

APPEAL NO. 26-1829
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONNA CAVE, et al.,
Plaintiffs-Appellees,
THE SATANIC TEMPLE, et al.,
Intervenors-Appellees,

v.

COLE JESTER, Arkansas Secretary of State, in his official capacity
(originally named as Mark Martin and John Thurston),
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Arkansas, Central Division
Case No. 4:18-cv-00342 / Hon. Kristine G. Baker

**BRIEF OF FAMILY COUNCIL AS *AMICUS CURIAE* IN
SUPPORT OF APPELLANTS FOR REVERSAL**

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

For nearly four decades, Family Council has shaped Arkansas public policy by advising legislators, mobilizing citizens, and advancing traditional family values at the State Capitol. Its offices sit two blocks from the Capitol grounds, where the Ten Commandments monument at issue here stands.

This appeal's threshold standing question directly threatens Family Council's work. If offended-observer standing survives in the Eighth Circuit, any ideological objector can hale Arkansas policymakers into federal court to challenge the very legislative and executive decisions that Family Council promotes. That doctrine invites boundless litigation rooted in subjective discomfort, erodes the separation-of-powers principles essential to democratic self-governance, and provides every aggrieved observer a veto over lawful government expression. With no limiting principle, just the threat of litigation could scrub any hint of religion from the public square. Family Council is uniquely positioned to explain why offended-observer standing chills lawful civic participation and why eliminating it is essential to restoring the proper constitutional limits on judicial power.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consented to its filing.

SUMMARY OF ARGUMENT

Article III does not empower federal courts to entertain suits by plaintiffs whose only claimed injury is that they observed something with which they disagree. Plaintiffs here viewed a Ten Commandments monument on the Arkansas Capitol grounds and purportedly felt “isolated and unwelcome.” That is not an Article III injury. The Supreme Court has long held that “psychological consequence[s] presumably produced by observation of conduct with which one disagrees” cannot satisfy Article III’s irreducible requirement of concrete, particularized harm. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982). And injury-in-fact demands a “close relationship to a harm traditionally recognized” at common law. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 440 (2021). Common-law courts did not entertain suits by plaintiffs who claimed hurt feelings from viewing a public symbol they found disagreeable.

Plaintiffs’ claim also fails for want of particularization. Offense at a public display is an objection any passerby could equally assert. If deliberately viewing a monument or re-routing a walk along Capitol grounds suffices for standing, the particularization requirement would cease to function as a meaningful constitutional constraint. Federal courts would become “roving commission[s],” *id.* at 423, empowered to second-guess democratic choices on the strength of nothing more than ideological disagreement—a result that “contravenes our constitutional

structure, Supreme Court precedent, and common sense.” *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 613 (5th Cir. 2026) (Oldham, J., concurring in part).

The district court stated that it was bound by this Court’s decision in *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012), which held that “unwelcome contact” with a monument producing feelings of “exclusion” and “discomfort” was sufficient injury to confer standing. But three intervening Supreme Court decisions—*Spokeo*, *TransUnion*, and *Kennedy*—have left nothing of *Red River Freethinkers*’ doctrinal foundation standing.

Lemon gone, that standing doctrine serves no purpose. And this panel need not wait for en banc action when, as here, superseding Supreme Court authority has undermined the circuit precedent’s foundation. This panel should abandon *Red River Freethinkers* and reverse the judgment below.

ARGUMENT

This appeal can and should be resolved on a threshold question: whether plaintiffs who allege only psychological offense at a government monument have Article III standing. They do not. Standing requirements are structural limits on judicial power, preventing courts from becoming “a vehicle for the vindication of the value interests” of concerned citizens. *Valley Forge*, 454 U.S. at 473 (citation modified).

I. Psychological offense alone cannot confer standing.

(A) Plaintiffs do not have an injury-in-fact. (1) Their alleged injury—feeling “isolated and unwelcome” after observing a government monument—is not *concrete* because psychological offense is not a cognizable harm at common law or under Article III. (2) And Plaintiffs’ injury is not *particularized* because offense at a public display is a complaint any passerby could lodge with equal force—the very definition of a generalized grievance that Article III forbids.

(B) Offended-observer standing also subverts the separation of powers. Article III’s standing requirement ensures that courts resolve genuine disputes rather than opine on policy matters that the Constitution entrusts to the political branches. If any citizen who professes offense at a government display can invoke the judicial power, federal courts become “roving commission[s],” *TransUnion*, 594 U.S. at 423, empowered to second-guess democratic choices. Such a regime hands aggrieved observers a veto over lawful government expression.

A. Plaintiffs fail Article III’s injury-in-fact requirement.

Each plaintiff testified to offense. None testified to injury. Ms. Cave and Ms. Piazza testified that they found the monument “offensive and alienating.” *Cave v. Jester*, No. 4:18-cv-00342, 2026 WL 916187, at *5, *27–29 (E.D. Ark. Mar. 31, 2026). Ms. Robbins stated that “[b]eing on public grounds, [she] was immediately offended.” *Id.* at *29. Mr. Misicko testified simply, “[Y]es, I am offended by that monument.” *Id.* Ms. Stewart “is offended by the Ten Commandments Monument.” *Id.* at *20. But their professed offense is not a concrete injury—it is a policy disagreement dressed up as a legal harm.

Article III demands far more than mere displeasure with the government. A claimed injury must be “concrete”—that is, it must “actually exist” and possess a “real” as opposed to “abstract” quality. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). And concreteness requires a “close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *TransUnion*, 594 U.S. at 440 (2021).

A plaintiff’s alleged injury must also be “particularized,” meaning it must “affect the plaintiff in a personal and individual way” rather than being shared by the citizenry at large. *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Standing is not “an ingenious academic exercise in the conceivable,” but

requires a real-world injury with tangible consequences. *Lujan*, 504 U.S. at 566 (citation omitted).

1. There is no concrete injury.

Since this Court’s decision in *Red River Freethinkers*, the Supreme Court has fundamentally reshaped how courts analyze Article III’s injury-in-fact requirement. The two cases at the forefront of that doctrinal refinement—*TransUnion* and *Spokeo*—confirm that when “assessing concreteness,” courts must ask “whether the asserted harm has a ‘close relationship’ to harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms.” *TransUnion*, 594 U.S. at 417 (quoting *Spokeo*, 578 U.S. at 340–41). That test reflects the constitutional design: the Framers drafted Article III against a common-law backdrop in which the judicial power was limited to disputes involving “concrete” harms of the kind courts had traditionally adjudicated. *Id.* at 422–23.

Nowhere did the district court engage in the historical-analogue inquiry. It simply identified *Red River Freethinkers* as controlling, applied it, and moved on. *Cave*, 2026 WL 916187, at *26–27. But *Red River Freethinkers* never asked whether personal offense at government displays corresponds to any historically cognizable harm—and neither did the district court in its decision below. Had the court done so, the

conclusion would have been inescapable. Although “tangible injuries are perhaps easier to recognize,” *Spokeo*, 578 U.S. at 340, examples of historically recognized “intangible” harms include “reputational harms, disclosure of private information, and intrusion upon seclusion.” *TransUnion*, 594 U.S. at 425. But mere psychological offense at government action was never among the injuries cognizable at common law or in equity. The absence of any historical analogue confirms that such claims fall outside Article III’s grant of judicial power.

The Supreme Court’s earlier decision in *Valley Forge* confirms the conclusion that offended-observer standing fails the Court’s standing inquiry. There, the Court held that plaintiffs who were offended by a government transferring property to a religious college lacked standing because their “psychological consequence” of disagreement with government action did not constitute a cognizable Article III injury. 454 U.S. at 485–86. The Court cautioned that “the psychological consequence[s] presumably produced by observation of conduct with which one disagrees” cannot be equated with the kind of “distinct and palpable” harm required for standing. *Id.* at 485, 488 (citation modified).

Nor is it enough that plaintiffs phrase their disagreement “in constitutional terms.” *Id.* at 485–86. Litigants cannot satisfy Article III by “couch[ing] [a] request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.” *Id.* at 471. This rule exposes the central defect in *Red*

River Freethinkers and the district court’s mechanical adherence to it. By collapsing the standing inquiry into the merits, the court treated Establishment Clause objections as self-validating proof of Article III injury.

Nothing in the text, history, or structure of the Constitution suggests that the Establishment Clause uniquely expands the judicial power to encompass claims of mere psychological discomfort. On the contrary, the Supreme Court “has already expressly rejected ‘offended observer’ standing under the Establishment Clause itself.” *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 82 (2019) (Gorsuch, J., concurring in the judgment) (discussing *Valley Forge*, 454 U.S. at 485); *Valley Forge*, 454 U.S. at 489 (reasoning that “there would be no principled basis for confining [a standing] exception to litigants relying on the Establishment Clause”). There is no concrete harm here. And as the Court put it plainly in *TransUnion*: “No concrete harm, no standing.” 594 U.S. at 417. This Court need go no further.

2. There is no particularization.

Plaintiffs also cannot satisfy the particularization side of the injury-in-fact coin. Trying to dress up their grievance as particular to them, they allege “direct, unwelcome contact” with the monument. *Cave*, 2026 WL 916187, at *26. But *Valley Forge* squarely rejected this theory, too. The plaintiffs in that case similarly learned of the

government action “through a news release” and objected to it. 454 U.S. at 469 Yet the Court held that their claims “amount[ed] to little more than attempts to employ a federal court as a forum in which to air generalized grievances about the conduct of the government.” *Id.* at 483 (citation modified).

Nor does it matter whether the Establishment Clause implicates rights that are “in some way” more “fundamental” than others; the Supreme Court also rejected the notion that Article III’s “burdens diminish as the ‘importance’ of the claim on the merits increases.” *Id.* at 484 (citation omitted). Indeed, “*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.’” *City of Ocala v. Rojas*, 143 S. Ct. 764, 767 (2023) (Thomas, J., dissenting from the denial of certiorari) (quoting *Valley Forge*, 454 U.S. at 489). And simply making a claim under “the Establishment Clause does not provide a special license to roam the country in search of government wrongdoing and to reveal their discoveries in federal court.” *Valley Forge*, 454 U.S. at 487.

That plaintiffs traveled to the Capitol grounds to observe the monument they opposed does not transform their generalized ideological objection into a particularized injury. Just as in *Valley Forge*, plaintiffs “fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological conse-

quence presumably produced by observation of conduct with which one disagrees.” *Id.* at 485.

The Eleventh Circuit recently reached this same conclusion. Two Georgia voters sued the Secretary of State, arguing that the failure to maintain the federal voter list “shook their faith in the electoral process” and “undermined their confidence in Georgia’s electoral process.” *Quinn v. Sec’y of State for Georgia*, 175 F.4th 1309, 1312 (11th Cir. 2026) (citation modified). The Eleventh Circuit held that the voters lacked standing. *Id.* at 1316. Although the voters “attempt[ed] to describe a personal, emotional injury,” the court held that “at [the] core [of] their claim,” the voters were simply objecting “that they are upset.” *Id.* at 1315. Similarly here, bare assurance that a plaintiff is “offended enough” to have standing is incompatible with the Supreme Court’s “longstanding teachings about the limits of Article III.” *Am. Legion*, 588 U.S. at 79, 83 (Gorsuch, J., concurring in the judgment).

Voluntary decisions to alter behavior also cannot particularize an alleged injury. It is therefore of no moment that Ms. Cave and Ms. Piazza rerouted their walk to avoid the monument. *Cave*, 2026 WL 916187, at *5. Those self-directed choices were made in response to their own feelings, not any government compulsion. After all, if offense alone cannot manufacture standing, then surely self-inflicted harm to avoid being offended cannot open the courthouse doors. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013) (rejecting the idea that

litigants can “manufacture standing merely by inflicting harm on themselves” for fear of hypothetical future harm).

In reaching the opposite conclusion, the district court incorrectly relied on *FEC v. Cruz*, 596 U.S. 289, 297 (2022). That case addressed whether a political candidate’s deliberate extension of personal loans to his own campaign—knowing the post-election repayment limit would apply—destroyed traceability. It did *not* hold that ideological objectors may manufacture the very offense they then claim as injury. *Cruz* is a causation case, not a concreteness case, and it did not purport to modify *Valley Forge*’s rule that personal offense cannot satisfy Article III. The legal principle at issue here is not whether plaintiffs caused their own concrete injury in the *Cruz* sense—it is whether psychological offense is the kind of concrete injury that counts at all. It is not.

The undisputed facts confirm that plaintiffs’ alleged injuries are classic generalized grievances, not particularized harms. All individual plaintiffs “learned of the proposed Ten Commandments Monument in connection with news reports” and “opposed the monument proposal” because “they believed it was inconsistent with the ‘separation of church and state.’” *Cave*, 2026 WL 916187, at *19–20. Those plaintiffs then “went to the monument for the purpose of seeing it” and “protest[ing]” it. *Id.* at *19–20, *28.

One plaintiff, Mr. Misicko, is a New Englander who “had no pre-litigation visits to the Capitol grounds except in connection with the

TST's efforts to oppose" the monument. *Id.* at *20. Plaintiffs' opposition predated the monument itself—formed through news reports before installation, then pursued through deliberate visits to protest it. That they sought out their own offense "through their own initiative does not uproot this supposed injury from the category of the general and plant it in the particular." *Quinn*, 175 F.4th at 1315.

These are not plaintiffs who stumbled upon an unwanted display; they are ideological objectors who manufactured a grievance. Their professed offense is precisely the kind of reaction any person who shared their ideological views might equally report. That theory of standing has no limiting principle: "In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends somebody." *Am. Legion*, 588 U.S. at 88 (Gorsuch, J., concurring in the judgment). If every citizen who professes ideological disagreement with a government display can claim standing by simply declaring offense, then the particularization requirement ceases to function as any meaningful constraint on federal jurisdiction.

B. Offended-observer standing inverts the separation of powers and amounts to a heckler's veto.

When any citizen who professes offense at a government display can file a federal lawsuit, government actors face an impossible choice: keep the display and litigate indefinitely or remove it and cede demo-

cratic judgment to the most easily offended constituent. That is not standing doctrine—it is veto by litigation.

Standing doctrine “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*, 568 U.S. at 408. The Framers understood that an unlimited judicial power would undermine democratic self-governance, and Article III’s standing requirement is among the principal safeguards against this danger. *See Raines v. Byrd*, 521 U.S. 811, 820 (1997) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”). (citation modified).

Plaintiffs’ theory of standing “warp[s] the very essence of the judicial power vested by the Constitution” by enabling courts to adjudge “hurt feelings” instead of actual controversies. *Rojas*, 143 S. Ct. at 767 (Thomas, J., dissenting from the denial of certiorari). It transforms courts into “legislatures, responding to social pressures rather than remedying concrete harms, in the process of supplanting the right of the people and their elected representatives to govern themselves.” *Am. Legion*, 588 U.S. at 80–81 (Gorsuch, J., concurring in the judgment). Article III’s standing requirement exists to prevent exactly that transformation—to keep federal courts in the business of resolving legal disputes, not ratifying policy grievances dressed in constitutional clothing.

Plaintiffs’ standing theory undermines the separation of powers in practice. Indeed, its mere existence creates an “ever-looming threat of litigation.” Joseph C. Davis & Nicholas R. 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, 38 (2020). That threat amounts to a heckler’s veto in reverse—not the suppression of private speech, but the suppression of government expression by whoever threatens federal litigation.

If anyone can drag the government into court under such a thin theory of standing, then “governments [will] tear down perfectly constitutional displays to avoid the very real risk of costly litigation.” *Id.* As long as courts are willing to entertain offended-observer lawsuits, executive and legislative actors will feel compelled to scrub the public square of religious memorials and displays “at the first hint of a controversy.” *Id.* Such a dynamic controverts our constitutional design and invites the judicial branch to interfere with the policy discretion the Constitution affords to the political branches.

II. The Court should abandon *Red River Freethinkers* and align circuit doctrine with the Supreme Court.

The district court felt bound by *Red River Freethinkers* and said so explicitly. *Cave*, 2026 WL 916187, at *26–27. There, this Court held that “unwanted contact” with a government monument that produced “feelings of exclusion, discomfort, and anger” was a “sufficient injury” to

confer standing. *Red River Freethinkers*, 679 F.3d at 1023. But subsequent Supreme Court decisions have eliminated the doctrinal premises on which that holding rested. Accordingly, (A) *Red River Freethinkers* no longer states a correct rule of law, and this panel should decline to follow it. And (B) the panel need not wait for the en banc Court to do so.

A. Subsequent Supreme Court decisions have demolished *Red River Freethinkers*’s foundation.

Since this Court’s decision in *Red River Freethinkers*, the Supreme Court has fundamentally reshaped both standing doctrine and Establishment Clause jurisprudence. By demolishing the two doctrinal pillars on which *Red River Freethinkers* rested, the Supreme Court has made continued reliance on that decision untenable. (1) *Red River Freethinkers*’s conception of “concrete injury” cannot survive *Spokeo* and *TransUnion*’s requirement of a historical analogue. And (2) *Red River Freethinkers*’s reliance on *Lemon*—the only framework under which feelings of “exclusion” and “unwelcomeness” could arguably constitute cognizable harm—cannot survive *Kennedy*’s abrogation of that test.

1. The Supreme Court’s standing decisions foreclose offended-observer claims.

The Supreme Court’s recent standing decisions have rearticulated the injury-in-fact requirement in ways *Red River Freethinkers* did not contemplate. In *Spokeo, Inc. v. Robins*, the Court reaffirmed that a

“concrete” injury must be “real” rather than “abstract.” 578 U.S. at 340. It then went further, holding that concreteness turns on whether the alleged harm has a “close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in American courts.” *Id.* at 340–41. The Court reinforced this historical test in *TransUnion LLC v. Ramirez*, holding that a “close historical or common-law analogue for their asserted injury” is required to satisfy Article III. 594 U.S. at 424.

Psychological offense from a government display has no such analogue—and *Red River Freethinkers* never purported to identify one. It simply held that “direct and unwelcome personal contact” with a religious monument, causing plaintiffs to “feel isolated and unwelcome,” constituted sufficient injury for standing. 679 F.3d at 1023–24 (citation omitted).

But under *Spokeo* and *TransUnion*, the question is whether those hurt feelings correspond to a harm “traditionally recognized” at common law. The answer is unequivocally no: “there is no historical comparator to offended-observer standing.” *Nathan*, 173 F.4th at 612 (Oldham, J., concurring in part) (citing *TransUnion*, 594 U.S. at 425). *Red River Freethinkers* applied a conception of concrete injury that the Supreme Court has since squarely repudiated. It has no place in Article III.

2. *Kennedy’s* abrogation of *Lemon* eliminates the foundation for offended-observer standing.

In *Lemon v. Kurtzman*, the Supreme Court “prohibit[ed] the government from doing anything that a ‘reasonable observer’ might perceive as ‘endorsing’ religion.” *Am. Legion*, 588 U.S. at 84 (Gorsuch, J., concurring in the judgment) (citation modified). Based on that test, “lower courts reasoned that, if the Establishment Clause forb[ade] anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue.” *Id.* Courts needed plaintiffs who could testify that they “observed” government conduct and “felt” excluded by it—because that testimony supplied the factual predicate for *Lemon’s* “endorsement” inquiry. Standing doctrine and merits doctrine thus became intertwined, and offended-observer standing emerged as *Lemon’s* jurisdictional shadow.

But *Lemon’s* doctrinal edifice has since collapsed. In *Kennedy v. Bremerton School District*, the Supreme Court explicitly abandoned *Lemon* and its endorsement test, holding that the “Court long ago abandoned *Lemon* and its endorsement test offshoot.” 597 U.S. 507, 534 (2022). In its place, the Court established an Establishment Clause test that looks to “historical practices and understandings.” *Id.* at 535 (citation modified).

Applied to this case, the doctrinal implication is clear. Under *Kennedy*, this Court must ask whether the Arkansas legislature’s place-

ment of a Ten Commandments monument on the Capitol grounds is consistent with “historical practices and understandings.” *Id.* (citation modified). Whether one of these plaintiffs felt “isolated” or “unwelcome” is irrelevant to that historical inquiry. Their subjective reactions neither advance the merits nor supply a constitutionally cognizable injury.

But the district-court opinion took a different tack. While conceding the Supreme Court has “abrogated” *Lemon*, it nevertheless applied the abandoned doctrine on the ground that the Supreme Court had not “expressly overruled” it. *Cave*, 2026 WL 916187, at *26–27, 37–38. That is a distinction without a difference that elevates semantic formalism over doctrinal reality. The Supreme Court need not utter the magic word “overruled” for lower courts to abandon a doctrinal test the Court explicitly repudiated.

True, lower courts should “leav[e] 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). But when the Supreme Court has unmistakably and explicitly abandoned a doctrine—as in *Kennedy*—lower courts “do not have the option of ignoring the Supreme Court’s express directives” and to “continue applying *Lemon*.” *Nathan*, 173 F.4th at 592.

The district-court opinion erred in applying *Lemon* on the merits. More fundamentally, the opinion erred in applying *Lemon*’s direct juris-

dictional offshoot: offended-observer standing. The Supreme Court “never endorsed the notion that an ‘offended observer’ may bring an Establishment Clause claim.” *Rojas*, 143 S. Ct. at 764–65 (Gorsuch, J., statement respecting denial of certiorari). And after the “demise of *Lemon*’s reasonable observer test, little excuse now remains for the anomaly of offended observer standing.” *Id.* (citation modified). Without *Lemon*, there is no merits framework in which a reasonable observer’s personal offense could constitute a constitutional injury. As a result, there is no principled basis for a standing doctrine that exists to produce that observer.

The district-court opinion attempted to rehabilitate offended-observer standing in two ways: first, by characterizing *Lemon* as merely “a taxpayer standing case,” and second, by noting that “*Kennedy* does not mention standing.” *Cave*, 2026 WL 916187, at *27. Neither argument holds.

The first argument misunderstands the relationship between the merits test and standing. Offended-observer standing did not emerge from *Lemon*’s approach to taxpayer standing. It emerged because the endorsement test required courts to ask how a “reasonable observer” would perceive government conduct. That inquiry, in turn, required a plaintiff who could testify to feeling like that observer. *Am. Legion*, 588 U.S. at 84 (Gorsuch, J., concurring in the judgment). The type of plaintiff offended-observer standing created was a product of the merits

framework *Lemon* imposed, not the standing theory *Lemon* employed. The fact that *Lemon* itself was a taxpayer standing case is beside the point. It is the framework *Lemon* created—not the vehicle it used—that spawned offended-observer claims.

The second argument proves too much. *Kennedy* did not need to mention offended-observer standing by name. Elimination of a merits framework necessarily eliminates the standing doctrine that existed solely to serve it. A cause of action cannot outlive the cause. Lower courts do not need to “keep applying the abrogated *Lemon* test” in all its varieties and offshoots “until the Supreme Court tells [them] not to.” *Nathan*, 173 F.4th at 592. Rather, now that *Lemon* is “shelved . . . the gaping hole [offended-observer standing] tore in standing doctrine in the courts of appeals should now begin to close.” *Am. Legion*, 588 U.S. at 87 (Gorsuch, J., concurring in the judgment).

B. En banc review is unnecessary to abandon *Red River Freethinkers*.

This Court’s standard for panel departure from circuit precedent compels abandonment of *Red River Freethinkers*.

Ordinarily, only the en banc court can overrule prior circuit decisions. *United States v. Lucas*, 521 F.3d 861, 867 (8th Cir. 2008). But that “cardinal rule is not absolute.” *United States v. Donath*, 107 F.4th 830, 836 (8th Cir. 2024). A panel “may disregard” a previous decision “on the basis of an intervening Supreme Court precedent that under-

mines or casts doubt on the earlier panel decision.” *K.C.1986 Ltd. P’ship v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007).

That standard is satisfied here. The Supreme Court’s standing decisions in *Spokeo* and *TransUnion* have conclusively repudiated the conception of concrete injury on which offended-observer standing rests. *Kennedy*’s abrogation of *Lemon* has simultaneously eliminated the only merits framework under which offended-observer standing made doctrinal sense. When the doctrinal premises on which a circuit decision rested have been repudiated by the Supreme Court, continued adherence to that circuit decision is not a virtue but an error. And no en banc court can repair *Red River Freethinkers* by reinterpreting those Supreme Court decisions—the foundation is gone. This panel should say so and declare *Red River Freethinkers* superseded by intervening Supreme Court authority.

CONCLUSION

This Court should vacate the judgment below and remand with instructions to dismiss for lack of Article III standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,504 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Dated: July 29, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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