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No. 08-472

In The

Supreme Court of the United States

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

Petitioners,

v.

FRANK BUONO,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF AMICUS CURIAE OF FIDELIS CENTER FOR LAW AND POLICY AND CATHOLICVOTE.ORG IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The amicus curiae adopts the questions presented by the Petitioners.

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INTEREST OF THE AMICI[1]

Fidelis Center For Law & Policy ("Fidelis") is a not-for-profit public interest organization that is dedicated to the sanctity of life, religious liberty, marriage and family. In an effort to protect and promote these fundamental rights and institutions, Fidelis engages in public education and public interest litigation.

Fidelis submits this brief on behalf of itself and those who support CatholicVote.org, a nonpartisan voter education program devoted to building a Culture-of-Life, a culture that embodies in its law respect for the fundamental rights and institutions described above. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religious tradition.

Fidelis and CatholicVote.org believe that our great nation arose from the fruitful interplay of religion and natural law philosophy that are at the heart of the Judeo-Christian tradition and the founding of this nation. Throughout our national experience religious wisdom, as mediated through the Judeo-Christian tradition, has informed our civil society, inspired civic virtue, and promoted the common good.

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[1] Counsel of Record were given notice and did consent to the filing of this brief. No counsel for any party participated in any way to the drafting of this brief and no party contributed funds for the brief.

We believe that the public recognition of religion is an appropriate tribute to the important contribution that religion has made to our national experience. For these reasons Fidelis and Catholic Vote believe that this Supreme Court of the United States should hold that the public recognition of religion at issue in this case does not create an injury cognizable under the religious liberty provision of the First Amendment.

REASON FOR GRANTING THE PETITION

This Court has granted certiorari to consider whether the Respondent, Frank Buono, has standing to advance a claim that the display of a Latin Cross placed on public land to commemorate soldiers who gave their lives for this country in World War I violates the Establishment Clause. More specifically, this Court will decide whether Buono, who has no objection to the public display of a cross, has standing to challenge its display because others cannot display symbols in the public park where the cross has been placed. For the reasons stated by the petitioner and other amici, this amicus agrees that Buono does not have standing.

Fidelis Center for Law & Policy writes separately to urge this Court to use this case to correct a fundamental flaw in Establishment Clause jurisprudence that is inextricably interwoven with the standing issue this court must address, i.e. the "endorsement" test. In the courts below, Buono was found to have

standing based on precedent from this Court lending credence to a claim that the display of a cross on public property is an "endorsement" of religion that violates the Establishment Clause. It is this flawed interpretation of the Establishment Clause that makes mere offense at the public recognition of religion an injury that is cognizable under the First Amendment. It is the recognition of this "offense" as a cognizable injury that provides the basis for the injury in fact needed to satisfy the standing required under Article III.

Because this Court must necessarily address the injury in fact needed to advance an Establishment Clause claim in order to determine if Buono has standing, it should take this opportunity to reconsider whether dismay arising from the display of a religious symbol on public property can support an injury cognizable under the Establishment Clause. In doing so, this Court should squarely hold that an objection to display of a religious symbol on public property does not create a cognizable injury in fact sufficient to support the standing needed to advance a claim under the Establishment Clause. The Establishment Clause was meant to protect the free exercise of religion; it was not meant to insulate citizens from mere discomfort at the sight of a religious symbol. To hold that the display of a religious symbol gives rise to a cognizable injury under the Establishment Clause trivializes, and ultimately undermines,

the important liberty interest that provision was intended to protect.

This Court Should Make Plain That Offense Arising From The Public Recognition Of Religion Of The Kind At Issue Here Creates No Injury Cognizable Under The Establishment Provision Of The First Amendment.

In connection with its consideration of whether Buono has an injury in fact that is cognizable under the Establishment provision of the First Amendment, this Court should make plain that mere feelings of personal offense or discomfort are insufficient to support standing for an Establishment Clause claim. In so holding, this Court will bring standing under the Establishment Clause back to the principled core of its standing jurisprudence under the First Amendment and cut off a highly problematic overextension of its standing doctrine that has produced confusion and inconsistency.

A brief review of the overarching trajectory of this Court's precedent under the Establishment Clause supports the request made here. This court's early Establishment Clause cases arose from claims that civil authority was being used to coerce support for religion. In *Bradfield v. Roberts*, 175 U.S. 291, 293-94 (1899), this court rejected such a taxpayer's claim holding that merely giving financial assistance to a hospital run by a particular religious denomination did not violate the Establishment Clause. In so

holding this Court emphasized that the hospital was conducting completely secular operations and tax dollars were not being used to support religious programs or religious beliefs so that government had not coerced support for religion.

Similarly in *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court entertained a taxpayer's claim that New Jersey violated the First Amendment prohibition of laws respecting an establishment of religion when it used tax-raised funds to pay the bus fares of parochial school pupils. The Court found that the program, which reimbursed parents for costs incurred to transport their children, did not amount to a use of the taxing power to compel support for the parochial schools. As a result this Court held that the program did not violate the First Amendment. *Id.* at 18.

Although *Bradfield* and *Everson* decided taxpayer claims on the merits, they did not specifically address the injury in fact required to advance a taxpayer claim under the Establishment Clause. In both cases, the Court took for granted that the Establishment Clause prohibited the use of civil authority to compel support for religion.

The Court confirmed this understanding of the Establishment Clause and its implicit consequences for standing in *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast,* this Court held that because the Establishment Clause was intended to operate as a specific limitation on the tax-and-spend power a taxpayer who

alleged that tax monies were spent to support religion did state a claim cognizable under the Establishment Clause. In so holding, this Court explained that the Establishment Clause was meant to prohibit coerced support for religion and that the coerced support for religion was the injury in fact that provided standing under the First Amendment. In subsequent cases challenging the use of public funds to support religion, the Court often assumed and sometimes explicitly held that standing was premised on the injury in fact recognized in *Flast*, which authorized taxpayer standing. *Doremus v. Board of Education,* 342 U.S. 429, 434 (1952); *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988). *See Tilton v. Richardson*, 403 U.S. 672, 665-88 (1971); *Roemer v. Bd. of Public Works,* 426 U.S. 736, 744 (1976); *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789 (1973); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

On the other end of the spectrum, the taxpayer standing cases had also provided an opportunity for this Court to define the sort of injury that is *not cognizable* under the Establishment Clause. In V*alley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982), plaintiffs challenged the government's transfer of public property to a religious group. This court held that the plaintiffs did not suffer any actual harm and therefore did not have standing. This Court explained that the plaintiffs lacked standing because they "fail[ed] 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 [and] that is not an injury sufficient to confer standing." *Id.* at 464.

More recently in *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007), this court confirmed the main thrust of its taxpayer standing cases when it held that plaintiffs who opposed the President's faith-based community initiatives based on their stated opposition to government endorsement of religion and their sense that the presidential initiative constituted such an endorsement. In holding that the plaintiffs could not demonstrate the concrete injury in fact needed to support taxpayer standing, the Court relied upon its earlier decision in *Doremus v. Board of Education*, 342 U.S. 429 (1952), where this Court found a state taxpayer lacked standing because he not show that funds were expended to support religious exercises and absent proof of the "direct dollars-and-cents injury" cognizable under the Establishment Clause, the plaintiff's injury reduced to a (non-cognizable) "religious difference." *Hein*, 551 U.S. at 439 (quoting *Doremus*, 342 U.S. at 435).

These cases mark out the main line of this Court's Establishment Clause precedent. By means of these decisions the Court had defined the injury cognizable under the Establishment Clause with an overarching consistency and crafted a stable body of standing precedent that was capable of principled and consistent application. At one end of the continuum it was clear that government could not coerce

support for religion and a program in which government did so gave rise to an injury cognizable under the Establishment Clause, the kind of concrete injury in fact needed to support standing. On the other end of the continuum this Court had made plain that mere offense at perceived government support for religion was not cognizable under the Establishment Clause, or put differently, was an insufficient injury in fact to support standing.

But beginning with *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), this court lent credence to the far-fetched notion that a feeling of discomfort occasioned by a public recognition of religion was cognizable under the Establishment Clause and therefore constituted a sufficient injury in fact to support standing. In that case the Court relied upon the idea that mere public recognition of religion could give rise to a cognizable injury under the Establishment Clause because "endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 625. It is this notion of endorsement which provides the basis for Buono's standing in this case. Later cases applying this notion produce results that must candidly be described as mystifying. *See Van Orden v. Perry*, 545 U.S. 677 (2005); *cf. McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005).

Fidelis respectfully submits that the endorsement test represents an unthinking and fatally flawed overextension of this Court's First Amendment standing precedent. For one thing, this Court must see that the very idea that perceived endorsement creates an injury cognizable under the Establishment Clause is inconsistent with decisions wherein this Court has itself acknowledged on any number of occasions the role of religion in our national experience and has indicated that the public recognition of religion does not violate the Establishment Clause.[2] Indeed, it defies common sense to suggest that a constitution which by its terms specifically protects the free exercise of religion is unconstitutional by virtue of "endorsement" of religion.

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[2] *Lynch v. Donnelly,* 465 U.S. 668, 674 (1984); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963); *Engel v. Vitale*, 370 U.S. 421, 434 (1962); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland*, 366 U.S. 420, 431 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 30-33 (2004) (giving several instances of public recognition of religion: George Washington using a Bible at his inauguration, the proclamation of Thanksgiving for being grateful to God, Lincoln mentioning the rights God gives, Woodrow Wilson asking for a declaration of war saying, "God help her," Theodore Roosevelt asking for the blessing of God while taking the oath of office, Dwight D. Eisenhower addressing soldiers asking for God's blessing upon them, "In God We Trust" on currency and Court Marshalls asserting, "God save the United States and this honorable Court.").

In addition, the fanciful notion that offense arising from a symbolic recognition of religion by government gives rise to an injury cognizable under the Establishment Clause is inconsistent with this Court's broader standing jurisprudence under the First Amendment. Just as this Court has recognized that offense of the speech of others is not cognizable under the First Amendment, *see Cohen v. Cal.*, 403 U.S. 15, 22 (1971), this Court has recognized that disagreements with government speech are a daily part of life and do not give rise to a cognizable injury. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (Government's placement of military recruiters at school was not found a violation of the constitution despite offense taken by faculty it did not "sufficiently interfere" with First Amendment rights of faculty or schools). Even more to the point given that the religious symbol here was placed by private citizens, this Court has refused to find a cognizable injury based on offense at the speech of others, *Tex. v. Johnson*, 491 U.S. 397, 408 (1989), and it has held that government has no interest in protecting the religious sensibilities of its citizens. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). Taken together, these cases show that a feeling of offense arising from the public recognition of religion should not be deemed cognizable under the Establishment Clause and should be insufficient to confer the concrete injury in fact needed to support standing. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (where a father could

not sue on behalf of his daughter, his offense was not sufficient for standing), *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Precisely because the notion that offense at public recognition of religion gives rise to a cognizable injury is so far removed from the gravamen of this Court's First Amendment standing precedent, the endorsement test has produced bizarre and inconsistent results belying any notion that it is a principled rule of law. As Judge Easterbrook has noted, efforts to decide whether a given governmental recognition of religion gives rise to a cognizable injury has forced courts to essay opinions more commonly associated with an interior decorator than Article III judges. *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J. dissenting). The very notion that whether public recognition of religion is unconstitutional turns on color of trees around a religious symbol or whether a sign says "Glory to God" or "Happy Holidays" is both bizarre and unbecoming given the history of our nation and the important interest that the religious liberty provision of the First Amendment is designed to protect. Judge Easterbrook is not alone. *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in part and dissenting in part) (saying that the endorsement test "threatens to trivialize constitutional analysis"), *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (O'Scannlain, concurring in judgment but disagreeing with the legal analysis and the endorsement test).

For these same reasons, leading academics have criticized the endorsement test. Jesse H. Choper has criticized the endorsement test and argued that

> 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.

Symposium, Beyond Separatism: Church and State: The Endorsement Test: Its Status and Desirability, 18 J. L. & Politics 499, 521.

Likewise, Steven D. Smith has noted that the term "outsider" represents nothing more than a person who disagrees with what the government is saying or doing and although there will always be someone who disagrees with a governmental initiative, that does not mean that government cannot act. The reason is simple, the citizen who disagrees is not injured in any meaningful sense because this "does not prevent such citizens from voting, running for office, advocating their own positions, serving on juries, or claiming the full panoply of rights extended by state and federal law, those citizens are considered to be fully protected in their freedoms of belief and expression." *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the*

"No Endorsement" Test, 86 Mich. L. Rev. 266, 310. Put another way, the dismayed citizen does not have the kind of concrete injury in fact needed to support standing because there is no meaningful interference with the individual citizen's First Amendment rights.

In the same vein, William P. Marshall has noted that,

> one cannot easily maintain the assertion that offensive governmental action is unconstitutional. Much of what the government does is offensive . . . governments erect monuments to war without regard to the sensibilities of pacifists . . . states . . . incorporate Confederate symbols . . . the symbol of the Confederacy is an obvious affront to blacks. Memorials, dedicated to the Unknown Child, may offend the sensibilities of pro-choice advocates. All of this occurs without running afoul of the Constitution.

66 Ind. L.J. 351, 359. Citing *Joseph Burstyn, Inc.*, *supra*, Marshall asserts that if "the first amendment's speech clause prohibits the state from acting to protect religious sensibilities . . . it would be inconsistent for the first amendment's establishment clause to simultaneously require that religious sensibilities be protected." 66 Ind. L.J. 351, 362.

Finally, Michael W. McConnell has pointed out that the endorsement test is inconsistent with the idea that the government is supposed to accommodate religion. 59 U. Chi. L. Rev. 115, 154. As McConnell notes, "the general rule is that plaintiffs who

suffer no personal injury other than the psychological consequence presumably produced by observation of conduct with which one disagrees lack standing to sue." 59 U. Chi. L. Rev. 115, 165. The notion that the subjective, psychological dismay of a citizen who is offended by the public recognition of religion produces an injury cognizable under the Establishment Clause is so chimerical that McConnell described the endorsement test as, "nothing more than an application to the Religion Clauses of the principle: I know it when I see it." *Id.* at 148.

This Court should use this case to disavow the far-fetched notion that dismay arising from the public recognition of religion gives rise to an injury cognizable under the Establishment Clause, an injury in fact sufficient to support standing. The whole notion is inconsistent with the history of our nation, which has featured a wholly appropriate recognition of the importance that religious conviction plays in the lives of our citizens and our national experience. It is inconsistent with the text of the First Amendment, which specifically recognizes and protects the free exercise of religion. It lies far outside the main thrust of this Court's precedent under the Establishment Clause, which focused on coerced support for religion; and it is inconsistent with this Court's broader standing jurisprudence under the cognate provisions of the First Amendment, where offense taken at the speech of government or other citizens is simply not cognizable. Attempts to apply the notion have produced results that are bizarre and inconsistent; and learned commentators have demonstrated that the

idea is deeply flawed. This Court should use its elaboration of standing in this case to make plain that "offense" at the display of a religious symbol on public property does *not* give rise to an injury that is cognizable under the First Amendment.

CONCLUSION

From the beginning this Court has recognized that the prohibition on laws respecting an establishment of religion contained in the First Amendment was intended to prevent the civil authorities from coercing support for religion. At the same time, this Court has recognized that public recognition of religion does not violate the First Amendment. In these two complementary lines of cases this Court long recognized implicitly that any feeling of discomfort produced by the public recognition of religion was not cognizable under the Establishment Clause or, put another way, such discomfort did not give rise to a concrete injury in fact sufficient to support standing.

In the case at bar, this Court must necessarily determine whether Buono has standing to advance a claim based on the Establishment Clause that rests upon nothing more than his dismay that only one religious symbol is displayed on Sunrise Rock in the Mojave Desert National Preserve. In order to do so, this Court must address whether and how the public recognition of religion creates an injury cognizable under the Establishment Clause. This Court should

take this opportunity to make plain that any discomfort that may arise from the public recognition of religion is not cognizable under the Establishment Clause. In so doing this Court will confirm the gravamen of its precedent under the First Amendment and disavow a far-fetched notion that has proven incapable of the principled application that characterizes the rule of law.

Respectfully submitted,

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