No. _____

In the Supreme Court of the United States

HON. JAMES DEWEESE, IN HIS OFFICIAL CAPACITY,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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June 13, 2011

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QUESTIONS PRESENTED

Judge James DeWeese of Richland County, Ohio, displayed a poster in his courtroom entitled "Philosophies of Law in Conflict." The poster identifies two opposing moral and legal philosophies, moral relativism vs. moral absolutes, and indicates that DeWeese supports the position of moral absolutes. The ACLU of Ohio, claiming it had standing because one of its members was offended at seeing the poster, filed suit in federal court. The district court held that the ACLU had Article III standing and granted summary judgment in favor of the ACLU, holding that the display violated the Establishment Clause of the First Amendment. The Sixth Circuit affirmed both holdings. The questions presented are:

1. Does respondent ACLU, whose "injury" consists of no more than the fact that one of its members on occasion views and takes offense at conduct with which he disagrees, have standing under Article III to bring an Establishment Clause challenge?

2. Did the Sixth Circuit err in holding, in conflict with this Court and the Third and Eighth Circuits, that DeWeese's purported religious purpose behind a previous courtroom display renders *any* proffered secular purpose behind a new display a sham?

3. Did the Sixth Circuit err in holding, in conflict with this Court's decisions recognizing with approval the role of religion in the country's history and heritage, that DeWeese's jurisprudential commentary was an impermissible endorsement of religion?

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INTRODUCTION

In the Establishment Clause case, *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464 (1982), this Court held that the "psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing under Article III. Despite this clear and unequivocal teaching, federal circuit courts, including the court below, have repeatedly found "offended observer" standing to suffice in Establishment Clause cases. To grant legal standing based solely on personal offense, disagreement, or grievance, however, even if phrased in constitutional terms, is to ignore, if not obliterate entirely, the mandate under Article III that the jurisdiction of federal courts be limited to cases or controversies.

The lower courts are badly in need of a reminder of what this Court clearly held in *Valley Forge*. The present case perfectly exemplifies this need. The theory of standing here is, in essence, "I came, I saw, I was offended."

For at least the past ten years, Mansfield, Ohio attorney and ACLU member Bernard Davis has been a regular advocate in the courtroom of petitioner, Judge James DeWeese. During that time, the two have enjoyed a cordial, professional relationship. But in 2008, over two years after DeWeese hung up a poster in the courtroom entitled "Philosophies of Law in Conflict," a poster containing DeWeese's natural law jurisprudential viewpoint, the ACLU sued DeWeese. The suit claimed that DeWeese's viewpoint and

purpose for hanging the poster were innately religious, hence *verboten* under the Establishment Clause.

The ACLU alleged that it had standing because one of its members, the aforementioned Mr. Davis, was injured by the presence of DeWeese's poster on the courtroom wall. Davis claimed the poster offended him because it was "an inappropriate expression of a religious viewpoint . . . in a public building." On the merits, the ACLU argued that, because DeWeese had once before been found to have harbored a religious purpose when he hung up a different poster, he must have had a religious purpose for his second poster.

Both the district court and the Sixth Circuit agreed that, as an offended observer, Davis (and thus the ACLU, to which he belongs) suffered enough of an injury to establish a "case or controversy" under Article III. Both courts then held that DeWeese's prior Establishment Clause transgression fatally and forever tainted any attempt by DeWeese to assert a non-religious purpose for his new poster.

DECISIONS BELOW

All decisions in this case are entitled *American Civil Liberties Union of Ohio Foundation, Inc. v. James DeWeese*. The panel opinion appears at 633 F.3d 424 (6th Cir. 2011). App. A. The decision of the district court granting the ACLU's motion for summary judgment on its federal and state constitutional claims is unpublished. No. 1:08CV2372, 2009 U.S. Dist. LEXIS 130790 (N.D. Ohio Oct. 7, 2008). App. B.

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its decision on February 2, 2011, and denied a timely petition for rehearing with suggestion for rehearing en banc on March 16, 2011. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article III of the United States Constitution provides in pertinent part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .

U.S. Const. Art. III, Sec. 2.

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion . . . .

U.S. Const. Amend. I.

STATEMENT OF THE CASE

1. Facts and Legal Proceedings Prior to Current Suit

Honorable James DeWeese is a judge of the Richland County Court of Common Pleas in the State

of Ohio. App. 28a. He has held this position for twenty years, having been first elected in 1991. *Id.*

In July, 2000, Judge DeWeese created and hung in his courtroom two posters. *See ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 487 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005). The first poster consisted of the text of the Bill of Rights. *Id*. The second poster consisted of a version of the Ten Commandments. Across the top of each poster was the phrase "rule of law." *Id*. Judge DeWeese hung both posters for the purpose of illustrating educational talks he was in the custom of giving to school and community groups who would visit his courtroom, and also as a way of fostering debate about the relative merits of a legal philosophy based on moral absolutes and one based on moral relativism. *Id*. at 491-92.

The ACLU of Ohio, the same respondent here, sued DeWeese, alleging that the display of the Decalogue in his courtroom violated the Establishment Clause of the First Amendment to the U.S. Constitution. The district court agreed, *ACLU of Ohio v. Ashbrook*, 211 F. Supp. 2d 873 (N.D. Ohio 2002), and a divided Court of Appeals affirmed, *ACLU of Ohio v. Ashbrook, supra*. Following the latter ruling, Judge DeWeese permanently removed the Ten Commandments poster from his courtroom. App. 3a.

Two years later, in June, 2006, DeWeese put up a new poster in his courtroom. App. 80a, ¶ 2. This poster, the one at issue in this case, bears the title, "Philosophies of Law in Conflict." *Id*. Most of the space on the poster is occupied by two columns of numbered statements: on the left, the Ten Commandments, labeled "Moral Absolutes;" on the

right, seven Humanist Precepts, labeled "Moral Relatives." App. 28a-29a, 87a.[1] The Commandments and the Precepts are the same in style, type, and appearance. App. 87a. However, because they are somewhat lengthier, the Humanist Precepts take up more space on the poster than the Commandments. *Id.*

In addition to the title and the Commandments and the Precepts, the poster contains — in type considerably smaller than the poster's other elements[2] — four separate numbered paragraphs in which Judge DeWeese expresses his viewpoint about what he sees as a conflict of legal philosophies in the United States. App. 28a-29a, 87a. He describes these philosophies in terms of moral absolutism versus moral relativism. As examples of each, he directs the reader to the Commandments and the Precepts. He concludes by stating that he joins with America's Founders in recognizing the need to ground legal philosophy on fixed moral standards as opposed to moral relativism. Beneath the last line of the poster, DeWeese placed his own name as a signature. Finally, in the lower right corner of the frame, a note tells the reader that an explanatory pamphlet, written by DeWeese and explaining his views in greater detail, is available from the receptionist. *Id.*

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[1] One of the Humanist Precepts DeWeese listed is a quotation from the Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Whether DeWeese's characterization of the passage he quotes is accurate or not is, of course, irrelevant to the ACLU's standing and Establishment Clause claim.

[2] The typeface on the poster is small enough that one would have to approach the poster to read it. App. 80a, ¶ 3.

Two years after DeWeese mounted his new poster, the ACLU filed a Motion for an Order to Show Cause why Judge DeWeese should not be held in contempt for allegedly violating the 2001 injunction ordering him to remove the Ten Commandments poster. *ACLU v. Ashbrook*, No. 1:01CV0556 (N.D. Ohio), Doc. 67. The court denied the motion because the injunction ordered nothing beyond the removal of the "rule of law" poster — an injunction DeWeese had fully complied with. App. 29a.

2. Current Suit and Proceedings in District Court

The ACLU filed the instant suit against Judge DeWeese in U.S. District Court for the Northern District of Ohio on October 7, 2008. The suit, naming only the ACLU of Ohio as plaintiff, alleged that DeWeese's Philosophies of Law in Conflict display violated the Establishment Clause of the First Amendment and Article I, Section 7 of the Ohio Constitution.[3]

In support of its motion for summary judgment on its federal and state claims, the ACLU submitted one declaration, that of Bernard Davis. App. E. In his declaration, Davis, an attorney who practices law in Richland County, states that he has witnessed the Philosophies of Law in Conflict poster in DeWeese's courtroom on a number of occasions. App. 67a, ¶¶ 2-3. He avers that the poster expresses the "espousal of a legal philosophy which is, in my opinion, clearly a religious message." *Id.* at ¶ 3. Davis describes the

[3] The court of appeals did not reach the state constitutional claim. That claim is therefore not before this Court.

supposed "injury" he suffers in two sentences. First: "The display offends me personally, in that I perceive it to be an inappropriate expression of a religious viewpoint as well as a display of a sacred text in a public building." *Id*. Second: "I find said display to be personally offensive and demeaning because it makes me feel as though a particular religious point of view is being thrust upon me." *Id.* at ¶ 4.

Davis nowhere states, in his declaration or elsewhere, that the display offends his own religious beliefs or sensibilities; that the display directly or indirectly coerces him to think or act in any particular way; that the display makes him feel like an outsider rather than a full member of the political community. Nor does Davis identify any personal "injury" beyond a perceived affront to his sense of propriety and, perhaps, his own view of what the law requires.

In opposition to the ACLU's motion for summary judgment, DeWeese submitted declarations by DeWeese himself and Professor Gerard Bradley of Notre Dame Law School. Apps. F and G.

In his declaration, DeWeese states that his purpose in creating and displaying the poster "was to express my views about two warring legal philosophies that motivate behavior and the consequences that I have personally witnessed in my 18 years as a trial judge of moving to a moral relativist philosophy and abandoning a moral absolutist legal philosophy." App. 81a, ¶ 5.

He states further that because the purpose behind the previous display was not clear from the display itself and because a court misinterpreted his purpose

to be a religious one, he was careful in the new display to explain the philosophical purpose behind it. *Id*. at ¶ 6. He has never used or referred to the display in any court proceeding and the text of the poster is too small to be read from the jury box. App. 82a, ¶ 10.

Finally, DeWeese states that he and Davis have a cordial, professional relationship. App. 83a, ¶ 11. DeWeese is unaware of Davis ever making a request that one of his cases be reassigned from him or that DeWeese recuse himself from any case in which Davis was involved. *Id.* at ¶ 12. Ironically, Davis himself has on at least one occasion made religious references when summing up a murder case to a jury. *Id.* at ¶ 13.

In the expert report submitted by Professor Bradley, an expert on the moral foundations of American law and jurisprudence, Bradley describes in detail how DeWeese's poster "expresses a recognizable viewpoint within the fields of the moral foundations of American law and jurisprudence." App. 104a.

Bradley's report was not contested by the ACLU with any opposing expert report.

On October 8, 2009, the district court granted summary judgment to the ACLU on both its federal and state claims.

The court found that the ACLU had standing to sue because it found that Davis had established an injury — "being personally offended" — and that declaratory and injunctive relief would prevent further injury. App. 35a.

On the merits of the federal Establishment Clause claim, the court found that DeWeese's purpose was an impermissibly religious one based on "the plain words of his declaration, the poster, and the pamphlet." App. 39a. The court also held that DeWeese's current purpose is "substantially similar" to the impermissible purpose found by the *Ashbrook* court. *Id.*

The court further concluded that DeWeese's poster represented an impermissible endorsement of religion. Among other things considered by the court in its endorsement analysis was the history of DeWeese's previous display. App. 49a. The court also considered the contents of DeWeese's explanatory pamphlet, in addition to the words of the poster itself. The court noted that DeWeese is a judge and displays the poster in a courtroom. Based on this, the court found that a reasonable observer would conclude "that the State of Ohio and/or Richland County endorse the opinions set forth in the poster," the most constitutionally offensive of which appears to be DeWeese's alleged "preference for the Judeo-Christian faiths." *Id.*

Finally, the court found that, since Ohio state courts have held that the Ohio Constitution provides no greater protection than the First Amendment, DeWeese's poster also violated Article I, § 7 of the Ohio Constitution. App. 52a.

3. Proceedings in the Sixth Circuit

DeWeese filed a timely appeal of the district court's decision with the U.S. Court of Appeals for the Sixth Circuit.

After briefing and oral argument, the Sixth Circuit rendered its decision on February 2, 2011. The Court held that (1) the ACLU had standing to sue based on the declaration of Bernard Davis, and (2) DeWeese's display violated the Establishment Clause. The Court noted that because the display violated the Establishment Clause, it did not need to decide whether it violated the Ohio Constitution. App. 23a, n.4.

On the issue of standing, the court noted that in suits brought under the Establishment Clause, "direct and unwelcome" contact with a challenged object "demonstrates psychological injury in fact sufficient to confer standing." App. 9a. Relying on the declaration of Davis, where he states that he comes in direct contact with DeWeese's display and that "this contact is unwelcome due to the poster's allegedly religious content," the court held that the ACLU had standing to sue. App. 11a.

The Sixth Circuit mischaracterized DeWeese's argument as being that, under *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464 (1982), psychological injury can ***never*** be the basis for Article III standing. The Sixth Circuit added: "This Court has consistently rejected this argument." App. 10a, n.1.

In fact, DeWeese had argued that it is inadequate to allege "***no more*** than the psychological consequence presumably produced by observation of conduct with which one disagrees," Br. of Appellant at 14 (emphasis added) (invoking *Valley Forge*), and that mere "psychic satisfaction" does not satisfy Article III (invoking *Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998)).

On the merits of the ACLU's Establishment Clause claim, the court held that, assuming DeWeese had stated a facially secular purpose in displaying the second poster in his courtroom, "the history of [his] actions demonstrates that any purported secular purpose is a sham." App. 16a. These "actions" derive from the first display DeWeese hung in his courtroom ten years earlier and that was held to be unconstitutional by the Sixth Circuit *Ashbrook* decision in 2004 — four years prior to the filing of the present suit.

The court acknowledged DeWeese's statement that because the purpose behind the "rule of law" display was unclear and misinterpreted by the court as a religious one, he was careful in the present display to explain his philosophical purpose. Looking, however, to what it wrote in the *Ashbrook* decision seven years earlier, the court found DeWeese's statements "unconvincing." App. 18a.

The court also opined that while DeWeese's past actions were alone sufficient to reveal "his religious purpose," the poster and explanatory pamphlet also evidenced DeWeese's religious purpose. App. 18a-20a.

Finally, while noting that the religious purpose behind his second display was enough to demonstrate an Establishment Clause violation, the court thought it would be "helpful" to consider the endorsement prong. App. 20a. The court held that the poster "sets forth overt religious messages and religious endorsements," and is "an explicit endorsement of

religion by Defendant in contravention of the Establishment Clause." App. 21a, 22a. Moreover, because the poster "specifically links religion and civil government," it failed "[t]o survive endorsement test scrutiny." App. 22a.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION ON STANDING DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS.

In finding that the ACLU had standing through its member, Bernard Davis, the Sixth Circuit applied a concept sometimes referred to as "offended observer standing." An observer, such as Mr. Davis, has "direct and unwelcome contact" with a display he deems to have religious content; in his opinion such a display is inappropriate in the pertinent public setting; he thus suffers "psychological injury." This psychological injury becomes the actual or threatened injury traceable to the defendant which he, or the ACLU claiming standing derivatively, must show to have his complaint adjudicated under Article III.

Mr. Davis alleges no coercion; he is free to observe or not to observe the poster. He alleges no actual civil or professional disability or penalty stemming from the poster's presence. On the contrary, he has been and continues to be a regular practitioner in the courtroom of Judge DeWeese, with whom he enjoys a cordial professional relationship. He claims no insult or offense to his own religious views attributable to the display. He does, however, think that the display of the poster is an inappropriate expression of a religious

viewpoint in a public building. In short, Mr. Davis observes, and takes offense.

Mere offended observer standing is irreconcilable with this Court's decisions. *See Valley Forge*, 454 U.S. 464 (1982); *Steele Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("psychic satisfaction . . . does not redress a cognizable Article III injury"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974). *Valley Forge* specifically held as insufficient to establish standing an injury consisting of no more than "the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485.

Yet, despite these rulings, mere observation is the standard proffered for standing in the vast majority of lower court religious display cases (as here). If *Valley Forge, Steele Co., et al.* are not to be eviscerated, it must mean that offended observer standing is an aberration with no support in this Court's standing jurisprudence.

Offended observer standing is flawed for numerous other reasons as well. For example, it confers a unique privilege on separationist plaintiffs. Although there are doubtless myriad ways in which government speech or displays might offend various citizens, only those who bring an Establishment Clause claim are allowed to make a federal case out of their offense.

Offended observer standing also encroaches upon the separation of powers. This Court repeatedly has said that lax standing requirements lead to judicial invasion into the province of the politically accountable

branches of government. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("the doctrine of standing . . . prevents courts of law from undertaking tasks assigned to the political branches"). Offended observer standing sweeps sizable categories of otherwise politically accountable government action into judicially reviewable litigation.

The cases of *Schlesinger*, 418 U.S. at 222, and *Richardson*, 418 U.S. at 179-180, established that being disturbed by a governmental violation of the Constitution is never enough, by itself, to qualify as a concrete, particularized injury under Article III. *Schlesinger,* 418 U.S. at 220; *Richardson*, 418 U.S. at 176-77. *See also Richardson,* 418 U.S. at 191 (Powell, J., concurring) ("The power recognized in *Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137 (1803), is a potent one. Its prudent use seems to me incompatible with unlimited notions of taxpayer and citizen standing").

In *Valley Forge*, 454 U.S. at 482-90, the principles articulated in *Richardson* and *Schlesinger* were applied to claims brought to enforce the Establishment Clause. The *Valley Forge* Court repudiated the notion that offense at alleged Establishment Clause violations is somehow distinguishable from the offense suffered by the plaintiffs in *Schlesinger* and *Richardson.* The court knew of "no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." *Id*. at 484-85. The Court noted further that "the proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Id.* at 485 (quoting *Schlesinger*, 418 U.S. at 227).

In spite of this Court's clear teaching, the Sixth Circuit and other circuits, *see* Section II, *infra,* have "consistently rejected" arguments taking *Valley Forge* at face value.[4] Efforts to make a principled distinction between *Valley Forge* and other cases have usually focused on two things: 1) that the plaintiffs in *Valley Forge*, for the most part residents of states other than Pennsylvania, did not directly observe the complained of conduct; and 2) that this Court has, subsequent to *Valley Forge*, decided *on the merits* cases involving religious displays on public property in which the basis for standing, arguably, appears to be that the plaintiffs had unwelcome, direct contact with the offending displays. *E.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005).

As to the first distinction, the Court stated in *Valley Forge* that it made no difference that at least some of the plaintiff association's members assertedly *did* live in Pennsylvania. 454 U.S. at 487, n.23. Moreover, the controlling principle of law laid down by the Court — the "psychological consequence presumably produced by *observation* of conduct with which one disagrees" does not constitute a sufficient injury — clearly encompasses not only disagreeable government conduct of which one hears or reads, but also conduct which one *observes.*

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[4] Sixth Circuit cases include *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 681-82 (6th Cir. 1994); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985).

As to the second purported distinction, reliance upon this Court's adjudication on the merits of such cases as *Allegheny, Lynch,* and *McCreary* is manifestly wrong. As recognized by the Court this Term, "[w]hen 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*, 131 S. Ct. 1436, 1448 (2011) (citations omitted). *See also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions — even on jurisdictional issues — are not binding in future cases that directly raise the questions").

Offended observer standing is irreconcilable with this Court's clear teaching in *Valley Forge*, *Steele Co.*, *Schlesinger*, and *Richardson*, because "it treats observation *simpliciter* as the injury." *Books v. Elkhart Cnty.*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting). Observation of a poster in a judge's courtroom no more triggers Article III than would observation of a turban or yarmulke on a judge's head. The Sixth Circuit's reliance on an offended observer in this case is a clear departure from this Court's precedents. That the lower court acknowledges that its rejection of this Court's teaching is something it has done "consistently" in this area only highlights the need for this Court to grant review.

II. THE CIRCUIT COURTS BADLY NEED GUIDANCE FROM THIS COURT ON THE QUESTION WHETHER OFFENDED OBSERVER CLAIMS SUFFICE TO ESTABLISH STANDING UNDER ARTICLE III.

Notwithstanding *Valley Forge's* clarity on the illegitimacy of standing predicated upon mere disagreement with something one observes, numerous lower federal courts in addition to the Sixth Circuit have read *Valley Forge* to permit standing where the plaintiff alleges that he has seen and been offended by a religious display. *E.g., Suhre v. Haywood Cnty.*, 131 F.3d 1083 (4th Cir. 1997); *Vasquez v. L.A. Cnty.*, 487 F.3d 1246 (9th Cir. 2007); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987).

This pattern of disregard or distortion of *Valley Forge* has not been without its critics. Individual judges have lamented the fact that offended observer standing is obviously irreconcilable with *Valley Forge, Schlesinger*, and the like. *See, e.g., ACLU of Ohio v. Ashbrook*, 375 F.3d at 495-500 (Batchelder, J., dissenting) (Sixth Circuit's decisions applying offended observer standing are "inconsistent with the holdings in *Valley Forge* and *Steel Co.*, and in that regard were wrongly decided"); *Washegesic v. Bloomingdale Public School*, 33 F.3d at 684-85 (Guy, J., concurring) ("discussion of 'psychological damage' establishes — not religion — but a class of 'eggshell' plaintiffs of a delicacy never before known to the law"); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008) (Kleinfeld, J., dissenting) ("*Valley Forge* holds that 'psychological' injury caused by 'observation' of

'conduct with which one disagrees' is not a concrete injury to a legally protected interest sufficient to confer standing . . . Thus being there and seeing the offending conduct does not confer standing"). Rarely, however, has any circuit been able to muster a majority to rebuff such a claim.

A notable exception to this trend is a recent decision in the Seventh Circuit. In *Freedom From Religion Foundation, Inc. v. Obama*, 2011 U.S. App. LEXIS 7678 (7th Cir. Apr. 14, 2011), the court vacated the judgment of a district court for lack of a justiciable controversy in an Establishment Clause challenge to the President's proclamation of a National Day of Prayer. Noting that, under this Court's precedents, "hurt feelings differ from legal injury," the Seventh Circuit held that "unless all limits on standing are to be abandoned, a feeling of alienation cannot suffice as injury in fact." *Id.* at *7, *9. Even in this instance, the court divided over the proper rationale. *See id.* at *15-*19 (Williams, J., concurring). The majority noted that, even within the Seventh Circuit, courts have perhaps not uniformly applied *Valley Forge*, though ultimately the court concluded that the circuit's interpretation of *Valley Forge* requires more than mere observation of offensive government conduct. *Id.* at *8-*10.

The lower courts continue to struggle with difficulty over these cases because of a fundamental contradiction: *Valley Forge, et al.*, disallow standing based upon the offense that flows from disagreement, even vigorous disagreement; yet the circuits rule that being an offended observer can nevertheless be enough. Reconciling these incompatible premises spawns endless arbitrary line-drawing, if not complete

abandonment of any limits on standing. As the Second Circuit observed,

> Standing is often a tough question in the Establishment Clause context, where the injuries alleged are to the feelings alone. This is often the case in religious display cases where the fact of exposure becomes the basis for injury and jurisdiction.

Cooper v. U.S. Postal Serv., 577 F.3d 479, 489 (2d Cir. 2009) (footnote omitted). The *Cooper* court cited to an Eighth Circuit case in which that court observed that "[n]o governing precedent describes the injury in fact required to establish standing in a religious display case." *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1028 (8th Cir. 2004), *vacated on reh'g en banc*, 419 F.3d 772 (2005). The *Cooper* court further noted that in religious display cases, "lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached." 577 F.3d at 490. Finally, the court quoted, *id.*, from Chief Justice Rehnquist's opinion dissenting from denial of certiorari in *City of Edmond v. Robinson*, 517 U.S. 1201, 1203 (1996): "[T]here are serious arguments on both sides of this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts' power of judicial review of state actions."

What Chief Justice Rehnquist observed in 1996 remains true today, as exemplified by the case at bar. This Court should grant review to resolve what injury should or should not suffice to establish standing in religious display cases.

III. THE DECISION BELOW, EMBRACING AN "INDELIBLE TAINT" APPROACH TO *LEMON*'S PURPOSE PRONG, CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE THIRD AND EIGHTH CIRCUITS.

The court below held that DeWeese's "Philosophies of Law in Conflict" display violated the so-called purpose prong of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (government action must have a secular purpose). In so doing, however, the court made a sweeping and insupportable conclusion, the force of which conflicts squarely with the decision of this Court in *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005), and with decisions of the Third and Eighth Circuits.

Judge DeWeese's declaration sets forth the purpose behind his display: to express his views about "two warring legal philosophies that motivate behavior" and the ill consequences he has personally witnessed sitting on the bench "of moving to a moral relativist philosophy and abandoning a moral absolutist legal philosophy." App. 81a, ¶ 5. DeWeese further states that because the purpose behind his first display was unclear and misinterpreted by a previous court as a religious one, he was "careful in the new 2006 display to explain [his] philosophical purpose in the text of the poster." App. 81a, ¶ 6.

Though acknowledging DeWeese's statement of his philosophical purpose, the court noted, without explanation, that "[i]t is questionable whether Defendant has articulated a facially secular purpose." App. 16a. Even assuming a secular purpose, however, the court found that because of the purported religious purpose behind DeWeese's first display in 2000, ***any***

purpose behind the second display in 2006 had to be disingenuous:

> [A]ssuming for the sake of argument that Defendant has stated a facially secular purpose, and giving that stated purpose its due deference, the history of Defendant's actions demonstrates that ***any*** purported secular purpose is a sham.

Id. (emphasis added).

In other words, according to the court below, there was nothing DeWeese could have done, said, or omitted with respect to his Philosophies of Law in Conflict display to articulate a predominant secular purpose, and thus satisfy the purpose prong of *Lemon*. According to the express language of the court, because of the history of DeWeese's actions, i.e., the alleged religious purpose behind DeWeese's first display, "***any*** purported secular purpose" behind the second display must be, *ipso facto*, "a sham." Despite DeWeese's declaration setting forth a secular purpose behind his second display, the court held that it was tainted — in fact, doomed — with an unconstitutional purpose from the start.

In short, the impermissible "taint" of DeWeese's prior actions was inescapable.

The Sixth Circuit's holding and rationale on this point conflicts squarely with this Court's decision in *McCreary County v. ACLU*, 545 U.S. 844 (2005). In *McCreary*, this Court held that though a history of religious purpose is relevant in discerning whether a government purpose behind a challenged display is

truly motivated by a predominant secular purpose, such history, standing alone, is far from dispositive. In fact, the Court made it clear that the defendant counties in that case were not forever tainted by their previous religious purposes in posting the Ten Commandments:

> In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, ***we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter***. We hold only that purpose needs to be taken seriously under the Establishment Clause . . . .

Id. at 843-44 (emphasis added).

What this Court held in *McCreary* it would not do — decide that a defendant's past action forever taints it from dealing with the same subject matter in the future — the Sixth Circuit did, holding that DeWeese's past actions indelibly tainted his ability to deal with the secular matters of law and morality in his second display.

The conflict between the court below and *McCreary* poses more than an abstract or purely theoretical problem. Left undisturbed, the decision below can be read to create a "one strike, you're out" rule. No government official or body, once having been found guilty of a "purpose prong" foot fault, could ever escape a fatal constitutional taint. This is ***not*** the law. No decision of this Court supports the notion of "once a religious purpose, always a religious purpose." *McCreary*, in fact, expressly declares the contrary.

In addition to conflicting with *McCreary*, the decision below conflicts with decisions of the U.S. Courts of Appeals for the Third and Eighth Circuits.

In *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (Alito, J.), *cert. denied*, 520 U.S. 1265 (1997), the Third Circuit rejected the argument that Jersey City's "prior history" should be fatally determinative when analyzing the city's purpose behind modifying a Christmas holiday display. For decades, Jersey City exhibited a holiday display that featured a menorah and a Christmas tree. *Id*. at 94-95. The district court permanently enjoined the display as a violation of the Establishment Clause. *Id*. at 95. After the injunction was ordered, Jersey City erected a modified display that included "not only a créche, a menorah, and Christmas tree, but also large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols on the tree." *Id*. at 95. The city also posted signs indicating that the display was "one of a series . . . put up by the City throughout the year to celebrate its residents' cultural and ethnic diversity." *Id*.

The modified display and newly posted signs did not assuage the plaintiffs. Relying on an observation from the district court, they argued that the alterations were nothing more than a "a ploy designed to permit continued display of the religious symbols." *Id*. at 105. The court characterized the plaintiffs as suggesting that, "even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the city officials were motivated by a desire to evade constitutional

requirements and that this motivation required invalidation of the modified display." *Id.*

The court unequivocally rejected this argument: "The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked 'a secular legislative purpose,' or that it was 'intended to convey a message of endorsement or disapproval of religion.'" *Id.* (citations omitted). "[T]he mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith." *Id.* (footnote omitted).

In *Roark v. South Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009), the Eighth Circuit reversed a district court's award of a declaratory judgment that a school district's "actions in instituting a policy that will facilitate the distribution of Bibles to elementary school students during the school day violates the Establishment Clause . . . ." *Id.* at 561.

The school district implemented its literature distribution policy after it was sued over its longstanding practice of allowing the Gideons to distribute Bibles to fifth grade students in the classroom, during the school day, and in the presence of a teacher or school administrator.

The Eighth Circuit reversed the district court's declaratory judgment for several reasons. Most relevant here, the court held that the district court's analysis under *Lemon* placed too much emphasis on the school's "past practice" and the personal beliefs of the school board members. *Id.* at 564. This approach,

the court noted, would "preclude the District from ***ever*** creating a limited public forum in which religious materials may be distributed in a constitutionally neutral manner." *Id*. (emphasis in original).

"Past actions," the Eighth Circuit held, "do not 'forever taint any effort [by a government entity] to deal with the subject matter.'" *Id*. at 564 (quoting *McCreary*, 545 U.S. at 874) (brackets in original). The fact that courts are to be "particularly vigilant" in monitoring Establishment Clause compliance in the public school setting, *see id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)), illustrates the force of the Eighth Circuit's refusal to tie the hands of the school district in future efforts.

In sum, the decision below embraces a doctrine of "indelible taint," whereby a governmental action deemed to have a religious purpose will taint with unconstitutionality any future efforts to come into constitutional compliance. The Sixth Circuit's holding on this point thus conflicts with this Court's holding in *McCreary* and decisions of the Third and Eighth Circuits.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS RECOGNIZING WITH APPROVAL THE ROLE OF RELIGION IN THE COUNTRY'S HISTORY AND HERITAGE.

The Sixth Circuit perceived an unconstitutional "endorsement" in the articulation of a notion — that moral and religious precepts have an important role in civil governance — historically embraced by all three branches of the federal government.

In addition to finding that DeWeese's second poster was not supported by a predominant secular purpose, the court below held that it constituted an impermissible endorsement of religion. Recalling its decision involving DeWeese's first poster, *Ashbrook*, *supra*, the court found that "the poster specifically links religion and civil government," and "thus violates the Establishment Clause under *Lemon*'s endorsement test." App. 22a-23a.

As described previously, DeWeese's poster contrasts two opposing views of law and morality ("moral absolutes" vs. "moral relatives") and in the margins, in considerably smaller type, states that DeWeese believes that the shift in the 20th Century from "moral absolutism to moral relativism" has brought about an increase in crime and other social ills. After citing to John Adams, the Declaration of Independence, and the Ohio State Constitution, each recognizing the divine as a source of rights and morality, DeWeese states that he "join[s] the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation." App. 87a.[5]

DeWeese's opinions regarding law and morality, and their relationship to religion, are no more an impermissible endorsement of religion violative of the Establishment Clause than are the repeated statements of this Court that "religion has been closely

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[5] Though the court quotes it as evidence of the poster's endorsement of religion, App. 21a-22a, the poster nowhere mentions "the God of the Bible." This statement is found only in DeWeese's explanatory pamphlet, App. 88a, not challenged, or even mentioned, in the ACLU's complaint. App. D.

identified with our history and government," *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 212 (1963); that "[o]ur history is replete with official references to the value and invocation of Divine guidance," *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); that "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); that "[t]he history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

Indeed, there is no practical difference between what DeWeese opines in his poster and what both Article I, § 7, of the Ohio Constitution and the Northwest Ordinance, 1 Stat. 50 (1789), provide: that "religion, morality, and knowledge" are "essential to good government." DeWeese's thoughts, in fact, coincide perfectly with what George Washington stated in his famous Farewell Address: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." 5 The Founders' Constitution 684 (P. Kurland & R. Lerner eds. 1987).

DeWeese's opinions regarding law and morality, and their ultimate grounding in a transcendent reality, can best be summed up by no less than Justice William O. Douglas:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

In *Van Orden v. Perry*, 545 U.S. 677 (2005), Chief Justice Rehnquist noted that this Court's Establishment Clause cases point, "Januslike," in two directions: one, "toward the strong role played by religion and religious traditions throughout our Nation's history"; the other, "toward the principle that governmental intervention in religious matters can itself endanger religious freedom." *Id.* at 683 (plurality).

DeWeese's poster, affirming nothing more than what this Court has itself recognized and observed, rests comfortably among those cases acknowledging the "strong role" religion has played in our country's history and cultural heritage. The jurisprudential principles DeWeese endorses have been part and parcel of the country's history, heritage, and culture for over two hundred years.

In arriving at the conclusion that DeWeese's display constitutes an impermissible endorsement of religion, the court below failed to address and discuss any decision of this Court respecting the "strong role" of religion in society. Instead, the court simply looked to whether a "link" could be established between "religion and civil government." App. 22a-23a. If the Sixth Circuit's "link" standard is to be the test for adjudicating challenges under the Establishment Clause, then it is difficult to fathom how other governmental recognitions of the divine could pass constitutional muster, from Ohio's State Motto, "With

God, All Things Are Possible," Ohio Rev. Code § 5.06;[6] to the National Day of Prayer, 36 U.S.C. § 119; to the United States motto, "In God We Trust," 36 U.S.C. § 302; to the Pledge of Allegiance's "one nation under God," 4 U.S.C. § 4; to legislative prayer and military chaplains; to this Court's longstanding practice of opening sessions with "God save the United States and this Honorable Court." Each of these state and federal affirmations, like DeWeese's display, link religion and civil government without entangling the two and without coercing private citizens to affirm belief in the divine.

In endorsing the view that society should return to an understanding of unchanging, transcendent moral truths, DeWeese is simply endorsing a jurisprudence of natural law, a jurisprudence that has shaped legal thinking and culture throughout the history of Western Civilization, including the Founders. App. G (Expert Report of Gerard V. Bradley). As Sir William Blackstone, an important influence on the Founders, described it:

> This law of nature, which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are

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[6] Above the bench in Judge DeWeese's courtroom is prominently displayed the seal of the State of Ohio and its motto. App. 82a, ¶ 9; 98a. The Sixth Circuit rejected an Establishment Clause challenge to this motto by the same respondent here. *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (2001) (en banc).

> valid, derive all their authority, mediately, or immediately, from this original.

Blackstone, Commentaries on the Laws of England, Bk 1, sec. 2. Or, in the words of another influence on the Founders, John Locke:

> Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions, must, as well as their own and other men's actions, be conformable to the law of nature, i.e. to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good, or valid against it.

Two Treatises of Government, Book II, Chapter XI, § 135.

The fact that DeWeese's understanding and acknowledgment of natural law principles may coincide with the tenets of Judeo-Christian moral teachings is irrelevant. *See Van Orden*, 545 U.S. at 690 (plurality) ("[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause") (citations omitted).

The decision of the court below, holding that DeWeese's poster constitutes an impermissible endorsement of religion, conflicts directly with this Court's longstanding recognition and affirmation that governmental acknowledgement of religion is consistent with America's heritage and her Constitution.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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