No. 12-696

# IN THE SUPREME COURT OF THE UNITED STATES

**TOWN OF GREECE,**

***Petitioner.***

***v.***

**SUSAN GALLOWAY and LINDA STEPHENS,**

***Respondents.***

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## Brief of Amicus Curiae Liberty Counsel in Support of Petitioner Town of Greece Seeking Reversal

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## INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a civil liberties organization that provides education and legal defense on issues relating to religious expression in the public square, as well as the family and sanctity of life, across the United States.

Liberty Counsel is committed to upholding the historical understanding and protection of the right to freely exercise religion in the public square and to ensuring that to such expression, such as legislative prayer at public meetings, remains a part of the country's cultural identify. Liberty Counsel has developed a substantial body of information related to the history, ubiquity and importance of legislative prayer to maintaining the fabric of freedom in the nation. Liberty Counsel respectfully submits this information to assist

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

this Court in evaluating Petitioner's longstanding legislative prayer policy.

## SUMMARY OF ARGUMENT

This Court has never ruled that status as an "offended observer" can suffice for Art. III standing, yet lower courts, including the courts in this case, continue to push the outer edge of the envelope to permit those are allegedly offended to topple longstanding governmental acknowledgements of religion. Despite the absence of direct precedent from this Court, appellate courts interpret this Court's continuing use of the endorsement test as license to broadly define standing in Establishment Clause cases. Continued adherence to the *Lemon*[2] test with its "endorsement" prong and "reasonable observer" standard has created a tyranny of the minority that aims to erase all vestiges of religion from the public square. The *Lemon* test and its endorsement prong have transformed the Establishment Clause from a shield against government intrusion into a sword aimed at destroying public acknowledgement of religion.

This case presents this Court with the opportunity to alleviate the difficulties posed by the uncertainty of standing in Establishment Clause cases. The uncertainty is itself a by-

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[2] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

product of continued reliance upon the *Lemon* test and in particular the endorsement prong that relies upon an elusive "reasonable observer" to determine whether a public religious acknowledgment violates the Establishment Clause.

## ARGUMENT

### I. OFFENDED OBSERVERS SUCH AS RESPONDENTS SHOULD NOT BE PERMITTED TO CHALLENGE PUBLIC ACKNOWLEDGMENTS OF RELIGION BASED UPON MERE PSYCHOLOGICAL DISCOMFORT WITH THE MESSAGE.

The district court's finding that Respondents have standing illustrates how far Establishment Clause standing jurisprudence has drifted from its Article III moorings. "Generally, in the context of an Establishment Clause challenge to legislative prayer, a plaintiff may establish standing by showing that he attended a meeting where he was exposed to prayer which he found offensive." *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 214 (W.D.N.Y. 2010).

> In this case, Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers, and

> they contend that when they complained, Town officials told them that they could leave the meetings if they did not like the prayers. Pursuant to *Cooper [v. U.S. Postal Service*, 577 F.3d 479, 489 (2d Cir. 2009)], the Court finds that these facts suffice to establish standing.

*Id*. at 215. In *Cooper*, the Second Circuit found that the plaintiff had standing merely because he was uncomfortable when he had to come into contact with a religious display in a post office near his home. 577 F.3d at 489. The *Cooper* court said that standing "is often a tough question in the Establishment Clause context, where the injuries alleged are to the feelings alone." *Id.* That sentiment in *Cooper*, which was adopted by the lower court in this case, rests upon the faulty premise that Establishment Clause violations must be analyzed differently because they will not cause injury sufficient to confer standing under the "traditional" view of Article III.

This Court rejected that presumption when the Third Circuit relied upon it to find standing in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 489 (1982). Carving out a special exception for Establishment Clause cases, as proposed by the Third Circuit in

*Valley Forge*, would render the "case or controversy" requirement of Article III at best a convenient vehicle for correcting constitutional errors and at worst a nuisance that may be dispensed with when it becomes an obstacle. *Id.* "This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause." *Id.* In Establishment Clause cases, as in other cases, Article III standing requires at an "irreducible minimum," a showing that a plaintiff has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," that the injury "fairly can be traced to the challenged action" and that the injury "is likely to be redressed by a favorable decision." *Id.* at 472.

Since *Valley Forge,* this Court has rejected attempts to transform Article III standing into "judicial versions of college debating forums." 454 U.S. at 473. This Court has rejected requests to exercise jurisdiction when doing so "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* (citing *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Just last term, this Court again confirmed that "Article III standing 'is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value

interests.'" *Hollingsworth v. Perry*, __ S.Ct. __, 2013 WL 3196927 at *6 (2013) (citing *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

Nevertheless, that is precisely what the lower courts here, and appellate courts throughout the country, have done, *i.e.,* placed standing in the hands of "bystanders," or "offended observers" whose only "injury" is discomfort at having to hear or see a public acknowledgement of religion. *See Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 214 (W.D.N.Y. 2010) ("Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers"). As was true in this case, the Fourth Circuit found that a city resident had standing to challenge legislative prayer based on her discomfort with having to hear sectarian prayers at the beginning of city council meetings. *Wynne v. Town of Great Falls,* 376 F.3d 292, 295 (4th Cir. 2004). The Sixth and Ninth Circuits found standing when teachers and students who attended school board meetings expressed discomfort at having to hear opening prayers. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 374 (6th Cir. 1999); *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.,* 52 Fed.Appx. 355, 356 (9th Cir. 2002). The Fifth Circuit found that an atheist city resident who was upset at having to see a Latin cross on the city's seal had standing to bring an Establishment Clause challenge. *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir.

1991). As the Second Circuit did in *Cooper*, the Fifth Circuit justified its expansion of standing by claiming that it "is particularly elusive in Establishment Clause cases." *Id.* (citing *Saladin v. City of Milledgeville*, 812 F. 2d 687, 692 (11th Cir. 1987)). In *Saladin*, the Eleventh Circuit cited the imprecision in Establishment Clause standing to justify a finding that plaintiffs had standing because they were troubled by having to view the city seal with a barely legible motto "Liberty and Christianity" on stationery and documents. 812 F.2d at 692.

In fact, it is not this Court's standing precedent, but the appellate courts' interpretation of precedent, that is problematic. When it has directly addressed standing, this Court has consistently required that the actual or threatened injury must be "concrete and particularized" as the result of an actual or imminent invasion of a legally protected interest. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). This Court specifically found no concrete and particularized injury in a challenge to a state law that was based upon the party's religious differences with the nature of the material being presented. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952). Most notably, in *Valley Forge*, this Court clarified that psychic discomfort with a public acknowledgement of religion is not a concrete and particularized injury sufficient to support standing. *Valley Forge*, 454 U.S., at 485–486.

> They [Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. [186], at 204 [(1962)], is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

*Id.*

This Court has continued to emphasize that "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree." *Elk Grove USD v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring). "It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Id.*

> There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress.

*Id.* at 32. (Rehnquist, C.J., concurring). "Michael Newdow's challenge to petitioner school district's policy is a well-intentioned one, but his distaste for the reference to 'one Nation under God,' however sincere, cannot be the yardstick of our Establishment Clause inquiry." *Id.* at 44 (O'Connor, J., concurring). "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic

indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Id.* at 44-45.

That is precisely what has happened as appellate courts have continued to permit Establishment Clause cases to proceed on little more than an allegation of psychological discomfort. *See e.g., Galloway*, 732 F. Supp. 2d at 214 (Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers). Eschewing this Court's statements that mere psychological injury is inadequate to support standing, appellate courts have adopted the offended observer concept of standing, by misinterpreting this Court's discussion distinguishing the facts of *Valley Forge* from the facts in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). This Court distinguished the circumstances in *Valley Forge,* which did not support standing, with the circumstances in *Schempp,* which did support standing, by pointing out that the plaintiffs in *Schempp* suffered cognizable injury because "impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. This Court based its analysis upon the fact that the students in *Schempp* were compelled to be at school and therefore were a captive audience unable to avoid the religious content. *Id.*

Notably, this Court specifically warned against reading its decision in *Schempp* as sanctioning standing based upon having merely a "spiritual stake," or psychic injury. *Id.*

However, that is precisely what lower courts have done. According to the Fourth Circuit, "in *Valley Forge* itself, the Court interpreted *Schempp* to premise standing on the fact that plaintiffs 'were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them,' not that they in fact did assume these burdens." *Suhre v. Haywood County*, 131 F.3d 1083, 1088 (4th Cir. 1997) (citations omitted). "The cognizable injury caused by personal contact with a public religious display may thus satisfy the injury-in-fact requirement for standing to bring an Establishment Clause case." *Id.* at 1090. The Fourth Circuit failed to recognize the context of this Court's discussion of *Schempp*, *i.e.,* that the plaintiffs in *Schempp* were compelled to be in school, and instead found that *Valley Forge* supports the proposition that standing in Establishment Clause cases can be based upon unwelcome contact with religious exercises or displays. *Id.*

Similarly, the Eleventh Circuit interprets *Valley Forge* as supporting standing for state residents who saw a cross memorial in a state park from an airplane or merely heard about the cross from anonymous phone calls and news releases and decided against visiting the

park. *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 (11th Cir. 1983). Even merely having to view a cross or religious reference on a governmental seal constitutes injury in fact sufficient to constitute standing under *Valley Forge,* according to Eleventh Circuit in *Saladin*, 812 F. 2d at 692 and the Tenth Circuit in *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989).

> Foremaster's allegations of direct, personal contact suffices as non-economic injury. He claimed that "the visual impact of seeing that Temple on a daily basis as part of an official emblem ... has and continues to greatly offend, intimidate and affect me." Although he did not contend he changed his behavior, he did allege that the presence of the religious logo in the City Hall offended and intimidated him. *His direct personal contact with offensive municipal conduct satisfied Valley Forge.*

882 F.2d at 1491 (emphasis added). Similarly, the Ninth Circuit has relied upon *Valley Forge* to support standing for a citizen who was offended by having to view, in the distance, a veterans' memorial containing a cross while

traveling along a highway in the California desert. *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004). Because the citizen was offended and therefore did not visit the area as often as he wanted, he suffered an injury that goes beyond mere psychological discomfort, and therefore satisfies *Valley Forge,* according to the Ninth Circuit. *Id.*

The Sixth Circuit has also relied upon *Valley Forge* to support standing for mere unwelcome observation of religious exercise or display. In *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 681 (6th Cir.1994), the court held that a graduate had standing to challenge his high school alma mater's display of a portrait of Jesus Christ because he continued to visit the school and encounter the portrait. Even the possibility of coming into contact with a planned public display can support standing for an Establishment Clause challenge, according to the Sixth Circuit in *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002).

Most recently, the Eighth Circuit found that a group of Freethinkers who felt "isolated and unwelcome" by the continued presence of a Ten Commandments monument on city-owned land had expressed an "injury in fact" sufficient to confer standing. *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012). The court acknowledged that the plaintiffs' injuries "are largely emotional," but

insisted that was not constitutionally significant. *Id.* "To the extent that emotional harms differ from other, more readily quantifiable harms, that difference lacks expression in Article III's case-or-controversy requirement." *Id.*

Acknowledging that their expansive definitions of standing do not follow directly from this Court's opinion in *Valley Forge* or other precedents, circuit courts have relied upon this Court's silence in cases with similar standing circumstances to justify their conclusions. For example, in *Red River Freethinkers*, the Eighth Circuit noted that none of the Justices on this Court questioned the plaintiff's standing based upon unwelcome contact with a Ten Commandments monument in *Van Orden v. Perry,* 545 U.S. 677 (2005). *Id.* at 1024 n.8. In *Murray*, the Fifth Circuit relied heavily on the fact that "standing has not been an issue in the Supreme Court in similar cases." *Murray v. City of Austin*, 947 F.2d at 151. This Court has warned lower courts against mistaking silence for acquiescence. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011). "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." *Id.* Notably, the Eighth Circuit acknowledged this language from *Winn*, but said, "we nevertheless observe that no Justice

questioned Van Orden's standing." *Red River Freethinkers*, 679 F.3d at 1024 n.8.

In a slightly different twist, the Fourth Circuit based its finding of standing based upon unwelcome contact on this Court's failure to offer explicit directions in *Valley Forge* or other cases. *Suhre*, 131 F.3d at 1088. Similarly, the Second Circuit cited this Court's lack of explicit directions in *Valley Forge* to justify its conclusion that standing in Establishment Clause cases can be based upon "injuries to the feelings alone," *Cooper*, 577 F.3d at 489. The Second Circuit reasoned that this Court's failure to delineate what plaintiffs needed to assert to confer standing in *Valley Forge* granted lower courts license to define standing to accommodate particular scenarios. *Id.* at 490. "This passage explains what standing is not, without saying what standing is in these kinds of cases." *Id.* "Lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached." *Id.* According to the Second and Fourth circuits, if this Court does not create an exhaustive description of the injuries upon which standing can be based, then lower courts are free to make their own, admittedly "arbitrary" determinations regarding whether and to what extent the regular rules of standing should apply in Establishment Clause challenges. *See id.*; *Suhre*, 131 F.3d at 1088.

Courts have embraced that perceived authority and elevated "offended observers" to the status of plaintiffs able to topple longstanding public acknowledgements of religion such as Petitioner's opening prayer. This strips any real meaning from Article III standing in Establishment Clause cases. Standing has been transformed from a vehicle to ensure that only justiciable controversies are reviewed by the courts to a tool used by hecklers to veto public religious observances with which they disagree. This Court should act to restore the constitutional meaning of Article III standing by clarifying that the status of an "offended observer" does not satisfy Article III requirements of a concrete and particularized injury in Establishment Clause challenges.

## II. THIS COURT SHOULD ABANDON THE REASONABLE OBSERVER STANDARD AND ENDORSEMENT TEST UNDER *LEMON*.

The proliferation of "offended observer" standing and the resulting transformation of Establishment Clause standing into a heckler's veto is the direct result of this Court's continuing reliance upon the "reasonable observer" concept of endorsement contained within the maligned but sentient *Lemon* test.

*Lemon v. Kurtzman*, 403 U.S. 602 (1971). When the effects prong of the *Lemon* test was renamed "endorsement," the focus of the inquiry shifted from the actions of the government to the reactions of those observing government actions. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor J., concurring) (clarifying *Lemon* by recasting effects as endorsement). When the concept of a "reasonable observer" was inserted into the endorsement test, courts' attention was further diverted away from whether government acted with the intent to establish religion to whether someone might perceive that the government is favoring religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) (discussing the "reasonable observer"). While this Court has criticized the "reasonable observer" concept, the "endorsement" prong and the *Lemon* test, it has not abandoned them. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) (the Lemon/endorsement test continues to "stal[k] our Establishment Clause jurisprudence" like "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."). Instead, the "reasonable observer" remains a benchmark for determining whether governmental actions violate the

Establishment Clause. *See Pinette*, 515 U.S. at 779.

Consequently, appellate courts can justify adopting ever-widening definitions of standing for Establishment Clause claims by pointing to allegations that "reasonable observers" are "injured" because they perceive that certain governmental actions favor religion. *See e.g., Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024 (8th Cir. 2012) (finding standing for admittedly "emotional" injuries based upon having to view a monument). This case shows that the endorsement test and its reasonable observer standard that the Court intended to be a yardstick for measuring when government crosses the line from acknowledgement to endorsement, s*ee Pinette*, 515 U.S. at 779, has morphed into a weapon aimed at eliminating all vestiges of public religious expression.

In her development of the "reasonable observer" concept, Justice O'Connor envisioned the reasonable observer as similar to the "reasonable person" in tort law, who "is not to be identified with any ordinary individual, who might occasionally do unreasonable things," but is "rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." *Id.* at 779-780.

> Thus, "we do not ask whether there is any person who could find an

endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion." *Americans United*, 980 F.2d, at 1544. Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a "reasonable non-adherent," *cf.* L. Tribe, AMERICAN CONSTITUTIONAL LAW 1293 (2d ed. 1988), nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. *A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.*

*Id.* at 780 (emphasis added). Therefore, the endorsement inquiry *should not* be "about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* (emphasis added). The test should not "focus on the actual perception of individual observers, who naturally have differing degrees of knowledge." *Id.* "Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof." *Id.*

In fact, that is precisely what has happened. Appellate courts have focused on the actual perceptions of individual observers with differing degrees of knowledge, and if those observers perceive that a government observance or display favors religion in a way that offends them, then the observance or display is precluded. *See e.g., Red River Freethinkers,* 679 F.3d at 1024; *Suhre*, 131 F.3d at 1088; *Adland*, 307 F.3d at 478. These results are not surprising in light of the "reasonable observer"/endorsement test's history of confusion and misinterpretation that has at times even caused dissension among members of this Court.

In *Pinette*, Justice O'Connor found that the reasonable observer looking at the Ku Klux Klan's display of a Latin cross in a plaza next

to the state capital "would view the Klan's cross display fully aware that Capitol Square is a public space in which a multiplicity of groups, both secular and religious, engage in expressive conduct." *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment).

> Moreover, this observer would certainly be able to read and understand an adequate disclaimer, which the Klan had informed the State it would include in the display at the time it applied for the permit, and the content of which the Board could have defined as it deemed necessary as a condition of granting the Klan's application.

*Id.* By contrast, Justice Stevens found:

> [A] reasonable observer would likely infer endorsement from the location of the cross erected by the Klan in this case. Even if the disclaimer at the foot of the cross (which stated that the cross was placed there by a private organization) were legible, that inference would remain, because a property owner's decision to allow a

> third party to place a sign on her property conveys the same message of endorsement as if she had erected it herself."

*Id.* at 806 (Stevens, J., dissenting). Justice Ginsburg similarly held that a reasonable observer viewing the stand-alone cross and aware of the fact that "no human speaker was present to disassociate the religious symbol from the State….No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message" would conclude that the state endorsed the display. *Id.* at 817 (Ginsburg, J., dissenting).

As Justice Scalia observed, the justices' disagreement about whether the "hypothetical beholder who will be the determinant of 'endorsement' should be any beholder (no matter how unknowledgeable), or the average beholder, or (what Justice STEVENS accuses the concurrence of favoring) the 'ultra-reasonable' beholder" shows how the endorsement test has led to "invited chaos." *Pinette*, 515 U.S. at 768 n.3. "And, of course, even when one achieves agreement upon that question, it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-

reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Id*.

The endorsement test and its reasonable observer component have been unworkable and ineffective since their inception, as exemplified by the internally inconsistent results in some of this Court's prominent Establishment Clause cases.

A reasonable observer in Pawtucket Rhode Island would not view the city's Christmas display that included a creche, Santa Claus house, reindeer, candy-striped poles, a Christmas tree and carolers as endorsing religion, according to Justice O'Connor. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). "Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display." Justices Brennan, Marshall, Blackmun and Stevens disagreed: "For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion…." *Id*. at 701 (Brennan, J. dissenting).

Holiday displays in the Allegheny County courthouse resulted in equally fractured rulings under the endorsement test. *County of Allegheny v. ACLU,* 492 U.S. 573 (1989). One of the displays challenged in the case was a creche placed in the county courthouse and the other a display that included a menorah, Christmas tree, and sign saluting liberty in front of the city-county building. *Id.* at 587. Analyzing the tree and menorah display, the plurality found that a reasonable observer would not view the addition of the menorah to the tree display as an endorsement of the Christian and Jewish faiths. *Id.* at 620. Justice O'Connor said that the display "conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635 (O'Connor, J. concurring). "A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Id.* at 635-636. However, Justice Brennan stated that the reasonable observer could not overlook the "religious significance" of the Christmas tree when it is placed next to a menorah. *Id.* at 641 (Brennan, J., concurring in part and dissenting in part). "I shudder to think that the only 'reasonable observer' is one who shares the

particular views on perspective, spacing and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law." *Id.* at 642-643. Justice Stevens also found that the reasonable observer would find that the "presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree. The overall display thus manifests governmental approval of the Jewish and Christian religions." *Id.* at 654 (Stevens, J., concurring in part and dissenting in part).

Justice Kennedy's characterization of the endorsement/reasonable observer standard illustrates why it is ineffectual as a constitutional measuring stick. *Id.* at 675-676 (Kennedy, J. dissenting).

> This test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of holiday display cases, using little more than intuition and a tape measure. Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication. "It would be appalling

> to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo candy cane." *American Jewish Congress v. Chicago*, 827 F.2d 120, 130 (CA7 1987) (Easterbrook, J., dissenting).

*Id.* Rather than providing an objective, neutral standard for courts to use when analyzing Establishment Clause challenges and legislatures to use when drafting legislation, the endorsement test and its "reasonable observer" standard have only further complicated what was already a labyrinthine constitutional analysis.

The inconsistent rulings among and within the circuits and even within decisions by this Court illustrate that the endorsement test is not the kind of objective standard necessary to analyze Establishment Clause claims. The endorsement test contains insoluble difficulties that render the test "incomprehensible."[3] "Is

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[3] William P. Marshall, *"We Know it When We See It." The Supreme Court Establishment,* 50 S. CAL. L.REV. 495, 536-537 (1986).

the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominate religious sensibility of the community, or one holding a minority view? Is there any 'correct' perception?"[4] One problem with the test is that it "attempts to objectify that which avoids objectification."[5] The test "incorrectly assumes that the symbolic inquiry is reducible to a rational construct, while the interpretation of symbols, and perhaps religion itself, is inherently irrational. Objectifying the inquiry in this manner is, as the idiom suggests, to place a square peg in a round hole."[6]

The fractured results spawned by the endorsement test show why it should be abandoned as an intellectually incoherent legal standard. With few exceptions, "the outcome of any constitutional case judged under the endorsement/objective observer analysis can be changed by simply altering the characteristics of the observer."[7] That is apparent in the inconsistent circuit court decisions that have used the uncertainty inherent in the endorsement test to create admittedly arbitrary

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4 *Id.* at 537.

5 *Id.* at 536.

6 *Id.*

7 Jesse H. Choper, *The Endorsement Test: Its Status And Desirability,* 18 J. L. & POL'Y 499, 513-514 (2002).

definitions of standing for Establishment Clause challenges. When someone can challenge a decades old religious exercise by merely stating that they are "offended" by listening or viewing it, there can be no doubt that the standard is ineffective.

As one constitutional scholar stated:

> Under the endorsement approach, reasonable perceptions of state approval or endorsement which beget legitimate feelings of alienation or offense by a segment of the population–and nothing more –trigger a holding of unconstitutionality. While this may indeed be an attractive feature of the test insofar as it appeals to our compassionate instincts...absent any meaningful threat to religious liberty, distressed sensibilities should not rise to the level of a judicially cognizable harm under the Establishment Clause because, if the endorsement threshold were faithfully applied, it would unjustifiably operate to invalidate desirable governmental attempts to accommodate religious interests as

> well as improperly authorize official injury to religious liberty.[8]

"In our pluralistic culture, 'not all beliefs can achieve recognition and ratification in the nation's laws and public policies; and those whose positions are not so favored will sometimes feel like 'outsiders.'"[9] "It is clear that the Constitution cannot generally provide relief when this occurs."[10]

Nevertheless, as this case illustrates, that is precisely what the endorsement test and its "reasonable observer" standard have done. Anyone who might feel slighted by a government observance or display that, from his perspective, gives too much attention to or provides too much support, even tangentially, to a particular religious tradition has the power to veto the presentation. The "offended observer" standard, like the reasonable observer under *Lemon,* improperly focuses upon the reactions of audience members instead of the actions of the government, which is what should be the focus in Establishment Clause claims, particularly in legislative prayer cases. *Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 (9th Cir. 2013) (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)). The ad-hoc,

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8 Choper, *The Endorsement Test*, at 521.

9 *Id. at 523.*

10 *Id.*

fact-specific reasonable observer standard wreaks havoc not only with the courts of appeal which must determine whether a claim is justiciable, but also with legislative bodies. "Governments face a Hobson's choice: foregoing [legislative prayer] or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1106 (10th Cir. 2010).

This hecklers' veto is antithetical to this Court's Establishment Clause jurisprudence. Consequently, the endorsement test and its "reasonable observer" standard that have led to "offended observer" standing utilized by appellate courts throughout the country and the lower court rulings here should be explicitly abandoned by this Court.

## III. THE PROBLEM OF THE HECKLERS' VETO INHERENT IN THE ENDORSEMENT PRONG OF *LEMON* DEMONSTRATES WHY *LEMON* NEEDS TO BE OVERRULED AND REPLACED WITH AN OBJECTIVE TEST.

The extent to which standing has been stretched under the endorsement prong of *Lemon*—to the extent that merely being an offended observer can create standing—

illustrates why this Court should abandon *Lemon* and replace it with an objective test that would differentiate between permissible public acknowledgment and impermissible public endorsement of religion. This would comport with this Court's concern that the country continue to honor "the religious history that gave birth to our founding principles of liberty." *Elk Grove USD v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring). As Justice Scalia said, "I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied–the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments." *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

As this Court has acknowledged, the wide variety of governmental functions that might be challenged under the Establishment Clause means that there cannot be a "one size fits all" test. "Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Bd. of Educ. of Kiryas*

*Joel Village School Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part).

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. There is, after all, only one Establishment Clause, one Free Speech Clause, one Fourth Amendment, one Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 211, 97 S.Ct. 451, 464, 50 L.Ed.2d 397 (1976) (Stevens, J., concurring). But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content based speech restrictions, for content neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry – personal liberty, an informed citizenry, government efficiency, public order,

> and so on – are present in different degrees in each context. And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.

*Id.* at 718-719. As is true with Free Speech cases, Establishment Clause challenges involve different contexts, including: (1) government action targeted at particular individuals or groups, (2) government (acknowledgment or) speech on religious topics, (3) government decisions involving religious doctrine and religious law, and (4) governmental delegations of power to religious bodies, under which the issues underlying the clause will operate quite differently. *See id.* at 720. In other words, there are different standards and concerns with funding cases, church property or employment

disputes, and government acknowledgments of religion such as the legislative prayer at issue here. Establishment Clause concerns are more heightened in the former two than in the latter. Government funding of religious activities or judicial inquiry into church practices to resolve property or personnel matters are more likely to raise Establishment Clause concerns than "under God" in the Pledge of Allegiance, "In God We Trust" on our currency, passive displays that include the Ten Commandments, war memorials that include crosses or invocations at the beginning of legislative sessions.

Any test adopted to replace *Lemon* must strive to separate a real threat from a harmless shadow, an establishment of religion from an acknowledgment. However, as Justice O'Connor cautioned, "the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*." *Id.*

This case is the latest example of the truth of Justice O'Connor's conclusion. The various patches applied to *Lemon*, including the "endorsement" test, have only added to the confusion that has left this Court's Establishment Clause jurisprudence "in

hopeless disarray." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Instead of continuing to patch up *Lemon*, which has only gotten worse over time, Amicus proposes that this Court adopt a new objective test for Establishment Clause challenges of government observances and displays. Under this proposal, if a religious observance (1) comports with history and ubiquity, and (2) does not objectively coerce participation in a religious exercise or activity, then it would be deemed a permissible acknowledgment of religion, not a violation of the Establishment Clause.

### A. History And Ubiquity, Properly Applied, Would Distinguish Public Acknowledgment From Establishment.

The first part of Amicus' proposed test focuses on "history and ubiquity." Ubiquity in this context is not the dictionary meaning of "omnipresent," but a practice "observed by enough persons" to warrant the term. *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 37 (2004) (O'Connor, J., concurring). Ubiquity is less helpful than history. Every practice has had small beginnings, and some practices create new arrangements based on

old traditions. Each Presidential invocation of God is both new and old. State mottos, constitutional preambles, the Pledge of Allegiance, and creche displays began at a point in history. Christmas did not begin as a widely celebrated holiday, but it has become so. Pressing ubiquity too much would mean creches were once impermissible but are now permissible because more people celebrate Christmas. At an extreme, an established church could become permissible because most people have acted in a way over time to establish religion.

Ubiquity is helpful only to the extent that it illuminates historical tutelage, one of the two aspects of history, the other being historical meaning. Historical tutelage looks at historical practices to distinguish between mere shadows of religious acknowledgment versus real threats of establishment. References to God in the country's mottos, constitutions, historical documents and even legislative prayers, have neither established nor tended to establish religion and would, therefore, be regarded as mere shadows of religious acknowledgment, not establishments.

Whether an acknowledgement of religion has sparked controversy is not helpful in discerning between acknowledgment and establishment. Longstanding practice and the lack of controversy do not create "a vested or protected right" to violate the Constitution *Id.*

at 39. However, the presence of controversy can undercut a constitutional practice. *Id.* Litigation is, by definition, a controversy. Relying upon controversy could create a "heckler's veto," as happened in this case, which would doom not only legislative prayer, but such acceptable practices as Sunday closing laws and school funding, which this Court has upheld as constitutional.

What is relevant, then, is whether history reveals that a practice has established or tended to establish religion. An historical meaning analysis should look for the best understanding of the purposes of the Establishment Clause, for which there is some agreement. Some general assumptions regarding the meaning of the Establishment Clause include that government cannot establish a church, discriminate among sects, or objectively compel a certain sectarian belief. There are divergent opinions beyond these areas, but this Court has found historical meaning to be relevant in upholding legislative prayers, property tax exemptions, and creches, noting that "an unbroken practice ... is not something to be lightly cast aside."

This Court has declared that the Establishment Clause permits the following government funding of religious activities or education: vouchers, scholarships, bus transportation, books, teaching materials, projectors, onsite training by public school

teachers, interpreters, remedial supplemental education, buildings, revenue bonds, and construction grants.[11] This Court has also approved property tax exemptions, a government-funded hospital run by a Roman Catholic order, and suggested that Medicare funds used by sectarian healthcare providers pose no constitutional problem.[12] Although a

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[11] *See e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 667-68 (2002)(vouchers); *Mitchell*, 530 U.S. at 793 (educational materials); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(interpreters); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (counseling); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986)(scholarship); *Mueller v. Allen*, 463 U.S. 388 (1983)(tax deduction for tuition); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976)(grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973)(revenue bonds for college facilities); *Tilton v. Richardson*, 403 U.S. 672 (1971)(grants for college facilities); *Board of Educ. v. Allen*, 392 U.S. 236 (1968)(loan of textbooks).

[12] *See e.g., Zelman*, 536 U.S. at 667-68; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982)(property grant); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)(property tax exemption); *Quick Bear v. Leupp*, 210 U.S. 50 (1908)(treaty and trust funds may be used for

guiding principle in government funding cases centers on neutrally available benefits and private choices, the fact remains the result of such, at least indirectly, is that the religious mission of the institution is advanced. In some cases, children who forgo government funding may lose out altogether on obtaining religious benefits. If the Establishment Clause reaches its apex in government funding of sectarian institutions and education and if government may at least fund such indirectly, the result of which is to advance the religious mission, then how much less does a passive display on law and government containing one religious/secular document not violate the Establishment Clause? If funding cases have not raised the shadow of an established religion, then the Foundations Display will not. Surely this Court is "unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage, long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of

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religious education); *Braunfield v. Roberts*, 175 U.S. 291 (1899)(religious hospital).

establishment of a state church is farfetched indeed."[13]

The same is true of public acknowledgments such as the legislative prayer at issue here, which this Court has described as "part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* Replacing *Lemon* with a test based upon history would properly differentiate between this tolerable acknowledgement and a true establishment.

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[13] *Lynch*, 465 U.S. at 686. *See also Aguilar v. Felton*, 473 U.S. 402, 419-20 1985)(Burger, C.J., dissenting)("It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks"). The view of Justice Burger, who authored *Lynch*, was later accepted by the majority when *Aguilar* was overruled by *Agostini*, 521 U.S. 203 (1997). History confirms the Archbishop is still held at bay.

### B. A Coercion Analysis Should Focus On Compulsion Rather Than Psychological Coercion.

The coercion factor in the proposed objective test would be more akin to legal compulsion than to psychological coercion. This would comport with the original intent of the Framers of the Constitution and this Court's pre-*Lemon* jurisprudence. *Van Orden*, 545 U.S. at 693-694 (Thomas, J. concurring).

The Framers understood that an establishment necessarily involved "actual legal coercion." *Id.* at 693. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (SCALIA, J., dissenting). "Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, THE ESTABLISHMENT CLAUSE 4 (1986)." *Id.* "Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of

Anglican ministers, and were taxed for the costs of building and repairing churches. *Id.*, at 3-4." *Id.* at 641-642. "In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers." *Van Orden,* 545 at 693 (Thomas, J. concurring). "[G]overnment practices that have nothing to do with creating or maintaining ... coercive state establishments simply do not "implicate the possible liberty interest of being free from coercive state establishments." *Id.* at 693-694.

Governmental acknowledgments of religion are pervasive. The mere presence of a religious symbol or statement that is pervasive historically and physically does not send a message of compulsion. Acknowledgments such as passive displays or invocations are far less likely to pose a real threat of coerced belief than are other forms of governmental involvement with religion such as the state churches that were a concern for the Founding Fathers. "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty." *Newdow*, 542 U.S. at 39.

As this Court said in *Marsh*, "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious

organizations." 463 U.S., at 791 (citations omitted). The "Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part, dissenting in part). "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." *Id.* at 662-663.

Mere recitation of an opening prayer does not "coerce anyone to support or participate in any religion or its exercise" and does not "give direct benefits to a religion in such a degree that it in fact establishes a state religion or tends to do so." *Id.* at 659. "[I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." *Id.* at 659-660. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662.

Consequently, including coercion in the form of legal compulsion as part of an alternative to *Lemon* would comport with this Court's historical Establishment Clause jurisprudence and with the Framer's intent. This more objective standard would relieve the confusion and chaos that *Lemon* has spawned and would provide local governments such as Petitioner with the kind of definitive guidance that is necessary to retain historically significant religious observances without fear of being sued by offended observers.

## CONCLUSION

Permitting litigants to challenge longstanding governmental acknowledgements of religion based upon mere status as offended observers strips Article III of meaning in Establishment Clause challenges. The ever expanding concept of standing exemplified by the offended observer status is a direct result of this Court's continuing use of the endorsement test and its reasonable observer standard as part of the *Lemon* test. This case presents an opportunity to finally abandon the unworkable and ineffective *Lemon* test and replace it with an objective standard based upon history and coercion.

Amicus respectfully requests that this Court take the opportunity to euthanize *Lemon* and provide lower courts and governmental agencies with a workable objective standard.

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