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

BRIEF OF *AMICUS CURIAE* THE AMERICAN LEGION DEPARTMENT OF CALIFORNIA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS* IN THIS CASE[1]

The American Legion Department of California represents some 130,000 Legionnaires organized in Posts, Districts, and Areas throughout the State of California. The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans organization. Since its inception, The Legion has maintained an ongoing concern and commitment to veterans and their families, and is a tireless advocate for veterans' rights. It is dedicated to preserving American values, promoting patriotism, and encouraging selfless service and sacrifice among the Nation's youth. And it seeks to honor the sacrifice for our country of those men and women of our armed forces who have gone before us, support those who continue to sacrifice for our country today, and prepare those who will be called to sacrifice for all of us in the future.

To this end, the Department of California has established the Defense of Veterans Memorials Project, through a working relationship with the Alliance Defense Fund. The express mission of this project is to defend veterans memorials throughout California, including the memorial that is the subject of this lawsuit.

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[1] All counsel of record have consented to the filing of this brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The relaxed standing rule for Establishment Clause claims authorized by the Ninth Circuit's decision below poses a grave threat to veterans organizations, like *amicus*. These groups commonly use crosses in veterans memorials because the cross is a uniquely transcendent symbol representing the decision to lay down one's life for the good of others. Under the Ninth Circuit's decision, a plaintiff with any ideological objection to a memorial cross on public property can challenge the memorial's constitutionality in court – even when the objection is based entirely on perceived harm to others.

The unpredictability of Establishment Clause cases in general makes it impossible for government officials and veterans organizations to know when a particular memorial is unconstitutional. Allowing proliferation of cases challenging these memorials through permissive standing only compounds the problem. To stem this confusion, this Court should clarify that Article III requires plaintiffs to have a concrete injury to bring an Establishment Clause case, and order this case be dismissed for lack of standing.

ARGUMENT

I. The Ninth Circuit's "offended observer" standing decision is inconsistent with Article III and the decisions of this Court.

This *amicus* agrees with the United States that the plaintiff lacks standing to bring his Establishment Clause claim. The Ninth Circuit's holding to the contrary is symptomatic of a burgeoning infirmity among the circuit courts: diluting Article III standing requirements so that plaintiffs may bring lawsuits alleging nothing more than their offense to a passive public display with a religious element. These delicate plaintiffs with eggshell sensitivities – who claim deep offense at the perceived acknowledgement of any beliefs that conflict with their own – then seek court orders censoring the religious display, as a type of heckler's veto. *See Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 684 (6th Cir. 1994) (Guy, J., concurring) (arguing that the "psychological damage" from viewing a religious portrait does not create a legal injury, and holding otherwise creates "a class of 'eggshell' plaintiffs of a delicacy never before known to the law").

This case is particularly troublesome because the Ninth Circuit lowered the bar even further for an "offended observer" to establish Article III standing. The plaintiff in this case does not claim, as in most memorial cross cases, that he has standing because he is offended by the presence of the cross itself. Rather, he claims – and the Ninth Circuit accepts –

that he has standing because he is ideologically opposed to the government displaying a cross without opening a forum for others to erect their own monuments. *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004). The plaintiff does not wish to erect his own monument; he is simply offended that others are not free to do so. Thus, the plaintiff's standing rests entirely on his perception of harm to *others*.

Contrary to the Ninth Circuit's new rule, this Court has been clear that standing requires some concrete actual or threatened personal injury. Article III standing cannot come from perceived harm to mere psyche, feelings, or ideology. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982). Nor can it come from merely asserting the rights of others. This Court has long held that "the general rule is that a litigant may only assert his own constitutional rights or immunities." *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) (finding the plaintiff lacked standing for this reason) (internal quotation marks and citation omitted).

The Court has not wavered from *Valley Forge*'s "irreducible minimum" in the two decades since it decided that case. *See Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 771 (2000) (standing requirements are "an essential and unchanging part of Article III's case-or-controversy requirement and a key factor in dividing the power of government between the courts and the two political branches") (internal quotation marks and citations omitted). This requirement is generally strict: even in environmental lawsuits, where the

harm is naturally more dispersed, plaintiffs still must demonstrate a direct and particularized injury to their unique interest. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (stating that plaintiffs allege injury in fact when they demonstrate that they uniquely are persons for whom the aesthetic and recreational values of the affected area will be lessened by the challenged activity, as opposed to citizens with a general interest in a clean environment); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (holding that "general averments" and "conclusory allegations" are inadequate when there is no showing that the particular acres out of thousands were affected by the challenged activity).

The plaintiff here tries to muster support for its position from *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), attempting to stretch a parallel between a law that required school children to begin their day with Bible reading and prayer, and occasionally driving past a passive memorial in a national preserve. But this Court has already rejected this type of far-fetched comparison: "The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but 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. In other words, the threshold standing question cannot be conflated with the ultimate substantive question, as the Ninth Circuit did in this case. The *Schempp* plaintiffs had a concrete injury because the challenged law required

that suggestible, captive schoolchildren be led in daily religious exercises. *Schempp*, 374 U.S. at 205-208. An adult choosing to drive past a passive memorial containing a cross is not required, coerced, or even encouraged to view the display, much less agree with any particular religious tenet.

In short, without concrete injury, Article III cannot be satisfied – the Constitution refused to give every concerned bystander a free pass into court.[2] Certainly, all speech has potential to offend, but insult without injury is not enough to create a case or controversy.

II. The Ninth Circuit decision has added to the wildly divergent views among the circuit courts about how to properly evaluate Establishment Clause claims.

A. The circuit courts frequently disagree about what constitutes sufficient harm to confer Article III standing.

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[2] This Court has emphasized the fundamental importance of the standing requirements to the entire framework of our constitutional form of government. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers"); *Lujan*, 504 U.S. at 559-60 ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts"); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (standing inquiry "serves to identify those disputes which are appropriately resolved through the judicial process").

Despite this Court's clear teachings to the contrary, there remains a great deal of confusion among circuit courts, among litigants, and among individual panels of judges on what is sufficient harm to confer standing. It is becoming increasingly common for circuit court panels to split into significantly divergent opinions on standing. *See, e.g., Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (producing three completely contrasting views on whether plaintiffs had requisite concrete harm for standing in an environmental case); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (denying standing with an opinion concurring in the judgment, over a dissent); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc) (rehearing produced a majority, a special concurrence, and two dissents on whether plaintiffs had offended observer standing for an Establishment Clause challenge); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 794-95 (9th Cir. 2008) (Kleinfeld, dissenting) (noting that the majority adopted the same offended observer standing argument that it flatly rejected earlier in the case).

At the same time, many federal judges have vehemently criticized the notion that a plaintiff can satisfy Article III's standing requirements merely by expressing offense at any government complicity in religion. *See, e.g., Washegesic*, 33 F.3d at 684-85 (Guy, J., concurring). Judge Easterbrook of the Seventh Circuit has addressed this issue at some length in two different opinions. *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005) (Easterbrook, J., dissenting); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (Easterbrook, J., dissenting). He

points out that *Valley Forge* requires courts to distinguish between injured and ideological plaintiffs, despite the line of circuit court decisions that have attempted to reduce *Valley Forge* to a "hollow shell." *Books*, 401 F.3d at 871.

Compounding this confusion is the fact that outside the Establishment Clause arena, "offended observers" have no standing to challenge the government's views on particular issues. Governmental messages to support the war in Iraq or to stop smoking or to reduce greenhouse emissions may be deeply offensive to certain people, but they do not give standing for those offended to go to court to censor the message. Indeed, while the Ninth Circuit's flawed opinion gave the plaintiff in this case his day in court, the fallen soldier's mother who is deeply offended by the plywood box that now hides the veterans' memorial from public view has no similar legal recourse. Lack of a judicial remedy does not silence these citizens, however. Their remedy is in the political process: "When the government expresses views in public debates, all are as free as they were before; that these views may offend some and persuade others is a political rather than a constitutional problem." *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120, 133 (7th Cir. 1987) (Easterbrook, J., dissenting).

Some argue that if courts do not relax standing requirements for plaintiffs to file such actions, then no one would have standing to challenge government actions that might violate the Establishment Clause. But this Court has already explained that the "assumption that if respondents

have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (citation omitted). Judge Easterbrook concurs, noting:

> If because no one is injured there is no controversy, then the Constitution demands that the court dismiss the suit. There is no exception for subjects that as a result cannot be raised at all. . . . If there is no case, then there is no occasion for deciding a constitutional question, and we should not mourn or struggle against this allocation of governmental powers.

Harris, 927 F.2d at 1422 (Easterbrook, dissenting) (citations omitted).

Consistently requiring plaintiffs to show concrete injury, even in Establishment Clause cases, will bring order to an area of law inundated with lawsuits brought by plaintiffs with attenuated standing to challenge the government's actions.

B. A relaxed standing requirement is particularly troublesome when combined with the uncertainty of this Court's Establishment Clause precedent.

Members of this Court have candidly acknowledged that "in respect to the First Amendment's Religion Clauses . . . there is 'no

simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.'" *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in judgment) (quoting *Schempp*, 374 U.S. at 306) (Goldberg, J., concurring)). Indeed, Establishment Clause jurisprudence has proven to be one of the most unpredictable areas of American law. Since at least the decision in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947), this Court has struggled to find a consistent Establishment Clause test. As the Court has recognized, "[t]here is no exact science in gauging the entanglement of church and state." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 766 (1976). This Court has also noted that Establishment Clause challenges involve fact-specific inquiries that will often lead to varying results. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 607-08 (1989); *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment) (stating that "no exact formula can dictate a resolution to such fact-intensive cases").

It is impossible to know with any degree of certainty whether an aspect of a government display somehow violates the Establishment Clause when this Court and the courts of appeal are unable to reach a consensus. Although it appears that the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), remains the dominant Establishment Clause test, the Court has also "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (citation omitted). This

Court has, in fact, applied several different tests to Establishment Clause cases. *See id.* (endorsement test); *Lee v. Weisman*, 505 U.S. 577 (1992) (psychological coercion test); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (neutrality test); and *Marsh v. Chambers*, 463 U.S. 783 (1983) (historical test). And several Justices have explicitly questioned *Lemon*'s continued value. *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (citing instances in which Justices Scalia, Thomas, Kennedy, O'Connor, and Chief Justice Rehnquist have criticized the *Lemon* test). Nonetheless, no test has yet conclusively supplanted *Lemon*.

Circuit courts have long lamented that this Court's Establishment Clause tests are difficult to apply and lead to inconsistent results. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proved ineffective."); *ACLU of N.J. v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (Nygaard, J., dissenting) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Barnes v. Cavazos*, 966 F.2d 1056, 1063 (6th Cir. 1992) ("The *Lemon* test has

received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon*'s analytical framework."); *Harris*, 927 F.2d at 1419 (Easterbrook, J., dissenting) ("Applying *Lemon* . . . to religious symbols on city seals is no cakewalk. *Lemon*'s 'three-part test' is not a test. It is a triad of questions, the answers to which conflict in all interesting cases.").

The recent Ten Commandments decisions by the Court highlight the confusion that the government faces in trying to gauge whether a particular display that includes religious elements complies with the Establishment Clause. In *McCreary County*, a plurality found that a public display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause. 545 U.S. at 881. But *Van Orden*, also a plurality decision, held that a public display of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause. 545 U.S. at 692. The plurality in *McCreary* applied the *Lemon* test, 545 U.S. at 864, but the plurality in *Van Orden* jettisoned *Lemon* in favor of an analysis "driven both by the nature of the monument and by our nation's history." 545 U.S. at 686 ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it is not useful in dealing with the sort of passive monument that Texas has created on its Capitol grounds"). Thus, the plurality in each case applied a different test and came to a different outcome regarding the public display of the Ten Commandments. After the dust cleared, only Justice Breyer thought that both decisions came to the right

result. *McCreary*, 545 U.S. at 850 (joining in the plurality); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring).

Regardless of what one thinks the outcome of the Establishment Clause decisions should be, it is beyond dispute that they are highly unpredictable, even for constitutional scholars. The permissive standing rule adopted by the Ninth Circuit, combined with the unpredictable Establishment Clause jurisprudence of this Court, makes it impossible for anyone to know with any degree of certainty when it is constitutionally permissible to use crosses or other religious symbols in public displays.

III. The Ninth Circuit's relaxed standing requirement threatens countless existing memorials and severely chills the government's willingness to allow future memorials to be erected.

The uncertainty that clouds this Court's Establishment Clause and standing jurisprudence poses a grave threat to the military and to veterans organizations, like *amicus*, that commonly use crosses in memorial displays. This has a substantial chilling effect on these groups' ability to erect such memorials, and on the government's willingness to permit such memorials on public land.

This threat is particularly grave because the cross is a uniquely transcendent symbol representing the decision to lay down one's life for the good of others. Eliminating it from current or

future veterans memorials, like the Mojave Desert Veterans Memorial, will blunt the core message these memorials seek to communicate. As one historian explained, "the cross is an emblem more universal in use than any other in the world." George Willard Benson, *The Cross: Its History and Symbolism* 61 (1934). The Latin cross is commonly used on military memorials to honor veterans who have given their lives in service to this country. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1215-16 (S.D. Cal. 2008) (listing examples). And one of the most enduring and well-known images honoring our nation's veterans are the rows of white crosses that memorialize America's war dead in military cemeteries around the world. These international cemeteries house the remains of almost 125,000 fallen American servicemen and servicewomen. *See* American Battle Monuments Commission, Cemeteries, http://www.abmc.gov/cemeteries/index.php (last visited June 1, 2009). The military uses a cross headstone for soldiers from a multitude of religious traditions, and those with no religious affiliation at all. *See, e.g.,* American Battle Monuments Commission, *Normandy American Cemetery and Memorial*, at 18-19, http://www.abmc.gov/cemeteries/cemeteries/no_pict.pdf (last visited June 1, 2009) ("Each grave is marked with a white marble headstone, a Star of David for those of the Jewish faith, a Latin cross for all others.").

The military and veterans organizations use the cross in other ways as well. It is used as a symbol to honor extreme gallantry and heroism in decorations such as the Distinguished Service Cross

(10 U.S.C. § 3742), the Navy Cross (10 U.S.C. § 6242), the Air Force Cross (10 U.S.C. § 8742), and the Distinguished Flying Cross (10 U.S.C. § 3749). And use of the cross as an "emblem for valor and bravery" is not unique to our military; rather, "[f]rom the time of the Crusades until the last great war, decorations for chivalry and for distinguished service have been made in the form of a cross." Benson, *supra*, at 57.

Crosses are also commonly used to symbolize death. The Montana American Legion, for example, has marked fatal traffic accidents throughout that state with white crosses for more than 55 years – over 2,000 markers have been erected to date. *See* Highway Fatality Marker Safety Program, http://www.mtlegion.org/programs/Marker.php (last visited June 1, 2009).

The tradition of using crosses to symbolize death and burial is rooted as much in culture as it is in religion. "[C]rosses are overwhelmingly employed in the design of memorials but apparently more as a matter of cultural integration, i.e., a reflex as opposed to an intentional or specific act of faith." Charles O. Collins & Charles D. Rhine, *Roadside Memorials*, 47 Omega: Journal of Death and Dying 221, 229 (2003); *see also* Jennifer Clark & Majella Franzman, *Authority from Grief, Presence and Place in the Making of Roadside Memorials*, 30 Death Studies 579, 591 (2006) (finding that crosses are "general markers of death and sacredness rather than purely Christian symbols"); Sylvia Grider, *Spontaneous Shrines in Public Memorialization, in Death and Religion in a Changing World*, 259

(Kathleen Garces-Foley ed., 2005) (noting that the practice of marking fatal car wrecks with roadside crosses is "deeply rooted in history" and an "integral feature of the cultural landscape throughout Central America, Mexico, and the Hispanic southwestern United States").

In short, the cross is one of the most common – and significant – symbols of our society. And the Ninth Circuit's relaxed standing requirement makes every cross on public property the potential subject of time-consuming and expensive litigation – solely because of one eggshell plaintiff's general offense to the cross or what may (or may not) be displayed next to it. Even when government officials believe that an Establishment Clause challenge would be meritless, the hassle and expense of such lawsuits and the fear of being saddled with attorney fees create a strong incentive for removing existing displays, and refusing to allow similar displays in the future. The end result: "a hostility toward religion that has no place in our Establishment Clause traditions," and the "very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) (citation omitted).

CONCLUSION

For more than two hundred and twenty-five years, millions of Americans have sacrificed their lives for their country. Their memories will long endure, etched in granite and marble, chiseled with a permanence that echoes their valiant lives. Every man and woman who fought our Nation's wars and

died in service is remembered in local, state, and national war memorials. It is disheartening to think that these memorials may be gutted because there are those who ignore the unique way the cross has universally honored the choice our soldiers made to lay down their lives for the good of the rest of us. If we cannot publicly acknowledge this Nation's religious history and heritage to honor those who have made the ultimate sacrifice, how can we as a Nation ever look into the face of youth to call on it to once again return to the altar of freedom and offer the same sacrifice given by generations before?

No memorial, however brilliantly conceived, can represent the sentiments of all those it is meant to serve. But conflicting sentiment, as in this case, does not create a constitutional injury. As such, *amicus* respectfully requests that this Court reverse the decision of the Ninth Circuit and order the case be dismissed because the plaintiff lacks standing.

Respectfully Submitted,

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