NO. 11-998

In the

Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,

Petitioner,

v.

STEVE TRUNK, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* UNITED RETIRED FIREFIGHTERS ASSOCIATION AND THE AMERICAN LEGION DEPARTMENT OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

United Retired Firefighters Association ("URFA") represents over 16,000 retired New York City Firefighters in twenty-four divisions located throughout the United States. It actively monitors and works to further community and political action that enhances the welfare of retired New York City firefighters. Representing thousands of former first responders, URFA seeks to honor the sacrifices firefighters have made in protecting the lives and property of New York City residents and visitors throughout fires, medical emergencies, natural disasters, and terrorist attacks. It thus has a unique interest in protecting monuments like the National September 11 Memorial, which houses the World Trade Center cross. That cross is already the subject of litigation, *see Am. Atheists, Inc. v. Port Auth. of N.Y.*, No. 11-civ-6026 (S.D.N.Y. notice of removal filed August 26, 2011), and may be affected by the outcome in this case.

The American Legion Department of California represents some 130,000 Legionnaires throughout the State of California. In 1919, Congress chartered

[1] The parties' counsel of record received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). Counsel for petitioners filed a letter with the Clerk granting blanket consent for the filing of *amicus* briefs. Letters reflecting Respondents' consent to the filing of this brief have been filed with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the American Legion as a patriotic, mutual-help veterans organization. The Legion maintains an ongoing 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. The Legion seeks to honor members of the 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 our nation in the future. To this end, the Department of California and the Alliance Defense Fund have established the Defense of Veterans Memorials Project to defend veterans memorials throughout California, including the Mt. Soledad National Veterans Memorial.

SUMMARY OF ARGUMENT

Over the last three decades a pandemic of Establishment Clause litigation has swept the nation and the federal courts. *See Catholic League for Religious & Civil Rights v. City & County of S.F.*, 624 F.3d 1043, 1068-72 (9th Cir. 2010) (en banc) (Graber, J., dissenting on the issue of jurisdiction but concurring in the judgment) (citing cases). The vast majority of these cases involve "passive or symbolic" monuments and displays that pose little "risk of infringement of religious liberty." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Nonetheless, lower courts often strip public memorials bare on the notion that religious symbols cause "offense."

These decisions are not only wrong on the merits; they "trivializ[e]" the very concept of constitutional injury and provide standing to plaintiffs where none exists. *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 685 (6th Cir. 1994) (Guy, J, concurring). Lower courts, for example, universally convey standing based on offended observers' evasion of monuments they dislike. But government no more produces this harm than any other emotionally-charged act of political protest.

Standing may not be the most stimulating of jurisprudential concepts but its practical importance cannot be overstated. Limiting federal courts' jurisdiction to claims brought by those who have established an injury in fact not only has the broad-scale effect of preserving our Constitution's "tripartite allocation of power," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quotation omitted), it also ensures that every decision to bring a dispute before the federal courts is made by those with a "direct stake" in the outcome. *Id.* at 473 (quotation omitted).

Offended observers have no such direct stake and the psychological harm to which they lay claim pales in comparison to that caused by the demolition of public memorials dedicated to those who gave their last full measure of devotion to our nation. *See Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality opinion) (recognizing crosses are "often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation").

Amici represent thousands of American citizens who served with the brave 9/11 first responders and armed service members who made that ultimate sacrifice. Their members come from many different religious and philosophical traditions. But one belief they share: public monuments to honor those who gave their lives in service to our nation, especially firefighters who died as a result of the 9/11 attacks and members of the armed services who lost their lives in time of war, should not be dismembered based on the subjective "offense" of a litigious few.

The Constitution demands more. It requires that the fate of irreplaceable public monuments like the National September 11 Memorial and the Mt. Soledad National War Memorial be entrusted to organizations like *Amici* who are truly interested in their welfare, as well as that of countless family members and friends the honored dead have left behind. Offended observer standing robs *Amici* of that right and places the future of these beloved memorials into the hands of activists whose sole concern is furthering a divisive, political agenda, no matter the cost.

Standing doctrine's very purpose is to prevent such wrongs and this case presents the perfect opportunity for the Court to consider its application to the offended observer brand of Establishment Clause claims. *Amici* testify not only to this matter's national importance, but also to its significance to family and friends of the fallen who daily face the potential destruction of national memorials dedicated to ones they love. And they urge this Court to grant review, reaffirm *Valley Forge*, and

reject offended observer standing once and for all.[2]

ARGUMENT

I. The Conclusion that Offense Constitutes a Cognizable Article III Injury Cannot be Squared with this Court's Precedents.

This Court implicitly rejected the concept of offended observer standing thirty years ago in *Valley Forge*. But lower federal courts have almost universally ignored this Court's teachings. As a result, *Valley Forge* has been "reduced . . . to a hollow shell." *Books v. Elkhart Cnty.*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting). This Court should grant review to vindicate the principle espoused in *Valley Forge* that psychic sting is not a cognizable injury in fact.

A. Article III's Standing Requirements Fully Apply to Offended Observers.

The irreducible requirements of Article III standing impose a structural limitation on the power of federal courts, *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), which decide cases and controversies to uphold the rights of individuals, not to levy "some amorphous general supervision of the operations of

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[2] Although Petitioners have not argued the issue of standing, it is well established that standing is "jurisdictional and not subject to waiver." *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). This Court is consequently able "to address the [standing] issue even if the courts below have not passed on it, and even if the parties fail to raise" it. *United States v. Hays*, 515 U.S. 737, 742 (1995) (quotation omitted).

government." *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (quotation omitted). Accordingly, this Court has rejected all attempts to lower standing requirements based on the fervency of a plaintiff's convictions, the importance of an issue, or a perceived lack of available plaintiffs. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 756-57 (1984) (concluding plaintiffs lacked standing to challenge IRS practices alleged to further racial segregation); *Valley Forge*, 454 U.S. at 476, 484, 488-90 (holding plaintiffs lacked standing to challenge the government's gift of land to a religious college).

When constitutional rulings of great national significance are at stake standing requirements are at their height. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). The same is true when the merits of a suit require a court to touch upon the constitutionality of action taken by one of the two coequal branches of government. *Raines*, 521 U.S. at 819-20. As illustrated by this case and others recently before the Court, Establishment Clause challenges frequently implicate both concerns.[3] *See, e.g., Buono*, 130 S. Ct. at 1813-14 (concerning the constitutionality of a federal statute designed to shift a memorial cross on federal land to private ownership); *Elk Grove*, 542 U.S. at 4-5 (regarding the constitutionality of the "under God"

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[3] *See also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986) (noting that the Court's "obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented" and stating that "[i]n such cases" this Court has "strictly adhered to the standing requirements").

portion of the national pledge of allegiance).

The mere fact that plaintiffs allege an Establishment Clause injury does not lower the standing bar.[4] *See Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III."). Thirty years ago, this Court rejected the proposition that the Establishment Clause is more fundamental to our system of government than other, less fashionable elements of the Constitution. *Valley Forge*, 454 U.S. at 484. And rightly so, for each constitutional provision binds government "to no greater or lesser extent than any other." *Id.* It is therefore impossible to employ "a hierarchy of constitutional values or a complementary 'sliding scale' of standing" in weighing Article III's requirements against the merits. *Id.*

As this Court explained just last year in addressing taxpayer standing under the Establishment Clause, use of the "judicial power" to cast the courts "in the role of a Counsel of Revision, conferring on [themselves] the power to invalidate [government acts] at the behest of anyone who disagrees with them" only serves to "undermine

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[4] The *Valley Forge* plaintiffs fell back on the well-worn argument that because they asserted an Establishment Clause injury a lower standing bar applied. *See* 454 U.S. at 486 n.22. This Court rejected that contention, explaining that not every "person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing." *Id.*

public confidence in the neutrality and integrity of the Judiciary." *Ariz. Christian*, 131 S. Ct. at 1449. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Id.*

B. Neither Subjective Offense Nor Its Fruits Constitute a Cognizable Injury In Fact Under Article III.

The very essence of the Constitution's case or controversy requirement is an "injury in fact," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1974), typically described as a concrete and particularized invasion of a legally protected interest that is actual or imminent and not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Federal plaintiffs thus have the burden of demonstrating more than a legal "disagreement, however sharp and acrimonious it may be." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). To invoke the judicial power, individuals must demonstrate cognizable injury personally suffered as a result of putatively illegal government conduct. *Id.*; *Raines*, 521 U.S. at 820 (explaining that plaintiffs have the burden of showing "their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable").

When taxpayer standing is not at issue, Establishment Clause plaintiffs "may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a

mandatory prayer in a public school classroom." *Ariz. Christian*, 131 S. Ct. at 1440. Offended observers demonstrate no such harm. Instead, their standing rests on subjective feelings of offense.

In this case, the allegations of lead plaintiff, Mr. Steve Trunk, typify those of offended observers nationwide who recoil at any employment of religious symbolism by the state.[5] Mr. Trunk's declaration states, for example, that the cross located at the Mt. Soledad National Veterans Memorial causes him to subjectively "feel uncomfortable, offended, disrespected and like a second class citizen." *Trunk v. City of San Diego*, No. 06-cv-1597, Doc. 179-8, at 4 (S.D. Cal. filed October 12, 2007). These feelings result from his subjective interpretation of the monument's symbolism as honoring "Christian war veterans and not non Christian[]" veterans like himself.[6] *Id.* at 3. Based on this aesthetic disagreement with the memorial's content and design, Mr. Trunk chooses not to visit the memorial and the surrounding city park, or to contribute to the monument by purchasing a

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[5] *But see Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality opinion) (noting "the 'risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires'" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995)).

[6] *But see Buono*, 130 S. Ct. at 1820 (plurality opinion) (recognizing that a "Latin cross . . . . evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten").

memorial plaque for a friend. *Id.* at 2-3.

Although such "offense" is certainly unfortunate, it fails to arise to the level of a cognizable injury in fact. Plaintiff's allegations of psychological injury stem not from any personal harm done to him, but from a subjective perception that the memorial unlawfully evinces "a preference by the government for Christians over non Christians." *Id.* at 3. This allegation boils down to nothing more than a "claim[] of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law,"[7] a claim this Court has repeatedly rejected.[8] *Valley Forge*, 454 U.S. at

[7] Mr. Trunk's mental discomfort clearly rests on his view that the law has been violated, rather than any cognizable, personal harm. As Mr. Trunk's own declaration explains, he "agree[s] completely with the courts which have held that [the use of a cross] gives the impression that only Christians are being honored." *Trunk*, No. 06-cv-1597, Doc. 179-8, at 3.

[8] *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) ("The only injury plaintiffs allege is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998) (concluding an organization lacked standing because it sought "not remediation of its own injury . . . but vindication of the rule of law"); *Lujan*, 504 U.S. at 573-74 ("[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."); *Allen*, 468 U.S. at 754 ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a

482-83 (quotation omitted).

That an alleged violation of law causes a plaintiff mental distress is of no moment. "[T]he psychological consequence" of the "observation of conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III," regardless of whether "the disagreement is phrased in constitutional terms." *Id.* at 485-86. Indeed, lawsuits, like this one, "that promise no concrete benefit to the plaintiff" and that entail the determination of "questions of law *in thesi* are most often inspired by the psychological smart of perceived official injustice, or by the government-policy preferences of political activists." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (quotation and internal citation omitted). But this Court's precedents are clear that allegations of this kind of "subjective 'chill' are not an adequate substitute" for a concrete and particularized injury in fact.[9] *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Federal courts are not "general complaint bureaus," *Hein v. Freedom from Religion Found.,*

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federal court."); *Valley Forge*, 454 U.S. at 483 ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.").

[9] *See also Steel Co.*, 523 U.S. at 107 ("[A]lthough a suitor may derive great comfort and joy from the fact that . . . a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.")

Inc., 551 U.S. 587, 593 (2007) (plurality opinion), or "ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487. Nor are they "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Id.* at 473. They exist solely to enforce the rights of individuals and leave the vindication of the public interest, including the public's generalized interest in upholding the rule of law, to Congress and the Chief Executive. *Lujan*, 504 U.S. at 576. "Psychic Injury" in offended observer cases is nothing more than "a contradiction of the basic propositions that the function of the judicial power is, solely, to decide on the rights of individuals, and that generalized grievances affecting the public at large have their remedy in the political process." *Hein*, 551 U.S. at 636 (Scalia, J., concurring in the judgment) (quotation and internal citation omitted).

In an attempt to make their claims of personal injury sound more concrete, offended observers frequently raise self-imposed restrictions as a substitute for harm suffered "as a result" of the government's "putatively illegal conduct." *Valley Forge*, 454 U.S. at 472 (quotation omitted). The lead plaintiff in this case exemplifies this trend, citing his personal unwillingness to visit the memorial or even the surrounding city park. But an offended observer's decision not to visit a memorial or its surroundings is not equivalent to being "personally subject to discriminatory treatment" at the hands of the state. *Allen*, 468 U.S. at 757 n.22. It is merely a form of political protest.

Offended observers who choose not to visit the environs of monuments containing religious symbols are, for example, no more victims of government oppression than pacifists who refuse to enter the grounds of a military base. Both groups disagree with government policies and manifest their displeasure by avoiding structures that bring those policies to life. Their political expression is clearly protected by the First Amendment, but any acts of self-deprivation involved are not attributable to the state. *See Diamond*, 476 U.S. at 70 ("Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue."). No plaintiff "can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Consequently, self-imposed harm cannot serve as the basis for an injury in fact. *See Harris v. City of Zion*, 927 F.2d 1401, 1421 (7th Cir. 1991) (Easterbrook, J., dissenting) (recognizing that "[s]omeone with a simple self-help remedy for his problem suffers no 'injury in fact'").

Even if government's use of religious symbolism could be said to cause offended observers' evasion of public areas, the abandonment of these vicinities is based on a non-cognizable mental harm. *See supra* pp. 8-11. This psychic injury is itself insufficient to establish an Article III injury; so too is any avoidance of public property that results. *See Harris*, 927 F.2d at 1420 (Easterbrook, J., dissenting) ("If offense is not enough, why is a detour attributable to that offense enough?"). The fruits of a non-cognizable injury do not a case or controversy

make. As Judge Easterbrook has explained, "dismay does not establish standing" and neither do "new and better ways to prove its existence." *Id.* In reaching the opposite conclusion, lower courts have allowed offended observers to "bootstrap" themselves "into federal court" based on fabricated injuries with no discernible legal basis. *Steel Co.*, 523 U.S. at 107.

C. The Court's Resolution of Offended Observer Cases Has Not Altered Its Standing Precedents.

This Court has reached the merits of multiple offended observer claims without considering the issue of standing. S*ee, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (concerning a Ten Commandments monument); *Cnty. of Allegheny*, 492 U.S. at 578 (regarding a Christmas tree and menorah used in a holiday display). Because the Court did not consider its jurisdiction in these prior actions, its standing precedents remain unaltered. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("[T]his court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.").

It is hardly unusual for this Court to grant certiorari on a particular legal issue and simply assume the validity of antecedent legal propositions, such as standing. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). These "assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the question[]." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) (quotation omitted).

Accordingly, nothing has undermined this Court's jurisdictional holding in *Valley Forge* that mental pain resulting from philosophical disagreement with state action fails to establish an injury in fact. To the contrary, over the years this Court has regularly cited *Valley Forge* with approval. *See, e.g.*, *Ariz. Christian*, 131 S. Ct. at 1442, 1445; *Hein*, 551 U.S. at 598-99, 601 n.2, 603-05, 608-11, 615 (plurality opinion); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341, 343, 353 (2006); *Raines*, 521 U.S. at 818, 820.

II. Lower Federal Courts Have Unpersuasively Distinguished *Valley Forge* to Reach the Merits of Offended Observer Claims.

Despite this Court's recognition of the continuing vitality of *Valley Forge*, lower federal courts have effectively distinguished its holding out of existence. *ACLU of Ohio Found, Inc. v. Ashbrook*, 375 F.3d 484, 496-97 (6th Cir. 2004) (Batchelder, J., dissenting). Prevailing doctrine now holds that standing materializes once offended observers come into direct contact with a government display they subjectively find offensive. *See Catholic League*, 624 F.3d at 1072-73 (Graber, dissenting on the issue of jurisdiction but concurring in the judgment). Offended observers are thus uniquely exempt from establishing a cognizable injury in fact. This Court's review is needed to reestablish the fundamental principle that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 475-76.

A. Lower Courts Improperly Provide Standing to Offended Observers Based Solely on Allegations of Mental Harm.

Although *Valley Forge* clearly held that psychic harm is insufficient to give rise to an Article III injury, lower courts have held just that. With few, if any, exceptions, the courts of appeals consider direct contact with an "offensive" monument sufficient to establish an injury in fact.[10] *See, e.g.*, *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1087 (4th Cir. 1997) (agreeing that standing "results from unwelcome personal contact with a state-sponsored religious display"); *Washegesic*, 33 F.3d at 682 (finding standing based on "'unwelcome' direct contact with [an] offensive object" (quotation omitted)); *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1252 (9th Cir. 2007) (determining that "direct contact with an offensive religious (or anti-religious) symbol to be a sufficient basis to confer Article III standing"); *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989) (grounding standing on "direct personal contact with offensive municipal conduct"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir.

[10] The Seventh Circuit has traditionally required that an offended observer demonstrate some cost, such as evasion of affected areas, to "validate, at least to some extent, the existence of genuine distress and indignation." *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986). But at least one panel of the Seventh Circuit has called this requirement into question. *See Doe v. County of Montgomery*, 41 F.3d 1156, 1161 (7th Cir. 1994) (opining that the Court's previous reliance on an offended observer's decision "to avoid the challenged conduct . . . was not controlling" as to the existence of standing).

1987) (according standing based on "direct contact with . . . offensive conduct").

They have accomplished this "about face" by limiting *Valley Forge* to its facts. None have more boldly disregarded this Court's precedents than the Sixth Circuit, which expressly acknowledges that it does not consider *Valley Forge* to mean "that psychological injury can *never* be a sufficient basis for the conferral of Article III standing." *Ashbrook*, 375 F.3d at 489 n.3; *see also ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 n.1 (6th Cir. 2011) (describing the Sixth Circuit's longstanding view that psychic disturbance is alone sufficient to constitute an injury in fact).

Other circuits have used more circumspect language to achieve the same result. Since *Valley Forge*, standing has been predicated on any number of euphemisms for purely mental harm. A small sampling of these turns of phrase includes "religious sensibilities," *Washegesic*, 33 F.3d at 682, the "experience[]" of "offensive and alienating contact," *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1030 (8th Cir. 2004), *as adopted by ACLU Neb. Found v. City of Plattsmouth*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc), "emotional injuries," *Barnes-Wallace v. City of San* Diego, 530 F.3d 776, 784 (9th Cir. 2008), and "metaphysical impact," *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1982).

The argument goes that because the *Valley Forge* plaintiffs had no contact whatsoever with the land transfer at issue, every other potential exposure

to "offensive" religious symbolism is "direct" by comparison and thus the resulting mental pangs are sufficient to comprise an injury in fact. Injury is thus presumed once an offended observer establishes "direct contact." *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002); *Vasquez*, 487 F.3d at 1251; *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 113 (10th Cir. 2010). And the standing inquiry ends where it should begin.

The rationale for this peculiar distinction between "direct" and "indirect" psychological injury—while rarely stated—is that mental harm may not alone be sufficient to establish injury when contact with religious symbols is indirect, *see Valley Forge*, but psychic pain resulting from direct contact is enough. *Washegesic*, 33 F.3d at 682. "Direct" exposure to "offensive" religious symbols may be necessary for purposes of standing, but it is clearly insufficient to allege an Article III harm. *See Valley Forge*, 454 U.S. at 485 (holding that "the psychological consequence . . . produced by observation of conduct with which one disagrees [*i.e.*, "direct" contact]. . . . is not an injury sufficient to confer standing under Art. III").

Tacitly acknowledging this fact, lower courts have developed a veritable cornucopia of ways to seemingly inflate and solidify mental harm. "Direct injury" has thus come to entail any number of things. It may mean that the severity of mental pain is greater because a religious symbol is located in a public building or simply that it hits geographically close to home. *Suhre*, 131 F.3d at 1087 (stating that "spiritual affront" is "compounded" when religious

symbolism is located in "a public facility"); *Washegesic*, 33 F.3d at 683 (opining that "[t]he practices of our own community may create a larger psychological wound"); *Plattsmouth*, 358 F.3d at 1030 ("That the injuries are caused by Doe's own City is all the more alienating."); *Vasquez*, 487 F.3d at 1251 (noting the plaintiff "has held himself out as a member of the community where the seal is located"); *Saladin*, 812 F.2d at 693 (explaining that the plaintiffs "are part of the City and are directly affronted by" its seal).

Or it could refer to the frequency or pervasiveness of exposure to a religious symbol taking psychic injury to new heights. *Adland*, 307 F.3d at 478 (relying on the fact that plaintiffs "frequently travel to the State Capitol" where a Ten Commandments monument is located); *Washegesic*, 33 F.3d at 683 (citing the plaintiff's "continuing direct contact" with a religious portrait); *Vasquez*, 487 F.3d at 1251 (referring to a plaintiff's "frequent regular contact with [a county] seal"); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005) (noting the plaintiffs were "constantly exposed to" an offensive statue); *Saladin*, 812 F.2d at 692 (describing how the plaintiffs "regularly receive[d] correspondence on city stationary bearing [its] seal").

Ironically, "direct contact" may also refer to "special burdens" offended observers self-impose in order *not* to contact religious symbols at all. *Davenport*, 637 F.3d at 1113 (explaining a plaintiff "altered [his] . . . route" to avoid roadside crosses); *O'Connor*, 416 F.3d at 1223 (explaining plaintiffs "alter[ed] their schedules and routes across campus

to avoid" a statue); *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (relying on the fact that plaintiffs hired "messengers" and bought "law books" to avoid travel to a courthouse containing a Ten Commandments display); *Rabun Cnty.*, 698 F.2d at 1108 (noting plaintiffs planned to use other "state parks for camping purposes" that did not contain a cross). At least one circuit has extended this rationale to avoidance based on nonreligious symbols to which highly-sensitive observers take offense. *Barnes-Wallace*, 530 F.3d at 787 (opining that "no amount of evenhanded access" would redress homosexuals' and atheists' discomfort at viewing Boy Scout symbols in a public park).

Distinctions based on geography, personal ties, frequency, and evasion are all well and good. But in laboring to demonstrate higher *degrees* of psychological impact, lower courts have missed the point of *Valley Forge*, which is that mental harm is categorically insufficient to establish a cognizable injury in fact. 454 U.S. at 485-86. This Court's review is necessary to refute the prevailing wisdom that ideological frustration satisfies Article III's essential requirements.

B. *Valley Forge* Disapproved Reliance on Psychic Injury to Establish Standing No Matter How "Direct" the Cause.

Valley Forge did not turn on the "directness" of the plaintiffs' contact with disputed government conduct. Nor did it hinge on the degree of the plaintiffs' mental upset. Instead, this Court grounded its holding in the nature of the plaintiffs'

psychological harm, concluding that it was insufficient to establish a cognizable injury. *Valley Forge*, 454 U.S. at 485-86.

The dispute in *Valley Forge* concerned the constitutionality of the federal government's transfer of surplus land to a private Christian college. *Id.* at 467-68. A group of atheists firmly committed to the "separation of church and state" learned of the transfer through a news release and brought suit, alleging the conveyance violated the Establishment Clause. *Id.* at 469, 486. This Court affirmed the Third Circuit's determination that the plaintiffs lacked taxpayer standing but reversed its conclusion that the plaintiffs had standing as offended observers with a "right to a government that 'shall make no law respecting the establishment of religion.'" *Id.* at 482 (quotation omitted).

A central component of this Court's reasoning was the well-established rule that citizens do not gain individual standing from their general right to a government that obeys the law. *Id.* at 482-83. While attractive in theory, Article III would lose all meaning if standing resulted from the mere "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently." *Id.* at 483. Accordingly, the Court proceeded to inquire whether the atheists had alleged an injury in fact, defined as a "personal injury suffered . . . *as a consequence* of the . . . constitutional error alleged. *Id.* at 485.

Only one such injury was asserted by the *Valley Forge* plaintiffs: psychological discomfort resulting from the "observation of conduct with which [they] disagree[d]." *Id.* This Court recognized that certain forms of non-economic harm may justify standing to bring suit under the Establishment Clause. *Id.* at 486. But it held that psychic injury is not one of them, explaining that "the psychological consequence presumably produced by observation of conduct with which one disagrees. . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485-86.

In so ruling, this Court did not question the degree of the atheists' offense or the reality of their mental anguish. *See id.* at 486 n.21 ("'We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them.'" (quoting *Schlesinger*, 418 U.S. at 225)). To the contrary, it specifically noted the "intensity" of the atheists' ideals and the resulting "fervor" of their advocacy. *Id.* at 486. None of these factors could serve, however, as an adequate "substitute" for the showing of a cognizable—or non-psychic—harm. *Id.*

Having established that the plaintiffs' allegations were insufficient to establish standing, the Court went on to state that the *Valley Forge* plaintiffs lived in Maryland and Virginia and placed their organizational headquarters in Washington, D.C. *Id.* at 487. Yet they invoked standing to challenge a transfer of land in Pennsylvania, which they only learned about through a news release. *Id.*

The plaintiffs' total lack of connection to the land transfer at issue made it abundantly clear that they could not allege a personal "*injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486.

This reference to the atheists' disassociation from the subject of the case simply explained that there were no cognizable, non-psychic grounds on which standing could rest. The Court did not suggest that any "indirectness" in harm precluded an assertion of Article III injury. For it had already established that the atheists raised one "personal injury *suffered by them*," *i.e.*, the mental pain "produced by observation of conduct with which [they] disagree[d]." *Id.* at 485 (emphasis added).

Such a "psychological consequence" was simply insufficient to establish a cognizable Article III injury. *Id.* at 485-86. Thus, when the Court stated that the atheists failed to "allege[] an *injury* of *any* kind . . . sufficient to confer standing," *id.* at 486, it merely recognized that the facts of the case also precluded standing based on any form of non-psychological harm. *See id.* at 486 n.22 (comparing the "impressionable schoolchildren" subject to "unwelcome religious exercises" in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) to the *Valley Forge* plaintiffs and concluding the latter "alleged no comparable injury").

Lower courts' obfuscation of the *Valley Forge* Court's holding is thus in vain. Plainly, this Court determined that psychological harm, no matter how

direct or extreme, is too insubstantial a foundation to support an injury in fact. It is time the Court revisited *Valley Forge* and refuted the assumption that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they [hinder] that transcendent" effort. *Id.* at 488.

CONCLUSION

Subjective feelings of offense are simply not concrete, personal injuries sufficient to establish an injury in fact. *See Valley Forge*, 454 U.S. at 485 ("[T]he psychological consequence . . . of conduct with which one disagrees" is not a "personal injury" under Article III.). This Court should grant review to vindicate *Valley Forge* and clarify Article III's application to the "offended observer" brand of Establishment Clause claims.

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