No. 15-2597

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION, ET AL.,

Plaintiffs-Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Defendant-Appellee.

&

THE AMERICAN LEGION, ET AL.,

Intervenors/Defendants-Appellees.

On Appeal From The United States District Court For The District Of Maryland, Greenbelt Division
(Hon. Deborah K. Chasanow, District Judge)

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-2597 Caption: American Humanist Ass'n v. Maryland-National Capital Plan. Comm'n

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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Paul J. Zidlicky Date: April 11, 2016

Counsel for: Becket Fund for Religious Liberty

CERTIFICATE OF SERVICE

****

I certify that on April 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Paul J. Zidlicky (signature) April 11, 2016 (date)

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Federal Rule of Appellate Procedure 29, the Becket Fund for Religious Liberty ("Becket Fund" or "*amicus curiae*") is a non-profit, public-interest legal and educational institute that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

The Becket Fund has long worked to prevent abuse of the Establishment Clause to exile religion from public life. For example, the Becket Fund has defended against Establishment Clause challenges to a multi-faith religious display, *ACLU of N.J. v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (represented city), to privately-owned highway crosses erected to honor fallen state highway troopers, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (represented State

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that (1) no counsel's party authored this brief in whole or in part, (2) no party or party's counsel contributed money that was intended to fund preparing or submitting of this brief, and (3) no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Under Federal Rule of Appellate procedure 29(a), *amicus curiae* states that all of the parties have consented to the filing of this brief.

amici) and to the Pledge of Allegiance, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010).

The Becket Fund is concerned that a reversal of the District Court's well-reasoned decision in this case would run contrary to the historical understanding and purposes of the Religion Clauses and undermine long-established practices of honoring the Nation's veterans in a manner that does not exhibit hostility to religious belief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants ("Plaintiffs") seek the removal, destruction or disfigurement of the Bladensburg World War I Veterans Memorial ("Memorial"), which has stood undisturbed for 90 years commemorating 49 veterans from Prince George's County who gave their lives for the Nation in the First World War. *See* Plaintiffs' Memorandum of Law in Support of Summary Judgment at 50, Doc. No. 80-1 (May 5, 2015) (seeking "removal," "demolition" or "removal of the arms" of the Memorial "to form a rectangular block or obelisk"). Plaintiffs seek its destruction because they contend that the shape of the Memorial – a Latin Cross – is an establishment of religion in violation of the United States Constitution. As discussed below, the decision of the district court rejecting Plaintiffs' claims should be affirmed for two principal reasons.

I. Plaintiffs lack standing under the Establishment Clause to demand the removal, demolition or disfigurement of the Memorial. The individual Plaintiffs contend that they have standing because they have had "unwelcome contact" with the Memorial. Status as offended bystanders is inadequate to confer Article III standing. Under settled precedent, "the psychological consequence presumably produced by observance of conduct with which one disagrees" is not "an injury sufficient to confer standing" under Article III even if "the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 485-86 (1982). Plaintiffs lack standing because they have not personally been denied equal treatment on the basis of religion or non-religion, *Allen v. Wright*, 468 U.S. 737, 755 (1984), or "subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22. To the contrary, neither the individual Plaintiffs nor the American Humanist Association ("AHA"), has "suffered, or is threatened with, an injury other than their belief that [the Memorial] violate[s] the Constitution." *Id.* at 487 n.23. Plaintiffs' sporadic contact with the Memorial is insufficient to confer standing to demand that the Memorial be removed, demolished or disfigured. To the extent that this Court has extended the scope of injury sufficient to confer Article III standing, that precedent

is inconsistent with *Valley Forge* and *Allen*, as well as more-recent Supreme Court precedent and should be reconsidered.

II. The Memorial does not violate the Establishment Clause based on an historical analysis of the concerns that animated its adoption. The Memorial has stood in the same location without controversy for over 90 years to commemorate the 49 men from Prince George's County who fought and died in World War I. The Memorial in no way compels citizens to engage in religious exercise or coerces citizens to support or participate in any religion or religious exercise. An encounter with the Memorial is not a religious exercise. Although the shape of the Memorial – a Latin cross – has religious significance to many, the Memorial has for generations served the secular message of commemorating the sacrifice of veterans from World War I.

The Memorial simply does not involve the government engaging in or compelling religious exercise. *See Myers v. Loudon Cty. Pub. Schs.*, 418 F.3d 395, 406-07 (4th Cir. 2005). To the contrary, Plaintiffs' request to remove, demolish or disfigure this long-standing monument would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment)).

ARGUMENT

I. PLAINTIFFS' STATUS AS "OFFENDED BYSTANDERS" DOES NOT CONFER UPON THEM ARTICLE III STANDING TO DEMAND THE REMOVAL, DEMOLITION OR DISFIGUREMENT OF THE 90-YEAR-OLD VETERAN'S WAR MEMORIAL.

In this litigation, Plaintiffs sought an injunction to prevent the display of the Memorial "on public property or otherwise in violation of the Establishment Clause." *See* Joint Appendix ("JA") 32. Plaintiffs specifically requested the "immediate" (i) "removal" of the Veteran's Memorial from its current location, (ii) "demolition" of the Veteran's Memorial, or (iii) "removal of the arms" of the Veteran's Memorial "to form a rectangle block or obelisk." Plaintiffs' Memorandum of Law in Support of Summary Judgment at 50, Doc. No. 80-1 (May 5, 2015). Plaintiffs lack standing under Article III to demand that the Memorial be removed, demolished or disfigured.

Plaintiffs are three individuals and the American Humanist Association ("AHA"), which brought suit on behalf of its individual members. The individual plaintiffs – two of whom are members of AHA – state that they are "non-Christian residents who have had unwelcome contact with Bladensburg Cross and feel it affiliates the government with Christianity." *See* Doc. No. 25 at 2 (Feb. 29, 2016).[2]

[2] Mr. Edwords alleged that he is a resident of Prince George's County. JA 25 ¶ 9. Mr. Lowe is a resident of the District of Columbia, JA 24-25 ¶ 6; Mr. McNeill is a resident of Beltsville, Maryland. JA 26 ¶ 10. AHA is incorporated in Illinois with a principal place of business in Washington, D.C. JA 24 ¶ 5.

Specifically, Plaintiffs assert that they "have had unwelcome contact with the Bladensburg Cross," that they feel that it "gives the impression that the state supports and approves of Christianity to the exclusion of other religions and non-religion," and that they feel "excluded by this governmental message." *See* Plaintiffs' Summary Judgment Memorandum, Doc. No 80-1, at 2-3. Plaintiffs' status as offended bystanders is not sufficient to support standing under Article III.

1. Under Article III, federal courts must assure themselves that a plaintiff has standing before they can address a plaintiff's claims. Under the familiar three-part test, a plaintiff must establish (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be addressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Put another way, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). These standing requirements ensure that "the decision to seek review" is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

With regard to injury in fact, the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. Instead, a plaintiff must have "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne v. Flores*, 557 U.S. 433, 445 (2009) (emphasis omitted).

The Supreme Court has applied these general principles to evaluate whether a plaintiff has standing to allege that the government has violated the Establishment Clause. In *Doremus v. Board of Education*, the Supreme Court concluded that it lacked jurisdiction to assess a challenge under the Establishment Clause to a state statute that required the reading of Old Testament verses from the Bible to schoolchildren at the opening of each school day. 342 U.S. 429, 432 (1952). The Court held that the plaintiff whose child attended the school could not establish standing because "th[e] child had graduated from the public schools before this appeal was taken to th[e] [Supreme Court]." *Id.* The Court also held that plaintiffs lacked standing as taxpayers because their claims "[we]re too

indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." *Id.* at 433.

Thereafter, in *Abington School District v. Schempp*, the Supreme Court again considered a challenge to the mandatory practice of reciting Bible verses at the beginning of each school day. 374 U.S. 203 (1963). The Court explained that "[i]t goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain," and that the "school children and their parents" had standing because they were "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n.9. That is, the schoolchildren were subjected to Biblical readings "which were contrary to the religious beliefs which they held and to their familial teaching." *Id.* at 208. The *Schempp* Court contrasted these schoolchildren and parents who had standing to challenge the reading of the Bible with the plaintiffs in *Doremus* who lacked standing because of "the graduation of the school child involved." *Id.*

In *Valley Forge Christian College v. Americans United For Separation of Church and State*, the Court again considered the issue of standing to challenge government action under the Establishment Clause. *Valley Forge* rejected the argument that the Court's decision in *Schempp* meant that "any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing." 454 U.S. 464, 486 n.22 (1982). The *Valley Forge* Court explained that

the plaintiffs in *Schempp* had standing "not because their complaint rested on the Establishment Clause – for as *Doremus* demonstrated, that is insufficient – but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Id.* The Court contrasted that concrete injury to the schoolchildren in *Schempp* to the plaintiffs' complaint regarding a land transfer that they learned of through a "news release," concluding that plaintiffs lacked standing because "the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing." *Id.* at 487.

Finally, in *Hein v. Freedom from Religion Foundation*, the Supreme Court again addressed the issue of Article III standing to challenge government action under the Establishment Clause. 551 U.S. 587 (2007). A plurality of the Court reaffirmed that the judicial power of the United States as defined by Article III "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Id.* at 598 (quoting *Valley Forge*, 454 U.S. at 471).[3] Justice Alito explained that plaintiffs lacked standing to object to the Executive Branch's Faith-Based and Community Initiatives program, which included speeches that used

[3] Because the plurality opinion of Justice Alito offered a narrower ground of decision than Justice Scalia's concurring opinion—which would have overruled *Flast v. Cohen*, 392 U.S. 83 (1968)—the plurality opinion controls. *See Marks v. United States*, 430 U.S. 188, 193-94 (1977).

"religious imagery" and praised the "efficacy of faith-based programs in delivering social services." 551 U.S. at 592 (plurality). In doing so, Justice Alito declined to extend the Supreme Court's decision in *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968), which held that taxpayers had standing to challenge the distribution of funds to religious schools under the Establishment Clause. The plurality explained that *Flast* had "largely been confined to its facts" and "gave too little weight" to "serious separation-of-powers concerns." 551 U.S. at 609, 611. As a result, the plurality concluded that the proper course was not to extend *Flast,* but, to follow the approach taken in *Valley Forge* and "leave *Flast* as we found it." *Id.* at 615.[4]

2. The Supreme Court also has addressed the issue of stigmatic harm under the Equal Protection Clause of the Fourteenth Amendment.

In *Allen v. Wright*, the Supreme Court considered claims that the IRS's grant of tax exemptions to racially discriminatory schools violated the Fifth and Fourteenth Amendments to the United States Constitution. 468 U.S. 737, 745 & n.12 (1984). Plaintiffs alleged that they were "harmed directly by the mere fact of Governmental financial aid to discriminatory schools." *Id.* at 752. The *Allen*

[4]*See Hein*, 551 U.S. at 633 (2007) (Scalia, J., concurring in judgment) (concluding that "taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner" is not "sufficiently concrete and particularized to support Article III standing"); *Salazar v. Buono*, 559 U.S. 700, 711 (2010) (plurality) (declining to address government's argument that plaintiff's "asserted injury is not personal to him and so does not confer Article III standing").

Court viewed this claim of injury as either (1) "a claim simply to have the Government avoid the violation of law alleged in [the Complaint]," or (2) "stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race." *Id.* at 753-54. The Court held that "[u]nder neither interpretation is this claim of injury judicially cognizable." *Id.* at 754.

First, the Court made clear that "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Id.* Relying on *Valley Forge*, the Court explained that "[a]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirement of [Article III] without draining those requirements of meaning." *Id.* (quoting *Valley Forge*, 454 U.S. at 483).

Second, the *Allen* Court concluded that plaintiffs did not "have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination." *Id.* at 755. While recognizing that "this sort of noneconomic injury is one of the most serious consequences of discriminatory government action," the Court explained that "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged

discriminatory conduct." *Id.*[5] The *Allen* Court explained that "[i]f the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating." *Id.* at 755-56. And, the "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of *concerned bystanders*.'" *Id.* at 756 (emphasis added) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

3. Under *Allen* and *Valley Forge*, Plaintiffs cannot establish Article III standing merely by contending that they suffer "psychic" or "psychological" harm when they see the Memorial.

The psychological consequence of seeing government conduct with which a plaintiff disagrees – whether a violation of the Equal Protection Clause or a violation of the Establishment Clause – is insufficient, by itself, to support standing under Article III. Rather, Article III requires that (1) the plaintiffs personally have been denied equal treatment on the basis of religion or non-religion, *Allen*, 468 U.S. at 755, or (2) plaintiffs' have been "subjected to unwelcome religious

[5] *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972) (holding that plaintiff had no standing to challenge a club's racially discriminatory membership policies because he had never applied for membership); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (holding that plaintiffs had no standing to challenge racial discrimination in the administration of their city's criminal justice system because they had not alleged that they had been or would likely be subject to the challenged practices).

exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22 (citing *Schempp*).[6] Thus, when the government provides a benefit to religious groups, but not to similarly situated secular groups, a secular group denied that benefit would have standing to bring a claim of unequal treatment. *See Tex. Monthly v. Bullock*, 489 U.S. 1, 7-8 (1989) (plurality). Likewise, public schoolchildren subjected to religious exercises at school events would have standing on the ground that they are a captive audience subject to government sponsored religious exercises. *See Schempp*, 374 U.S. at 205.

Under these standards, however, Plaintiffs lack standing based upon their psychic reaction upon seeing the Memorial. Plaintiffs have not been denied equal treatment based upon the basis of their religion or non-religion. Rather, they say that (1) the Memorial makes them feel that "the State supports and approves of Christianity, as opposed to other religions," (2) they feel "excluded by this governmental message," and (3) they "oppos[e] this appearance of governmental favoritism for religion and for a particular religion." JA 25 ¶ 7; JA 25-26 ¶¶ 8-10.

[6] Nor should the standards for assessing standing under Article III turn on whether a plaintiff is alleging that a State is violating the Equal Protection Clause of the Fourteenth Amendment or the Establishment Clause. As explained in *Valley Forge*, "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." 454 U.S. at 484. Creating such a hierarchy here would be particularly inappropriate because the Supreme Court has held that the Establishment Clause applies to the States through the Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

Those feelings, however, are indistinguishable from the feelings of "stigmatic injury, or denigration" alleged by the plaintiffs in *Allen* under the Equal Protection Clause, 468 U.S. at 754, which the Supreme Court explained was inadequate because plaintiffs were not themselves "'denied equal treatment' by the challenged discriminatory conduct." *Id.* at 755.

Plaintiffs' allegations are also indistinguishable from the psychic injury deemed inadequate in *Valley Forge* – namely, "the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485-86. There, the Court contrasted mere psychic harm with the injury to impressionable schoolchildren in *Schempp*, who "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22. Plaintiffs do not attempt to allege that they have been "subjected to unwelcome religious exercises," or have been forced "to assume special burdens to avoid them." *Id.* Rather, they have encountered the Memorial, at most, occasionally, while running errands or visiting commercial establishments or friends. JA 24-25 ¶ 6 (Mr. Lowe); JA 25 ¶ 9 (Mr. Edwords: "unwelcome contact" on "several occasions"); JA 26 ¶ 10 (Mr. McNeill: "unwelcome contact" "at least four times"). Sporadic contact by adult bystanders is a far cry from the injury claimed by the schoolchildren in *Schempp*. *See Valley Forge*, 454 U.S. at 486 n.22. Plaintiffs lack standing because, under *Valley Forge*,

they have demonstrated no injury "other than their belief that [the government's conduct] violated the Constitution." *Id.* at 487 n.23.

For similar reasons, AHA also lacks standing to challenge the Memorial. AHA has not alleged any direct injury from the Memorial, but instead has brought suit to "assert the First Amendment rights of its members." JA 24 ¶ 5. As a result, it must show "its members would otherwise have standing to sue in their own right" and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Because AHA's members lack standing to sue in their own right, AHA also lacks standing.

4. Appellees state that this Court "could also affirm due to a lack of standing because none of the Plaintiffs has foregone any legal rights . . . to avoid contact with the Memorial," but that "controlling Fourth Circuit precedent currently forecloses this argument." Appellees' Br. 46 n.12 (citing *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1088-89 (4th Cir. 1997)). *Amicus curiae* respectfully suggests that *Suhre* misreads the decision in *Valley Forge* and should be reconsidered in light of recent decisions by the Supreme Court.[7]

[7] Even if the Panel concluded it were bound by *Suhre*, the Fourth Circuit en banc would be authorized to revisit the issue. *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (explaining that prior opinion controls subsequent panels "unless the prior opinion has been overruled by an intervening opinion from this court sitting en banc or the Supreme Court").

In *Suhre*, this Court ruled that "unwelcome direct contact with a religious display that appears to be sponsored by the state" is sufficient to confer Article III standing in cases involving the Establishment Clause. 131 F.3d at 1086. In reaching that conclusion, this Court acknowledged that *Valley Forge* held that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." *Id.* (quoting *Valley Forge*, 454 U.S. at 485). *Suhre* continued, however, that *Valley Forge* also recognized that the plaintiffs in *Schempp*, "who 'were subjected to *unwelcome religious exercises* or were forced to assume special burdens to avoid them'" had standing to bring an Establishment Clause claim. *Id.* (quoting *Valley Forge*, 454 U.S. at 487 n.22) (emphasis added). That is, in *Schempp*, the plaintiff schoolchildren had standing because they were "subjected to unwelcome religious exercises" – daily reading from the Bible – or were required "to assume special burdens to avoid" those religious exercises. Thus, the injury claimed by the schoolchildren and their parents in *Schempp* was the Hobson's choice of being subjected to unwelcome religious exercise or assuming a special burden to avoid that religious exercise by being separated from their classmates.

The *Suhre* Court extended *Schempp* and *Valley Forge* far beyond captive individuals who were "subjected to unwelcome religious exercises" and ruled that offended bystanders also would have standing if they alleged "direct contact with

an unwelcome *religious* . . . *display*." *Id.* (emphasis added). This Court has highlighted the critical importance of determining whether the government's challenged activity is "religious exercise." *Myers*, 418 F.3d at 406-07. Thus, in *Myers*, the Court upheld a Virginia law mandating the recitation of the Pledge of Allegiance – which contains a "religious phrase," "under God," with admitted "religious significance" – in public schools because recitation of the Pledge was not "religious exercise" under Supreme Court precedent. *Id.* In contrast, *Suhre* engaged in no analysis to support its extension of Article III standing by captive schoolchildren challenging unwelcome "religious exercise" to offended bystanders seeking the removal, destruction or disfigurement of a display they contend is religious.

Further, the *Suhre* Court asserted that the "best proof of [its] reading of *Valley Forge* lies in the actions of the Supreme Court itself," which in two subsequent "religious display cases . . . proceeded to the merits of the challenges to the displays and found no infirmity in the standing of plaintiffs alleging direct contact with them." 131 F.3d at 1088 (citing *Allegheny Cty. v. ACLU*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984)). That is mistaken. Neither *Allegheny County* nor *Lynch* considered the issue of Article III standing, and the law is settled that "the existence of unaddressed jurisdictional defects has

no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (emphasis added).[8]

Further, the Supreme Court's more-recent decision in *Hein* undercuts expansion of Article III standing to include individuals offended by "religious displays." As noted above, in *Hein*, the plurality explained that it was error for the lower court to *expand* the scope of Article III standing for Establishment Clause claims because "it is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always extended to the limit of its logic." 551 U.S. at 615 (plurality). Rather, the appropriate course was to leave the scope of standing set forth in cases such as *Flast* and *Valley Forge* "as we found it." *Id.*

And even if *Suhre* were to be applied on its own terms, it would not help plaintiffs, because they are merely alleging the "psychological consequence" this

[8] *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect."); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) ("The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us"); *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 63, n.4 (1989) ("[T]his Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us"). Further, the lower courts in *Allegheny* and *Lynch* rested jurisdiction either expressly or implicitly on plaintiffs' status as taxpayers – not merely on the psychological consequence of viewing the displays. *See Donnelly v. Lynch*, 691 F.2d 1029, 1031-32 (1st Cir. 1982) (concluding that plaintiffs had standing as taxpayers); *ACLU v. Cty. of Allegheny*, 842 F.2d 655, 657-58 (3d Cir. 1988) (relying upon county and city aid to the crèche and menorah). Thus, those lower court decisions likewise do not support *Suhre*.

Court refused to rely upon in *Suhre*. 131 F.3d at 1086 (citing *Valley Forge*). Nor have they shown that they were "filled … with revulsion" like the plaintiff in *Suhre*. *Id.* at 1085. Although *Suhre* does not truly reflect the Supreme Court's thinking in *Hein* or *Valley Forge*, the Court need not make that an issue because *Suhre* is not applicable on its own terms.

II. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE REMOVAL, DESTRUCTION OR DISFIGUREMENT OF THE MEMORIAL.

Amicus will not repeat Appellees' analysis of why the Memorial should be upheld under *Van Orden v. Perry*, 545 U.S. 677 (2005), Appellees' Br. 24-30, and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), Appellee's Br. 30-46. We instead show that Plaintiffs' claim also fails under an historical analysis of the Establishment Clause – an analysis that the Supreme Court has relied upon heavily in recent cases. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014); *Van Orden*, 545 U.S. at 686 (plurality); *see also Myers*, 418 F.3d at 402 (Establishment Clause "must be viewed 'in the light of its history and the evils it was designed forever to suppress'").

A. The Supreme Court Has Relied Upon Historical Practice to Assess Challenges to Government Conduct Under The Establishment Clause.

1. The Founders understood the meaning of "establishment of religion" from the centuries-old establishment in England and the established churches that

existed in nine of the 13 colonies. Although these establishments varied in their particulars, they all shared one unifying feature: the use of government power to coerce religious belief or observance. *See* Michael W. McConnell, *Establishment & Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). That is, the "essential . . . ingredients" of an establishment took one of four forms: (1) government financial support of the church, (2) government control of the doctrine and personnel of the church, (3) government coercion of religious beliefs and practices—including "compulsory church attendance," "prohibitions on worship in dissenting churches," and "restriction of political participation," and (4) government assignment of important civil functions to church authorities. *Id.* at 2118, 2131.

2. The Supreme Court adopted a similar approach in its most-recent Establishment Clause decision – *Town of Greece v. Galloway* – focusing on history to assess whether a town's practice of "opening its monthly board meetings with a prayer" violated the Establishment Clause. 134 S. Ct. at 1815. The Court explained that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause," *id.* at 1818 (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)), and thus the application of the "formal 'tests' that have traditionally structured" the Establishment Clause analysis

was "unnecessary because *history* supported the conclusion that legislative invocations are compatible with the Establishment Clause." *Id.* (emphasis added).[9]

The Court explained that its reliance on historical practice did not purport to insulate a "practice that would amount to a constitutional violation if not for its historical foundation," but "teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819. The Court reasoned that "[a] test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Id.* It therefore upheld the town's legislative prayer because it (1) comported with historical practice, *id.* at 1820-24, and (2) did not involve the coercion of its citizens to support or participate in any religion or its exercise, *id.* at 1824-28 (plurality).

As to historical tradition, the Court rejected the argument that to comport with the Establishment Clause legislative prayer must be "nonsectarian or ecumenical" because such an argument was "not consistent with the tradition of legislative prayer outlined in the Court's cases." *Id.* at 1820. The Court explained

[9] Indeed, Justice Kennedy's opinion for the Court, both concurring opinions, and Justice Kagan's principal dissent agreed on this much: History was a key analytical tool to be applied to the Establishment Clause question. *See, e.g.*, *Town of Greece*, 134 S. Ct. at 1819-21 (Kennedy, J.); *id.* at 1832-34 (Alito, J. concurring); *id.* at 1837-38 (Thomas, J., concurring); *id.* at 1845-46, 1849 (Kagan, J., dissenting).

that "[g]overnment may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy" or require that "legislative prayer . . . be addressed only to a generic God." *Id.* at 1822.

As to coercion, the Court explained that the government "may not coerce its citizens 'to support or participate in any religion or its exercise.'" *Id.* at 1825 (plurality). The Court, however, rejected the argument that the legislative prayer offered by the town "compelled its citizens to engage in religious observance" based upon "the setting in which the prayer arises and the audience to whom it is directed." *Id.* Rather, legislative prayer "ha[d] become part of our heritage and tradition, part of our expressive idiom," "not to afford government an opportunity to proselytize or force truant constituents into the pews," but "to acknowledge the place religion holds in the lives of many private citizens." *Id.* Such acknowledgments of the divine did not "suggest that those who disagree are compelled to join the expression or approve its content." *Id.*

3. The Court employed a similar historical analysis in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), where it upheld the display of the Ten Commandments on the grounds of the Texas State Capitol. There, the plurality analyzed the constitutionality of a "passive monument" based not just on the "nature of the monument" but on "our Nation's history." *Id.* at 686 (plurality).

The plurality emphasized an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984)). Even though the Ten Commandments were "religious" they also "have an undeniable historical meaning," *id.* at 690, and "displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments," *id.*

In casting the deciding vote, Justice Breyer stated that he saw "no test-related substitute for the exercise of legal judgment." *Id.* at 700 (Breyer, J., concurring in judgment). That "legal judgment" was informed by the specific history of the Ten Commandments' display, which had "stood apparently uncontested for nearly two generations," *id.* at 704, and thereby illustrated that "as a practical matter of *degree* this display is unlikely to prove divisive." *Id* (emphasis in original). The history further suggested that the "the public viewing the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage." *Id.* at 703.[10]

Conversely, Justice Breyer feared that removal of the tablets "based primarily on the religious nature of the tablets' text would . . . lead the law to

[10] *See also Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970) ("declin[ing] to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history").

exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704. Indeed, "removal of longstanding depictions of the Ten Commandments from public buildings across the Nation . . . could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* Justice Breyer upheld the display of the Ten Commandments at the Texas State Capitol because the "First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise or in the favoring of religion as to have a meaningful and practical impact." *Id.* (quoting *Schempp*, 374 U.S. at 308).

B. The Memorial Cross Does Not Violate The Establishment Clause.

1. Under the Supreme Court's historical analysis, the Memorial does not violate the Establishment Clause because it bears none of the historical hallmarks of an establishment of religion. *See Town of Greece*, 134 S. Ct. at 1825 (plurality).

First, the Memorial does not involve the direct financial support by the government of any religious entity. To the contrary, the Memorial was constructed with private funds on private land and dedicated by the American Legion in 1925. JA 2506. Second, the Memorial involves no government control over any church. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976) (holding that State high court "has unconstitutionally undertaken the resolution of

quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church"). Third, the Memorial does not coerce private parties to engage in any religious exercise. *Compare Schempp*, 374 U.S. at 224 n.9 (striking down law that requiring religious exercise, i.e., daily Bible readings, in public schools), *with Myers*, 418 F.3d at 406-08 (upholding Pledge of Allegiance because it did not involve "religious exercise"). The fact that the Memorial's shape – a Latin cross – may have religious significance to many does not transform an unwelcome encounter with a passive Memorial into coerced religious exercise. *See id.* Finally, the Memorial in no way cedes government power to religious organizations. *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 690 (1994).

2. The Memorial's own history further confirms that it is not an establishment of religion. Throughout its more than 90-year existence, the Memorial's purpose has been to honor veterans from Prince George's County who died in World War I. JA 2506. The Memorial contains a bronze plaque making clear that it was "DEDICATED TO THE HEROES / OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN / THE GREAT WAR FOR THE LIBERTY OF THE WORLD." JA 2991. The Memorial is one of a number of monuments contained in Veteran's Memorial Park, including a World War II Honor Scroll dedicated by the American Legion in 1944, a Pearl Harbor

Memorial, a Korean-Vietnam Veterans Memorial dedicated in 1983, a September 11th Memorial Garden, and a Battle of Bladensburg Memorial. JA 3092-93; JA 1961-65. Since its dedication, the Memorial has been used consistently to commemorate veterans' events, *see* JA 1876, JA 1971; JA 2532; JA 2059, and has been viewed by the public as a memorial honoring soldiers from Prince George's County who died in World War I. JA 2542.

This history and context are closely analogous to the display of the Ten Commandments upheld by the Supreme Court in *Van Orden*. While the Memorial's shape may be of religious significance to persons of faith in the same way that the text of the Ten Commandments conveys a religious message to adherents, *see Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment); *Myers*, 418 F.3d at 407, the Memorial has for over 90 years served the secular purpose of commemorating the deaths of World War I veterans. The Memorial is one of multiple war memorials in Veterans Memorial Park, thereby confirming the overall commemorative purpose of the Memorial. *See Van Orden*, 545 U.S. at 702 (Breyer, J. concurring in judgment). Finally, the Memorial has stood without challenge for over 90 years, such that the public has perceived the Memorial as part of "a broader moral and historical message reflective of a cultural heritage." *Id.* at 703 (Breyer, J. concurring in judgment).

That the Memorial has stood unchallenged for nearly 90 years confirms "that as a practical matter of *degree* this display is unlikely to prove divisive." *Id.* at 704 (Breyer, J., concurring in judgment). In contrast, the removal, demolition, or disfigurement of the Memorial demanded by Plaintiffs based solely upon the Memorial's shape could "lead the law to exhibit a hostility to religion that has no place in our Establishment Clause traditions" and "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.*

CONCLUSION

For these reasons, and for those set forth in Appellees' Brief, the Becket Fund respectfully requests that the Court affirm the District Court's order granting summary judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Rule 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,443 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in Microsoft Word 2007, using Times New Roman, a proportionately spaced typeface, in 14-point font.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of April, 2016, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system. All parties are appellate ECF filing users and will receive service via the appellate CM/ECF system.

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