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 AND VALERIE BREEN;
AND MAXWELL BREEN,
Respondents,

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed amicus curiae briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that the constitutional rights of groups that advocate traditional values like the Boy Scouts are fully protected, and that the crucial legal doctrine of standing is fully maintained.

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

STATEMENT OF THE CASE[2]

Since the mid-1950s, the San Diego Imperial Council, Boy Scouts of America (hereafter "San Diego Boy Scouts") has operated Camp Balboa in Balboa Park in the center of the city, under a long term lease with the City of San Diego. Camp Balboa includes campgrounds, a swimming pool, an amphitheater, a program lodge, a picnic area, a ham radio room, restrooms, showers, archery programs, and a camp ranger office, all built and maintained by the San Diego Boy Scouts. *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 781 (9th Cir. 2008); SER 217, para. 18. The Ninth Circuit adds, "The Boy Scouts have landscaped, constructed recreational facilities, and installed water and power on the property. [SER 217, para. 17]." App. B, 26a. The current lease requires the Scouts to spend at least $1.7 million for capital improvements on the property over just seven years. App. B, 26a.

The City entered into this lease as part of a general policy of leasing public property to non-profits who then bear the costs, rather than the taxpayers, of operating facilities for the public. As the Ninth Circuit observed, "[T]hese leases save the City some money by placing the costs of maintenance and improvements upon the lessee organizations. [SER 204-05]" App. B, 26a. Pursuant to this policy, the City has entered into at least 123 leases with such non-profits as

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[2] In the citations throughout this brief, "ER___" refers to the fourteen-volume "Excerpts of Record" submitted to the Ninth Circuit by Plaintiffs on January 3, 2005. "SER___" refers to the five-volume "Supplemental Excerpts of Record" submitted by the Boy Scouts on February 14, 2005. Numbers followed by "a" refer to pages in the bound Appendix submitted by Petitioners with their Petition for a Writ of Certiorari.

the San Diego Calvary Korean Church, Point Loma Community Presbyterian Church, the Jewish Community Center, the Vietnamese Federation, the Black Police Officers Association, and ElderHelp. 530 F. 3d at 797; (SER 10, 36).

In the mid-1980s, 42 youth serving organizations in San Diego joined to ask the City to enter into another, similar lease with the San Diego Boy Scouts to build and operate a youth aquatic center on Fiesta Island, because they believed the Scouts were the best equipped to do so. (ER 3289-90; SER 3, para. 12, 1047-52, 1065-79, 1082, 1133, 1137-41.) The City entered into this recommended lease in 1987, and the San Diego Boy Scouts built a Youth Aquatic Center on the leased land with $2.5 million of its own funds. (SER 215, 1047-49, 1051-52, 1065-79, 1082, 1084 para. 19, 1137-41; App. B, 27a) The Scouts maintain programs at the Center for kayaks, canoes, sailboats, rowboats, and swimming. (SER 215-16, paras. 10-11.)

The record establishes the following facts without dispute in regard to the Scout operation of these two properties:

> —The City leased Camp Balboa and the Youth Aquatic Center to the San Diego Boy Scouts for the entirely secular purpose of advancing youth recreation, and not for any religious purpose. (SER 51, 422).
>
> —The City spends no money on the two leased properties. (SER 3 para. 9, 5 para. 17.) The San Diego Boy Scouts have built, operated, and maintained the properties at a cost to them of millions of dollars. (ER 732, 820; SER 215 para. 10; SER 1084, para. 19.) The Scouts even pay the City a $2,500 administrative fee under the Camp Bal-

boa lease to cover the City's costs of administering the lease. (App. B 25a). Consequently, in the operation of these leases, the Boy Scouts are subsidizing the City, rather than the City subsidizing the Boy Scouts. That is a result intended by the Scouts as part of their charitable mission.

—The San Diego Boy Scouts administer both Camp Balboa and the Youth Aquatic Center open to the public on a first-come, first-served basis, and the general public utilizes both facilities extensively. (SER 216 paras. 11, 13, 217 para. 18, 218, para. 19, 295 (118:16-119:14), 307 (67:13-19), 317 (249:11-15), 617 (64:8-18); ER 2266-2296). Even when the San Diego Boy Scouts were using the properties for Boy Scout events, numerous other youth groups have used the properties at the same time, and no non-Scout group has been turned away even at these times. (SER 291 (170:13-15, 171:3-6, 315 (227:11-14). *See also* SER 624 (156:16-157:16); 291 (170:13-15).

—As the Ninth Circuit stated, "There are no religious symbols either at Camp Balboa or at the Youth Aquatic Center." 530 F.3d at 782 (28a).

—The plaintiffs have conceded that the San Diego Boy Scouts "is not a house of worship like a church or a synagogue," and that the "Boy Scouts of America is not a religious sect." (ER 54 para. 185; *see* ER 2007 para. 185). The Boy Scouts are also "absolutely non-sectarian." (ER 1580, art. IX, Sect. 1, cl. 1; SER 273 (227:1-6), 274 (230:20-231:1), 309 (75:7-8).

—The San Diego Boy Scouts have not engaged in discrimination against any individual in violation of the leases, which prohibit discrimination

> on the basis of religion or sexual orientation in operating the leased properties.[3] *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1282 (S.D. Cal. 2003). Indeed, the San Diego Boy Scouts have never turned anyone away from either Camp Balboa or the Youth Aquatic Center. 530 F. 3d at 782-783.

Members and adult volunteers of the Boy Scouts are not required to affiliate with any particular religious faith, organization, or denomination. (ER 309 (75:7-8), 1580, art. IX sect. 1, cl. 1; App. B, 23a; *see also*, ER 1527; ER 54 para. 185, ER 2007 para. 185.) Nationally, the Boy Scouts include boys and adult leaders of every faith, and those not associated with any organized religion. But boys must promise to do their duty to God and be reverent in accordance with the Scout Oath and Scout Law in order to be Boy Scout members.

The Scout Oath states,

> "On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> Mentally awake and morally straight.

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[3] In writing for the 6 judges dissenting from the denial of rehearing en banc by the Ninth Circuit below, Justice O'Scannlain correctly stated that,

> "Although the Boy Scouts' membership policies exclude homosexuals and agnostics, the Boy Scouts do not discriminate on the basis of sexual orientation or religion in administering the leased parklands. A homosexual or agnostic may use the lands leased to the Boy Scouts on the same terms as everybody else." (App. A, 4a-5a).

(SER 745, 764.) The Scout Law states that a Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent. (SER 745.)

Based on these principles, by national rule the Boy Scouts do not accept atheists, agnostics, or homosexuals as members or adult leaders. App. B, 22a.

The Barnes-Wallace Plaintiffs are a lesbian couple and their minor male child. 530 F. 3d at 780. (24a). The Breen Plaintiffs are an agnostic couple and their minor male child. *Id*. (24a). They brought suit against the San Diego Boy Scouts, the Boy Scouts of America and the City alleging that they are offended by the above values and beliefs of the Boy Scouts. Because of their aversion and revulsion concerning these values and beliefs, they could not bear to even try to use facilities "subject to the Boy Scouts' ownership and control." App. B, 29a. (ER 85, 370-71; SER 252 (35:12-15; 36:2-5). They seek to force the City to terminate the leases with the San Diego Boy Scouts and lease the facilities on which the Scouts have spent millions of their own funds to another nonprofit organization that they may find acceptable. (ER 604; SER 241 (75:7-24); 234 (55:17-21); 252 (36:14-20); 247-249 (98:5-106:22)).

Plaintiffs allege that the leases violate the Establishment Clauses of the U.S. and California Constitutions, among other claims. (ER 602-604).

Not one of the Plaintiffs has ever even tried to use Camp Balboa or the Youth Aquatic Center. 530 F. 3d at 782 (29a). That means that not one of the Plaintiffs has ever been denied use of the facilities by the San Diego Boy Scouts. In fact, under the policies of the San Diego Boy Scouts in administering the prop-

erties, as discussed above, the Plaintiffs have always been welcome to the use of either property on the same terms and conditions as everyone else.

The district court denied summary judgment on the issue of standing even though it concluded that, "Plaintiffs refusal to use the public parklands prevents them from establishing a direct injury in fact," (206a). The court ruled that the case could nevertheless proceed based on the theory of standing as municipal taxpayers (216a). When the court later granted summary judgment on the merits for the Plaintiffs, it did not address the issue of standing, whether as municipal taxpayers or otherwise. In fact, municipal taxpayer standing is not available to the Plaintiffs because, as mentioned above, the undisputed record shows that the City spends no taxpayer funds on the properties leased to the San Diego Boy Scouts.

On appeal, the Ninth Circuit at first ruled on the issue of standing that Plaintiffs' "purposeful avoidance of the parklands leased by the Boy Scouts as a protest against the Scouts' exclusionary policies is not a sufficient injury." *Barnes-Wallace v. Boy Scouts of America*, 471 F. 3d 1038, 1045 (9th Cir. 2006)(85a-86a). It also recognized that Plaintiffs could not have standing as municipal taxpayers because the evidence showed that tax dollars did not support the properties leased by the Scouts, correcting the mistake made by the district court. *Id*. at 1046 (86a-87a). But the court still ruled contrary to undisputed evidence, this time mistakenly concluding 2-1 that the Plaintiffs had standing because they were denied equal access to Camp Balboa and the Youth Aquatic Center. *Id*. at 1044-45.

The panel recognized this error[4] and granted rehearing, with the majority reversing itself and adopting the standing theory it had at first rejected. The majority concluded this time that Plaintiffs had standing because they were "offended" by the Boy Scouts traditional values and beliefs as described above, thereby suffering an "aversion to the facilities", and feeling "unwelcome there." 530 F. 3d at 783, 784 (29a).

The Scouts sought en banc review on the grounds that this theory of standing was contrary to the established precedents of this Court. But the Ninth Circuit denied review, 6 judges dissenting.

SUMMARY OF ARGUMENT

The Plaintiffs' basis for standing in this case is that they are "offended" by the traditional moral values espoused by the Boy Scouts. Consequently, they felt that they could not bear to even try to use the facilities leased to the San Diego Boy Scouts. As the Ninth Circuit explained below, "The injury . . . is the offensiveness of having to deal with the Boy Scouts in order to use park facilities." 530 F. 3d at 785 n.5 (36a).

Consequently, in this case there is nothing more for standing than avoidance of a place, by the Plaintiffs, because of people there, the Boy Scouts, who hold different views. As Judge O'Scannlain explained in dissent below,

> "the [Plaintiffs] based standing on the claim that although they wanted to use public land and

[4] The Plaintiffs were never denied equal access to the leased facilities. (SER 216 paras. 11, 13, 217, para. 18, 218, para. 19, 295 (118:16-119:14), 307 (67:13-19), 317 (249:11-15)).

> *could* use it without interference from the Boy Scouts, they nevertheless declined to use it, because they *would be* offended by the Boy Scouts views on sexuality and religion if they did."

App. A, 5a. He adds,

> "the claim here is that the [Plaintiffs] are psychologically injured by *the thought of* associating with the Boy Scouts; they contend that they would be offended by the Boy Scouts' views *if* they chose to use the parks.

App. A, 8a.

This does not remotely amount to standing under the precedents of this Court, which have long held that the mere psychological harm of feeling offended does not provide standing. An actual, concrete, injury-in-fact is required.

The doctrine of standing is fundamental to our whole system of government, demarking the boundary between the role of the judiciary on the one hand, and democratic decisionmaking on the other. A robust standing doctrine keeps the federal courts limited to actual cases involving the application of the law to well-defined, individual disputes, and out of political questions involving the weighing of competing values to decide what the law should be, which is the role of democratically elected legislatures.

Yet, the decision of the Ninth Circuit below effectively leaves no substance to the doctrine of standing. This is why this case presents fundamentally important, crucial questions of law that should be decided by this Court.

Moreover, upholding the standing doctrine of the Ninth Circuit below would say to those that hold tra-

ditional moral and religious views that holding those views is itself a basis for granting standing to sue them. This would constitute a major burden on the freedom of the American people to choose their own views and values, and act to uphold and propagate them. It would constitute viewpoint discrimination in violation of the Free Speech Clause, religious discrimination in violation of the Freedom of Religion Clause, and, unless any views that anyone found objectionable conferred a basis for standing, a violation of the Equal Protection Clause as well.

REASONS FOR GRANTING THE WRIT

I. THE PLAINTIFFS DO NOT HAVE STANDING UNDER THE PRECEDENTS OF THIS COURT, WHICH REQUIRE CONCRETE INJURY-IN-FACT NOT MERE OFFENSE.

The Plaintiffs' basis for standing in this case is that they are "offended" by the traditional moral values espoused by the Boy Scouts, and consequently feel an "aversion" to the facilities leased to the Scouts. As the Ninth Circuit explained it, the Plaintiffs felt that they had to avoid "Camp Balboa and the Aquatic Center because they object to the Boy Scouts presence on, and control of, the land: They do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts representatives in order to gain access to the facilities." 530 F. 3d at 784 (33a). Or, as the Ninth Circuit further explained, "The injury . . . is the offensiveness of having to deal with the Boy Scouts in order to use park facilities." 530 F. 3d at 785 n.5 (36a).

But as discussed above, there are no religious symbols or signs posted either at Camp Balboa or at the Youth Aquatic Center. As the Ninth Circuit itself

found, "[T]here 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 views must avoid them." 471 F. 3d at 1045 (85a-86a). The only symbol on the "signs posted by the Boy Scouts" is the Scout badge, which includes an eagle, a shield with stars and stripes, and a fleur-de-lis, similar to the official seals in many federal courts. (SER 746; ER 3717 para. 57).

Nor have the Plaintiffs provided any evidence that they would be exposed to any religious expression or conduct merely by interacting with Scout officials involved in administering the properties. There is no record of any complaints lodged with anyone regarding such religious activity by any Scout administrator at Camp Balboa or the Youth Aquatic Center. These Scout officials are involved in overseeing outdoor activities such as camping, swimming, canoeing, kayaking, and archery, not religious advocacy.

Moreover, the Scouts have long administered both facilities open to the general public, including the Plaintiffs, on a first-come, first-served basis, without engaging in discrimination of any sort against visitors, without, indeed, ever turning anyone away, and many, many youths who are not members of the Boy Scouts have used the facilities on this basis. Plaintiffs themselves not only have not been excluded from Camp Balboa, none of them has ever even tried to use either facility.

As Judge O'Scannlain wrote for 6 judges dissenting from the denial of en banc rehearing below,

> "The [Plaintiffs] did not have any of the traditional bases of standing: they did not compete for the leases, try to participate in any Boy Scout activities on the leased land, or even use or try to

> use the land for their own purposes . . . .Rather, the [Plaintiffs] based standing on the claim that although they wanted to use public land and *could* use it without interference from the Boy Scouts, they nevertheless declined to use it, because they *would be* offended by the Boy Scouts views on sexuality and religion if they did."

App. A, 5a.

Judge O'Scannlain added,

> "This case is most notable for what it does *not* involve. There is no economic injury here; the [Plaintiffs] did not compete with the Boy Scouts for the lease. Nor did the families try to join the Boy Scouts or to participate in Boy Scout activities in the parks. Thus, they cannot claim that they were excluded from anything. Most critically, the families did not even *try* to use, for their own purposes, the portions of the parks that the Boy Scouts control. Thus, they cannot even claim that they suffered any psychological injury as a result of associating with the *Boy Scouts*. Rather, the claim here is that the families are psychologically injured by *the thought of* associating with the Boy Scouts; they contend that they *would be* offended by the Boy Scouts' views *if* they chose to use the parks.

App. A, 8a.

Indeed, as Judge Kleinfeld recognized in dissent below, in this case "there is nothing but avoidance of a place [by the Plaintiffs] because of people there who hold different views." 530 F. 3d at 795 (60a). The panel majority below claimed that Plaintiffs suffered "both emotional harm and the loss of recreational enjoyment." *Id*. at 785 (35a). But they did not suffer

any loss of recreational enjoyment caused by the Boy Scouts. That was caused by the Plaintiffs themselves in refusing to use the facilities open to them. Quite to the contrary, it was the Boy Scouts who spent millions of dollars of their own funds precisely to offer recreational enjoyment open to them. The "emotional harm" is the purely psychological injury of being offended by the traditional moral values that the Boy Scouts hold, and uphold.

This does not remotely amount to standing under the precedents of this Court. Those precedents have long held that the mere psychological harm of feeling offended does not provide standing. An actual, concrete, injury-in-fact is required. *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc*. 454 U.S. 464 (1982); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

In *Valley Forge*, the federal government gave away without charge a 77 acre tract of surplus land worth over half a million dollars to the Valley Forge Christian College, affiliated with the Assemblies of God Pentecostal denomination. The College, which required its faculty to be "baptized in the Holy Spirit" and "to live Christian lives," planned to use the property for training "men and women for Christian service as either ministers or laymen." 454 U.S. at 468-469. Americans United for Separation of Church and State sued to challenge the property transfer as a violation of the Establishment Clause.

This Court ruled that the plaintiffs did not have standing because Article III of the Constitution,

> "requires the party who invokes the court's authority to show that he personally has suffered

> some actual or threatened injury as a result of the putatively illegal conduct of the defendant.

Id, at 472. The Court concluded that the plaintiffs in that case,

> "fail to identify any personal injury suffered by them . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .

Id., at 485-486.

Similarly, in the present case we have nothing more than the psychological consequence of the Plaintiffs being morally offended by the different views and values held by the Boy Scouts, or, as Judge Kleinfeld put it above, avoidance of a place, by the Plaintiffs, because of people there, the Boy Scouts, who hold different views. If the Plaintiffs had been denied access to the facilities, or discriminated against in some way, or if they had been alternative bidders competing against the Scouts for lease of either of the properties, they would have had an actual, concrete injury providing standing. But as Judge Kleinfeld further elaborated, while the Plaintiffs in the present case,

> "may feel 'degraded' or 'offended' because of the Boy Scouts positions on reverence and sexuality, so long as their access is unimpaired the feeling is no stronger a basis for standing than the feelings others may have about atheists or lesbians managing the facility."

530 F. 3d at 798 (67a).

Judge Kleinfeld rightly concluded based on *Valley Forge*, "A feeling of revulsion for others who have dif-

ferent beliefs, so strong that one feels degraded or excluded if they are present, does not confer standing." *Id*. Judge O'Scannlain added,

> "A plaintiff who is psychologically injured by the mere thought of associating with people who hold different views cannot claim that he has suffered a legally cognizable injury-in-fact.

App. A, 17a.

Indeed, the Ninth Circuit below itself originally ruled correctly on standing that the "purposeful avoidance of the parklands leased by the Boy Scouts as a protest against the Scouts exclusionary policies is not a sufficient injury." 471 F. 3d at 1045 (85a). But that was before it realized that the basis on which it did find standing in that opinion, that the Scouts had denied equal access to the Plaintiffs to Camp Balboa and the Youth Aquatic Center, was in error.

Upholding the standing doctrine of the Ninth Circuit below would say to those that hold traditional moral and religious views that holding those views is itself a basis for granting standing to sue them. This would constitute a major burden on the freedom of American citizens to choose their own views and values, and act to uphold and propagate them. It would constitute viewpoint discrimination in violation of the Free Speech Clause, religious discrimination in violation of the Freedom of Religion Clause, and, unless any views that anyone found objectionable conferred a basis for standing, a violation of the Equal Protection Clause as well.

II. THE NINTH CIRCUIT'S DECISION WOULD LEAVE NO EFFECTIVE DOCTRINE OF STANDING.

In writing for the 6 judges dissenting from the Ninth Circuit's denial of rehearing en banc in this case, Judge O'Scannlain wrote regarding the holding of the majority panel on standing,

> "Henceforth, a plaintiff who claims to be offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact. No other circuit has embraced this remarkable innovation, which contradicts nearly three decades of the Supreme Court's standing jurisprudence. In practical effect, the three-judge panel majority's unprecedented theory creates a new legal landscape in which almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court."

App. A, 3a-4a.

Judge O'Scannlain adds that the Ninth's Circuit's standing doctrine in this case,

> "is an unprecedented theory. It splits standing law at the seams, forcing open the courthouse doors to plaintiffs without concrete, particularized injuries. Henceforth, a plaintiff need only assert that he *would* be offended *if* he chose to interact with someone whose beliefs offend him. Does this mean that an animal rights activist may sue the owner of a hot dog stand located on government property for buying beef from ranchers in violation of FDA health requirements, even if the activist has never visited the stand? Should the activist so much as allege that she

> *wants* to visit the stand but is offended by the stand owner's implicit endorsement of how range cattle are treated in Kansas or by the owner's reluctance to hire PETA activists, the majority . . . would roll out the red carpet."

App. A, 8a-9a.

Judge O'Scannlain is right that the Ninth Circuit's standing doctrine effectively leaves no substance to the concept of standing. All of the social controversies of our society would be sufficient to provide grounds for standing to have the competing grievances somehow resolved by the courts, a role for which judges and the law do not have adequate tools, expertise, or democratic legitimacy.

For example, suppose the City leased park facilities to be run by a social organization for Orthodox Jews. They put millions into the construction, operation, and maintenance of the facilities, operate them on a totally even handed basis open to the general public on a first-come, first served basis, and thousands of non-Jews use and enjoy the facilities each year. In the Ninth Circuit at least, a Muslim who never used the facilities because he is offended at the thought of having to deal with the Jews who run it would have standing to bring suit against the Jewish organization to have it removed from administering the facility.

Or suppose the City leased the park to a social organization for Muslims. They performed the same as the Jewish organization in the above hypothetical, although the facilities include Muslim symbols and signs in Arabic, and a call to Muslim prayers is played five times a day. The Ninth Circuit's doctrine would confer standing on a Jew who never visited the

facilities either, but who is offended at the thought of dealing with the Muslims who run it, and the association it brings to his mind with the terrorists who murder his people. The same would be true for a Christian plaintiff who is offended at the thought of the Muslim calls to prayer he never heard because he also never visited the place.

Or suppose the City ran the facilities and just hired an Orthodox Jew as a park ranger sitting at the entrance and processing entrants and administering reservations? Could an offended Muslim sue? What if the City hired a Muslim instead and an offended Jew wanted to sue?

Suppose the City leased the facilities to a social organization for gay youths that advocated gay rights. The organization also fully performs as well as in the hypothetical above, but all the staff wears T-shirts that say "Gay? Fine with me." Would a Pentecostal minister for an Assembly of God church have standing to sue because he is offended? What if he says his church's youth group cannot use the facilities under these circumstances?

What if the City instead leased the facilities to an Assembly of God youth organization, and they again performed as above, with no religious symbols or advocacy of any sort, just like the Boy Scouts in the present case? Would this confer standing on the gay youth organization to sue? What if the Assemblies of God minister affiliated with the youth organization gave a sermon across town in his own church quoting Bible passages he says condemn homosexuality as a mortal sin? Does this confer standing on the gay organization composed of members who have never visited the facilities because they can't bear to "deal" with such people? Suppose it is a Catholic youth or-

ganization running the facilities and a local Catholic priest, or the Pope in Rome, gives the above sermon on homosexuality? Does that confer standing on the offended parents of a gay son, or on an offended lesbian couple with a non-gay son?

Or suppose the Assembly of God church runs into financial trouble, and the minister takes a day job administering park admission and reservations for the City. Does this confer standing for anyone offended by the minister's sermons? What if an outspoken gay rights activist is hired for the job instead, and he wears a T-shirt to work saying "Gay? Fine with me." Suppose he places gay rights literature on the counter.

Suppose the City leases land to a Republican Youth organization that spends millions of dollars for an auditorium where debates on public issues are held, as well as other performance events such as circuses and concerts. A member of Moveon.org sues claiming he is offended and can't attend the events because he doesn't want to have to "deal" with the equivalent of Hitler youth and an organization of aspiring war criminals. Standing?

Then there is Judge Kleinfeld's hypothetical:

> "If a Jewish plaintiff challenges a government lease to the Protestant Church to operate a non-discriminatory recreational facility that the plaintiff has never visited, may the Jewish plaintiff base standing on the grounds that the Protestant church prevents him from serving as a minister?"

Under the Ninth Circuit's doctrine on standing in the present case, there would apparently be standing in all of these cases, because the very notion of

standing would have been drained of all meaning and substance. As Judge Kleinfeld concluded, "After today, the only real hard and fast limit on a plaintiff's standing to sue that I can see will be the viability of the underlying claim on the merits." App. A, 9a. Or, as this Court recognized in *Allen*, 468 U.S. at 756, standing based on personal offense would leave the federal courts as "no more than a vehicle for the vindication of the value interests of concerned bystanders."

Indeed, in *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), a Jewish veterans association was found to have standing because they felt offended by crosses in a federal war memorial, even where they had never visited the memorial. The court said,

> "In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish "injury in fact."

Id. at 1205 (citing *Barnes-Wallace*).

III. THIS CASE PRESENTS CRUCIAL QUESTIONS OF LAW REGARDING THE FUNDAMENTAL DOCTRINE OF STANDING.

In *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), this Court said, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Id. at 341-342 (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

The Court further elaborated the importance of standing in *Diamond v. Charles*, 476 U.S. 54 (1986), saying that standing requirements ensure that judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" 476 U.S. at 62 (quoting *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 687 (1973).

The doctrine of standing is rooted in the Constitution itself, where Article III, Sect. 2, cl. 1 limits the federal judiciary to deciding "Cases" and "Controversies." This is because the doctrine is fundamental to our whole system of government, demarking the boundary between the role of the judiciary on the one hand, and democratic decisionmaking on the other. A robust standing doctrine keeps the federal courts limited to actual cases involving the application of the law to well-defined, individual disputes, and out of political questions involving the weighing of competing values to decide what the law should be, which is the role of democratically elected legislatures.

This is why this case presents fundamentally important, crucial questions of law that should be decided by this Court. The decision of the Ninth Circuit below demolishes the doctrine of standing, as shown in the prior section above. This is plainly unconstitutional, and litigation is already proceeding in the federal courts seemingly leaping out of the absurd hypotheticals discussed above. This will only lead to chaos in the federal courts unless this Court steps in and restores the doctrine of standing to its rightful place in our judicial system and democratic framework of governance.

Of course, the decision of the Ninth Circuit below on standing creates a conflict among the Circuits, as amply demonstrated by the brief of the Boy Scouts.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that this Court should grant the requested Writ of Certiorari.

Respectfully submitted,

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