IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RABBI MARA NATHAN, on behalf of herself and on behalf of her minor child, M.N., et al., *Plaintiffs,* *v.* ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, et al., *Defendants.*	Case No. 5:25-cv-00756

***AMICUS CURIAE* BRIEF OF TEXAS VALUES IN OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION**

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INTEREST OF AMICUS CURIAE

Texas Values is a statewide Judeo-Christian nonprofit organization that promotes research, education, and legislative advocacy to encourage, strengthen, and protect Texas families. Texas Values has over 200,000 supporters statewide, including supporters in all 254 counties in the State of Texas. Texas Values provides its members legal and legislative representation and support on issues of faith, family, and freedom and is a leading organization in Texas on issues affecting constitutionally-protected religious freedom, free speech, and parental rights.

INTRODUCTION

The Ten Commandments have a longstanding and undeniable history in America and in the State of Texas. While modern Establishment Clause analysis makes reliance on the *Lemon* test misguided, the U.S Supreme Court has not left courts without a standard rooted in the rich history and traditions of our country. S.B. 10 easily meets and surpasses rational basis requirements because it simply acknowledges the Ten Commandments as a foundation of American law and does not require any specific activity or forced participation.

ARGUMENT

I. Texas' S.B. 10 is constitutional because it has an undeniable history in public education.

The Plaintiffs' case is based almost entirely on the tainted and now invalid case of *Stone v. Graham,* 449 U.S. 39 (1980) which for decades applied a flawed interpretation of the Establishment Clause of the Unites States Constitution including the application of a now abandoned test—the *Lemon* Test in *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). In 2022, in *Kennedy v. Bremerton Sch. Dist.,*597 U.S. 507, 510 (2022), the United States Supreme Court ruling struck down the *Lemon* test, wounding if not completely putting an end to any precedent weight held by the *Stone* case. Therefore, this court should ignore *Stone* as binding precedent upon this Court for purposes of determining whether an Establishment Clause violation exists in this instant case. Although, even if this Court determines that *Stone* is still controlling, it does not directly apply to Texas' S.B. 10. Even if factually the Kentucky statute in *Stone* and Texas' S.B. 10 are similar, analytically the cases that directly control whether Texas' S.B. 10 violates the Establishment Clause are *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014), *American Legion v. American Humanist Assn*, 588 U.S. 29 (2019) and *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507, 510 (2022) and their test of referencing historical practices and understandings—the history and traditions test.

Texas' S.B. 10 is constitutional under *Kennedy* and other well-established Supreme Court precedent. Because of this, this Court should deny Plaintiffs'

preliminary injunction request as they cannot establish a substantial likelihood of success on the merits.

A. This Court must apply the current Establishment Clause test in reference to historical practices and understandings rather than apply *Stone* which utilized the abandoned *Lemon* Test

In *Stone*, the United States Supreme Court utilized the three–part *Lemon* Test to conclude that the Kentucky statute failed the first prong of the test—in that it had no secular legislative purpose—and therefore violated the Establishment Clause of the United States Constitution. Based upon the Court's holding in *Stone*, Plaintiffs make the erroneous assertion that Texas' S.B. 10 "cannot be reconciled with *Stone's* binding precedent, [and thus] this Court's constitutional analysis can begin and end there." *Plaintiffs' Motion for Preliminary Injunction* pg. 1

However, what Plaintiffs conveniently fail to mention is that *Stone* was chiefly decided upon the now abandoned *Lemon* Test. "We conclude that… [Kentucky's statute…violates the first part of the *Lemon v. Kurtzman*, test, and thus the Establishment Clause of the Constitution." *Id.* at 42–43. Since *Lemon* and *Stone* were decided, the Supreme Court in *Kennedy* affirmed that through *American Legion*, "this Court long ago abandoned *Lemon* and its endorsement test offshoot" and "[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.'" (quoting *Town of Greece v. Galloway*,

572 U.S. 565, 576 (2014)). Even in Justice Sotomayor's dissenting opinion in *Kennedy*, she exclaimed that "the Court overrules *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision." *Id.* at 546.

Plaintiffs cite *Stone* as their seminal case for furthering their argument. However, *Stone* was decided on the now abandoned *Lemon* Test and is not controlling as the instant case must be analyzed utilizing the new test acknowledged in *Kennedy*—reference to historical practices and understandings.

B. The United States Court of Appeals for the Fifth Circuit was wrong to hold that Stone applied directly in *Roake*, and this Court would be wrong to hold that *Stone* applies directly in this case

Plaintiffs cite to *Roake v. Brumley,* 141 F.4th 614 (5th Cir. 2025) in support of their argument that Texas' S.B. 10 violates the Establishment Clause. However, even in that case the United States Court of Appeals for the Fifth Circuit explained that the Supreme Court in *Kennedy* clarified that *Lemon* has been set aside and "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Roake* at 637 (quoting *Kennedy at* 535). Plaintiffs cannot simultaneously cite both *Stone,* call it *binding* precedent, and *Roake* to support their argument when these cases are directly at odds to assess whether an Establishment Clause violation exists. On one hand, *Stone* applied the *Lemon* Test to conclude that the Kentucky statute violated the

Establishment Clause. On the other hand, *Roake* asserted that *Lemon* has been set aside.

Although, while the Fifth Circuit in *Roake* claimed that "the Supreme Court set aside the *Lemon* test in *Kennedy*,… *Kennedy* did not overrule *Stone*", it asserted that "*Stone* remains good law and therefore controls, if it 'direct[ly] appli[es].'" *Id.* at 642 (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). Ultimately, the Fifth Circuit held in *Roake* that *Stone* directly applied and was controlling. Therefore, it concluded that Louisiana's H.B. 71 was unconstitutional.

The Fifth Circuit was wrong. While factually the Louisiana statute closely mirrored that of the Kentucky statute, analytically the Fifth Circuit's assertion that *Stone's* reasoning was equally germane to their analysis of Louisiana's statute was erroneous. *Id.* at 643. It is worth noting that the State of Louisiana requested an *en banc* hearing, questioning the Fifth Circuit Panel's jurisdictional and merits determinations. For an Establishment Clause analysis, *Stone's* reasoning is not equally germane in determining whether an Establishment Clause violation exists with today's controlling constitutional tests. *Stone's* Establishment Clause analysis centered on the abandoned *Lemon* Test. The current controlling Establishment Clause constitutional test stems from *Town of Greece*, *American Legion*, and *Kennedy* referencing historical practices and understandings. This Court is bound to apply this history and traditions test in

this case rather than apply a case decided on reasons that have since been rejected.

While factually Texas' S.B. 10 closely mirrors that of the Kentucky statute in *Stone*, the reasoning behind the Court's decision in *Stone* was based upon the abandoned *Lemon* Test. Due to this, it would be improper for this Court to apply *Stone* to analyze Texas' S.B. 10 since S.B. 10 must instead be analyzed in accordance with the controlling Establishment Clause analysis found in *Kennedy*—referencing historical practices and understandings.

C. *Town of Greece, American Legion,* and *Kennedy,* have direct application to this case and must directly control the Court's decision

In *Rodriguez de Quijas*, the Court held that "[i]f a precedent of this 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 this Court the prerogative of overruling its own decisions." *Id.* at 484.

Following *Rodriguez de Quijas*' precedent and applying it to this instant case, it would be improper for this Court to apply *Stone*. First, *Stone* does not directly apply to this instant case. Although the facts of this case are very similar to those of *Stone*, its decision rests upon the *Lemon* Test since rejected through the line of cases of *Town of Greece*, *American Legion*, and *Kennedy*.

The Supreme Court stated in 2019 that the Ten Commandments "have historical significance as one of the foundations of our legal system." *Am.*

Legion, 588 U.S. at 53. The Court also made it clear that merely being offended by what a person observes in a passive display is no evidence that the government is engaging in impermissible coercion. *Town of Greece*, 572 U.S. at 590.

The "history and tradition" is the new standard used by the U.S. Supreme Court in modern Establishment Clause analysis, and Ten Commandments have an undeniably longstanding history. The Court in *Van Orden v. Perry,* 545 U.S. 677 (2005) said the Ten Commandments are part of the "rich American tradition of religious acknowledgments." 545 U.S. at 689-92. Further, the Ten Commandments were integrated much more extensively for students in early American history than they even are today, being found in important textbooks for schoolchildren such as the McGuffey Readers. Considering this, it is clear that schools today are well within historical norms to take the Ten Commandments – which although considered religious material contains an indisputable historical background – and display them passively on walls to be viewed or not viewed.

This Court is not mandated—and it would be an improper Establishment Clause analysis —to consider the holding of *Stone* as authoritative in this instant case. *Stone* was decided upon the application of the *Lemon* test which is now abandoned. The proper Establishment Clause analysis of Texas' S.B. 10 at issue in this case is reference to historical practices and understandings—the history

and tradition test deriving from *Town of Greece*, *American Legion*, and *Kennedy*. Texas' S.B. 10 is constitutional under *Kennedy* and other U.S. Supreme Court precedent. And it is undeniable that the Ten Commandments have a unique and longstanding history in our country.

II. S.B. 10 is constitutional under the Establishment Clause because exposure to passive historical displays may offend but do not coerce

Plaintiffs spend a great deal of time trying to build a case for Establishment Clause coercion, especially with regard to the captive audience theory which asserts that public school students, being subject to compulsory attendance and truancy laws, are "captive" to "religious messages" posted in public school classrooms. This theory has a shaky and ambiguous legal foundation at best but is consistent with opposition messaging heard in public testimony on S.B. 10, and as promoted by the Freedom from Religion Foundation, the American Civil Liberties Union, and other opponents of the legislation.[1]

The term "captive audience" gained general but regrettable use in court opinions after the U.S. Supreme Court used it in *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) to examine free speech rights of Matthew Fraser, a high school student who was suspended for giving an inappropriate speech at

[1] https://capitol.texas.gov/tlodocs/89R/publiccomments/billhistory/SB00010H.pdf

school assembly. In *Bethel,* the court expanded its long-established standard on student speech regulation derived from *Tinker v. Des Moines Comm. Sch. Dist.,* 393, U.S. 503 (1969) (examining whether speech caused a "substantial and material disruption"), and went beyond that to consider the responsibilities of the school and school staff related to the idea of compelled listening.

The Court in that case did not offer a rationale or precedent to explain why it considered students who heard Fraser's speech to be a captive audience, and lower courts have since lacked clear guidance as to when they might use the term of art to validate content-based regulation of speech. One distinguishing element in *Fraser* was the term being deployed in the context of objectionable speech of a "lewd" or "indecent" nature.[2] Another consideration is that the captive audience theory has been upheld as valid most often by courts when used in the context of one's home. A string of cases addressing the validity of residential picketing demonstrate this point.[3] Thirdly, the *Fraser* court and others following it distinguished oral presentations and audio messages from passive, written words, due to a person's inability to "look away" and escape exposure.[4]

[2] *Fraser* at 478 U.S. 675, 683 (1986)
[3] Schneider v. State of New Jersey, 308 U.S. 147 (1939)
[4] See *Kovacs v. Cooper,* 336 U.S. 77 (1949)

However, the *Tinker* court did not see it as necessary to restrict speech of public school students to avoid incompatible or conflicting ideas, stating:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.[5]

In plain terms, public schools should focus on the impact of speech. It is not good enough that someone may be, or is, offended by a particular display. Disagreement will happen in a free society and that should be an expectation, not a cause for surprise or concern.

The problem with the term "captive audience" is that it reflects a value judgement – not a judicial standard. Plaintiffs' children are not required to do anything related to Ten Commandments posters in public school classrooms. There is no requirement to read or discuss the Ten Commandments posters. The statutory language does not even require the displays to be put in a particularly notable or conspicuous place in the classroom. The focus for modern Establishment Clause analysis is on religious activity, not on the content or being an offended observer, and no religious activity is mandated. Thus "captive" is not being used literally, but in a figurative sense. The problem with this, of course, is that each person might have a unique value judgement. Value

[5] *Tinker v. Des Moines Comm. Sch. Dist.,* 393 U.S. 503, 508 (1969)

judgements are just that - an assessment of something based on many aspects of a person that could include personal taste, moral codes, or cultural norms – but not a clear, articulable, across-the-board standard.

Plaintiffs hammered the idea that students would be "subjected to the Ten Commandments for nearly every hour they are in school…"[6] However, courts assessing captive audience situations do not require students to leave a space or room. For example, in *Cohen v. California*, 403 U.S. 15 (1971) the court said that averting the eyes was sufficient to avoid a message. Value judgements make poor judicial standards which is why they are traditionally avoided. Value judgements exist on the individual-level, are unique to each person, and are formed and influenced by different backgrounds.

Thankfully, the Supreme Court has been very clear on this issue. The majority said that "offense does not equate to coercion." *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507 (2022) (cleaned up); see also *Doe v. Beaumont Indep. Sch. Dist.,* 240 F.3d 462, 470 (5th Cir. 2001) (en banc) ("If no religious activity is at issue, any speculation as to whether students might feel pressured to participate is irrelevant."). As mentioned earlier, the focus for modern Establishment Clause analysis is on forced religious activity. Since the S.B. 10

[6] Pacer Filing: Civil Action No. 5:25-cv-00756. Plaintiff's Motion for Preliminary Injunction Pg. 16

Ten Commandments displays are passive and historically grounded, they are easily constitutional and should be upheld.

Finally, Plaintiffs try to twist the U.S. Supreme Court's recent decision in *Mahmoud v. Taylor*[7] to their advantage by equating S.B. 10 displays with "classroom instruction" in public schools.[8] In fact, in that case, the Respondent Maryland school district tried to frame active instruction in a language-arts curriculum that featured lesbian, gay, bisexual and queer characters, as "mere exposure to ideas that contradict religious beliefs.[9]" The Court made it clear that the curricular materials actively advocated for a certain position, emphasizing that "[i]t is significant that [a particular book] does not simply refer to same-sex marriage as an existing practice. Instead, it presents acceptance of same-sex marriage as a perspective that should be celebrated."

The *Mahmoud* court clearly hinged coercion on the difference between passive exposure and active instruction, saying "seeing objectionable conduct alone is not actionable under the First Amendment. Further, the Court pointed out that the school board in *Mahmoud* had encouraged teachers to reinforce certain viewpoints, and the Court saw this as a clear step beyond "mere exposure" which has traditionally been allowed. S.B. 10's passive poster

[7] No. 24-297, 2025 WL 1773627 (U.S. Aug. 12, 2025)
[8] Pacer Filing: Civil Action No. 5:25-cv-00756. Plaintiff's Motion for Preliminary Injunction Pg. 7
[9] *Mahmoud v. Taylor*, No. 24-297, 2025 WL 1773627 (U.S. Aug. 12, 2025) Brief of Resp. 12.18.24 Pg. 10

displays of the Ten Commandments is clearly distinguishable as Plaintiffs likely know very well.

CONCLUSION AND PRAYER

Accordingly, Texas Values urges this Court to deny the Plaintiff's motion for a preliminary injunction against S.B. 10 in order to uphold and apply a modern Establishment Clause analysis as prescribed by the U.S. Supreme Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2025, I electronically filed the foregoing Brief of Amicus Curiae Texas Values using the CM/ECF system. Counsel for all parties to the case are registered users and will be served by the CM/ECF system.

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