No. 22-278

In The
Supreme Court of the United States

CITY OF OCALA, FLORIDA,

Petitioner,

v.

ART ROJAS AND LUCINDA HALE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

MONICA L. MILLER
Counsel of Record
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place NW
Washington, DC 20036
(202) 238-9088
mmiller@americanhumanist.org

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 STATEMENT

Respondent American Humanist Association is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It has no parent or publicly held company owning ten percent or more of the corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The lower courts correctly found that Plaintiffs meet the requirements of Article III. Pet.App.6a,38a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE ISSUES

Under the direct supervision of a police chief and mayor, uniformed law enforcement personnel delivered Christian prayers to hundreds gathered at the city's hour-long worship service held in the heart of town. The Plaintiffs were personally invited to attend this event by the police chief.

The Plaintiffs had an interest in being a part of the community and were concerned about crime. They attended the city's event but were unable to participate in any form because it was all prayer. Do Plaintiffs have Article III standing to challenge the government's actions under the Establishment Clause?

SUMMARY OF THE ARGUMENT

This case is not about protecting atheists from offense. It is about protecting prayer from government intrusion and the government from tyranny.

Uniformed police personnel preached Christianity in a revivalist style to hundreds of citizens assembled at its behest for an hour in the heart of town.

The Plaintiffs were invited to attend by their own city officials and had an interest in being a part of the community and were concerned about crime. They attended but were unable to participate in any of the activity because it was all prayer.

The City of Ocala, represented by the American Center for Law and Justice ("ACLJ"), asks this Court to overturn what it pejoratively calls "Offended Observer Standing" (hereafter "Direct Unwelcome Contact" standard).

ACLJ argues that this Court must do away with standing predicated on spiritual or psychological harm alone. In support of its overarching argument, it makes three auxiliary arguments: (1) Plaintiffs' standing is "peculiar" because they only object to government prayer, not private prayer, and this means nonjusticiable (the "Peculiar Injury" argument, Pet.24); (2) Plaintiffs have a duty to avoid anticipated Establishment Clause violations, even if it means forfeiting other First Amendment rights (the "Self-inflicted" injury argument, Pet.24); and (3) that Establishment Clause standing confers a unique benefit on atheists (the "Unique Benefit" argument, Pet.17).

Ocala failed to identify a single conflict with this Court's precedents or with any circuit's precedents. The circuits have also affirmatively *rejected* ACLJ's argument that a plaintiff has a duty to stay away.

This Court's Establishment Clause cases—including (*inter alia*) *American Legion*, *Lee*, *Schempp*, and

Town of Greece—render ACLJ's argument that Plaintiffs' injury here is nonjusticiable, untenable.

Moreover, this Court's recent decisions reaffirm the justiciability of pure symbolic First Amendment harms, *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021), even when the harm is "self-inflicted." *FEC v. Ted Cruz for S.*, 142 S.Ct. 1638, 1647 (2022).

ACLJ's argument would deprive citizens of apodictic First Amendment speech rights, *viz.*, those exercised on matters of public concern in traditional public fora.

ACLJ's argument would force anyone objecting to the police's message to stay home to maintain standing. This is impossible, of course, for want of direct unwelcome contact and evidence. And anyone who remains is a government sympathizer, not a plaintiff. As ACLJ would have it, no one would have standing to vindicate Establishment Clause violations.

ACLJ's argument that Establishment Clause standing confers a unique benefit on atheists misapprehends the Establishment Clause's foremost dual functions: to protect government from corruption and to protect prayer from government overreach.

Crucially, ACLJ overlooks the fact that many "separationist" cases are filed by non-atheists and Christians either challenging government promotion of Christianity or government promotion of alleged Satanism or Secularism. *Infra* § III, IV.A.

Lastly, this case is not the right vehicle for the issue presented. Plaintiffs have far exceeded the minimum threshold for standing. OPD's known exclusion of devout Jewish citizens makes the injury more acute. OPD scheduled its Christian revival on a Jewish holiday, in the face of vocal opposition, making it impossible for observant Jewish citizens to attend without violating their deeply-held beliefs.

To disavow authority to decide this case would be a cataclysmic narrowing of the Court's own power under Article III. The Court would strip itself of authority to decide "symbolic injury" cases, not only under the First Amendment but necessarily across the board. This wholesale reversal of *Marbury v. Madison* has no basis in our constitutional tradition.

COUNTERSTATEMENT OF THE CASE

A. The Plaintiffs

The Plaintiffs (Lucinda Hale, Daniel Hale [deceased in his 80s in 2020], Frances Jean Porgal [deceased in her late 70s in 2017] and Art Rojas) are longtime residents of Marion County and members of the American Humanist Association (AHA). Dkt.1¶6,8.

The Hales had a child who was murdered. Dkt.54-14,6. They learned of the event on OPD's Facebook and immediately contacted the Mayor. *Id.* The Hales felt pressure to attend the vigil based on the urgent-sounding language in the Chief's letter. Dkt.54-4#.

After Chief Graham's personal invitation to speak at the vigil, Mrs. Hale decided to attend for a number of reasons: "I attended because I wanted to observe what happened, see how religious it would be, and see the extent of city and police department involvement. I also felt that my presence would be a form of protest." Dkt.54-3#12.

As the District Court found, Mrs. Hale "is concerned about alleviating crime, which was the purported purpose of the Prayer Vigil, but she felt unable to participate in any part of what actually transpired." Pet.App.28a.

Likewise, "Rojas, who lives and works in Ocala, attended the Prayer Vigil, which he described as being 'essentially a Christian revival' that was 'not a comfortable place for non-believers' and caused anyone present to feel 'some pressure to participate and show approval,' lest they be seen as 'publicly opposing the police.'" Pet.App.29a. "Rojas thought that the Police Department should represent everyone, but by involving itself in the Prayer Vigil, it did not represent him." *Id.*; Dkt.54-1 #14.

B. Lower Court Decisions

The Magistrate Judge, the District Court Judge, and the Eleventh Circuit all concluded that Plaintiffs exceeded the minimal threshold for Article III standing. Pet.App.4-6a,34-38a,90-91a.

The magistrate's report determined that Plaintiffs

> personally witnessed the prayer vigil, along with the prayers recited at it, including those recited by the officers. (Complaint at ¶¶6-8, 38). In addition, in response to Plaintiff Lucinda Hale's concerns about the prayer vigil, Mayor Guinn sent her an email in which he advised that 'we are not canceling it we are trying to promote it,' and Chief Graham sent Plaintiff Porgal emails in which he advised that the prayer vigil was just one law enforcement strategy, that he had 'no intention of canceling the event,' and that he was 'attempting to bring our community together to fight crime.'

Pet.App.90a.

The magistrate found "the instant case is *readily distinguishable*" from *Valley Forge*, as this case "involved *an announcement* for a prayer event, the alleged organization and promotion of the event, *direct communication with two of the Plaintiffs* about it, *and Plaintiffs presence* at the event itself." Pet.App.90-91a n.3 (emphasis added). The District Court (Judge Corrigan) agreed and adopted the Report and Recommendation. Pet.App.74a.

The District Court again rejected Ocala's standing challenge at summary judgment:

> The factual development of the case since then further supports that determination. The undisputed facts reveal that the Hales are residents of Marion County who have

> attended events in the Downtown Square in Ocala. They saw the Ocala Police Department Facebook page and attended the Prayer Vigil because they wanted to observe, *but also* because they have interest in being a part of the community and are concerned about crime. They attended the Prayer Vigil but were unable to participate in any of the activity because the speakers only invited the audience to pray and sing. The Hales have *more than a mere interest in the matter*.

Pet.App.35a (emphasis added). The court added:

> Similarly, Art Rojas lives and works in the City of Ocala. He saw the Ocala Police Department Facebook page and attended the Prayer Vigil. He wants his community to be inclusive of all its residents, not just Christians. Like the Hales, Rojas has more than a mere interest in the matter.

Id.

The Eleventh Circuit had no trouble distinguishing *Valley Forge* and finding standing. Pet.App.4-6a. Regarding Mrs. Hale, it noted the following:

- "Hale lives in Marion County (where Ocala is located) and had visited the Ocala downtown square 'a number of times' before the prayer vigil took place, including going to the farmer's market there."
- "She heard about the prayer vigil when someone informed her and her late

husband about the Ocala Police Department's Facebook posting, and they then looked at that posting."

- "She testified that '[c]rime creates an environment that's negative for all citizens,' but she felt that the invitation to a community prayer vigil did not include her or others who do not pray."
- "Hale attended the prayer vigil and later testified that it was similar to a Christian revival."
- "She is concerned about alleviating crime but felt unable to participate in the vigil because the speakers invited the audience only to pray and sing."
- "Hale had attended the vigil because she wanted to observe it and also because she has an interest in being part of the community and is concerned about crime."

Pet.App.5a.

C. Factual Background

"While the City paints this as a fleeting incident," the District Court found, "the events here took place over the course of eight days." Pet.App.66a. During that time "both Chief Graham and Mayor Guinn took many actions in their official roles in very public ways to initiate, organize, facilitate, promote, encourage, endorse, and otherwise sponsor the Prayer Vigil (all in

the face of vocal opposition which pointed out the violation)." *Id.*

The District Court, *sua sponte*, found it necessary to invoke the "sham affidavit doctrine" on Chief Graham's testimony due to its discrepancies and doublespeak. Pet.App.18-19a n.6.

1. Ocala Police Initiate and Organize Worship Service.

Chief Graham held a meeting at OPD headquarters on September 17, 2014, with OPD personnel, officers, and a single community member, Narvella Haynes. Pet.App.11a.

OPD Chaplain Quintana proposed a "Prayer Vigil." Pet.App.12a. Graham "thought it was a great idea," saying, "Let's do it." *Id.*

Mayor Guinn approved the event, writing to Graham: "As I told you I think this is a great idea and have been responding to the atheist groups that are writing me about it." Pet.App.21a.

Pursuant to OPD's Directive: "Ocala Police Department Chaplains are official members of the Ocala Police Department" and are "considered members of the staff." Pet.App.17a. OPD supplies and pays for the uniforms. *Id.* "They are issued Police Identifications," a "badge," cell phones, and "Department vehicles," and are covered by workers compensation. Pet.App.17-18a. *See also* Dkt.54-10,78.

Captain Edwards emailed OPD staff saying he was "working on getting this prayer vigil set up." Pet.App.25a.

Chaplain Quintana sent an email titled "Urgent Prayer Service," instructing all OPD Chaplains: "Chief Graham asked me to contact all our chaplains and ask you all to be pres[sent] . . . [and] '[d]ressed up in the Official Chaplains Uniform (White Shirt).'" Pet.App.16a; Dkt.54-26.

Chief Graham emailed Captain Edwards. "We are going to have the vigil on Thursday night instead of Wednesday due to getting feedback from a lot of ministers that Wednesday is not the best night to do it." Dkt.54-21.

Captain Edwards suggested they secure a Baptist church in the event of rain, as he was "keeping in mind the fair weather Christians and the children that may attend." Dkt.54-28.

2. Chief and Mayor Promote Prayer and Ignite Division.

Chief Graham directed an OPD Sergeant to post the following letter, printed on OPD letterhead, on OPD's Facebook page to promote the Prayer Vigil:

> Blessings to all our citizens, specifically Pastors, Community Leaders, Parents and our precious youth.

> We are facing a crisis in the City of Ocala and Marion County that *requires fervent prayer* and your presence to show unity. . . .
>
> I am urging you all to please support a *very important* "Community *Prayer Vigil*" that will be held this coming Wednesday, September 24, 2014 at 6:30 pm to be held at our Downtown Square located in the heart of the City.
>
> Please support peace and this appeal for unity on this *very important* "Community Prayer Vigil" coming this next Wednesday. *We need you.*

Pet.App.13-14a (emphasis added).

The prayer event became "a matter of public debate in Ocala, with the citizenry vocalizing opinions both for and against it on social media, in communications to Chief Graham and Mayor Guinn, and in local news outlets." Pet.App.23a.

One citizen opined: "why are the police asking us to pray? will they arrest us if we don't pray?" *Id.*

Mayor Guinn wrote to one citizen:

> I'm proud to stand by my Chief and support him. Times like this do test leadership and that's why we're leading the community in this prayer vigil.

Pet.App.22a. *See also* Pet.App.19a (Chief Graham: "I have no intention on [sic] calling this gathering off nor changing my personal belief on the power of prayer.").

3. The Chief *personally* invited Plaintiffs to participate.

Chief Graham personally invited Mrs. Hale to the prayer vigil. *See* Dkt.54-41,4 ("It is my pleasure to invite you [Mrs. Hale] to participate in this event to bring our community together to help encourage all of us to stand strong against violence."); *see also* Pet.App.19a; Dkt.52-13,#13 (to Porgal).

The Mayor personally guaranteed Mrs. Hale the event would not violate the Constitution:

> There is nothing in the constitution to prohibit us from having this vigil. Not only are we not canceling it we are trying to promote it and have as many people as possible to join us. . . . [I]n Jesus name we pray.

Pet.App.22a.

4. OPD holds hour-long Christian worship service that barred Plaintiffs' participation.

Plaintiffs were assured that the Prayer Vigil would be constitutional. *Id.* Upon arrival, the Hales witnessed police "employees in uniform on the stage singing, praying, raising their hands like a good old-fashioned down-home revival." Pet.App.28a; *see also*, Dkt.54-15,22-23.

Mr. Hale testified that he observed uniformed OPD

> praying and holding hands with the other citizens and bowing heads. I mean, it was kind of like a tent revival . . . [T]he hallelujahs, the hands in the air, the oh, yes, Lord, so on and so forth.

Dkt.54-14,29,47.

Mrs. Hale was shocked that "there was no part of the event in which I felt I was able to participate." Dkt.54-3#8.

It is undisputed, as Porgal attested, that "police representatives spent no time discussing the crimes that had recently occurred," or "requesting assistance" from the community, or urging people to come forward with information; instead, speakers prayed, preached, and sang. Pet.App.30a; *see also* Dkt.54-2#8.

Rojas was alarmed to find himself at "a Christian revival." Pet.App.29a. He testified that this was "not a comfortable place for non-believers." *Id.* He felt "pressure to participate and show approval," lest he be seen as "publicly opposing the police." *Id.*

"Approximately ten people were on the stage during the Prayer Vigil, including four uniformed Ocala Police Chaplains" and five Christian ministers invited by OPD. Pet.App.25a. OPD staff preached from the stage. Pet.App.25-26a; Dkt.54-19; Dkt.54-31. The service lasted about an hour. Pet.App.26a. About 500-600 attended. *Id.*

The Ocala Atheists staged a peaceful protest that Rojas joined. Dkt.54-18; Dkt.54-73; Dkt.54-1#8.

D. Ocala materially distorts the record.

1. Neither the Eleventh Circuit nor the District Court uses ACLJ's pejorative "offended observer" label.

Ocala posits: "Both the district court and the Eleventh Circuit held that at least one of the respondents had 'offended observer' standing to bring suit." Pet.i. Neither court used this phrase. *See* Pet.App.1-8a,9-72a.

ACLJ apparently coined the "offended observer" phrase itself. The term first emerged in *ACLU v. Mercer Cnty.*, 219 F. Supp. 2d 777, 787 (E.D. Ky. 2002). ACLJ represented Mercer County.[1]

The circuits consistently use the phrase "direct, unwelcome contact" or "direct and unwelcome contact." *See Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016)

---

[1] ACLJ admits this is a "made-up rule." Walter M. Weber, *Vital Steps Forward at the Supreme Court in 2022*, ACLJ (September 10, 2022), https://aclj.org/supreme-court/vital-steps-forward-at-the-supreme-court-in-2022/ [https://perma.cc/US84-HKME]. ("[W]e've asked the Court to add a new prayer case . . . [involving] *the made-up rule* that lets atheists and separationists challenge any religious display or speech that they disagree with.") (emphasis added).

(citing unanimous body of precedent using close iterations of those words).[2]

ACLJ's "offended observer" serves as its strawman. ACLJ asserts that "the 'offense' at issue consisted, not of something offensive as such, but rather, something offensive to respondents only because of alleged municipal involvement." Pet.24.

Plaintiffs do not base their standing on "offense." They base it on real exclusion, both intangible feelings of exclusion and an actual inability to participate for the entire hour they stood eagerly ready to hear how they could help solve these terrible crimes. To characterize this as mere "offense" is to misuse the term.[3]

2. Ocala omits facts that support standing.

Ocala's petition is laden with omissions and half-truths. For example, Ocala omits Hale's undisputed concern about wanting to help OPD resolve the crimes as a key reason for attending. *See, e.g.*, Pet.App.5a,28a. Ocala also omits the multiple conversations the Chief and Mayor had with Plaintiffs.[4]

---

[2] Just these two iterations (there are many others) yield over 70 case hits on Lexis. The phrase "offended observer" appears in only 15 cases, most following Justice Gorsuch's 2019 concurrence.

[3] To characterize it as "observation of religious messages" (Pet.i) is inaccurate for the similar reasons.

[4] *E.g.*, Dkt.54-15,10:20-2; Dkt.54-15,25:17-21; Dkt.54-15,26:19-22; Dkt.54-15,30:1-4.

3. Ocala omits facts of OPD involvement.

Ocala states: (1) that "a local minister [OPD Chaplain Edwin Quintana] proposed a prayer vigil"; (2) that "minister [Quintana] and a local community activist [Haynes] planned a vigil"; and "The minister [Quintana] and activist then handled the planning and organization of the vigil." Pet.4.

Both Guinn and Graham admitted that they were "not aware" of "any entity that was more involved in initiating, planning, or conducting the Vigil than the OPD." Dkt.52-5,4:6-25; Dkt.54-10, 23:22-25,24:1-9.

The idea came from OPD headquarters, *nowhere else.* Dkt.54-56 (Graham taking credit for "bringing the community together through prayer.") Dkt.54-32,4 (Quintana to Edwards: "God bless you *Captain for organizing this event*.").

REASONS FOR DENYING THE WRIT

Certiorari should be denied. The circuits are as undivided as possible on the issue presented. Not only has Petitioner failed to identify a single conflict with this Court's precedents, its standing arguments go against numerous Supreme Court decisions and the First Amendment itself. *See* Sup. Ct. R. 10.

ARGUMENT

I. The circuits are completely unanimous: Every circuit has adopted the Direct Unwelcome Contact Standard and many circuits have emphatically *rejected* ACLJ's conception of standing.

The caselaw in the circuits is as harmonious as it gets. Disrupting this harmony by overturning Establishment Clause standing as we know it would not merely upend decades of unanimous circuit precedent, it would threaten the bedrock of our democracy: First Amendment freedoms. *See infra* § II.

"[E]very court of appeals has held that standing in this context 'requires only direct and unwelcome personal contact with the alleged establishment of religion.'" *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476-77 (3d Cir. 2016) (citations omitted; collecting circuit cases). *Accord Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1252-53 (9th Cir. 2007) ("We join the majority of the circuits and hold that, in the Establishment Clause context, spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury.").

The circuit precedent "'is clear' that 'alleging *only* personal and unwelcome contact with government-sponsored religious symbols is sufficient to establish standing.'" *Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. Re-1*, 859 F.3d 1243, 1251 (10th Cir. 2017) (citation omitted).

Every circuit has adopted the Direct Unwelcome Contact standard and most have rejected the exact arguments raised by Ocala. A mere sampling reflecting this uniform body of precedent follows.

First Circuit

- *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 14-15 (1st Cir. 2010) (standing based on "mere exposure to Pledge alone)
- *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990) (exposure to one prayer)

Second Circuit

- *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (Jewish citizens had standing to challenge Jewish display based on contact)
- *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) ("direct contact with religious displays")
- *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 72 (2d Cir. 2001) ("direct exposure to the challenged activity")

Third Circuit

- *Freedom from Religion Found., Inc. v. Cnty. of Lehigh*, 933 F.3d 275, 279 n.2 (3d Cir. 2019) (direct unwelcome contact with cross)

- *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 479 (3d Cir. 2016) ("unwelcome contact with the allegedly offending object or event, regardless of whether such contact is infrequent or *she does not alter her behavior to avoid it*") (emphasis added)

Fourth Circuit

- *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203 (4th Cir. 2017) (direct contact with cross)
- *Lund v. Rowan County*, 863 F.3d 268, 277 (4th Cir. 2017) (en banc) *cert. denied*, 138 S.Ct. 2564 (2018) (contact with avoidable prayers)
- *Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997)

Fifth Circuit

- *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525, 529 n.25 (5th Cir. 2017) (adult had standing to challenge avoidable board prayers consistent with his faith)
- *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.7 (5th Cir. 2001) ("This direct exposure to the policy satisfies the 'intangible injury' requirement")

Sixth Circuit

- *Gerber v. Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021) ("We have '*consistently*

rejected' arguments that 'psychological injury can never be the basis for Article III standing.'") (emphasis added)

- *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 682 (6th Cir. 1994) ("'unwelcome' direct contact with the offensive object is enough'")

Seventh Circuit

- *Woodring v. Jackson Cnty.*, 986 F.3d 979, 985 (7th Cir. 2021) ("it makes no difference whether Woodring can or does go out of her way to avoid seeing the display")
- *Books v. City of Elkhart*, 235 F.3d 292, 299-300 (7th Cir. 2000) ("Although it is true that the plaintiffs here could have altered their path into the Municipal Building to avoid the monument, . . . they *were not obligated to do so*") (emphasis added)

Eighth Circuit

- *Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1024-25 (8th Cir. 2012)
- *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 774 (8th Cir. 2005)

Ninth Circuit

- *Vasquez*, 487 F.3d at 1253 ("spiritual harm resulting from unwelcome direct contact")

- *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010)

Tenth Circuit

- *Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. Re-1*, 859 F.3d 1243, 1250, 1254 n.4, 1261, 1247 (10th Cir. 2017) ("we have expressly held that a plaintiff need not change his behavior to establish standing")
- *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005) (Christians had standing to challenge allegedly anti-Catholic statue based on observation alone)

Eleventh Circuit

- *Kondrat'Yev v. City of Pensacola*, 949 F.3d 1319, 1324 (11th Cir. 2020) ("Although it doesn't appear that Ryland . . . has taken any affirmative steps to avoid encountering the cross, his 'offen[se]' and 'exclu[sion]' would seem to qualify")
- *Williamson v. Brevard County*, 928 F.3d 1296, 1316 (11th Cir. 2019) (direct unwelcome contact with avoidable legislative prayers)
- *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1279-80 (11th Cir. 2008) (plaintiffs had standing to challenge legislative prayers they sought on the internet)

D.C. Circuit

- *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006)
- *Allen v. Hickel*, 424 F.2d 944, 947 (D.C. Cir. 1970)

II. ACLJ's conception of standing would require mass overturning of this Court's constitutional precedents and settled First Amendment rights.

A. This Court's Establishment Clause precedents firmly support Direct Unwelcome Contact standing.

The Eleventh Circuit's decision is in absolute accord with this Court's cases.

As discussed more fully below, this Court has routinely exercised jurisdiction over Establishment Clause cases predicated on direct unwelcome contact and upon mere spiritual harm alone (and irrespective of the *Lemon* test). *See, e.g.*, *American Legion v. Amer. Humanist Ass'n*, 139 S.Ct. 2067 (2019); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion); *Lee v. Weisman*, 505 U.S. 577 (1992); *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963).[5]

---

[5] *See also McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,

Many of these cases squarely rebuff ACLJ's argument that plaintiffs must avoid avoidable governmental religious speech to maintain standing. *E.g.*, *American Legion*; *Lee*, *Town of Greece*; *Schempp, Van Orden, infra.*

1. *American Legion*

In *American Legion*, seven Justices declined Justice Gorsuch's invitation to overturn "offended observer" standing. *Am. Legion*, 139 S.Ct. at 2098 (Gorsuch, J., joined by Thomas, J., concurring in the judgment).

Contrary to ACLJ's argument (Pet.17,20-21), "*American Legion* does not call into question [direct unwelcome standing cases]." *Woodring*, 986 F.3d at 986.

As the Seventh Circuit explained:

> Amici go further than the County and urge us to ditch "offended observer" standing based on *American Legion*. But only two Justices in *American Legion* addressed standing. *Am. Legion*, 139 S.Ct. at 2098-2103 (Gorsuch, J., concurring in the judgment) (joined by Justice Thomas). The rest of the Justices addressed the merits without mentioning standing—even though, as the Fourth Circuit's opinion below shows, the plaintiffs in

---

492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 671 (2002); *Stone v. Graham*, 449 U.S. 39 (1980). *See* Pet.App.39-40a.

> *American Legion* were also relying on "offended observer" standing.

Id. *See also*, *Freedom from Religion Found., Inc. v. Cnty. of Lehigh*, 933 F.3d 275, 279 (3d Cir. 2019) (citing *American Legion* to support direct unwelcome contact standing).

In response to this Court's GVR Order, the Eleventh Circuit in *Kondrat'Yev* similarly found:

> Having carefully reviewed the *American Legion* opinion . . . it is not strictly necessary for an Establishment Clause plaintiff to . . . avoid the alleged violation; rather, it is enough that he claim to have suffered "metaphysical"—or . . . "spiritual"—injury.

949 F.3d at 1321, 1324-25.[6]

2. *Schempp*

In *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963), this Court held that direct contact with unwelcome religious symbolism by the government in one's own community "surely suffices to give the parties standing to complain."

3. *Valley Forge*

In *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc*., 454 U.S. 464, 486 n.22 (1982) this Court fully preserved its prior holding that

[6] The undersigned was lead plaintiff counsel in both cases.

direct contact with government religious speech in one's own community "surely suffice[s] to give the parties standing." (quoting *Schempp*, 374 U.S. at 224 n.9).

The Court rejected the argument that a "psychological" or "spiritual" harm is not justiciable, Pet.12,23. *Id*. at 486 ("[W]e *do not* retreat from our earlier holdings that standing may be predicated on noneconomic injury.") (emphasis added).

The Court also rejected Ocala's argument that Plaintiffs forfeit standing if they willfully observe the violation. The Court specified that Plaintiffs have standing if they have been "*subjected to unwelcome religious exercises or* [are] forced to assume special burdens to avoid them." *Id*. at 487 n.22 (emphasis added).

4. *Lee*

In *Lee*, 505 U.S. 577 (1992), this Court expressly ruled that a father had standing to enjoin a single Rabbi's prayer slated for his daughter's future graduation (i.e. it was completely avoidable and would be delivered by a man of their own Jewish faith):

> We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

Id. at 584.

5. *Town of Greece*

In *Town of Greece*, 572 U.S. 565, 571 (2014) this Court exercised jurisdiction over a challenge to completely avoidable prayers in an adult setting (the public is not even the target audience) and that policy expressly allowed atheist invocations. The Plaintiffs could easily "leave the meetings if they did not like the prayers." *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 215 (W.D.N.Y. 2010).

B. This Court recently reaffirmed its jurisdiction over pure symbolic harm in *Uzuegbunam*.

At *ACLJ's* behest, this case was stayed pending *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). Dkt.114.[7] The Court found standing to vindicate a pure symbolic harm: "Because 'every violation [of a right] imports damage,' nominal damages can redress Uzuegbunam's injury *even if he cannot or chooses not to quantify that harm in economic terms*." *Id.* at 802 (citation omitted, emphasis added).

---

[7] The case probably would have otherwise evaded counsel's radar, but due to shared concern for the other First Amendment values, the undersigned coordinated with ADF counsel and filed a brief in support, which itself made "unlikely bedfellow" headlines, which culminated into a very public Yale Law School event and a joint op-ed with Waggoner. *E.g.*, Kimberly Strawbridge Robinson, *College Proselytizers Draw Broad Support in SCOTUS Speech Case*, BLOOMBERG LAW (Jan. 12, 2021), https://news.bloomberglaw.com/us-law-week/college-proselytizers-draw-broad-support-in-scotus-speech-case [https://perma.cc/JRH9-9B2Q].

C. The Direct Unwelcome Contact Standard is detached from *Lemon*.

ACLJ opines that "the lower courts adopted offended observer standing in response to this Court's creation of the *Lemon* and endorsement tests." Pet.20. This is wrong on multiple levels.

First, *this Court* adopted the standard (however it is labeled), not the lower courts; *see Schempp*.

Second, the Direct Unwelcome Contact Standard stems from pre-*Lemon* jurisprudence (*Schempp*) and was relied on by this Court in numerous non-*Lemon* cases: *American Legion*, *Town of Greece*, *Lee*, *Van Orden*. All of these cases involved only "psychological" or "spiritual" injury.

Third, "standing in no way depends on the merits." *Warth v. Seldin*, 422 U.S. 490, 500, (1975); *FEC v. Ted Cruz for S.*, 142 S.Ct. 1638, 1647 (2022) ("For standing purposes, we accept as valid the merits of appellees' legal claims.").

Fourth, ACLJ's argument necessarily implies that this Court has been acting *ultra vires* for decades. The Court has repeatedly held that "'[w]hile we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, *neither should we disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases*." *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (citation omitted) (emphasis added).

Moreover, the Court's cases can hardly be said to be "*silentio*." A plurality was forged on *Lemon* because Justices Gorsuch and Thomas concurred in the judgment only, asserting that the Court lacked jurisdiction and urging that they overturn "offended observer standing."

D. Requiring Plaintiffs to avoid witnessing an expected constitutional violation to maintain standing goes against this Court's cases and the First Amendment itself.

1. This Court rejected the "self-inflicted" injury argument in *FEC v. Cruz*.

As ACLJ is aware (Pet.9), in *Cruz*, this Court rejected the identical argument that self-inflicted harms are non-justiciable:

> We have never recognized a rule of this kind under Article III. To the contrary, we have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, *even if the injury could be described in some sense as willingly incurred.* See *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam) (that the plaintiff subjected himself to discrimination "for the purpose of instituting th[e] litigation" did not defeat his standing); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 37 (1982) (a "tester" plaintiff posing as a renter for purposes of

> housing-discrimination litigation still suffered an injury under Article III).

142 S.Ct. at 1648 (emphasis added).[8]

2. Imposing a duty to avoid compounds and multiplies the Establishment Clause injury.

Neither "Supreme Court precedent nor Article III imposes such a change-in-behavior requirement." *Suhre*, 131 F.3d at 1086-89. Such a rule "would effectively add 'insult' to the existing 'injury' requirement." *Id*. "Rules of standing that require plaintiffs to avoid public places would make religious minorities into outcasts." *Id.* Compelling plaintiffs to avoid government events "is to impose on them a burden that no citizen should have to shoulder." *Id.*

Such a rule would also run afoul of substantive Establishment Clause law: "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request." *Schempp*, 374 U.S. at 224-25 (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)); *accord Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985).

---

[8] Ocala relies on the earlier case of *Carney v. Adams*, 141 S.Ct. 493, 501 (2020). Pet.11. Yet unlike here, the plaintiff in *Carney* was "without any actual past injury." *Id*.

E. ACLJ's argument deprives citizens of inalienable Free Speech rights.

Standing to vindicate one First Amendment right cannot be forfeited by the proper exercising of another. *Cruz*, 142 S.Ct. at 1648.

Plaintiffs have a fundamental right to assemble in the Town Square, traditional public fora, which occupies a "special position in terms of First Amendment protection." *United States v. Grace*, 461 U.S. 171, 180 (1983).

Plaintiffs attended to protest as much as to witness and participate. Pet.5; Dkt.54-19,23. The constitutional right to protest a governmental message in a town square on a matter of public concern is beyond question. *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) ("'emotional distress'—fails to capture fully the anguish Westboro's choice added to Mr. Snyder's already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street").[9]

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

---

[9] Mr. Rojas even joined the Ocala Atheists crowd which brought picket signs. Dkt.54-19,28-29.

This Court in *Cruz* soundly rejected the identical "self-inflicted" argument because it would violate Free Speech rights:

> Demanding that the Committee comply with the Government's "alternative" would *therefore require it to forgo the exercise of a First Amendment right we must assume it has*. . . . Such a principle finds no support in our standing jurisprudence.

142 S.Ct. at 1648 (emphasis added, citation omitted).

F. Adopting ACLJ's argument would destroy symbolic-injury standing in all First Amendment contexts—including Free Speech and Free Exercise.

1. Symbolic standing is not unique to the Establishment Clause.

ACLJ's argument would end standing to vindicate symbolic injuries across the board. ACLJ cites *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) for the proposition that "'psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.'" Pet.12. This citation underscores that the breadth of ACLJ's challenge goes well beyond the Establishment Clause.

2. ACLJ's argument threatens *all* symbolic injury cases.

The Court has long recognized that First Amendment freedoms, including under the Free Speech and Free Exercise Clause, are by their nature, generally nonmonetizable. *See generally Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality).

There is no principled distinction between a symbolic Establishment Clause injury and a symbolic Free Speech or Free Exercise injury. *See Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (holding that Plaintiffs "may have a *spiritual* stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause *and the Free Exercise Clause*") (emphasis added). A claim that the government is preventing one from practicing religion can just as easily be cast as "mere offense" or "hurt feelings."[10]

ACLJ's argument would upend the legal system at large given the vast expanse of cases that turn on symbolic harm alone. *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016) ("intangible injuries can nevertheless be concrete"); *Crawford v. United States Dep't of Treasury*, 868 F.3d 438, 453 (6th Cir. 2017) ("intangible harms such as those produced by defamation"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992)

---

[10] A prisoner denied a gong for a religious ritual in prison has no harm other than a spiritual injury.

("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."); *accord Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000).

III. That Plaintiffs support private prayer is no barrier to their standing to challenge government prayer.

ACLJ argues that Plaintiffs lack standing because they "objected, not to the event, but to the city's involvement," asserting that "[t]here is something 'peculiar' about such an alleged injury." Pet.24.

It's difficult to take this argument seriously considering that the Establishment Clause only reaches government speech. Is Ocala arguing that a Christian would lack standing to challenge a government-led Christian prayer? It seems so.

Not only does this argument defy reason and the First Amendment's primary purpose (*supra* § IV.B), but it is belied by mountains of precedent allowing religious adherents to challenge the government's promotion of their own faith:

- *Lee*, 505 U.S. 577 (1992) (Jewish plaintiff, Rabbi prayer)
- *Buono v. Norton*, 371 F.3d 543, 546-48 (9th Cir. 2004) (practicing Roman Catholic ideologically offended by the government's cross, but not cross itself, had

standing), *rev'd on other grounds*, 559 U.S. 700, 711-13 (2010)

- *McCarty*, 851 F.3d at 525 (5th Cir. 2017) (Christian had standing to challenge Christian prayers)
- *Ellis v. La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (Catholic had standing to challenge cross)
- *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379, 382 (9th Cir. 1996) (Jewish citizens had standing to challenge menorah)
- *Smith v. Cnty. of Albemarle, Va.*, 895 F.2d 953, 954-55 (4th Cir. 1990) (Christian ministers had standing to challenge county's creche)
- *Adland v. Russ*, 307 F.3d 471, 477-78 (6th Cir. 2002) (Rabbi and Reverends had standing to challenge Ten Commandments)
- *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (Rabbi challenging menorah)
- *Kondrat'Yev v. City of Pensacola*, 949 F.3d 1319, 1323-25 (11th Cir. 2020) (practicing Satanist's standing was not forfeited by his use of challenged cross for Satanic ritual)
- *Hewett v. City of King*, 29 F. Supp. 3d 584, 601-603 (M.D.N.C. 2014) ("Plaintiff's personal display of the Christian flag on his

> private property does not prevent a finding that Plaintiff has standing")

Counsel has personally represented devout Christian clients in Establishment Clause cases. *See Hake v. Carroll County*, 2014 U.S. Dist. LEXIS 40476, *5 (D. Md. Mar. 25, 2014) ("Hake, a practicing Roman Catholic, alleges that attending Board meetings forces him to 'participate in proceedings that violate his religious faith.' *Id.* ¶ 8."); *McCarty*, 851 F.3d at 525 (Texas student was Christian AHA member); *M.B. v. Rankin Cnty. Sch. Dist.*, 2015 U.S. Dist. LEXIS 117289, *23-24 n.5 (S.D. Miss. July 10, 2015) (Christian student challenged Christian prayer; there was not "one assertion that M.B. is a *non*-Christian."); *Am. Humanist Ass'n v. Baxter Cnty.*, 2015 U.S. Dist. LEXIS 153162, *7-8 (W.D. Ark. Nov. 12, 2015) (court rejected argument that my client's harm "was not unwelcome" because she "displays a nativity scene in her own house").

IV. Ocala's argument is predicated on two false premises: (1) that the Establishment Clause uniquely benefits atheists; and (2) that it disadvantages Christians.

ACLJ argues: "Offended observer standing is flawed for . . . it confers a unique privilege on separationist plaintiffs." Pet.17.

It is not immediately clear what "separationist plaintiffs" means. Anyone who brings an Establishment Clause case? That interpretation is pure tautology. It is akin to saying Free Exercise Clause cases

confer a unique privilege on Free Exercise plaintiffs, or that the Equal Protection Clause confers a unique privilege on equality plaintiffs. Read in the context of ACLJ's articles about the present case, they mean "atheists."

In one solicitation, ACLJ blasts: "Angry atheists and anti-Christian extremists have long been abusing the federal court system, rushing to court claiming to be offended by some public display of prayer or exercise of religious liberty. . . . We're appealing to the Supreme Court. . . . And anti-Christian radicals have NO RIGHT to bring these suits in the first place."[11]

Nothing in the record remotely implies that Mrs. Hale and Mr. Rojas are "anti-Christian" or even against prayer. ACLJ itself bases an entire argument on the fact Plaintiffs would support a private prayer vigil. Pet.24-26. [12]

A. Christians make up a large portion of "offended observer" cases.

Ocala's argument even lacks empirical support. Atheists in no way monopolize "offended observer" standing. Christians regularly challenge actions

---

[11] *Defend Prayer at the Supreme Court*, ACLJ (last visited Nov. 16, 2022), https://aclj.org/defend-prayer-at-scotus/ [https://perma.cc/Z287-EQJS].

[12] The Hales and Jean Porgal were raised Christian. Indeed, many AHA members continue to adhere to Christianity while believing in our core mission that we can be "good without a god." (See undersigned's case list *supra*).

allegedly against Christianity or more regularly, for another religion or atheism, predicated upon the same "offended observer" standard. A selection of such cases include:

- *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1221 (10th Cir. 2005) (Catholic plaintiff had standing to challenge *Holier Than Thou* statue claiming that it "mocks God the Father" and "attacks the sacrament of Penance")
- *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 56 (2d Cir. 2001) (Christians had standing to challenge alleged promotion of "satanism and occultism," through "meditation, yoga, guided-imagery and self-hypnosis")
- *Catholic League*, 624 F.3d at 1049, 1053 (Catholic plaintiffs had standing to challenge allegedly anti-Catholic message based on mere "contact")
- *Alvarado v. City of San Jose*, 94 F.3d 1223, 1225-26 (9th Cir. 1996) (Christians had standing to challenge Aztec sculpture on the basis it promoted ancient Aztec religion)
- *Fleischfresser v. Dirs. of Sch. Dist., 200*, 15 F.3d 680, 683, 688 (7th Cir. 1994) (Christians had standing to challenge children's stories involving witches and goblins) https://law.justia.com/cases/federal/district-courts/FSupp/805/584/2593133/

- *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) (Christian clergy had standing to challenge city logo depicting Mormon temple)
- *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 690 (11th Cir. 1987) (Christian plaintiffs had standing to challenge "home economics textbooks" that allegedly promoted Humanism)
- *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) (Christians had standing to challenge the "*Learning Tree* in an English literature class" for promoting "secular humanism")
- *Sedlock v. Baird*, 235 Cal. App. 4th 874, 887 n.16 (2015) (Christians had standing to challenge yoga as endorsing Hinduism over Christianity)

B. The Establishment Clause protects prayer and Christianity from government overreach and corrosive secularism.

ACLJ seems to forget that the Establishment Clause's "*first* and most immediate purpose rested on the belief that a union of government and religion tends to *destroy government* and to *degrade religion*." *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (emphasis added).

"It is a matter of history that . . . governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to

leave England and seek religious freedom in America." *Id.* at 425.

In the Court's original prayer cases, the Court did not focus on coercion or endorsement but instead upon the Clause's twin aims of protecting religion and free government. *Engel* turned on the Establishment Clause's "first and most immediate purpose," and accurately described government control over prayer as "*governmental encroachment* upon religious freedom." *Id.* at 430.

As this Court reiterated more recently in *Lee*, our founders

> deemed religious establishment antithetical to the *freedom of all*. The Free Exercise Clause embraces a freedom of conscience . . . but the Establishment Clause *is a specific prohibition on forms of state intervention in religious affairs* with no precise counterpart in the speech provisions.

505 U.S. at 591 (emphasis added).

Lee focused on coercion, but no less upon the religious degradation concern: "while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, *these same Clauses exist to protect religion from government interference*." *Id.* at 589 (emphasis added).

1. The Establishment Clause was added to the Constitution to prevent government control over prayer *to protect religious liberty.*

The Establishment Clause was specifically designed "to put an end to governmental control of religion *and of prayer*." *Engel*, 370 U.S. at 435 (emphasis added). The "First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of [the government] would be used to control, support *or influence* the kinds of prayer the American people can say." *Id.* at 429-30 (emphasis added).

2. Allowing the Church to maintain autonomy over prayer benefits Christianity.

As Justice Kennedy explained in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 678 (1989) (concurring and dissenting in part, emphasis added), "devout adherents" may "be as offended by the holiday display as are nonbelievers, *if not more so*."

Many Christians oppose government prayer precisely because it's forbidden in the Bible. Even the mayor testified that according to *Matthew* 6:5-6 (King James), the "Bible says not to pray for public gain or not to pray for public admonition." Dkt.54-11.

3. The Establishment Clause protects Christianity's role in society.

Keeping religion out of the government's hands best enables religion to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). History proved that "politically appointed ministers in colonial Virginia were, in the view of the faithful, often 'less than zealous in their spiritual responsibilities.'" *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2060 n.9 (2020) (citation omitted).

Our founders knew that "many people had lost their respect for any religion that had relied upon the support of government to spread its faith." *Engel*, 370 U.S. at 431.

Government-controlled prayers put "at grave risk that freedom of belief and conscience which are *the sole assurance that religious faith is real, not imposed.*" *Lee*, 505 U.S. at 592 (emphasis added).

Wallace struck down government prayer, "not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that *religious beliefs worthy of respect* are the product of free and voluntary choice by the faithful." 472 U.S. at 52-54 (emphasis added).

Benjamin Franklin asserted:

> When a Religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support [it], so that

> its Professors are oblig'd to call for the help of the Civil Power, 'tis a Sign, I apprehend, of its being a bad one.[13]

C. The Establishment Clause guards against a different injury than the Equal Protection Clause.

Ocala argues that "bestowing offended observer standing only on separationists leads to bizarre results: 'An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause.'" Pet.17.

But standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). See *Schempp*, 374 U.S. at 225 n.9.

"The reason that Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected against under the Clauses are different." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017). "The Establishment Clause prohibits the Government from endorsing a religion, and thus directly regulates Government speech if that speech endorses religion." *Id.* (citation omitted). "The same is not true under the Equal Protection Clause: the gravamen of an equal protection claim is differential

---

[13] Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), http://bit.ly/2jMsrVO.

governmental treatment, not differential governmental messaging." *Id.* (citations omitted).

D. The preservation of a free government depends on enforcement of the Establishment Clause.

1. ACLJ seeks to render the Establishment Clause a nullity.

Ocala's conception of Article III would render the Establishment Clause unenforceable. Pet.15-17. Ocala rejects the notion that " 'someone has to be able to sue' " for Establishment Clause enforcement. Pet.16. Yet it "cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

The Nobility Clause (Pet.16) is not in the Bill of Rights. The Establishment Clause is the cornerstone of our democracy. *See Wallace*, 472 U.S. at 61 (recognizing "the fundamental place held by the Establishment Clause in our constitutional scheme").

2. The Establishment Clause is uniquely and foremost a restraint on government power.

Plaintiffs agree there is no hierarchy of constitutional values warranting a "sliding scale of standing." Pet.17. Unlike the other First Amendment Clauses, however, the Establishment Clause is not just a source

of individual rights, it is primarily a restraint on government power.

The Establishment "Clause is more than a negative prohibition." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). "The Establishment Clause was designed as a specific bulwark against [] potential abuses of governmental power." *Flast v. Cohen*, 392 U.S. 83, 104 (1968).

The Court in *Lee* made this explicit: "if citizens are subjected to state-sponsored religious exercises, *the State disavows its own duty* to guard and respect that sphere of inviolable conscience and belief *which is the mark of a free people.*" 505 U.S. at 592 (emphasis added).

V. This case is a bad vehicle to challenge the standing issue presented.

A. Plaintiffs were personally invited to participate by the police chief.

ACLJ places much emphasis on Gorsuch's concurrence which condemned "offended observer" standing in *American Legion*. 139 S.Ct. at 2098. *American Legion* involved a display in the middle of a highway. This case involves actual exclusion from a government event Plaintiffs were *personally* invited to.

Even receipt of the general OPD letter, Dkt.54-17, would be enough for standing. *See Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. Re-1*, 859 F.3d 1243,

1250-53 (10th Cir. 2017) (standing based on "only receiv[ing] one flier and one email").

B. The City categorically excluded observant Jewish citizens.

This is also an unattractive case because the City knowingly excluded observant Jewish citizens from the event. Ocala news reports described the "prayer vigil" as a worship service "attended by leaders from the *Christian community*." Dkt.54-73,17 (emphasis added).

A reporter wrote to an Ocala official, asking for a comment: "Tonight, which is Rosh Hashana [sic], is the police chief's prayer vigil. I've been asked if there is only a Christian God." Dkt.54-69,3. One citizen complained to the City: "you are saying Jews need not appear." Dkt.54-18,17.

C. ACLJ is using the machinery of this Court to advance its own ideological interests.

ACLJ argues that "respondents voluntarily sought out the offending exposure in question underscores the fictional—and manipulable—nature of the supposed injury." Pet.9 n.2.

Plaintiffs only sought $1. The Hales lost their own child to murder. Dkt.54-14,6:6-9. The police chief personally urged Mrs. Hale to come to the event to help him fight crime. Dkt.54-41,4. Plaintiffs arrived only to

be stuck at a Christian revival. Even though dismayed, Mr. Hale "spoke personally with Chief Graham during the event about volunteering with the police department." Ocala Br. at 22 (No. 18-12679) (11th Cir. 2022). Plaintiffs also made repeated good faith attempts to reach a settlement with Ocala.[14]

Meanwhile, ACLJ has dragged this case out for over half a decade, suspiciously appearing to advance their own political and ideological agendas. [15]

The Mayor immediately rushed to Fox News to sustain the attention *he generated* in "taking a stand" against the "angry atheists" Dkt.61-1; Dkt.54-11,100. Responding to a citizen who praised the mayor for "*fighting the enemies of our God*," Dkt.54-10, the Mayor replied: "*The fight is on*." Dkt.54-41 (emphasis added).

Long before the Eleventh Circuit's decision, ACLJ extolled its plans to take this case up to the Supreme Court. Jordan Sekulow, *ACLJ wins BIG in Court Against Biden's Unconstitutional Overreach*, ACLJ (July 9, 2021), https://aclj.org/religious-liberty/the-aclj-is-in-court-fighting-against-government-overreach/ [https://perma.cc/VA6H-AJUE].

---

[14] Pet.App.10a ("Efforts to settle the case failed. . . . The parties made further efforts to settle, but those too failed.").

[15] ACLJ "is a d/b/a for Christian Advocates Serving Evangelism, Inc., a tax-exempt, not-for-profit, religious corporation . . . specifically dedicated to the ideal that religious freedom and freedom of speech are inalienable, God-given rights." ACLJ Home Page, aclj.org (last visited Nov. 21, 2022).

ACLJ even lauds in a solicitation for members: "It's a case 35 years in the making." *Defend Prayer at the Supreme Court*, ACLJ (last visited Nov. 16, 2022), https://aclj.org/defend-prayer-at-scotus.

In sum, there is no good reason for certiorari to be granted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MONICA L. MILLER
Counsel of Record
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place NW
Washington, DC 20036
(202) 238-9088
mmiller@americanhumanist.org

Counsel for Respondents

ABBREVIATIONS

"Pet." Refers to the Petition filed in this Court.

"Pet.App." Refers to the Petition Appendix ("a") pages appended to the Petition.

"Dkt.__" refers to parts of the district court record not in the Pet.App.

"OPD" refers to Respondent the Ocala Police Department.

Petitioner, the City of Ocala ("Ocala"), Kenneth Graham ("Chief Graham"), Reuben Guinn ("Mayor Guinn"), is collectively referred to as "Ocala" "the City" or "ACLJ" unless otherwise stated.[1]

[1] Greg Graham served as the OPD Police Chief ("Chief Graham" or "Graham") between 2012 and 2020 when he passed away.