stone* so that it stood for only a sliver of a proposition. Now that *Lemon* is no more, the Court should not extend *Stone*’s holding to Arkansas’s law, which can be applied in ways that differ from the situation considered in *Stone*. Even if the Court thinks *Stone* sweeps more broadly, the Court should not apply it. When the Supreme Court abrogated *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 Arkansas’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. 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).

In fact, the full Fifth Circuit just rejected an Establishment Clause challenge to Texas’s analogous law requiring the Ten Commandments to be displayed in public schools. *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576 (5th Cir. 2026) (en banc). The Court rejected any suggestion that *Stone* remains good law because to “keep applying *Stone* . . . would be to ignore *Lemon*’s abrogation.” *Id.* at 589. And under *Kennedy*’s history-driven test, the Court held that the challengers did not identify “a shred of founding-era evidence equating the government’s use of religious text, displays, or symbols with an establishment of religion.” *Id.* at 602. This Court should hold the same here.

ARGUMENT

Arkansas offers several persuasive reasons why the permanent injunction issued below should be reversed. The amici States focus on the district court’s holding that *Stone* controls because it “has not been explicitly overturned.” *Stinson v. Fayetteville Sch. Dist. No. 1*, --- F. Supp. 3d ---, 2026 WL 736964, at *7 (W.D. Ark. Mar. 16, 2026). The amici States make two points about *Stone*. First, they argue that *Stone* did not survive the

abrogation of *Lemon*, as the Fifth Circuit just held. Second, even if something remains of *Stone*, they explain why Arkansas’s law still survives this facial challenge.

I. Now that *Lemon* has been abrogated, nothing remains of *Stone*.

Everyone agrees that *Lemon*’s three-part test is no longer a permissible way to interpret the Establishment Clause. In *Kennedy*, the Supreme Court squarely held that it had “long ago abandoned *Lemon* and its endorsement test offshoot.” 597 U.S. at 534. And despite the district court not citing *Groff* in its permanent-injunction decision, the Supreme Court reaffirmed there that *Lemon* has been “abrogated.” 600 U.S. at 460 & n.7. Going forward, *Lemon*’s test is not an appropriate way to interpret the Establishment Clause.

That *Lemon* has been abrogated raises the question of how to treat a Supreme Court precedent like *Stone* that depends entirely on *Lemon*. 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 applied this rule to hold that *Stone* controls because it “has not been explicitly overruled.” *Stinson*, 2026 WL 736964, at *7. That conclusion fails because *Stone* does not, to quote the above rule, “rest on reasons rejected in some other line of

decisions.” See *Nathan*, 173 F.4th at 591 (so holding); accord *Roake v. Brumley*, 170 F.4th 292, 301 (5th Cir. 2026) (en banc) (Ho, J., concurring in the judgment). Instead, *Stone* rests entirely on precedent (*Lemon*) that the Supreme Court has “abandoned” (per *Kennedy*) and “abrogated” (per *Groff*). *Kennedy*, 597 U.S. at 510; *Groff*, 600 U.S. at 460 & n.7. The upshot is that by abrogating *Lemon*, the Supreme Court necessarily did the same to *Stone*.

To understand why this is so, take a close look at *Stone*. In 1978, a Democratic state legislator in the Bluegrass State 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 ultimately 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. (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.² From beginning to end, the Court applied *Lemon*—in particular, its first step. *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 Commandments in public schoolrooms had no secular purpose, and is therefore unconstitutional.” *Id.* at 41. Taking *Stone* at its word, the decision 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

² 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).

in nature.”³ *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.

This summary of *Stone* shows that it is an application of *Lemon* and nothing more. *Stone* found that Kentucky’s law violated the first step in *Lemon*’s test, declared the law unconstitutional for that reason alone, and moved on. As the Fifth Circuit explained, “*Stone* depended entirely on *Lemon* and nothing but *Lemon*. Remove the three-part *Lemon* test, and *Stone*’s reasoning vanishes.” *Nathan*, 173 F.4th at 590–91. Indeed, the district court couldn’t avoid this simple point. In particular, it discussed its conclusion that Arkansas’s law lacks a secular purpose. *Stinson*, 2026 WL 736964, at *8–9. But whether a law has a secular purpose is the first step in *Lemon*’s test—the same test that, to quote the Supreme Court, has been “abandoned” and “abrogated.” *Kennedy*, 597 U.S. at 510; *Groff*, 600 U.S. at 460 & n.7. As the decision below shows, to apply *Stone* is to apply

³ In dissent, then-Justice Rehnquist correctly pointed out that the Court’s declaration about Kentucky’s alleged purpose has “no support beyond [the Court’s] own *ipse dixit*.” *Stone*, 449 U.S. at 43 (Rehnquist, J., dissenting).

Lemon. It follows that to abrogate *Lemon* is to abrogate *Stone*. Or as the Fifth Circuit concluded, “[w]ith *Lemon* gone, there is nothing left of *Stone* to apply.” *Nathan*, 173 F.4th at 591.

The district court made much of the fact that the Supreme Court has not said “*Stone* is overruled.” But the Supreme Court didn’t need to use those magic words. When the Supreme Court abrogated *Lemon*, it rejected *Lemon*’s methodology for interpreting the Establishment Clause. *See Kennedy*, 597 U.S. at 534 (noting that the Court “abandoned” *Lemon*’s “approach to the Establishment Clause”). In fact, *Kennedy* didn’t just talk about *Lemon* but about “*Lemon* and its progeny.” *Id.* Of course, *Stone* is part of *Lemon*’s progeny. And *Kennedy* swept broadly in rejecting *Lemon*’s application to any Establishment Clause challenge. As *Kennedy* explained, *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. The same is true of *Kennedy*’s unambiguous directive that going forward courts applying the Establishment Clause “must” focus on our Nation’s history. *Id.* at 535–36. That categorical 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.”); *Nathan*, 173 F.4th at 592 (“[I]here is no plausible way to read *Kennedy* as somehow preserving *Lemon* for certain cases.”). To continue following *Stone* does not respect the Supreme Court’s prerogative to overturn its own decisions.

It flouts the Supreme Court's express directives that *Lemon* has been “abandoned” and “abrogated.” See *Kennedy*, 597 U.S. at 510; *Groff*, 600 U.S. at 460 & n.7.

II. Arkansas's law can be applied differently than the situation considered in *Stone*.

Even if the Court concludes that something is left of *Stone*, any remaining holding cannot justify the district court's decision to facially invalidate Arkansas's law. 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. This Court has done much the same. Under no circumstances does *Stone* require facial invalidation of Arkansas's law, which permits the Ten Commandments to be displayed in ways not addressed in *Stone*.

A. The Supreme Court's 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[].’”⁴ *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 display. 465 U.S. 668, 670–71, 687 (1984). Whereas *Stone* treated *Lemon* as all that mattered, *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.” *See 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, 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

⁴ Later decisions have underscored that *Marsh* refused 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”).

secular purpose for the statute that was “secondary.” *McCreary County 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 emphasized, “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.”⁵ *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 County*, 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 Kentucky 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 Ten Commandments monument at the Texas state

⁵ The Supreme Court made a similar point about *Stone* nearly two decades 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”).

Capitol. 545 U.S. at 681 (plurality op.). In doing so, 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*. To *Stone*, *Lemon* was everything. To *Van Orden*, *Lemon* was irrelevant to the constitutionality of a passive Ten Commandments display on public property.

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). As evidence, 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 emphasized that “[i]n *Van Orden* and *McCreary*, no Member of the Court thought that these depictions [of the Ten Commandments on public property] 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 County*, 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. As noted above, *Stone* itself refutes such an implication. 449 U.S. at 42. In fact, 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 an extreme 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 explained 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. That has been 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. If *Stone* continued to matter, that would have been an obvious place for the Supreme Court to say so.

As this summary shows, *Stone* did not fare well in the Supreme Court even while *Lemon* was good law. *Stone*’s methodology for considering the constitutionality of a Ten Commandments display lost out 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 applies 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.

B. This Court has rightly followed the Supreme Court’s lead in not extending *Stone*. Two decades ago, the en banc Court refused to apply *Lemon* in rejecting an Establishment Clause challenge to placing a Ten Commandments monument in a Nebraska city park. *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc). “Taking [its] cue from Chief Justice Rehnquist’s opinion” and Justice Breyer’s concurrence in *Van Orden*, a 10-judge majority focused on our Nation’s “heritage,” not *Lemon*’s test, to allow the city to display the Ten Commandments

monument. *Id.* at 775–77, 778 n.8. It reasoned that “[a]lthough the text of the Ten Commandments has undeniable religious significance, simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Id.* at 778 (cleaned up) (citation omitted). The sole mention of *Stone* was to note that the *Van Orden* plurality distinguished it. *Id.* at 776. Indeed, Judge Bye’s dissent did not invoke *Stone*.

In 2014, this Court again refused to apply *Lemon*. *Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014). Over Judge Bye’s dissent invoking *Lemon*, the Court held that a “passive display of the Ten Commandments on public land is evaluated by the standard in *Van Orden*, which found *Lemon* ‘not useful.’” *Id.* (cleaned up) (internal citations omitted). The Court applied *Van Orden* and this Court’s en banc decision in *City of Plattsmouth* to allow the display of a Ten Commandments monument on a city plaza with “other symbols, such as the American flag and an ‘allseeing eye’ within a pyramid.” *Id.* at 949–50. Neither the majority nor the dissent cited *Stone*.

Four years later, this Court effectively interred *Lemon*. *See New Doe Child #1 v. United States*, 901 F.3d 1015, 1019–21 (8th Cir. 2018). In that case, the plaintiffs challenged the placement of the national motto “In God We Trust” on United States currency. *Id.* at 1018. The Court noted that Establishment Clause jurisprudence “[o]ver the last half century” is convoluted because “the Supreme Court has adopted numerous tests to interpret the Establishment Clause, without committing to any one.” *Id.* at 1019 (collecting cases). The Court resolved this confusion by applying the history-driven test

from *Town of Greece v. Galloway*, 572 U.S. 565 (2014), which at the time was the Supreme Court’s “most recent direction,” *New Doe Child #1*, 901 F.3d at 1019–20. As the Court emphasized, “[i]n *Galloway*, the Supreme Court offered an unequivocal directive: The Establishment Clause *must* be interpreted by reference to historical practices and understandings.” *Id.* at 1020 (cleaned up) (citation omitted). And the Court underscored that *Galloway*’s “historical approach is not limited to a particular factual context.” *Id.* *Kennedy* later vindicated this reading of *Galloway*. As *Kennedy* put it (quoting *Galloway*), “[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” 597 U.S. at 535 (citation omitted). In short, even before *Kennedy*, this Court rightly applied a history-driven inquiry rather than *Lemon* and *Stone*.

C. If the Court applies *Stone*, the Court should not apply it broadly, given that *Stone* is such an outlier in modern Establishment Clause jurisprudence. It is unmistakable from *Stone* that the Supreme Court considered only a standalone display of the Ten Commandments along with a short explanatory statement. As a result, *Stone* did not consider a Ten Commandments display that was situated alongside other historical documents or displays of America’s heritage. If anything, *Stone* conveys that such displays would comport with the Establishment Clause, given its allowance of public schools using the Ten Commandments “in an appropriate study of history, civilization, ethics, comparative religion, or the like.” *See Stone*, 449 U.S. 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 documents or patriotic symbols.

Arkansas's law can be applied in ways that differ from the standalone Ten Commandments display considered in *Stone*. Nothing in Arkansas's law prohibits a public school from displaying the Ten Commandments as part of a larger display of historical documents or symbols of America's heritage. *See* Ark. Code Ann. § 1-4-133. Indeed, Arkansas's brief (at 16–17, 40) confirms that its law can be applied to allow such diverse displays. The district court's conclusion that Arkansas's law does not require such complementary displays mistakes what the law requires with what it allows. *See Stinson*, 2026 WL 736964, at *7. What matters is that Arkansas's law does not prohibit a public school from displaying the Ten Commandments alongside other documents formative to modern law, like a poster about the Supreme Court's decision in *Marbury v. Madison* or a picture of the Code of Hammurabi. Or a school could decide to display the Ten Commandments beside the required displays of the national motto and the American and Arkansas flags. *See* Ark. Code Ann. § 1-4-133(a)(1)(A). In addition, although Arkansas's law does not require that an explanatory statement be included with each display like the law in *Stone*, nothing prevents a public school from including a robust context statement explaining the historical and legal significance of the Ten Commandments. Any of the above hypothetical displays allowed under Arkansas'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, ethics,

comparative religion, or the like.” 449 U.S. at 42; *accord Red River Freethinkers*, 764 F.3d at 949–50 (allowing a Ten Commandments display with “other symbols, such as the American flag and an ‘allseeing eye’ within a pyramid”).

The challengers to Arkansas’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 a narrow, 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 Arkansas’s law. But the challengers’ burden in this facial challenge is to show that every way that an Arkansas public school might comply with the Ten Commandments law violates the Establishment Clause. *See Salerno*, 481 U.S. at 746. In other words, the challengers’ decision to bring a facial challenge to Arkansas’s law “comes at a cost.” *See*

Moody v. NetChoice, 603 U.S. 707, 723 (2024). That cost is that *Stone* cannot be dispositive (assuming it remains good law). Even accepting *Stone* on its terms, it does not require sustaining a facial challenge to a law like Arkansas’s that allows Ten Commandments displays that are in line with *Stone*.

One final point: It cannot be disputed that *Stone* is untethered from the original meaning of the Establishment Clause. Even if the Court concludes that *Stone* remains good law, it should refuse to extend its holding beyond the facts there. Along these lines, the Supreme Court recently declined to “extend” a questionable decision that “sits uneasily with the [Constitution’s] terms, original meaning, and our precedents.” *City of Grants Pass v. Johnson*, 603 U.S. 520, 549–50 (2024); accord *Boudreaux v. La. State Bar Ass’n*, 3 F.4th 748, 755 (5th Cir. 2021). Instead of extending *Stone*’s as-applied holding to facially invalidate Arkansas’s law, the Court should instead limit *Stone* to its facts and apply the history-driven approach mandated by *Kennedy*. As this Court has already held in the Establishment Clause context, “the prudent course for an inferior court . . . is to hew closely to the [Supreme] Court’s specific, contemporary guidance.” See *New Doe Child #1*, 901 F.3d at 1019–20 (citation omitted). That “specific, contemporary guidance” is *Kennedy*, not *Stone*.

CONCLUSION

The Court should hold that *Stone* is not binding precedent or that it does not apply here.

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I certify that on June 3, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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