NO. _____

IN THE

Supreme Court of the United States

CITY OF BLOOMFIELD,

Petitioner,

v.

JANE FELIX; B.N. COONE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's rulings in *Van Orden v. Perry* and *McCreary County v. ACLU of Kentucky*, lower courts have struggled with how to evaluate monument displays under the Establishment Clause. The Eighth Circuit and (sometimes) the Ninth Circuit have used the test from *Van Orden*, while the Second, Sixth, and Tenth Circuits have used the test from *Lemon v. Kurtzman*. Municipalities have struggled too. Petitioner City of Bloomfield approved a proposal in 2007 to allow a Ten Commandments monument as a historical display on its City Hall lawn. Before any monument was erected and in conformance with circuit precedent at the time, the City passed a policy to create a public limited forum for private citizens to erect historical monuments on the lawn. No monument was displayed until four years later, when private citizens began erecting monuments under the policy. They have so far erected Ten Commandments, Declaration of Independence, Gettysburg Address, and Bill of Rights monuments. Two Bloomfield residents alleged they were offended by the Ten Commandments monument and claimed it violated the Establishment Clause. The Tenth Circuit agreed after applying the *Lemon* test. The questions presented are:

1. What standard should be used to evaluate Establishment Clause challenges to passive displays such as monuments?

2. Do litigants have standing to challenge a monument on Establishment Clause grounds simply because they are offended by it?

PARTIES TO THE PROCEEDING

Petitioner is the City of Bloomfield, New Mexico. Respondents are Jane Felix and B.N. Coone.

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INTRODUCTION

This case concerns an Establishment Clause challenge to a monument displaying the Ten Commandments, which sits alongside three similar monuments displaying the Declaration of Independence, the Gettysburg Address, and the Bill of Rights on the City Hall lawn in Bloomfield, New Mexico.

Applying the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Tenth Circuit held that the monument "impermissibly gave the impression to reasonable observers that the City was endorsing religion" and affirmed a district court decision ordering removal of the monument.

The Tenth Circuit's reliance on *Lemon* highlights a sharp conflict among the courts of appeals regarding the proper Establishment Clause analysis of "passive" displays such as the monument here. Inconsistent guidance from the decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005), has led to widespread confusion. Like the Tenth Circuit here, the Second

and Sixth Circuits have applied the *Lemon* test in challenges to passive monuments. *See Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014); *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005). But the Eighth Circuit has affirmatively rejected the *Lemon* test and instead applied *Van Orden* to such challenges. *See Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014). And the Ninth Circuit has applied both the *Lemon* test *and* the *Van Orden* test to evaluate passive monuments. *See Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (applying *Van Orden*); *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (applying both *Lemon* and *Van Orden*). The lower courts need direction from this Court. As Justice Thomas recognized six years ago, it is "difficult to imagine an area of the law more in need of clarity" than the constitutionality of displays of religious imagery on government property. *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of certiorari).

This petition raises a second question of significant importance: whether individuals have standing to bring an Establishment Clause challenge simply because they are offended by a monument. This Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), says no. But many lower courts have relaxed injury-in-fact requirements in Establishment Clause challenges to monuments and other passive displays. As a result, they have allowed standing for so-called offended observers—plaintiffs who allege no more than "being exposed to a state symbol that offends his beliefs." *City of*

Edmond v. Robinson, 517 U.S. 1201, 1202 (1996) (Rehnquist, J., dissenting from denial of certiorari).

The Tenth Circuit's decision exemplifies this erroneous approach. The court of appeals found it sufficient that the monument was "visible from a major road" and caused Respondents to "feel excluded" whenever they drove by the monument or encountered it on a visit to City Hall. But such alleged harm amounts to nothing more than a generalized grievance, insufficient to demonstrate injury in fact. As lower courts such as the Tenth Circuit have expanded Article III standing to encompass such harm, *Valley Forge* has been "reduced … to a hollow shell," *Books v. Elkhart Cty.*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting), and lower courts have been left with inconsistent guidance regarding the threshold for standing in monument display cases. This petition presents an opportunity to correct course by clarifying that "offended observer" standing is inconsistent with Article III.

OPINIONS BELOW

The memorandum opinion and order of the district court, App. 37a, is reported at 36 F. Supp. 3d 1233. The opinion of the court of appeals, App. 1a, is reported at 841 F.3d 848. An order of the court of appeals denying rehearing *en banc* with a dissenting opinion, App. 114a, is reported at 847 F.3d 1214.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2016, and a timely petition for

rehearing *en banc* was denied on February 6, 2017. On March 16, 2017, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to July 6, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The text of the First Amendment and of Article III to the United States Constitution is found at App. 131a.

STATEMENT OF THE CASE

I. Factual Background

A. Creation of the public forum

Petitioner is the City of Bloomfield, New Mexico. In 2006, a Bloomfield City Councilor named Kevin Mauzy saw a park full of historical monuments in a nearby town. App. 85a, 156a. That inspired him to seek to allow similar monuments in Bloomfield. App. 156a. At a Bloomfield City Council meeting in April 2007, Mauzy proposed that the City allow private parties to erect various historical monuments on City Hall Lawn, starting with a Ten Commandments monument. App. 85a-86a, 157a. The City Council discussed the proposal to allow historical monuments and, as the meeting minutes state, approved a Ten Commandments display as the first of such monuments to serve "as a historical and art display for the City" which would be funded "from private donations from the community." App. 203a-207a, 228a-231a, 241a-244a, 261a-262a.

Shortly after and consistent with the approval from the April 2007 Council meeting, Mauzy in his personal capacity asked a private company to create the Ten Commandments monument and asked private parties for donations for the monument.[1] App. 86a-87a, 231a-233a, 245a-246a. As stipulated, Mauzy wanted to erect this monument "because of the Ten

[1] Mauzy's full-time job was as a building contractor. App. 238a-239a. He served as a City Council member in his spare time.

Commandments' historical nature and message." App. 157a.

During and after the April City Council meeting, a small number of Bloomfield citizens objected to the Council's decision. App. 145a, 158a, 188a-189a. City officials considered these objections and responded by conducting research and receiving advice over a period of several months before allowing any monument to be displayed. App. 188a-189a. As a result of this process, City officials passed a written monument policy in July 2007 which designated the lawn in front of City Hall as a "limited public forum" for privately funded monuments. App. 158a, 263a. The City's policy conformed to Tenth Circuit legal precedent that was well established at the time. *See Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997) (remanding because complaint sufficiently alleged that monument erected by private parties on city hall lawn was "private religious speech" within a limited public forum). This policy allowed private parties to propose and erect monuments on the lawn "to acknowledge and commemorate the history and heritage of its law and government." App. 263a. In 2011, the City updated its policy to account for this Court's intervening decision in *City of Pleasant Grove v. Summum*, 555 U.S. 460 (2009). App. 160a-161a.[2]

[2] According to the City's amended policy, monument donors must re-apply every ten years to keep their monuments on the City Hall Lawn. App. 272a.

B. The Ten Commandments Monument

Following passage of the original forum policy in 2007, no one erected any monuments for four years. App. 158a. All monument activity ceased, and Kevin Mauzy left the City Council in 2008. App. 87a.

Then in June 2011, the City received its first monument request under the forum policy—for a monument displaying the Ten Commandments (the "Monument"). App. 88a-89a, 190a-195a, 253a-255a. A group of private citizens, including Mauzy, made this request and together helped design and fundraise for the Monument, which cost $3,940. App. 102a, 250a-255a. Mauzy donated only $220 of this amount and private citizens and organizations contributed as well, while the City contributed nothing. App. 102a-103a, 207a-208a, 233a-235a. The City approved that request under its forum policy the same month, and private parties erected the Monument on the City Hall Lawn shortly thereafter. App. 159a, 190a-195a, 210a-214a.

On behalf of those in the community, Mauzy then sponsored additional monument requests under the forum policy and, with City approval, erected larger monuments containing the Declaration of Independence (in November 2011), the Gettysburg Address (in 2012), and the Bill of Rights (in 2014). App. 91a-92a, 110a, 161a-162a, 182a, 193a-198a, 214a-222a, 225a-226a, 235a-238a, 255a-257a.[3] The

[3] Currently, all of the monuments sit on the north half of City Hall lawn, but no monuments have yet been placed on the south

monuments were created, funded, designed, and installed by private citizens or organizations, not by the City. App. 159a-160a, 162a, 183a. The City does not own or maintain the monuments. App. 104a, 159a-160a, 162a, 183a.

Along with the text of the Ten Commandments, the Monument includes an engraved statement and disclaimer saying:

PRESENTED TO THE PEOPLE OF SAN JUAN COUNTY

BY PRIVATE CITIZENS

RECOGNIZING THE SIGNIFICANCE OF THESE LAWS IN OUR NATION'S HISTORY

JULY 4, 2011

ANY MESSAGE HEREON IS OF THE DONORS AND NOT THE CITY OF BLOOMFIELD

App. 95a-96a. The other monuments each contain similar statements. App. 96a, 110a. City officials also approved placement of a red-lettered sign that appears next to the Ten Commandments Monument and that states:

> The City has intentionally opened up the lawn around City Hall as a public forum where local citizens can display monuments that

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half of this lawn which is also open under the City's forum policy. App. 93a-94a, 263a, 283a, 295a.

> reflect the City's history of law and government. Any message contained on a monument does not necessarily reflect the opinions of the City, but are statements from private citizens. If you would like to display a monument in this forum, please contact the City Clerk, who can give you a copy of the ordinance that explains the procedures for displaying a monument.

App. 6a, 94a-95a, 227a.

Private citizens also held a dedication ceremony for the Monument on July 4, 2011; no Bloomfield city official spoke or played any role in deciding the format or content of the ceremony. App. 91a, 100a, 160a. The ceremony was a large event at which several people spoke, including Mauzy who read aloud the Monument's disclaimer. App. 100a-101a. Similar ceremonies took place for each monument. App. 161a-162a, 179a-180a.

C. Respondents' Objections to the Monument

Respondents, Jane Felix and B.N. Coone, are polytheistic Wiccans and residents of Bloomfield. App. 4a, 81a. They object to the Monument on the ground that it conflicts with their religious beliefs and causes them to feel excluded. App. 81a. In particular, Respondents object to certain commandments appearing on the Monument, which they say are inconsistent with their polytheistic beliefs. App. 81a, 165a.

Respondent Felix has viewed the Monument up close one time when she pulled her car into City Hall for the sole purpose of looking at the Monument. App. 208a-210a. Although Felix stated that she has stopped visiting City Hall to avoid the Ten Commandments monument, she stipulated to having no reasons or upcoming plans that would require her to visit City Hall in the future. App. 82a, 164a. And though Felix sees the Monument five to six times a week while driving on the street past City Hall, she cannot read the Monument's text while driving by. App. 82a. Felix is not offended by the other references to monotheism on the City Hall lawn, such as "under God" in the Gettysburg Address or the phrases "Nature's God," "endowed by their Creator," and "the protection of divine Providence" in the Declaration of Independence. App. 82a.

Respondent Coone has never actually read the text on the Monument. App. 82a-83a. He instead knows what the Ten Commandments say and believes that their message conflicts with his polytheistic beliefs. App. 81a-83a, 165a. Much like Felix, Coone sees the Monument three to four times a week while driving past City Hall, but he too never drives close enough to read the language on the Monument. App. 82a-83a, 165a. Coone also sees the Monument about once a month when paying his water bill at City Hall. App. 82a-83a.

II. Procedural History

Respondents sued the City on February 8, 2012, at a time when the City Hall lawn contained both the Monument and the Declaration of Independence

monument. App. 90a-91a. Respondents asserted that the Monument constituted an impermissible establishment of religion under the First Amendment. App. 132a-135a.[4]

On March 22, 2012, Petitioner answered the lawsuit and raised as affirmative defenses that Respondents lacked standing, that the City had created a public forum for private speech, and that the Monument did not establish religion. App. 137a-141a.

After the parties stipulated to 137 facts, the district court held a three-day bench trial in March 2014, resulting in Findings of Fact by District Judge James A. Parker on June 5, 2014 and Supplemental Findings of Fact on July 16, 2014. App. 80a-81a, 109a-111a, 143a.[5] On August 7, 2014, the district court issued an opinion that addressed issues of standing, the public forum doctrine, and the Establishment Clause. App. 37a.

The district court held that Respondents had Article III standing based on their "direct, regular and unwelcome contact with the display." App. 44a. The court also rejected the City's argument that the public forum doctrine applied even though the Monument

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[4] The suit also named several city officials who were subsequently dismissed from the case. App. 38a.

[5] After the bench trial concluded, private parties obtained the City's approval and erected the Bill of Rights monument. This timing led the City to file a motion to reopen and supplement the trial record with new declarations and photographs. While Respondents initially opposed that motion, they withdrew that opposition. *See* App. 109a-110a.

had been proposed and built by private parties pursuant to the City's public forum policy. Instead, the court concluded that the Monument was "government speech regulated by the Establishment Clause because the [Monument] is a permanent object located on government property and it is not part of a designated public forum open to all on equal terms." App. 77a-78a.

Turning to Respondents' Establishment Clause challenge, the district court applied the test established in *Lemon v. Kurtzman*, 403 U.S. at 602, and held that the Monument "had the primary or principal effect of endorsing religion." App. 78a. It noted, however, that the challenge to the Monument represented a "very close case" and that "[t]he result could differ with a slight change in the facts." App. 76a.

The Petitioner timely appealed to the Tenth Circuit, which affirmed the district court's decision. App. 33a.

On standing, the court of appeals held that Respondents had the "requisite direct contact" with the Monument based on its visibility from a major road. App. 10a. According to the court, it was unnecessary for Respondents to show that they had studied the Monument up close; it was enough that the Monument was visible to them "from afar." App. 11a-12a. The court also held that the Monument was sufficiently permanent that it should be analyzed as government speech, not private speech. App. 12a-13a.

The balance of the court of appeals' analysis concerned the Establishment Clause issue. Applying the *Lemon* test and focusing on the issue of "endorsement," the court determined the purpose of the Monument by using its interpretation of a reasonable observer standard. App. 14a-17a. Under its analysis, the Tenth Circuit found that the Ten Commandments themselves are "unmistakably religious" and that the location near City Hall suggested endorsement. App. 17a-19a. The Tenth Circuit also found that the initial fundraising efforts in 2007 included local churches and that the ceremony contained enough religious references to suggest endorsement of religion. App. 19a-20a. Finally, the Tenth Circuit found that the timing of the lawsuit, seven months after the Monument was erected, was evidence that a reasonable observer would find the display to be a religious endorsement. App. 20a-22a. While acknowledging the mitigating effect of additional monuments on the City Hall lawn, the court found that the facts suggesting religious endorsement outweighed those that did not. App. 22a-33a.

The City filed a timely petition for rehearing *en banc*, which was denied on February 6, 2017. App. 114a-115a.

Judge Kelly, joined by Chief Judge Tymkovich, dissented from the denial of rehearing *en banc*. The dissent pointed out that the panel's decision failed to reflect "the historical understanding of an 'establishment of religion,'" noting that the City was not attempting to control religious doctrine, fund religious exercise, or compel religious participation.

App. 116a, 129a. Under *Van Orden*, Judge Kelly explained, "'[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause.'" App. 129a (quoting *Van Orden*, 545 U.S. at 690). The panel's approach, by contrast, "combin[ed] *Lemon* with an endorsement spin that is tantamount to a hostile 'reasonable observer.'" App. 126a. The result, the dissent concluded, was a panel decision that is deeply inconsonant with the historical Establishment Clause and should have led the court of appeals to "reexamine [its] Establishment Clause cases." App. 128a.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals are Applying Conflicting Establishment Clause Standards to Monuments and Passive Displays.

For years, the courts of appeals have been divided over the proper analysis of Establishment Clause challenges to so-called "passive" monuments and displays.[6] The Tenth Circuit's decision below deepens this conflict further. This longstanding disagreement has led to disparate outcomes because the lower

[6] *See Van Orden*, 545 U.S. at 686 (plurality opinion) (referring to a similar Ten Commandments display as a "passive monument"); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (referring to "passive and symbolic" displays that pose little "risk of infringement of religious liberty").

courts disagree and remain confused about the implications of two of this Court's opinions issued on the same day: *Van Orden* and *McCreary*. Various lower court judges and legal commentators, as well as several members of this Court, have highlighted the confusion resulting from these decisions, and have called for this Court to bring clarity to this area of law. There is thus a significant need for this Court to address the issues presented in this petition.

This Court's decisions in *Van Orden* and *McCreary* have provided inconsistent guideposts for lower courts confronted with Establishment Clause challenges to passive monuments. In *Van Orden*, five justices eschewed the three-pronged test laid out by this Court in *Lemon*.

Chief Justice Rehnquist's plurality opinion explained that the test was "not useful in dealing with" the passive monument in that case. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). Looking instead to "the nature of the monument" and "our Nation's history," the plurality held that the Ten Commandments monument at issue did not violate the Establishment Clause. *Id.*

Justice Breyer concurred in the *Van Orden* judgment upholding the monument, and he also did not apply the *Lemon* test. In his opinion, he stated that this Court has found "no single mechanical formula that can accurately draw the constitutional line in every" Establishment Clause case. 545 U.S. at 699. Justice Breyer noted multiple criticisms of the *Lemon* test and wrote that *Van Orden* was a "borderline case" for which there was "no test-related

substitute for the exercise of legal judgment." *Id.* at 700. Justice Breyer concluded, based on the monument's context and history, that the monument did not violate "the basic purposes of the First Amendment's Religion Clauses themselves," and that striking down the monument would exhibit "a hostility toward religion" that could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704.

That same day, the four Justices who dissented in *Van Orden*, along with Justice Breyer, applied the *Lemon* test to strike down a Ten Commandments display. *See McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 859 (2005). This Court's opinion in *McCreary* did not attempt to reconcile its analysis with this Court's rejection of *Lemon* in *Van Orden*.

Van Orden and *McCreary* thus left lower courts to figure out for themselves whether an Establishment Clause challenge to a monument warranted the *Lemon* test, or was a "borderline" case requiring contextual historical analysis and the application of legal judgment.

A. Lower Courts Are Split on the Proper Standard to Evaluate Establishment Clause Challenges to Monuments and Other Passive Displays.

The divergent opinions in *Van Orden* and *McCreary* gave rise to a circuit conflict on what standard to apply to passive monument challenges—a conflict that was further entrenched by the Tenth Circuit's decision below.

1. The Tenth Circuit, Second Circuit, and Sixth Circuit apply the *Lemon* Test.

In evaluating the Monument, the Tenth Circuit applied "the three part-test from [*Lemon*], as refined by Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984)," more commonly known as the "endorsement test." App. 13a-14a. The Second and Sixth Circuits have also applied the *Lemon*/endorsement test to passive displays such as monuments. *See Am. Atheists, Inc. v. Port Auth.,* 760 F.3d 227, 238 (2d Cir. 2014) (applying *Lemon* to beams found at Ground Zero in the shape of a cross); *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005) (applying *Lemon* to a Ten Commandments display similar to the one in *McCreary* but finding it constitutional).

All three of these circuits have applied the *Lemon*/endorsement test based on reliance on circuit precedent that predates *Van Orden* and *McCreary*. For instance, just months after *Van Orden* and *McCreary,* the Sixth Circuit announced that because the "recent decisions of [the Sixth Circuit] have routinely applied *Lemon*, including the endorsement test" and "*McCreary County* and *Van Orden* do not instruct otherwise," the court would continue to use the *Lemon*/endorsement test to evaluate Establishment Clause challenges to passive monuments. *Mercer Cty.*, 432 F.3d at 636.

The Tenth Circuit similarly concluded that the "*Lemon* test clings to life because the Supreme Court … has never explicitly overruled the case." *Green v.*

Haskell Cty. Bd. of Comm'rs, 568 F.3d 784, 797 n.8 (10th Cir. 2009). Thus, the court adhered to the *Lemon* test because "[w]hile the Supreme Court may be free to ignore *Lemon*, this court is not." *Id.*; *see also Am. Atheists*, 760 F.3d at 238 n.12 ("As we have previously observed, although the *Lemon* test has been much criticized, panels of this court are required to follow this precedent."). Some of these decisions have recognized the relevance of the *Van Orden* decision, but have felt constrained not to follow it. *See, e.g.*, *Green*, 568 F.3d at 797 n.8 ("Therefore, we cannot do as the Board wishes and be guided in our analysis by the *Van Orden* plurality's disregard of the *Lemon* test." (internal citation omitted)).

2. The Eighth Circuit applies the *Van Orden* Test.

The Eighth Circuit has taken the opposite approach, holding that the *Van Orden* analysis applies to all Establishment Clause challenges to passive monuments. *See Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014) ("A passive display of the Ten Commandments on public land is evaluated by the standard in [*Van Orden*], which found [*Lemon*] 'not useful in dealing with [a] passive monument.'" (quoting *Van Orden*, 545 U.S. at 686 (plurality opinion))). In 2005, shortly after *Van Orden* and *McCreary*, the *en banc* Eighth Circuit held that a Ten Commandments monument made "passive—and permissible—use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage." *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776-77 (8th Cir. 2005) (en banc). The *en banc* court expressly grounded its

analysis in the *Van Orden* approach rather than *Lemon*. *See id.* at 778 n.8 ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test.").

3. The Ninth Circuit applies both the *Lemon* and *Van Orden* Tests.

Further adding to the confusion, the Ninth Circuit has used both *Lemon* and *Van Orden* to evaluate passive monuments at different times. In one 2008 case involving a Ten Commandments monument, the Ninth Circuit applied the *Van Orden* framework. *See Card*, 520 F.3d at 1016. But three years later, in a case dealing with a Latin cross, the court expressed uncertainty whether to apply the *Lemon* test or the *Van Orden* framework and eventually settled on applying *both*. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011).

B. The Circuit Conflict is Widely Acknowledged.

This circuit conflict on the proper test for Establishment Clause challenges to passive monuments is mature, entrenched, and widely acknowledged. It developed just months after *Van Orden* and *McCreary*. *Compare Mercer Cty.*, 432 F.3d at 636 (applying *Lemon* to Ten Commandments display), *with ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) (applying *Van Orden* to Ten Commandments display). Since 2005, there have been no fewer than thirteen merits decisions on this issue from the

federal courts of appeals. *See* App. 1a-36a; *Am. Atheists*, 760 F.3d 227; *Red River Freethinkers*, 764 F.3d 948; *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011); *Trunk*, 629 F.3d 1099; *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837 (6th Cir. 2010); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (en banc); *Green*, 568 F.3d 784; *Card*, 520 F.3d 1009; *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008); *Mercer Cty.*, 432 F.3d 624; *Plattsmouth*, 419 F.3d 772; *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005). And the conflict has been acknowledged from the moment it first emerged. *See Mercer Cty.*, 432 F.3d at 636 (applying *Lemon* while acknowledging that the *Plattsmouth* case had declined "to apply *Lemon* post-*McCreary County* and *Van Orden*").

C. The Circuit Conflict Has Produced Inconsistent Results.

It should also come as no surprise that this divergence in approach has led to inconsistent outcomes in the courts of appeals. For example, a Latin cross displayed on government property was held unconstitutional when surrounded by thousands of stone plaques honoring military personnel, *see Trunk*, 629 F.3d 1099, but constitutional when displayed in a city insignia, as a sculpture outside of a city sports complex, and in a mural on an elementary school wall, *see Weinbaum*, 541 F.3d 1017. Like cases do not even come out alike. A Ten Commandments poster in a courthouse, like in *McCreary*, was found constitutional by the Sixth Circuit. *See Mercer Cty.*, 432 F.3d at 633. But a Ten Commandments monument on the grounds of a

public building, as in *Van Orden*, was found unconstitutional in this case. *See* App. 33a. The lower courts are essentially shooting in the dark when it comes to passive monuments. More light is needed.

D. Jurists and Scholars Have Called for Resolution of the Circuit Conflict.

The uncertain state of the law has caused Justices of this Court, lower court judges, and legal commentators to call for clearer guidance. Indeed, a majority of the Justices of this Court either have called for this Court to bring order to this area of law or expressed doubt as to the correct test to use in passive monuments cases. *See Utah Highway Patrol Ass'n v. Am. Atheists, Inc.,* 565 U.S. 994, 995 (2011) (Thomas, J., dissenting from the denial of certiorari) ("Because our jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess, I would grant certiorari."); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., concurring in the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity."); *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("[A]ppellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments surely have their hands full after *McCreary* and *Van Orden*."); *cf. Salazar v. Buono*, 559 U.S. 700, 720-21 (2010) (plurality opinion of Kennedy, J., joined in full by Roberts, C.J. and in part by Alito, J.) (expressing

doubt as to whether the endorsement test is "appropriate" for religious displays).

Similarly, lower court judges have puzzled over the standard for passive monuments and have pleaded for clarity. *See, e.g.*, *Card*, 520 F.3d at 1016 ("Confounded by the ten individual opinions in [*Van Orden* and *McCreary*], and perhaps inspired by the Biblical milieu, courts have described the current state of the law as both 'Establishment Clause purgatory' and 'Limbo.'" (internal citations omitted)); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, J., concurring) ("For more than four decades, courts have struggled with how to decide Establishment Clause cases, as the governing framework has profoundly changed several times."); *Green*, 574 F.3d at 1245 (Gorsuch, J., dissenting from the denial of rehearing en banc) ("[A]s a result, at least until our superiors speak, we leave the state of the law 'in Establishment Clause purgatory.'" (quoting *Mercer Cty.*, 432 F.3d at 636)).

Legal commentators have similarly called for this Court to address this important area of law. *See, e.g.*, Lindsey H. Emerson, *An Artifact or a Memorial?: The Latin Cross and the Establishment Clause*, 85 Miss. L. J. 471, 473 (2016) ("Due to a lack of guidance in applying Establishment Clause doctrine, courts are coming to incongruent conclusions regarding the constitutionality of religious symbols incorporated into public displays."); Brian C. Nadler, *Jurisprudential Juxtapositions: Resolving Establishment Clause Issues after* Town of Greece, N.Y. v. Galloway, 50 Gonz. L. Rev. 75, 76 (2015) (describing this Court's Establishment Clause

jurisprudence as "fractured, incoherent, and in need of a great deal of clarification"); Eric B. Ashcroft, American Atheists v. Davenport: *Endorsing a Presumption of Unconstitutionality against Potentially Religious Symbols*, 2012 BYU L. Rev. 371, 372 (2012) (describing previous Tenth Circuit religious display opinion as "evidence of the need for clarification of Establishment Clause jurisprudence by the Supreme Court").

II. The Tenth Circuit's Decision Contradicts This Court's Precedent on the Proper Establishment Clause Standard to Apply to Monuments and Passive Displays in a Public Forum.

Not only did the Tenth Circuit's decision contradict the holdings of sister courts, it contradicted this Court's rulings on what Establishment Clause standard to apply to monuments and passive displays, how to apply that standard, and the role a public forum plays in the Establishment Clause analysis.

First, the Tenth Circuit contradicted this Court's decision in *Van Orden*. Although the court of appeals felt bound by its own precedent to apply the *Lemon*/endorsement test, the similarities between this case and *Van Orden* should have led the court to use *Van Orden* as its guide. Like the display in *Van Orden*, the Monument in Bloomfield is a privately donated display that stands with other secular markers near a government building, accompanied by disclaimers. "Even if we can't be sure anymore what legal rule controls Establishment Clause analysis in

these cases, we should all be able to agree at least that cases like *Van Orden* should come out like *Van Orden*." *Green*, 574 F.3d at 1249 (Gorsuch, J., dissenting from the denial of rehearing en banc). "[I]f an inclusive display where the decalogue makes an appearance was acceptable to the Supreme Court in *Van Orden*, similar displays should be acceptable" to the lower courts. *Id.* *Van Orden* should have led the court of appeals to conclude that the Monument does not violate the Establishment Clause.

Second, even if the *Lemon*/endorsement test were to be applied to these facts, the Tenth Circuit misapplied it under this Court's precedents. The Tenth Circuit should have applied the *Lemon*/endorsement test by adopting the position of a reasonable observer as defined by cases like *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995). *See id.* at 779-81 (O'Connor, J., concurring) (describing the reasonable observer's focus as on "the 'objective' meaning of the [government's] statement in the community," informed by the "history and context of the community and forum in which the religious display appears," as well as the "general history of the place in which the [religious message] is displayed" (citation omitted)).

But instead of considering the Monument as a *reasonable* observer would, the court of appeals applied a combination of "*Lemon* with an endorsement spin that is tantamount to a hostile 'reasonable observer,'" as the dissent from the denial of rehearing *en banc* aptly stated. App. 126a. A truly reasonable observer would have given weight to the

City's written policy explaining its secular purpose for the Monument, to the City's consistent enforcement of this policy since 2007, to the secular markers around the Monument, and to the numerous disclaimers nearby. These factors were largely ignored or discounted by the Tenth Circuit's analysis, leading the court to conclude that the City endorsed religion.

Third, the Tenth Circuit decision contradicted this Court's rulings on how to apply the Establishment Clause to public forums. In the 1980s, this Court formalized its "forum analysis" doctrine for determining when the government has created a public forum. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802-03 (1985). Forum analysis is vital because the government's creation of a public forum for private speech strongly cuts against finding that speech in such a forum violates the Establishment Clause. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 271-72 (1981) (rejecting Establishment Clause challenge to university's decision to give facilities access to religious groups because university had created public forum open to all speakers). Indeed, this Court has never found an Establishment Clause violation when the government created a public forum for private speech. To determine whether the government has created such a forum, this Court's forum analysis doctrine asks whether the government intended to create a forum as evidenced by the government's policy and practice as well as the nature of the property and its compatibility with expression. *See Cornelius*, 473 U.S. at 802.

But the Tenth Circuit never gave forum analysis a chance. It never applied this Court's standard test to determine whether the Monument constituted private speech in a public forum. Instead, the Tenth Circuit created a categorical rule that "permanent monuments are *government* speech, regardless of whether a private party sponsored them." App. 12a (emphasis added).

The Tenth Circuit mistakenly believed that this Court adopted such a rule in *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009). But *Summum* did no such thing. Rather, it merely declared that "[p]ermanent monuments displayed on public property *typically* represent government speech." *Id.* at 470 (emphasis added). This statement hardly precluded forum analysis altogether. In fact, *Summum* later noted that there are "circumstances in which the forum doctrine might properly be applied to a permanent monument." *Id.* at 480.

Even more importantly, the result in *Summum* cannot be applied here because the facts were fundamentally different. The city in *Summum* never intended to create a public forum for monuments nor did it claim to have done so. Private parties attempted to gain access to government property by arguing that the city had created a public forum that the private parties could use, but the city in *Summum* denied any intent to open a forum. 555 U.S. at 467 (contrasting these arguments); *see also* Brief for Petitioners, *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009) (No. 07-665), 2008 WL 2445506, at *45-47 (arguing that city never intended to create forum). In contrast, Bloomfield openly declared its intent to create a

public forum and created a religiously neutral forum policy that it has consistently applied since 2007. App. 173a-179a, 181a-183a, 188a-198a, 263a. This Court has found a public forum in such circumstances. *See, e.g., Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 247-53 (1990) (plurality opinion) (rejecting Establishment Clause challenge to Equal Access Act because Act created public forum for private speech). The Tenth Circuit's decision ignored this case law and wrongly jettisoned forum considerations from its Establishment Clause analysis.

III. The Tenth Circuit's Decision—Like Many Other Lower Court Decisions—Ignored This Court's Holdings That Being Offended is not Sufficient to Establish Standing.

"'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (*quoting Raines v. Byrd*, 521 U.S. 811, 818 (1997)). The very essence of the Constitution's "case or controversy" requirement is that a plaintiff must establish an "injury in fact," typically described as a concrete and particularized invasion of a legally protected interest that is actual or imminent and not conjectural or hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court has made clear that this standing requirement applies in Establishment Clause cases no less than in other contexts. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (rejecting view that "the business

of the federal courts is correcting constitutional errors" and stating that this view "does not become more palatable when the underlying merits concern the Establishment Clause").[7]

But lower federal courts have struggled with how to apply the injury-in-fact requirement in the Establishment Clause context. As the Second Circuit has summarized, "[s]tanding is often a tough question in the Establishment Clause context, where the injuries alleged are to the feelings alone," and yet "[n]o governing precedent describes the injury in fact required to establish standing in a religious display case." *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009). *Cf. Awad v. Ziriax*, 670 F.3d 1111, 1121 (10th Cir. 2012) ("Since *Valley Forge*, the Supreme Court has not provided clear and explicit guidance on the difference between psychological consequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing.").

As a result, lower federal courts, including the Tenth Circuit, have allowed standing to mere offended observers—plaintiffs who allege no more than "being exposed to a state symbol that offends his beliefs." *City of Edmond v. Robinson*, 517 U.S. 1201, 1202 (1996) (Rehnquist, J., dissenting from denial of

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[7] *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

certiorari).[8] As Chief Justice Rehnquist (joined by Justices Scalia and Thomas) recognized, "there are serious arguments on both sides of this question, [and] the Courts of Appeals have divided on the issue." *Id.* at 1203. In fact, divergences exist even among panels within individual circuits. For example, Judge Easterbrook noted that the Seventh Circuit "may need to revisit the subject of observers' standing in order to reconcile this circuit's decisions." *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011).

This Court should grant certiorari to address whether simply being offended by state action is sufficient for a plaintiff to establish Article III standing.

A. This Court Has Disapproved Reliance on Psychological Injury Based on Personal Disagreement to Establish Standing.

In *Valley Forge*, this Court considered whether the plaintiffs had standing to challenge the conveyance of surplus federal property to a Christian college. The Third Circuit below had held that the

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[8] This Court has noted that, when taxpayer standing is not at issue, Establishment Clause plaintiffs "may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom," or "on the ground that they have incurred a cost or been denied a benefit on account of their religion … such as when the availability of a tax exemption is conditioned on religious affiliation." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129-30 (2011). Offended observers like Respondents can demonstrate no such injury.

plaintiffs established an "'injury-in-fact' to their shared individuated right to a government that 'shall make no law respecting an establishment of religion.'" 454 U.S. at 470. This Court reversed, explaining that the plaintiffs had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486.

A central component of this Court's reasoning in *Valley Forge* was the well-established rule that citizens do not gain standing from their general right to a government that acts in accordance with the Constitution. 454 U.S. at 482-83. Article III would lose all meaning, this Court noted, if standing were conferred by the mere "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently." *Id.* at 483.

This Court in *Valley Forge* concluded that the plaintiffs had failed to establish any personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485. But such a psychological consequence, this Court found, is not "an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86. Neither the degree of the plaintiffs' offense nor their mental pain "produced by observation of conduct with which [they] disagree[d]" could serve as an adequate "substitute" for the showing of cognizable harm. *Id.*

In short, this Court's precedent makes clear that a "psychological consequence" based on mere

disagreement with something one has observed cannot establish a cognizable Article III injury.[9] *Valley Forge,* 454 U.S. at 485-86; *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (concluding that "psychic satisfaction … does not redress a cognizable Article III injury"); *Allen v. Wright*, 468 U.S. 737, 753-56 (1984) (holding that "abstract stigmatic injur[ies]" are "not judicially cognizable"); *cf. Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) (emphasizing that mere "offense" does not violate the Establishment Clause); *see also Freedom From Religion*, 641 F.3d at 807 ("[H]urt feelings differ from legal injury. The 'value interests of concerned bystanders' do not support standing to sue." (internal citation omitted)); *Harris v. City of Zion,* 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) ("*Valley Forge* tells us that dismay does not establish standing, and therefore new and better ways to prove its existence cannot create standing.").

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[9] Since *Valley Forge*, this Court has reached the merits of offended-observer claims without considering standing, including in a case involving a Ten Commandments monument. *See, e.g.*, *Van Orden*, 545 U.S. at 681. Because this Court did not consider its jurisdiction in these prior cases, these decisions do not undermine *Valley Forge* or suggest that this Court has already decided the standing issue presented here. *See Winn*, 563 U.S. at 144 ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). To the contrary, this Court has regularly cited *Valley Forge* with approval. *See, e.g., id.* at 139, 155; *DaimlerChrysler Corp.*, 547 U.S. at 341, 343, 353.

B. Lower Federal Courts Have Ignored This Court's Holding in *Valley Forge* to Reach the Merits of Offended-Observer Claims.

Although *Valley Forge* held that alleged psychic harm based on personal disagreement cannot support an Article III case, lower courts have widely disregarded that holding in offended-observer cases, such that this Court's holding has been "reduced … to a hollow shell." *Books*, 401 F.3d at 871 (Easterbrook, J., dissenting); *cf. ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 495-500 (6th Cir. 2004) (Batchelder, J., dissenting) (noting that prior circuit decisions allowing offended observer standing are "inconsistent with the holdings in *Valley Forge* and *Steel Co.*, and in that regard were wrongfully decided").

While *Valley Forge* makes clear that mere disagreement with state action is *not* sufficient to establish an injury in fact, this Court has not described what alleged injuries in a passive monument case *are* sufficient. *Cf. Cooper*, 577 F.3d at 490 (noting that *Valley Forge* "explains what standing is *not*, without saying what standing *is* in [religious display] cases"). Lower courts have thus been "left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached." *Id.* In the process, courts have tended to relax the standing requirement, ultimately countenancing mere psychic harm—or even "spiritual harm"[10]—as

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[10] *See Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1253 (9th Cir. 2007) ("[S]piritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious)

injury in fact, contrary to *Valley Forge*, and reducing the "direct injury" requirement to a near nullity.

With few exceptions, courts of appeals now consider any "direct contact" with an "offensive" object—no matter how brief—to be sufficient to establish an injury in fact.[11] Indeed, injury in fact is presumed once an offended observer establishes such minimal "direct contact." *See Books*, 401 F.3d at 871 (Easterbrook, J., dissenting) (noting that "the conclusion … that seeing an unwelcome object equals injury in fact is impossible to reconcile with *Valley Forge*, for it treats observation *simpliciter* as the injury").

The Tenth Circuit's opinion below exemplifies the fundamental error with offended-observer standing. Instead of following *Valley Forge*'s jurisdictional holding discussed above, the Tenth Circuit noted that it had "decided multiple cases where direct contact with religious monuments on public property sufficed for standing," App. 10a (citing cases), and concluded that "Plaintiffs have had the requisite direct contact

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symbol is a legally cognizable injury and suffices to confer Article III standing.").

[11] *See, e.g., Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. RE-1*, No. 16-1049, 2017 WL 2641057, at *3-6 (10th Cir. June 20, 2017); *Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476-80 (3d Cir. 2016); *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023-24 (8th Cir. 2012); *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 843-44 (6th Cir. 2010); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1279-80 (11th Cir. 2008); *Books v. City of Elkhart*, 235 F.3d 292, 300-01 (7th Cir. 2000); *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1087 (4th Cir. 1997).

here," *id.* So long as a plaintiff can demonstrate some "direct contact" with a passive display, he or she can demonstrate standing in the Tenth Circuit.

But like the plaintiffs in *Valley Forge*, Respondents allege no more than a psychological injury. Both Respondents testified that they saw the Monument from a distance multiple times a week while driving on a public road, and one Respondent testified that he saw the Monument every month while he paid his water bill. App. 82a-83a. Yet one Respondent has never actually read the Monument's text, and the other Respondent has only seen the Monument up close once, going out of her way to do so. App. 82a-83a, 208a-210a.

The Constitution requires much more for standing. Such incidental, sporadic exposure to a religious symbol, in a public setting, is simply insufficient to support an Article III injury. *See Valley Forge*, 454 U.S. at 485-86 (holding that "the psychological consequence … produced by observation of conduct with which one disagrees [*i.e.*, 'direct' contact] … is not an injury sufficient to confer standing under Art. III").

Nor does it suffice that the Respondents had a subjective perception that the Monument unlawfully makes them feel "excluded." App. 10a. "If a perceived slight, or a feeling of exclusion, were enough, then Michael Newdow would have had standing to challenge the words 'under God' in the Pledge of

Allegiance, yet [this Court] held that he lack[ed] standing." *Freedom From Religion*, 641 F.3d at 807.[12]

C. This Court Should Address Whether Offended Observers Lack Article III Standing.

This Court should grant review to vindicate the principle established in *Valley Forge* and reject offended-observer standing once and for all. For one, the lower courts' approach in cases like this one is not only wrong on the merits; it "trivializ[es]" the very concept of constitutional injury. *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684-85 (6th Cir. 1994) (Guy, J, concurring) (noting that "discussion of 'psychological damage'" establishes not religion but "a

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[12] Certain courts of appeals have, at times, based their standing analysis not only on alleged "direct contact" but also on whether offended observers altered their behavior to avoid the challenged display. *See, e.g., Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988) (finding no standing to challenge Ten Commandments display where plaintiffs "admit[ted] that they have not altered their behavior as a result of the monument"). But this is merely another species of offended-observer standing. The alleged harm (an alleged alteration of behavior) rests entirely on avoiding something (the alleged offense) that is itself a constitutionally *insufficient* injury. Carl H. Esbeck, *Why the Supreme Court Has Fashioned Rules of Standing Unique to the Establishment Clause*, 10 Engage: J. Federalist Soc'y Prac. Groups 83, 84 (Oct. 2009) ("[T]he second alleged harm (avoiding offense) logically collapses into the first (being offended)."). The proliferation of the "direct contact" and "altered behavior" tests is only further reason for this Court to clarify the proper standing analysis.

class of 'eggshell' plaintiffs of a delicacy never before known to the law").

Moreover, "offended observer" standing in the Establishment Clause context is a unique outlier in standing jurisprudence. In no other context does offense suffice. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (rejecting standing based on "abstract stigmatic injury" in Equal Protection Clause context). Indeed, permitting offended-observer standing runs counter even to Establishment Clause jurisprudence. For example, offended-observer standing is in tension with this Court's careful efforts over the past decade to limit taxpayer standing in Establishment Clause cases, even though plaintiffs in taxpayer standing cases allege not only psychic but also monetary harm. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129 (2011) (rejecting taxpayer standing to challenge state tax credit); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (rejecting taxpayer standing to challenge executive expenditure). Just as it has done with taxpayer standing, this Court should bring standing to challenge passive displays into line with general standing jurisprudence.

IV. This Case Provides an Ideal Vehicle for Resolving Important Establishment Clause and Standing Issues.

This case provides an ideal vehicle for resolving the application of the Establishment Clause to passive monuments and the requirements of Article III standing in suits brought by "offended observers."

With respect to the Establishment Clause issue, the facts underlying the Tenth Circuit's analysis were developed in a three-day bench trial and, as the case comes to this Court, are not in dispute. Indeed, the parties stipulated to 137 facts for trial.

Moreover, in adopting its policy for City Hall lawn, the City was guided by factors this Court laid out in prior cases, and it took intentional steps to avoid any endorsement of religion in connection with the Monument. In particular, the City explicitly declared its secular purpose for allowing monuments in a written policy, followed this policy precisely, and approved multiple disclaimers to be placed on City Hall lawn. On top of that, the Monument now sits near other secular markers in a manner that appropriately reflects the historical purpose of the City Hall lawn. Yet the court of appeals still ordered the Monument's removal.

This is also an appropriate case to address the Article III issues raised by the petition. The facts supporting Respondents' asserted standing are not in dispute. And Respondents' claims of injury are limited to the psychological impact of their insubstantial contact with the Monument. This Court is thus presented with a clean vehicle for determining whether offended-observer status is sufficient for Article III standing.

Finally, the questions presented are of real importance and require no further percolation. Many state and local governments have engaged in passive displays like the Monument, for a variety of historical and social reasons. From headstones in national

cemeteries to plaques in city parks, passive monuments have been used to honor fallen soldiers, commemorate victims after tragedy, and bind our country together in difficult times. Such monuments can also reflect aspects of our history and institutions and their importance to our society's development. Each of these displays is, unfortunately, a federal lawsuit waiting to happen. Yet it is difficult for anyone to say what legal standard will apply to these displays or how to erect these displays constitutionally. That is an unhappy quandary for small towns and government officials everywhere who must decipher the Establishment Clause riddle based on inconsistent clues and indeterminate standards.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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