No. 26A203

In the Supreme Court of the United States

NATIONAL PARK SERVICE, ET AL.,

Applicants,

v.

NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES

On Application for a Stay of the Injunction Issued by the United States District Court for the District of Columbia and Request for an Immediate Administrative Stay

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPLICANTS

JOSEPH C. DAVIS
Counsel of Record
ERIC RASSBACH
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, D.C. 20006
jdavis@becketfund.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. The Court should expressly reject "offended observer" standing. 2

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases

ACLU of Ohio Found., Inc. v. *Ashbrook*,
375 F.3d 484 (6th Cir. 2004) 3

American Legion v. *American Humanist Ass'n*,
588 U.S. 29 (2019) 3, 5

Burwell v. *Hobby Lobby Stores, Inc.*,
573 U.S. 682 (2014) 1

Catholic Charities Bureau, Inc. v. *Wisconsin Lab. & Indus. Rev. Comm'n*,
605 U.S. 238 (2025) 1

Cave v. *Jester*,
829 F. Supp. 3d 582 (E.D. Ark. 2026) 7

Cooper v. *United States Postal Serv.*,
577 F.3d 479 (2d Cir. 2009) 3

FDA v. *Alliance for Hippocratic Med.*,
602 U.S. 367 (2024) 5

Flast v. *Cohen*,
392 U.S. 83 (1968) 3

Foremaster v. *City of St. George*,
882 F.2d 1485 (10th Cir. 1989) 4

Freedom From Religion Found., Inc. v. *New Kensington Arnold Sch. Dist.*,
832 F.3d 469 (3d Cir. 2016) 3

Freedom From Religion Found., Inc. v. *Weber*,
628 F. App'x 952 (9th Cir. 2015) 1

Freedom From Religion Found., Inc. v. *County of Lehigh*,
933 F.3d 275 (3d Cir. 2019) 6

Freedom From Religion Found., Inc. v. *Mack*,
49 F.4th 941 (5th Cir. 2022) 6

Fulton v. *City of Philadelphia*,
593 U.S. 522 (2021) 1

Gerber v. Herskovitz,
14 F.4th 500 (6th Cir. 2021) 6

Holt v. *Hobbs*,
574 U.S. 352 (2015) 1

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *EEOC*,
565 U.S. 171 (2012) 1

Johnson v. *Mayor, City of Jacksonville*,
178 F.4th 1240 (11th Cir. 2026) 3

Kondrat'yev v. *City of Pensacola*,
903 F.3d 1169 (11th Cir. 2018) 1, 6

Little Sisters of the Poor Saints Peter & Paul Home v. *Pennsylvania*,
591 U.S. 657 (2020) 1

Mahmoud v. *Taylor*,
606 U.S. 522 (2025) 1

Murray v. *City of Austin*,
947 F.2d 147 (5th Cir. 1991) 3

In re Navy Chaplaincy,
534 F.3d 756 (D.C. Cir. 2008) 4

Our Lady of Guadalupe Sch. v. *Morrissey-Berru*,
591 U.S. 732 (2020) 1

Penkowski v. *Bowser*,
486 F. Supp. 3d 219 (D.D.C. 2020) 4

Red River Freethinkers v. *City of Fargo*,
679 F.3d 1015 (8th Cir. 2012) 3-4

Rojas v. *City of Ocala*,
40 F.4th 1347 (11th Cir. 2022) 4, 5, 6, 7

Steel Co. v. *Citizens for Better Env't*,
523 U.S. 83 (1998) 2

Suhre v. *Haywood County*,
131 F.3d 1083 (4th Cir. 1997) 3, 5, 6

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*,
454 U.S. 464 (1982) 4, 5

Vasquez v. *Los Angeles County*,
487 F.3d 1246 (9th Cir. 2007) 4

Washegesic v. *Bloomingdale Pub. Schs.*,
33 F.3d 679 (6th Cir. 1994) 5

Woodring v. *Jackson County*,
986 F.3d 979 (7th Cir. 2021) 3

Zubik v. *Burwell*,
578 U.S. 403 (2016) 1

INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 578 U.S. 403 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732 (2020); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657 (2020); *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021); *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238 (2025); *Mahmoud* v. *Taylor*, 606 U.S. 522 (2025). Becket has also frequently represented governments sued under the Establishment Clause by plaintiffs who merely observed government actions they did not like. See, *e.g.*, *Freedom From Religion Found., Inc.* v. *Weber*, 628 F. App'x 952, 953 (9th Cir. 2015) (plaintiff "made a conscious effort to avoid Big Mountain because of the Jesus Statue"); *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1175 (11th Cir. 2018) (Newsom, J., concurring), granted, vacated, and remanded, 588 U.S. 917 (2019) (plaintiffs "assert[ed] that they fe[lt] 'offended,' 'affronted,' and 'excluded' by the Bayview Park cross").

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission.

Amicus offers this brief to bring to the Court's attention one fact: Its ruling in this case will have an unavoidably significant effect on the "offended observer" theory of standing adopted by many lower courts in the context of Establishment Clause litigation. The nature of the Respondent's theory of standing in this case—that Professor Hoagland "regularly walk[s] through portions of President's Park" and will take in "views of the White House" that she finds objectionable, App.289a, 295a-296a—precisely tracks the test for offended observer standing in the lower courts. Given the inevitable effect on lower-court adjudication, and the pernicious effects of the offended observer theory, Becket urges the Court to expressly reject offended observer standing in whatever context it arises.

INTRODUCTION AND SUMMARY OF ARGUMENT

Applicants have ably shown how the Trust's "aesthetic" and "visual" theory of standing is fundamentally misguided. Application at 15-18; Reply at 4-8. "Walk-by" standing is no better than "drive-by" jurisdiction. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 91 (1998).

But this case will not be about just Professor Hoagland's strolls through central DC. The theory of standing the Trust relies on is inextricably linked with "offended observer" standing under the Establishment Clause. Therefore, whatever answer the Court gives to the standing question in this case will have an unavoidable impact on offended observer standing and whether it continues to be applied in the lower courts.

ARGUMENT

I. The Court should expressly reject "offended observer" standing.

1. Courts generally have no trouble recognizing the principle that should resolve

this case: that "recourse for disagreement and offense" from viewing disagreeable government action "does not lie in federal litigation." *American Legion* v. *American Humanist Ass'n*, 588 U.S. 29, 88 (2019) (Gorsuch, J., concurring in the judgment); see also, *e.g.*, *Johnson* v. *Mayor, City of Jacksonville*, 178 F.4th 1240, 1246-1248 (11th Cir. 2026). But that sensible rule has not always prevailed in Establishment Clause cases. In that context, lower courts have developed a doctrine aimed at permitting plaintiffs to challenge government monuments and displays they perceive as sending an objectionable message about religion. Like the Establishment Clause exception to the general rule against taxpayer standing recognized in *Flast* v. *Cohen*, 392 U.S. 83 (1968), this doctrine—"offended observer" standing—seeks to allow Establishment Clause lawsuits to proceed despite the normal rules of justiciability.

This Court has never endorsed "offended observer" standing. But ten circuits have, with the relevant test typically focused on whether there has been "direct, unwelcome contact" with the offending government action or display. See *Cooper* v. *United States Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) ("direct contact"); *Freedom From Religion Found., Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 479 (3d Cir. 2016) ("direct, unwelcome contact"); *Suhre* v. *Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997) ("unwelcome direct contact"); *Murray* v. *City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) ("direct, personal contact"); *ACLU of Ohio Found., Inc.* v. *Ashbrook*, 375 F.3d 484, 490 (6th Cir. 2004) ("direct, unwelcome contact"); *Woodring* v. *Jackson County*, 986 F.3d 979, 985 (7th Cir. 2021) ("direct and unwelcome contact"); *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015,

1023 (8th Cir. 2012) ("direct and unwelcome personal contact"); *Vasquez* v. *Los Angeles County*, 487 F.3d 1246, 1253 (9th Cir. 2007) ("unwelcome direct contact"); *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989) ("direct, personal contact"); *Rojas* v. *City of Ocala*, 40 F.4th 1347, 1351 (11th Cir. 2022), cert. denied, 143 S. Ct. 764 (2023) (plaintiff "voluntarily attended the prayer vigil and knew she would encounter religious practices she found offensive, but under Supreme Court precedent that does not mean she lacks standing to bring an Establishment Clause claim"). These decisions flout the principle, rightly recognized elsewhere, that Article III does "not allow anyone who becomes aware of a government action that allegedly violates the Establishment Clause to sue over it on the ground that they are offended by the allegedly unconstitutional 'message' communicated by that action." *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (Kavanaugh, J.); see also *Penkowski* v. *Bowser*, 486 F. Supp. 3d 219, 229, 231-237 (D.D.C. 2020) (McFadden, J.) ("Plaintiffs' 'offended observer' theory of standing has no basis in law." (cleaned up)).

The lower courts' widespread adoption of the concept might seem surprising given this Court's ruling in *Valley Forge*. There, the Court said plaintiffs lack Article III standing if their only injury is "the psychological consequence" produced by "observation of conduct with which one disagrees." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). But lower courts have distinguished *Valley Forge* on the basis that the plaintiffs there became aware of the challenged governmental conduct only by reading about it in a

news release. "Direct contact," they say, is different—because it involves seeing the government conduct or display *in person*. *Suhre*, 131 F.3d at 1086-1087. It therefore comes as no surprise that *Valley Forge*—and Article III—can easily be evaded by Establishment Clause plaintiffs. As long as a single plaintiff can be found to testify that they occasionally walk by the area where the offending structure, display, or activity is located, and thus might take a glimpse, standing is no longer an obstacle.

2. Article III should not be so readily ignored. As *Valley Forge* explained, there is no "'sliding scale' of standing" based on the nature of the underlying claim. 454 U.S. at 484. And as many judges—including Justices of this Court—have explained, the aberration of offended observer standing is both pernicious and unwarranted. See, *e.g.*, *American Legion*, 588 U.S. at 80 (Gorsuch, J., concurring) ("'offended observer' theory of standing has no basis in law"); *City of Ocala*, 143 S. Ct. at 767 (Thomas, J., dissenting) ("Offended observer standing appears to warp the very essence of the judicial power vested by the Constitution."); see *id.* (collecting numerous judicial criticisms). As a general rule, "distress at or disagreement with the activities of others" does not suffice to make a federal case. *FDA* v. *Alliance for Hippocratic Med.*, 602 U.S. 367, 390 n.3 (2024). And that the disagreeable conduct may be viewed in person at most goes to the intensity of the "psychological consequence" felt by the viewer; it does not change its nature. *Valley Forge*, 454 U.S. at 485; see also, *e.g.*, *Washegesic* v. *Bloomingdale Pub. Schs.*, 33 F.3d 679, 683 (6th Cir. 1994) ("larger psychological wound").

3. That is precisely what this case is about. As the court of appeals explained, the

Trust's theory of standing in this case turns on whether Professor Hoagland, on her visits to the area around the White House, will observe a structure that to her sends the wrong "message" about the home of the President. App.289a-292a. That is the offended observer standing argument, where the plaintiff claims she will "directly" observe a monument or display she perceives as sending an objectionable "message" about religion (*e.g.*, "endors[ing]" it). *E.g.*, *Suhre*, 131 F.3d at 1086-1087.

In deciding whether the Trust has "visual" standing, the Court should therefore reject the intertwined concept of offended observer standing. As Justice Thomas has noted, offended observer standing actively undermines standing doctrine in other areas: "Far from naturally receding, offended observer standing threatens to dilute Article III requirements in other areas." *City of Ocala*, 143 S. Ct. at 768 (Thomas, J., dissenting) (citing *Gerber* v. *Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021)).

4. Finally, unless this Court *expressly* rejects offended observer standing, it will remain the law in all the Circuits (except the First and D.C. Circuits), because they are bound by their pre-existing precedents. See, *e.g., Kondrat'yev*, 903 F.3d at 1174 (Newsom, J., concurring) (court "stuck with" offended observer standing); *Freedom From Religion Found., Inc.* v. *County of Lehigh*, 933 F.3d 275, 280 (3d Cir. 2019) (Hardiman, J.) (up to "the Supreme Court—or this Court sitting en banc—to determine whether to discard" offended observer standing). *Freedom From Religion Found., Inc.* v. *Mack*, 49 F.4th 941, 949 (5th Cir. 2022) (Smith, J.) ("correct or not, our precedents bind us" to recognize offended observer standing). Moreover, Justice Gorsuch's "expect[ation]" that "lower courts will recognize that offended observer

standing has no more foundation in the law than the *Lemon* test that inspired it" has proven too optimistic. *City of Ocala*, 143 S. Ct. at 765 (statement of Gorsuch, J.). See, *e.g.*, *Cave* v. *Jester*, 829 F. Supp. 3d 582, 625-626 (E.D. Ark. March 31, 2026) (finding offended observer standing in monument case despite *Kennedy* because "*Lemon* is not a case where standing was premised on direct unwelcome contact; it is a taxpayer standing case" and because *Lemon* "concerned a challenge to a statute, not a challenge to any establishment with a physical or auditory manifestation with which a person could have direct unwelcome contact"). In short, until this Court explicitly states that offended observer standing is invalid, the concept will persist in robust form in the lower courts. And a ruling from this Court that takes on the issue of "visual" standing but is silent as to "offended observer" standing risks *reinforcing* the offended observer theory, because silence will be interpreted as assent by lower courts. See, *e.g.*, *Cave*, 829 F. Supp. 3d at 625 (because "the majority's opinion in *Kennedy* does not mention standing" offended observer standing remained valid).

* * *

No one has standing to challenge a government ballroom just because they anticipate walking by it, seeing it, and not liking the design. By the same token, no one should have standing to challenge a monument just because they anticipate walking by it, seeing it, and not liking what it says—even if it mentions religion.

CONCLUSION

This Court should vacate the preliminary injunction and hold that offended observer standing is invalid in whatever context it is invoked.

Respectfully submitted.

/s/ Joseph C. Davis

JOSEPH C. DAVIS
Counsel of Record
ERIC RASSBACH
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, D.C. 20006
jdavis@becketfund.org

Counsel for Amicus Curiae

AUGUST 2026