No. 18-351

IN THE
Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, *ET AL.*,

Petitioners,

v.

AMANDA KONDRAT'YEV, *ET AL.*,

Respondents.

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

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Brief of *amici curiae* of the Jewish Coalition for Religious Liberty, the Coalition for Jewish Values, and the Union of Orthodox Jewish Congregations of America in support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

Orthodox Jews, such as *amici* identified below, are a minority faith community in the United States, and the Constitution's guarantees of religious liberty have been the indispensable foundation upon which the community and its institutions have grown and flourished. *Amici,* therefore, all have an interest in promoting religious liberty by advocating for a proper interpretation of Article III of the Constitution and the Religion Clauses of the First Amendment, and are concerned that the "offended observer" standing doctrine will make America a less hospitable place for members of minority faiths.

The Jewish Coalition for Religious Liberty ("JCRL") is an cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to religious liberty. As adherents of a minority religion, its members have a strong interest in ensuring that religious liberty rights are protected.

The Coalition for Jewish Values ("CJV") is a trade name of Project Genesis, Inc., a Maryland-based charity operating pursuant to 26 U.S.C. § 501(c)(3). The CJV advocates for classical Jewish ideas and standards in matters of American public policy. The CJV represents over 200 rabbis who have served the

[1] The parties' counsel were notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

Jewish and greater American communities for decades as leaders, scholars and opinion makers.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations across the United States. The Orthodox Union, through its OU Advocacy Center, has participated in many cases before the federal courts that raise issues of critical importance to the Orthodox Jewish community.

SUMMARY OF THE ARGUMENT

I. Offended observers lack standing to challenge religious displays. To show standing, a plaintiff must have suffered a concrete injury. An emotional reaction to the government's conduct does not amount to one. Indeed, this Court has specifically held that the "spiritual" or "psychological" effect of "observ[ing]" an alleged violation of the Establishment Clause is not an injury. *Valley Forge Christian Coll.* v. *Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). That type of psychic opposition to state action is abstract, not concrete, and it invades only the plaintiff's emotional satisfaction, not his judicially cognizable interests. As with standing doctrine generally, this rule ensures the federal courts do not wander from their proper role of enforcing individual rights and stray into the messy business of superintending general government operations.

Establishment Clause plaintiffs have tried to justify offended-observer standing on a number of grounds, but none is persuasive. Rather, this Court's authority provides no support for opening the courthouses to distressed bystanders—quite the

opposite. This Court has ruled that "observation" does not confer standing, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (plurality op.); that "psychic satisfaction" "does not redress a cognizable Article III injury," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998); and that no one has an interest in avoiding "affront from the expression of contrary religious views," *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1826 (2014) (plurality op.).

II. Beyond its shaky legal foundation, offended-observer standing uniquely harms minority faiths. The public tends to lack familiarity with the practices of minority religions, including Judaism. This lack of familiarity leads observers to find the symbols and practices of such religions distasteful, offensive—and worthy of challenge. Offended-observer standing is the vehicle for such challenges.

One effect of offended-observer standing, then, is to encourage the erasure of minority religions from public life. Indeed, in practice, offended observers have often taken aim at public displays of menorahs (ancient emblems of Judaism, and modern symbols of Hanukkah). In response, local officials have often preemptively decided that displaying such symbols is not worth the trouble. In this way, offended-observer standing drives acknowledgment of our nation's religious pluralism out of the public square even in cases where no offended observer can be found.

Even more worrisome, offended-observed standing discourages governmental accommodation of minority religious practices, including in ways that may act as *de facto* bars preventing members of minority religions from living in certain communities. Because current First Amendment case law does not

require religious exemptions from neutral laws, adherents of minority religions must persuade local officials to facilitate their religious practices rather than seeking to have those practices protected by the judiciary. But the threat that offended observers will sue local officials over such accommodations discourages the officials from extending them in the first place. Disgruntled individuals who disapprove of religious minorities should not be uniquely empowered to weaponize their disapproval to ban religious minorities from their neighborhoods.

Both because of its doctrinal flaws and its regrettable consequences, this Court should grant the petition for certiorari and definitively reject the theory of offended-observer standing.

ARGUMENT

I. Offended observers have not suffered the sort of concrete harm that would give them standing to challenge religious displays.

Under Article III of the Constitution, federal courts exercise the "judicial power" only to decide "Cases" and "Controversies." See U.S. Const. art. III, § 2. A lawsuit qualifies as a case or controversy if the plaintiff has standing to sue—*i.e.*, only if he has suffered an injury in fact that is fairly traceable to the challenged conduct and would be redressed by a favorable judicial decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In the instant proceeding, Plaintiffs assert standing to challenge the cross in Pensacola's Bayview Park because it offends them. They say the presence of the cross injures them because they feel

"offended," "affronted," and "shock[ed]" whenever they encounter it during their sojourns in the park. (Compl. ¶¶ 7–16, ECF No. 1.)

This theory of standing—*veni, vidi, ego offendi*[2]—does not satisfy the dictates of Article III. An observer's offense at a religious display does not amount to injury in fact, even if the offense stems from direct contact with the display and even if the observer (unlike Plaintiffs here) takes detours to avoid it. In all events, the observer has suffered no concrete incursion to any cognizable interests.

A. Offense at a religious display does not create a tangible harm that confers standing.

The first fundamental component of standing is an injury to the plaintiff—a "concrete" and "particularized" invasion of a "judicially cognizable interest." *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997). Simply put, dismay at a religious display is not such an injury; it is not "concrete" and it does not invade any cognizable interest.

1. Time and again, this Court has ruled that one's emotional reaction to government conduct is a "purely abstract" harm that falls short of "the kind of . . . concrete injury that is necessary to confer standing to sue." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 616 (1989) (plurality op.); *accord id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part). Consequently, a plaintiff cannot establish injury by asserting that the challenged government action forces him to endure "the psychological consequence . . . produced by observation of conduct with which one

[2] Lit. "I came, I saw, I was offended."

disagrees." *Id.* at 616 (plurality op.); *accord id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part). Or by showing the action makes him feel socially, emotionally, or spiritually "stigmatiz[ed]." *Allen* v. *Wright*, 468 U.S. 737, 754 (1984). Or by showing that it consumes him with "fear." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 418 (2013). Or by showing that it disturbs his "conscien[ce]." *Diamond* v. *Charles*, 476 U.S. 54, 67 (1986). Or, for that matter, by showing that the invalidation or termination of the action would bring him "comfort," "joy," or "psychic satisfaction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). All this belongs in the realm of the abstract and intangible, beyond the reach of the federal courts.

The same principles apply to Establishment Clause cases, as "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Thus, in *Valley Forge*, this Court held the plaintiffs lacked standing to challenge the Federal Government's transfer of land to a Christian college. The plaintiffs claimed "spiritual" and "psychological" harm from the "observation of conduct with which [they] disagree[d]." 454 U.S. at 485 & 486 n.22. But the Court ruled this was "not an injury sufficient to confer standing." *Id.* at 485. Despite the "sincerity" of the plaintiffs' reactions, the "depth" of their commitments, and the "intensity" of their emotions, they had not alleged "an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486 & n.22.

Valley Forge is no outlier. Decades earlier, in *Doremus* v. *Board of Education*, 342 U.S. 429 (1942), this Court held a concerned citizen lacked standing to

challenge Bible reading in school. A person who suffered "direct and particular injury" from such a practice (like a student forced to attend the school) could sue; but a merely "offended" bystander has identified only a "religious difference," not an invasion of a cognizable interest. *Id.* at 432, 434–35. And decades later, in *Hein* v. *Freedom From Religion Foundation*, 551 U.S. 587 (2007), this Court reaffirmed this rule, denying standing to challenge federal conferences for religious charities, even though the conferences allegedly "sent the message to nonbelievers that they are outsiders." *Id.* at 596 (plurality op.). Justice Scalia, concurring in the judgment, was even more emphatic in condemning "the very concept of Psychic Injury." *Id.* at 626. This Court should grant certiorari to reign in lower courts that have ignored this Court's precedent to the detriment of millions of religious Americans.

2. The rejection of such psychological aversion to state action as a basis for standing rests on the sensible notion that avoiding unwelcome religious ideas does not constitute a "judicially cognizable interest." *Bennett*, 520 U.S. at 167. That is why (for example) this Court ruled that a street preacher "invaded no right or interest" of his listeners when he attacked "all organized religious systems as instruments of Satan." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940). "The hearers were, in fact, highly offended," but there was no "assault," no "threatening of bodily harm," and no "personal abuse." *Id.* at 309, 310. The same is true when the state takes action that an observer finds offensive due to its religious character. Put simply, individuals do not suffer an invasion of their cognizable legal interests every time they experience "a sense of affront from the expression

of contrary religious views." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1826 (2014) (plurality op.).

Equating *offense* with *injury* would thus also defeat the main purpose of standing doctrine: confining federal courts to their proper constitutional role. "The province of the court is, solely, to decide on the rights of individuals." *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803). It is not to conduct a "general supervision of the operations of government." *Raines* v. *Byrd*, 521 U.S. 811, 829 (1997). Yet in adjudicating an offended observer's complaint, a court does not decide on the rights of individuals, as nobody has "a right entirely to avoid ideas with which [he] disagree[s]." *Town of Greece*, 134 S. Ct. at 1826 (plurality op.). Instead, the court engages in general supervision of government operations, at the behest of someone who happened to witness them.

3. Under these basic, well-founded standing principles, an individual cannot challenge a religious display on public property simply because he takes offense at it, whether he takes umbrage when seeing the display firsthand or hearing about it from another. Either way, the harm reduces to bare psychological displeasure at conduct with which one disagrees. This Court held in *Valley Forge* that "the psychological consequence . . . produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing," 454 U.S. at 485, and *ASARCO* later reiterated that "observation of conduct with which one disagrees" does not create "the kind of . . . concrete injury that is necessary to confer standing to sue," 490 U.S. at 616 (plurality op.); *accord id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part).

Indeed, if a plaintiff were to argue in any other setting that observation creates standing, he would be laughed out of court. Nobody thinks offended pacifists can challenge declarations of war if they observe bombing campaigns from nearby refugee camps; that offended victims can challenge presidential pardons if they encounter freed convicts on the street; that offended death-penalty abolitionists can challenge death sentences if they watch trials from courtroom galleries; that offended activists can challenge permissive abortion laws if they watch women enter abortion clinics; or that offended traditionalists can relitigate *Obergefell* v. *Hodges* if they witness same-sex weddings. If observation does not establish standing there, neither can it do so here, for there is "no principled basis" to distinguish "the Establishment Clause" from the rest of the Constitution in applying Article III. *Valley Forge*, 454 U.S. at 484. By granting certiorari in this case, this Court can reaffirm that religious Americans are not second-class citizens whose interest are uniquely susceptible to legal challenge. Such a notion is offensive to American tradition and this Court's precedent.

B. The defenses of offended-observer standing are unconvincing.

Over the years, Establishment Clause plaintiffs have offered the lower courts a host of citations and rationales that supposedly justify offended-observer standing. None of them is persuasive.

First, some have claimed this Court endorsed offended-observer standing in *School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963), when it held that children have standing to challenge Bible reading and prayers in public schools. Not so. Children who

are "required by law to attend school," *id.* at 223, suffer concrete injury from such a practice—namely, a *compulsion* to witness (and even participate in) a religious exercise. But, as *Doremus* had held two decades earlier, mere observation *sans* coercion does not amount to Article III injury. 342 U.S. at 432. Furthermore, this Court has shown special solicitude in cases involving both coercion and children—factors not present in the instant appeal or in other offended-observer cases. Compare, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 588 (1992) (curtailing school-sponsored prayers by clergy at public school graduations in light of the "subtle coercive pressures" on the impressionable youths to attend and participate) with *Town of Greece*, 134 S. Ct. at 1826 (plurality op.) ("Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions.").[3]

Second, some plaintiffs have appealed to *Flast* v. *Cohen*, 392 U.S. 83 (1968), which held that taxpayers have standing to challenge laws appropriating money for religious use. But this Court has "confined" *Flast*

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[3] Notably, *Town of Greece* demonstrates that, in the absence of the "coercive pressures" found in the school context, *Lee*, 505 U.S. at 588, the presence of children who observe religious speech or images is an insufficient basis upon which to find an Establishment Clause violation. *See Town of Greece*, 134 S. Ct. at 1831 (Alito, J., concurring) (noting that "ordinary citizens (and even children!) are often present"); *id.* at 1846 (Kagan, J., dissenting) ("There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.").

"to its facts," *Hein*, 551 U.S. at 609 (plurality op.); indeed, it has "beat[en] *Flast* to a pulp," leaving it "weakened" and "denigrated," *id.* at 636 (Scalia, J., concurring in the judgment). It therefore cannot be extended from offended *taxpayers* to offended *observers*—a leap that fails in any event. Taxpayers hold a personal right against "extract[ion]" of their money for religious use, *Flast*, 392 U.S. at 106; observers lack a comparable right against the "sense of affront from the expression of contrary religious views," *Town of Greece*, 134 S. Ct. at 1826 (plurality op.). A physical display is thus not analogous to a financial expenditure.

Third, Establishment Clause plaintiffs have noted that this Court has adjudicated various religious-display cases on the merits without addressing standing. *E.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). So it has. But "drive-by jurisdictional rulings . . . have no precedential effect." *Steel Co.*, 523 U.S. at 91. "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." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 144 (2011). *Winn* thus brushed aside "several earlier cases" that decided Establishment Clause claims but that failed to "mention standing." *Id.* Because this Court's religious-display cases, similarly, neither note nor discuss standing, they are not *stare decisis* on its existence. Thus the importance of this Court review of this case to squarely reaffirming that "offended observer standing" is not cognizable.

Fourth, some plaintiffs have mourned that, without offended-observer standing, *nobody* would have standing to challenge at least some public

religious displays. Perhaps so. "But the assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge*, 454 U.S. at 489. After all, courts are supposed to decide constitutional questions only when necessary to decide real cases; they are not supposed to manufacture cases so that they can resolve more constitutional questions. Nor may courts assume that the democratic branches will ignore the Constitution in the absence of constant judicial supervision. Legislators and executive officers take their own oaths to support and defend the Constitution and, indeed, they "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry.* v. *May*, 194 U.S. 267, 270 (1904).

Finally, some have contended that, even if taking offense at a display does not count as injury, a plaintiff who takes a detour to avoid the unwelcome sight thereby bears a concrete burden entitling him to invoke the jurisdiction of the federal courts. Notably, plaintiffs in this case have *not* attempted that maneuver. (See App. 11a.) Regardless, it would fail too. In *Clapper* v. *Amnesty International*, the Supreme Court explained that a plaintiff "cannot manufacture standing" by "choosing" to incur burdens to avoid something that is not *itself* an Article III injury. *Clapper*, 568 U.S. at 402. In *Clapper*, the plaintiffs challenged a surveillance program; although the program did not itself injure the plaintiffs, since they could not be certain that it would intercept their calls, they took "burdensome measures" "to avoid" "the threat of surveillance." *Id.* at 411–15. Still, they lacked standing: Those costs and burdens arose from "choices that *they* ha[d] made," and such "self-inflicted

injuries" were "not fairly traceable" to the challenged program. *Id.* at 417–18 & n.7. In other words, the plaintiffs could not "manufacture standing by incurring costs in anticipation" of a non-injury. *Id.* at 422; see also *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam).

The same reasoning defeats the ploy to create standing by taking detours to avoid religious monuments that would otherwise cause offense. Detours are not fairly traceable to governments; they are "self-inflicted" injuries, which are traceable to the observer's own "choices." Put another way, because observation of a religious display is not itself an Article III injury, a plaintiff "cannot manufacture standing" by taking a detour "in anticipation" of that non-injury. *Clapper*, 568 U.S. at 422.

The Eleventh Circuit's opinions below were critical of the doctrine of offended-observer standing and expressed skepticism of its continued viability in light of this Court's case law steadily eroding the shaky foundations on which the doctrine supposedly rests.[4] But because this Court has not yet expressly and emphatically buried the doctrine, the court below felt bound by its own intra-Circuit precedent recognizing and applying the doctrine. The time has come to inter the doctrine with finality.

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[4] As noted above, this Court has ruled that "observation" does not confer standing, *ASARCO*, 490 U.S. at 616; that "psychic satisfaction" "does not redress a cognizable Article III injury," *Steel Co.*, 528 U.S. at 107; and that no one has an interest in avoiding "affront from the expression of contrary religious views," *Town of Greece*, 134 S. Ct. at 1826 (plurality op.).

C. Offended-observer standing amounts to an impermissible and discriminatory "heckler's veto" of religious exercise.

Yet another reason to grant the Petition is to close the doctrinal loophole that allows anti-religious hecklers to shout down religious speech in the public square. The "heckler's veto" is "one of the most persistent and insidious threats to first amendment rights." *Berger* v. *Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). Allowing citizens standing in federal court solely to complain about *religious* offensive speech "effectively empower[s] a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California*, 403 U.S. 15, 21 (1971); *cf. Snyder* v. *Phelps*, 562 U.S. 443, 448 (2011) (protecting grossly offensive speech from attempts by citizens to employ governmental power to punish the speech). Indeed, targeting religious speech just because of its religious nature is a "blatant" form of unconstitutional discrimination. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995). Hence this Court's longstanding precedent against "a modified heckler's veto" which sought to ban a group's religious activity on the basis of what others might perceive. *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 119 (2001). More broadly, the Constitution rejects the notion that "adult citizens" are injured by mere exposure to religious expression. *Town of Greece*, 134 S. Ct. at 1823 (noting that "adult citizens" are presumed by law to be "firm in their own beliefs" and able to tolerate exposure to others' expression of faith). Offended observer standing is akin to, but *worse* than, the heckler's veto:

> In the case of the heckler's veto, the state's decision to censor expression is not intended to suppress speech or to appease hecklers, but rather to serve a strong interest in protecting public safety from a potentially violent demonstration. However, in cases concerning offended observers, the government curtails speech not to protect public safety, but merely to appease the sensibilities of those who have decided to seek to censor an unwanted display rather than to avert their eyes.

Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause As A Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 265–66 (2014). This Court should reaffirm the equality of religious Americans by closing the ahistorical loophole that empowers anti-religious hecklers to drag religious expression into court and to chill religious speech in the public square.

II. Offended-observer standing uniquely harms minority religions, including Judaism.

Allowing offended observers to bring Establishment Clause cases is not just contrary to law. It is also bad policy that uniquely harms minority religions such as Judaism. The general public tends to lack familiarity with the practices of these religions. For example, everyone knows that this year is (to Christians) the Year of Our Lord 2017; but not everyone knows that it is (to Jews) the Year of the World 5779. Everyone has heard of Easter; not everyone has heard of Purim. Most people have seen Christians wearing ashes on their foreheads on Ash Wednesday; most people have not seen Jews wearing

tefillin (small leather boxes containing Torah verses) on their biceps and foreheads during morning prayers.

This lack of familiarity often leads members of the public to find the symbols and practices of minority religions upsetting or off-putting.[5] Such a reaction may reflect the "instinctive mechanism to guard against people who appear to be different." *Board of Trs.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Or it may reflect "simple want of careful, rational reflection." *Id.* Or, in some cases, it may reflect outright "malice" or "animus." *Id.*[6]

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[5] *See Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring) (explaining how religious activities from a variety of faiths can be misperceived by outsiders); Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 941 (2001) ("Minority religions may have practices viewed as unfamiliar or distasteful by the general public.") (citations omitted); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1187 (2005) (noting the inclination "to find 'good cause' in familiar religions and 'fault' in unfamiliar or minority faiths"); J. David Cassel, *Defending the Cannibals*, 57 CHRISTIAN HISTORY & BIOGRAPHY 12 (1998) (noting that in the early centuries A.D., the ruling Roman upper-class believed the tiny early Christian church was home to "cannibalistic, incestuous ass-worship").

[6] For example, several municipalities in New York were incorporated out of sheer "animosity toward Orthodox Jews as a group." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (quoting leader of the incorporation movement as stating "the reason [for] forming this village is to keep people like you [*i.e.*, Orthodox Jews] out of this neighborhood"); *see also Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002), cert. denied, 539 U.S. 942 (2003) (noting the Borough had refused to allow demarcation of an eruv on telephone poles after Tenafly residents "expressed vehement objections prompted by

Whatever the reason, unfamiliar religions tend to prompt offense more often than familiar ones. Recognizing standing for offended observers, then, disproportionately promotes challenges to the symbols of minority religions. In the long run, it encourages the erasure of minority religions from public life, and discourages governments from accommodating their needs.

A. Offended-observer standing encourages the elimination of minority religions from the public square.

Our nation has a proud tradition of using prayers, proclamations, and monuments to recognize minority religions. Congress has invited rabbis, imams, Hindu priests, and the Dalai Lama to deliver opening prayers. Bas-reliefs in the House of Representatives honor Moses and Maimonides. Presidents have hosted Passover, Eid al-Fitr, and Diwali celebrations. These symbols serve as visible reminders that the United States, "which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens." George Washington, Letter to the Newport Hebrew Congregation (Aug. 18, 1790).

Offended observers, however, frequently take aim at these acknowledgments of religious minorities. Consider, for example, the countless lawsuits challenging public displays of menorahs. Offended

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their fear that an eruv would encourage Orthodox Jews to move to Tenafly," "that the Orthodoxy would take over," and that "Jews might stone [] cars that drive down the streets on the Sabbath") (citations and quotation marks omitted) (alteration in original).

observers in Los Angeles once challenged the display of a 19th century menorah previously owned by a Polish synagogue and "rescued from the flames of the Holocaust." *Okrand* v. *City of Los Angeles*, 207 Cal. App. 3d 566, 570 n.5 (1989). Offended observers in other cities have filed similar lawsuits. See*, e.g.*, *ACLU of N.J.* v. *Schundler*, 104 F.3d 1435, 1439 (3d Cir. 1997); *City of Allegheny* v. *ACLU of Greater Pittsburgh*, 492 U.S. 573 (1989); *Am. United* v. *City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990); *Am. Jewish Cong.* v. *City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996). And observers have also taken aim at more obscure religious symbols and rituals. See *infra* Part II.B.

Indeed, these challenges disproportionately affect unfamiliar (and hence conspicuous) symbols of minority religions. Compare, for example, one court's claim that a Christmas-time nativity scene promotes a "friendly community spirit of good will," *Lynch*, 465 U.S. at 685, with other courts' claims that a Hanukkah-time menorah is a "disturbing" and "emotion-laden" religious symbol, *Kaplan* v. *City of Burlington*, 891 F.2d 1024, 1030–31 (2d Cir. 1989).

In response, many public officials—perhaps baffled by Establishment Clause doctrine, or perhaps alarmed by the prospect of paying hefty legal fees—have decided that recognizing minority faiths is not worth the trouble. In one case, fear of Establishment Clause liability prevented Georgia officials from displaying a menorah in the state capitol rotunda, even though the officials continued to host an "annual presentation of a state-sponsored Christmas tree." *Chabad-Lubavitch* v. *Miller*, 5 F.3d 1383, 1386 (11th Cir. 1993). In another case, complaints from offended observers prompted officials to banish a menorah from

a holiday display, even as they retained a Christmas tree on the theory it was "secular, rather than religious." *Grossbaum* v. *Indianapolis-Marion Building Auth.*, 63 F.3d 581, 583 (7th Cir. 1995).

Through this cycle, offended-observer standing thus tends to blot out public recognition of minority religions, allowing unfamiliarity, suspicion, and even bigotry to chill the diverse, tolerant, pluralistic spirit that has always animated this Nation. In short, it undermines, rather than promotes, the purposes of the Religion Clauses.

B. Offended-observer standing discourages accommodation of minority religious needs.

Quite apart from officially acknowledging minority religions, our nation has a long tradition of accommodating their religious needs. Federal law, however, generally does not *require* accommodations by state or local officials. *Employment Div.* v. *Smith*, 494 U.S. 872 (1990); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). Adherents of minority religions must instead persuade those officials to account for their beliefs.

Offended-observer standing threatens to short-circuit this democratic process. It allows bystanders to threaten officials with litigation for offering help to religious minorities. The underlying legal claims may lack merit, but the threat of litigation and its attendant costs and hardships will still deter officials from assisting religious minorities in exercising their faiths.

For example, Jewish groups often must seek permission from local zoning authorities to build synagogues. Yet zoning decisions on synagogues "are

particularly vulnerable" to "community pressure" from residents who do not want religious Jews to move into their towns. U.S. Dep't of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act* at 13 (Sep. 22, 2010); see also *Gagliardi* v. *City of Boca Raton*, 197 F. Supp. 3d 1359 (S.D. Fla. 2016) (analyzing suit brought by offended residents who sued a city for permitting the building of a synagogue). Expansive theories of offended-observer standing encourage such suits, making it even harder than it already is for Jews to build places of worship.

A second example: Orthodox Jews are biblically prohibited from transferring items from a private to a public area on the Sabbath. One way to avoid violating this rule is to set up an *eruv*—a physical boundary, such as a series of wires, around the city perimeter. The *eruv* ritualistically separates the "home" area from the rest of the world, enabling adherents to carry keys, push strollers, etc., within the former. Offended observers, however, have sued cities for granting permission to set up an *eruv*. *E.g.*, *Jewish People for the Betterment of Westhampton Beach* v. *Vill. of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015); *ACLU of N.J.* v. *City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987). This threat of litigation deters cities from allowing an *eruv* in the first place. In such cases, allegedly offended observers can effectively bar Orthodox Jews from living in their neighborhoods. These plaintiffs' intangible psychic harm cannot possibly compare to the concrete harm that Orthodox Jews suffer when told that they are not welcome to live in a town or city.

A third example: Over the weeklong holiday of Sukkot, observant Jews build, eat in, and (sometimes)

dwell in temporary reed-and-branch-roofed huts (known as *sukkot*), commemorating the Israelites' use of temporary dwellings during the Exodus. In urban areas, Jews who lack backyard space often seek permission to put up *sukkot* in public parks. Yet offended observers have objected to these structures under the Establishment Clause. See*, e.g.*, Joseph Berger, *In a TriBeCa Park, a Question of Law and a Religious Symbol*, N.Y. TIMES (Sep. 25, 2011). Once more, the looming specter of litigation may discourage cities from permitting Jews to celebrate this holiday.

In short, offended-observer standing hangs like Damocles' sword over the heads of state and local officials as they consider whether to accommodate religious practices. It therefore poses a serious and dangerous threat to our traditional and vital religious freedoms.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court grant the Petition for Certiorari and bring needed clarity and historical consistency to Establishment Clause jurisprudence.

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