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 of 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 of 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; Austin 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
No. 5:25-CV-756

BRIEF OF AMICI CURIAE SENATOR TED CRUZ, SPEAKER OF THE HOUSE OF REPRESENTATIVES MIKE JOHNSON, AND CONGRESSMAN CHIP ROY, ET AL., IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 25-50695

NATHAN, ET AL.,

Plaintiffs-Appellees,

v.

ALAMO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Introduction and Interest of Amici Curiae

Amici curiae[1] are 46 members of the United States Congress and are individually named in the Appendix to this brief. Amici wish to preserve the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life. . . ." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). As elected representatives of "a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), Amici participate in the governance of this Nation under the watchful eyes of Moses—the central and only full-frontal frieze among the lawgivers adorning the House Chamber—and pass under the words "In God We Trust" and "Annuit Coeptis" (God Favors Our Undertakings) when entering the Senate Chamber. We may seek divine wisdom as we perform our duty of representing the American people in the Capitol Prayer Room, which also contains the inscription, "Preserve me, O God: for in thee do I put my trust," from Psalm 16:1. And when the United States Supreme Court hears a case challenging a law that we passed, it does so once again under the eyes of Moses, this time holding the tablets bearing the Ten Commandments, both inside the courtroom and on the building's exterior. The tablets themselves adorn the doors leading into the courtroom where the highest level of judicial power under our Constitution is exercised.

[1] Pursuant to Rule 29(a)(4)(E), undersigned counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation and submission of this brief.

Plainly, our Nation's history and tradition acknowledge Moses as a lawgiver and the Ten Commandments as a historical foundation of our system of laws. *See Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 53 (2019). All three branches of government "have recognized the role the Decalogue plays in America's heritage," and public displays of the Ten Commandments "bespeak the rich American tradition of religious acknowledgments," *Van Orden v. Perry*, 545 U.S. 677, 689, 690 (2005) (plurality op.). These acknowledgments are on display for any visitor to Washington, D.C. to see, including schoolchildren. And "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America." *Id.* at 688. Texas acknowledged this history with a monument on the grounds of the State Capitol, and it defended the constitutionality of that monument all the way to the Supreme Court. *Id.* Texas once again wishes to acknowledge this history. This time, it has chosen to do so by reminding Texas students of the importance of this fundamental foundation of both U.S. and Texas law through requiring the posting of the Ten Commandments in public schools. *See* Tex. Educ. Code § 1.0041. Louisiana has done the same. *See* La. Stat. Ann. § 17:2124; *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025). And with the long overdue overruling of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), both States should legally be able to do so.

The contrary conclusions by the district court in this case, and by a panel of this Court in *Roake*, are both alarming and stuck in a *Lemon*-flavored past. In our view, they threaten the tradition of public acknowledgment of our country's religious heritage and the foundation of our laws—both on the merits, and by entertaining the

Plaintiffs' claims based on an injury merely amounting to offense to a poster they haven't even seen yet. Amici are concerned that the interpretation of the Establishment Clause and Article III standing doctrine advocated by Appellees would jeopardize federal displays that incorporate religious words and images, including several in the U.S. Capitol, and thereby disrespect the shared history and values those displays commemorate. The decisions also threaten to disrupt the proper balance between the judicial and legislative branches of government. And as members of Congress, we are particularly concerned when the unelected judiciary usurps government power the Constitution reserves for the duly elected representatives of the people.

As Justice Gorsuch warned in *American Legion*, if individuals "could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it . . . Courts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves." 588 U.S. at 80–81 (Gorsuch, J., concurring). If mere "offense" suffices for standing to challenge a law, any number of legitimate legislative actions could be held up for years in litigation, which is obviously of concern to Amici. The Court should take this opportunity to clarify that more is demanded to satisfy Article III's requirements to invoke judicial authority, even in the Establishment Clause context.

ARGUMENT

The district court relied heavily on a panel of this Court's decision in *Roake*, a case involving a similar challenge to the recent Louisiana law also requiring the Ten

Commandments to be posted in public school classrooms. *Nathan v. Alamo Heights Indep. Sch. Dist.*, No. SA-25-cv-00756-FB, 2025 WL 2417589 (W.D. Tex. Aug. 20, 2025). The district court's analysis of subject-matter jurisdiction was brief and focused mostly on ripeness. Even though the district court acknowledged that Plaintiffs' challenge to the Texas law preceded Plaintiffs' encounter with any Ten Commandments display, the district court determined that Plaintiffs nevertheless have standing and their claims are ripe because they challenge the minimum requirements for the display as outlined in the statute. *Id.* at *14.

Roake, the decision relied on by the district court here, and which has already been vacated by this en banc Court, held that the Plaintiffs had standing because "[s]tudents will be subjected to unwelcome displays of the Ten Commandments for the entirety of their public school education." 141 F.4th at 636. In other words, because the students will have to see something they disagree with or that is "unwelcome," that suffices for constitutional injury. *Id.* Puzzlingly, the *Roake* panel held that the Plaintiffs had standing because they would *observe* something that *offended* them, *id.*, yet denied that Plaintiffs were not "mere 'offended observers'" because they would be "directly affected" by that offensive observation. *Id.* at 637. As people are generally "directly affected" by their own observation, this weak distinction does nothing to cabin the broad theory of standing embraced by the panel. As explained below, both the district court's decision in this case and the panel decision in *Roake* are wrong and the theory of standing they embrace is inconsistent with Article III of the Constitution.

I. Permitting Offended Observers to Challenge Government Actions Endangers the Separation of Powers.

Standing may seem to some like an overly technical legal issue. But as this Court knows, proper observation of the limits on standing, and on the federal court's jurisdiction, should be of concern to all Americans because it strikes directly at the heart of the separation of powers. And the separation of powers—or the idea that the three branches of our government must adhere to their constitutionally prescribed spheres when exercising government power—is fundamental to our system of government. As Members of Congress, we are particularly concerned when the unelected judiciary usurps powers that are meant to be exercised by the people's duly elected representatives. As we explain below, permitting individuals to challenge government actions merely because they disagree with them or are offended by them violates this principle because without a concrete harm to a plaintiff's legally protected interest, courts are deciding merely generalized or political grievances that are better left to the legislative branch to address.

A. Standing doctrine requiring a concrete injury to a legally protected interest protects against the unelected judiciary exercising power the Constitution does not grant.

The Constitution limits the judicial power to deciding "Cases" and "Controversies." U.S. Const. art. III § 2. Federal courts may decide only those cases and controversies that the Constitution and Congress have authorized them to hear. And "the irreducible constitutional minimum of standing contains three elements": (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury-in-fact test requires a plaintiff to prove "an invasion

of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* (cleaned up).

"The law of Article III standing," the Supreme Court has said, "is built on separation-of-powers principles, [and] serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Standing questions "must be answered by reference to the Art[icle] III notion that federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). When "a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury . . . serves the function of insuring that such adjudication does not take place unnecessarily." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

By contrast, "[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id.* at 222. And without standing requirements, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Unless a plaintiff has a concrete, particularized injury to a legally protectable interest, his complaint is merely a "generalized grievance," which is nonjusticiable by

federal courts. A litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–574; *Allen,* 468 U.S. at 754 ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"); *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923) ("The party who invokes the [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.").

B. It has long been established that mere disagreement with government action is not a concrete injury for standing purposes.

In general, the Supreme Court has been adamant that disagreement with government action is insufficient to satisfy the concrete-injury requirement. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). That is why a plaintiff who challenges a government action that does not directly affect him will not have standing—the claimed injury amounts to nothing more than disapproval. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (third party lacks standing to challenge the validity of a death sentence imposed on a capital defendant who did not appeal).

Nor does "stigmatic injury" or "denigration" satisfy the concrete-injury requirement. *See, e.g.*, *Allen*, 468 U.S. 737 (plaintiffs challenging tax-exempt status of racially discriminatory schools lacked standing based on stigmatic injury). Put simply, the "psychological consequence" of "observation of conduct with which one disagrees," even regarding religion, is "not an injury sufficient to confer standing under Art. III." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). The "Supreme Court has long rejected allegations of offense, fear, and stigma as sufficient to establish standing." *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1337 (11th Cir. 2020) (Newsom, J., concurring).

This is also consistent with a historical understanding of Article III. J. Davis & N. Reaves, *Fruit of the Poisonous* Lemon *Tree: How the Supreme Court Created Offended-Observer Standing, and Why It's Time for It To Go*, 96 Notre Dame L. Rev. Reflection 25, 35–36 (2020) ("Under a historical understanding of Article III," "psychological offense resulting merely from seeing [challenged government] action does not qualify" as "concrete harm").

Despite this, courts have permitted plaintiffs to challenge government action in the Establishment Clause context just because the plaintiff disagrees with, or is offended by, religious content or symbols. But as Justice Thomas has observed, "[o]ffended observer standing appears to warp the very essence of the judicial power vested by the Constitution. Under Article III, federal courts are authorized 'to adjudge the legal rights of litigants in actual controversies,' not hurt feelings." *City of*

Ocala, Florida v. Rojas, 143 S. Ct. 764, 767 (2023) (Thomas, J., dissenting from denial of certiorari) (quoting *Valley Forge*, 454 U.S. at 471).

II. Decisions Permitting Offended Observer Standing in Establishment Clause Cases Are No Longer Good Law.

A. Offended observer standing is rooted in the Supreme Court's now-overruled decision in *Lemon v. Kurtzman*.

If the Supreme Court has generally disallowed offense to suffice for constitutional injury, why have courts seemingly given it a free pass in the Establishment Clause context, as the district court did here? "Lower courts invented offended observer standing for Establishment Clause cases in the 1970s in response to [the Supreme Court's] decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." *Am. Legion*, 588 U.S. at 84 (Gorsuch, J., concurring in the judgment). *Lemon* announced a three-part test for determining the constitutionality of state action in the context of the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613 (citations omitted). And lower 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. *See, e.g., Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

By defining an Establishment Clause offense so broadly, *Lemon* launched thousands of lawsuits challenging everything from war memorials and legislative prayers to holiday decorations and Ten Commandments monuments, allegedly because they

constitute an "establishment of religion" in violation of the First Amendment. U.S. Const. am. I. Infamously, the Supreme Court's decision in *Lynch*, 465 U.S. 668, established the so-called "Reindeer Rule," which was that public holiday displays could escape constitutional downfall under *Lemon* so long as enough reindeer and other "secular" symbols of the Christian holiday of Christmas accompanied angels or a nativity. The Supreme Court added further confusion by embracing an offshoot of the *Lemon* test called the "endorsement" test, which held that the *Lemon* test was not met if the government action was anything that a "reasonable observer" might perceive as "endorsing" religion. *Cnty. of Allegheny v. Am. Civ. Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 620–621, (1989) (opinion of Blackmun, J.); *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment).

Unsurprisingly, "these tests 'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." *Kennedy*, 597 U.S. at 534 (citation omitted). But courts continued to apply them. Over the years, then, *Lemon* opened courthouse doors to anyone who perceived and was offended by an "endorsement" of religion. Under *Lemon*, instances of public commemoration of the country's religious foundations (including the examples in the U.S. Capitol and the Supreme Court listed above in the Introduction) were at risk if any offended observer challenged them. The Supreme Court's per curiam decision in *Stone v. Graham* enjoining a Kentucky law requiring the display of the Ten Commandments in public school classrooms relied on the *Lemon* test to conclude the passive displays donated by others violated the Establishment Clause, even though the Court acknowledged that the displays were not "integrated into the school

curriculum," were not "read aloud," and were a "relatively minor encroachment[] on the First Amendment." 449 U.S. 39, 42 (1980). But *Lemon* is no more, and *Stone*'s foundation has crumbled. That changes the game for the similar Texas and Louisiana laws, and for Establishment Clause jurisprudence itself.

B. *Kennedy v. Bremerton School District* overruled *Lemon* and reshaped Establishment Clause claims.

After decades of *Lemon*'s repeated reanimation like a "ghoul in a late-night horror movie," *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment), and its continued chaotic application by lower courts, the Supreme Court mortally wounded it in *American Legion* and finally "killed and buried" it in *Kennedy*, *id. See Am. Legion*, 588 U.S. at 49-52; *Kennedy*, 597 U.S. at 534-35. In doing so, the Supreme Court reshaped claims under the Establishment Clause. Post-*Kennedy*, courts should no longer look for religious purpose, perceived endorsement or advancement of religion, or entanglement. *Kennedy* "put to rest any question about *Lemon*'s vitality." *City of Ocala*, 143 S. Ct. at 765 (Gorsuch, J., statement respecting the denial of certiorari). "The Court has since made plain, too, that the Establishment Clause does not include anything like a 'modified heckler's veto, in which . . . religious activity can be proscribed" based on 'perceptions' or 'discomfort.'" *Kennedy*, 597 U.S. at 534 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)). Rather, "[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,' and

"'faithfully reflect the understanding of the Founding Fathers.'" *Id.* at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576, 577 (2014)).

Rather than prohibiting any public acknowledgment of religion resulting in mere offense, "coercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment." *Id.* at 537. Thus, "consistent with a historically sensitive understanding of the Establishment Clause," the government may not "make a religious observance compulsory," "coerce anyone to attend church," or "force citizens to engage in a formal religious exercise." *Id.* (citations omitted). Acknowledging the role religion played in our country's founding and our system of laws is consistent with practices at the time of the Founding and ratification of the First Amendment. *Am. Legion*, 588 U.S. at 61-63. While that may offend some, the Supreme Court has made it clear: "offense does not equate to coercion," and therefore does not violate the Establishment Clause. *Kennedy*, 597 U.S. at 539 (citations omitted).

C. The district court and the *Roake* panel erred by finding standing despite the impact *Kennedy* had on Establishment Clause claims.

By evaluating the Plaintiffs' standing under *Lemon*-era standing doctrine, the district court and the *Roake* panel ignored *American Legion* and *Kennedy* and the sea-change they affected on Establishment Clause jurisprudence, which clearly affects standing doctrine as well. The *Roake* panel quickly brushed Louisiana's standing arguments aside because it claimed that the notion that "offended observer" standing is wrong is based only on "non-binding, minority-view Supreme Court opinions,"

and *Kennedy* did not "mention standing." *Roake*, 141 F.4th at 632, 637. But that is wrong. *Kennedy* is a binding majority opinion, and it makes clear that mere offense at religious content or symbols is not a legally protected interest under the Establishment Clause. Thus, it follows from the Court's opinion that any alleged injury sufficing to provide standing under the Establishment Clause must include coercion to engage in religious activity. Even if *Kennedy* did not "mention standing," *id.* at 637, by redefining what legal interest the Establishment Clause protects—religious coercion rather than mere offense at religion or perceived endorsement—*Kennedy* plainly affected standing doctrine, which requires a concrete injury to a legally protected interest. *Lujan*, 504 U.S. at 560. It is therefore untrue that "unwanted exposure to government-sponsored religious displays can . . . violate a plaintiff's First Amendment rights" unless the plaintiff can show the display coerces religious exercise or devotion. *Roake*, 141 F.4th at 632. *Roake* even cites *Lynch*, the "Reindeer Rule" case, in support of that proposition (along with many other *Lemon*-era precedents). *Id.* at 632-33. Given the *Kennedy* Court's analysis of what may truly "establish religion" in violation of the First Amendment, it is highly unlikely that the Court would find that the nonsensical *Lemon*-based examination of the number of reindeer near a creche as the key to a Christmas display's constitutionality, much less that an offense caused to an observer of a reindeer-less Christmas display would give rise to a constitutional injury. That is why Justice Gorsuch stated that, post-*Kennedy*, he "expect[s] lower courts will recognize that offended observer standing has no more foundation in the law than the *Lemon* test that inspired it." *City of Ocala,* 143 S. Ct. at 765 (Gorsuch, J., statement respecting the denial of certiorari). The district court

and the *Roake* panel erred by disregarding *Kennedy*'s clear repudiation of *Lemon* and offense-based Establishment Clause violations.

Plaintiffs here cannot allege that the passive display of the Ten Commandments in school classrooms forces children to participate in religious practices or attend church, just as Coach Kennedy's personal prayer at the fifty-yard line did not force children to participate. Merely being offended by the display's presence because of the family's disagreement does not amount to coercion. And as the Supreme Court has now held, the "legally protected interest" the Establishment Clause protects against, and which therefore must underlie any claim of injury giving rise to standing, is religious coercion. *See Kennedy*, 597 U.S. at 537, 539.

Further, Plaintiffs' allegation that because of the passive display, students "will be pressured to observe, meditate on, venerate, and follow this scripture and to suppress expression of their own religious beliefs and backgrounds at school," *Roake*, 141 F.4th at 637, is purely speculative, which also does not meet the injury-in-fact requirement. *See Clapper*, 568 U.S. at 409 ("threatened injury must be *certainly impending* to constitute injury in fact, and . . . [a]llegations of *possible* future injury are not sufficient." (citation omitted)). First, Plaintiffs have never even come into contact with the posters, as they were never posted in their school before the district court enjoined the Defendants, so Plaintiffs cannot say they are being "pressured" or coerced now. And second, neither the Texas nor the Louisiana laws require teachers or students to say a single word about the posters, nor do they make them part of the curriculum, so there is no reason to believe any student will be pressured to abandon their own beliefs or "venerate" the Ten Commandments just because they are

posted on the wall in the classroom at some point in the future. *See id.* at 412 (because the challenged statute "at most authorizes—but does not mandate or direct—the surveillance that respondents fear, respondents' allegations are necessarily conjectural.").

D. The Court should take this opportunity to correct this Circuit's Establishment Clause standing doctrine and realign it with Article III and binding precedent.

Even if *Kennedy* somehow did not affect standing, its different perspective on Establishment Clause claims justifies embracing a fresh perspective on standing. And there is nothing other than *Lemon*-era circuit precedent standing in the way. Though the Supreme Court has made several non-precedential "drive by" rulings adjudicating Establishment Clause claims without questioning offended observer standing, it never embraced it. *Am. Legion*, 588 U.S. at 82- 83 (Gorsuch, J., concurring in the judgment). In fact, it expressly repudiated it in *Valley Forge*. 454 U.S. at 485; *see also City of Ocala*, 143 S. Ct. at 767 (Thomas, J., dissenting from denial of certiorari) ("*Valley Forge* could not have been clearer that a relaxed standing doctrine 'does not become more palatable when the underlying merits concern the Establishment Clause.'" (quoting *Valley Forge*, 454 U.S. at 489). Thus, there is no precedent binding on this en banc Court which would tie its hands on limiting offended observer standing.

Further, many judges, including some on this Court, have often pointed out that offended observer standing is an aberration that is inconsistent with Article III. *See Freedom From Religion Foundation, Inc. v. Mack*, 49 F.4th 941, 949 (5th Cir.

2022) (Smith, J.) ("[T]he law of Establishment Clause standing is hard to reconcile with the general principle that standing is absent where a plaintiff has only a generalized grievance shared in substantially equal measure by all or most citizens" (internal quotation marks omitted)); *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (Easterbrook, C. J.) ("[H]urt feelings differ from legal injury"); *Barnes-Wallace v. San Diego*, 530 F.3d 776, 795 (9th Cir. 2008) (Kleinfeld, J., dissenting) ("[B]eing there and seeing the offending conduct does not confer standing"); *Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007) (DeMoss, J., specially concurring) (explaining that offended observer standing "opens the courts' doors to a group of plaintiffs who have no complaint other than they dislike any government reference to God"); *Am. Civ. Liberties Union of Ohio Foundation, Inc. v. Ashbrook*, 375 F.3d 484, 497 (6th Cir. 2004) (Batchelder, J., dissenting) (explaining that standing based on "unwelcome contact" with governmental religious displays is "inconsistent with . . . *Valley Forge*"); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 684–685 (6th Cir. 1994) (Guy, J., concurring) (explaining that offended observer standing "establishe[s] . . . a class of 'eggshell' plaintiffs of a delicacy never before known to the law"); *Penkoski v. Bowser*, 486 F. Supp. 3d 219, 231 (D.D.C. 2020) (McFadden, J.) (explaining that offended observer standing "cannot be squared with" *Valley Forge*).

Even if the Court agrees with the *Roake* panel's claim that *Kennedy* did not touch standing, there is no reason why the Court should continue down the *Lemon*-inspired path of permissive standing for Establishment Clause plaintiffs when *Lemon* is no longer good law and there is no binding Supreme Court precedent requiring it. The

Court should take this opportunity to right the ship and bring the Court's standing doctrine under the Establishment Clause into alignment with standing doctrine for all other types of claims. Based on Justice Gorsuch and Justice Thomas's explicit statements since *American Legion*, and the Court's opinion in *Kennedy*, there should be no doubt that the Supreme Court would support such a decision.

III. Even if the Plaintiffs Had Standing, Their Establishment Clause Claim Fails on the Merits in Light of *Kennedy*.

American Legion and *Kennedy* show that the Plaintiffs' claims fail on the merits, even if the Court agreed with the district court and the *Roake* panel that the Plaintiffs have standing. Those decisions replaced the *Lemon* test that *Stone* relied on with analysis "focused on original meaning and history." *Kennedy*, 597 U.S. at 536. The Establishment Clause "must be interpreted 'by reference to historical practices and understandings.'" *Am. Legion*, 588 U.S. at 61 (quoting *Town of Greece*, 572 U.S. at 576. "'[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" *Kennedy*, 597 U.S. at 536 (quoting *Town of Greece*, 572 U.S. at 577). "Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional." *Am. Legion*, 588 U.S. at 63. After all, "it would be incongruous to interpret the Establishment Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Van Orden*, 545 U.S. at 688 (citation omitted).

As the Supreme Court stated in *Van Orden* when it upheld the Ten Commandments monument at the Texas State Capitol, "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America," and "displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments." 545 U.S. at 688, 689. While *Stone* enjoined a Kentucky law requiring the display in classrooms because it violated the *Lemon* test, that per curiam decision did so without the historical analysis of the practice that current precedent now requires. 449 U.S. 40-42. That history shows a robust tradition of not merely displaying, but *teaching*, the Ten Commandments in public schools. The Louisiana statute recounts some of that history:

> The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1688, *The New England Primer* became the first published American textbook and was the equivalent of a first grade reader. The *New England Primer* was used in public schools throughout the United States for more than one hundred fifty years to teach Americans to read and contained more than forty questions about the Ten Commandments. The Ten Commandments were also included in public school textbooks published by educator William McGuffey, a noted university president and professor. A version of his famous *McGuffey Readers* was written in the early 1800s and became one of the most popular textbooks in the history of American education, selling more than one hundred million copies. Copies of the *McGuffey Readers* are still available today. The Ten Commandments also appeared in textbooks published by Noah Webster in which were widely used in American public schools along with America's first comprehensive dictionary that Webster also published. His textbook, *The American Spelling Book*, contained the Ten Commandments and sold more than one hundred million copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

La. Stat. Ann. § 17:2124(B)(3).

As discussed above, *Kennedy* acknowledged that protection against religious coercion—such as "mak[ing] a religious observance compulsory," "coerc[ing] anyone to attend church," or "forc[ing] citizens to engage in a formal religious exercise," is "consistent with a historically sensitive understanding of the Establishment Clause." 597 U.S. at 537. But as *Kennedy* squarely held, children merely passively observing religious content, without more, is not coercive. Again, "offense does not equate to coercion," and therefore does not violate the Establishment Clause. *Id.* at 539 (citations omitted).

CONCLUSION

The district court's opinion should be reversed and the preliminary injunction vacated.

Respectfully submitted.

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Certificate of Service

On December 1, 2025, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5126 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

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