
**United States Court of Appeals
For the Eighth Circuit**

DONNA CAVE, *et al.*, and ANNE ORSI, *et al.*,

Plaintiffs-Appellees,

THE SATANIC TEMPLE, *et al.*,

Intervenors-Appellees,

— v. —

COLE JESTER, in his official capacity as
the Secretary of State of Arkansas,

Defendant-Appellant.

On appeal from the United States District Court
for the Eastern District of Arkansas
No. 4:18-cv-342 (Hon. Kristine Baker)

BRIEF OF CAVE PLAINTIFFS-APPELLEES

JOHN L. BURNETT (ABN 77021)
LAVEY AND BURNETT
904 West Second Street
Little Rock, AR 72201
(501) 376-2269
jburnett@laveyandburnett.com

ANDREW G. SCHULTZ
MELANIE B. STAMBAUGH
RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.
P.O. Box 1888
Albuquerque, NM 87103-1888
(505) 765-5900
aschultz@rodey.com
mstambaugh@rodey.com

*Counsel for Plaintiffs-Appellees Donna Cave, et al.
(continued on inside cover)*

Additional Counsel for Plaintiffs-Appellees Donna Cave, et al.

JOSHUA D. GILLISPIE (ABN 2010131)
GREEN & GILLISPIE
1 Riverfront Place, Suite 605
North Little Rock, AR 72114
(501) 244-0700
josh@greenandgillispie.com

JOHN C. WILLIAMS (ABN 2013233)
ARKANSAS CIVIL LIBERTIES
UNION FOUNDATION
904 West Second Street
Little Rock, AR 72201
(501) 374-2842
john@acluarkansas.org

STATEMENT REGARDING ORAL ARGUMENT

The Cave Plaintiffs agree that oral argument is warranted and respectfully request 30 minutes.

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INTRODUCTION

In 2015, the Arkansas Legislature enacted the Ten Commandments Monument Display Act (“Display Act”). As codified, the Act requires the Secretary of State to “arrange for the placement on the State Capitol grounds of a suitable monument commemorating the Ten Commandments.” Ark. Code Ann. § 22-3-221(b). The Act specifies the precise text of the Ten Commandments that must appear on the monument. Other than the text of the Commandments, the Act does not require any other language or inscription that must appear on the face of the monument.

Consistent with the mandate of the Display Act, a granite monument—displaying the prescribed version of the Ten Commandments, weighing nearly three tons, and standing over six feet high—stands beside the Arkansas State Capitol.

The Cave Plaintiffs are both agnostic. They do not subscribe to the religious directives of the Ten Commandments and they both believe that it is wrong for the State to dictate religious belief. They viewed the Ten Commandments monument as part of a group of women who frequent the State Capitol grounds during their weekly bicycle/walking outings.

Because of the alienation caused by the monument, both women have since altered their routes so that they no longer go past it during their outings.

Relying on controlling Eighth Circuit precedent, the district court found that both Cave Plaintiffs have standing to pursue their First Amendment claim challenging the Display Act and monument. The district court also found that the Display Act and monument violate the Establishment Clause because they favor one religion over others and because the monument is not consistent with historical practices.

The district court properly granted summary judgment in the Cave Plaintiffs' favor and denied Secretary Jester's summary judgment motion. This Court should affirm.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the Cave Plaintiffs satisfy the standing requirements to maintain their Establishment Clause claim?

Apposite authority: *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *reh'g granted and opinion vacated, on reh'g en*

banc sub nom. ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772 (8th Cir. 2005).

2. Whether the Display Act and Ten Commandments monument violate the Establishment Clause?

Apposite authority: *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022); *Cath. Charities Bur., Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238 (2025); *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Arkansas State Capitol.

The Arkansas State Capitol is the seat of Arkansas state government. The Arkansas State Capitol building houses the offices of the Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, and Commissioner of Public Lands, along with both chambers of the General Assembly. App. 3748-49; R. Doc. 286, at 4-5 ¶¶16-17, 20. The Justice Building is adjacent to the State Capitol Complex and houses the Arkansas Supreme Court and Court of Appeals. App. 3748-49; R. Doc. 286, at 4 ¶18.

A number of permanent monuments are located on the State Capitol grounds.¹ Many of these monuments contain plaques and other information explaining the purpose of the display and the significance of the groups, individuals, and events that they depict. App. 3749; R. Doc. 286, at 5 ¶22.

B. The Display Act and Monument.

In 2015, (now former) State Senator Jason Rapert was the primary sponsor of the bill that became the Display Act. The original bill introduced by Senator Rapert contained a series of legislative findings. App. 3754; R. Doc. 286, at 10 ¶44. None of these legislative findings, however, are part of the Display Act that was codified into law. *See* Ark. Code Ann. § 22-3-221. Other than the absence of the legislative findings,

¹ These monuments include (a) a Vietnam Veterans Memorial (honoring Arkansas soldiers killed or wounded during the Vietnam war), (b) memorials to Arkansas law enforcement officers and firefighters who died in the line of duty, (c) a replica of the Liberty Bell to commemorate the American Bicentennial, (d) a boulder to mark a century of Arkansas statehood, (e) a sculpture honoring the nine school children credited with desegregating Little Rock's public schools, and (f) a marker in memory of the Union and Confederate prisoners who were held in a prison located on the grounds of what is now the State Capitol. App. 3749; R. Doc. 286, at 5 ¶21.

the Display Act codified in the Arkansas statutes is identical to the bill introduced by Senator Rapert. App. 3129-30; R. Doc. 266-8, at 46-47.

The Display Act specifies the precise text of the Ten Commandments that is required to appear on the Ten Commandments monument placed on the State Capitol grounds:

“The Ten Commandments

I AM the LORD thy God.

Thou shalt have no other gods before me.

Thou shalt not make to thyself any graven images.

Thou shalt not take the Name of the Lord thy God in vain.

Remember the Sabbath day, to keep it holy.

Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbor.

Thou shalt not covet thy neighbor’s house.

Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.”

App. 3756-57; R. Doc. 286, at 12-13 ¶51. Other than the text of the Ten Commandments, the Display Act does not specify any other language, symbol, or inscription that must appear on the face of the monument. Ark. Code Ann. § 22-3-221. Nothing in the Act as codified requires that the State provide any explanation about why the monument was placed on the State Capitol grounds or its significance to the State of Arkansas. *Id.* In fact, the only other words on the face of the monument are “Presented to the People of Arkansas by the American History and Heritage Foundation.”² Add. 73; App. 3932; R. Doc. 345, at 73. Yet “[t]here is no explanation on or near the Ten Commandments Monument as to what this organization is, who its members are, or the reason why they presented this monument.” Add. 73-74; App. 3932-33; R. Doc. 345, at 73-74.

The American History and Heritage Foundation submitted a request to the Arkansas Secretary of State for the Ten Commandments monument to be placed on the State Capitol grounds. App. 3758; R. Doc. 286, at 14 ¶58. As required by Arkansas law at the time, the Capitol Arts

² Senator Rapert is an officer and director of the American History and Heritage Foundation. App. 3773; R. Doc 286, at 29 ¶124. He also is an ordained minister. Add. 26; App. 3885; R. Doc 345, at 26.

and Grounds Commission then reviewed the application. Because the Display Act mandated the text to be used for the Ten Commandments, the Commission had no discretion to alter these words; however, the Commission did have discretion with regard to monument's location, appearance, and design. App. 3759-60; R. Doc. 286, at 15-16 ¶¶60-61, 63.

The Display Act states that the Ten Commandments monument “shall be placed on the State Capitol grounds where there are other monuments.” Ark. Code Ann. § 22-3-221(b)(2)(B). It is undisputed, however, that the location for the monument chosen by the Commission “is isolated from the other monuments on the roughly 40 acres that makes up the State Capitol grounds.” Add. 82; App. 3941; R. Doc. 345, at 82. As Chief Deputy Secretary of State Kelly Boyd testified, “[w]e have a long, enduring history here of placing monuments by themselves.” App. 1496; R. Doc. 260-31, at 44.

In addition to having no visual relationship to any other monument, there also is no subject-matter relationship between the Ten Commandments monument and any of the other monuments on State Capitol grounds. Among the Secretary's duties is the publication of a pamphlet entitled “A Walk on the Hill: A self-guided tour of the Arkansas

State Capitol grounds and monuments.” App. 3750; R. Doc. 286, at 6 ¶27. That publication contains a listing of the monuments that are located on the State Capitol grounds and a picture and description of each of those monuments. App. 2876; R. Doc 266, at 6 ¶28. It is undisputed that from 2018 through the date of the summary judgment hearing in 2023, that publication never included “the Ten Commandments monument either in the list of monuments that appear on the State Capitol grounds or in the pictures and descriptions of those monuments.” Add. 11; App. 3870; R. Doc. 345, at 11.

C. The Two Ten Commandments Monuments.

The first Ten Commandments monument was installed in June 2017. App. 3761; R. Doc. 286, at 17 ¶70. Barely one day later, a motorist intentionally destroyed it with his car. Add. 19; App. 3878; R. Doc. 345, at 19. A second monument with the same size, weight, and dimensions was placed in the same location in April 2018. App. 3762; R. Doc. 286, at 18 ¶74. The placement includes protective barriers to prevent intentional destruction. Add. 19-20; App. 3878-79; R. Doc. 345, at 19-20.

D. Statements by the Display Act's Primary Sponsor.

From the time he introduced the Display Act and continuing for months after the installation of the second monument, Senator Jason Rapert, the Display Act's primary sponsor, frequently spoke out in multiple forums about the overtly religious reasons for erecting a Ten Commandments monument. These included repeated comments about America being a "Christian nation," being founded on Judeo-Christian values, and the need to "honor[] God and the Bible." Add. 29-30, 75; App. 3888-89, 3935; R. Doc. 345, at 29-30, 75.

Only one month before he introduced the Display Act in the Arkansas Legislature, Senator Rapert declared, "To deny America was founded upon Judeo-Christian values is willful ignorance." Add. 104; App. 3963; R. Doc. 345, at 104. On the same day the Arkansas General Assembly passed the bill that became the Display Act, Senator Rapert tweeted, "Bill passes to display holy rules at Capitol – Ten Commandments to be honored." App. 2881; R. Doc 266, at 11 ¶50.

After passage of the Act, Senator Rapert wrote a newspaper editorial stating that "our nation would be better off if people simply honored, followed and adhered to the Ten Commandments given by God

Himself to Moses on Mount Sinai.” Add. 29; App. 3888; R. Doc. 345, at 29. And immediately before the installation of the first Ten Commandments monument, Senator Rapert professed, “Thank god we have a clear record of our Judeo-Christian history.” Add. 107; App. 3966; R. Doc. 345, at 107. Even during the pendency of this litigation, Senator Rapert stated during an interview: “When our state took a stand for the Ten Commandments in 2015 . . . and every other time our state takes a stand for something that honors God and the Bible, it definitely sends a signal to everyone in the spiritual realm that Arkansas seeks to honor God and invites his blessing.” App. 3778-79; R. Doc. 286, at 34-35 ¶147.

E. Fundraising for the Ten Commandments Monument.

More than two-thirds of the amount raised for the first Ten Commandments monument came from a single Little Rock church and its Executive Administrator. Add. 22; App. 3881; R. Doc. 345, at 22. For the second monument, PureFlix—“a Christian movie studio’ whose vision is to influence the global culture for Christ through media”—donated \$25,000. *Id.* That donation occurred at an event held at the Arkansas State Capitol attended by Senator Rapert and numerous other state legislators. Add. 23; App. 3882; R. Doc. 345, at 23.

F. Installation of the Ten Commandments monuments

When the first Ten Commandments monument was installed in June 2017, Senator Rapert was filmed in front of the monument with the pastor of the church that donated the majority of the funds. Add. 19; App. 3878; R. Doc. 345, at 19. At the dedication ceremony for the second monument, members of the pastoral team from that same church stood near the podium, and individuals associated with the Arkansas Family Council (whose mission is to advocate for “traditional family values found and reflected in the Bible”) stood at the front near the podium next to the monument. Add. 20-21; App. 3879-80; R. Doc. 345, at 20-21.

G. Divisive Nature of the Display Act and the Monument.

The Display Act has “proven to be a divisive piece of legislation.” Add. 84; App. 3943; R. Doc. 345, at 84. While the Capitol Arts and Grounds Commission was considering the application for the monument, the Secretary received “a fair amount of mail about the monument,” including mail from people who opposed it. Add. 24; App. 3883; R. Doc. 345, at 24. Similarly, at public hearings on the monument, nearly half of the people who addressed the Commission spoke against the monument.

Id. During the State’s deliberative process, “citizens wrote letters to the editors of various newspapers speaking out against having a Ten Commandments Monument at the State Capitol, and certain newspapers wrote editorials against having a Ten Commandments Monument placed on the State Capitol grounds.” *Id.* And of course, the first Ten Commandments monument was physically destroyed within 24 hours after its installation.

H. The Cave Plaintiffs’ Objections to the Monument.

Plaintiffs Donna Cave and Pat Piazza are part of a group of local women who walk or bicycle most weekends. Add. 51; App. 3910; R. Doc. 345, at 51. For more than two decades, this group participated in regular outings that frequently included routes that passed through the grounds of the Arkansas State Capitol and the site of the Ten Commandments monument. *Id.* After the installation of the monument, the Cave Plaintiffs viewed the monument on one of these outings. *Id.* Both Cave Plaintiffs are agnostics. App. 3745, 3747; R. Doc. 286, at 1, 3 ¶¶2, 7. As agnostics, they both objected to this unwelcome contact. Add. 51; App. 3910; R. Doc. 345, at 51. In order to avoid the alienation caused by the

monument, both women “altered the walking/bicycling routes to avoid going past the Ten Commandments monument.” *Id.*

Ms. Cave believes that placing the Ten Commandments on the State Capitol grounds, where she comes into unwelcome contact with them, improperly dictates the religious beliefs that she should adopt and conveys that she is an outsider because she follows a contrary agnostic tradition. Add. 8; App. 3867; R. Doc. 345, at 8. For example, she disagrees with the First Commandment set forth on the monument (“I am the Lord thy God”) because it is contrary to her agnostic beliefs and thus exclusionary toward her as an agnostic. Add. 7-8; App. 3866-67; R. Doc. 345, at 7-8. “I have felt that the State has excluded me by erecting a monument that does not reflect my right to believe or disbelieve in God—in a god. . . . I feel like a second-class citizen because I do not agree with this monument that the State has erected.” App. 2871; R. Doc 266, at 1 ¶4. Likewise, Ms. Piazza objects to the monument because it directs her to adopt and live by specific religious rules and practices to which she, as an agnostic, does not subscribe. Add. 8; App. 3867; R. Doc. 345, at 8. “I do not want anybody, you know, telling me what I need to believe and it

makes me feel like a second-class citizen, which I am not.” App. 2598; R. Doc. 260-56, at 6 (Piazza Dep. at 17:14-16).

II. PROCEDURAL BACKGROUND

In light of the harms caused by the monument, the Cave Plaintiffs filed suit in May 2018 seeking injunctive and declaratory relief. R. Doc. 1; R. Doc. 20. They asserted that both the Display Act and monument violate the Establishment Clause of the First Amendment.

After extensive discovery, the Cave Plaintiffs (App. 2867; R. Doc. 264) and the Secretary (App. 0668; R. Doc. 257) filed cross-motions for summary judgment. Following a hearing in July 2023, the district court issued its opinion granting the Cave Plaintiffs’ motion and denying the Secretary’s motion.

The Secretary does not claim that the district erred in finding that the facts are undisputed. Nor could he. The trial court identified scores of undisputed facts supported by hundreds of citations to the extensive factual record submitted by the parties. The Secretary does not challenge a single one of these facts or argue that there is a material factual dispute. For purposes of this appeal, therefore, there are no genuine

issues of material fact that preclude summary judgment in the Cave Plaintiffs' favor.

STANDARD OF REVIEW

This court “reviews de novo the grant of summary judgment,” affirming “if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Mortier v. LivaNova USA, Inc.*, 31 F.4th 1044, 1048 (8th Cir. 2023) (citation modified).

SUMMARY OF THE ARGUMENT

The district court correctly held that the Cave Plaintiffs have standing to pursue their claims. The Secretary spends little time arguing otherwise because this Court’s precedents are abundantly clear: standing arises from unwelcome personal contact with a religious monument, not to mention the loss of recreational space arising from avoidance of that unwelcome contact. The Cave Plaintiffs have suffered precisely this sort of concrete and particularized injury.

The district court also correctly held that the Display Act and the Ten Commandments monument violate the Establishment Clause. Under the analysis required by *Van Orden v. Perry*, 545 U.S. 677 (2005), and *American Legion v. American Humanist Association*, 588 U.S. 29

(2019), the monument is unconstitutional because it does not have a long history of standing on public ground without objection, it is plainly divisive, and it is imbued with religious rather than secular significance under the undisputed facts. Moreover, the district court correctly held that the monument and Display Act are unconstitutional because there is no longstanding historical practice of displaying the text of the Ten Commandments on public grounds. The district court further found that the state showed preference for monotheistic religions—and Christianity in particular—when it required that the Ten Commandments monument be erected.

ARGUMENT

I. THE CAVE PLAINTIFFS HAVE STANDING UNDER BINDING EIGHTH CIRCUIT PRECEDENT.

The Cave Plaintiffs plainly have standing under *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015 (8th Cir. 2012). There, this Court held that “direct and unwelcome personal contact” with a religious monument confers standing to challenge it. *Id.* at 1023 (citation modified). Not only did the Cave Plaintiffs have the requisite direct and unwelcome personal contact with the Ten Commandments monument, but they also “altered their behavior to avoid” it. *Id.* Thus, under *Red*

River Freethinkers, the Cave Plaintiffs have an injury sufficient to support standing. *Id.* at 1024; *see also* *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1029, 1030 (8th Cir. 2004) (“*Plattsmouth I*”) (finding that plaintiff’s injuries arising from “direct and unwelcome contact” with monument in public park and alteration of behavior to avoid the park “are concrete in nature, particularized to [plaintiff], actual and ongoing, and not merely conjecture or hypothetical, and therefore judicially redressable injuries in fact”).³ And the Secretary does not dispute that the monument causes the Cave Plaintiffs’ injury or that he can redress that injury. *See* Appellant’s Br. 22-24.

Given the clarity of this Court’s precedent, it is not surprising that the Secretary spends a scant three pages challenging the Cave Plaintiffs’ standing to bring this case. His argument hinges on the faulty premise that because the Supreme Court’s ruling in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), “express[ly] reject[ed]” the three-part test

³ After the Supreme Court decided *Van Orden*, this Court vacated the panel opinion in *Plattsmouth* and granted rehearing en banc, but the en banc court adopted the panel’s standing analysis. *See ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (“*Plattsmouth II*”).

set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for assessing the merits of an Establishment Clause claim, the entire existing body of Establishment Clause standing law has been “cast into doubt.” Appellant’s Br. 23 (citation omitted). Accordingly, the Secretary claims, this Court should revisit its prior binding precedent under the “cast-into-doubt” standard and reverse the district court’s conclusion that the Cave Plaintiffs have standing. *Id.* at 23-24.

This argument lacks merit because it relies on an interpretation of standing that never has earned majority support in the Supreme Court. Although the majority opinion in *Kennedy* stated that the Supreme Court “long ago abandoned *Lemon* and its endorsement test offshoot,” *Kennedy*, 597 U.S. at 534, the Court never mentioned standing, much less discussed how the Court’s substantive Establishment Clause analysis would affect standing. *See also Town of Greece v. Galloway*, 572 U.S. 565 (2014) (articulating the historical practices test stated in *Kennedy* without considering standing).

The Secretary’s argument also fails because it does not take into account that “[t]he standing inquiry is not . . . an assessment of the merits of a plaintiff’s claim.” *Red River Freethinkers*, 679 F.3d at 1023 (citing

ASARCO Inc. v. Kadish, 490 U.S. 605, 624 (1989)). Rather, standing is an independent threshold inquiry separate from the substantive analysis involved in Establishment Clause jurisprudence. An intervening Supreme Court opinion cannot “cast into doubt” this Court’s binding precedent on an issue the Court did not even consider. *See State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (holding that appellate court properly applied binding precedent even though subsequent ruling had “gravely weakened” its “conceptual foundations”); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (courts cannot conclude that the Supreme Court’s “more recent cases have, by implication, overruled an earlier precedent”).

Moreover, even those jurists who support the wholesale rewriting of standing requirements for Establishment Clause claims, including the jurists on whose dissenting and concurring opinions the Secretary exclusively relies,⁴ acknowledge that the current test for standing is still controlling, even after *Kennedy* disavowed the *Lemon* test. *See City of Ocala, Fla. v. Rojas*, 143 S. Ct. 764, 768 (2023) (Thomas, J., dissenting

⁴ In challenging the Cave Plaintiffs’ standing, the Secretary cites a concurrence by Justice Gorsuch, a dissent by Justice Thomas from the denial of certiorari, and Justice’s Gorsuch’s statement respecting the denial of certiorari. Appellant’s Br. 23-24. The Secretary also cites both concurring and dissenting opinions from circuit court judges. *Id.* at 24.

from denial of certiorari) (“I continue to urge the Court to review the legitimacy of this form of standing.”); *see also Am. Legion*, 588 U.S. at 84 (Gorsuch, J., dissenting) (critiquing Establishment Clause standing). Although the Secretary takes issue with this Court’s existing analysis of standing in Establishment Clause cases, *see* Appellant’s Br. 23, he does not—and cannot—credibly dispute that the existing standard remains binding on this Court.

The holding in *Red River Freethinkers* is consistent with the Article III requirement that the plaintiff’s injury be “both concrete *and* particularized.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016). The Cave Plaintiffs’ injury is particularized because it “affect[s] [them] in a personal and individualized way.” *Id.* at 339. Not only do the Cave Plaintiffs live in the city where the monument has been erected, they routinely use the grounds on which it stands for recreation and leisure. *Contrast Plattsmouth I*, 358 F.3d at 1028 (“The injury-in-fact requirement ‘serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.’”) (citation modified) *with Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S.

464, 487 (1982) (holding that plaintiffs had not demonstrated cognizable injury to challenge Pennsylvania land transfer where they did not live in Pennsylvania and learned about the transfer via a news release). Although many other people may also use the Capitol grounds, the “fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.” *Spokeo*, 578 U.S. at 339 n.7.

Furthermore, the injury is “concrete” because it is “real” and not “abstract”; it “actually exists” even if in “intangible” form. *Id.* at 340. In *Santa Fe Independent School District v. Doe*, the Supreme Court made this point by holding that “[government] sponsorship of a religious message . . . sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” 530 U.S. 290, 309-10 (2000) (citation modified); accord *Cath. Charities Bur., Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 248 (2025) (“Government actions that favor certain religions . . . convey to members

of other faiths that ‘they are outsiders, not full members of the political community’” (quoting *Santa Fe*, 530 U.S. at 309)).

This is precisely the sort of spiritual alienation the Ten Commandments monument engenders for individuals like the Cave Plaintiffs, who do not conform to the State’s preferred religious doctrine. That type of harm is more than sufficient to confer standing. *See Plattsmouth I*, 358 F.3d at 1030 (discussing “very real injuries” that can be caused by such displays, including “official alienation, perceived political diminution and pressure to conform one’s views to those of the majority”). Indeed, the concrete nature and severity of that harm is evident in the Cave Plaintiffs’ subsequent avoidance of the Capitol grounds as a result of the monument’s placement, which gives real-world consequence to the injury and alienation suffered.

The Supreme Court’s recent decision in *National Park Service v. National Trust for Historic Preservation in the United States*, 609 U.S. ___, 2026 WL 2564318 (Aug. 31, 2026) (per curiam), is not to the contrary. The plaintiff’s alleged injuries there were based on her “aesthetic, cultural, and historical interests” and her belief that the “‘scale,’ ‘height,’ and ‘massing’ of the government’s design [was] distasteful”; they had

nothing to do with government-imposed religion. *Id.* at *2. The Cave Plaintiffs, by contrast, assert a more belief-based harm and alienation based on government conduct conveying that they are second-class citizens or “outsiders” because they are not adherents of the State’s preferred faith. *See Santa Fe*, 530 U.S. at 309-10.

This injury falls well within the “traditional harms” sufficient to convey standing, which “may also include harms specified by the Constitution itself,” such as abridgement of free speech, infringement of free exercise, or imposition of established religion. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021); *cf. Nat’l Park Serv.*, 2026 WL 2564318, at *4 (Roberts, C.J., dissenting) (noting that the plaintiff alleged only that the government was violating a generally applicable statute requiring Congress to authorize construction on public grounds in the District of Columbia).

The Cave Plaintiffs also have the additional injury of losing the use of recreational space. Indeed, in *National Park Service*, the Court distinguished cases in which the defendant’s actions “forced them to abandon” recreational space. *Id.* at *2 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000)); *cf.*

Plattsmouth I, 358 F.3d at 1030 (citing *Friends of the Earth* to support standing).⁵

Finally, the Cave Plaintiffs’ ability to bring their Establishment Clause claim does not implicate any judicially-created prudential standing concerns. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-61 (1992) (noting the standing doctrine incorporates both constitutional requirements and prudential considerations). The Cave Plaintiffs’ injuries land squarely within “the zone of interests to be protected” by the Establishment Clause’s prohibition on government establishment of religion. *See Plattsmouth I*, 358 F.3d at 1031. In addition, because both Cave Plaintiffs are agnostics, their grievances are not pervasively shared.

⁵The Secretary appears to have abandoned on appeal the argument from the district court that the Cave Plaintiffs manufactured their own injuries by changing their walking route to avoid the monument. *See Add.* 50-51; App. 3909-10; R. Doc. 345, at 50-51. One amicus picks up this banner, arguing that the Cave Plaintiffs are not injured because their “self-directed choices were made in response to their own feelings.” Br. of Family Council at 10. But that argument runs straight into *Red River Freethinkers*. And it is wrong on its own terms. It is based on *Clapper v. Amnesty International USA*, 568 U.S. 398, 416 (2013), but amicus elides a key provision from that case, emphasized here: “[R]espondents cannot manufacture standing merely by inflicting harm on themselves *based on their fears of hypothetical future harm that is not certainly impending*.” In this case, the Cave Plaintiffs acted to avoid a harm that already had occurred—direct and unwelcome contact with a Ten Commandments monument on their existing recreational route.

“This is precisely the sort of grievance for which the federal courts are best suited; the representative branches are less equipped to disobey the wishes of a passionate majority whose religious views are being established.” *Id.* at 1031. Under the Secretary’s proposed view, plaintiffs in religious monument cases would be left without any recourse whatsoever in federal courts.

Under binding Supreme Court and Eighth Circuit precedent, the Cave Plaintiffs satisfy the standing requirements to maintain their Establishment Clause claims.

II. THE DISPLAY ACT AND THE TEN COMMANDMENTS MONUMENT VIOLATE THE ESTABLISHMENT CLAUSE.

The Secretary challenges both the manner in which the district court evaluated the Cave Plaintiffs’ Establishment Clause claims and the substance of the court’s conclusions. There is no merit to either argument. The district court properly concluded that the Display Act and the Ten Commandments monument are unconstitutional.

A. The District Court Properly Considered the Supreme Court’s Establishment Clause Precedent.

“Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. 1. Despite the facial simplicity of this

command, “pinning down the meaning of a ‘law respecting an establishment of religion’ has proved to be a vexing problem.” *Am. Legion*, 588 U.S. at 48 (plurality opinion).

The three-part test developed fifty years ago by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), focused on the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail. The Secretary contends that in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), the Supreme Court “overruled *Lemon*” (Appellant’s Br. 19, 34), and its “approach has been overruled in all contexts.” *Id.* at 30. As a result, any case that cites *Lemon* no longer is good law. Thus, the Secretary never bothered to cite *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005), in his brief, and dismisses the holding in *Stone v. Graham*, 449 U.S. 39 (1980), in a mere footnote. *Id.* at 32 n.1.

That premise is incorrect. The fact that the Supreme Court “abandoned” *Lemon*, *Kennedy*, 597 U.S. at 534, does not invalidate any other decision that cites that case.⁶ In *Kennedy*, the Court never

⁶ In *Kennedy*, the Court favorably cited *Santa Fe Independent School District*, 530 U.S. 290, which cites *Lemon*. *Kennedy*, 597 U.S. at 541-42. Last year, in *Catholic Charities*, 605 U.S. at 247-48, the Court likewise

mentioned either *McCreary* or *Stone*, much less overruled them. And the Secretary’s argument that cases citing *Lemon* are no longer precedential conflicts with the Supreme Court’s repeated warning that lower courts are required to follow binding precedent. “If 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 [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *cf. Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 412 (2024) (even after overruling the *Chevron* framework, “we do not call into question prior cases that relied on” that form of analysis). This Court abides by these principles. Even if earlier Supreme Court decisions appear “to rest on reasons rejected in some other line of decisions,” the Court would still “follow the case which directly controls, leaving to [the Supreme] Court the prerogative of

relied on *Santa Fe*, as well as *Larson v. Valente*, 456 U.S. 228, 244 (1982), another precedent that cites *Lemon*. And, in *Mahmoud v. Taylor*, 606 U.S. 522, 555 (2025), the Court favorably quoted *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987), which (like *Stone* and *McCreary*) also cited *Lemon*.

overruling its own decisions” *Lozano v. United States*, 171 F.4th 1025, 1032 (8th Cir. 2026) (citation modified).

B. The Display Act and the Ten Commandments Monument Violate the Establishment Clause Under *Van Orden* and *Plattsmouth*.

In *Van Orden*, the Supreme Court upheld the constitutionality of a Ten Commandments monument on the grounds of the Texas State Capitol. Three months later, this Court reached the same conclusion with regard to a Ten Commandments monument located in a city park in Nebraska. *Plattsmouth II*, 419 F.3d 772. In both cases, the courts focused not on the undeniably religious nature of the Ten Commandments’ text, but on “the context in which the Ten Commandments text is used.” *Id.* at 776; *Van Orden*, 545 U.S. at 686. Using that form of analysis, the district court correctly ruled that the Display Act and Ten Commandments monument violate the Establishment Clause.

The district court’s evaluation centered on distinguishing the essential facts of *Van Orden* and *Plattsmouth* from those of the present case. In this regard, it is important to recall that the Supreme Court decided two separate Ten Commandments cases on the same day with different outcomes. In *Van Orden*, the Court upheld a Ten

Commandments monument which had stood legally uncontested for forty years. In *McCreary*, on the other hand, the Court invalidated a Ten Commandments display which had been posted for only a few months and was challenged soon thereafter. Justice Breyer, whose vote was the only one that changed in those cases, found this difference to be “determinative.” *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

The district court considered many of the same contextual elements found in all of these cases, and it concluded that the differences between them make “[t]his case . . . factually distinguishable from both *Van Orden* and *Plattsmouth*.” Add. 80; App. 3939; R. Doc. 345, at 80. The district court’s rigorous analysis was correct.

Perhaps the most notable distinction is that, unlike the monuments in *Van Orden* and *Plattsmouth*, the Arkansas monument was only recently erected, and did not stand on public grounds for years without contention. The Supreme Court has made clear “that retaining established, religiously expressive monuments . . . is quite different from erecting . . . new ones.” *Am. Legion*, 588 U.S. at 57.

The monument in *Van Orden* was installed in 1961, and “40 years passed in which the presence of this monument, legally speaking, went

unchallenged.” 545 U.S. at 702 (Breyer, J., concurring). The *Plattsmouth* monument had been present since 1965, and “decades passed during which the Ten Commandments monument stood in Plattsmouth’s Memorial Park without objection.” *Plattsmouth II*, 419 F.3d at 778. The presence of these monuments for significant periods of time without objection showed “that few individuals, whatever their system of beliefs, [were] likely to have understood the monument[s] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, [or] primarily to promote religion over nonreligion.” *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

In comparison, the Ten Commandments display in *McCreary* had been present for only a few months before they were challenged. 545 U.S. at 852-58. With regard to the Ten Commandments placed at the Arkansas State Capitol, the district court ruled that “[p]erhaps most notably here, the Ten Commandments Monument is new,” and the Cave Plaintiffs “did not wait many years before challenging the monument.” Add. 80; App. 3939; R. Doc. 345, at 80. In fact, the Cave Plaintiffs brought their action “within one month of the installation of the Ten

Commandments Monument” in 2018. Add. 81; App. 3940; R. Doc. 345, at 81. This timing carries substantial weight.

There is no “presumption of constitutionality” for a recently erected monument. *Am. Legion*, 588 U.S. at 52 (plurality opinion); *cf. id.* at 68 (Breyer, J., concurring) (“A newer memorial, erected under different circumstances, would not necessarily be permissible under [the history and tradition] approach”); *see also Felix v. City of Bloomfield*, 841 F.3d 848, 859 (10th Cir. 2016) (finding it significant that plaintiffs filed suit “only seven months after the monument was erected”).

More than the recency of the monument and prompt initiation of litigation, the undisputed evidence also demonstrates that the Ten Commandments monument has been controversial from the start. Unlike the monuments in *Van Orden* and *Plattsmouth*, it has not enjoyed a long, uninterrupted history. Instead, like “the short (and stormy) history of the courthouse Commandments’ displays” in *McCreary, Van Orden*, 545 U.S. at 703 (Breyer, J., concurring), the Ten Commandments monument here was contested at the outset.

At every stage of its existence—from its initial consideration by the Capitol Arts and Grounds Commission, to public hearings on the

monument, through the State’s deliberative process, to the intentional destruction of the first monument within 24 hours after its installation—there has been prolonged and persistent opposition to monument. This history is consistent with Justice Breyer’s observation that “a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that [a] longstanding, pre-existing monument has not.” *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring).

The isolated location of the monument and the lack of relationship to other monuments on the State Capitol grounds also is important. It is undisputed that the site for the monument chosen by the Commission “is isolated from the other monuments on the roughly 40 acres that makes up the State Capitol grounds.” Add. 82; App. 3941; R. Doc. 345, at 82.

That the Ten Commandments monument has no visual relationship to any other monument at the State Capitol is compounded by the lack of any subject-matter relationship between the Ten Commandments monument and any of the other monuments on the State Capitol grounds. The Secretary chose not to include any information about the Ten Commandments monument either in his

pamphlet about the State Capitol grounds or on the website about the grounds. Add. 74; App. 3933; R. Doc. 345, at 74. As a result, there is no information describing how the Ten Commandments monument relates to other monuments or showing how it is part of a unified display. In contrast, the Ten Commandments monument in *Van Orden* was part of the Capitol Monument Guide that showed all of the monuments at the Texas State Capitol. *See Van Orden*, 545 U.S. at 706 (Appendices).

The government’s essential role in mandating the monument and directing its appearance is likewise significant. The Ten Commandments monuments in both *Van Orden* and *Plattsmouth* were voluntarily donated by the Fraternal Order of Eagles—a private “social, civic, and patriotic organization.” *Van Orden*, 545 U.S. at 682; *Plattsmouth II*, 419 F.3d at 774. And because these monuments were donated by a private organization, the text and inscriptions that appeared on those monoliths were selected entirely by that group. *See generally Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (describing the process used by the Eagles to create the donated monuments).

By contrast, the Display Act mandated the placement of the Ten Commandments monument on the Arkansas State Capitol grounds. Ark.

Code Ann. § 22-3-221(b)(1). The Arkansas monument is thus more like the display in *McCreary*, where “the placement of the Commandments responded to an order of the county legislative body.” *McCreary*, 545 U.S. at 851.

The Display Act further dictates that a specific version of the full text of the Ten Commandments appear on the face of the monument. Ark. Code Ann. § 22-3-221(b)(1). “Where the text [of the Commandments] is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view.” *McCreary*, 545 U.S. at 868. This text “commands” the reader to follow certain directives that are largely religious and not secular in nature. The required version states, “Thou shalt have no other gods before me”; “Thou shalt not make to thyself any graven images”; “Thou shalt not take the Name of the Lord thy God in vain”; and “Remember the Sabbath day, to keep it holy.” Ark. Code Ann. § 22-3-221(b)(1). This text “is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.” *McCreary*, 545 U.S. at 869; *see also Stone*, 449 U.S. at 42 (“[T]he first part of the Commandments concerns the religious

duties of believers”). The required text highlights monotheism and “has the effect of excluding the beliefs of nonadherents” like the Cave Plaintiffs. Add. 75; App. 3934; R. Doc. 345, at 75. Nothing in the mandated text of the monument provides any secular context for the displayed words or inscriptions.

Even the installation of the Ten Commandments monuments was dissimilar to the one in *Van Orden*. Rather than being conducted by state officials, 545 U.S. at 682, the installation ceremonies for both Ten Commandments monuments here involved the presence of religious leaders and individuals associated with religious organizations. Add. 19-21; App. 3878-80; R. Doc. 345, at 19-21. These resemble the initial installation of the Ten Commandments display in *McCreary* that was presided over by both County executives and their religious leaders. 545 U.S. at 851.

Finally, there is no merit in the Secretary’s attempt to rely on the legislative findings to argue that the monument merely “acknowledge[s] the historical significance of the Ten Commandments. . . .” Appellant’s Br. 33. These generic statements—which are not part of the codified

law⁷—stand in stark contrast to the repeated statements of Senator Rapert—the Display Act’s primary sponsor—relating to the Ten Commandments as God’s holy rules. The district court properly considered these statements as evidence that the monument lacked an historical pedigree as the Secretary has suggested. *See Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (relying on testimony of prime sponsor of legislation to find prayer law unconstitutional); *Edwards*, 482 U.S. at 586-88 (looking to detailed public comments of the statute’s sponsor in striking down law that required creationism be taught alongside evolution).

The district court correctly concluded, in light of all of the evidence discussed above, “that this case is distinguishable from *Van Orden* and from *Plattsmouth*.” Add. 84.; App. 3943; R. Doc. 345, at 84. “[B]ased on the undisputed record evidence taken as a whole, . . . the Display Act and the Ten Commandments Monument on State Capitol grounds violate the Establishment Clause.” *Id.*

⁷ “Under Arkansas law, the text as codified controls. . . .” *Bio Gen LLC v. Sanders*, 142 F.4th 591, 601 (8th Cir. 2025) (citing *Porter v. Ark. Dep’t of Health & Hum. Servs.*, 286 S.W.3d 686, 691-92 (Ark. 2008)).

C. The Display Act and the Ten Commandments Monument Violate the Establishment Clause Under *Kennedy* and *New Doe Child #1 v. United States*.

Finally, the Secretary turns to the “historical practices and understandings” test set forth in *Kennedy*, *Town of Greece*, and *New Doe Child #1 v. United States*, 901 F.3d 1015 (8th Cir. 2018). The Secretary does not fault the district court for using this analysis, but disagrees with the court’s conclusion that it shows that the Display Act and Ten Commandments monument violate the Establishment Clause. The district court was correct.

- 1. The district court properly analyzed the relevant historical evidence regarding the specific practice at issue in this case to hold that the Display Act and monument violate the Establishment Clause.**

As articulated by the Supreme Court, “the Establishment Clause must be interpreted by reference to historical practices and understandings.” *Town of Greece*, 572 U.S. at 576 (citation modified). “The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers.” *Kennedy*, 597 U.S. at 535-36 (citation modified).

Thus, the Court in *Town of Greece* found that the practice of opening a town board meeting with a prayer did not violate the Establishment Clause “[i]n light of the unambiguous and unbroken history of more than 200 years” of legislative bodies following this practice. 572 U.S. at 576. This Court has interpreted *Town of Greece* as “an unqualified directive” for the manner in which the Establishment Clause must be construed. *New Doe Child*, 901 F.3d at 1020. More recently, however, in *Catholic Charities*, the Court found an Establishment Clause violation without citing *Town of Greece*, *Kennedy*, or the historical practices and understandings test.

One point is clear: an essential inquiry under the Establishment Clause is whether “history shows that the *specific practice* is permitted,” not whether a general practice is consistent with historical custom. *Town of Greece*, 572 U.S. at 577 (emphasis added); *see also New Doe Child*, 901 F.3d at 1021 (the first inquiry is whether history has spoken to the “specific practice” at hand); *Rowan Cnty. v. Lund*, 585 U.S. 1035, 1037-38 (2018) (Thomas, J., dissenting from the denial of certiorari) (*Town of Greece*’s historical inquiry concerns the “specific practice” at issue).

In this case, the specific practice in question is a government-mandated display of the text of the Ten Commandments on a monument located on public property. The district court properly understood this narrow focus. *See* Add. 89-90; App. 3948-49; R. Doc. 345, at 89-90.

The Secretary tries to avoid this essential analytical element by taking a far more expansive view of the “specific practice” and arguing instead that the relevant practice is “[g]overnment acknowledgements of religion and God.” Appellant’s Br. 43. But as the district court held, this “analysis of the specific issue in this case misses the mark.” Add. 89; App. 3948; R. Doc. 345, at 89.

Based on the uncontradicted record evidence, the district court determined that displays of the text of the Ten Commandments have a relatively recent ancestry, dating primarily to the mid-twentieth century. Add. 91; App. 3950; R. Doc. 345, at 91. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extreme but Missing the Liberty*, 118 Harv. L. Rev. 155, 236 (2004) (“[T]here is no long and ubiquitous history of large monuments displaying the text of the Commandments.”). They thus “lack the historical pedigree of other forms of government religious expression, such as with

legislative chaplains,” which date back to the First Congress. Add. 91; App. 3950; R. Doc. 345, at 91. *See Marsh v. Chambers*, 463 U.S. 783, 787-89 (1983). The historical record related to the “‘specific practice’ at hand,” *New Doe Child*, 901 F.3d at 1021, demonstrates that a government-mandated monument displaying the text of the Ten Commandments does not “accord with history and faithfully reflect the understanding of the Founding Fathers,” and thus clearly falls on the “impermissible” side of “the line that [the Court] must draw.” *Kennedy*, 597 U.S. at 536.

The Secretary’s half-hearted reliance on an artistic depiction of “Moses holding the Ten Commandments in the Library of Congress” (Appellant’s Br. 43) is of no significance. Again, the “specific practice” at issue in this case is a free-standing monument that displays the full text of the Decalogue. The Library of Congress statue described by the Secretary, on the other hand, is one of but many figures representing art, commerce, history, law, philosophy, poetry, religion and science. *See* <https://www.loc.gov/about/online-tours/thomas-jefferson-building/main-reading-room/> (last visited Oct. 4, 2026). It depicts Moses holding a tablet, but does not show the actual text of the Ten Commandments. By contrast, when the full text of the Ten Commandments is viewed in its

entirety with no other explanatory writing, it presents “an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.” *McCreary*, 545 U.S. at 869.

The Secretary also seeks to avoid the district court’s well-supported historical practices analysis by claiming that *Kennedy* adopted an exhaustive set of six “hallmarks” for determining what historically would have been understood as the “establishment” of religion. And because the Cave Plaintiffs failed to show that the Display Act implicates any of these specific hallmarks, the Secretary says, the Act and the monument are consistent with historical practices. Appellant’s Br. 40-41.

This argument rests on flimsy grounds. In a footnote, *Kennedy* cited, among other opinions and authorities, a portion of Justice Gorsuch’s *Shurtleff* concurrence (joined by Justice Thomas) “discussing coercion and *certain other* historical hallmarks of an established religion.” *Kennedy*, 597 U.S. at 537 n.5 (citing *Shurtleff v. City of Boston*, 596 U.S. 243, 285-86 (2022) (Gorsuch, J., concurring in the judgment)) (emphasis added). The Court did not, however, create a “hallmarks” test through a single footnote citing a two-Justice concurrence. *Kennedy* did not directly quote or even apply any of the six “hallmarks” outlined in the

non-binding *Shurtleff* concurring opinion, much less adopt them as the exclusive Establishment Clause test to override the historical directive put forward in both *Town of Greece* and *Kennedy*.

Moreover, even if a hallmarks analysis applied, Justice Gorsuch's *Shurtleff* concurrence makes clear that the hallmarks he enumerated were illustrative, not exhaustive. He identified only “*some* helpful hallmarks [of establishment] that localities and lower courts *can* rely on.” *Shurtleff*, 596 U.S. at 285 (Gorsuch, J., concurring in the judgment) (emphasis added).

The district court properly understood and applied the historical practices and understandings test to the specific practice at issue in this litigation. “On the record before it,” the court ruled that historical tradition does not support “the Display Act through which the State of Arkansas issued a government mandate for a display of the text of the Ten Commandments . . . and required the placement of a permanent, stand-alone Ten Commandments Monument on State Capitol grounds.” Add. 93; App. 3952; R. Doc. 345, at 93.

2. The district court correctly recognized that the Display Act favors certain faiths.

The district court concluded that the Display Act is “coercive.” Add. 104, 115; App. 3963, 3974; R. Doc. 345, at 104, 115. But as the Cave Plaintiffs argued below (R. Doc. 265, at 13-14), coercion is not an essential element in an Establishment Clause challenge (particularly a challenge to a religious monument). *See Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”); *Cath. Charities*, 605 U.S. 238 (finding an Establishment Clause violation without addressing coercion). The district court’s opinion bears that out.

After exhaustively considering a wide range of “undisputed record evidence in the light most favorable to Secretary Jester,” Add. 115; App. 3974; R. Doc. 345, at 115,⁸ the district court found that the Display Act

⁸ That evidence covered “(1) the Arkansas General Assembly’s passage of the Display Act . . .; (2) the placement of the first Ten Commandments Monument and then of the second Ten Commandments Monument after approval by the Arts and Grounds Commission Subcommittee; (3) the gathering of funding for the first and second Ten Commandments monuments by the Foundation, chaired by Senator Rapert, from a local

and the monument favor both religion in general and the “Christian religion” in particular. Add. 98, 104, 115; App. 3957, 3963, 3974; R. Doc. 345, at 98, 104, 115. This finding of denominational preference, although misfiled as “coercion,” further supports the finding of an Establishment Clause violation.

While the Secretary argues that a clear government preference for particular religious beliefs is not unconstitutional, Appellant’s Br. 47-48,⁹ the Supreme Court disagrees, and recently affirmed that “[t]he clearest command of the Establishment Clause’ is that the government may not ‘officially prefe[r]’ one religious denomination over another.” *Cath.*

church and PureFlix; and (4) the Secretary of State and State Officials’ involvement in the ceremonies for the funding of the second Ten Commandments Monument and when the monuments were placed where donors appeared.” Add. 114; App. 3973; R. Doc. 345, at 114. The district court also reviewed “the Display Act and its legislative findings.” Add. 115; App. 3974; R. Doc. 345, at 115. The Secretary nowhere challenges that the facts the district court relied on are undisputed.

⁹ The Secretary relies on various concurrences and dissents authored by Supreme Court Justices for the proposition that coercion is the bedrock for finding an Establishment Clause violation—as if those separate opinions carry the same precedential effect as the Court’s majority opinions. See Appellant’s Br. 28, 46, 48, 50 (citing concurrences by Justices Gorsuch, Scalia, and Thomas, and a dissent by Justice Scalia). They do not. See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997); *United States v. Freeman*, 964 F.3d 774, 780 n.4 (8th Cir. 2020).

Charities, 605 U.S. at 247 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Here, the Display Act mandates that the Secretary of State must “permit and arrange for” the placement on the Capitol grounds of a monument that displays a religious text derived from the Judeo-Christian religions, to the exclusion of religions that do not recognize a singular deity. Ark. Code Ann. § 22-3-221(b). And the undisputed facts support the district court’s conclusion that the Arkansas Ten Commandments monument favors Christianity in particular.

The Secretary contends that there is no religious preference in the Display Act because the Commandments’ text mirrors the text of the Texas monument upheld in *Van Orden*. Appellant’s Br. 35, 48. But even if the Arkansas and Texas monuments were identical, the text obviously favors monotheistic religions, and in the context of this particular display (unlike those in *Van Orden* and *Plattsmouth*), it reflects and constitutes a denominational preference. The Secretary thus must rely on the Act’s *ipse dixit* that “placement of the monument under this section shall not be construed to mean that the State of Arkansas favors any particular religion or denomination over others.” Ark. Code Ann. § 22-3-221(d).

The undisputed facts surrounding the monument contradict that statement. The statements of the Display Act’s primary sponsor, the source of the funds raised for the monuments, the installation ceremonies, and the lack of any spatial or substantive relationship to any other monument demonstrate an unmistakable preference for a religious display of the text that is uniquely sacred to monotheistic faiths, and Christianity in particular. *See generally*, Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 Fordham L. Rev. 1477, 1479 (2005) (“[T]he Ten Commandments have no place at all in Hinduism, Buddhism, Taoism, and other non-western faiths.”).

The Secretary tries to avoid this conclusion by again relying on his earlier “hallmarks of religious establishment” claim based on the lone *Kennedy* footnote. Appellant’s Br. 45-46. As shown above, *supra* at 41-42, the Supreme Court has not adopted the “hallmarks” test. No matter—denominational preference *is* a hallmark of religious establishment. This core principle traces back to the Founders’ desire to avoid repeating the colonial experience: “Before the Revolution, religious establishments of differing denominations were common throughout the Colonies.” *Larson*, 456 U.S. at 244. James Madison, the principal architect of the First

Amendment,¹⁰ said: “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” James Madison, “Memorial and Remonstrance Against Religious Assessments,” [ca. June 20, 1785], in *The Papers of James Madison*, vol. 8, *10 March 1784–28 March 1786*, ed. Robert A. Rutland and William M. E. Rachal (Chicago: University of Chicago Press, 1973), 295-306.

Coercion is *not* required to demonstrate an Establishment Clause violation generally, and that principle extends to alleged violations of the denominational-neutrality rule. In recently applying the bar on denominational preference in *Catholic Charities*, the Supreme Court did not discuss coercion at all.¹¹ Nor was coercion required under the Court’s reasoning in *Town of Greece*. Although the Court held that the challenged legislative prayer practice was not coercive, it also suggested that the

¹⁰ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 234-35 (1963).

¹¹ Amici thus miss the mark when they argue that *Kennedy* undercut this Court’s conclusion in *Plattsmouth* “that government coercion is *not* a required element of an Establishment Clause claim.” Br. of Sen. Ted Cruz et al. at 12.

town's prayer practice would nevertheless be unconstitutional if it had relied on denominational preferences. *See Town of Greece*, 572 U.S. at 576 (challenged legislative prayers were constitutionally permissible because “no faith was excluded by law, nor any favored”). And in upholding the 90-year-old Bladensburg Cross in *American Legion*, the Court did not address whether the cross was coercive; rather it explained that the passage of time could “obscure” whether “the original purpose of a monument was infused with religion.” *Am. Legion*, 588 U.S. at 54. Here, there has been no passage of time and the religious infusion is not obscure.

The concurrences essential to the *American Legion* judgment agreed that infusion of religion is important to the analysis. Justices Breyer and Kagan would not have joined the judgment “if there were evidence that the organizers had deliberately disrespected members of minority faiths.” *Id.* at 67 (Breyer, J., concurring) (citation modified). And Justice Kavanaugh incorporated respect for, and neutrality toward, other religions into the “overarching set of general principles” he derived for Establishment Clause cases:

If the challenged government practice is not coercive *and* if it
(i) is rooted in history and tradition or (ii) treats religious

people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, there is ordinarily no Establishment Clause violation.

Id. at 71 (Kavanaugh, J., concurring).¹² Justice Kavanaugh’s concurrence also confirms that coercion is not necessary to demonstrate that a religious monument violates the Establishment Clause, especially where (as here) it is not rooted in history and tradition and the record shows that the monument favors particular religious people or denominations, which this monument unquestionably does.

By placing this massive stone structure at the State Capitol, the State of Arkansas intended this monument to speak on its behalf. Indeed, the State deliberately erected the Ten Commandments monument in a locale essential to public life so that non-adherents visiting the seat of State government must encounter the monument’s

¹² *Cf. Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 584 U.S. 617, 639 (2018) (finding a free-exercise violation where government action was “neither tolerant nor respectful of [plaintiff’s] religious beliefs,” as judged by the “historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body”).

Christian message. Every time a person comes to the State capitol—the center of State public life—they are confronted with the State’s unmistakable preference for certain religious denominations over others. And they have no choice but to understand that, in Arkansas, individuals whose religious beliefs do not conform to the official denominational preference are second-class citizens.

The State chose to place the monument, “funded by religious entities and bearing a religious text, i.e., the Ten Commandments, in front of a population with many different religious and nonreligious fundamental beliefs.” Add. 84; App. 3943; R. Doc. 345, at 84. The Cave Plaintiffs are two of those citizens.

The Display Act is a “law respecting an establishment of religion.” The district court properly held that the Display Act and the Ten Commandments monument violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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Respectfully submitted,

/s/ Andrew G. Schultz

John L. Burnett (ABN 77021)
Lavey and Burnett
904 West Second Street
Little Rock, AR 72201
(501) 376-2269
jburnett@laveyandburnett.com

Andrew G. Schultz
Melanie B. Stambaugh
Rodey, Dickason, Sloan, Akin &
Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103-1888
(505) 765-5900
aschultz@rodey.com
mstambaugh@rodey.com

Joshua D. Gillispie
(ABN 2010131)
Green & Gillispie
1 Riverfront Place, Suite 605
North Little Rock, AR 72114
(501) 244-0700
josh@greenandgillispie.com

John C. Williams (ABN 2013233)
Arkansas Civil Liberties
Union Foundation
904 West Second Street
Little Rock, AR 72201
(501) 374-2842
john@acluarkansas.org

CERTIFICATE OF SERVICE

On October 7, 2026, I served this document via CM/ECF on all registered counsel and thereby transmitted it to the Clerk of Court.

/s/ John C. Williams
John C. Williams

CERTIFICATE OF COMPLIANCE

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/s/ John C. Williams
John C. Williams