No. 10-1512

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Standing. Does one who personally and directly observes an unwelcome governmental display of religion, without more, have Article III standing to challenge that display? Respondent says yes; this Court says no. The *Valley Forge* decision could not have been clearer: "the psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 485 (1982).

Yet the conflict between what this Court has held, regarding offended observers in the Establishment Clause context, and what the lower courts have held, is stark. Again and again, lower courts have distinguished *Valley For*ge away to the point of little or no meaning. Unless this Court would have the lower courts treat *Valley Forge* as a "dead letter," *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011), it should grant review and reassert the authority of its decision.

Merits. Try as it might to recast the holding of the court below, the words of the Sixth Circuit speak for themselves: even after the length of five years, a later government action remains tainted with the alleged religious purpose behind an earlier action, and any subsequent asserted secular purpose must be deemed a sham. The court below embraced a doctrine of indelible religious taint that contradicts decisions of this Court and the Third and Eighth Circuits.

Even more remarkable is respondent's defense of the Sixth Circuit's endorsement holding. In the face of the extensive historical record of governmental officials and bodies acknowledging and embracing the importance of God and religion to this nation, Pet. at 26-30, respondent says the "most persuasive" rebuttal is the claim that these ubiquitous religious references "have been breaches" of the Establishment Clause. Opp. at 19-20. Invoking a "societal shift . . . to Secularism," Opp. at 20 n.7, respondent asserts that under "modern" constitutional law, "secular standards have been established which prohibit governmental involvement in and endorsement of religion," extending even to such historically pedigreed statements as those set forth in the DeWeese poster, *id*. at 20-21. In other words, the governmental acknowledgements of God and religion that populate the historical record from the time of the Founding are merely quaint but unconstitutional artifacts of a bygone era. Presumably the current reference in the Pledge to this being a nation "under God," and the invocation of God's help in this Court's public sessions, are either likewise unconstitutional or else permissible only because they have become meaningless leftovers of a time when such phrases actually had significance. That this is the "most persuasive" defense of the Sixth Circuit's ruling which respondent can offer only highlights the need for this Court's review.

ARGUMENT IN REPLY

I. OFFENDED OBSERVER STANDING IS INCONSISTENT WITH *VALLEY FORGE* AND ARTICLE III OF THE U.S. CONSTITUTION.

Respondent does not dispute the fact that *Valley Forge* remains good law. Respondent does not dispute *Valley Forge*'s central holding that an injury consisting of no more than "the psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing.

In an attempt to square offended observer standing with this Court's holding in *Valley Forge*, respondent proffers essentially three arguments: (1) this Court has refrained from addressing standing in numerous Establishment Clause cases; (2) unlike the plaintiffs in *Valley Forge*, Bernard Davis, and thus offended observers like him, has suffered a concrete, cognizable injury; and (3) the lower courts are nearly unanimous in accepting some form of offended observer standing.

Each of respondent's arguments is without merit.

That this Court did not discuss *Valley Forge* and offended observer standing in cases cited by respondent — *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); and *Lynch v. Donnelly*, 465 U.S. 668 (1984) — says nothing about standing. As respondent itself acknowledges, a federal decision that neither notes nor discusses a potential jurisdictional defect does not stand for the proposition that no defect existed. Opp. at 8, n.3 (citing *Ariz.*

Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011)).

Respondent attempts to distinguish *Valley Forge* from Davis's alleged injury by focusing on the fact that the demands of Davis's profession require him to frequent Judge DeWeese's courtroom where he observes the "offending display." Opp. at 9. Davis finds the display to be offensive and demeaning because it makes him "feel like a particular religion [is] being thrust upon him." *Id.*

The circumstances of Davis' contact with the Philosophies poster, however, does not change the fact that Davis is merely offended by it. As DeWeese has pointed out, and respondent does not dispute, Davis's declaration nowhere states that the poster attacks his own religious beliefs or that it coerces him to think or act in any particular way. Pet. at 7. His "injury" is nothing more than a theoretical and abstract one, nothing more than "the psychological consequence presumably produced by *observation* of conduct with which [he] disagrees." *Valley Forge*, 454 U.S. at 485 (emphasis added).[1]

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[1] Contrary to respondent's suggestion, *United States v. SCRAP*, 412 U.S. 669 (1973), does not support offended observer standing. Opp. at 9, n.2. In *SCRAP*, the plaintiff association alleged that its members "suffered economic, recreational and aesthetic harm" due to decisions made by the Interstate Commerce Commission. *SCRAP*, 412 U.S. at 675-76. The association's members did not simply allege, as does Davis, that the defendant's actions were "personally offensive and demeaning." Davis Declaration, App. 67a, ¶ 4. In fact, *SCRAP* specifically *rejected* the notion of standing as "a vehicle for the vindication of the value interests of concerned bystanders." *Id*. at 687 (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

This is not a case of school children being subjected to exercises contrary to their religious beliefs. *Cf.*, *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 208 (1963) (school children were subject to Biblical readings "which were contrary to the religious beliefs which they held and to their familial teaching") (citation omitted); *Engel v. Vitale*, 370 U.S. 421 (1962) (parents of ten students filed suit "insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children"). Respondent's reliance upon *Lee v. Weisman*, 505 U.S. 577 (1992), Opp. at 10, is therefore misplaced. To equate underage students with adult attorneys in a courtroom completely disregards this Court's expressed concerns about the impressionability of minors (or, in the case of graduation ceremonies, the peer pressure and social expectations to which minors are subject). Attorneys are not, one hopes, as vulnerable to coercion or as impressionable as children. Furthermore, the injury suffered by the 14 year old Deborah Weisman was not mere offense at an invocation, but "being forced by the State to pray in a manner her conscience [would] not allow." *Lee*, 505 U.S. at 593.

Finally, the nearly unanimous view of the lower courts accepting some form of offended observer standing is not dispositive in this Court. On the contrary, it shows the pressing need for correction and guidance by this Court. This Court has not hesitated to reverse a majority of the lower courts on a point of law when circumstances dictated that it do so. See, e.g., *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 n.3 (2001) (rejecting "catalyst theory" for obtaining attorney's fees under 42 U.S.C. § 1988 despite every circuit, but two,

accepting it); *id*. at 621 (Scalia, J., concurring) ("our disagreeing with a 'clear majority' of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and long-standing interpretation of lower federal courts") (emphasis in original, citation omitted).

Where, as here, the issue is one of Article III jurisdiction, this Court should be all the more ready and willing to correct and provide guidance to lower courts that have gone astray. See *Winn*, 131 S. Ct. at 1442 (noting Chief Justice Marshall's admonition that this Court should take care to observe the "role assigned to the judiciary" within the Constitution's "tripartite allocation of power") (citation omitted).

Moreover, the lower courts are not as in unison as respondent would have this Court think. While respondent acknowledges the recent Seventh Circuit's decision in *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011) (observing that "offense at the behavior of the government, and a desire to have public officials comply with . . . the Constitution, differs from a legal injury"), there is also the Second Circuit decision from a mere two years ago, noting the "uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context." *Cooper v. U.S. Postal Serv*., 577 F.3d 479, 490 (2d Cir. 2009). See also *Freedom from Religion Foundation v. Perry*, No. H-11-2585 (S.D. Tex. July 28, 2011) (in order denying motion for preliminary injunction, district court held, citing *Valley Forge* and *Obama*, that plaintiff had no Article III standing to challenge the governor of Texas participating in a prayer rally); Pet. at 17-18.

In short, respondent cannot explain the plain inconsistency between the lower courts' embrace of offended observer standing and this Court's precedents. This Court should grant review.

II. THE SIXTH CIRCUIT'S EMBRACE OF THE NOTION OF INDELIBLE RELIGIOUS TAINT CONFLICTS WITH DECISIONS OF THIS COURT AND THE THIRD AND EIGHTH CIRCUITS.

In holding that DeWeese had an impermissible religious purpose in mounting his Philosophies of Law in Conflict display, the Sixth Circuit could not have been clearer in its embrace of the notion of an indelible religious taint: "the history of Defendant's actions demonstrates that ***any*** purported secular purpose is a sham." App. 16a (emphasis supplied).

Respondent attempts to find fault with DeWeese for "seizing" on this one sentence of the opinion, Opp. at 15, but the chosen words of the court speak for themselves. The court did not say that the history of DeWeese's actions help support a finding that DeWeese's articulated purpose is a sham; it did not say that history was one factor, even an important one, in finding that DeWeese's purported purpose was a sham. It held that the history of DeWeese's actions demonstrates, i.e., proves or establishes, that ***any*** secular purpose proffered by DeWeese had to be disingenuous.

It is true, as respondent points out, that in evaluating DeWeese's purpose the court looked to the words of the new display, as well as DeWeese's pamphlet. Opp. at 17-18. The court, however, did not

consider these facts in addition to the history of DeWeese's actions. It evaluated them through the tinted glasses of that history. As the decision below notes elsewhere:

> Defendant's history of Establishment Clause violation casts aspersions on his purportedly secular purpose in hanging the poster in his courtroom. So too do the similarities between Defendant's stated purpose in this case, and his unconstitutional purpose in *Ashbrook*.

App. 18a.

Thus, for the court below, the history of DeWeese's actions was more than a touchstone in evaluating his purpose behind the second display, it was the determinative factor according to which the second display was measured and adjudicated.

In *McCreary*, where the Court found an impermissible religious purpose behind the mounting of three different Ten Commandments displays in one year's time, two after suit was filed, the Court was nonetheless careful to point out that "past actions" did not "forever taint" future efforts of the government defendants. *Id.* at 874.

Here, despite the length of ***five years*** between posting his first and second displays, as well as the interim decision of the district court that the second display did not violate its order striking down the first display, see Pet. at 6, the court below held that DeWeese's past actions were enough to demonstrate that "any secular purpose" behind his philosophy

poster was a "sham." The Sixth Circuit's position is crystal clear: once tainted, always tainted.

The rationale and decision of the court below, holding that past actions indelibly taint future governmental efforts to deal with a subject matter, squarely conflicts with the holdings of this Court in *McCreary* and cases in the Third and Eighth Circuits.[2]

III. A GOVERNMENTAL AFFIRMATION OF MORAL ABSOLUTES DOES NOT CONSTITUTE AN IMPERMISSIBLE ENDORSEMENT OF RELIGION.

DeWeese contends that the challenged poster falls in line with this Court's decisions recognizing "the strong role played by religion and religious traditions throughout our Nation's history." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality). In support, DeWeese cites numerous decisions of this Court, statements from the Founding Era, federal statutes, legal thinkers who played an undeniable role in the founding of the country, and this Court's longstanding practice of beginning public sessions with an invocation. Pet. at 26-30.

The ACLU's response to this line of legal and historical precedent amounts to no response at all. Respondent dismisses the statements from the

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[2] DeWeese explained that the decision below conflicts with *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), *cert. denied*, 520 U.S. 1265 (1997), and *Roark v. South Iron R-1 Sch. Dist.*, 573 F.3d 556 (8th Cir. 2009), on the subject of indelible taint. Pet. at 23-25. Respondent does not address either case.

Declaration of Independence and the framers as "almost nostalgic."[3] Opp. at 19. The ACLU similarly waves aside the longstanding influence of natural law jurisprudence as being "of academic interest but of little relevance" here. *Id*. at 20. The ACLU also ignores entirely those federal statutes, as well as this Court's public practice, that specifically and explicitly invoke the divine.

The ACLU's assertion that the decision below squares with this Court's decisions fares no better. DeWeese does not dispute *Schemmp*'s observation that religious freedom is as imbedded in our public and private life as is religion in our history and government. Opp. at 20. This case, however, does not implicate religious freedom. Neither Davis, nor anyone else, is being coerced to take any action or think any thought in violation of their religious beliefs or practices.

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[3] The words of the Declaration of Independence are hardly a mere thing of the past. They were invoked by Congress, for example, in support of the Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101(22): "One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded."

Respondent's use of *Allegheny* and *McCreary* similarly miss the mark. Opp. at 20. While there may have been breaches of the Establishment Clause at various times in the country's history, as this Court opined in *Allegheny*, the ACLU fails to mention the nature of these breaches and how the challenged poster amounts to such a breach. If the ACLU is suggesting that the Pledge of Allegiance, the National Motto, or this Court's practice of beginning public sessions with an invocation amount to such a breach, then this is all the more reason for this Court to grant review.

Respondent is left with the bare assertion that the "strong iconic display of the Ten Commandments," coupled with DeWeese's statements, including his view that the "God of the Bible" is the ultimate authority of morality, leave the "'reasonable viewer' with the impression that the poster is an endorsement of religion, forbidden under the Establishment Clause." Opp. at 21.

This assertion cannot stand. First, the text of the Ten Commandments contained in the poster is certainly no stronger or "iconic" than the stone Ten Commandments monolith upheld by this Court in *Van Orden*. Moreover, here, unlike in *Van Orden*, countervailing statements flank the Decalogue.

DeWeese's statement that he agrees with the Founders in grounding morality in a divine source is no more an establishment of religion than what this Court itself has recognized regarding the historical and symbiotic role between religion and government. Pet. at 26-27. Moreover, as already pointed out by DeWeese, and not disputed by respondent, the phrase

"God of the Bible" is nowhere mentioned in the poster. Pet. at 26, n.5. The phrase is found in DeWeese's pamphlet, not challenged by the ACLU in this case and not on public display.

DeWeese's poster is an affirmation of what the Founders and their successors saw as a simple and abiding truth; that a recognition of moral absolutes, which receive their permanence from a divine source, are critical in "restoring the moral fabric of this nation." App. 87a. To assert that such an affirmation constitutes an impermissible endorsement of religion, as did the court below, is "to take a rigid, absolutist view of the Establishment Clause" this Court has "consistently declined" to adopt. *Lynch*, 465 U.S. at 678.

The decision of the Sixth Circuit, striking down DeWeese's Philosophies of Law in Conflict display as unconstitutional, conflicts with this Court's precedents recognizing "the strong role played by religion and religious traditions throughout our Nation's history." *Van Orden*, 545 U.S. at 683.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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