No. 08-1222

In the Supreme Court of the United States

BOY SCOUTS OF AMERICA; AND SAN DIEGO-IMPERIAL COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

LORI & LYNN BARNES-WALLACE; MITCHELL BARNES-WALLACE; MICHAEL & VALERIE BREEN; AND MAXWELL BREEN,
Respondents.

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

BRIEF OF *AMICI CURIAE* ALLIANCE DEFENSE FUND AND THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations have represented hundreds of faith-based groups that provide social services in coordination with government programs. Because this case involves the balancing of various constitutional liberties and directly threatens faith-based charitable initiatives, its resolution is a matter of significant concern to ADF.

THOMAS MORE LAW CENTER is a national, not-for-profit public interest law firm based in Ann Arbor, Michigan. It is dedicated to defending and promoting America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities. Because this case involves an issue of law that impacts Christian organizations, its resolution is a matter of significant interest to the Thomas More Law Center.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The permissive standing rule authorized by the Ninth Circuit's decision below will significantly impact faith-based groups' cooperation with government to provide social services. In amici's experience, permissive standing combined with the unpredictability of Establishment Clause cases has made government officials more reticent to include religious groups for fear of a lawsuit. Even when officials believe that an Establishment Clause challenge would be meritless, they often choose not to include religious organizations because of the hassle and expense a lawsuit would entail. Allowing permissive standing in these cases also creates a strong disincentive for faith-based groups to have any role in providing public services. Amici have observed this trend becoming more common as Establishment Clause lawsuits have increased.

The overarching effect is a new type of hostility to religion, where government excludes religious groups from programs simply because officials fear being sued. This new hostility is a significant public detriment because it erodes faith-based groups' provision of much-needed public services. To stem this new hostility and relieve confusion among the lower courts, this Court should clarify that Article III requires that a plaintiff suffer some concrete harm to have standing.

REASONS FOR GRANTING THE WRIT

I. Permissive Ideological Standing Rules Chill Faith-Based Groups' Involvement in Government Programs.

The Ninth Circuit's decision below represents a new threat for faith-based organizations that choose to cooperate with the government in establishing public benefit programs like Balboa Park campground and Fiesta Island in Mission Bay Park. Plaintiffs in the Ninth Circuit can now challenge programs like San Diego's with nothing more than general offense at a tenet of an organization's mission. So long as a person *feels* unwelcome by the private groups' beliefs—without any exposure to religious symbols or denial of any services—he can sue to have the program declared unconstitutional.

But contrary to the Ninth Circuit's new rule, this Court has been clear that standing requires some concrete actual or threatened injury. Perceived harm to mere psyche, feelings, or ideology is not enough. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-86 (1982). The Court has not wavered from *Valley Forge's* "irreducible minimum" in the two decades since it decided the case. *See Vermont Agency of Natural Resources v. United States ex rel.*, 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"). 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.[2]

Nonetheless, there remains a great deal of confusion among the circuits, among litigants, and among individual panels of judges on what is sufficient harm to confer standing. That confusion is perhaps best reflected in the Ninth Circuit's decision below to adopt the same offended observer standing argument that it had flatly rejected earlier in the case. *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 794-95 (9th Cir. 2008) (Kleinfeld, dissenting). But the same confusion is also evident in the growing trend for circuit court panels to split into three divergent opinions on standing. *See, e.g., Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (producing three completely divergent 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

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[2] *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 particular acres out of thousands were affected by the challenged activity).

produced a majority, a special concurrence, and two dissents on whether plaintiffs had offended observer standing for an Establishment Clause challenge).

Some federal judges have questioned whether "offended observer" plaintiffs should have standing to bring Establishment Clause challenges. *See, e.g., Washegesic v. Bloomingdale Pub. Sch.,* 33 F.3d 679, 684–685 (6th Cir. 1994) (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. But the Ninth Circuit's decision goes far beyond even "offended observer" standing. Here, there was nothing for plaintiffs to observe and take offense at.

This Court should grant the Boy Scout's petition for certiorari and decide the case in conjunction with *Salazar v. Buono*, 77 U.S.L.W. 3458 (U.S. Feb. 23, 2009) (No. 08-472), to bring clarity to this highly troubled area. The Court should reaffirm that ideological plaintiffs lack the actual harm required for standing by Article III.

II. Ideological Standing Is Particularly Troublesome When Combined With the Uncertainty of This Court's Establishment Clause Precedent.

Because the Court's Establishment Clause decisions are in such disarray, it is impossible for religious groups or government officials to adequately predict a constitutional violation. Allowing proliferation of these cases through permissive standing only compounds the problem.

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, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring in judgment) (quoting *School Dist. Of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (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 Ed. of Ewing*, 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. Board of Public Works of Maryland*, 426 U.S. 736, 767 (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, 607-608 (1989); *Van Orden*, 125 S.Ct. at 2689 (stating that

"no exact formula can dictate a resolution to such fact-intensive cases") (Breyer, J., concurring in the judgment).

It is not reasonable to expect religious groups or government officials to know with any degree of certainty whether an aspect of a government grant somehow violates the Establishment Clause when this Court and the federal courts of appeal are unable to come to any 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, 679-81 (1984). This Court has applied several different tests to Establishment Clause cases. *See Lynch v. Donnelly,* 465 U.S. 668 (1984) (endorsement test); *Lee v. Weisman,* 505 U.S. 577 (1992) (psychological coercion test); *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 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 Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 125 S.Ct. 2722, 2751 (2005) (Scalia, J. dissenting) (citing instances in which Scalia, J., Thomas, J., Kennedy, J., O'Connor, J., Rehnquist, C.J., and Stevens, J., expressed criticism of *Lemon*). 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 proven ineffective."); *ACLU v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (dissent) ("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."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence."); *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."); *City of Zion v. City of Rolling Meadows,* 927 F.2d 1401, 1419 (7th Cir. 1991) ("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 this Court highlight the confusion faith-based groups

and government entities face in trying to gauge whether a program complies with the Establishment Clause. In *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), the Court found, in a plurality decision, that the public display of the Ten Commandments in two Kentucky courthouses violated the Establishment Clause. However, in *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court found, in a plurality decision, that a public display of the Ten Commandments on the Texas State Capitol grounds did not violate the Establishment Clause. The plurality in *McCreary* applied the *Lemon* test in finding an Establishment Clause violation. *McCreary*, 545 U.S. at 864. The plurality in *Van Orden*, however, 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 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 the plurality); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment).

To expect religious groups and government to navigate through Establishment Clause jurisprudence with any degree of certainty is too much to ask. Regardless of what one thinks the outcome of these Establishment Clause decisions should be, it is beyond dispute that they are highly

unpredictable, even for constitutional scholars. In the final analysis, the permissive standing rule adopted by the Ninth Circuit combined with the unpredictable Establishment Clause jurisprudence of this Court forces government to steer away from cooperative efforts with faith-based organizations to the public detriment.

III. The Loss Of Faith-Based Public Services Is A Public Detriment.

Provision of basic social services in the United States would collapse without the assistance of private, morally-motivated organizations like the Boy Scouts. The White House Office of Faith-Based and Community Initiatives has reported that:

> [R]eligious organizations represent a major part of the American welfare system. Tens of thousands of people in the Philadelphia area are being helped by all kinds of programs, from soup kitchens to housing services, from job training to educational enhancement classes. One can only imagine what would happen to the collective quality of life if these religious organizations would cease to exist.

White House Office of Faith-Based and Community Initiatives, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, 3 (2001) www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf (quoting Ram A. Cnaan, with

Robert J. Wineburg and Stephanie C. Boddie, *The Newer Deal: Social Work and Religion in Partnership* 275 (1999)). The type of charitable work offered by religious groups includes prisoner reentry programs, housing for the elderly and homeless, soup kitchens, job training, and AIDS shelters. *Id.* In short, the breadth of social services provided by religious organizations spans almost every sector of society. Much of the funding that supports these organizations is private, but they also receive significant funding from the government. *Id.*

As the Office of Faith-Based and Community Initiatives has found, religious groups already "often face serious managerial and political obstacles" to helping fulfill "the Nation's social agenda." *Unlevel Playing Field*, at 3. Religious groups must wade through the bureaucratic red-tape that accompanies government programs, jump through extra hoops because they are faith-based, and worry how their religious-based hiring policies will open them to liability. *Id.* at 1-3.

Many of the obstacles that are erected specifically for faith-based groups are often based not on the law, but instead on a public official's overly-cautious view of what restrictions must be placed on the groups. *Id.* at 10-11. There is no doubt that bureaucratic fears—including red tape—will grow as Establishment Clause lawsuits (and the mere threats of such lawsuits) inevitably increase under the Ninth Circuit's permissive standing rule.

CONCLUSION

Amici respectfully requests that this Court grant the writ of certiorari to clarify that plaintiffs must have a concrete injury to bring an Establishment Clause case. This will ensure that faith-based groups will continue to play their vital role in cooperating with government to provide much-needed public services.

Respectfully submitted,

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