No. 17-60

IN THE
Supreme Court of the United States

CITY OF BLOOMFIELD,

Petitioner,

v.

JANE FELIX, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THOMAS H. DUPREE JR.
Counsel of Record
BRIAN M. LIPSHUTZ
DAVID W. CASAZZA*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

* Admitted only in New York; practicing under the supervision of principals of the firm.

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Members of Congress who are committed to defend and protect our First Amendment freedoms and who believe that faith plays a vital role in the history and culture of our nation.

Amici and their colleagues enact legislation that funds and regulates the nation's system of national parks, millions of acres of public land, more than 130 national cemeteries, and dozens of monuments and memorials. In these public spaces, religious texts and emblems often serve to honor the sacrifice of American soldiers, recall the accomplishments of past generations, and recognize the important contributions of many religious traditions to our political, legal, and moral culture. The disorder in the courts applying the Establishment Clause generates unnecessary litigation regarding these symbols and memorials that reflect our national heritage.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amici* and their counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* states that counsel for Petitioner and Respondents received timely notice of intent to file this brief. Petitioner has entered consent on the docket to the filing of *amicus curiae* briefs and Respondents have consented in writing to the filing of this brief.

Amici are:

United States Senators

Mike Lee (UT)
John Boozman (AR)
Ted Cruz (TX)
Steve Daines (MT)
Charles Grassley (IA)
Orrin G. Hatch (UT)
James M. Inhofe (OK)
James Lankford (OK)
Luther Strange (AL)

Members of the House of Representatives

Steve Pearce (NM)
Robert B. Aderholt (AL)
Brian Babin, DDS (TX)
Jim Banks (IN)
Jeff Duncan (SC)
Trent Franks (AZ)
Vicky Hartzler (MO)
Jody Hice (GA)
Steve King (IA)
Doug Lamborn (CO)
Barry Loudermilk (GA)
Mark Meadows (NC)
Pete Olson (TX)
Mark Walker (NC)
Randy Weber (TX)

SUMMARY OF ARGUMENT

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST., amend. I. For decades the nation's courts have struggled to apply this stricture with consistency. This Court has defined, revised, and disregarded a kaleidoscope of standards. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014); *Van Orden* v. *Perry*, 545 U.S. 677 (2005); *Marsh* v. *Chambers*, 463 U.S. 783 (1983); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The lower courts have further complicated this area in their struggle to make sense of this Court's shifting guidance. The result, in the Tenth Circuit and across the nation, is a "judicial morass." *Green* v. *Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing).

The disarray in the doctrine is particularly acute in cases concerning civic displays. "Government officials attempting to parse these sharply divided public display decisions might be forgiven for occasionally thinking . . . that they confront a 'jurisprudence of minutiae' that leave them to rely on 'little more than intuition and a tape measure' to ensure the constitutionality" of public displays. *Skoros* v. *City of New York*, 437 F.3d 1, 15 (2d Cir. 2006) (quoting *Cty. of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 674–75 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

The Tenth Circuit's decision demonstrates the confusion legislators confront because of the lack of manageable standards. As that court bluntly stated, "[w]e cannot speculate what precise actions a government must take" to comply with the Establishment Clause. *Felix* v. *City of Bloomfield*, 841 F.3d 848, 864

(10th Cir. 2016) (*Felix I*); *see also id.* at 863 ("What would be enough to meet this standard? The case law does not yield a ready answer.").

In this case, the Tenth Circuit reached a result that cannot be reconciled with this Court's decision in *Van Orden*. Bloomfield's display, like Texas's, depicts the Ten Commandments as one of a number of monuments commemorating important historical documents. *Felix I*, 841 F.3d at 852–53; *Van Orden*, 545 U.S. at 681–82. Bloomfield's display, like Texas's, was privately funded. *Felix I*, 841 F.3d at 852; *Van Orden*, 545 U.S. at 682. Bloomfield's monument also stands next to a clear disclaimer that the monuments "reflect the City's history of law and government" but do "not necessarily reflect the opinions of the City." *Felix I*, 841 F.3d at 852–53. Yet, while this Court found no violation in *Van Orden*, the Tenth Circuit disallowed Bloomfield's display.

The decision below also reflects the confusion in the circuit courts about whether "offended observers" have standing. Those circuits that have recognized offended-observer standing have ignored the holding in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), that offense is not an injury in fact. Four circuits—including the Tenth—have also misinterpreted this Court's silence about standing in *Van Orden* and other recent decisions as tacit holdings that the plaintiff in that case had standing as an offended observer. The Court should grant certiorari to reaffirm *Valley Forge*'s holding that, under ordinary principles of standing, offense is not an injury in fact.

ARGUMENT

This Court's Establishment Clause "jurisprudence has confounded the lower courts and rendered

the constitutionality of displays of religious imagery on government property anyone's guess." *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari). In this area of uncertainty, and in disregard of this Court's recent decisions in *Van Orden* and *Town of Greece*, the Tenth Circuit continues to impose a version of *Lemon* that amounts to a "presumption of unconstitutionality." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1102 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing en banc). At the same time, it has mistakenly relied on *Van Orden* to justify offended-observer standing despite the holding of *Valley Forge* that psychological consequences do not amount to injury.

I. CERTIORARI IS WARRANTED TO RESOLVE CONFLICT IN THE APPLICATION OF THE ESTABLISHMENT CLAUSE TO PUBLIC DISPLAYS.

Recent decisions have moved the Court away from the indistinct, much disparaged, multi-factor *Lemon* test. *See, e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) ("*Lemon* is not useful in dealing with the sort of passive monument" at issue); *id.* at 699–700 (Breyer, J, concurring) (declining to apply *Lemon*'s "single mechanical formula"); *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1815 (2014) (upholding public prayer without reference to *Lemon*); *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010) (discussing the context surrounding a monument and citing *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment)). Instead, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 134 S. Ct. at 1819 (quoting *Cty. of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J.,

concurring in the judgment in part and dissenting in part)). But many lower courts, including the Tenth Circuit, continue to apply *Lemon* and its progeny in defiance of more recent guidance. The Court should grant certiorari to provide a clear standard in this area of widespread judicial confusion.

A. Congress Has Responsibility Over Federal Buildings, Lands, And Monuments.

Congress has the power to "make all needful Rules and Regulations respecting . . . Property belonging to the United States." U.S. CONST., art. IV, § 3. Pursuant to this power, Congress has created and funds thousands of federal buildings; millions of acres of national parks, national forests, and wilderness areas; and hundreds of national cemeteries, monuments, and memorials. Congress governs these spaces for the benefit of the public, mindful of the heritage and traditions of the American people. Congress seeks to recognize the sacrifices of generations past, celebrate the nation's religious cultural heritage, and recall the contributions of religion to the evolution of law and society, while taking care to avoid an establishment of religion.

Historically, Congress employed religious imagery without provoking controversy. Countless national cemeteries feature crosses, stars, and dozens of other "emblems of belief." *Available Emblems of Belief for Placement on Government Headstones*, Nat'l Cemetery Admin., https://www.cem.va.gov/hmm/emblems.asp. National memorials and federal buildings invoke the judgment, compassion, and glory of God to honor our history and hallow our war dead. *See Van Orden*, 545 U.S. at 689 & n.9 (cataloging federal installations depicting religious images and text, includ-

ing the House of Representatives, the Library of Congress, the National Archives, the Department of Justice, the federal courthouse in the District of Columbia, and monuments on the National Mall). Congress has also enacted legislation directing that "In God We Trust" appear on the currency, Act of July 11, 1955, 69 Stat. 290, and establishing the same phrase as the national motto, Act of July 30, 1956, 70 Stat. 732.

Indeed, Congress displayed its awareness of religion's particular role in our legal history when it approved and funded the Supreme Court's current building. *See* Act of Dec. 20, 1929, 46 Stat. 51. The friezes around the courtroom feature religious figures, including Moses holding the Decalogue, Solomon, Confucius, Muhammad, and Saint Louis. *Courtroom Friezes: South and North Walls*, https://www.supremecourt.gov/about/northandsouthwalls.pdf. Moses and the Decalogue also appear on the courtroom's north and south gates and on the building's east façade. *See Van Orden*, 545 U.S. at 688. Congress chose these figures to represent the vital importance of religious leaders in the evolution of our law. "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *ACLU of Ky.* v. *Mercer Cty.*, 432 F.3d 624, 626–27 (6th Cir. 2005).

B. The Courts Apply Shifting And Inconsistent Establishment Clause Standards.

Congress's stewardship of public displays honoring our cultural and legal traditions is threatened by unnecessary litigation borne of disarray in the courts. As one judge succinctly observed, "Establishment

Clause jurisprudence is a law professor's dream, and a trial judge's nightmare." *Am. Humanist Ass'n* v. *Md. Nat'l-Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 381 (D. Md. 2015). The "nightmare" began in earnest when the Court laid out a three-part test in *Lemon* v. *Kurtzman* that has baffled judges for more than forty-five years. 403 U.S. 602 (1971). *Lemon* described a three-pronged test for Establishment Clause challenges—purpose, effect, or excessive entanglement, 403 U.S. at 612–13—but the test has proven difficult to apply.

Over the succeeding decades, the Court has applied *Lemon* sporadically and inconsistently. *See Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment) (collecting cases applying, ignoring, or criticizing *Lemon*). Only two years after laying out the three criteria, the Court itself characterized them as "no more than helpful signposts." *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973).

Few constitutional standards have drawn such widespread criticism. *See, e.g.*, *Tangipahoa Parish Bd. of Educ.* v. *Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari) ("Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test."); *Comm. for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (lamenting "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*"); *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 494 (2d Cir. 2009) ("*Lemon* is difficult to apply and not a particularly useful test."); *Roark* v. *S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 (8th Cir. 2009) ("[T]he *Lemon* test has had a 'checkered career.'"

(quoting *Van Orden*, 545 U.S. at 700)). Yet *Lemon* endures: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence." *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

Adding to the confusion, this Court has applied a number of other tests, either as part of a *Lemon* factor or as an independent standard. These include the "endorsement" test, *Lynch* v. *Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring); the *Marsh* test, *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); the "narrow coercion test," *Lee* v. *Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting); *Cty. of Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part); the "broad coercion test," *Lee*, 505 U.S. at 586–99; and the "nonpreferentialist test," *Wallace* v. *Jaffree*, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting). *See also Separation of Church & State Comm.* v. *City of Eugene*, 93 F.3d 617, 627 (9th Cir. 1996) (O'Scannlain, J., concurring) (The Court's decisions employ standards that "are not always clear, consistent or coherent.").

Recent decisions of this Court have further complicated the situation. The majority in *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005), purported to apply *Lemon* while once again tinkering with its formulation. The Court modified the purpose prong in invalidating the County's display. While prior applications of *Lemon* inquired into the state's "actual purpose," *see Lynch*, 465 U.S. at 690 (O'Connor, J., concurring), the *McCreary County* majority asked only what a "reasonable observer" could perceive the

state's "ostensible" purpose to be, *McCreary Cty.*, 545 U.S. at 860, 866.

A majority of the Justices in *Van Orden*, which was decided the same day, declined to apply *Lemon* to a civic display containing the Ten Commandments on the Texas Capitol grounds. 545 U.S. at 686 (plurality opinion) (concluding that *Lemon* is "not useful in dealing with the sort of passive monument" at issue); *id.* at 699 (Breyer, J., concurring in the judgment) (declining to apply *Lemon* because "no single mechanical formula . . . can accurately draw the constitutional line in every case"). A majority of the Justices recognized that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Id.* (Breyer, J., concurring in the judgment); *see also id.* at 686–87 (plurality opinion). These Justices concluded that monuments like Bloomfield's must be assessed as "acknowledgements of the role played by the Ten Commandments in our Nation's heritage," *id.* at 688 (plurality opinion), that convey "a secular moral message (about proper standards of social conduct) [and] convey a historical message (about a historic relationship between those standards and the law)," *id.* at 700 (Breyer, J., concurring in the judgment).

Because of the tension among the ten opinions in *Van Orden* and *McCreary County*, lower courts "remain in Establishment Clause purgatory." *Mercer Cty.*, 432 F.3d at 636. Some courts have attempted to blend *Lemon* as applied in *McCreary County* with *Van Orden*, treating the latter's discussion of history and tradition as a sub-part of the *Lemon* prongs. *See, e.g.*, *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (concluding *Van Orden* "does not dispense with the *Lemon* factors" but does add new elements

for "difficult borderline cases" (quoting *Van Orden*, 545 U.S. at 700)). Other courts have applied both *Van Orden* and *Lemon* as distinct tests. *See, e.g.*, *Freedom From Religion Found., Inc.* v. *Weber*, 951 F. Supp. 2d 1123, 1134 (D. Mont. 2013). And still others have read *Van Orden* as superseding *Lemon*, at least in some cases. *See Card* v. *City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008) (concluding *Van Orden* "carv[es] out an exception" from *Lemon* for Ten Commandment displays); *ACLU Neb. Found.* v. *City of Plattsmouth*, 419 F.3d 772, 776, 778 n.8 (8th Cir. 2005) (en banc); *see also Trunk* v. *City of San Diego*, 660 F.3d 1091, 1093 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc) (by using *Lemon* "the panel applied the wrong test"); *Access Fund* v. *U.S. Dep't of Agric.*, 499 F.3d 1036, 1047 (9th Cir. 2007) (Wallace, J., concurring) ("I do not believe that the *Lemon* test is helpful under the circumstances of this case, and would follow *Van Orden* instead.").

When this Court last addressed a public monument, it discussed *Van Orden* without invoking *Lemon*. *See Buono*, 559 U.S. at 721; *see also Town of Greece*, 134 S. Ct. at 1819 (assessing an Establishment Clause claim with reference to history and context without employing *Lemon*).

Adding to this backdrop of uncertainty, and in conflict with this Court's approach in *Van Orden* and *Town of Greece*, the Tenth Circuit and other courts continue to apply only *Lemon*. *See Felix* v. *City of Bloomfield*, 841 F.3d 848, 856 (10th Cir. 2016) (*Felix I*) (applying *Lemon* without any discussion of its relevance after *Van Orden*); *Cooper*, 577 F.3d at 494 (applying only *Lemon* even after acknowledging the test's "beleaguered" status); *Access Fund*, 499 F.3d at 1042–43 (holding that *Lemon* "remains the benchmark" for

Establishment Clause challenges although it has "hardly been sanctified by the Supreme Court"); *Mount Royal Joint Venture* v. *Kempthorne*, 477 F.3d 745, 758 (D.C. Cir. 2007); *Mercer Cty.*, 432 F.3d at 636.

Further complicating matters, *Lemon*'s contours vary widely from one circuit to another. *Compare Cmty. House, Inc.* v. *City of Boise*, 490 F.3d 1041, 1055 (9th Cir. 2007) ("[T]he Supreme Court refined the *Lemon* test by folding the 'excessive entanglement' inquiry into, and setting out revised criteria for, the 'effect' prong."), *with Felix I*, 841 F.3d at 856 n.4 (continuing to recognize "excessive entanglement" as a distinct prong); *see also Jewish War Veterans* v. *United States*, 695 F. Supp. 3, 14 (D.D.C. 1988) (adding a least-religious-alternative step to the effect analysis); *Am. Humanist Ass'n* v. *City of Lake Elsinore*, No. 13-989, 2014 WL 791800 (C.D. Cal. Feb. 25, 2014) (same). Questions also exist about whether newly established monuments should be treated differently than longstanding monuments that have generated little complaint. *Compare Freedom From Religion Found., Inc.* v. *Weber*, 628 F. App'x 952, 954 (9th Cir. 2015) (highlighting the "absence of complaints through [the monument's] sixty year history"), *with Trunk*, 629 F.3d at 1122 (lack of complaints is "not a determinative factor"). And it remains unclear what effect, if any, a clear statement disclaiming a religious purpose or endorsement has. *Compare Weber*, 628 F. App'x at 954 (no endorsement because of plaque disclaiming government speech), *with Felix I*, 841 F.3d at 860–61 (concluding multiple disclaimers are ineffective at preventing endorsement).

C. The Tenth Circuit Applies A Version Of *Lemon* That Is Antagonistic To Religion.

Among the circuits that continue to apply a version of *Lemon* to civic displays, the Tenth Circuit takes an unusually aggressive approach, "combin[ing] *Lemon* with an endorsement spin that is tantamount to a hostile 'reasonable observer.'" *Felix* v. *City of Bloomfield*, 847 F.3d 1214, 1219 (10th Cir. 2017) (*Felix II*) (Kelly, J., dissenting from denial of rehearing en banc). In application, the Tenth Circuit's "reasonable observer" turns out to be "rather an admittedly *un* reasonable one. He just gets things wrong." *Green* v. *Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc); *see also id.* at 1245–48 (cataloguing the "reasonable observer's" legal and factual errors). Applying this "unreasonable observer" test, the Tenth Circuit orders the removal of monuments if the court can "imagine" a "hypothetical" observer "who *could think* [a city] means to endorse religion—even when it doesn't." *Am. Atheists*, 637 F.3d at 1110 (Gorsuch, J., dissenting from denial of rehearing en banc.).

The result is a "presumption of unconstitutionality." *Am. Atheists*, 637 F.3d at 1102 (Kelly, J., dissenting from denial of rehearing en banc). In so holding, the Tenth Circuit disregards this Court's guidance. *See Green*, 574 F.3d at 1249 (Gorsuch, J., dissenting from denial of rehearing en banc) ("Even if we can't be sure anymore what legal rule controls Establishment Clause analysis in these cases, we should all be able to agree at least that cases like *Van Orden* should come out like *Van Orden*.").

The Tenth Circuit also claims that, by carefully choosing its words and actions, a city can avoid a violation, but "there exists a gap between the test we purport to apply and a more stringent one we secretly require." *Felix II*, 847 F.3d at 1220 (Kelly, J., dissenting from denial of rehearing en banc). The panel opinion suggested that the city could avoid a violation by taking "sufficiently purposeful, public, and persuasive actions," *Felix I*, 841 F.3d at 864, including "accompanying the monument with other secular markers, avoiding religious ceremonies when unveiling the monument, and displaying clear disclaimers," *Felix II*, 847 F.3d at 1220 (Kelly, J., dissenting from denial of rehearing en banc). Bloomfield did each of these things, but the panel still concluded the monument violated the Establishment Clause. *Id.*

* * *

Amici and other legislators across the country are left adrift. Because the "*Lemon* test and other tests and factors, which have floated to the top of this chaotic ocean from time to time, [remain] so indefinite and unhelpful," legislators must sound the depths of an Establishment Clause jurisprudence that "has not become more fathomable." *Card*, 520 F.3d at 1024 (Fernandez, J., concurring). This Court should grant certiorari to reverse the Tenth Circuit's aberrant ruling and to provide clarity to legislators and lower courts alike.

II. CERTIORARI IS WARRANTED TO REAFFIRM THAT ORDINARY PRINCIPLES OF STANDING APPLY IN ESTABLISHMENT CLAUSE CASES.

The Tenth Circuit's recognition of offended-observer standing conflicts with *Valley Forge Christian College* v. *Americans United for Separation of Church*

& State, Inc., 454 U.S. 464 (1982), and ordinary principles of standing. The court held that, "[i]n the context of alleged Establishment Clause violations, a plaintiff may establish [standing] if 'directly affected by the laws and practices against which [his] complaints are directed.'" *Felix* v. *City of Bloomfield*, 841 F.3d 848, 854 (10th Cir. 2017) (*Felix I*) (quoting *Green* v. *Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 793 (10th Cir. 2009)). The court then concluded that the "[p]laintiffs have had the requisite direct contact here" because "they feel excluded by the Ten Commandments" and are confronted with them when they drive by City Hall or enter the building to pay a water bill. *Id.*

Valley Forge forecloses this result. It held that psychological discomfort from an alleged Establishment Clause violation is not enough to create standing. Some courts justify offended-observer standing by relying on recent Establishment Clause cases. But that reliance is misplaced because silence about standing is not precedent that standing existed. The consequence of this erroneous approach is to chill important expressions of our national heritage.

A. Offended-Observer Standing Conflicts With *Valley Forge*.

The Court ruled out offense as constitutionally cognizable injury in *Valley Forge*. The plaintiffs there alleged that the transfer of surplus federal property to Valley Forge Christian College violated the Establishment Clause. The Court held that the plaintiffs lacked standing because "the psychological consequence presumably produced by observation of conduct with which one disagrees" "is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."

Valley Forge, 454 U.S. at 485–86. This is precisely the harm alleged by offended observers.

One circuit has acknowledged the tension between *Valley Forge* and offended-observer standing. It recognized that "[i]t can be argued the [plaintiffs'] alleged injuries from observance of the [holiday] display . . . are tantamount to the 'psychological' consequence[s] produced by observation of conduct with which one disagrees,' and that these psychological consequences are insufficient to establish standing." *ACLU-NJ* v. *Twp. of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (Alito, J.) (quoting *Valley Forge*, 454 U.S. at 485). But in that appeal, the court did not reach the question whether offended-observer standing is constitutional. *Id*.[2]

Several judges writing individually have made similar points. In *American Civil Liberties Union of Ohio Foundation, Inc.* v. *Ashbrook*, 375 F.3d 484 (6th Cir. 2004), Judge Batchelder concluded that the offended observer-plaintiffs "alleged no injury other than the 'psychological consequence presumably produced by an observation of conduct with which one disagrees'—an injury that the Supreme Court has specifically found insufficient to give standing under Article III." *Id.* at 496 (Batchelder, J., dissenting). What she said then is still true: "*Valley Forge* remains good law, and has been cited by the Supreme Court more than three dozen times without so much as a hint of disapproval." *Id.* Judge Guy has raised a similar concern. *See Washgesic* v. *Bloomingdale Pub.*

---

[2] The Third Circuit has since recognized offended-observer standing. *See Freedom From Religion Found. Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 479 (3d Cir. 2016).

Schs., 33 F.3d 679, 684–85 (6th Cir. 1994) (Guy, J., concurring) ("[A] discussion of 'psychological damage' resulting from viewing this picture does implicate an 'establishment'—but not one of religion. What is established is a class of 'eggshell' plaintiffs of a delicacy never before known to the law."); *see also Freedom From Religion Found., Inc.* v. *Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (noting, without resolving, a conflict within the circuit on offended-observer standing and a potential conflict with *Valley Forge*).

Nevertheless, many courts of appeals have recognized "injuries . . . to the feelings alone," *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009), based on a misreading of *Valley Forge*. Their emphasis on direct contact purports to distinguish *Valley Forge* on the ground that the plaintiffs there were geographically removed from the offending property. *See, e.g.*, *Vasquez* v. *Los Angeles ("LA") Cty.*, 487 F.3d 1246, 1252 (9th Cir. 2007); *ACLU of Ohio Found.*, 375 F.3d at 489 n.3.

But this distinction has no basis in *Valley Forge*. The Court concluded that there was no standing because offense is not an injury under Article III. *Valley Forge*, 454 U.S. at 485. Only in the next paragraph, while explaining why "we do not retreat from our earlier holdings that standing may be predicated on noneconomic injury," did the Court mention the lack of direct contact. *Id.* at 486. And in a footnote to that paragraph, the Court confirmed that proximity was not the main problem; the Court concluded that even if Americans United had members in Pennsylvania, that would not "establish[ ] a cognizable injury where none existed before." *Id.* at 487 n.23 *Valley Forge* thus holds that offended citizens do not have standing.

Valley Forge simply applied ordinary principles of standing. As part of "the 'irreducible constitutional minimum' of standing," a plaintiff must have "suffered an injury in fact." *Spokeo* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An injury in fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). For an injury to be concrete, it "must be '*de facto*'; that is, it must actually exist." *Id.* Although an injury may be concrete even if it is intangible, courts refer to history "[i]n determining whether an intangible harm constitutes injury in fact." *Spokeo*, 136 S. Ct. at 1549. *Valley Forge* reviewed the caselaw and found no historical precedent for treating offense as a concrete injury. *See Valley Forge*, 454 U.S. at 482–87; *see also Washgesic*, 33 F.3d at 684 (noting the novelty of offended-observer standing).

"The Constitution confers limited authority on each branch of the Federal Government." *Spokeo*, 136 S. Ct. at 1546. In so doing, it "endows the federal courts with '[t]he judicial Power of the United States,'" which "extends only to 'Cases' and 'Controversies.'" *Id.* at 1547 (quoting U.S. CONST., art. III, §§ 1–2). Standing doctrine thus "developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Id.* As the Court wrote in *Valley Forge*, "[t]he federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487. These principles apply in Establishment Clause cases, and the Court should reaffirm that the circuits must follow those principles as articulated in *Valley Forge*.

B. Circuits Have Divided Over The Significance Of This Court's Silence About Standing In *Van Orden*, *McCreary County*, And Other Cases.

Although *Van Orden* and *McCreary County* do not address standing, the Fourth, Eighth, Ninth, and Tenth Circuits cite those decisions as support for offended-observer standing. They do so despite the well-settled rule that a decision with no discussion of standing is not precedent about standing.

The Tenth Circuit has committed this error. It found "some direction . . . from the numerous cases in which the Court has addressed the merits of Establishment Clause claims alleging exposure to unwelcome government-sponsored religious messages." *Awad* v. *Ziriax*, 670 F.3d 1111, 1121 n.6 (10th Cir. 2012). The Tenth Circuit acknowledged that this Court "recently cautioned that '[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.'" *Id.* (quoting *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1448 (2011)). But it stated "[n]onetheless" that "the volume and content of Supreme Court merits decisions in Establishment Clause religious display and expression cases involving noneconomic injury is instructive." *Id.* The Tenth Circuit has also cited *Van Orden* and stated that "the [Supreme] Court has often recognized standing where a plaintiff has been directly exposed to a religious symbol displayed by a government entity." *Habecker* v. *Town of Estes Park*, 518 F.3d 1217, 1227 n.9 (10th Cir. 2008).

Likewise, the Eighth Circuit has "observe[d] that no Justice questioned Van Orden's standing," even as it "recognize[d] that '[w]hen a potential jurisdictional

defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.'" *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015, 1024 n.8 (8th Cir. 2012) (second alteration in original) (quoting *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1448). The Fourth Circuit has written that "[t]he best proof of our reading of *Valley Forge* [to allow offended-observer standing] lies in the actions of the Supreme Court itself." *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1088 (4th Cir. 1997). Specifically, in *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), and *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), "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. And the en banc Ninth Circuit has treated *Van Orden* and *McCreary County* as precedent about standing. *See Catholic League for Religious & Civil Rights* v. *City & Cty. of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc).

Two circuits have resisted this mistake. Sitting en banc, the Fifth Circuit stated that it could not "infer standing from the Supreme Court's decision in similar Establishment Clause cases where the issue was not ruled on by the Court." *Doe* v. *Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 498 (5th Cir. 2007) (en banc). As that court explained, "[g]oing back to Chief Justice Marshall, the Court has consistently 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.'" *Id.* (alteration in original) (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)). Similarly, the D.C. Circuit has recognized that this Court's Establishment Clause cases "do not all discuss the standing issue,"

and "[i]t is a well-established rule that 'cases in which jurisdiction is assumed *sub silentio* are not binding authority for the proposition that jurisdiction exists.'" *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (quoting *John Doe, Inc.* v. *DEA*, 484 F.3d 561, 569 n.5 (D.C. Cir. 2007)).

Even though this rule has existed since the time of Chief Justice Marshall, several circuits have refused to follow it. Unless the Court grants certiorari, the lower courts will continue to invoke *Van Orden* and *McCreary County* to justify a doctrine that undermines the separation of powers and magnifies the confusion in the substantive Establishment Clause doctrine.

C. The Issue Of Standing Is Especially Important In Establishment Clause Cases.

The scope of standing to bring an Establishment Clause claim is an exceptionally important issue. In any kind of lawsuit, limits on standing protect the separation of powers. "[T]he law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches." *Spokeo*, 136 S. Ct. at 1547 (citation omitted). As such, a "[p]roper regard for the complex nature of our constitutional structure requires" that the judiciary not "hospitably accept for adjudication claims of constitutional violations by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge*, 454 U.S. at 474.

Offended-observer standing does just that, and it begets litigation over even the most benign references to God in our civic displays. As the D.C. Circuit has recognized, Presidents of both parties have long invoked God in their speeches, whether Lincoln's address to "a war-weary nation [about] 'malice toward

none' and 'charity for all [ ] with firmness in the right as God gives us to see the right,'" Kennedy's exhortation that "'here on earth God's work' must be our own," or Reagan's vision of "the shining city . . . built on rocks stronger than oceans, windswept, God-blessed, and teeming with people of all kinds living in harmony and peace." *Newdow* v. *Roberts*, 603 F.3d 1002, 1010 (D.C. Cir. 2010). But the offended-observer doctrine gives a heckler's veto over displays commemorating those speeches. Such a result is inconsistent with our traditions, and the Court should grant certiorari to eliminate any doubt that offense is not an injury under Article III.

CONCLUSION

The decision below highlights the confusion in the lower courts about the meaning of the Establishment Clause. It also highlights the need for this Court to reaffirm that offended-observer standing is inconsistent with the requirements of Article III. For both of these reasons, this Court should grant the petition and reverse the decision of the Tenth Circuit.

Respectfully submitted,

THOMAS H. DUPREE JR.
Counsel of Record
BRIAN M. LIPSHUTZ
DAVID W. CASAZZA*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

* Admitted only in New York; practicing under the supervision of principals of the firm.

Counsel for Amici Curiae

August 10, 2017