No. 17-60

In the Supreme Court of the United States

CITY OF BLOOMFIELD, NEW MEXICO, PETITIONER

v.

JANE FELIX, ET AL.

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

BRIEF FOR THE FRATERNAL ORDER OF EAGLES AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

The Fraternal Order of Eagles is a nonprofit civic organization. Established in 1898, the Order now boasts nearly 800,000 members and over 1,500 local chapters across the United States and Canada. Former members include Presidents Theodore Roosevelt, Harding, Franklin D. Roosevelt, Truman, Kennedy, and Reagan.[*]

[*] Pursuant to Rule 37.6, the Order affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the Order, its members, or its counsel made such a monetary contribution. The parties have con-

The Order promotes the spirit of liberty, truth, justice, and equality and works to make human life more desirable by lessening its ills and promoting peace, prosperity, gladness, and hope. The Order's notable accomplishments over the years include the founding of Mothers' Day and the promotion of Social Security. Today, the Order embodies its motto of "People Helping People" by assisting veterans, organizing community events, and raising funds for charitable causes.

In the mid-1950s, the Order partnered with Cecil B. DeMille, director of *The Ten Commandments*, to commission more than 10,000 Ten Commandments monuments for display on public lands nationwide. The goal of the project was to promote the Order's foundation of faith and to encourage citizens to use the Commandments as guidelines for treating others well and for building strong communities. Many of those monuments still stand today.

In recent years, the Order's monuments have come under legal attack. See, *e.g.*, *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009) (monument donated by the Order); *Van Orden* v. *Perry*, 545 U.S. 677 (2005) (same). Many lawsuits challenging the Order's monuments involve plaintiffs who, like respondents here, claim no harm other than the asserted offense from observing one of the monuments on public grounds. Petitioner's case thus presents a question of paramount importance to the Order: specifically, whether litigants have standing to challenge a public monument on Establishment Clause grounds simply because they are offended by it. In the decision below, the court of appeals held that such

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sented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

offense confers standing, at least when the plaintiff had direct contact with the monument. That holding has broad ramifications for the Order and for the thousands of its Ten Commandments monuments across the country. For that reason, the Order has a substantial interest in the resolution of this case.

SUMMARY OF ARGUMENT

As with any constitutional claim, a litigant cannot claim that government conduct violates the Establishment Clause without first suffering a concrete and particularized injury in fact sufficient for Article III standing. In *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), this Court held that the "psychological consequence presumably produced by observation of conduct with which one disagrees"—including government interaction with religion—is not enough to confer standing. *Id.* at 485. That holding is in line with this Court's broader standing jurisprudence, which provides that ideological or stigmatic harm, standing alone, does not give rise to cognizable injury.

Under *Valley Forge*, mere offense at observing a religious practice, symbol, or monument on government property plainly does not constitute an injury in fact. Yet lower courts have largely failed to apply *Valley Forge* faithfully to Establishment Clause claims. Lower courts have further divided over what a plaintiff must show to establish so-called "offended observer" standing.

Despite the lower courts' confusion, this Court has not spoken on the issue of non-taxpayer standing in the Establishment Clause context since it decided *Valley Forge* some 35 years ago. In the absence of the Court's guidance, some lower courts have attempted to read the tea leaves from cases in which the Court has reached the

merits of Establishment Clause claims but has not addressed or even mentioned standing. That is plainly improper, and those cases in any event point in both directions.

Petitioner's case is an optimal vehicle for the Court to break its protracted silence and reaffirm the broader principle that offense from, or disagreement with, government action does not constitute a judicially cognizable injury in fact. The parties in this case have briefed the standing question throughout the litigation, and the question is presented here in an optimal factual context. And given that there has been a generation's worth of lower-court decisions since *Valley Forge*, it is beyond obvious that no further percolation is necessary. The Court should grant the petition for certiorari and definitively resolve whether litigants have standing to challenge a public monument on Establishment Clause grounds simply because they are offended by it.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE AVAILABILITY OF 'OFFENDED OBSERVER' STANDING IN ESTABLISHMENT CLAUSE CASES

A. Under This Court's Decision In *Valley Forge*, Offense From Government Action Does Not Constitute An Injury In Fact

1. a. Article III of the Constitution vests "[t]he judicial Power of the United States" in the federal courts but limits the exercise of that power to "Cases" and "Controversies." U.S. Const. Art. III, §§ 1-2. As this Court has stated, "[n]o principle is more fundamental to the judiciary's proper role in our system of government" than that limitation. *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks and citation omitted).

The doctrine of constitutional standing implements that limitation by confining the federal courts to "the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers* v. *Earth Island Institute*, 555 U.S. 488, 492 (2009). The doctrine of standing thus "prevent[s] the judicial process from being used to usurp the powers of the political branches," *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 408 (2013), and confines courts to their "proper—and properly limited—role * * * in a democratic society," *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

This Court has established three requirements that together form the "irreducible constitutional minimum of standing." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Those familiar requirements are "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks, alteration, and citation omitted).

The injury in fact requirement is the "[f]irst and foremost" aspect of Article III standing. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 103 (1998). That requirement demands proof of "an invasion of a legally protected interest" that is (among other things) "concrete and particularized." *Lujan*, 504 U.S. at 560; see *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1545 (2016). A "concrete" injury is one that is "real," not "abstract." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks and citation omitted). A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Ibid.* (internal quotation marks and citation omitted).

b. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." That prohibition applies to the States through the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

As with any other constitutional claim, a party seeking to claim in federal court that state action violates the Establishment Clause must demonstrate an Article III injury in fact. See, *e.g.*, *Arizona Christian School Tuition Organization* v. *Winn*, 563 U.S. 125, 132, 134 (2011). This Court has held that, in certain "narrow" circumstances, government spending of taxpayer funds can constitute a sufficient injury in fact for purposes of an Establishment Clause claim. *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 602 (2007) (plurality opinion); see *Flast* v. *Cohen*, 392 U.S. 83 (1968). But no claim of taxpayer standing is available in this case, because no public funds were used to erect or maintain the Ten Commandments display at issue. See Pet. App. 159a-160a. Respondents therefore must demonstrate some other injury in fact in order to challenge the display on Establishment Clause grounds.

2. This Court's most in-depth—and most recent—discussion of non-taxpayer standing in the Establishment Clause context came in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In that case, the plaintiffs filed suit to challenge a federal agency's conveyance of land to a religious college; the plaintiffs alleged both taxpayer and non-taxpayer standing. See *id.* at 466-469. The district court held that the plaintiffs lacked standing, but a divided court of appeals disagreed. *Americans United for Separation of Church & State, Inc.* v. *Department of Health, Education & Welfare*, 619 F.2d 252, 261 (3d Cir. 1980). The court of ap-

peals held that the plaintiffs lacked taxpayer standing but nevertheless had "citizen standing" based on an "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" *Ibid.* Such "citizen standing" was necessary, a concurring judge wrote, in order to ensure the existence of an "available plaintiff" to pursue an Establishment Clause claim. *Id.* at 267 (opinion of Rosenn, J.).

This Court reversed, holding that plaintiffs lacked both taxpayer and non-taxpayer standing. See 454 U.S. at 482, 485-486, 490. As to non-taxpayer standing, the Court observed that the only harm the plaintiffs allegedly suffered was the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. But that consequence, the Court reasoned, was insufficient to confer Article III standing, "even [when] the disagreement is phrased in constitutional terms." *Id.* at 485-486.

The Court acknowledged that the plaintiffs "[we]re firmly committed to the constitutional principle of separation of church and State" and had a visceral response to the challenged government conduct. 454 U.S. at 486. Indeed, in their briefing before this Court, the plaintiffs stated that, "when Government takes sides on matters of religion, it is taking a side against [their] religion." Resp. Br. at 24, *Valley Forge*, *supra* (No. 80-327). The plaintiffs asserted that they had a "spiritual stake" in the government's transfer of property sufficient to confer standing. *Id.* at 23 (quoting *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 154 (1970)).

According to the Court, however, that was not enough. In *Valley Forge*, the Court noted that, when it had suggested in *Association of Data Processing* that a

"spiritual stake" could constitute an injury in fact, it was referring to the facts of *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). *Valley Forge*, 454 U.S. at 486 n.22. *Schempp* involved Bible reading in public schools, and the plaintiff students and parents had standing because, as the *Valley Forge* Court explained, "impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Ibid.* The students in *Schempp* thus faced the choice of participating in the Bible readings or suffering the reputational harm of being labeled as "odd balls" or "un-American." *Schempp*, 374 U.S. at 208 & n.3 (internal quotation marks omitted). That sort of ongoing coercion, the Court reasoned in *Valley Forge*, can amount to an injury in fact. 454 U.S. at 486 n.22.

The Court contrasted *Schempp* with *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). See *Valley Forge*, 454 U.S. at 486 n.22. *Doremus* contained "identical substantive issues" to *Schempp*, except that the only student at issue there had already graduated. *Ibid.*; see *Doremus*, 342 U.S. at 431. The adult plaintiffs in *Doremus* thus had no claim of ongoing coercion similar to that of the plaintiffs in *Schempp*, so they had to rely on their status as "citizen[s]" and "taxpayer[s]" for standing. *Doremus*, 342 U.S. at 431. In *Doremus*, the Court held that status to be insufficient, because "the grievance [the plaintiffs] sought to litigate" was only a "religious difference." *Id.* at 434.

In *Valley Forge*, the Court viewed the plaintiffs' asserted injury from the religious conveyance as more similar to the asserted injury in *Doremus* and, more generally, as an "assertion of a right to a particular kind of Government conduct." 454 U.S. at 483 (discussing *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S.

208 (1974), and *United States* v. *Richardson*, 418 U.S. 166 (1974)). To permit suit on that basis, the Court explained, would "drain[] [Article III's standing] requirements of meaning." *Ibid.*

Finally, the Court rejected the notion that the plaintiffs must be considered to have standing in order to ensure the existence of an "available plaintiff" to pursue an Establishment Clause claim. 454 U.S. at 488-490. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' " *Id.* at 484 (quoting *Flast*, 392 U.S. at 99). Article III's requirements, the Court explained, do not depend on the importance of the substantive claim at issue. *Ibid.* Indeed, the Court noted, it is unclear what "principled basis" would supply the rule for distinguishing between constitutional values in that manner. *Ibid.*

The Court admonished that there is "no place in our constitutional scheme" for the philosophy that "cases and controversies are at best merely convenient vehicles" for correcting constitutional errors and "at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." 454 U.S. at 489. Nor does such a philosophy "become more palatable when the underlying merits concern the Establishment Clause." *Ibid.* "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Ibid.* (internal quotation marks, alternation, and citation omitted).

3. The Court's decision in *Valley Forge* was entirely consistent with its broader standing jurisprudence; in fact, the Court has frequently cited *Valley Forge* in a range of different contexts. See, *e.g.*, *Spokeo*, 136 S. Ct. at 1548; *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2665-

2666 (2015); *Clapper*, 568 U.S. at 408. The Court, moreover, has seen many cases in which a plaintiff claimed to have standing because a government action conflicted with the plaintiff's goals, beliefs, or personal desires. Time and again, the Court has held that such an ideological injury does not constitute a concrete injury in fact. See, *e.g.*, *Steel Co.*, 523 U.S. at 107; *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 616 (1989) (plurality opinion); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39-40 (1976); *Schlesinger*, 418 U.S. at 225; *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 739-740 (1972). "[A] special interest" in a government action "does not alone confer federal standing." *ASARCO*, 490 U.S. at 616 (plurality opinion). And there is no reason for a different outcome where that "special interest" is a "religious difference" with a government action. *Doremus*, 342 U.S. at 434.

Valley Forge also comports with the Court's case law on stigmatic injury: that is, harm that involves not just offense but also public "shame or discredit." *Webster's Third New International Dictionary* 2243 (rev. ed. 2002); cf. *Paul* v. *Davis*, 424 U.S. 693, 699 (1976). The Court has made clear that the experience of stigma—even racial stigma, "one of the most serious consequences of discriminatory government action"—is also insufficient to confer Article III standing. *Allen* v. *Wright*, 468 U.S. 737, 755 (1984). Instead, in a case involving alleged discrimination, a plaintiff must have been "personally denied equal treatment by the challenged discriminatory conduct." *Ibid.* (internal quotation marks and citation omitted). So too in the Establishment Clause context: absent a more tangible harm, the negative feelings one

experiences from a government action do not establish injury in fact.

In short, the Court has never retreated from, and indeed has reaffirmed, *Valley Forge*'s core principle that "the psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art[icle] III." 454 U.S. at 485; see *ASARCO*, 490 U.S. at 616 (plurality opinion). That principle should be controlling here.

B. Courts Of Appeals, Including The Court Below, Have Ignored *Valley Forge* And Sowed Confusion In The Process

This Court's decision in *Valley Forge* plainly forecloses "the conclusion * * * that seeing an unwelcome [religious] object" on government property "equals injury in fact." *Books* v. *Elkhart County*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting). Yet the courts of appeals have largely ignored *Valley Forge*'s clear teaching, though they have disagreed about exactly what is required to establish Article III standing. The result is a muddled collection of case law that is "impossible to reconcile with *Valley Forge*." *Ibid.*

1. The court of appeals' opinion in this case is emblematic of how the lower courts have disregarded *Valley Forge*.

a. Respondent B.N. Coone is a Wiccan who considers the Ten Commandments to be "tenets of a foreign religion." Pet. App. 81a. He thus "feel[s] like [an] outsider[]" when he passes by the Ten Commandments monument in Bloomfield, New Mexico, several times a week. Pet. App. 81a, 83a. The court of appeals determined that such "exposure" was "more than enough for standing." *Id.* at 11a. But respondent's injury amounts

to nothing more than the "psychological consequence" of offense "produced by observation of" an object with religious significance on public property. *Valley Forge*, 454 U.S. at 485.

The court of appeals is not alone in permitting standing on such a flimsy basis. Other courts have held that "unwelcome contact" with a religious display is sufficient to supply standing for an Establishment Clause claim. See, *e.g.*, *Freedom From Religion Foundation Inc.* v. *New Kensington Arnold School District*, 832 F.3d 469, 476 (3d Cir. 2016); *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012). Those courts often claim that observers have a "spiritual stake" in challenging religious displays that offend them. See, *e.g.*, *Catholic League for Religious & Civil Rights* v. *City & County of San Francisco*, 624 F.3d 1043, 1050 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 974 (2011). But as explained above, see pp. 7-9, this Court has squarely rejected that "broad reading of the phrase 'spiritual stake'" from its prior opinions. *Valley Forge*, 454 U.S. at 486 n.22. A spiritual injury sufficient to establish injury in fact must be more akin to the harm in *Schempp*: namely, state coercion to participate in a religious exercise. See pp. 7-9, *supra*. The mere observation of a religious symbol on government property does not rise to that level.

b. The other respondent, Jane Felix, is also a Wiccan who believes that the Ten Commandments are "tenets of a foreign religion." Pet. App. 81a. She "feel[s] like [an] outsider[]" when she drives past the Bloomfield monument several times a week, even though she "cannot read the text * * * from the highway." *Id.* at 81a, 82a. To avoid being offended, respondent "stopped paying her water bill in person at City Hall," where the monument is located. *Id.* at 82a. The court of appeals

determined that this "change[] to [her] behavior" confirmed the presence of an injury in fact. *Id.* at 10a-11a.

The Tenth Circuit is not alone in focusing on such an alteration in behavior. Some courts of appeals have correctly recognized that, under *Valley Forge*, the fact that certain individuals "do not like a [religious display] on public property—even that they are deeply offended by such a display—does not confer standing." *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir.), cert. denied, 479 U.S. 961 (1986); see *ACLU of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (per curiam). But those courts have proceeded to hold that a party's willingness to "incur a tangible if small cost" in order to avoid seeing the display *does* confer standing. *ACLU of Illinois*, 794 F.2d at 268; see *ACLU of Georgia*, 698 F.2d at 1103-1104, 1108. Under the view of those courts, an offended observer does not have standing from the mere fact of being offended, yet can purportedly manufacture standing by taking the affirmative action of avoiding the offending object.

That theory of standing-by-bootstrapping cannot be correct. As one judge has put it, "[i]f offense is not enough, why is a detour attributable to that offense enough?" *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting), cert. denied, 505 U.S. 1229 (1992). It is doubtful that such bootstrapping would work in any other context. Consider, for example, the plaintiffs in *Schlesinger*, who lacked standing to complain that members of Congress were serving in the military reserves in violation of the Incompatibility Clause of Article I, Section 6. See 418 U.S. at 217-227. Those same plaintiffs surely could not have manufactured standing by undertaking some voluntary burden—such as writing letters to military commanders, cam-

paigning for another candidate, and so on—to address the non-cognizable harm caused by the alleged constitutional violation. The same should be true here. As *Valley Forge* explains, Article III's strictures apply to the Establishment Clause just as they do in any other context. See p. 9, *supra*.

2. The trouble with the "unwelcome contact" and "alteration in behavior" approaches just described is not just that they are erroneous; they have produced conflicting case law in the lower courts.

Courts of appeals differ, even internally, on whether an alteration in behavior is necessary to demonstrate standing. Compare, *e.g.*, *Harris*, 927 F.2d at 1406 (requiring an alteration in behavior), with *Books*, 401 F.3d at 861 (holding observation alone to be sufficient). Courts are also confused as to whether the frequency of contact with the allegedly offensive object should matter. Compare, *e.g.*, *New Kensington*, 832 F.3d at 479 (determining frequency does not matter), with *Vasquez* v. *Los Angeles County*, 487 F.3d 1246, 1252 (9th Cir.) (emphasizing frequency), cert. denied, 552 U.S. 1062 (2007). Meanwhile, a number of judges have highlighted the obvious conflict between the more expansive approaches to standing and *Valley Forge*. See, *e.g.*, *Barnes-Wallace* v. *City of San Diego*, 530 F.3d 776, 794-799 (9th Cir. 2008) (Kleinfeld, J., dissenting), cert. denied, 559 U.S. 1106 (2010); *Books*, 401 F.3d at 871 (Easterbrook, J., dissenting); *ACLU of Ohio Foundation, Inc.* v. *Ashbrook*, 375 F.3d 484, 495-500 (6th Cir. 2004) (Batchelder, J., dissenting), cert. denied, 545 U.S. 1152 (2005).

The disarray in the lower courts has not gone unnoticed. Even two decades ago, Chief Justice Rehnquist recognized the "disagreement among the [c]ourts of [a]ppeals about whether *Valley Forge* allowed standing to a plaintiff alleging direct injury by being exposed to a

state symbol that offends his beliefs." *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1202-1203 (1996) (opinion dissenting from denial of certiorari). Courts of appeals have similarly cited the "uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context." *Cooper* v. *U.S. Postal Service*, 577 F.3d 479, 490 (2d Cir. 2009), cert. denied, 559 U.S. 971 (2010); see *ACLU Nebraska Foundation* v. *City of Plattsmouth*, 358 F.3d 1020, 1028 (8th Cir. 2004), vacated, 419 F.3d 772 (8th Cir. 2005); *Freedom From Religion Foundation, Inc.* v. *Obama*, 641 F.3d 803, 811-812 (7th Cir. 2011) (Williams, J., concurring). Scholars, too, have called for the Court to resolve the confusion among the courts of appeals, with one author noting that "the lower courts are unlikely to change course on their own initiative." David Spencer, Note, *What's The Harm? Nontaxpayer Standing To Challenge Religious Symbols*, 34 Harv. J.L. & Pub. Pol'y 1071, 1097 (2011). That confusion is ripe—indeed, more than ripe—for the Court's intervention.

C. This Court's Silence Has Exacerbated The Confusion In The Courts Of Appeals

Despite the confusion that has arisen in the lower courts, this Court has not spoken since *Valley Forge* on the issue of non-taxpayer standing in Establishment Clause cases. Yet the Court has reached the merits in several Establishment Clause cases where the basis for the plaintiff's standing was not obvious. The Court's silence on the issue of non-taxpayer standing has only amplified the confusion among the lower courts.

1. Since *Valley Forge*, this Court has considered three types of religious displays under the Establishment Clause without discussing standing.

a. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the Court addressed the propriety of crèche and menorah displays. In *Donnelly*, the defendant town had acquired the crèche display for under $1,500 seven years before the lawsuit was filed and had spent approximately $20 annually to erect and disassemble it. See 465 U.S. at 671. In *County of Allegheny*, private groups apparently donated the crèche and menorah displays to the defendant county, which the county decorated during the Christmas and Hanukkah seasons. See 492 U.S. at 579-580, 587 (plurality opinion). In neither case, however, did the Court discuss standing before proceeding to the merits.

It is not obvious why the plaintiffs in those cases had standing after *Valley Forge*. It is possible that the Court implicitly found taxpayer standing based on the towns' expenditures. But, at least in *County of Allegheny*, it is not clear that any local tax dollars funded the displays. Cf. *Doremus*, 342 U.S. at 434 (distinguishing between "a direct dollars-and-cents injury," in the form of spent tax dollars, and a mere "religious difference").

b. In *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), and *Van Orden* v. *Perry*, 545 U.S. 677 (2005), the Court addressed the propriety of Ten Commandments monuments on municipal property. *McCreary County* involved Ten Commandments displays in two county courthouses, see 545 U.S. at 851; *Van Orden* involved a Ten Commandments monument donated by amicus Fraternal Order of Eagles and displayed on the grounds of the Texas State Capitol, see 545 U.S. at 681-682 (plurality opinion). The district court in *Van Orden* addressed standing, see *Van Orden* v. *Perry*, Civ. No. 01-833, 2002 WL 32737462, at *2 (W.D. Tex. Oct. 2, 2002), as did the district court in *McCreary County* in a related

case, see *Doe* v. *Harlan County School District*, 96 F. Supp. 2d 667, 669 (E.D. Ky. 2000). Amici in both cases also raised the issue of standing before this Court. See Senator Bill Harris Br. at 4-8, *McCreary County*, *supra* (No. 03-1693); Focus on the Family Br. at 24-26, *Van Orden*, *supra* (No. 03-1500). Once again, however, the Court proceeded directly to the merits.

Again, it is not clear why the plaintiffs in those cases had standing after *Valley Forge*. It appears that the county governments in *McCreary County* may have purchased the Ten Commandments displays at issue, perhaps giving rise to taxpayer standing. See 545 U.S. at 851. But no such basis for standing was present in *Van Orden*. See 545 U.S. at 681-682 (plurality opinion).

c. Finally, in *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014), the Court addressed the propriety of legislative prayer. The district court had addressed standing, see *Galloway* v. *Town of Greece*, 732 F. Supp. 2d 195, 214 (W.D.N.Y. 2010), and amici raised the issue before this Court, see Liberty Counsel Br. at 4-16, *Galloway*, *supra* (No. 12-696); Unitarian Universalist Ass'n Br. at 22-26, *Galloway*, *supra*. It is possible that the plaintiffs in *Galloway* suffered the "spiritual injury" of religious coercion, *Schempp*, 374 U.S. 203, as they argued that "the setting and conduct of the town board meetings create[d] social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board." 134 S. Ct. at 1820. Again, however, the Court simply did not speak to the issue of standing.

2. Some lower courts have interpreted this Court's silence as affirmative evidence that offended observers have standing to challenge religious displays. See, *e.g.*, *Suhre* v. *Haywood County,* 131 F.3d 1083, 1088 (4th Cir.

1997) (citing *County of Allegheny* and *Donnelly*); *Murray* v. *City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) (same), cert. denied, 505 U.S. 1219 (1992). Yet this Court has long cautioned that, when one of its decisions "neither note[s] nor discuss[es]" "a potential jurisdictional defect," the decision "does not stand for the proposition that no defect existed." *Winn*, 563 U.S. at 144; see, *e.g.*, *United States* v. *More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.).

What is more, some of this Court's decisions since *Valley Forge* arguably cut in the other direction, suggesting that mere offense does not qualify as a judicially cognizable injury. In those decisions, the Court dismissed on standing grounds even in the apparent presence of such offense.

In *Hein*, for example, the plaintiffs challenged the provision of federal funds to religious conferences, alleging that "the conferences sent the message to nonbelievers that they are outsiders and not full members of the political community." 551 U.S. at 595-596 (plurality opinion) (internal quotation marks and citation omitted). This Court held that the plaintiffs lacked taxpayer standing, and the case was dismissed. See *id.* at 596, 615. If mere offense constituted an injury in fact, however, the plaintiffs' challenge seemingly should have gone forward.

Similarly, in *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1 (2004), the plaintiff protested that the Pledge of Allegiance contained the words "one Nation under God" and that his daughter was required to recite those words at school. See *id.* at 7-8. The Court dismissed the case on prudential-standing grounds to avoid getting into complicated family-law issues. See *id.* at 11-18. But "[i]f a perceived slight, or a feeling of exclusion, were enough, then [the plaintiff in *Newdow*] would have had standing to challenge the words 'under

God' in the Pledge of Allegiance" in his own right. *Freedom From Religion Foundation*, 641 F.3d at 807. "[Y]et [this] Court held that he lacks standing." *Ibid.*

At most, then, this Court's decisions after *Valley Forge* have sent mixed messages about how lower courts should address standing in Establishment Clause cases. Some decisions could be read to hint that mere offense constitutes an injury in fact, while others rebut that inference. In the absence of clearer guidance from this Court, the confusion among the lower courts is unlikely to be dispelled.

D. The Court Should Resolve The Availability Of 'Offended Observer' Standing In This Case

This case is an optimal vehicle for the Court to clarify that mere offense does not constitute an injury in fact—whether for Establishment Clause purposes or otherwise.

To begin with, there are no impediments to the Court's resolving the standing issue. Petitioner raised the issue at each stage of the litigation, and the key facts are undisputed. See Pet. App. 9a-12a, 40a-47a, 81a-83a, 143a-144a, 152a, 159a-160a, 164a-166a. Both of the lower courts, moreover, addressed standing at length in their opinions. See *id.* at 9a-12a, 40a-47a.

In addition, this case presents the question in an attractive factual setting. Respondent Coone asserts no other injury than the offense of observing the monument at issue, while respondent Felix asserts that she altered her behavior at some point to avoid the monument. That combination of facts allows the Court to resolve all debates over "offended observer" standing at once; a holding that neither respondent has standing will inform the lower courts that neither the "unwelcome contact" nor the "alteration in behavior" approach has merit.

Finally, at the risk of stating the obvious, no further percolation is necessary. The lower courts have grappled with the issue of non-taxpayer standing in Establishment Clause cases for more than a generation since *Valley Forge*, and there is no shortage of analysis from judges, litigants, and scholars on the issue. See pp. 11-15, *supra*. This Court's intervention is long overdue. The Court should grant the petition for certiorari and reaffirm its holding in *Valley Forge* that the "observation of conduct with which one disagrees" does not constitute an Article III injury in fact. 454 U.S. at 485.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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