No. 08-472

IN THE

Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., *Petitioners,*
v.
FRANK BUONO, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND FIFTEEN MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of record for amici has presented oral argument before this Court numerous times, including most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

ACLJ attorneys often defend various governmental entities against claims that the presence of a religious symbol on government property violates the Establishment Clause. *See e.g.*, *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004). The offended observer standing rule, which emerged after (and contrary to) this Court's ruling in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), allows the plaintiffs in these cases to plead merely that they had contact with and are offended at the alleged constitutional violation.

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* The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

A *sui generis* principle, offended observer standing is devoid of support in this Court's Article III standing jurisprudence. The Court has never specifically addressed the offended observer standing doctrine although the Court has assumed jurisdiction in several of these cases. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005). The ACLJ strongly urges the Court to address the proper boundaries of Article III standing in Establishment Clause cases, and specifically to reaffirm *Valley Forge*'s holding that mere offense at government conduct is never enough to satisfy Article III's requirement of a concrete and particularized injury.

This brief is also filed on behalf of Todd Akin, Michele Bachmann, Roy Blunt, John Boehner, Eric Cantor, Randy Forbes, Scott Garrett, Walter Jones, Jim Jordan, Doug Lamborn, Thaddeus McCotter, Jeff Miller, Mike Pence, Joseph Pitts, and Joe Wilson. These amici currently are members of the United States House of Representatives in the One Hundred Eleventh Congress and are concerned with the offended observer standing doctrine's erosion of separation of powers.

SUMMARY OF THE ARGUMENT

Offended observer standing is irreconcilable with this Court's decisions. *See Valley Forge*, 454 U.S. 464; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *United States v. Richardson*, 418 U.S. 166, 179-180 (1974). *Valley*

Forge specifically held that the mere observation of a government violation of the Establishment Clause is not enough to constitute injury for purposes of Article III standing. Yet despite *Valley Forge*, mere observation is the standard proffered for standing in lower court religious display cases (as here). If *Valley Forge* is not to be eviscerated, it must mean that offended observer standing is an aberration with no support in this Court's standing jurisprudence.

Offended observer standing is flawed for numerous other reasons as well. For example, it conflates the merits of the claim with the injury. Although there are doubtless myriad ways in which government speech or displays might offend various citizens, only those who bring an Establishment Clause claim are allowed to make a federal case out of their offense.

Offended observer standing also encroaches upon the separation of powers. This Court repeatedly has said that lax standing requirements lead to judicial supremacy over the politically accountable branches of government. Offended observer standing sweeps sizable categories of otherwise politically accountable government action into judicially reviewable litigation.

ARGUMENT

Mr. Buono is offended by the display of a cross on Sunrise Rock in the Mojave National Preserve. His offense derives from the fact that Sunrise Rock is not

open to other groups and individuals to erect other permanent displays. Of course, this term, the Court unanimously repudiated the notion that citizens have a constitutional right to erect permanent displays in public parks. *Pleasant Grove,* 129 S. Ct. 1125, 1138 (2009) ("The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."). Regardless of the underlying merits of Mr. Buono's claim, his offense is essentially the "psychological consequence presumably produced by *observation* of conduct with which [he] disagrees." *Valley Forge,* 454 U.S. at 485 (emphasis added).

This case is only the most extreme example of a phenomenon that has plagued the federal courts for the past three decades. Ideologically motivated citizens and public interest groups [1] search out alleged Establishment Clause violations, almost always in the form of a passive religious symbol or display of some sort, and make a federal case out of offense at the display. The basis for standing is

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[1] Typically, if not universally, the plaintiffs are adherents of the view that there must be a high wall of separation between church and state. They, thus, "dislike any government reference to God." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007).

typically that the religious display offends the sensibilities of the plaintiffs. The offense may be characterized as an affront to religious values,[2] or as one in which plaintiffs feel stigmatized as political or community outsiders.[3] But the sum and substance of the injury is that the display bothers the plaintiffs.[4]

Offended observer standing is inconsistent with Article III. This Court should therefore reverse and remand with instructions to dismiss for want of standing.

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[2] *E.g.*, *ACLU-NJ ex rel. Miller v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Freedom From Religion Found. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1106-07 (11th Cir. 1983).

[3] *E.g.*, *Saladin v. City of Milledgeville*, 812 F.2d 687, 692-93 (11th Cir. 1987) (plaintiffs alleged that they were made to feel like "second class citizens").

[4] *E.g., Van Orden v. Perry*, 2002 U.S. Dist. LEXIS 26709 (W.D. Tex 2002).

I. "Offended Observer" Standing is an Indefensible Anomaly in Article III Standing Doctrine.

A. Offended Observer Standing Is Irreconcilable With This Court's Long-Standing Refusal to Serve as a Forum for Generalized Grievances.

This Court has "'consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). The requirement of a particularized and concrete injury serves "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. Article III standing requirements are most important "when matters of great national significance are at stake" because they safeguard this Court's duty to "guard jealously and exercise rarely [its] power to make constitutional pronouncements." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

The cases of *Schlesinger*, 418 U.S. at 222, and *Richardson*, 418 U.S. at 179-180, established that being disturbed by a governmental violation of the Constitution is never enough, by itself, to qualify as a concrete, particularized injury under Article III. *Schlesinger*, 418 U.S. at 220; *Richardson*, 418 U.S. at 176-77. *See also Richardson*, 418 U.S. at 191 (Powell, J., concurring) ("The power recognized in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing.").

In *Valley Forge*, 454 U.S. at 482-90, the principles articulated in *Richardson* and *Schlesinger* were applied to claims brought to enforce the Establishment Clause. The *Valley Forge* Court repudiated the notion that offense at alleged Establishment Clause violations is somehow distinguishable from the offense suffered by the plaintiffs in *Schlesinger* and *Richardson*: The court knew of "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Id.* at 484-85. The Court noted further that "the proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Id*. at 485 (quoting *Schelsinger*, 418 U.S. at 227).

Valley Forge could not have been more clear that Article III standing cannot be premised upon mere psychological offense at the government's alleged complicity in religion. This is true whether the person claiming the offense actually views the conduct or merely hears about it. *Id.* at 487 n.23 (finding it irrelevant that some of the Association's members lived Pennsylvania, perhaps in close proximity to the college). Proximity "does not establish an injury where none existed before." *Id.* The "psychological consequence presumably produced by *observation* of conduct with which one disagrees," does not constitute "an injury sufficient to confer standing under Article III." *Id.* at 485 (emphasis added).

Offended observer standing is therefore irreconcilable with *Valley Forge, Schlesinger,* and *Richardson* because "it treats observation *simpliciter* as the injury." *Books,* 401 F.3d at 871 (Easterbrook, J., dissenting). In no other context would – or should – mere observation of offensive government conduct confer Article III standing to bring a federal case.

For example, a devout Christian viewing a government-funded depiction of a cross immersed in urine[5] might suffer an affront to his spiritual values that is no less, and quite possibly, much more profound than the offense suffered by the strict

[5] *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 574 (1998) (challenged statute enacted after NEA funded "art" depicting crucifix immersed in urine).

separationist plaintiff who observes a Decalogue display in the county courthouse. Hasidic Jews might suffer an affront to their spiritual values from viewing a public television show espousing the view that the City of Jerusalem should be ceded in its entirety to the Palestinians as part of a Mid-East peace accord. Finally, there can be no doubt of the widespread offense that would result from the government's public execution of a convicted felon. *See Valley Forge*, 454 U.S. at 489 n.26 (listing imposition of capital punishment and implementation of affirmative action as "but two among . . . many possible examples" of government action that could trigger claims "on the basis of a personal right to government that does not [violate] commands in the Constitution").

Under *Valley Forge*, however, it does not matter how severe the offense to spiritual or other personal values or how outrageous or unconstitutional the government conduct is. *Id.* at 484 (rejecting argument that "Article III burdens diminish as the importance of the claim on the merits increases"). The plaintiff must show that he personally suffered a "distinct and palpable" injury apart from mere offense at exposure to the government conduct. *Id*. at 488.

If standing were allowed in these and other scenarios where government conduct or speech caused offense to the spiritual (or other) values of citizens, the possibilities become endless. For example, pacifist Quakers could sue over offense

from war memorials in which the government appears to be endorsing the just war theory of other Christian denominations. Vegetarians whose beliefs include the conviction that the sanctity of animal life is equal or comparable to that of human life could sue over offense from government messages endorsing the consumption of meat. *See Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005) (federal advertising program promoting beef consumption). Catholics who adhere to church teaching on the sanctity of human life from conception could take offense at all government messages promoting abortion. *See also Books,* 401 F.3d at 870 (Easterbrook, J., dissenting) (listing examples of how government messages could cause offense to various segments of the population). Eventually, government speech would be chilled into extinction.

In any event, worst case scenarios usually have political consequences. *See Nat'l Endowment for the Arts,* 524 U.S. at 574 (public outcry against government funding of cross immersed in urine display resulted in the enactment of federal decency standards for NEA art funding). As this Court observed in *Richardson,* "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Richardson,* 418 U.S. at 179*; see also Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000) (citizenry who object to government speech can elect new officials who "espouse some different or contrary

position"). Thus, even a directive that a Latin cross be mounted on every government building[6] is subject to correction after the next election.

B. The Lower Courts' Adoption of Offended Observer Standing Is Based on a Misreading of Valley Forge and Abington v. Schempp.

Notwithstanding *Valley Forge*'s clarity on the illegitimacy of psychological offense as a basis for standing to bring Establishment Clause suits, numerous lower federal courts have read *Valley Forge* to permit standing where the plaintiff alleges that he has seen and been offended by a religious display. *See*, *e.g., ACLU-NJ ex rel. Miller*, 246 F.3d at 266; *Suhre*, 131 F.3d at 1086; *Harvey v. Cobb County*, 811 F. Supp. 669, 675 (N.D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 683 (6th Cir. 1994); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Saladin,* 812 F.2d at 692-93; *Rabun County Chamber of Commerce*, 698 F.2d at 1106-07. *But cf. Zielke*, 845 F.2d at 1467-68;

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[6] *See County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., dissenting). Of course, "speech may coerce in some circumstances," *id*., for example with mandatory indoctrination of public school children, or mandatory "diversity" reeducation of public employees. In such cases, standing would rest, not on mere observation, but on *government coercion* of observation. *See Valley Forge*, 454 U.S. at 486 n.22 (distinguishing school prayer cases).

Murray v. City of Austin, 947 F.2d 147, 151 (5th Cir. 1991).

The error stems from a misreading of the *Valley Forge* Court's discussion of *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203 (1963). The *Valley Forge* Court distinguished *Schempp* by pointing out that the plaintiffs in that case suffered injury because "impressionable schoolchildren were *subjected* to unwelcome religious exercises or were *forced* to assume special burdens to avoid them." *Valley Forge,* 454 U.S. at 487 n.22 (emphasis added). The lower courts that have extrapolated from that language the doctrine of offended observer standing by equating the passive viewing of a religious display with subjection to "unwelcome religious exercises" simply ignore the fact that public school children are *compelled to be there and listen.*

For example, in *Rabun County Chamber of Commerce*, 698 F.2d at 1106-07, the first federal appellate decision in a religious display case after *Valley Forge*, the court concluded that plaintiffs who were offended by the presence of a cross in a state park had standing to sue. Noting that the schoolchildren in *Schempp* were subjected to "unwelcome religious exercises," the court inexplicably concluded that "no less can be said of the plaintiffs in [this] case." *Id.* at 1108. Because the plaintiffs chose to avoid use of the park, their injury was like that of the *Schempp* schoolchildren. *Id.* Obviously, there are no truancy penalties for failure to use a park, and no government authority

can discipline those who fail to "pay attention" to a given display.

The Fourth Circuit likewise equated "unwelcome religious exercises" with the observation of a passive religious display for purposes of Article III's injury requirement in *Suhre*. The court went so far as to add the term "religious display" to this Court's discussion of *Schempp* in *Valley Forge*. "[L]ike *Schempp* before it, *Valley Forge* recognized that direct contact with an unwelcome religious exercise *or display* works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Suhre*, 131 F.3d at 1086 (emphasis added).

Additionally, the Fourth Circuit placed great weight on this Court's addressing of the merits in *Allegheny County* and *Lynch v. Donnelly*, 465 U.S. 668 (1984). "The best proof of our reading of *Valley Forge* lies in the actions of the Supreme Court itself." In *Lynch* and *Allegheny County*, "the Court has proceeded to the merits of the challenges to the displays and found no infirmity in the standing of plaintiffs alleging direct contact with them." *Suhre*, 131 F.3d at 1088. *See also Murray,* 947 F.2d at 151 ("considerable weight" given to the fact that standing was not an issue in *Lynch* and *County of Allegheny*).

Such reliance is manifestly wrong. The Court consistently has held that it "is not bound by a prior exercise of jurisdiction in a case where [jurisdiction] was not questioned and it was passed *sub silentio*."

United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (citations omitted); *See also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

In any event, as one Fifth Circuit judge bluntly stated:

> The Supreme Court cannot continue to speak out of both sides of its mouth if it intends to provide real guidance to federal courts on this issue. That is, it cannot continue to hold expressly that the injury in fact requirement is no different for Establishment Clause cases, while it implicitly assumes standing in cases where the alleged injury, in a non-Establishment Clause case, would not get the plaintiff into the courthouse.

Doe, 494 F.3d at 500 (DeMoss, J., concurring).

The concept of offended observer standing drains *Valley Forge, Richardson,* and *Schlesinger* of all meaning. Mere exposure to an unwelcome religious display is not equivalent to coerced exposure to a religious exercise, any more than coerced exposure to

a patriotic exercise is equivalent to viewing the Statue of Liberty or the Capitol Rotunda. "Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting).

The vast constitutional gulf between coerced exposure to a religious exercise and the mere observation of a passive religious symbol or display was most poignantly expressed by Judge Easterbrook in *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting).

> Words do not coerce. *See Rust v. Sullivan*, 500 U.S. 173 (1991). A barrage of advertisements tempting young people to join the military does not oblige anyone to do so; no more does display of the Ten Commandments coerce support for religion. The Magna Carta (which begins "John, by the grace of God, king of England . . .") is part of this display, yet Elkhart County does not establish divine-right monarchy. Lady Justice, derived from the Greek goddess Themis, is in the display, but Elkhart County has not established the ancient pantheon as its religion. No one would understand any document's presence in this display to suggest that Elkhart County imposes either legal or social sanctions on nonbelievers. *Cf. Santa Fe Independent School*

District v. Doe, 530 U.S. 290, 310-13 (2000) (prayer before public high school event entails social disapproval of those who do not participate, and thus coerces religious conformity).

What the display may do is give offense, either to persons outside the religious tradition that includes the Book of Exodus or to those who believe that religion and government should be hermetically separated. Yet Themis may offend Christians (and all icons offend Muslims), the military's ads offend religious pacifists, and the message in *Rust* supports one religious perspective on human life while deprecating others. See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-87 (1992) (states may require physicians to tell women about the risks of abortion and the advantages of childbirth). Public policies and arguments pro and con about them often give offense, as do curricular choices in public schools. *See Webster v. New Lenox School District*, 917 F.2d 1004 (7th Cir. 1990). But the rebuke implied when a governmental body supports a point of view that any given person finds contemptible (or believes should be left to the private sector) is a great distance from "coercion." So great a distance, indeed, that the insulted person lacks standing to sue.

The additional requirement in some circuits, that plaintiffs must allege that they have altered their behavior to avoid the unwelcome contact with the religious display, does nothing to create an "injury" out of mere psychological offense. *See, e.g., Rabun County Chamber of Commerce*, 698 F.2d at 1108; *Zielke*, 845 F.2d at 1468; *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985). *See* Brief of Petitioner at 16-17, *Salazar et al. v. Buono*, 08-472 (June 1, 2009). As the United States explains, "plaintiffs cannot bootstrap their way into standing by choosing to inflict on themselves an additional or different injury." *Id*. at 17.

Valley Forge established that there is no "sliding scale of standing," yet that is precisely what exists in the lower federal courts. "Offended observer" standing is untenable and has turned the federal courts into "ombudsmen of the general welfare" with respect to Establishment Clause issues. *Valley Forge*, 454 U.S. at 487. A correct understanding of *Schempp* requires that plaintiff show some *coercion*, not mere contact with a passive display. *See Schempp*, 374 U.S. at 224; *cf. Santa Fe Indep. Sch. Dist.,* 530 U.S. 310-13 (religious conformity coerced when religious exercise before public high school event risks social disapproval of those who do not participate); *see also Bowen v. Roy*, 476 U.S. 693, 703 (1986) (objecting citizens cannot dictate how government orders its internal operations).

II. Offended Observer Standing Expands the Judicial Role at the Expense of Separation of Powers.

The standing requirements of Article III are essential to maintain the proper separation of powers between the Congress, the Executive, and the Judiciary, and between the federal government and the states. *E.g., Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct., 2553, 2570 (2007) (plurality); *id.* at 2573 (Kennedy, J., concurring); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006); *Lewis v. Casey,* 518 U.S. 343, 349 (1996); *Lujan,* 504 U.S. at 576-77 (1992). Offended observer standing is just the sort of lax standard that fosters "permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

As the lower court's decision in this case demonstrates, offended observer standing reallocates power away from the politically accountable branches of government and results in expanded judicial overview. Whenever "one or more of the branches seek to transgress the separation of powers," "liberty is always at stake." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also Schlesinger*, 418 U.S. at 222 ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the

potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); *Richardson*, 418 U.S. at 179-80 (Founding Fathers did not intend judiciary to act as Athenian democracy overseeing the conduct of the national government).

The sheer volume of religious display cases that have flooded the courts[7] in the past three decades is

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[7] For example, Ten Commandments display cases alone comprise a small percentage of religious display cases, yet they are legion. *Books*, 401 F.3d 857; *ACLU of Ky. v. McCreary County,* 354 F.3d 438 (6th Cir. 2003), *aff'd*, 125 S. Ct. 2722 (2005); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated and reh'g granted by* No. 02-2444, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Freethought Soc'y* of *Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Summum v. City of Ogden,* 297 F.3d 995 (10th Cir. 2002); *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Turner v. Habersham County*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003); *Mercier v. City of La Crosse,* 276 F. Supp. 2d 961 (W.D. Wis. 2003), *rev'd and remanded sub nom. Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002); *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002); *Baker v. Adams County/Ohio Valley Sch. Bd.*, No. C-1-99-94, 2002 U.S. Dist. LEXIS 26226 (S.D. Ohio 2002), *aff'd*, 86 F. App'x 104 (6th Cir. 2004); *Kimbley v. Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000); *Ind. Civ. Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000), *aff'd*, 259

proof positive that offended observer standing has catapulted the federal judiciary into the role of "ombudsmen of the general welfare" with respect to Establishment Clause issues. *Valley Forge*, 454 U.S. at 487. Offended observer standing, like the lax taxpayer standing sought in *Hein*, improperly "enlist[s] the federal courts to superintend . . . the speeches, statements and myriad daily activities" of government officials. *Hein*, 127 S. Ct. at 2570 (plurality).

III. Offended Observer Standing Also Conflates the Merits of an Establishment Clause Claim with the Standing Inquiry and Promotes Religious Divisiveness.

Offended observer standing is not only indefensible under this Court's precedents, it also conflates the merits of the claim with the plaintiff's injury and promotes religious divisiveness.

In other contexts, this Court has held that feelings of stigmatization do not constitute injury sufficient to establish standing, even where the government conduct giving rise to those feelings is unquestionably unlawful.

> Neither do [plaintiffs] have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination.

F.3d 766 (7th Cir. 2001); *Harvey*, 811 F. Supp. 669, *aff'd*, 15 F.3d 1097.

> There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. *Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.*

Allen v. Wright, 468 U.S. 737, 755 (1983) (citations omitted) (emphasis added).

Only those plaintiffs with an Establishment Clause claim are permitted to haul the government into federal court for objections to government conduct or speech on the mere basis of offence taken. All others who suffer an affront to their sensibilities from government speech or conduct must turn their backs and ignore the offense. Federal court vindication is not an option.

To the extent that "divisiveness" is a proper consideration in Establishment Clause adjudication, *compare Van Orden*, 545 U.S. at 704 (Breyer, J., concurring), *and Schempp,* 374 U.S. at 307 (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children"), *with Zelman v. Simmons-Harris*, 536 U.S. 639, 662 n.7 (2002) (and

cases cited) (potential for "divisiveness" properly disregarded), privileging with unique standing those who assert offense over religious symbols aggravates, rather than mitigates, such divisiveness.

Legal scholars have noted the divisive effect of "encourag[ing] people to think that what seem to be minor irritations are in reality violations of some sacred principle for which they have a duty to fight." Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817, 830 (1984). Litigation over religious symbols, in which only certain types of offense will secure the plaintiff a day in court, "exacerbates religious division and discord by heightening the sense of grievance over symbolic injuries." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 192 (1992).

> Does anyone believe that the annual outbreak of lawsuits over the symbols of the December holidays advances the cause of religious harmony or civic understanding? When a constitutional doctrine aggravates the very problem it is supposed to solve, without offering hope for resolution, it should be replaced.

Id. at 193 (discussing the endorsement test).

In uniquely privileging only Establishment Clause claimants, offended observer standing also skews public discourse. "[T]he Constitution does not

guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove Unified Sch. Dist*, 542 U.S. at 44 (O'Connor, J., concurring). *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2004) (Government creation of two-tiered litigation system in a certain class of cases distorts usual function of court system).

CONCLUSION

The lower federal appellate courts need to hear the message of *Valley Forge* again in this case. This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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