No. 08-472

# In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

FRANK BUONO, RESPONDENT

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

## BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

KEVIN J. HASSON
ERIC C. RASSBACH
*Counsel of Record*
HANNAH C. SMITH
LUKE W. GOODRICH
LORI H. WINDHAM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036
(202) 955-0095

*Counsel for* Amicus Curiae

## QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page**

**Miscellaneous**

## INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions.[1] The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Because religion—like race, ethnicity, art, or music—is a fundamental aspect of human culture, the Becket Fund opposes attempts to use the Establishment Clause to banish acknowledgement of religion from the public square. It has litigated numerous Establishment Clause cases before the Federal Courts of Appeals and this Court. Most recently, The Becket Fund served as special counsel for the States of Colorado, Kansas, New Mexico, and Oklahoma, presenting oral argument in *American Atheists, Inc.* v. *Duncan*, No. 08-4061 (10th Cir. argued Mar. 9, 2009), a Tenth Circuit appeal involving thirteen roadside cross memorials that may be affected by the outcome in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Ninth Circuit's grant of standing—based solely on the fact that Mr. Buono is "deeply offended" by the Mojave Desert cross—demonstrates just how

---

[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

confused the doctrine of standing in Establishment Clause cases has become. Pet. App. 105a-107a.

If Mr. Buono were African-American, and he were "deeply offended" at government action supporting race discrimination—such as government approval of a racially discriminatory club or private school—this Court's cases are unequivocal: Mr. Buono's offended sensibilities, no matter how deep and how justified, would not by themselves constitute a cognizable injury. *Allen* v. *Wright*, 468 U.S. 737 (1984) (racially discriminatory private school); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (racially discriminatory private club). Rather, Mr. Buono would suffer a cognizable injury only if he had been "personally denied equal treatment by the challenged discriminatory conduct"—that is, if he had applied to the club and been rejected, or if he had been personally denied the ability to receive an education in a racially integrated school. *Allen*, 468 U.S. at 755-56.

Turn Mr. Buono into a Roman Catholic, however, and make him "deeply offended" that government property hosts a Latin cross but not a Buddhist stupa, and suddenly his feelings of offense become a cognizable injury. Pet. App. 105a-107a.

If that seems odd, it's because it is. Several leading scholars have noted that courts treat standing under the Establishment Clause as a lower bar than standing in any other area of the law.[2] And as Mi-

---

[2] See, *e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & Pol. 499, 521-30 (2002); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. Rev. 1345, 1351-52 (2001); Richard H. Pildes & Richard G. Niemi,

chael McConnell has observed, "[t]here is no evident reason to treat establishment claims with greater solicitude." McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 165 (1992). Indeed, this Court has repeatedly rejected the notion that standing should be a "sliding scale" depending on which constitutional value happens to be at stake. *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

Accordingly, this brief offers a simple principle: standing in Establishment Clause cases should mirror standing in Equal Protection Clause and Free Exercise Clause cases—no more stringent, and no less. That is, a plaintiff's feelings of offense should give rise to a cognizable injury only where the plaintiff has been "personally denied equal treatment" on the basis of religion, *Allen*, 468 U.S. at 755, or where, like a captive audience of public school children, the plaintiff has been unwillingly subjected to government-sponsored religious exercises, *School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

Such a rule is consistent with this Court's decisions in past Establishment Clause cases; it would harmonize the doctrine of standing across areas of constitutional law; and it would further the fundamental purposes of Article III. Under this standard, Mr. Buono lacks standing, and the case should be dismissed.

---

*Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483, 513-14 (1993).

II. Should this Court nevertheless reach the merits, it would once again find that the sporadically-applied "endorsement test" provides no reasoned basis for a decision. The deepest flaw of the endorsement test is its tacit assumption that, to a reasonable observer, every monument conveys only one objective "message." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). But this Court itself has disavowed that assumption in the free speech context, observing that "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure" because any given monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125, 1136 (2009).

Such multiple messaging is on full display in this case, as a lone cross in the middle of the desert can reasonably convey several different meanings. The endorsement test offers no principled basis for picking just one of those meanings; thus, it ends up being "nothing more than an application to the Religion Clauses of the principle: 'I know it when I see it.'" McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 148 (1992).

## ARGUMENT

### I. Standing in Establishment Clause cases should mirror standing in equal protection cases.

This Court's case law under the Equal Protection Clause offers a more coherent model for Establishment Clause standing than the Ninth Circuit's flawed recognition of mere "psychological harm" as a

cognizable Article III injury. Under the Ninth Circuit's misinterpretation of this Court's standing case law, Article III supplies no meaningful limit on Establishment Clause claims: a person who sees a photograph of the Mojave Desert cross in the *New York Times* can suffer just as much, if not more, psychological harm as a person who drives by the cross every day. The doctrine of standing is thus reduced to arbitrary and manipulable limits, such as how often a person sees a monument, or whether they were so offended that they altered their conduct to avoid further offense. Section I.A., *infra*.

By contrast, in an equal protection challenge to race discrimination, psychological harm is not enough to confer standing; rather, standing is available only for "those persons who are *personally denied equal treatment* by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (emphasis added); Section I.B., *infra*. This Court already uses a similar approach to standing under the Free Exercise Clause, and the vast majority of this Court's Establishment Clause cases have *implicitly* applied the same approach. Section I.C., *infra*. Making this approach explicit will bring much needed clarity to the question of standing in Establishment Clause cases.

### A. Recognizing "psychological harm" as an Article III injury produces arbitrary and inconsistent standing decisions in Establishment Clause cases.

The Ninth Circuit concluded that Mr. Buono has standing because he is "deeply offended by the cross

display" and thus avoids visiting Sunrise Rock.[3] Pet. App. 105a-107a. This Court, however, has never recognized "psychological harm," standing alone, as a basis for standing to sue under the Establishment Clause.

1. The leading case on psychological harm is *Valley Forge*. There, the plaintiffs challenged the transfer of federal property to a religious college. 454 U.S. at 468. The plaintiffs had never visited the property, but filed suit after hearing about the transfer through a news release. *Id.* at 487.

This court concluded that the plaintiffs lacked standing. As the Court explained, "the psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III." *Id.* at 485. There must be a "personal injury" beyond mere psychological harm. *Ibid.*

Since *Valley Forge*, lower courts have struggled to draw a line between mere psychological harm, which is not sufficient to confer standing, and concrete personal injuries, which are. The task is made more difficult by this Court's inconsistent Establishment Clause rulings, particularly those relying on the the-

---

[3] The Government emphasizes that Mr. Buono is not offended by the cross itself, but by a "policy disagreement[]" about the fact that Sunrise Rock is not open to other private displays. Pet. Br. at 13-14. As explained below, however, it makes no difference whether the source of Mr. Buono's offense is the cross *qua* religious symbol or the cross *qua* limited forum; what matters is that psychological harm, standing alone, is not a cognizable injury. Indeed, asking lower courts to parse the source of the plaintiff's psychological harm will needlessly complicate the standing inquiry.

ory of endorsement. Specifically, if the chief evil of establishment is "endorsement"—which "sends a message to nonadherents that they are outsiders, not full members of the political community"—then lower courts have every reason to think that plaintiffs who suffer psychological harm upon receiving such a message have a cognizable Article III injury. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

At bottom, the endorsement theory is in tension with *Valley Forge*. *Valley Forge* says that psychological harm is not a cognizable injury; but the endorsement theory says that psychological harm is key to an Establishment Clause violation.[4]

In an effort to obey both commands, lower courts typically look to one of four limiting circumstances to distinguish the mere psychological harm at issue in *Valley Forge* from cognizable Article III injuries:

1. *Personal contact*: the plaintiffs must have "direct, personal contact" with the challenged display, which interferes with their "use and enjoyment" of government property;[5]

---

[4] See, *e.g.*, Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483, 513-14 (1993) (noting that there is "significant tension * * * between recognition of expressive harms," such as offensive messages under the endorsement test, "and the traditional requirements of individualized wrongs"); see *infra* Section II (discussing flaws of the "endorsement" theory on the merits).

[5] *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985); see also *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987); *Suhre* v. *Haywood County*, 131 F.3d 1083, 1087-88 (4th Cir. 1997).

2. *Frequency*: the plaintiffs must have "frequent" contact with the challenged display;[6]

3. *Residency*: the plaintiffs must reside in the jurisdiction responsible for the challenged display;[7] or

4. *Altered behavior*: the plaintiffs must alter their behavior in response to the challenged display.[8]

As explained below, all of these circumstances are simply window dressing on the same "injury" claimed in *Valley Forge*, namely, psychological offense at the government's conduct. It is therefore no surprise that these "limiting" circumstances turn out to be easily manipulable, transforming the standing inquiry into nothing more than an invitation to artful pleading.

---

[6] See, *e.g.*, *Vasquez* v. *L.A. County*, 487 F.3d 1246, 1252 (9th Cir. 2007) (plaintiff's contact with the offensive symbol "was frequent and regular, not sporadic and remote"); *Foremaster*, 882 F.2d at 1491 (plaintiff "has frequent and close connection with [the city][,] * * * [and] is directly confronted by the logo on a daily basis").

[7] See, *e.g.*, *Washegesic* v. *Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir. 1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."); *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) ("Maybe it ought to make a difference if a plaintiff is complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere.").

[8] See, *e.g.*, *St. Charles*, 794 F.2d at 268 (plaintiffs "have been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use"); *Glassroth* v. *Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (plaintiff "has incurred expenses in order to minimize contact with the monument").

2. One of the most common limitations—adopted in the Fourth, Sixth, Tenth, and Eleventh Circuits—is that the plaintiff must have "direct, personal contact" with the offensive monument. See n.5 *supra*. These courts often analogize to standing based on environmental harm, saying that personal contact with offensive government conduct "impairs [the plaintiff's] actual use and enjoyment of [government] property."[9] For example, merely seeing a picture of the Mojave Desert cross in the *New York Times* is not enough; but if the plaintiff visits the Mojave Desert and sees the cross in person, he has suffered a cognizable injury.

But there is no difference in kind, and often no difference in degree, between the harm suffered when seeing a picture of an offensive monument in a newspaper (or hearing about it in a news release) and seeing the same monument in person. As Judge Posner has explained, the fact that individuals are "deeply offended" when they see a government display in person "is not by itself a fact that distinguishes them from anyone else in the United States who disapproves of such displays." *St. Charles*, 794 F.2d at 268. Rather, one who sees the cross in person experiences the same type of harm (psychological offense and feelings of exclusion) as the one who sees only a picture. See also *ACLU-NJ* v. *Township of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (Alito, J.) (not-

---

[9] *Hawley*, 773 F.2d at 739-40 (citing *United States* v. *SCRAP*, 412 U.S. 669 (1973)); see also *Gonzales* v. *North Township of Lake County*, 4 F.3d 1412, 1417 (7th Cir. 1993) ("Like the *SCRAP* plaintiffs, the plaintiffs here are users of Wicker Park, and their full use and enjoyment of the Park has been curtailed because of the defendants' display of the crucifix.").

ing that feelings of "resentment" upon seeing a religious display in person are, at least arguably, "tantamount to the 'psychological consequence[s]'" that were "insufficient to establish standing" in *Valley Forge*).

Nor is it any help to re-characterize the harm (with a nod to environmental cases like *SCRAP*) as interference with the plaintiff's "use and enjoyment" of government property. *Hawley*, 773 F.2d at 740 (citing *SCRAP*). Physical harm to public lands produces a concrete, external interference with the plaintiff's ability to use and enjoy public land (*e.g.*, fishing is fruitless because fish have been killed by pollution; hiking in pristine wilderness is impossible because trails are strewn with litter). By contrast, in the case of a religious display, there is no external, *physical* change in the plaintiff's ability to use and enjoy public lands. The only change is in the internal, *psychological* experience of the offended visitor.[10]

Indeed, taken to its logical conclusion, treating psychological harm like physical harm to public lands (religious pollution, if you will) creates just the sort of "special license to roam the country in search of governmental wrongdoing" that the Court condemned in *Valley Forge*. 454 U.S. at 487. A perfect example is the Eleventh Circuit's ruling in *American Civil Liberties Union of Georgia* v. *Rabun County*

---

[10] Moreover, "use and enjoyment," as used in *SCRAP* and *Lujan*, is a term of art, referring not to mere psychological pleasure at visiting public lands, but to a concrete legal interest—a usufructuary right—in public lands. See *Black's Law Dictionary* 1580 (8th ed. 2004) (defining "usufruct" as "[a] right to use and enjoy the fruits of another's property").

*Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983). There, the plaintiffs challenged an illuminated cross located in a Georgia state park. None of the plaintiffs had ever been to the park or seen the cross in person (except one plaintiff who saw it from an airplane); instead, they heard about the cross through "anonymous phone calls and news releases." *Id.* at 1107.

Nevertheless, drawing on *SCRAP* and other cases of environmental injury, the court found standing. Two of the plaintiffs liked to camp in state parks, but they were unwilling to camp in a park with an illuminated cross. Under *SCRAP*, this was enough to establish interference with the use and enjoyment of public land: "we can conceive of no rational basis for requiring the plaintiffs to *view [the cross] in person* * * * [because] [e]ach plaintiff found his option to use the Georgia state public parklands restricted, *upon learning of the cross*." *Id.* at 1107 n.17 (emphasis added). Such a broad conception of injury serves none of the purposes underlying Article III.

3. Frequency and residency add nothing of substance to the standing analysis, either.[11] As for frequency, if a plaintiff is not injured by seeing an offensive display for the first time, there is no reason to think he will be injured by seeing the same display for the second, or sixtieth, time. Frequency gets at the magnitude of the injury, not the nature of the injury.

---

[11] See, *e.g.*, *Vasquez*, 487 F.3d at 1251-52 (mentioning frequency and residency, but relying principally on "unwelcome direct contact"); *Hawley*, 773 F.2d at 740 (same).

As for residency, arguably, one who resides in the jurisdiction responsible for a religious display might feel "intensely distressed," or even threatened, if the government erects an offensive display, *St. Charles*, 794 F.2d at 268, while a transient visitor need not fear what the government might do when he departs. But even for a resident, the feelings of exclusion and threat are just that—feelings (psychological harm). They are not, standing alone, the stuff of Article III injury. As Judge Posner put it, a residency requirement simply gets at "degrees of distress"; it does not separate one type of injury from another. *Ibid.*[12]

4. The final candidate for a rational limiting principle is that plaintiffs must alter their behavior in response to the offensive display. Under this principle, the plaintiff who is offended at seeing the Mojave Desert cross on his regular visits does *not* have standing; but the plaintiff who avoids the cross by taking an inconvenient detour does.

This rule raises an obvious question, which has no good answer: "If 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).

Proponents of the detour approach say that it serves three purposes. First, "the willingness of plaintiffs * * * to incur a tangible if small cost *serves*

---

[12] Like other limitations, residency is also manipulable. See *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) (when the Society of Separationists could find no residents who objected to the city's seal, the plaintiff "moved to a boarding house within the city's limits and lent his name to the litigation").

*to validate*, at least to some extent, *the existence of genuine distress and indignation*, and to distinguish the plaintiffs from other objectors to the alleged establishment of religion." *St. Charles*, 794 F.2d at 268 (Posner, J.) (emphasis added). In other words, a court cannot believe a plaintiff's allegation of psychological harm unless he proves his sincerity by altering his behavior in some inconvenient fashion. But if psychological harm cannot, by itself, create standing, "new and better ways to prove its existence cannot create standing" either. *Harris*, 927 F.2d at 1420 (Easterbrook, J., dissenting).

Second, proponents say that allowing the court to find standing on the basis of a detour ensures that "there will be [a] judicial remedy against establishments of religion that do not depend on public funds." *St. Charles*, 794 F.2d at 268 (Posner, J.). But this Court has long rejected the notion that the doctrine of standing should be stretched to ensure that there is an available plaintiff: "The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

Third, requiring a detour to establish standing "narrows the class of plaintiffs and scope of dispute." *Harris*, 927 F.2d at 1420 (Easterbrook, J., dissenting). True; but so would limiting standing to redheads, or to cases of financial harm. Just because a rule cuts back on the number of plaintiffs who have standing does not mean that it is a *principled* rule. To be principled, it must do the work of separating concrete injury from intangible harm. A detour limi-

tation does not do so; it simply permits standing in some cases of psychological harm, but not others.

Not only is the detour approach unhelpful in separating concrete injuries from intangible harm, but it also creates serious traceability problems. As this Court has repeatedly explained, "self-inflicted" injuries—injuries attributable not to the defendant's conduct but to the plaintiff's "personal choice" in response—do not create standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976); *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003). Thus, while the psychological harm of seeing an offensive display may be traceable to the government, the plaintiff's decision to take a detour is not—and that decision cannot serve as a basis for standing.

* * * * *

Personal contact, frequency, residency, and altered behavior are all simply artificial means of dressing up what is, at bottom, the "psychological consequence" of observing conduct with which one disagrees. *Valley Forge*, 454 U.S. at 485. As such, they are an insufficient basis for a coherent jurisprudence of Article III standing.

### B. Standing in Establishment Clause cases, like standing in equal protection cases, should be based on the objective legal effects of the government's conduct.

This Court should look to its equal protection cases as a model for Establishment Clause standing. When assessing standing under the Equal Protection Clause, this Court has long held that mere psychological harm—such as the stigma resulting from racially discriminatory laws—is insufficient, by itself,

to confer standing. Rather, stigma confers standing only for "those persons who are *personally denied equal treatment* by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (emphasis added; internal quotations omitted).

This rule, which focuses on the "legal treatment" of the plaintiffs, has provided lower courts with clear guidance for assessing standing in equal protection challenges. Applying a similar rule in the Establishment Clause context would not only provide similar clarity, but would faithfully advance the principles underlying Article III.

1. The leading case on equal protection standing is *Allen*. There, the parents of African-American public school children sued the Internal Revenue Service (IRS), claiming that the IRS had violated its obligation to deny tax-exempt status to racially discriminatory private schools. According to the parents, as a result of the IRS's discriminatory practices, they and their children suffered "stigmatic injury, or denigration," on the basis of their race. *Id.* at 754. (This injury is analogous to the injury alleged in many Establishment Clause cases, where plaintiffs complain of being stigmatized as "outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).)

In a 5-3 opinion written by Justice O'Connor, this Court denied standing because the plaintiffs did not allege that they had been "*personally denied equal treatment*" by the IRS. *Allen*, 468 U.S. at 755 (emphasis added). As the court explained, "[t]here can be no doubt that [the stigmatizing injury often caused by racial discrimination] is one of the most serious

consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are *personally denied equal treatment*' by the challenged discriminatory conduct." *Ibid.* (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984)) (emphasis added).

Under this rule, plaintiffs do *not* have standing to challenge a racially discriminatory membership policy at a club merely because the policy makes them feel like stigmatized outsiders; they have standing only if they "applied for membership" and were denied. *Ibid.* (citing *Moose Lodge*, 407 U.S. at 166-67). Similarly, plaintiffs do not have standing to challenge race discrimination in the criminal justice system merely because it makes them feel like outsiders; they have standing only if "they ha[ve] been or would likely be *subject to the challenged practices*." *Ibid.* (citing *O'Shea* v. *Littleton*, 414 U.S. 488 (1974)) (emphasis added).

Otherwise, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating * * * . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." *Id.* at 755-56 (internal quotations and citations omitted) (citing *Valley Forge*, 454 U.S. at 489-90 n.26). Much like the lower courts' jurisprudence in Establishment Clause cases, such a rule would "transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* at 756.

*Allen*'s "legal treatment" rule has provided consistent, easily administrable guidance in the vast majority of equal protection cases. For example, when a plaintiff's vote is diluted[13] or disparately weighted[14] because of race, the plaintiff has standing. So, too, when a plaintiff is denied a government benefit because of gender,[15] or is denied the ability to compete for a government benefit on equal footing because of race.[16] In all of these cases, it is easy to determine that the plaintiff has not merely suffered stigmatic harm, but has been "personally denied equal treatment" by the challenged discriminatory conduct. As Wright and Miller have observed, this Court has applied "the basic equal-protection standing theory * * * without hesitation or difficulty." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.4 n.109, p. 222 (3d ed. 2008).[17]

---

[13] See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *White* v. *Regester*, 412 U.S. 755 (1973).

[14] See *Reynolds* v. *Sims*, 377 U.S. 533 (1964)

[15] See *Heckler*, 465 U.S. at 736-740.

[16] See *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 280 n.14 (1978); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 210-12 (1995).

[17] The borderline cases under the legal treatment rule have involved claims of race-based redistricting, or "racial gerrymandering," under *Shaw* v. *Reno*, 509 U.S. 630 (1993). Under *Shaw*, plaintiffs need not allege vote dilution or disparate weighting of votes. Rather, this Court has found a cognizable injury based on "representational harms"—namely, the notion that, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *United States* v. *Hays*, 515 U.S. 737, 744 (1995).

Few cases have analyzed standing under the Equal Protection Clause to challenge offensive government displays (such as Confederate flags). But there, too, the legal treatment rule has proved helpful. For example, in *Mississippi Division of United Sons of Confederate Veterans* v. *Mississippi State Conference of NAACP Branches*, 774 So. 2d 388 (Miss. 2000), several civil rights groups sued under Mississippi's Equal Protection Clause to enjoin the display of the state flag, which contained a depiction of the Confederate Battle Flag. Although the plaintiffs alleged that the flag stigmatized them on the basis of race, and although Mississippi's standing rules are "quite liberal" compared to the federal courts, *Burgess* v. *City of Gulfport*, 814 So. 2d 149, 152 (Miss. 2002), the Mississippi Supreme Court denied standing, explaining that "[n]either the flying of the State Flag, nor the flag itself, causes any constitutionally recognizable injury." 774 So. 2d at 390.

---

Thus, voters who reside in a racially gerrymandered district "ha[ve] been denied equal treatment" because they "may suffer the special representational harms racial classifications can cause in the voting context." *Id.* at 744-45.

Several members of the Court have criticized "representational harms" as too diffuse to support Article III injury—particularly when those harms are asserted by members of the majority race. *Bush* v. *Vera*, 517 U.S. 952, 1053 (1996) (Souter, J., dissenting); *Shaw* v. *Hunt*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting). But even assuming that "representational harms" push the limits of Article III injury, the legal treatment rule has still provided an easily administrable, bright-line rule for claims under *Shaw*: those who reside in a racially gerrymandered district, and thus suffer representational harms, have standing, *id.* at 904, while those who reside outside the district do not, *Hays*, 515 U.S. at 745-46.

Similarly, in *NAACP* v. *Hunt*, 891 F.2d 1555 (11th Cir. 1990), the NAACP challenged Alabama's practice of flying the Confederate flag over the state capitol dome. Although the court did not consider standing, instead dismissing the case on the merits, its reasoning was much closer to a dismissal under *Allen* for lack of standing: "there is no unequal application of the state policy; all citizens are exposed to the flag[,] [and] [c]itizens of all races are offended by its position." *Id.* at 1562. In other words, the plaintiffs failed to allege that they had been "personally denied equal treatment" by the flying of the Confederate flag. *Allen*, 468 U.S. at 755.

2. Adopting *Allen*'s legal treatment rule (with minor modifications) in the Establishment Clause context would be particularly helpful. That rule would provide as follows: the "psychological consequence" of seeing offensive government conduct is not, by itself, sufficient to support standing (*Valley Forge*); rather, psychological consequences support standing only where (1) the plaintiff has been "personally denied equal treatment" on the basis of religion, *Allen*, 468 U.S. at 755, or (2) the plaintiff has been unwillingly subjected to government-sponsored religious exercises, *School Dist.* v. *Schempp*, 374 U.S. 203 (1963).

In practice, such a rule would produce the same standing results in the vast majority of Establishment Clause cases. For example, when the government gives a benefit (such as a tax exemption) to religious groups but not secular groups, a secular group that was denied the benefit would have standing to sue on the basis of unequal treatment. See *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 7-8 (1989). Similarly, public school students who complain of reli-

gious exercises at school events—such as prayer at graduation, *Lee* v. *Weisman*, 505 U.S. 577 (1992), or Bible reading in the classroom, *Schempp*, 374 U.S. at 205—would have standing on the ground that, as a captive audience, they had been subjected to government-sponsored religious exercises.

Taxpayer standing would remain unchanged, so taxpayers offended by government funding of religious organizations would still have standing to sue. *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007). And even in the absence of taxpayer standing, individuals who were adversely affected by aid to religious groups—such as parents of public school students who were allegedly harmed by a voucher program benefiting religious schools—would also have standing to sue.

The only area where a legal treatment rule might make a difference is in religious display cases. For example, plaintiffs who are merely offended at seeing a religious symbol (or inconvenienced by a detour in response) would not have standing to sue because they have not been treated unfavorably on the basis of religion and, unlike public school students, they are not a captive audience.

But that does not mean there would be no basis for challenging religious displays. If a government appropriated tax dollars to support a religious display, taxpayers could have standing to sue. Similarly, if the government subjected a particularly sensitive captive audience (such as public school students) to a religious display, the captive audience members would have standing to sue. And if the government allowed private parties to erect displays,

but preferred one party over another on the basis of religion, the proponents of a rejected display would have standing to sue. See *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009).

Of course, there might be a few cases where, under a legal treatment rule, no plaintiff would have standing to challenge a religious display. But that would be a strong indication that the subject matter is more appropriately committed "to the surveillance of Congress, and ultimately to the political process." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

In short, far from eliminating standing in religious display cases, the legal treatment rule would *rationalize* the standing inquiry in those cases.[18]

### C. Focusing on the objective legal effects of the government's conduct is consistent with this Court's precedent and furthers the purposes of Article III.

1. The "legal treatment" rule has many benefits. First, and most importantly, it provides a persuasive explanation of what the Court has *already been do-*

---

[18] Following *Allen*, some lower courts have already adopted a legal treatment rule in Establishment Clause standing cases. See, *e.g.*, *In re U.S. Catholic Conference*, 885 F.2d 1020, 1025-26 (2d Cir. 1989) (denying standing because the plaintiff ministers had alleged no "illegal government conduct directly affecting their own ministries") (citing *Allen*); *Americans United for Separation of Church & State* v. *Reagan*, 786 F.2d 194, 200 (3d Cir. 1986) (denying standing to non-Catholic religious groups that claimed to be stigmatized by the President's decision to extend diplomatic recognition to the Vatican).

*ing*, at least implicitly, in prior Establishment Clause cases.

*Valley Forge* is a prime example. There, the Court denied standing because the plaintiffs alleged mere psychological harm. If *Valley Forge* were based merely on the plaintiff's lack of "personal contact" with the transferred property, the plaintiffs could have circumvented the Court's ruling simply by visiting the transferred property and alleging that they were deeply offended by that personal contact. The legal treatment rule, by contrast, is not so easily manipulable. Plaintiffs would have standing only if, for example, they applied to have the property transferred to them but were denied in favor of a religious group.

Another case that illustrates the legal treatment rule at work is *Schempp*. There, public school children and their parents challenged laws requiring Bible reading and recitation of the Lord's Prayer in public schools. The Court found standing because the plaintiffs were "directly affected by the laws and practices against which their complaints are directed." 374 U.S. at 225 n.9. Or, as *Valley Forge* later put it, the plaintiffs "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. at 486 n.22. Far from couching the standing analysis in terms of the plaintiffs' offense, the Court focused on the objective legal effect of the government's conduct.

Of course, the result in *Schempp* would have been the same under a more lenient "personal contact" rule. But assume, for example, that an adult atheist was also present in the classroom as a voluntary

guest (for Show-and-Tell, for example). Under a "personal contact" rule, although the atheist is, as a practical matter, nothing more than a concerned bystander, he would almost certainly have standing to sue. See *Washegesic*, 33 F.3d at 683 (visitor to public school had standing). By contrast, the offended atheist would not have standing to sue under the legal treatment rule: as a voluntary guest, he is free to leave at any time; he is not subject to any coercion; and he has not been denied equal treatment on the basis of religion. As explained in Section I.C. below, such a result far better comports with the purposes of Article III.

In contrast with *Valley Forge* and *Schempp*, this Court's display cases have been completely silent on the question of standing.[19] Because standing was never raised, and the relevant facts were never discussed, it can be difficult to tell whether the results would have been any different under a legal treatment rule. But many of those cases are perfectly consistent with the legal treatment rule.

In *Summum*, for example, the City accepted and displayed a Ten Commandments monument from one group, but rejected another religious monument from a different group. 129 S. Ct. at 1129-30. Under a legal treatment rule, the proponent of the rejected monument would have had standing to bring an Establishment Clause challenge because it could have

---

[19] See *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009); *Van Orden* v. *Perry*, 545 U.S. 677 (2005); *McCreary County* v. *ACLU*, 545 U.S. 844 (2005); *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch*, 465 U.S. at 671; *Stone* v. *Graham*, 449 U.S. 39 (1980).

alleged differential treatment. Similarly, in *Stone*, public school students who were forced, as a captive audience, to view posters of the Ten Commandments would also have standing under a legal treatment rule. 449 U.S. at 42. And in *Lynch* and *Allegheny*, the Court accepted the exercise of jurisdiction by lower courts that rested, either expressly or impliedly, on taxpayer standing. See *Donnelly* v. *Lynch*, 691 F.2d 1029, 1031-32 (1st Cir. 1982) (plaintiffs had standing as municipal taxpayers); *ACLU* v. *County of Allegheny*, 842 F.2d 655, 657-58 (3d Cir. 1988) (citing county and city aid to creche and menorah).

2. The legal treatment rule also harmonizes standing in Establishment Clause cases with standing in free exercise cases. This Court has long rejected the notion that standing should be a "sliding scale" that is easier to satisfy for some constitutional challenges than for others. *Valley Forge*, 454 U.S. at 484. Yet many scholars have noted the wide discrepancy between how courts treat standing in Establishment Clause cases versus standing in other areas of the law.[20] As Michael McConnell has argued, the problem of offensive messages "applies with equal strength to equal protection and free exercise claims, but the Court has recognized that the costs of recog-

---

[20] See, *e.g.*, Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. Rev. 1345, 1351-52 (2001) ("*With the notable exception of claims under the Establishment Clause*, the Court's general response is that when everyone has been affected equally by a governmental decision, no one has standing.") (emphasis added); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483, 513-14 (1993).

nizing [standing for] such claims outweigh the benefit. *There is no evident reason to treat establishment claims with greater solicitude*." McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 165 (1992) (emphasis added).

Like the standing inquiry in equal protection cases, the standing inquiry in free exercise cases is based on the legal treatment of the plaintiff. To establish standing to sue under the Free Exercise Clause, it is not enough to allege that government action is offensive, or even hostile, to the plaintiff's religious beliefs; rather, the plaintiff must allege that government action affirmatively interfered with the exercise of those beliefs. See *Braunfeld* v. *Brown*, 366 U.S. 599, 615 (1961) (Brennan, J., concurring and dissenting) (plaintiff must "show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause").

In *Harris* v. *McRae*, for example, a religious group brought a free exercise challenge to federal restrictions on abortion funding, alleging that the restrictions would burden some women who, "as a matter of religious practice and in accordance with their conscientious beliefs," would otherwise have obtained an abortion. 448 U.S. 297, 320-21 (1980). This Court, however, denied standing, reasoning that no member of the religious group "contended that the [statute in question] in any way coerce[d] them *as individuals* in the practice of their religion." *Id.* at 321 n.24 (quoting *Allen*, 392 U.S. at 249) (emphasis and alterations in

original).[21] By contrast, where the plaintiff alleges that the government has denied him equal treatment because of his religion,[22] or otherwise interfered with his religious exercise,[23] this Court has found standing.[24]

3. Finally, the legal treatment standard furthers the underlying purposes of Article III. The doctrine of Article III standing is "built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752. Its primary function is to "prevent[] courts of law from undertaking tasks assigned to the political branches." *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996). It also prevents courts from unnecessarily deciding constitutional questions, and prevents litigants from converting the judicial process into "no more than a vehicle for the vindication of the value interests of

---

[21] See also *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961) (store employees lacked standing to challenge Sunday closing laws under the Free Exercise Clause because "they d[id] not allege any infringement of their own religious freedoms due to Sunday closing").

[22] *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542 (1993) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'") (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)).

[23] See, *e.g.*, *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985) (imposition of minimum wage and recordkeeping requirements).

[24] Moreover, lower courts have had little difficulty applying this standard. See, *e.g.*, *Tarsney* v. *O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) ("perceived moral injury" from use of state money to pay for abortions was not a cognizable injury; plaintiffs "must identify a direct injury they have experienced from state interference" with their exercise of religion).

concerned bystanders." *Valley Forge*, 454 U.S. at 473-74.

Under a personal contact rule, offended observers can marshal federal courts to sit in judgment on all manner of political decisions—from the design of city seals to the arrangement of holiday Christmas displays—regardless of whether those political decisions have any legal effect on the offended observer. By contrast, the legal treatment rule ensures that if courts are to exercise the "ultimate and supreme function" of judicial review over these sorts of decisions, *ibid*, they do so only on behalf of plaintiffs who have suffered a concrete legal harm—namely, unfavorable treatment on the basis of religion, or coerced participation in unwelcome religious exercise. Such a rule not only reduces unnecessary judicial interference with the political branches, but also limits judicial review to its intended purpose—namely, serving as a "formidable means of vindicating individual rights." *Id.* at 473. In short, it better serves the fundamental purposes of Article III.

* * * * *

Mr. Buono claims standing not because he has been denied equal treatment on the basis of religion (*Allen*), and not because he has been unwillingly subjected to government-sponsored religious exercises (*Schempp*), but simply because he is "deeply offended by the cross display." Pet. App. 105a-107a. Under the legal treatment rule, such psychological offense is an insufficient basis for Article III standing, and this Court should dismiss the case for lack of jurisdiction.

## II. The endorsement test collapses in self-contradiction because monuments more often than not convey multiple messages.

Although the Court need not reach the merits, if it does so, it will once again find that the endorsement "test" offers no principled basis for reaching a decision. See, *e.g.*, *Van Orden*, 545 U.S. at 691-92 (plurality opinion) (not applying the endorsement test); *id.* at 699-701 (Breyer, J., concurring) (same). The problem at the heart of the endorsement test is its assumption that every monument conveys only one objective message. But most monuments convey multiple messages, and reasonable observers can disagree about which message is the objective one. The endorsement test thus forces judges to pick a single, "objective observer" message from among the many messages reasonably conveyed—a task that is inherently subjective and unpredictable, and especially so in this case.

### A. The endorsement test is unhelpful when a monument conveys more than one message.

In the 25 years since it was first proposed in *Lynch*, 465 U.S. at 687-694 (O'Connor, J., concurring), the endorsement test has spawned a jurisprudence of contradiction. The seed of the contradiction lies in the need to imagine an "objective observer" who must carry out an inherently subjective and ultimately impossible task: attributing a single reasonable "message" to symbols that can be reasonably interpreted by different observers to convey different, and often contradictory, messages.

1. The endorsement test, whether referring to an "objective observer" or a "reasonable observer," has tacitly (and perhaps unconsciously) assumed that the imagined observer would perceive only one message. See *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring) ("***The*** meaning of a statement to its audience depends both on the intention of the speaker and on ***the*** 'objective' meaning of the statement in the community.") (emphasis added); *Thornton* v. *Caldor*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("***The*** message conveyed is one of endorsement of a particular religious belief.") (emphasis added); *McCreary*, 545 U.S. at 860 (display "sends ***the*** * * * message to * * * nonadherents that they are outsiders") (internal quotations omitted; emphasis added); *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("to determine ***the*** message that the text here conveys, we must examine how the text is *used*") (first emphasis added). In each of these examples, it would be more accurate to replace the word "the" with "one possible."

Justice O'Connor explained the single-message assumption in her controlling concurrence in *Capitol Square Review and Advisory Board* v. *Pinette*, 515 U.S. 753 (1995). Although acknowledging that "[t]here is always *someone* who, with a particular quantum of knowledge, ***reasonably*** might perceive a particular action as an endorsement of religion," she explained that this problem could be overcome by making the endorsement test a "collective standard" based on "a personification of a community ideal of reasonable behavior." *Id.* at 779-80 (second emphasis added). Such a standard would identify "***the*** 'objective' meaning of the [government's] statement in the

community." *Id.* at 779 (emphasis added); see also *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 34-45 (O'Connor, J., concurring).

In short, as acknowledged in the controlling concurrence in *Pinette*, there are typically different *reasonable* interpretations of a particular symbol or text, depending on the interpretive standpoint of the observer; but once an objective observer is made aware of the right facts about the display, then there is only one "objective" conclusion to be reached.

2. Ever since the inception of the "objective observer" test, the single message assumption has been questioned.

Most recently, this Court squarely rejected the single-message assumption in a free speech case—*Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). There, the Court emphasized that any given monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id.* at 1135. In fact, not only may monuments mean different things to different observers, but those involved in a monument's display—creators, donors, government—may *intend* to convey different messages:

> Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city

> property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.

*Id.* at 1136.

The Court also explained that "[t]he 'message' conveyed by a monument may change over time." *Ibid.* A study of war memorials, for example, "found that 'people reinterpret' the meaning of these memorials as 'historical interpretations' and 'the society around them changes.'" *Ibid.* (quoting J. Mayo, *War Memorials as Political Landscape: The American Experience and Beyond* 8-9 (1988).

The single message assumption has also been a point of frequent contention in Establishment Clause cases. In his dissent in *Pinette*, for example, Justice Stevens argued that different observers might have different interpretations of the challenged cross: "while this unattended, freestanding wooden cross was unquestionably a religious symbol, [some] observers may well have received completely different messages from that symbol. Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion * * * ." 515 U.S. at 798.

Similarly, in his controlling concurrence in *Van Orden*, Justice Breyer wrote that Ten Commandments monuments "can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message." *Van Orden*, 545 U.S. at 701

(Breyer, J., concurring). And in *Allegheny*, Justice Kennedy criticized the majority's single-message approach, arguing that it forces the courts to "assume[] the difficult and inappropriate task of saying what every religious symbol means." *Allegheny*, 492 U.S. at 678.

Leading academics have also argued that the endorsement test gives courts no neutral basis for selecting among multiple reasonable meanings:

> Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no "neutral" position, outside the culture, from which to make this assessment. The bare concept of "endorsement" therefore * * * is nothing more than an application to the Religion Clauses of the principle: "I know it when I see it."

McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 148 (1992).

Several scholars have drawn a helpful analogy to race, arguing that just as a racially charged symbol may be interpreted differently depending on the observer's racial background, so too a religious symbol may be interpreted differently depending on the observer's attitude toward religion. See, *e.g.*, Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. Mich. J.L. Reform 247, 279-82 (2003) (collecting examples). Still others have drawn on the philosophy of language and metaphysics, arguing that there is no single objective meaning for a particular government act. See, *e.g.*, Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Al-*

*ternative to Current Establishment Clause Doctrine*, 40 DePaul L. Rev. 53, 83-86 (1990); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 Md. L. Rev. 506, 554-56 (2001). But the common conclusion has been that the single message assumption of the endorsement test is wrong, and that it often "serves only to mask [the judiciary's] reliance on untutored intuition." McConnell, 59 U. Chi. L. Rev. at 151.

In sum, the crucial assumption that every symbol communicates a single "objective" meaning is doubtful, both as a matter of fact and as a matter of basic hermeneutics. This Court has already rejected that assumption in the free speech context; it should do the same under the Establishment Clause.

### B. The endorsement test is unhelpful here because the Mojave Desert cross conveys more than one message.

The Mojave Desert cross is one of those "monuments [that] are almost certain to evoke different thoughts and sentiments in the minds of different observers." *Summum*, 129 S. Ct. at 1135. To its creators, it was a remembrance of their comrades fallen in battle. To those who maintained it, it sent a message of gratitude to America's veterans for their sacrifice. For National Park Service employees, it might be another historic monument to be maintained on a small budget. For a casual Christian observer today, it might be an unexpected *vox clamantis in deserto*. For an agnostic onlooker, it might be an unwelcome reminder of the beliefs of others. For a student of the history of California, it might be a tangible reminder of that history.

Each of these impressions is reasonable, but they are not the same. Because objective observers can and do disagree about what the Mojave Desert cross means, this Court cannot pick one of those meanings without itself engaging in a subjective and ultimately unpredictable exercise.

* * * * *

In the end, the endorsement test fails on the merits for the same reason it fails with respect to standing. With standing, it depends too much on the subjective, incommunicable, and ultimately unpredictable perceptions of the individual plaintiff. On the merits, it depends too much on the subjective, incommunicable, and ultimately unpredictable perceptions of individual judges. Neither dependency comports with the rule of law.

## CONCLUSION

For the foregoing reasons, the Ninth Circuit's ruling should be reversed, and the case dismissed for lack of standing.

Respectfully submitted,

KEVIN J. HASSON
ERIC C. RASSBACH
*Counsel of Record*
HANNAH C. SMITH
LUKE W. GOODRICH
LORI H. WINDHAM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036-1735
(202) 955-0095

*Counsel for* Amicus Curiae