No. 17-60

IN THE

Supreme Court of the United States

CITY OF BLOOMFIELD,
Petitioner,

v.

JANE FELIX; B.N. COONE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR *AMICUS CURIAE* JEWS FOR RELIGIOUS LIBERTY SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus is a group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty.[1] Representing members of the legal profession and as adherents of a minority religion, *amicus* has a unique interest in ensuring that Establishment Clause jurisprudence nurtures, rather than stifles, the diversity of religious viewpoints and practices

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Letters from counsel of record for each party consenting to the filing of this *amicus* brief are on file with the clerk's office.

in the United States. To that end, *amicus* urges the Court to grant certiorari and repudiate both "offended observer" standing and the "objective observer" test for passive religious displays.

SUMMARY OF ARGUMENT

The Tenth Circuit's opinion ignores the rich and historic influence of the Ten Commandments—and, by implication, the Jewish people—on a hunt to "cure" government speech from the "taint" of religion. This quest to erase all traces of religious influence in public life specifically harms religious minorities, whose religious practice often relies on accommodation from a broader public that encourages faith. The endorsement test also has troubling implications in future Establishment Clause contests for religious minorities whose symbols are less familiar and consequently more likely to be found impermissibly sectarian when they appear in government speech.

Moreover, the Tenth Circuit's doctrine of standing for "offended observers" is particularly harmful to religious minorities, whose practices are less familiar and consequently more conspicuous to those "offended observers" seeking to root out religion. Reducing the threshold for standing for those offended by religion—and nothing else—constitutes disfavored treatment for religious speech and amounts to an unconstitutional burden on the free exercise of religion.

ARGUMENT

I. THE TENTH CIRCUIT STIGMATIZES THE TEN COMMANDMENTS, ERASING A JEWISH CONTRIBUTION TO THE UNITED STATES

By ordering the Ten Commandments monument to be pulled down, the Tenth Circuit stigmatizes one of the most prominent examples of Jewish contribution to pub-

lic life in America. Such a ruling should not go unreviewed.

According to the Tenth Circuit, "it is hard to imagine a religious statement that is more likely to give [the polytheistic Wiccan] Plaintiffs the impression they do not belong" than the text of the Ten Commandments, and in particular the first commandment: "Thou shalt have no other gods before me." Pet. App. 18a. The court's single-minded focus on "the impression" given to Wiccans led it to altogether neglect the effect of removing the Monument on (at the least) Jewish citizens. See *Van Orden* v. *Perry*, 545 U.S. 677, 679 (2005) (Thomas, J., concurring) (criticizing the "reasonable observer" modification to the *Lemon* test for failing to consider the possibility that removing religious signs or displays as acts hostile to religious faith). Here, the Tenth Circuit's opinion trivializes and minimizes the unquestioned influence of the Ten Commandments—and therefore of the Jewish people—on the founding and character of the United States.

The Ten Commandments are "undeniably a sacred text" in both the Jewish and Christian faiths. *Stone* v. *Graham*, 449 U.S. 39, 41 (1980). But for Jews, who are fewer than 2% of all Americans, the Ten Commandments may be one of the most prominent examples of Jewish contributions to American government and society. Pew Research Center, America's Changing Religious Landscape 21 (2015) (surveying the religious faiths of Americans). The Ten Commandments are distinctly associated with Moses, a Jewish lawgiver. As Justice Stevens recognized, displays of the Ten Commandments may convey a message of "respect for Judaism * * * *." *Cty. of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part) (abrogated in part by *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1821 (2014)).

Depictions of the Ten Commandments have adorned public life since at least 1872. See, *e.g.*, *King* v. *Richmond Cty., Ga.*, 331 F.3d 1271, 1273-1274 (11th Cir. 2003) (describing the long history of the depiction of the Ten Commandments on the seal of the Superior Court of Richmond County, Georgia). The Ten Commandments have been depicted on official seals, plaques, sculptures, murals, medallions, and friezes in at least forty states and the District of Columbia. See Appendix, Brief for the United States as *Amicus Curiae*, *McCreary Cty.* v. *ACLU*, 545 U.S. 844 (2005) (collecting examples of depictions of the Ten Commandments). The comparatively few who enter this Court's courtroom see the Ten Commandments on Court's South Wall Frieze depicting lawgivers, but so do many others across the United States.

Beyond depictions, the Ten Commandments have profoundly influenced American legal thought and society. From the Republic's earliest days, the Ten Commandments have been acknowledged as foundational. President John Quincy Adams described the Decalogue as "a civil and municipal as well as a moral and religious code" that contained "laws essential to the existence of men in society, and most of which have been enacted by every nation, which ever professed any code of laws." Adams, Letters of John Quincy Adams to His Son 61 (1850).

While no one argues that the Ten Commandments are themselves the positive law of the United States, they have long informed and continue to flavor the common law, our statutes, and judicial interpretations of both. For example, in concluding that a defendant charged with felony theft was sufficiently apprised of the elements for theft by false pretext, the Fifth Circuit observed: "Theft is a synoptic concept: the Eighth Commandment condemns theft without explaining every possible nuance and contrivance in its accomplishment." *Cameron v. Hauck*, 383 F.2d 966, 971 (5th Cir. 1967); see

also, *e.g.*, *Petition of Yee Wing Toon*, 148 F. Supp. 657, 659-660 (S.D.N.Y. 1957) (determining, in light of the fifth commandment to "honor thy mother and father," that a petitioner for naturalization had not committed a "crime involving moral turpitude" by illegally sending money to his mother in China). The commandments against murder, theft, and lying have taken deep root in both criminal and civil law. *E.g.*, Welch, Biblical Law in America, 2002 B.Y.U. L. Rev. 611, 621 (2002) (tracing the influence of religious law, beginning with the Puritans' explicit adoption of the Ten Commandments as part of the capital law of Massachusetts). Likewise, the commandment to keep the Sabbath holy contributed to the creation of the five-day work week. See Rybczynski, Waiting for the Weekend, The Atlantic Monthly 35-52 (Aug. 1991). Blue laws, too, had their roots in the fourth commandment. See, *e.g.*, *Williams* v. *State*, 144 S.E. 745, 745-746 (Ga. 1928) (interpreting statute prohibiting work on Sundays in light of "Mosaic law").

Jewish Americans are rightfully proud of the significant and historic contributions of the Jewish faith—including the Jewish moral and legal code and the Decalogue—to civic life in America. The principles espoused in the Ten Commandments work a continuing force for good in the United States and deserve to be honored or, at the very least, not to be summarily dispensed with or hidden from view on the orders of a federal court.

II. THE TENTH CIRCUIT'S ENDORSEMENT TEST PARTICULARLY HARMS RELIGIOUS MINORITIES

Establishment Clause jurisprudence is often conceptualized as preventing Christians from Establishing Christianity in America, or at least, to prevent them from getting the government to endorse Christianity. But Christians are not alone in being proud of their faith; members of other religions also wish to see their religious symbols and practices in the public square. The

Tenth Circuit's opinion will be used in the public square and in the courts to abridge religious speech and practice, particularly that referencing minority religious practices or customs.

A. The Tenth Circuit's endorsement test promotes an erasure of religion in public life that threatens minorities in unique ways.

The opinion below encourages Americans to view any trace of religion in public life as an offensive invasion and contradicts America's history of encouragement and welcome of religious minorities. See, *e.g.*, Letter from George Washington to Newport Hebrew Congregation (Aug. 18, 1790), in 6 Papers of George Washington 285 (M. Mastromarino ed. 1996) ("All possess alike liberty of conscience and immunities of citizenship."). Members of religious minorities who thrive in and among a majority culture, and occasionally depend on reasonable accommodation from their employers and government, are subject to unique harms by this erasure from American culture.

The Tenth Circuit's endorsement test asks if an "objective observer who is aware of the purpose, context, and history of the [challenged] symbol," would conclude that symbol has the "effect" of endorsing religion. Pet. App. 15a. If even a private actor had religious motivations in supporting the symbol, the government must take purposeful, public, and persuasive actions to "cure" the "taint." Pet. App. 22-23a, 27a, 31a (attributing the religious motivations of former councilman Mauzy to the government and proposing how the "taint" of such motivations might be "cured"). As observed by Judge Kelly, the city here actually undertook the "cure" suggested by the Tenth Circuit—yet *still* (in the panel's view) failed to acceptably scrub any trace of religion from the monument. Pet. App. 127a (Kelly, J., dissenting from the denial of rehearing *en banc*). This impossibly high thresh-

old has the effect of signaling that the Ten Commandments are inherently offensive, and that the government can only recognize the role played by the Decalogue—and therefore the Jewish people—through vociferous denouncement of any religious purpose, if at all.

The Tenth Circuit's "objective" observer views religion in public life as a "taint" to be "cured," revealing a startling contempt for modern faithful and the convictions of their forebears. Pet. App. 27a; see TAINT, Black's Law Dictionary (10th ed. 2014) ("1. To imbue with a noxious quality or principle. 2. To contaminate or corrupt. 3. To tinge or affect for the worse."). But religion does not taint public life—it enhances it. A flourishing American society honors the faiths of its citizens. See *Van Orden*, 545 U.S. 686-687 (charting the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.").

A culture that perceives all presence of religion in the public sphere as offensive will be unmoved by requests for religious accommodation, and may even seek to eradicate any indicia of religious life from the public sphere. Religious minorities—whose customs and practices are less familiar and therefore more conspicuous—cannot avoid being particularly affected.

Indeed, Jews have faced an increasing number of legal and governmental assaults on their religious practices. For example, before the last two consecutive Yom Kippurs, animal-rights activists have brought suits to curtail the use of chickens in Day of Atonement rituals. *E.g.*, Complaint, *United Poultry Concerns* v. *Chabad of Irvine*, No. 8:16-CV-01810 (C.D. Cal. Sept. 29, 2016); Complaint, *Animal Protection & Rescue League* v. *Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Super. Ct. Orange Cty. Sept. 14, 2015). Last summer, the New York Times published an editorial decrying women-only

swimming hours at a public pool in an Orthodox Jewish neighborhood.[2] Editorial Board, Everybody Into the Pool, N.Y. Times A20 (June 1, 2016). The editorial concluded: "Let those who cannot abide public, secular rules at a public, secular pool find their own private place to swim when and with whom they see fit." *Ibid.* Similarly, in 2014, New York City attempted to fine Orthodox Jewish stores that had posted a request for customers to dress modestly. Berger, No Fines for Stores Displaying a Dress Code, N.Y. Times A15 (Jan. 22, 2014). One year earlier, a New York City Orthodox Jewish probationary policeman had to seek the protection of federal court after he was forced to resign over department facial-hair regulations.[3] *Litzman* v. *N.Y. City Police Dept.*, No. 12 Civ. 4681 (HB), 2013 WL 6049066, *1 (S.D.N.Y. Nov. 15, 2013).

Although these attacks on the ability of Jews to practice their faith in the public view have largely been resolved in favor of religious liberty, they reflect an ominous trend of increasing hostility toward religion and religious accommodations. Allowed to persist, and buoyed by court opinions that aggressively detect and stamp out any hint of religious purpose, this secularizing force threatens the religious practices of not just Jews, but all who are religious, especially religious minorities.

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[2] Jewish law, as understood by many, promotes modesty and restricts unrelated men and women from seeing each other in a relative state of undress. Without women-only and men-only swimming hours, many Orthodox members of the public would be religiously prohibited from using the public pool, despite being taxpaying members of the public. This sort of "accommodation" is precisely what is endangered by wholesale scrubbing of any religiously relevant considerations from public life.

[3] Some believe the prohibition in Leviticus 19:27 against shaving extends to an electric shaver, and thus have no means of closely trimming their facial hair.

Jewish people have contributed significantly to America, including through their link to the precepts of the Ten Commandments. Allowing governments to honor that contribution promotes tolerance of religious minorities. Additionally, reminding passersby of the positive influence that religion plays in America may encourage support and accommodation for religious practices that seem unusual.

B. The Tenth Circuit's endorsement test cannot be applied equally to religious speech from a minority-religion tradition.

Beyond encouraging a culture of hostility and intolerance of religious presence in public life, the Tenth Circuit's endorsement test also has troubling legal effects. Outsourcing constitutional analysis to the "objective observer who is aware of the purpose, context, and history of the symbol" is particularly harmful to religious minorities. See Pet. App. 15a.

As the district court observed, "in performing the role of this [objective] observer, the Court is thrust into a realm of pretend and make-believe, guided only by confusing jurisprudence and its own imagination." Pet. App. 59a. With such signposts, it should surprise no one that religious symbols may be deemed acceptable, or not, depending merely on the soil in which they are planted. Compare *Am. Humanist Assoc.* v. *Md.-Nat'l Capital Park*, 147 F. Supp. 3d 373 (D. Md. 2015) (holding forty-foot-tall World War I memorial cross did not violate the Establishment Clause) with *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1111 (10th Cir. 2010) (holding twelve-foot-tall Utah High Patrol memorial cross violated the Establishment Clause). Such frequent disparity, turning often on minutiae,[4] vindicate Justice Scalia's criticism

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[4] The district court opined that "[a]ny variation in the many factors in this proceeding could favor the Defendant instead of the Plain-

that, since its inception, the *Lemon* test has been "manipulated to fit whatever result the Court aimed to achieve." *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 900-901 (2005) (Scalia, J., dissenting).

But the endorsement test does not just result in such inconsistencies as nearly identical monuments being expunged or exculpated by "virtue of details familiar only to the parties to litigation and their lawyers." *Id.* at 907; see *Van Orden*, 545 U.S. at 697 (criticizing the inconsistency between the *McCreary County* and *Van Orden* decisions, two Ten Commandments cases published on the same day). The supposedly objective observer, as understood by the Tenth Circuit, is actually *hostile* to religion, as described in Part II.A, *supra*. "Despite assurance from the Supreme Court that the Establishment Clause does not require us to 'purge from the public

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tiffs." Pet. App. 77a. The sorts of seemingly trivial changes that, it thought, could convert this small memorial from one that violates the U.S. Constitution into one that was *unremarkable* illustrate how the First Amendment is being twisted:

> The result could differ with a slight change in the facts. For example, had the Ten Commandments monument been established last in the series of monuments, after placement of the Declaration of Independence, Gettysburg Address, and Bill of Rights monuments, the First Amendment may not have been offended. Had the Ten Commandments monument been arranged at the rear of the north lawn near the municipal building complex, with the other three monuments (consisting of six tablets) in front of it, the Ten Commandments monument may have passed muster. Had the Ten Commandments monument been installed without a dedication event or with a ceremony absent religious overtones, the ultimate conclusion may have differed. Had the City of Bloomfield adopted the amended policy permitting monuments first, with language clearly allowing only temporary residence of a monument, the result might have changed.

Pet. App. 76a-77a.

sphere all that in any way partakes in the religious,' the court's 'reasonable observer' seems intent on doing just that." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1101 (10th Cir. 2010) (Kelly, J., dissenting from the denial of rehearing *en banc*) (quoting *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (internal citation omitted)).

This hostile objective observer ignores this Court's admonishments: "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690. Instead, the Tenth Circuit should have followed this Court's decision in *Town of Greece* v. *Galloway*, 134 S.Ct. 1811 (2014). There, considering the historic practice of legislative prayer, the Court held that "acknowledging the central place that religion, and religious institutions, hold in the lives of those present" through prayer during the ceremonial portion of town meetings did not create an impermissible establishment of religion. *Id.* at 1827. A monument that (among other things) honors the role religion plays in the lives of many Americans does not establish religion, even if some of its benefactors had a religious purpose—any more than other public acts motivated by religious principles, such as so many of the notable civil-rights advances in our history (which are similarly "tainted" by religious motivation).

If the Tenth Circuit's hostile observer is permitted to extend his or her reign, the result will be a particularly pernicious effect on government speech related to minority religions. Symbols of the Christian religion are often so common as to have become largely secularized, diminishing the likelihood that the objective observer will find the symbol objectionably religious. For example, the Second Circuit described how rubble from Ground Zero in the shape of a Roman Cross "came to be seen as a symbol of hope, faith, and healing by numerous persons, without regard to their belief systems." *Am. Atheists,*

Inc. v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 241 (2d Cir. 2014) (internal quotation marks omitted). "From the totality of these circumstances, a reasonable observer would understand that The Cross at Ground Zero, while having religious significance to many, was also an inclusive symbol for any persons seeking hope and comfort in the aftermath of the September 11 attacks." *Id.* at 244. Likewise, Christian practices such as abstaining from eating meat on certain days during Lent are frequently accommodated by public schools and prisons without comment or scrutiny. See, *e.g.*, Bosworth & Thomas, 1 Encyclopedia of Prisons and Correctional Facilities 330-31 (Bosworth, ed., 2005) (noting that Jewish prisoners must submit a request in writing for kosher meals during Passover, but Christians are offered meatless meals "on the mainline menu" during Lent).

But the symbols and practices of minority religions, being inherently less familiar and less common, will likely never fade into neutrality to sufficiently "pass" as secular enough to satisfy the objective observer. The symbols and practices of minority religions will attract the eye of an objective observer hostile to religion. For example, an airplane was diverted after a flight attendant was alarmed by a Jewish teenager praying using a tefillin, a small leather box attached to leather straps that is wrapped around the arms and head of the user. Barron, A Flight is Diverted by a Prayer Seen as Ominous, N.Y. Times A20 (Jan. 21, 2010). Though the tefillin had presumably already passed through a metal detector, and the teenager explained its use for prayer, the plane was nonetheless diverted from Louisville to Philadelphia, where the teenager was briefly placed in handcuffs. *Ibid.* Because these unfamiliar symbols and practices are less familiar, the objective observer may unfairly target them for elimination. A particular concern arises where religious practice requires government accommodation; an

objective observer may be less likely to view the unfamiliar practice as reasonable. The objective-observer test therefore prohibits adherents of minority religions from having the central role that their faith plays in their lives acknowledged by the government.

At bottom, the Tenth Circuit applied a test that is simultaneously a jurisprudential muddle *and* a needless threat to religious minorities. The Court should take this opportunity to resolve this "hopeless disarray" in Establishment Clause jurisprudence. See *Bauchman for Bauchman* v. *W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (quoting *Rosenberger* v. *Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring)).

III. THE THREAT OF FRIVOLOUS CLAIMS BROUGHT ON THE BASIS OF OFFENDED-OBSERVER STANDING WILL DISCOURAGE GOVERNMENT ACCOMMODATIONS FOR RELIGIOUS MINORITIES

As the foregoing argument suggests, *amicus* is primarily concerned about the substantive First Amendment doctrines. But before the Court itself can decide those questions, it must consider its jurisdiction and determine whether respondents had standing to sue in the first place. *Amicus* believes that, at the very least, the question whether "offended observers" have standing should justify granting the writ of certiorari. Allowing those who self-describe as "offended" to invoke the judicial power of the United States risks eroding this Court's doctrine of standing—and would do so in a way that, like the Tenth Circuit's endorsement test, poses a particular burden on religious minorities. The Tenth Circuit's broad approach to Article III standing warrants further scrutiny.

1. A plaintiff must establish an "irreducible constitutional minimum of standing," consisting of an injury in fact that is actual or imminent, concrete and particular-

ized, and fairly traceable to the challenged action of the defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit," but "is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787 * * * ." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-476 (1982). Yet the Tenth Circuit and other courts have developed an exception to the strict injury-in-fact requirement: the "offended observer." The Tenth Circuit endorsed "offended observer" standing, holding that simply because the plaintiffs described themselves as offended by the sight of the Ten Commandments monument, they were sufficiently aggrieved to bring suit.

This Court's resolute insistence that plaintiffs satisfy justiciability requirements—and especially show their own standing—is grounded in a desire to avoid blurring the line between judicial and political decision-making. One of the key purposes of the individualized injury-in-fact requirement of standing is to maintain the constitutional structure of our government, in which the courts do not "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian Coll.*, 454 U.S. at 474. Hence the title of one of Justice Scalia's articles: The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881 (1983).

Justiciability doctrines respect the separation of powers because they are vital for distinguishing *judicial* work from work that, while perhaps done by those who wear black robes, cannot be considered judicial. The court's exercise of power to determine the validity of an act of any legislature is "legitimate only in the last resort, and as a necessity in the determination of re-

al, earnest, and vital controversy between individuals." *Muskrat* v. *United States*, 219 U.S. 346, 359 (1911). The injury-in-fact requirement ensures that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues * * *." *Baker* v. *Carr*, 369 U.S. 186, 205 (1962); see also *Muskrat*, 219 U.S. at 362-363 (declining to issue advisory opinion).

2. Consistent with these principles, in case after case, this Court has refused to allow someone who simply disagrees with a policymakers' decisions to challenge those decisions in a judicial forum.[5] "Offended observer" standing risks eroding the limitations of justiciability and allows litigants to dress up generalized grievances in the garb of actual disputes. It invites courts to pass on the constitutionality of the acts of representative bodies, when the question has not been raised by a party with a

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[5] *E.g.*, *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted."); *Mass.* v. *Mellon*, 262 U.S. 447, 488 (1923) ("The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."); *U.S.* v. *Richardson*, 418 U.S. 166, 174 (1974) (A "taxpayer may not employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System") (internal quotation marks omitted); *McClure* v. *Carter*, 513 F. Supp. 265, 269 (D. Idaho 1981*), aff'd sub nom. McClure* v. *Reagan*, 454 U.S. 1025 (1981) ("[W]e conclude that a United States Senator, suing in either his individual capacity or his official capacity as a senator, lacks standing to challenge the validity of the appointment of a federal judge.").

real injury at stake. Each of the plaintiffs in cases like *Fairchild*, *Frothingham*, and *Richardson*—among many others—surely made clear their status as an offended citizen, adamant that the courts compel the Government to obey the law. The Court did not dispute the plaintiffs' veracity—it just found their anger or offense to be insufficient under Article III. If those who asserted merely their offense or anger at an alleged governmental violation was sufficient for unbridled standing to convert the dispute into a judicial matter, the consequence would be to assume for the judiciary an "amorphous, general supervision of the operations of government," as Justice Powell warned. See *Richardson* v. *United States*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

Even allegations that go beyond mere anger or offense but extend to psychological injuries such as "being offended" or "feeling excluded" have been held insufficiently injurious—*even in the Establishment Clause context*—to confer standing. *E.g.*, *Valley Forge Christian Coll.*, 454 U.S. at 485-486 (denying standing based on the psychological injury of observing purported objectionable violation of the separation between church and state); *Allen* v. *Wright*, 468 U.S. 737, 755-56 (1984) (denying standing predicated on abstract stigmatic injury) (abrogated on other grounds by *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)).

While it is true that an injury is not "abstract" or "generalized" *solely* because it is an injury shared by many, see, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11 (1998), this Court's cases make clear that the injury must be something more than an intellectual one, like disagreement. In *Akins*, the injury was the actual denial of specific, tangible records that the plaintiffs alleged a statutory right to possess. *Id.* at 20.

The need for this Court's review of the Tenth Circuit's lower bar for standing to challenge passive government

speech regarding religion is that the court of appeals appears to require nothing more than what this Court has repeatedly found insufficient. If upheld, this lower bar will necessarily elevate the frequency of litigation and judicial intervention in the context presented by this case. If mere observation confers standing, then religious practices in the public view will attract lawsuits. The very question of "offended observer" standing justifies certiorari in this case, and it is quite likely that the Court will be able to avoid a merits ruling.

3. This entirely foreseeable increase in lawsuits is itself a reason to doubt the validity of the special test for standing that the Tenth Circuit adopted. A test that creates a special burden on the free exercise of religion is not likely a test that Article III truly requires. Religious adherents should not be singled out for disfavored treatment, including in the context of being uniquely subjected to litigation. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017) ("The Free Exercise Clause protects against laws that impose special disabilities on the basis of religious status.") (internal quotation marks omitted). A special standing doctrine that allows otherwise uninjured "offended observers" to target religious speech risks exactly that state of affairs.

That rule would not just target religious expression but, for many of the reasons articulated above, would *especially* burden religious minorities. The practices of religious minorities, being inherently less familiar and more conspicuous, are more likely to draw the attention of observers searching out offense.

For example, it is the practice in many Jewish communities to erect visible markers to create an *eruv*, which designates an area in their community in which Jews may carry items (such as house keys and prayer books) and push strollers and wheelchairs on the Sabbath. The *eruv*

is particularly significant for the Sabbath observance of the elderly and parents of young children by making their transportation to the synagogue possible. These *eruv* markers often take the form of strings attached to municipal telephone poles by trained representatives of the Jewish community with the permission of the governments and operators of the telephone lines.

These markers are not entirely inconspicuous. Indeed, they have drawn at least one lawsuit from offended observers already, as well as unconstitutional antagonism from local governments. See *Jewish People for the Betterment of Westhampton Beach* v. *Village of Westhampton Beach*, 778 F.3d 390, 393 (2d Cir. 2015); *Tenafly Eruv Assoc.* v. *Borough of Tenafly*, 309 F.3d 144, 177-178 (3d Cir. 2002) (concluding that Borough's attempts to remove an *eruv* violated plaintiffs' free exercise of religion). The plaintiffs in *Westhampton Beach* argued that the *eruv* "will be a constant and ever-present symbol, message and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity." 778 F.3d at 393. While the Second Circuit in that case held that the government actor was neutrally accommodating religion and therefore pursuing a secular purpose, *id.* at 395-396, if an *eruv* is ever successfully challenged and dismantled, it would prevent Jews who need wheelchairs and strollers from attending synagogue, and make life much harder for many Jews, who may wish to do tasks as innocuous as carrying their house keys.

Similarly, many Jews require accommodation from their employers to leave work earlier on Fridays to honor the Sabbath. Under the Tenth Circuit's standing jurisprudence, a federal employee who merely witnesses and takes offense to his employer's accommodation of a coworker's religion might have standing to bring suit. Such a suit may well be frivolous, but nonetheless ex-

tremely harmful. The threat of litigation may deter governments from offering legal and secularly beneficial accommodations in the future.

Religious minorities are more dependent on accommodations than those in the majority. To give but one example, Christians do not need to be accommodated to celebrate Christmas at home because Christmas is a federal holiday. Jews who desire to celebrate holidays that many have never heard of—*Shemini Atzeret* and *Purim*, for example—require accommodations and often have a difficult time getting them. Therefore, religious minorities are more likely to be harmed by any doctrine that suppresses accommodation.

Religious speech and accommodation should not be singled out for inferior protection. The Tenth Circuit's standing jurisprudence seems very likely to contravene this Court's standing precedents, and if left standing will encourage a blight of lawsuits against religious accommodations. The brunt of this litigation—whether successful or not—will be unequally felt by more-conspicuous religious minorities.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted.

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