COMMONWEALTH OF KENTUCKY
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OAG 25-02

Subject:

1. May the General Assembly restore a Ten Commandments monument to the Capitol grounds without violating the Establishment Clause of the First Amendment?

2. May the General Assembly direct public schools in Kentucky to display a copy of the Ten Commandments in classrooms?

Requested by: Clinton J Elliot, Attorney, on behalf of former State Representatives Claudia and Tom Riner, former House Speakers Jody Richards and Greg Stumbo, and the following 77 current Kentucky State Senators and State Representatives[1]:

State Senators

President Robert Stivers, Dist. 25
Sen. Lindsey Tichenor, Dist. 6
Sen. Shelley Funke Frommeyer, Dist. 24
Sen. Amanda Mays Bledsoe, Dist. 12
Sen. Robin L. Webb, Dist. 18
Sen. Gary Boswell, Dist. 8
Sen. Danny Carroll, Dist. 2
Sen. Donald Douglas, Dist. 22
Sen. Greg Elkins, Dist. 28
Sen. Rick Girdler, Dist. 15
Sen. Jimmy Higdon, Dist. 14
Sen. Scott Madon, Dist. 29
Sen. Stephen Meredith, Dist. 5
Sen. Robby Mills, Dist. 4
Sen. Matt Nunn, Dist. 17

State Representatives

Speaker David W. Osborne, Dist. 59
Rep. Jennifer Decker, Dist. 58
Rep. Emily Callaway, Dist. 37
Rep. Deanna Gordon, Dist. 81
Rep. Kim King, Dist. 55
Rep. Savannah Maddox, Dist. 61
Rep. Candy Massaroni, Dist. 50
Rep. Marianne Proctor, Dist. 60
Rep. Felicia Rabourn, Dist. 47
Rep. Nancy Tate, Dist. 27
Rep. Shane Baker, Dist. 85
Rep. Adam Bowling, Dist. 87
Rep. Josh Branscum, Dist. 83
Rep. Steve Bratcher, Dist. 25
Rep. Josh Bray, Dist. 71

[1] Current Senators and Representatives are listed in the order reflected in the letter requesting this opinion.

Sen. Steve Rawlings, Dist. 11
Sen. Aaron Reed, Dist. 7
Sen. Craig Richardson, Dist. 3
Sen. Brandon Smith, Dist. 30
Sen. Brandon J. Storm, Dist. 21
Sen. Stephen West, Dist. 27
Sen. Phillip Wheeler, Dist. 31
Sen. Gex Williams, Dist. 20
Sen. Mike Wilson, Dist. 32
Sen. Max Wise, Dist. 16
Sen. Julie Raque Adams, Dist. 36

Rep. Josh Calloway, Dist. 10
Rep. Steven Doan, Dist. 69
Rep. Ryan Dotson, Dist. 73
Rep. Daniel Elliott, Dist. 54
Rep. Daniel Fister, Dist. 56
Rep. Patrick Flannery, Dist. 96
Rep. Chris Freeland, Dist. 6
Rep. Chris Fugate, Dist. 84
Rep. Jim Gooch, Jr., Dist. 12
Rep. Peyton Griffee, Dist. 26
Rep. David Hale, Dist. 74
Rep. Tony Hampton, Dist. 62
Rep. Mark Hart, Dist. 78
Rep. John Hodgson, Dist. 36
Rep. Kim Holloway, Dist. 2
Rep. Thomas Huff, Dist. 49
Rep. Mary Beth Imes, Dist. 5
Rep. DJ Johnson, Dist. 13
Rep. Chris Lewis, Dist. 29
Rep. Scott Lewis, Dist. 14
Rep. Michael Meredith, Dist. 19
Rep. Shawn McPherson, Dist. 22
Rep. Jason Nemes, Dist. 33
Rep. Jason Petrie, Dist. 16
Rep. T. J. Roberts, Dist. 66
Rep. Scott Sharp, Dist. 100
Rep. Tom Smith, Dist. 86
Rep. Walker Thomas, Dist. 8
Rep. Aaron Thompson, Dist. 98
Rep. James Tipton, Dist. 53
Rep. Timmy Truett, Dist. 89
Rep. Bill Wesley, Dist. 91
Rep. Richard White, Dist. 99
Rep. Wade Williams, Dist. 4
Rep. Nick Wilson, Dist. 82
Rep. Kimberly Poore Moser, Dist. 64

Written by: Christopher L. Thacker, General Counsel

Syllabus: 1. Restoring a monument inscribed with the text of the Ten Commandments to the Capitol grounds in recognition of the role that the Ten Commandments have played in the history of our

nation and Commonwealth likely would not violate the Establishment Clause.

2. The General Assembly likely may direct public schools in Kentucky to display a copy of the Ten Commandments in classrooms without violating the Establishment Clause provided that the manner and context of such displays "lack a 'plainly religious,' 'pre-eminent purpose,'"[2] but rather serve to highlight the "undeniable historical meaning"[3] of the text.

Opinion of the Attorney General

Writing on behalf of former State Representatives Claudia and Tom Riner, former House Speakers Jody Richards and Greg Stumbo, and 77 current members of the Kentucky General Assembly, attorney Clinton J Elliot has requested an opinion "on the constitutionality of restoring the Ten Commandments display to the Capitol grounds in Frankfort and in our public schools." That a majority of the current membership of the General Assembly chose to join in this request is clearly indicative of the significance of the issue to the citizens of our Commonwealth. The importance and timeliness of the questions addressed in this opinion motivated the Office of Attorney General to lead a coalition of 17 states in filing an amicus brief before the United States Court of Appeals for the Fifth Circuit in support of a law recently enacted by the state of Louisiana providing for Ten Commandments displays in public school classrooms. *Roake v. Brumley*, No. 24-30706 (5th Cir. filed Nov. 12, 2024).

As set forth in that brief, and as further discussed below, judicial decisions striking down previous Kentucky statutes providing for the display of the Ten Commandments were firmly grounded on the now repudiated Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In place of the *Lemon* factors, the Supreme Court has since adopted an Establishment Clause analysis that is focused on "the nature of the monument" and "our Nation's history." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion). More recently, the Court has expressly directed that "the Establishment Clause must be interpreted by reference to historical practices and understandings" and "accord with history and faithfully reflect the understanding of the Founding Fathers." *Kennedy v. Bremerton School District*, 597 U.S. 507, 535–36 (2022) (cleaned up). Under such an analysis "focused on original meaning and history," *id.* at 536, public displays of the Ten Commandments on government property will likely be found to comport with the Establishment Clause absent evidence that a display was erected for a primarily religious reason, rather than to acknowledge the historical significance of the text.

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[2] *Van Orden v. Perry*, 545 U.S. 677, 691 n.11 (2005) (citation omitted).
[3] *Id.* at 690.

1. The restoration of a passive monument inscribed with the text of the Ten Commandments to the Capitol grounds likely would not violate the Establishment Clause.

A Ten Commandments monument was displayed on the grounds of the Kentucky State Capitol from 1971 until 1980 or so. It was removed at that time to make room for construction on the grounds. In 2000, Governor Patton signed Senate Joint Resolution 57, which ordered the Department for Facilities Management to display the monument near the floral clock located on the West Lawn of the Capitol grounds. This prompted a lawsuit by the American Civil Liberties Union ("ACLU") in the United States District Court, Frankfort Division. The Court granted the ACLU a permanent injunction because it found the law violated the Establishment Clause. *Adland v. Russ*, 107 F. Supp. 2d 782 (E.D. Ky. 2000). In doing so, the Court applied the *Lemon* test and permanently enjoined the state defendant from applying the law to "relocat[e] the 'Ten Commandments Monument' to the location on the Capitol grounds near the floral clock." *Id.* at 784–87.

The Sixth Circuit affirmed, in a 2–1 opinion. 307 F.3d 471 (6th Cir. 2002). That opinion again expressly applied the *Lemon* test. *Id.* at 479. While the appellate court recognized the criticisms of *Lemon*, it held that "we are an intermediate federal court and are bound to follow this test until the Supreme Court explicitly overrules or abandons it." *Id.* The Supreme Court denied the petition for writ of certiorari filed on behalf of the Commonwealth, leaving the Sixth Circuit's ruling in place. *Russ v. Adland,* 538 U.S. 999 (2003).

In 2005, however, the U.S. Supreme Court decided *Van Orden v. Perry*. There, a plurality held that "the First Amendment allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds." 545 U.S. at 681. Based upon the Court's description of it, that Texas's monument appears substantively identical to the one that was previously displayed on the Capitol grounds here in Kentucky. The Supreme Court found that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Id.* at 686. Justice Breyer provided the fifth vote and concurred in the judgment. *Id.* at 698. He found it important that Texas's display "has stood apparently uncontested for nearly two generations." *Id.* at 704.

In 2022, the Supreme Court decided *Kennedy v. Bremerton School District*, 598 U.S. 507 (2022), in which it concluded it had "long ago abandoned *Lemon*." *Id.* at 534. In its place, the Court instructed that historical practice and understanding should guide the Establishment Clause analysis. *Id.* at 535. Relevant here, the *Kennedy* decision completely undermines the reasoning of both the district court decision and the Sixth Circuit's opinion in *Adland v. Russ*. Accordingly, a federal court reviewing the same issue today would apply *Kennedy*'s history-focused test.

As this Office explained in a recent amicus brief, the weight of historical evidence in favor of public displays of the Ten Commandments is significant:

> "[A]cknowledgements [on public property] of the role played by the Ten Commandments in our Nation's heritage are *common throughout America*." [*Van Orden,* 545 U.S. at 688] (emphasis added). In fact, the Court noted that the Ten Commandments are displayed several places in its own building. The Decalogue appears with Moses in the Supreme Court's "own Courtroom"; it "adorn[s]" the gates on both sides of the Courtroom and the "doors leading into the Courtroom"; and "Moses . . . sits on the exterior east facade of the building holding the Ten Commandments tablets." *Id.* And the Supreme Court's building is no exception when compared to other government buildings in our Nation's capital. *Id.* at 689 ("Similar acknowledgements can be seen throughout a visitor's tour of our Nation's Capital."). The Supreme Court later affirmed that "[i]n *Van Orden* and *McCreary*, no Member of the Court thought that these depictions [of the Ten Commandments] are unconstitutional." [*American Legion v. American Humanist Association*, 588 U.S. 19, 53 (2019)].[4]

Accordingly, federal courts faced with the question today under a newly passed Kentucky law would likely hold that restoration of the Ten Commandments monument to the Capitol grounds would not violate the First Amendment.

2. The General Assembly may likely direct public schools in Kentucky to display a copy of the Ten Commandments in classrooms without violating the Establishment Clause provided that the manner and context of such displays highlight the "undeniable historical meaning" of the Ten Commandments.

In 1978, the Kentucky General Assembly enacted House Bill 156, which was codified as KRS 158.178. That statute directs "the Superintendent of Public Instruction" "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." The law further specifies that such displays are to "be sixteen

[4] Brief for Amici Curiae Kentucky, Alabama, Arkansas, Florida, Idaho, Iowa, Indiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia, *Roake v. Brumley*, No. 24-30706, p. 10-11 (5th Cir.), ECF No. 100 (herein after "Amicus Brief").

(16) inches wide by twenty (20) inches high" and accompanied by a notation "[i]n small print below the last commandment" explaining "the purpose of the display, as follows: '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.'"

In a per curiam decision, the United States Supreme Court summarily held that KRS 158.178 violated the Establishment Clause. *See Stone v. Graham*, 449 U.S. 39 (1980). While the Supreme Court has not specifically revisited the precise question of a Ten Commandments display in the public-school setting since abandoning the *Lemon* test for the history and tradition analysis reflected in *Van Orden* and *Kennedy*, should the General Assembly choose to again provide for the display of the Ten Commandments for secular historical and educational purposes, such legislation would likely survive constitutional scrutiny.[5]

Just as the Sixth Circuit's holding in *Russ v. Adland*, the per curiam opinion in *Stone v. Graham* rested firmly on the now abandoned *Lemon* analysis. This Office elaborated on this point in the amicus brief filed in support of Louisiana's more recent Ten Commandments law:

> From beginning to end, the Court applied *Lemon*—in particular, its first prong. *Stone*, 449 U.S. at 40–43. *Stone* can be read no other way. As the Court summarized at the top of its decision: "We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular purpose, and is therefore unconstitutional." *Id*. at 41. So *Stone* was all about—and only about—*Lemon*.
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> In applying *Lemon*, *Stone* rejected Kentucky's "'avowed' secular purpose," expressed through the statutorily required statement at the bottom of each Ten Commandments display. *Id*. The Court summarily declared that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." *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

[5] Significantly, even before *Lemon*'s abrogation, a clear statement of legislative purpose should be accepted as sufficient evidence of a secular purpose. *See Wallace v. Jaffree*, 472 U.S. 38, 74–75 (1985) (O'Connor, J., concurring in judgment) (stating the *Lemon*-era standard: "[i]f a legislature expresses a plausible secular purpose," "courts should generally defer").

> 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.[6]

Accordingly, although the Supreme Court has not specifically stated that *Stone* is overruled, the decision unmistakably rests on a mode of analysis that the Supreme Court has abrogated. It likely follows that while the ultimate outcome of any litigation involving a new statute providing for the display of the Ten Commandments in Kentucky's classrooms may vary depending on the specific provisions and requirements of any new law, the analysis will look very different than that of the *Stone* opinion. Rather than rely on the *Lemon* test, the courts will now look to "the nature of the [display]," *Van Orden* at 686, and apply the history-focused test mandated by the Supreme Court in *Kennedy*. Under this corrected constitutional analysis, any statute that clearly articulates a valid secular, educational purpose would likely be upheld notwithstanding the ruling in *Stone*.

As the Office explained, the plurality opinion in *Van Orden* clearly reflects just how limited *Stone*'s continuing validity is, even in the context of public-school classrooms.

> [T]he *Van Orden* plurality highlighted 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 wrote off *Stone* as a case in which the displays contained not even a hint of a secular purpose. *See id.* That can only be a rare circumstance. After all, in nearly the same breath, the *Van Orden* plurality held that "the Ten Commandments have an undeniable historical meaning" and that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690.

Accordingly, provided that any new law directing the display of the Ten Commandments in the Commonwealth's classrooms recognizes the "historical

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[6] Amicus Brief, p. 5-6.

significance" that the Ten Commandments have "as one of the foundations of our legal system," the law would likely be upheld. *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 53 (2019).

The Louisiana statute at issue in *Roake v. Brumley* offers one model for such legislation, though by no means the only constitutionally permissible one. *See* La. Rev. Stat. § 17:2124. In particular, the Louisiana statute provides flexibility to local school districts to determine the exact format of displays of the Ten Commandments, requires a robust three-paragraph "context statement" providing discrete examples of the Ten Commandments being "a prominent part of American public education for almost three centuries," and permits the display of other historical documents alongside the Ten Commandants. While none of these features are necessarily required to ensure the constitutionality of the statute, they clearly demonstrate the secular, educational purpose of the displays.

Finally, the kind of display envisioned by the requestors is passive. As explained in the letter requesting this opinion, "the display is not intended to require participation." As such, it is not likely that a court reviewing a challenge to a new law providing for the display of the Ten Commandments in public schools would find a constitutional violation based on any coercive impact. As Justice Gorsuch wrote for the Court in *Kennedy*: "Of course, some will take offense to certain forms of speech [] they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But '[o]ffense ... does not equate to coercion.'" 597 U.S. at 538–39 (citing *Town of Greece v. Galloway*, 572 U.S. 565, 589 (2014) (plurality opinion)).

Conclusion

In the years since the last litigation involving public displays of the Ten Commandants within the Commonwealth, the Supreme Court has abandoned the misguided *Lemon* test and clarified that the controlling analysis in all such cases is "that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Kennedy*, 597 U.S. at 510. Specifically, in *Kennedy* the Court explained what those practices and understandings are—namely, "the hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.* at 537; *accord Shurtleff v. City of Boston*, 596 U.S. 243, 285–87 (2022) (Gorsuch, J., concurring in the judgment). Moreover, under the analysis mandated by *Kennedy*, Establishment Clause plaintiffs now bear "the burden" of "proving that th[e] facts align with a historically disfavored establishmentarian practice." *Firewalker-Fields v. Lee*, 58 F.4th 104, 122 n.7 (4th Cir. 2023)

This poses a significant hurdle for any plaintiff challenging a Ten Commandments display in any public space, as "[n]o one at the time of the founding

is 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) (citation omitted). Thus, the Commonwealth has considerable latitude in deciding whether and how to draw attention to the historical significance and influence of the Ten Commandments without offending the Establishment Clause.

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