No. 17-13025

In The United States Court of Appeals For The Eleventh Circuit

Amanda Kondrat'yev, *et al.*,
Plaintiffs-Appellees,

v.

City of Pensacola, Florida, *et al.*,
Defendants-Appellants.

On Appeal from
the United States District Court
for the Northern District of Florida

BRIEF FOR *AMICI CURIAE*
JEWS FOR RELIGIOUS LIBERTY,
AGUDATH ISRAEL OF AMERICA,
COALITION FOR JEWISH VALUES,
RABBINICAL COUNCIL OF AMERICA, AND
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
IN SUPPORT OF APPELLANTS AND REVERSAL

Yaakov M. Roth
Counsel of Record
Vivek Suri
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Tel: (202) 879-3939
Email: yroth@jonesday.com

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rule 26.1-1, counsel certify that, in addition to the persons listed in the certificates of interested persons filed by the parties, the following persons (*amici curiae*, their parent corporations, publicly held corporations that own 10% or more of their stock, and their counsel) have an interest in the outcome of this case:

1. Agudath Israel of America
2. Coalition for Jewish Values
3. Jews for Religious Liberty
4. Jones Day
5. Project Genesis, Inc.
6. Rabbinical Council of America
7. Roth, Yaakov (Jacob)
8. Suri, Vivek
9. Union of Orthodox Jewish Congregations of America

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the following Jewish organizations:

Jews for Religious Liberty ("JFRL") is an unincorporated 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.

Agudath Israel of America ("AIA") is a New York-based non-profit organization that was founded in 1922 to unite a broad array of Orthodox Jews and to serve and advocate their interests nationwide. Among other things, AIA sponsors educational, social, and religious programs for needy persons from all backgrounds.

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

The Rabbinical Council of America ("RCA") plays an integral role in Jewish life around the world. Its 1000 members serve as congregational rabbis, community organizers, academics, youth and outreach professionals, and chaplains in the military, prisons, and health care systems; they build and sustain Jewish schools, synagogues, and centers throughout the country. The RCA also often represents North American Orthodox Jewry in its relations with government officials and other bodies.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1000 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.

Orthodox Jews 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 been able to grow and flourish. *Amici curiae* 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.

Counsel for both parties have consented to the filing of this brief. No counsel for any party authored any part of this brief. No party or counsel contributed money intended to fund the preparation of submission of this brief. No person (other than *amici curiae*, their members, and their counsel) contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

Does an observer have standing to challenge a display under the Establishment Clause simply because the display offends him?

SUMMARY OF 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, the Supreme 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. Americans United for Separation of Church and 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 that the federal courts do not stray from their proper role of enforcing individual rights into the messy business of superintending general government operations as such.

Establishment Clause plaintiffs have tried to justify offended-observer standing on a number of grounds, but none is persuasive. Supreme Court authority provides no support for opening the courthouses to distressed bystanders—quite the opposite. And while a handful of this Court's precedents have recognized standing based on offense from religious symbols or rituals, many have been abrogated by subsequent Supreme Court decisions (such as the recent rejection of the notion that plaintiffs may manufacture standing by voluntarily incurring burdens to avoid a consequence that is not itself a cognizable injury) and the remainder can and must be distinguished in order to reconcile them with *Valley Forge* and its progeny.

II. Beyond its shaky legal foundation, offended-observer standing uniquely harms minority faiths. The general 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 challenge.

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 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 more worrisome, offended-observed standing discourages governmental accommodation of minority religious practices. Because current First Amendment caselaw 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.

Both because of its doctrinal flaws and its practical consequences, the Court should reject the theory of offended-observer standing—or at least decline to expand it beyond the limited and unique contexts in which this Court has allowed it.

ARGUMENT

I. OFFENDED OBSERVERS LACK STANDING TO CHALLENGE RELIGIOUS DISPLAYS.

Under Article III of the Constitution, federal courts exercise only the "judicial power" and decide only "Cases" and "Controversies." 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).

Plaintiffs here assert standing to challenge the cross in Pensacola's Bayview Park because it offends them. They say that 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—I came, I saw, I was offended—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. To be sure, some of this Court's cases have held otherwise, but later Supreme Court decisions have undermined those cases to the point of abrogation. This Court should therefore rule that taking offense at a display does not establish injury; at the least, it should refrain from expanding offended-observer standing beyond its existing bounds.

A. Offense at a Religious Display Does Not Create 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, the Supreme 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 disagrees." *Id.* at 616 (plurality op.); *accord id.* at 634 (Rehnquist, C.J., concurring in part and dissenting in part). Or by showing that 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*, the Court held that 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 that 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), the Supreme Court held that 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 certainly 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), the 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.

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) the Supreme 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 very 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. *Valley Forge* held 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 that 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.

B. The Defenses of Offended-Observer Standing Are Unconvincing.

Over the years, Establishment Clause plaintiffs have offered a host of citations and rationales that supposedly justify offended-observer standing, notwithstanding the clear Supreme Court authority that forecloses it. None of these is persuasive.

First, some have claimed that the Supreme 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.

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 the Supreme Court has "confined" *Flast* "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 the Supreme 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 School 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 the Supreme Court's religious-display cases, similarly, neither note nor discuss standing, they do not constitute precedents on its existence.

Fourth, some 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 the Constitution and, indeed, "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* Pensacola Br. at 28-33.) 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. 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, traceable to the observer's own "choices." Put another way, since 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.

C. This Court's Caselaw Does Not Justify Offended-Observer Standing, and Certainly Not in This Context.

There is no denying that this Court has, in the past, recognized standing for certain offended observers of perceived Establishment Clause violations. But many of those decisions have been superseded by Supreme Court precedent, and others are distinguishable from the type of bare offended-observer standing invoked here.

At the outset, all of this Court's religious-display cases have found standing on the "detour" theory discussed above—*i.e.*, when plaintiffs "altered their behavior" to avoid seeing the display. *ACLU of Florida, Inc. v. Dixie Cty.*, 690 F.3d 1244, 1250 (11th Cir. 2012); *see also Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003); *ACLU of Georgia v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983). But these cases all predate *Clapper*, which the Supreme Court decided in 2013. Since they directly contradict *Clapper*'s holding that plaintiffs *cannot* convert a non-injury into an injury by incurring a cost to avoid it, they are no longer good law. And, anyway, the plaintiffs in this case did *not* alter their behavior to avoid the Bayview cross.

Aside from those "detour" cases, two other decisions of this Court endorsed standing for certain offended observers: *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987), which involved a challenge to a religious message on a city seal, and *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008), which involved a challenge to a legislative prayer before a county commission. Both cases are readily distinguishable, however, and such distinctions are necessary to reconcile them with *Valley Forge*.

For one thing, *Saladin* and *Pelphrey* involved religious messages that burdened citizens' communications with their own governments, implicating unique interests of constitutional magnitude. U.S. Const., amdt. I. (*See* Pensacola Br. at 31-32.) Displays in public parks do not raise such competing concerns. Moreover, both cases involved receipt of unwanted messages in one's own private home. In *Saladin*, the government "regularly" sent the plaintiff "correspondence" containing the unwelcome religious message, 812 F.2d at 692; and in *Pelphrey*, it broadcast (and the plaintiff watched) the unwelcome prayers "on the internet," 547 F.3d at 1280. The law recognizes in scores of contexts that the home is unique, and people have a distinctive interest in avoiding unwanted messages there. *See, e.g.*, *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (unwanted mail); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (unwanted broadcasts). There is no comparable interest in avoiding unwanted messages *in public*.

Saladin and *Pelphrey* should be limited to those factual parameters, as extending them further would contradict droves of subsequent Supreme Court decisions. Since *Saladin*, the Supreme Court has ruled that "observation" does not confer standing, *ASARCO*, 490 U.S. at 616, and that "psychic satisfaction" "does not redress a cognizable Article III injury," *Steel Co.*, 528 U.S. at 107. Since *Pelphrey*, the Supreme Court has added 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.). For this Court to now expand the limited scenarios in which it has granted offended-observer standing would squarely disregard these later-decided Supreme Court cases.

II. RECOGNIZING 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, and 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 is (to Christians) the Year of Our Lord 2017; not everyone knows that it is (to Jews) the Year of the World 5778. 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. 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.* 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. 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 "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 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); *Americans 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 taken aim at more obscure religious symbols or rituals, too. *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, 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 Christmas tree on the theory that 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 generally does not *require* accommodations by state or local officials, however, *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 legal claims may lack merit, but the threat of litigation will still deter officials from protecting religious minorities from 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). Indeed, just last year, offended residents within this Circuit went so far as to sue a city for permitting the building of a synagogue. *Gagliardi v. City of Boca Raton*, 197 F. Supp. 3d 1359 (S.D. Fla. 2016). 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* ritually 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.

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.

Offended-observer standing, in short, allows bystanders to exercise a heckler's veto over public accommodation of religious practices. It therefore poses a serious and dangerous threat to our traditional and vital religious freedoms.

CONCLUSION

The Court should hold that offended observers, like plaintiffs here, lack Article III standing to challenge religious displays; at a minimum, it should cabin the doctrine of offended-observer standing within its existing bounds.

Dated: October 3, 2017

Respectfully submitted,

/s/ Yaakov M. Roth

Yaakov M. Roth
Counsel of Record
Vivek Suri
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
Email: yroth@jonesday.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 4,977 words, as determined by the Microsoft Word 2007 program used to prepare it.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Garamond.

Dated: October 3, 2017

/*s*/ Yaakov M. Roth
Yaakov M. Roth
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on October 3, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

Dated: October 3, 2017

/s/ Yaakov M. Roth
Yaakov M. Roth
Counsel for Amici Curiae