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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

The issue in this case is the constitutional validity of "offended observer" standing, under Article III, in Establishment Clause cases.

In its petition, the City of Ocala made three main points. First, that offended observer standing is incompatible – and rightly so – with Article III and this Court's precedents. Pet. § I. Second, this Court's review is necessary because there is no realistic prospect that the lower courts, having widely embraced offended observer standing in Establishment Clause cases, will correct this problem on their own initiative. Pet. § II. And third, that the respondents here present an especially apt occasion for the disavowal of offended observer standing, as they sought out the very exposure they complain of, and their own testimony makes clear that their "injury" is purely ideological disagreement, namely, their judgment that the city acted unconstitutionally. Pet. § III.

In their Brief in Opposition, respondents Lucinda Hale and Art Rojas provide no reason not to grant review. To the contrary, their brief further illustrates the need for this Court's intervention.

On the first point – that offended observer is inconsistent with Article III – respondents essentially rest their contrary view on the *Schempp* school Bible readings case. But as discussed *infra*, their argument quickly falls apart.

On the second point – that the circuits are not going to fix their error by themselves – respondents do not disagree. In fact, they cite an even longer list of cases showing that this constitutional error is firmly entrenched in the lower courts.

On the third point – that respondents' claim of standing is especially weak – respondents make the rather startling claim that even weaker claims would suffice (namely, simply reading a letter posted online, Opp. at 44), showing the need for this Court to step in and put an end to the blatant and continuing disregard of Article III.

Finally, respondents offer a potpourri of other objections to this Court's review, none of which amounts to a persuasive counter-argument.

Petitioner addresses these matters below.

1. Offended Observer Standing Is Inconsistent with Article III.

As noted in the petition, this Court condemned, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982), the notion of resting federal court jurisdiction on the "psychological consequence presumably produced by observation of conduct with which one disagrees". This Court's cases, both before and after *Valley Forge*, reinforce that principle. Pet. at 10-14. Respondents Hale and Rojas nevertheless defend offended observer standing in Establishment Clause lawsuits.

Respondents rely heavily upon footnote 9 of *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963). That case involved the exposure of children in public schools, against their parents' wishes, to daily Bible readings. *Id.* at 205-06, 211. But *Schempp's* footnote "will not bear th[e] weight" of respondents' argument, *Valley Forge*, 454 U.S. at 486 n.22. As this Court explained:

> The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them. Respondents have alleged no comparable injury.

Valley Forge, 454 U.S. at 486 n.22. And while respondents also cite *Lee v. Weisman*, 505 U.S. 577, 584 (1992), that case, like *Schempp*, involved the exposure of a public school student to officially arranged religious expression (viz., an invocation and benediction).

Respondents also invoke cases where this Court addressed the *merits* of Establishment Clause challenges brought by offended observers, without discussing the standing question. Opp. at 22 & n.5. But again, this Court has already dispatched that argument. Pet. at 14-15. "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *ACSTO v. Winn*, 563 U.S. 125, 144 (2011).

Curiously, respondents assert that this Court's ruling in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), stands for the proposition that "symbolic harm" suffices for Article III standing. Opp. at 26. Not so. *Uzuegbunam* addressed nominal damages and expressly held as "flawed" the contention that such damages are "purely symbolic," 141 S. Ct. at 800-01. Moreover, that case involved a direct impairment of a plaintiff's free speech rights, so there was "no dispute" that an Article III injury existed. 141 S. Ct. at 797.

Respondents claim that the cognizability of "symbolic harm" is a settled part of this Court's jurisprudence. Opp. at 3, 26, 31-32. However, respondents cite no Supreme Court (or other) case that even uses that term, much less holds that a symbolic harm satisfies Article III. That respondents seek shelter under the rubric of "*symbolic* harm" shows that even they recognize there is no *actual* Article III harm at issue here.[1]

Given the demise of the *Lemon* test[2] and Justice Gorsuch's discussion of *Lemon*'s possible role in the genesis of offended observer standing, Pet. at 20, respondents argue that offended observer standing predates *Lemon* and exists independently of that now-defunct standard, Opp. at 27. To make this argument, respondents again invoke *Schempp*, which as noted above does not in fact support offended observer standing. That *Lemon* presented a *merits* standard, while this case addresses *standing*, *cf.* Opp. at 27, is true but irrelevant to the question whether offended observer standing comports with Article III.[3]

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[1]Respondents seem not to grasp the difference between symbolic and actual harm. They assert that "the government . . . preventing someone from practicing religion can just as easily be cast as 'mere offense' or 'hurt feelings,'" and that depriving someone of an item needed for a religious ritual causes "no harm other than a spiritual injury." Opp. at 32 & n.10.

[2]From *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[3]Respondents assert that special standing rules are needed for Establishment Clause claims because such claims "guard against a different injury," citing a prohibition on "[g]overnment speech , , , that . . . endorses religion." Opp. at 42. There are two obvious problems with that argument. First, this Court has clearly stated

2. This Court's Intervention Is Needed to Dislodge Offended Observer Standing from the Lower Courts.

As noted in the city's petition, lower courts – despite this Court's teachings – have widely embraced offended observer standing for Establishment Clause claims, and there is no reason to believe they will extricate themselves from this error. Far from disagreeing, respondents Hale and Rojas helpfully provide their own long list of citations to lower federal court decisions employing offended observer standing. Opp. at 18-22.

Indeed, recent cases from the Third, Seventh, and Eleventh Circuits confirm that the death of the *Lemon*/endorsement test is *not* prompting the lower courts to discard offended observer standing. Pet. § II. To that list can now be added the Fifth Circuit. In *Freedom from Religion Foundation v. Mack*, 49 F.4th 941 (5th Cir. 2022), that court observed that "the law of Establishment Clause standing is hard to reconcile" with general standing principles, that "the Establishment Clause has repeatedly gotten special treatment when it comes to standing," and that such special treatment "may have been unwarranted." *Id.* at 949. *Nevertheless,* the Fifth Circuit professed its hands to be tied: "Without an unequivocal, intervening change in the law, we must apply the rules established by our prior decisions." *Id.* (internal quotation marks

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that there are *not* different jurisdictional rules for different constitutional provisions. Pet. at 15. And second, this Court "long ago" abandoned the endorsement test for Establishment Clause cases. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2427 (2022).

and citation omitted). *This lower court status quo will not change unless this Court steps in.*

3. Respondents' Claims Perfectly Illustrate the Problems with Offended Observer Standing.

As the city explained in the petition, respondents' assertion of standing here highlights the flawed nature of offended observer standing. Hale and Rojas claim that it is enough to *witness* an unconstitutional act to be entitled to challenge it in federal court. But worse still, (1) they acknowledge that they *deliberately sought out* the very exposure they complain of, and (2) they admit that their objection is not to what they witnessed (a prayer vigil), but to the degree of the city's perceived involvement in – and hence, the arguable unconstitutionality of – the event.

As to the first point: yes, it is permissible to construct test cases. The picketer knowingly approaches the no-speech zone and is rebuffed by law enforcement. The tester couple applies for a rental property and is refused on the basis of their race. In such cases, the cognizability of the injury is clear: suppression of a person's free speech and denial of equal protection under federal civil rights laws are injuries sufficient for Article III jurisdiction. But merely *witnessing* an alleged constitutional violation is not enough. The citizen who runs outside to view an arrest involving excessive force does not *ipso facto* have a claim against the police officer. The person who rushes across town to videotape the FBI swat team ransacking the wrong house does not have standing to bring a Fourth Amendment claim. That these

hypothetical observers may be deeply shaken by what they saw, or passionately committed to righting the injustices they observed, does not translate into Article III standing. That they made a point personally to observe the violation underscores how plainly manipulable – and self-creating – offended observer standing in such cases would be.

As to the second point: constitutionally cognizable injuries are injuries, not disagreements. It would be madness to say, "I have no problem with inhaling tear gas; it was the fact that a government agent threw the device that's the problem." Yet that is essentially respondents' position: they do not object to prayer vigils, just to those with excessive (in their view) government involvement.[4] Their testimony, Pet. at 6, thus makes clear that their supposed injury is in reality *ideological* or *constitutional disagreement*, albeit dressed up in terms of personal offense.

Respondents have no answer to this except to point out that many of the Establishment Clause plaintiffs are themselves religionists. Opp. at 33. There is no obvious logical relevance to this rejoinder. Rather, this is a continuation of respondents' mischaracterization of the city's argument. *Contra* respondents, the city does *not* argue that offended observer standing is a special or unique privilege for "atheists." Opp. at 2, 3. Rather, the petition notes that offended observer standing is a unique privilege for "Establishment

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[4]Of course, the presence or absence of state action matters on the *merits*: The burglar does not violate the Fourth Amendment, while the police officer may. But the injury – invasion of the home – exists in both cases. To say that the *harm* is only a harm where the Constitution is violated is to admit that the alleged injury is legal disagreement on the merits, not cognizable Article III injury.

Clause plaintiffs" (Pet. at 15), i.e., "separationist plaintiffs" (*id.* at 17). And as respondents themselves copiously document, the set of separationist plaintiffs includes plenty of theists. Opp. at 33-35. The offended observer doctrine improperly privileges, not particular believers or unbelievers, but one set of constitutional claims (and thus, those who bring such claims), namely, claims under the Establishment Clause, in sharp contrast to the universe of other claims and plaintiffs in federal court. Pet. at 15-18. Such privileging is improper: "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).

Yet respondents urge that offended observer standing should be even *more* wide-open, namely, that there is no need for Hale and Rojas even to have attended and observed the challenged prayer vigil, or for that vigil even to have occurred: "Even receipt of the general OPD [Ocala Police Department] letter [Pet. App. 13a-15a, announcing the upcoming vigil] would be enough for standing." Opp. at 44. Recall that the OPD letter was posted on OPD's Facebook page, and that is how the respondents learned of the letter. Pet. at 5. In essence, the OPD letter was an online press release from the city. In *Valley Forge Christian*, the plaintiffs likewise "learned of the [challenged act] through a news release." 454 U.S. at 469. Respondents are therefore squarely rejecting *Valley Forge*. This is, however, the inevitable consequence of offended observer standing. If seeing or hearing of the alleged Establishment violation suffices, if *avoiding* seeing or

hearing the alleged violation suffices,[5] and if perceiving the alleged violation online suffices, as respondents contend here, then there is no limiting principle at all. This Court should grant review and repudiate such a boundless standing doctrine.

4. Respondents' Remaining Contentions Merit No More than Summary Treatment.

The foregoing discussion dispenses with the central points at issue. The city offers the following brief response to some other contentions in respondents' Brief in Opposition.

Respondents argue that, absent offended observer standing, the Establishment Clause would be a "nullity." Opp. at 43. This is sheer hyperbole. As petitioner has noted, plaintiffs who are subjected to coerced exposure to religious (or anti-religious) material, religion-based unequal treatment, or the misuse of their municipal taxpayer funds have claims to standing on grounds independent of mere offended observer allegations. Pet. at 11, 14 n.3, 18-19.

Respondents Hale and Rojas insist cases like this are different because the challenged event took place in their "own community," Opp. at 24. (Rojas is a resident of Ocala. Hale lives in a different city in the same county. Pet. at 4-5; Pet. App. 5a.) Of course, being a municipal *taxpayer* can offer a distinct basis for standing. Pet. at 11. But respondents do not sue on

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[5] *See, e.g., Woodring v. Jackson Cty.*, 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"); *Vasquez v. L.A. County*, 487 F.3d 1246, 1250 (9th Cir. 2007) ("plaintiffs' affirmative avoidance [is] sufficient to confer standing").

that basis. And outside of an objective category such as who is or is not a local taxpayer, a "community" test has little to commend it. In cases of actual infringement of someone's constitutional rights, one's residence is generally beside the point. And deciding who is part of a "community" is about as open-ended and subjective as a test can be, making it quite unsuitable for federal jurisdictional determinations.

Respondents mischaracterize the city's position as imposing a "duty" on a plaintiff to avoid the sights or sounds that offend them. Opp. at 2, 28, 29. That is inaccurate. The city points out that *coerced* exposure (e.g., in school, in prison, in the workplace, as a condition of public benefits) presents a stronger claim for Article III standing. Pet. at 18-19. But absent coercion, it is completely up to individuals whether to observe or avoid the material they find offensive. There is no "duty."

Respondents Hale and Rojas complain that they faced "real exclusion," not just "offense." Opp. at 15, 44. But no one stopped respondents from attending. And respondents concede that they "attended [the event] *to protest* as much as to witness and participate." *Id.* a 30 (emphasis added). By "real exclusion," Hald and Rojas do not mean "No entry." Rather, they explain, they felt "intangible feelings" of exclusion and an "actual inability to participate." *Id.* at 15. But this is just another way of saying they felt strongly that this event did not cater to their views, and that their consciences did not permit them to participate. An abortion opponent or defender could say the same thing about a government conference on

abortion, depending on what message was offered.[6]

Respondents devote portions of their brief to the Establishment Clause merits of their case.[7] This is, of course, beside the point. The petition for certiorari does not address the merits of respondents' claims (which the Eleventh Circuit did not reach), and respondents have filed no cross-petition on that issue. Had the lower courts properly rejected this lawsuit for lack of standing, as petitioner city urges, there would be no need to address the merits.[8]

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[6]Respondents' passing assertions about the exclusion of observant Jews, Opp. at 4, 45, represent a red herring. There is no record basis for saying that the city intentionally or knowingly scheduled the vigil to conflict with any Jewish holiday. Moreover, none of the plaintiffs claimed either to be Jewish or that they would not have objected had the vigil been held on a different day.

[7]The Eleventh Circuit did not reach the merits, remanding for reconsideration in light of this Court's decision in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). Pet. App. 6a-8a. If respondents lack offended observer standing, there is no longer any need for consideration of the merits, and this case comes to an end upon remand for purposes of dismissal for want of jurisdiction.

[8]Respondents bizarrely claim that the city's attorneys have "dragged this case out for over a decade, suspiciously appearing to advance their own political and ideological agendas." Opp. at 46. Respondents, of course, are the plaintiffs, and they were free to drop their case at any time; the city had no power to "drag the case out," only the power to defend itself, which it has done. The biggest irony is that the American Humanist Association, whose counsel makes this charge, is itself a donor-supported, agenda-driven organization that not only supplied counsel in this case but was even originally a party. Pet. at 3-4, 6-8.

CONCLUSION

This Court should grant certiorari and, upon review, reverse the judgment of the Eleventh Circuit and remand for dismissal for want of standing.

Respectfully submitted,

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