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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 FOR AMICUS CURIAE BOY SCOUTS OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* *

Boy Scouts of America ("Boy Scouts") and its local council in San Diego have petitioned this Court for *certiorari* in *Barnes-Wallace* v. *Boy Scouts of America*, 530 F.3d 776 (9th Cir.), *rehr'g denied*, 551 F.3d 891 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1222), a case that presents a standing question closely related to the standing question in *Buono* v. *Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.*, *Salazar* v. *Buono*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08 472). The standing decision in *Barnes-Wallace* relies heavily upon the Ninth Circuit's earlier decision in the *Buono* litigation, and the Ninth Circuit has now stayed proceedings in *Barnes-Wallace* pending this Court's decision on the merits in *Buono* and resolution of Boy Scouts' petition for *certiorari*. Boy Scouts has requested that the Court decide *Barnes-Wallace* and *Buono* together.

Boy Scouts of America

Boy Scouts is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Boy Scouts of America* v. *Dale*, 530 U.S. 640, 644 (2000). More than three million youth members and one million adult leaders are active in the traditional programs of Cub Scouting, Boy Scouting, and Venturing.

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* The parties have consented to the filing of this brief, and their consent forms have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Boy Scouts' mission is "to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law." All Boy Scouts and their adult leaders agree to follow the Scout Oath and Law,[1] which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight." *Id.* In adhering to these values, Boy Scouts does not accept as members atheists or agnostics, *see Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Randall* v. *Orange County Council*, *Boy Scouts of America*, 952 P.2d 261, 264-65 (Cal. 1998), or avowed homosexuals, *see Dale*, 530 U.S. at 653-54; *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 224-25 (Cal. 1998). The Plaintiffs in *Barnes-Wallace* do not challenge Boy Scouts' membership criteria.

Boy Scout Leases with the City of San Diego

The City of San Diego leases a campground in Balboa Park and a half-acre aquatic center on Fiesta Island in Mission Bay Park to the Boy Scouts' local council in San Diego and Imperial Counties ("San Diego Boy Scouts") for use by both Boy Scouts and the public. The lease of Camp Balboa to San Diego Boy Scouts is substantially

1. The Scout Oath states that "On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, / mentally awake, and morally straight." *Dale*, 530 U.S. at 649. The Scout Law provides that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Id.*

similar to leases to Girl Scouts and Camp Fire of adjacent campgrounds in Balboa Park. The Fiesta Island lease to San Diego Boy Scouts was made at the request of 42 youth-serving organizations to the City that San Diego Boy Scouts was the best organization to operate such a lease, and San Diego Boy Scouts thereafter built the aquatic center on Fiesta Island with $2.5 million of its own funds. Both Camp Balboa and the Youth Aquatic Center are open to the public on a first-come, first-served basis, and are used by the public extensively.

The City leased the two properties to San Diego Boy Scouts for entirely secular public purposes of providing camping and aquatic facilities for the public. Camp Balboa offers camping, swimming, archery, and meeting space to the public at nominal fees. The Youth Aquatic Center offers kayaks, canoes, sail and rowboats, and meeting space to youth groups at inexpensive rates. The City spends nothing on the properties leased to San Diego Boy Scouts. *See* 530 F.3d at 781. San Diego Boy Scouts maintains and administers the properties at no cost to the City, and the City and the public are beneficiaries of the millions of dollars San Diego Boy Scouts have invested in improvements. *See id.*

Establishment Clause Challenge to the Leases

Boy Scouts have been defending the leases for almost a decade of litigation brought by Plaintiffs who simply disagree with Boy Scouts' values. Plaintiffs, who identify themselves as an agnostic couple and their minor child and a lesbian couple and their minor child, 530 F.3d at 780, have never sought to use the Youth Aquatic Center or Camp Balboa, *id.* at 782. No person

seeking to use the properties has been discriminated against in violation of the leases. 275 F. Supp. 2d at 1282. Rather, Plaintiffs object to the leases based on what they "feel" and "believe" about Boy Scouts and sued to require the City to lease to another nonprofit that is more acceptable to them.

Plaintiffs alleged that the leases violate the Establishment Clauses of the U.S. and California Constitutions, the "No Preference" Clause of the California Constitution, the Equal Protection Clauses of the U.S. and California Constitutions, the "No Aid" Clause of the California Constitution, and California common law.

In a pair of decisions in 2003 and 2004, the district court held that because Boy Scouts' private speech requires that members promise to do their duty to God, the City established religion by negotiating the leases exclusively with San Diego Boy Scouts. *See* 275 F. Supp. 2d at 1273-76. Even though the process followed was public and entirely typical, *see id.* at 1274 75, and even though the City selected San Diego Boy Scouts because it "alone is best suited to fulfill the City's needs with respect to the parkland," *id*. at 1287, the district court held that exclusive negotiations with San Diego Boy Scouts were not neutral because, by definition, they were not equally open to "the religious, areligious and irreligious," *id.* at 1275. The district court concluded that the lack of competitive bidding was necessarily an Establishment Clause violation.

Having originally rejected municipal taxpayer standing and held in abeyance the federal standing question, the district court never addressed the federal standing question.

The Ninth Circuit's Standing Decision

After a protracted appeals process, the Ninth Circuit concluded that Plaintiffs had standing and certified questions concerning the application of the California Constitution to the California Supreme Court.[2] 530 F.3d at 779, 784-86. In particular, the Ninth Circuit held that Plaintiffs had injury-in-fact by being "offended" at Boy Scouts' traditional values, having "aversion to the facilities," and feeling "unwelcome there." 530 F.3d at 783, 784. Plaintiffs avoided property leased to San Diego Boy Scouts "because they object to the Boy Scouts' presence on, and control of, the land: They do not want to view signs posted by the Boy Scouts or interact with the Boy Scouts' representatives in order to gain access to the facilities." *Id.* at 784. The majority of the panel did not address the question of whether there is, in fact, an Establishment Clause violation here, but, assuming federal standing, the majority appears inclined to examine the case under the California Constitution instead.

In dissent, Judge Kleinfeld pointed out that the theory of standing accepted by the majority conflicts with this Court's requirement that there be a concrete injury rather than merely personal dissatisfaction. *Id.* at 794-95. He described the majority's new theory of standing as both unprecedented and a threat to the First Amendment:

> There is a distinction important to our liberties between having a legally protected

2. On April 1, 2009, the California Supreme Court declined to answer the questions certified by the Ninth Circuit.

> interest and having an interest in not being offended. Some people may feel 'degraded' or 'offended' because of the Boy Scouts' positions on reverence and sexuality but so long as their access is unimpaired, the feeling is no stronger a basis for standing than the feelings others may have about atheists or lesbians managing the facility. By treating the Barnes-Wallaces and Breens revulsion for Boy Scouts and consequent avoidance of a place the Boy Scouts manage as conferring standing, we extend standing to a claim that precedent does not support. And we assist in a campaign to destroy by litigation an association of people because of their viewpoints. A feeling of revulsion for others who have different beliefs, so strong that one feels degraded or excluded if they are present, does not confer standing.

530 F.3d at 798.

Boy Scouts sought *en banc* review, arguing that the majority's standing decision was inconsistent with *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), and precedent from other courts of appeals. The court of appeals denied en banc review on December 31, 2008. *Barnes-Wallace* v. *Boy Scouts of America*, 551 F.3d 891, 892 (2008). In a dissent joined by five other judges, Judge O'Scannlain concluded that "the three-judge panel majority's unprecedented theory creates a new legal landscape in which almost anyone who is almost offended by almost anything has standing to air his or

her displeasure in court." *Id*. This theory "contradicts nearly three decades of the Supreme Court's standing jurisprudence" and has not been accepted by any other circuit. *Id*. "Henceforth, a plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact." *Id*.

On March 31, 2009, Boy Scouts filed a petition for a writ of certiorari with this Court (No. 08-1222) seeking review of the Ninth Circuit's standing decision. The Ninth Circuit has since stayed the proceedings.

ARGUMENT

The principle that standing cannot be based on merely feeling offended stated in *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, *Inc.*, 454 U.S. 464 (1982), should be reaffirmed here. In the absence of such a reaffirmation, the floodgates would open for Establishment Clause challenges, which threaten the First Amendment rights of organizations that are required to defend themselves over and over again.

A. Article III Standing Cannot Be Based on Merely Feeling Offended

This Court has long held that merely feeling offended by government action does not give rise to standing to sue. *See Allen* v. *Wright*, 468 U.S. 737, 752-55 (1984); *Valley Forge*, 454 U.S. at 473; *see also Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992). To permit standing based merely on feeling offended would

transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders," *Allen*, 468 U.S. at 756 (citation omitted), or a "a judicial version of college debating forums," *Valley Forge*, 454 U.S. at 473.

This Court's holding in *Valley Forge* should be dispositive in *Buono* and *Barnes-Wallace*. In *Valley Forge*, the federal government had given to the Valley Forge Christian College, free of charge, a 77-acre tract of land appraised at $577,500. 454 U.S. at 467-68. The deed required the college to use the property for 30 years solely for a school that met the accrediting standards of the State of Pennsylvania, The American Association of Bible Colleges, the Division of Education of the General Council of the Assemblies of God, and the Veterans Administration. *Id.* at 468. The college, which required its faculty to be "baptized in the Holy Spirit" and to live "Christian lives" and its administrators to be affiliated with the Assemblies of God, planned to use the property to expand its training of "'men and women for Christian service as either ministers or laymen.'" *Id.* at 468-69 (citation omitted).

The Third Circuit found standing based on a violation of the plaintiffs' constitutional right to be free from government establishment of religion. *See id.* at 482-83. This Court reversed, noting that Article III of the Constitution

> requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the

> defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

454 U.S. at 472 (internal quotations and citations omitted). The plaintiffs in *Valley Forge*, however,

> 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.

Id. at 485-86 (emphasis in original).

Notwithstanding *Valley Forge*, the Ninth Circuit concluded that Respondent Buono has standing because he feels offended by the display of a cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50. Likewise, in *Barnes-Wallace*, the Ninth Circuit concluded Plaintiffs have standing because they feel "offended" that Boy Scouts is the lessee and suffered "both personal emotional harm and the loss of recreational enjoyment" 530 F.3d at 785, as a result of their refusal to use the property.

The Ninth Circuit's standing decisions in *Buono* and *Barnes-Wallace* are in conflict with the decisions of this Court and of other courts of appeals, which follow *Valley*

Forge and reject standing based on merely feeling offended resulting from some government conduct. The Ninth Circuit's holding here is a radical expansion of standing far beyond the limits heretofore observed in other courts of appeals. On the Ninth Circuit's reasoning, plaintiffs would have standing if the government employed an Orthodox Jew or a Muslim as a park ranger in charge of permitting access to the parkland. As Judge O'Scannlain wrote for five other Ninth Circuit judges in dissent in *Barnes-Wallace*, "[n]o other circuit has embraced this remarkable innovation," according to which "almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court." 551 F.3d at 892.

B. The Ninth Circuit's Standing Decisions in *Buono* and *Barnes-Wallace* Are a Grave Threat to First Amendment Rights

The Ninth Circuit has radically expanded standing jurisprudence in *Buono* and *Barnes-Wallace*, opening the courthouse doors to anyone claiming to be offended by any government action under the Establishment Clause and threatening the First Amendment rights of organizations that are the target of attacks.

As this Court recently underscored, "[n]o principle is more fundamental to the judiciary's proper role in our federal system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341-42 (2006) (brackets in original) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Standing requirements ensure that judicial review "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.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)).

This limitation is applied particularly rigorously in Establishment Clause cases, where standing cannot be based on mere disagreement with the government's action but rather exists only if a plaintiff can demonstrate the specific expenditure of actual taxpayer funds in support of religion, *see*, *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83, 102-03 (1968), or direct exposure to unquestionably religious expression by the government, such as the display of giant crosses on public land, *see*, *e.g.*, *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986). The basis for the strict application of the constitutional standing requirements in the Establishment Clause context is that unnecessary governmental intervention in religious matters can itself endanger religious freedom. *See Van Orden* v. *Perry*, 545 U.S. 677, 683, 699 (2005); *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819, 845 46 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires"). As Judge Kleinfeld wrote in dissent in *Barnes-Wallace*, by allowing standing based merely on feelings of revulsion, the court of appeals "assist[s] in a campaign to destroy by litigation an association of people because of their viewpoints." 530 F.3d at 798.

The Ninth Circuit's standing decisions in *Buono* and *Barnes-Wallace* effectively eliminate any meaningful limits on standing to bring an Establishment Clause challenge. Prisoners have a new section 1983 claim if they object to the presence of a prison chapel that they steadfastly avoid. Every would-be litigant can now sue for denial of access to the courts on Establishment Clause grounds if he or she claims to avoid the courts because there are images of Moses and the Ten Commandments there. Mr. Newdow now has standing to proceed with an Establishment Clause challenge to the Pledge of Allegiance if he claims to avoid government property where "one Nation under God" is recited.

These are not far-fetched examples. The court of appeals' decision is already being followed as precedent to expand standing. A district court in San Diego permitted Jewish War Veterans and several individuals to challenge Congress' acquisition of the land surrounding the Mt. Soledad cross and the presence of the cross on federal property as violations of the Establishment Clause. *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199, 1202, 1204-05 (S.D. Cal. 2008). Plaintiffs based their standing to bring the suit on their feeling offended at the presence of the cross in a war memorial. *See id*. at 1204-05:

> If Plaintiffs' claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing. . . . In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish "injury in fact."

Id. at 1205 (citing *Barnes-Wallace*).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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