No. 08-1222

IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA; and
SAN DIEGO-IMPERIAL COUNCIL,
BOY SCOUTS OF AMERICA,
Petitioners,

v.

LORI & LYNN BARNES-WALLACE;
MITCHELL BARNES-WALLACE;
MICHAEL & VALERIE BREEN;
and MAXWELL BREEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INDIVIDUAL RIGHTS FOUNDATION AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether individuals who have never visited or been excluded from a public facility nevertheless have standing to challenge a city's lease of that facility to a third party that makes those facilities available for public use—solely because the third party expresses beliefs (unrelated to their operation of the facility) that offend the would-be plaintiffs.

2. Whether individuals who are not potential bidders for a lease to a public facility nevertheless have standing to challenge the bidding process solely because the third party awarded the lease expresses beliefs (unrelated to their bidding for the lease or operation of the facility) that offend the would-be plaintiffs.

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INTEREST OF *AMICI CURIAE*

Petitioners Boy Scouts of America and San Diego-Imperial Council, Boy Scouts of America (collectively, "Boy Scouts") and Respondents Lori & Lynn Barnes-Wallace, Mitchell Barnes-Wallace, Michael & Valerie Breen, and Maxwell Breen have each consented to the filing of this brief by *amici curiae* Individual Rights Foundation and Cato Institute.[1]

The IRF was founded in 1993 and is the legal arm of the David Horowitz Freedom Center, a nonprofit and nonpartisan organization. The IRF is dedicated to supporting litigation involving civil rights, and protection of speech and associational rights, and it participates in educating the public about the importance of First Amendment rights and the Fourteenth Amendment's guarantee of equal protection of the law. To further its goals, IRF attorneys appear in litigation and file *amicus curiae* briefs in appellate cases involving significant First Amendment and Equal Protection issues. The IRF opposes attempts from anywhere along the political spectrum to undermine equality of rights, or speech or associational rights, which are fundamental components of individual rights in a free and diverse society.

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1. Counsel of record for all parties received notice at least 10 days before its due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court Review, and files *amicus* briefs with the courts. This case is of central concern to Cato because it represents a radical expansion of standing jurisprudence that transforms the judiciary into little more than a glorified political arena.

The IRF filed an *amicus curiae* brief in favor of the petitioners in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The IRF's brief argued that a consistent, distinct, homogeneous, or articulate message is not a condition of constitutional protection and that the First Amendment is not limited to narrow homogeneous groups which have rigid rules of selection. This Court's opinion in *Hurley* reflects an adoption of that idea.

The IRF and Cato also separately filed *amicus curiae* briefs in favor of the petitioners in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The IRF's brief argued that the right of expressive association is not limited to consistent, distinct or articulate messages and that limiting the right would eviscerate *Hurley* and all but destroy the freedom of expressive association by excluding from First Amendment protection the expressive policies of most large associations. Cato's

brief argued that maintaining a broad protection for freedom of association is required for a robust private sphere and that preventing private discrimination is not a compelling state interest sufficient to trump First Amendment rights. This Court's opinion in *Dale* reflects an adoption of those ideas.

The IRF and Cato believe that the present case raises parallel concerns to those raised in the *Hurley* and *Dale* cases. *Amici* take special interest in the case because the Petition for a Writ of Certiorari is based in part on the need to protect expressive association rights.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Petition for a Writ of Certiorari ("Petition") by Boy Scouts.[2] Nonetheless, we wish to highlight a few points in the record below.

It is important at the outset to focus on what is not contained in the record below. The Ninth Circuit concedes that there are no religious symbols at any of the subject facilities operated by Boy Scouts (28a) and that Boy Scouts never excluded Respondents or anyone else from the facilities. (P5; 29a; 180a.) Moreover, Respondents never even tried to contact Boy Scouts

2. Numbers preceded by "P." refer to the Petition for a Writ of Certiorari; numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition; "ER ___" refers to the fourteen-volume "Excerpts or Record" submitted to the Ninth Circuit by Plaintiffs on January 3, 2005; "SER ___" refer to the five-volume "Supplemental Excerpts of Record" submitted by Boy Scouts on February 14, 2005.

about using the facilities, and admitted that they knew little or nothing about Boy Scouts' policies regarding facilities access. (P5; 29a; 39a.)

What the record below does show is that Boy Scouts have leased public park lands in the City of San Diego, including property in Balboa Park, for over 50 years. (139a.) From its own funds, Boy Scouts also developed and built the aquatic center on Fiesta Island, at no cost to the City. (P3; 26a.) Boy Scouts have spent millions of dollars to improve and maintain facilities on these various public properties and to pay their operating expenses, thereby eliminating the need for taxpayer funding. (P3; 25a-26a.) By paying for these valuable improvements, Boy Scouts has conferred, and continues to confer, valuable benefits on the City by eliminating expenditures that the City would otherwise spend for comparable services. (*Id.*)

Boy Scouts has permitted the public to use, upon advance reservation, the leasehold properties by making their facilities open to all members of the public without regard to sexual orientation or religious belief, in accordance with the City's policies, on a non-discriminatory, first-come/first-serve basis. (P5; 27a-28a; 180a.) Boy Scouts has not turned away any non-Scout groups at the subject facilities. (28a.)

In addition to the Boy Scouts, the City has leased 123 public properties to various nonprofit organizations, including the following arguably "discriminatory" nonprofit organizations that limit their membership or services on the basis of race, ethnicity, age, sex, or

religion, none of which pay market rent for their City leases (24a-25a):

Girl Scouts of America (25a n.2);
Campfire Girls (25a n.2);
Girls Club of San Diego (SER 12, 27);
Boys Club of San Diego (SER 12, 27);
Asian Business Association (SER 11, 29);
Black Police Officer's Association (SER 11, 28);
Jewish Community Center (25a n.2);
ElderHelp (25a n.2);
Point Loma Community Presbyterian Church (24a n.2);
Salvation Army (25a n.2);
San Diego Calvary Korean Church (24a n.2);
San Diego County Hispanic Chamber of Commerce (SER 11, 28);
Vietnamese Federation of San Diego (25a n.2);
Young Men's Christian Association (SER 11, 27); and
Young Women's Christian Association (SER 28).

Boy Scouts presented evidence to the District Court that "the lease terms and property uses of the [Boy Scouts'] leases are indeed comparable to those of other non-profit organizations, and that the [Boy Scouts] are not receiving any special treatment from the City beyond that accorded to other non-profit lessees on similar property." (SER 201 (Expert Witness Report of Richard B. Peiser).) The City's lease with Boy Scouts helps to "assure that the facilities are available to broadest possible segment of the youth population at minimal fees [and] is best served by the current arrangement." (SER 205.)

Notwithstanding the City's comparable low-cost leases with each of the above "discriminatory" nonprofit organizations and Boy Scouts' compliance with City anti-discrimination policies in the use of its leaseholds, the Respondents singled out Boy Scouts. They filed the present lawsuit to prevent the City from providing a "subsidy" to Boy Scouts because of the allegedly below-market annual fee Boy Scouts have been paying for the right to lease these public lands. (ER 1968, 1972.) [3]

On cross-motions for summary judgment regarding the leasehold properties, the District Court ruled that Boy Scouts' leases of the Balboa Park and Fiesta Island properties were effected by way of exclusive lease negotiations with the City, to the exclusion of other groups, thereby violating the federal constitution's Establishment Clause and the California constitution's No Preference and No Aid clauses. (114a-127a; 151a-175a.) The District Court specifically rejected the Boy Scouts' offer of proof that the City's exclusive lease negotiation process has been employed with regard to numerous other non-profit leases (160a), including the Girl Scouts, whose internal membership policies also arguably discriminate on the basis of religion and gender.[4] Instead, the District Court declared that the

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3. The Ninth Circuit's opinion concedes that it is "unclear whether San Diego loses money by charging nominal rent but requiring lessees to maintain and improve the lease property." (38a.)

4. The evidence suggested that other nonprofit groups, such as the Girl Scouts, also renewed their City leases through an exclusive negotiation process that was the same or

(Cont'd)

City's practices with regard to other leases were irrelevant and refused Boy Scouts the opportunity to show that they did not receive any preferential treatment over other non-profit organizations. (*Id.*)

On appeal, the Ninth Circuit: (a) affirmed standing on the ground that Boy Scouts exercised preferential use of the facilities because Respondents allegedly did not have an equal opportunity to use them (82a-85a), but (b) rejected municipal taxpayer standing and stigmatic injury standing because Respondents did not suffer a "direct dollars-and-cents injury" (86a) and did not suffer any emotional injury because "there are no displays in either Camp Balboa or the Aquatic Center that would be so overwhelmingly offensive that families who do not share the Scouts' religious view must avoid them." (85a-86a.) The Court further found that Respondents' alleged emotional injuries were "'conjectural or hypothetical' because they never paid the fee to the Boy Scouts." (86a.) The Court ultimately deferred a final decision in the matter by requesting certification of three questions of state constitutional law to the California Supreme Court. (73a.)

(Cont'd)

substantially similar to the process used for the Boy Scouts. (ER 1978.) Similar to the Boy Scouts' Oath, the Girl Scout Promise reads:

> On my honor, I will try
> To serve God and my country,
> To help people at all times
> And to live by the Girl Scout Law.

(SER 153.)

After granting Boy Scouts' petition for a rehearing, however, the Ninth Circuit issued a second opinion that reversed both of its standing rulings. First, the court found no standing based on the Boy Scouts' preferential use of the facilities—holding that Respondents had never used the subject facilities and, therefore, "cannot show actual and imminent injury from a discriminatory policy of denying access." (39a.) Then the Court adopted the standing theory it had initially rejected, finding emotional injury standing for stigmatic injury based on this Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984), because Respondents are "offended by the Boy Scouts' exclusion, and publicly expressed disapproval, of lesbians, atheists and agnostics" and because Boy Scouts' control of access to the subject facilities would require Respondents to go through the Boy Scouts and pass by "symbols of its presence and dominion." (32a.) The Court again deferred a final decision by requesting certification to the California Supreme Court (19a-21a), a request which was recently denied.

SUMMARY OF ARGUMENT

Amici respectfully submit that the Ninth Circuit's errors regarding Article III and prudential standing warrant this Court's review:

(1) Contrary to this Court's standing jurisprudence, as described in *Allen v. Wright*, 468 U.S. 737 (1984), and related cases, the Ninth Circuit radically extended Article III standing doctrine by conferring standing for stigmatic injuries in the absence of any direct or concrete discriminatory treatment. Although Respondents have never been denied access to the park facilities in

question—and have never even attempted to use them—the court accepted their claim of personal offense as injury enough. Such a subjective standing standard for stigmatic injuries would open the floodgates to lawsuits by anyone opposed to the beliefs or practices of any private organization (religious or not) involved in any kind of private/public cooperative arrangement, lease, tax exemption, or use of public property. Such a holding is contrary to this Court's well-established doctrine incorporating objective standards for standing.

(2) The Ninth Circuit also failed to meet the prudential standing requirements described in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004). The decision below, because it grants standing to anyone with a generalized grievance against the allegedly offending government action, allows someone who is not directly injured or discriminated against to pursue claims regarding hypothetical harms. The plaintiffs here, in particular, fall outside the zone of interests protected by the Establishment Clause.

(3) The Ninth Circuit's newly-minted doctrine erodes expressive associational rights by conferring standing on any "emotionally offended" plaintiff who wishes to challenge the internal policies of expressive associations having any business with local government. The court's novel ruling opens a Pandora's Box and chills public/private partnership arrangements of all kinds for reasons disconnected from the beneficial services such organizations provide to local governments.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING DESERVES REVIEW BECAUSE IT RADICALLY EXTENDS THIS COURT'S STANDING DOCTRINE, REPLACING THE STANDARD ARTICULATED IN *ALLEN v. WRIGHT* AND *VALLEY FORGE CHRISTIAN COLLEGE v. AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE* WITH A PURELY SUBJECTIVE STANDARD THAT OPENS THE LITIGATION FLOODGATES.

The Ninth Circuit's opinion below attempts to distinguish the instant case from *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), by suggesting that the *Valley Forge* plaintiffs "did not purport to have an interest in using the land at issue." (35a.) The Ninth Circuit further states that this case falls outside the scope of *Valley Forge* because plaintiffs here are members of classes "excluded and publicly disapproved of" by Boy Scouts and thus have a personal interest in objecting to Boy Scouts' use of the land in question. (36a.) Accordingly, the Ninth Circuit opines, standing is permitted under a stigmatic injury theory pursuant to *Allen v. Wright*, 468 U.S. 737 (1984). (36a n. 5.)

Even in stigmatic injury cases, however, all the traditional rules of Article III standing apply: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. at 751. The "personal injury" must be "distinct and palpable," and not abstract, conjectural, or hypothetical. *Id.*

In *Allen*, the parents of African-American children attending public schools undergoing desegregation brought a nationwide class action alleging that the Internal Revenue Service had not adopted standards to deny tax-exempt status to racially discriminatory private schools. They alleged that they were injured in two ways: (1) "denigration" suffered by the mere fact of government financial aid to discriminatory private schools, and (2) federal tax exemptions to discriminatory schools in their community impaired their ability to have their public schools desegregated. Although recognizing that "stigmatizing injury" is "one of the most serious consequences of discriminatory government action" and may be "sufficient in some circumstances to support standing," this Court rejected both of the *Allen* plaintiffs' claimed injuries. *Id.* at 755. The first injury was simply too abstract, speculative, and hypothetical because standing is permitted "only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id*. Because the plaintiffs had not been turned away from an educational opportunity, there was no "stigmatic injury suffered as a direct result of having personally been denied equal treatment." *Id*.

The *Allen* court cited several other stigmatic injury cases, each alleging comparable official racial discrimination, in which standing had been denied "because the plaintiffs were not personally subject to the challenged discrimination." *Id*. (citing, *e.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (no standing to challenge a club's racially discriminatory membership policy because plaintiff "had never applied for membership"); *O'Shea v. Littleton*, 414 U.S. 488 (1974)

(plaintiffs had not been subjected to the challenged practices)).

In the present case, not only were Respondents never denied access to any of the park facilities for any reason, they never applied to use them in the first place. Accordingly, as in *Moose Lodge* and *Allen*, there is simply no question that, from an objective viewpoint, Respondents cannot have standing to sue.

Moreover, unlike the stigmatic injury cases cited above, Respondents do not even claim that *any* third parties have been denied access to, or use of, the subject facilities at *any* time based on *any* putatively illegal action by either the Boy Scouts or the City. Respondents' claims are entirely abstract, speculative, and hypothetical and fail to allege an injury giving rise to a "case or controversy" under any relevant precedent.[5]

The Ninth Circuit granted standing despite a factual record showing that Respondents' non-access to the facilities is caused only by psychological or subjective factors that are completely within Respondents' choice and control. Respondents are "offended" solely by Boy Scouts' internal membership policies, Boy Scouts' publicly-expressed opinions regarding "disapproval, of lesbians, atheists, and agnostics," and the fact that Boy

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5. The Ninth Circuit cites *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) for the proposition that "[p]sychological injury can be caused by symbols or activities other than large crosses." In *Heckler*, however, plaintiff's standing was based on denial of his social security benefits arising from the alleged illegal and discriminatory conduct, a very tangible injury and one unlike the mere psychological injury alleged here.

Scouts' control of access would require Respondents to pass by symbols of Boy Scouts' presence and dominion. (32a.) That is, their claimed injury consists of nothing more than the possibility of having to encounter Boy Scout representatives and insignia while using public facilities.

By contrast, nowhere in the Ninth Circuit's opinion are there any facts indicating that either Boy Scouts or the City of San Diego have imposed any kind of objective, external, or physical restraints on Respondents' use of the facilities. The opinion below even acknowledges that there is no religious symbolism on the properties in question. (28a.) Thus, the alleged Establishment Clause injury is either non-existent or is entirely psychological, abstract, and subjective. When the definition of Article III standing is thus extended to recognize purely subjective injuries, within the sole choice or control of the plaintiffs, there is great danger of erosion of the core purpose behind the standing rules. This Court has long held that the law of Article III standing is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. at 752. In other words, standing principles are rooted in judicial self-restraint and respect for the deliberative processes of their co-equal democratic branches of government.

By adopting a far more subjective standard for standing, based on the merely psychologically "offensive" nature of alleged illegal conduct and without any root in an objectively determinable injury, the Ninth Circuit granted itself the power to review generalized grievances. Such jurisprudential imperialism effectively transfers control of the judicial docket to *any* citizen who has an adverse reaction to *any* action that *any* other citizen could potentially construe as offensive.

Without objective restraints on Article III standing, the separation and balance of powers between the judiciary and its co-equal democratic branches of government will be altered in fundamental and unpredictable ways. Thus, the Ninth Circuit's expansive new definition of standing in stigmatic injury cases threatens to swallow up and destroy the core purpose of Article III standing requirements.

In short, when federal courts permit such broad re-definitions of standing—to include psychological injury resulting from ideological differences—they wade into the very kinds of cases that would convert them into "publicly funded forums for the ventilation of public grievances" and "judicial versions of college debating forums." *Valley Forge*, 454 U.S. at 473. There is thus a danger in this case not only of intruding on the democratic branches' prerogative to resolve generalized grievances, but also of eroding liberty generally through judicial regulation of the internal policies of private expressive associations that run contrary to a plaintiff's particular sensibilities.

II. THE NINTH CIRCUIT'S RULING ALSO DESERVES REVIEW BECAUSE IT VIOLATES PRUDENTIAL STANDING CONSIDERATIONS.

For many of the same reasons as those addressed in Section I, the present case raises profound and troubling issues regarding prudential standing considerations.

This Court has held that, even in stigmatic injury cases,

> [s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general

> prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Allen v. Wright, 468 U.S. at 751.

In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004), this Court reaffirmed several prudential considerations precluding standing to sue when: (1) someone only has a generalized grievance common to all citizens against an allegedly offending government action; (2) someone who is not directly injured or discriminated against seeks to pursue legal rights on behalf of persons allegedly suffering such discrimination; and (3) the putatively illegal government action falls outside the zone of interests protected by the Establishment Clause. The present case raises all three of these prudential impediments to standing.

First, for the reasons explained in Section I, the highly subjective nature of the Ninth Circuit's new standing formulation makes it far more likely that generalized grievances—which are better suited for consideration and resolution by the representative branches—will end up being heard in federal court. "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be

unnecessary to protect individual rights." *Elk Grove*, 542 U.S. at 12 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). By refusing to tether standing in stigmatic injury cases to any kind of objective, definite, or tangible injury, such as an attempt to access park facilities or join a club and being turned away for illegal reasons, the Ninth Circuit spurns long-established prudential standards that prevent the federal courts from becoming roving social policy commissions—or super-legislatures—that are required to review any government action that may "offend" someone but which does not concretely or tangibly injure them.

Second, because the Respondents have admittedly never been denied access to the subject facilities—and have not even attempted to use them—the present case plainly raises the prudential consideration that standing should be refused to someone who merely pursues legal claims on behalf of third persons allegedly suffering harms.

> There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80 (1978).

In this case, the alleged injury is the entirely hypothetical "offensiveness of having to deal with the Boy Scouts in order to use park facilities that they wish to use, and would use, but for the control of the Boy Scouts over those facilities." (36a.) Because Respondents admit they have not tried to use the facilities, their alleged harm is entirely abstract and they are, in fact, seeking to vindicate the rights of hypothetical third party users who would allegedly be offended by Boy Scouts' operation of those facilities.

Third, "[f]or a plaintiff to have prudential standing . . . the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected . . . ." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998). This requirement means that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Here, there is little or no evidence that the interest sought to be protected—Respondents' feelings being hurt by the Boy Scouts' internal policies—falls within the zone of interests protected by the Establishment Clause:

(1) The Ninth Circuit's opinion below concedes that "[t]here are no religious symbols" at the facilities in question, (28a), so the Establishment Clause is arguably not implicated at all. The present case thus falls entirely outside the zone of interests protected by the Establishment Clause.

(2) The Establishment Clause seeks to prevent state establishment of religion and is not intended to regulate the internal membership policies of private expressive associations. *See*, *e.g.*, *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226, 250 (1990) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (emphasis in original)).

(3) Even assuming *arguendo* that the present case otherwise fell within the Establishment Clause's zone of interests, as long as Boy Scouts' operation and management of the facilities in question does not discriminate against groups protected by the Establishment Clause, such as atheists or agnostics, there would again appear to be no basis for claiming a violation of the Establishment Clause.[6]

In short, allowing claims for hypothetical and generalized harms to proceed would be an even greater violation of prudential standing considerations than, *e.g.*, allowing a non-custodial parent to sue for his child having to recite the Pledge of Allegiance.

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6. Although state actions affecting atheists and agnostics may fall within the zone of interests protected by the Establishment Clause, it is hard to see how the interest of the lesbian plaintiffs here implicates those concerns. This is especially true because Boy Scouts' policies regarding homosexuals are not based on religious doctrine, but on their non-sectarian belief in traditional moral values. (23a.) By validating the lesbian plaintiffs' claims, the Ninth Circuit expands the Establishment Clause's zone of interests, which may one day lead to the anomaly of subjecting homosexual groups' membership policies to Establishment Clause challenges.

III. THE NINTH CIRCUIT'S RULING DESERVES REVIEW BECAUSE ITS REFORMULATION OF STANDING DOCTRINE SHIFTS TO THE COURTS THE PUBLIC DEBATE ON PUBLIC/PRIVATE PARTNERING ARRANGEMENTS, LEASES, AND USES OF PUBLIC PROPERTY, AND DIMINISHES THE RIGHTS OF PRIVATE EXPRESSIVE ASSOCIATIONS, INCLUDING GAY AND ATHEIST ASSOCIATIONS.

The Ninth Circuit's novel standing doctrine erodes the rights of all expressive associations, religious or not, by empowering plaintiffs who, under the guise of claiming psychic injuries, wish to challenge the ideological policies of expressive associations having any business with local government or using government property in any way.

There are important policy reasons why this Court should rein in the Ninth Circuit's radical expansion of standing. This Court should resist efforts from any segment of society to compel ideological orthodoxy, whether by increased litigation or otherwise, especially when those efforts are directed against expressive associations. Far from vindicating the rights of homosexuals and atheists, a ruling which undermines the right of expressive associations here may lay the groundwork for the erosion of all First Amendment rights, especially those of minorities such as homosexuals and atheists.

For example, the Ninth Circuit's new rule may permit standing for Christian fundamentalists who are offended by the internal policies of homosexual or atheist groups to challenge such groups' public relationships on Establishment Clause grounds. Such challenges could include access to affirmative action programs, public leases, or the groups' ability to use public property or to form

public/private alliances which may benefit the local community. In other words, the Ninth Circuit's "offensiveness" standard is a stone on which to grind all kinds of ideological axes, to the detriment of expressive association rights for all citizens, including gays and atheists. Such a scenario would diminish First Amendment rights generally and can only reduce, not increase, political and cultural diversity.

Another primary effect of the Ninth Circuit's expanded standing doctrine will be to shift the public debate over the propriety of public/private relationships from city councils and state legislatures to the courts. Far from vindicating the rights of homosexuals and atheists, the Ninth Circuit undermines expressive association rights by allowing Establishment Clause attacks against any number of expressive associations engaged in all kinds of public/private cooperative arrangements, leases and uses of public property, or receipt of public benefits or privileges. Allowing such attacks may substantially chill the First Amendment rights of all citizens, including gays and atheists, "at the expense of individual autonomy and civil liberty." David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 Univ. Chi. Legal Forum 133, 196.

In short, the Ninth Circuit's standing reformulation begs review because it chills public/private partnering for reasons disconnected from the beneficial services provided by private organizations to the public. This Court in *Valley Forge* and *Allen v. Wright* singularly rejected standing for the kind of injuries allegedly suffered by Respondents in this case. Allowing the ruling below to remain undisturbed would open courtrooms to the airing of political disputes and threaten everyone's expressive and associational freedoms.

CONCLUSION

Amici respectfully submit that this Court should resist efforts from anyone to compel ideological conformity via a radical and unwise expansion of standing doctrine. Granting certiorari in this case and reversing the ruling below will not lead to a general undermining of legal protections for gays or atheists; to the contrary, it will better insulate all varieties of culturally diverse private associations from unjustified litigation. If the Ninth Circuit's ruling is allowed to stand, the ability of all private expressive associations to work in partnership with municipalities for the public benefit could be substantially chilled. Therefore, *amici* respectfully urge this Court to grant the Petition and avoid the erosion of important First Amendment rights.

Respectfully submitted,

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