It's Time to Make Non-Economic or Citizen Standing Take a Seat in "Religious Display" Cases

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I. INTRODUCTION

In City of Edmond v. Robinson the Supreme Court denied a petition for writ of certiorari to the United States Court of Appeals

1. The term “religious display” is used in this comment only to refer to cases wherein the challenged display is alleged to be “religious.” In cases that deal with plaques, pictures or monuments wherein the underlying cause of action is the Establishment Clause, defendants should by no means state, admit, or aver that the “display” is of a religious nature. The paradox of Supreme Court Establishment Clause jurisprudence is that if one can get past the hurdle of standing, most likely the first element that must be dealt with under Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) is the secular purpose prong; therefore, one must disavow that the display has a religious nature in order to survive the sourness of the Lemon test. For example, in Books v. City of Elkhart, 235 F3d 292, 302 (7th Cir. 2000) Judge Ripple sounded the death knell that many courts have hammered on that were hostile to any type of Ten Commandments display. That is, they invoke Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) as a proposition for the unsupported assumption that there can be no valid recitation of a secular legislative purpose behind the posting of a Ten Commandments display because the Commandments are “undeniably a sacred text in the Jewish and Christian faiths.” See Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993); ACLU, Inc. v. O’Bannon, 110 F. Supp. 2d 842 (S.D. Ind. 2000); ACLU v. McCrerey County, 96 F. Supp. 2d 679 (E.D. Ky. 2000); and ACLU v. Pulaski County, 96; F. Supp. 2d 691 (E.D. Ky. 2000); Adland v. Russ, 107 F. Supp. 2d 782 (E.D. Ky. 2000). Stone is the only Supreme Court case dealing with the Ten Commandments and it was decided without oral argument or briefs on the merits. Justice Rehnquist launched a vigorous dissent because of the Court’s rejection of the secular purpose articulated by the Kentucky legislature. Indeed, Justice Rehnquist stated that:

[with no support beyond its own ipse dixit, the Court concludes that the Kentucky statute involved in this case “has no secular purpose,” and that “the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.” This even though, as the trial court found, “the General Assembly thought the statute had a secular legislative purpose and specifically said so.” Stone, 449 U.S. at 43 (Rehnquist, J., dissenting).


3. Supreme Court Rule 10 lists three criteria that the Court finds important in deciding whether to grant cert:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10(a)-(c).
for the Tenth Circuit that requested the Court to address the issue of whether a city seal that includes a religious symbol therein violates the Establishment Clause. Chief Justice Rehnquist dissented from the denial of certiorari noting a conflict in the circuit courts on that very issue. In addition, the Chief Justice would have required the parties to brief the issue as to whether the plaintiffs had standing to be in federal court in the first place.

4. "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

5. Aside from the split in the circuits, there is also a split amongst the Justices regarding the practice of dissenting from denials of certiorari. See City of Elkhart v. Books, 121 S. Ct. 2209 (2001). Indeed, instead of the usual one line statement of denial, the Elkhart denial is only one page shorter than the Court’s decision in Stone v. Graham, 449 U.S. 39 (1980) (declaring that a statute requiring the posting of the Ten Commandments in Kentucky public school classrooms violated the Establishment Clause). Justice Stevens “disfavors” these dissents because he opines that they are rarely answered and “may include a less than complete statement of the facts bearing on the question whether the case merits review.” City of Elkhart, 121 S. Ct. at 2209 (Stevens, J., statement respecting the denial of the petition for writ of certiorari). Furthermore, Justice Stevens likened dissents from denial of certiorari to “the purest form of dicta” and are misleading because they “typically appear to be more persuasive than most other opinions.” Id. at 2209 n.1 (quoting Singleton v. Comm'r, 439 U.S. 940 (1978)). Nevertheless, the very fact that Justice Stevens felt compelled to defend the denial of certiorari in City of Elkhart is ample reason to continue the practice. A dissent from denial of certiorari, although it may not have any “precedential significance,” alerts the public that certain Justices felt that the case warranted consideration. Moreover, like the dissent from a denial of a petition for writ of certiorari, the denial itself has no precedential value, i.e., the fact that the Supreme Court refused to hear a case should not be interpreted as a stamp of approval for the way that the case was decided. See Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) (stating that the sole significance of denial of petition for writ of certiorari by United States Supreme Court is that fewer than four members of Court have deemed it desirable to review decision of lower court as matter of sound judicial discretion). Thus, the practice of dissenting from denials of petitions for writ of certiorari should not be criticized for the reasons proffered by Justice Stevens, to the contrary, it should be embraced as providing knowledge to the public that there is a significant disagreement by one or more Justices as to the importance of hearing the case.

6. The standing to sue doctrine is as follows:

"Standing to sue" means that party has sufficient at stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court; it is the right to take the initial step that frames the legal issues for ultimate adjudication by court or jury. The requirement of "standing" is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation. Standing is a jurisdictional issue that concerns power of federal courts to hear and decide cases and does not concern ultimate merits of substantive claims involved in the action. The doctrine emanates from the case or controversy requirement of the Constitution and from general principles of judicial administration, and seeks to insure that the plaintiff has alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness.

Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable. Essence of standing is that no person is entitled to assail the constitutionality of an ordinance or statute except as he himself is adversely affected by it.

Indeed, since 1990, the Court has emphasized that “the question of standing is not subject to waiver: ‘We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.’” Thus, the Chief Justice recognized that the courts of appeals are in disagreement as to whether a plaintiff has incurred an injury sufficient to confer standing merely by reason that he has “been exposed to a state symbol that offends his beliefs.” Considering the enormous potential for endless litigation over religious symbols or displays in public places, the Court should provide guidance on this vital issue before the federal courts are flooded with lawsuits that consume vital judicial resources.

II. COLLEGE DEBATING FORUMS?

One reason that the Court should address the non-economic standing issue in religious display cases is its pronouncement in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* that the language of Article III of the

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8. *City of Edmund*, 134 L. Ed. 2d at 802 (citing Foremaster v. City of St. George, 882 F. 2d 1485 (10th Cir. 1989) (acknowledging the difference of opinion in how the circuit courts interpret Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)); see also Freedom From Religion v. Zielke, 845 F. 2d 1463 (7th Cir. 1988) (holding that mere exposure to a symbol that offends one's beliefs is insufficient to confer standing); cf. Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir. 1985) (finding that mere exposure is sufficient).


United States Constitution\textsuperscript{11} forecloses the federal courts to potential litigants except where there is an actual case or controversy.\textsuperscript{12} Although the Court has acknowledged that it has not clearly articulated certain features of the “standing” doctrine, \emph{i.e.}, whether they are actually required by Article III or whether they are Court imposed requirements, the Court has always required that a litigant possess “standing” to bring an action in federal court.\textsuperscript{13} As early as 1851, the Court acknowledged that it had no power to hear disputes unless such “judicial power was granted by the Constitution to the courts of the United States.”\textsuperscript{14}

\textit{Valley Forge} is the only case with an underlying Establishment Clause claim, wherein the sole issue addressed by the Supreme Court was Article III standing. Subsequent interpretation by the circuit and district courts in the United States has been far from uniform. The majority of those courts have stretched the language of \textit{Valley Forge} beyond recognition when faced with the standing issue in an Establishment Clause claim. Despite paying homage to the letter of \textit{Valley Forge}, courts in the majority of circuits have misconstrued its rationale, and distinguished it into oblivion, even though they are bound by its precedent under the doctrine of \textit{stare decisis}.\textsuperscript{15} As a result, litigants in religious display cases are granted

\textsuperscript{11} “The judicial power shall extend to all cases . . . arising under this Constitution . . . and . . . to controversies.” \textit{U.S. Const.} art. III, § 2, cl. 1.

\textsuperscript{12} \textit{Valley Forge}, 454 U.S. at 473. The Court stated that “[t]he federal courts have abjured appeals to their authority which would convert the judicial process into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’” \textit{Id.} (quoting \textit{United States v. Students Challenging Regulatory Agency Procedures (SCRAP)}, 412 U.S. 669, 687 (1973)). \textit{Cf. n.8 supra.} Furthermore, the Court added that:

\begin{quote}
Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of “standing” would be quite unnecessary. But the “cases and controversies” language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.
\end{quote}

\textit{Valley Forge}, 454 U.S. at 473 (emphasis added).

\textsuperscript{13} \textit{Id.} at 471. See \textit{Warth v. Seldin}, 422 U.S. 490, 498 (1975).

\textsuperscript{14} \textit{United States v. Ferreira}, 15 U.S. 40, 48 (13 How. 40) (1851).

\textsuperscript{15} \textit{Stare decisis} is defined as follows:

Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. Doctrine is one of policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and
Standing in “Religious Display” Cases

Article III standing who have not suffered any type of injury other than a disagreement with how they believe the Establishment Clause is interpreted. The survey of cases outlined in the following sections will demonstrate the tortured application of Valley Forge. Indeed, one court has gone so far to state that a plaintiff need not even see the religious display because “even if I don’t see it, I certainly know it is there.”

Before examining the cases that purport to apply Valley Forge, one should be aware of the essential elements of standing to sue in federal court, as well as the policies at issue. The crucial element involved in non-economic standing is the concept of an “injury-in-fact.” Thus, what does or does not constitute an “injury” sufficient to confer standing in religious display cases is at the heart of the controversy. One type of injury that has been held NOT sufficient to establish standing is a constitutional right to a government that does not establish religion. This alleged injury is followed, though later found not to be legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within court’s discretion under circumstances of case before it. Under doctrine, when point of law has been settled by decision, it forms precedent, which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it. The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta or obiter dicta.

BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

16. Books, 235 F.3d at 297. Taken to its logical conclusion, this seventh circuit ruling would allow a person in Pittsburgh, Pennsylvania who knows of, and objects to a religious display anywhere in the jurisdiction of the seventh circuit, to file a lawsuit in federal district court because he “knows it is there.”

17. Justice Rehnquist, writing for the majority in Valley Forge stated that “Art. III requires the party who invokes the court’s authority to ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.’” Valley Forge, 454 U.S. at 472 (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).

18. Valley Forge, 454 U.S. at 482-84. The Court noted that time and time again it has rejected claims of standing based on “the right, possessed by every citizen, to require that the Government be administered according to law . . . .” Id. at 482-83 (quoting Fairchild v. Hughes, 258 U.S. 126, 129 (1922); Baker v. Carr, 369 U.S. 186, 208 (1962)). The Court emphatically stated that “[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.” Id. at 485 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974)). Indeed, the Court opined that:

Were we to recognize standing premised on an “injury” consisting solely of an alleged violation of a “personal constitutional right” to a government that does not establish religion,” a principled consistency would dictate recognition of respondents’ standing.
nothing more than a generalized grievance common to all citizens. As the majority in *Valley Forge* recognized, a claim of this type is nothing more than an attempt "to employ a federal court as a forum in which to air ... generalized grievances about the conduct of government."\(^{19}\)

Closely related to the above concept was the Court's rejection of the theory, proffered by the court of appeals in *Valley Forge*,\(^ {20}\) that "Art. III burdens diminish as the 'importance' of the claim on the merits increases."\(^ {21}\) The issues that a party wishes to adjudicate are not the focus of whether a party has standing. To the contrary, the main issue is whether a party has suffered a palpable injury to himself that was caused by the complained of governmental act that may be redressed by a favorable judicial decision.\(^ {22}\) In other words, unless one can show a distinct, palpable injury apart from the "merits" of one's case, one has not satisfied the most basic requirement to have standing to sue in federal court.\(^ {23}\)

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\(^{19}\) Id. at 489 n.26 (internal citation omitted).
\(^{19}\) Id. at 483 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).
\(^{21}\) Valley Forge, 454 U.S. at 484. Indeed, the Court opined that "we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States." Id.
\(^{22}\) Id. See Warth, 422 U.S. at 501 (holding that petitioners lacked standing because, although they were part of a class that allegedly had been discriminated against, none of them could show how they were personally injured by the complained of governmental conduct).

23. This proposition is well illustrated by the following dialogue from the oral argument in *Valley Forge*:

**QUESTION:** Well, on your theory, then, on your theory members of Jehovah's Witnesses and other religious people who sincerely are opposed to all forms of warfare and defense, military establishment, would have standing to challenge the levy of a tax on them to the extent that tax was used to buy tanks and airplanes and other things. Is that right?

**MR. BOOTHBY:** Well, perhaps they have standing. The question then would be raised as to what the compelling state interest might be, and how -

**QUESTION:** Well, all we are concerned here with now, we are talking about standing, aren't we?

**MR. BOOTHBY:** Yes, the question in that case -

**QUESTION:** We are not getting to the merits of this case.

**QUESTIONS:** What is the injury in fact?

**MR. BOOTHBY:** Injury in fact in this particular case is that type of injury which is
experienced by many people in this country, but the fact that government is not being neutral and establishing an environment which prevents a government operating with a separation of church and state.

QUESTION: Well, is that the sort of injury in fact that Barlows or Associated Processing was concerned with?

MR. BOOTHBY: Well, of course, those were concerned with economic problems.

QUESTION: But in Data Processing the Court specifically indicated that what it said in that case also applied to spiritual values, and we are dealing here with a spiritual value, not an economic value.

QUESTION: Mr. Boothby, along that same line, can you argue your case on standing without the merits, because you say that unless this is a church school, you have no case.

MR. BOOTHBY: I don't think one –

QUESTION: Well, if this is a school that is completely non-sectarian, do you have standing?

MR. BOOTHBY: I think that in order to reach the standing question, as the Court said in Flast, to find out if there is a nexus between the plaintiff and the injury, that you have to look at the facts in that fashion, but you do not need to cross the threshold and decide the merits of the case. You do not need to determine whether in fact this is a pervasively sectarian institution, merely look to see whether there is an allegation –

QUESTION: Then you have to get to the merits. You would rather call it facts, but I prefer to call it merits.

MR. BOOTHBY: I think you have to look to see whether there is an allegation raised by the plaintiff that there is a pervasively sectarian institution involved, but you need not decide that fact.

QUESTION: But you have to get to it.

MR. BOOTHBY: To that extent.

QUESTION: If this was a non-sectarian institution, you would have no case.

MR. BOOTHBY: Well, there would not be the claim of establishment violation.

QUESTION: You would not have any standing, would you?

MR. BOOTHBY: You would not, and that would probably be a political question at that point.

QUESTION: You wouldn't have any standing.

MR. BOOTHBY: That's true.

QUESTION: We are talking about standing now. I would like to leave it with standing. I have great problems with where your line is drawn. I can allege that my religion is against taxing, so I want to stop paying my income tax. I don't have standing for that.

MR. BOOTHBY: I think then you reach the question of whether it is a burden on the free exercise rights of those people. I think you have to look to that issue, and then the question of sincerity. Now, perhaps they would have standing to raise the question.

QUESTION: And they could plead forma pauperis and it wouldn't cost them a nickel to do it. Right?

QUESTION: Mr. Boothby, I have been looking at your complaint. What provision of the complaint . . . contains your allegation of injury in fact?

MR. BOOTHBY: Paragraph 12 is the one that deals with the claimed violation of the establishment clause.
Another significant pronouncement of *Valley Forge* is that psychological offense at governmental conduct that one disagrees with is insufficient to confer standing to a would-be litigant. Immaterial to that Court was the notion that just because Americans United were zealous advocates of separation of church and state, this somehow conferred standing upon it to litigate Establishment Clause claims. Additionally, it was irrelevant in *Valley Forge* that the plaintiffs were based in Washington, D.C. and the complained of transfer of land was in Pennsylvania. In other words, proximity to the alleged unconstitutional governmental conduct, without injury, is an insufficient basis to allege standing. Moreover, the fact that the Supreme Court has decided establishment clause cases that involved holiday displays, does not stand for the proposition that any plaintiff who wishes to challenge a similar display, automatically has standing. Several courts mentioned in the subsequent section have found this fact persuasive. Nonetheless, standing is not conferred by the type of case being adjudicated, but is granted on the basis that a party has suffered a palpable injury.

Finally, the Court dismissed the argument made by Americans United in *Valley Forge* to the effect that if they do not have standing, “who will?”:

QUESTION: Is there any allegation in here other than that, which seems to relate to status as taxpayers, that indicates an injury in fact to these particular plaintiffs?

MR. BOOTHBY: Not in the complaint, Your Honor. . . .


24. *Valley Forge*, 454 U.S. at 485-86. Americans United was unable to identify any type of injury “other than the psychological consequence presumably produced by observation of conduct with which one disagrees.” *Id.* at 485. The Court held that this type of “injury” was woefully insufficient to confer standing under Article III. *Id.*

25. *Id.* at 486. Justice Rehnquist opined that “standing is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.” *Id.* Thus, although “concrete adverseness . . . sharpens the presentation of issues,” and may be the consequence of one who has been injured in fact; “it is not a permissible substitute for the showing of injury itself.” *Id.* at 486 (internal quotes *Baker*, 369 U.S. at 204).

26. *Id.* at 487 n.23. After stating that these plaintiffs do not have a license to roam the country in search of establishment clause violations, the court noted that:

Respondent Americans United claims that it has certain unidentified members who reside in Pennsylvania. *It does not explain, however, how this fact establishes a cognizable injury where none existed before*. Respondent is still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution.

*Id.* (emphasis added).
This philosophy has no place in our constitutional scheme. . . . Respondents' claim of standing implicitly rests on the presumption that violations of the Establishment Clause typically will not cause injury sufficient to confer standing under the "traditional view of Art. III. But "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." . . . [W]e are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit.27

Thus, absent any allegations that Plaintiffs have truly suffered some type of palpable injury from the plaque, reliance upon the political process is not only proper; it is totally consistent with our form of government.

III. CIRCUIT AND DISTRICT COURT CASES RE: NON-ECONOMIC STANDING

A survey of the various circuits in which standing has been challenged in Establishment Clause cases reveals that most courts of appeals do not set a very high threshold for meeting standing requirements in religious display and/or Establishment Clause cases. As a result, those courts have opened the federal judiciary to be the master legislators on whether states and local governments are establishing religions by displaying plaques, pictures, and/or monuments that have significant historical richness. Nevertheless, standing should be challenged in religious display cases upon the appropriate facts, especially in light of the fact that the Supreme Court has not spoken specifically on this issue in the religious symbolism context. Four Supreme Court decisions appear in most of the decisions analyzing this issue; they are: Abington School District v. Schempp;28 United States v. Students Challenging Regulatory Agency Procedures ("SCRAP");29 Valley Forge; and

27. Id. at 489 (quoting Schlesinger, 418 U.S. at 227) (emphasis added). The Court in United States v. Richardson, 418 U.S. 166 (1974) went one step further stating: In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

Lujan v. Defenders of Wildlife.\textsuperscript{30} The Fourth, Sixth, Seventh, and Tenth Circuit Courts of Appeals have held that direct, repeated contact with an "offensive" display constitutes an injury sufficient to confer standing under Valley Forge. The District of Columbia Circuit, First, Second, Third, and Ninth Circuit Courts of Appeals seem to indicate that something more is needed besides direct contact to establish an injury sufficient to confer Article III standing.

A. District of Columbia

In Swomley v. Watt,\textsuperscript{31} the district court held that plaintiffs lacked standing to sue the Department of the Interior over the use of federal monies to erect various religious symbols and maintain grounds known as the "Holy City" near Lawton, Oklahoma.\textsuperscript{32} Here, in the pre-Valley Forge era, the plaintiffs relied upon a two-pronged test stated by the Court in Association of Data Processing Service Organizations, Inc. v. Camp.\textsuperscript{33} In order to have standing, this test required a plaintiff to "allege 'injury in fact, economic or otherwise,' to an interest 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"\textsuperscript{34} On the one hand, the plaintiffs argued that spiritual values are within the zone of interests protected by the Establishment Clause. On the other hand, the defendants argued that the plaintiffs alleged no concrete and particular injury to themselves, and that neither emotional involvement, nor mere interest in a problem is a sufficient basis upon which to predicate standing.\textsuperscript{35} Although the court noted that standing had recently been interpreted more broadly in Establishment Clause cases, an allegation of particular, concrete injury to the qualifying interest is still required.\textsuperscript{36} In Swomley, the court noted that even if "a concern for religious freedom and a right to a government separate from religion,\textsuperscript{37} may be within the zone of interests cognizable as a basis

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  \item 32. Swomley, 526 F. Supp. at 1272, 1275.
  \item 33. 397 U.S. 150 (1970).
  \item 34. Swomley, 526 F. Supp. at 1273 (quoting Data Processing, 397 U.S. at 152-53).
  \item 35. Id. at 1274.
  \item 36. Id. See also Southern Mutual Help Ass’n v. Califano, 574 F.2d 518 (D.C. Cir. 1977) (stating that the injury must be specifically alleged by the plaintiff, must be particularized, and it must be capable of direct redress by the court through the requested remedy).
  \item 37. The Court in Valley Forge expressly rejected this notion stating: Were we to recognize standing premised on an "injury" consisting solely of an alleged
\end{itemize}
for citizen standing under the Establishment Clause,” plaintiffs nonetheless did not satisfy the injury-in-fact requirement. Here, only two of the four plaintiffs alleged that they had seen the site: one, a farmer who traveled frequently on a highway adjacent to it, and another who visited Holy City for research purposes. The other two plaintiffs only claimed to be “seriously concerned about the separation of church and state” and the court found that they had presented nothing more than “generalized grievances” insufficient to assert a public interest in a constitutional claim.

In the case of Fordyce v. Frohmayer, the district court held that the plaintiffs lacked standing to challenge an art exhibition partially sponsored by the National Endowment for the Arts. The court began its analysis by turning to Valley Forge which, stated that in order for a citizen to have standing to sue the person must allege: (1) an injury in fact; (2) caused by, or traceable to, the challenged action; and (3) which injury is likely to be redressed by a favorable judicial decision. The court noted that the first element requires an injury to be immediate, objective, and concrete, not speculative or abstract. Moreover, the court opined that the mere assertion of a “spiritual injury” under the establishment clause principle was insufficient to support standing. Instead, the court found persuasive a couple of earlier seventh Circuit decisions, ACLU v. City of St. Charles, and Freedom From Religious Foundation, Inc., v. Zielke, that required some type of alteration in behavior as requisite to violation of a “personal constitutional right” to a government that does not establish religion,” a principled consistency would dictate recognition of respondents’ standing to challenge execution of every capital sentence on the basis of a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.

Valley Forge, 454 U.S. at 489 n.26.

38. Swomley, 526 F. Supp. at 1275.
39. Id.
40. Id.
42. Fordyce, 763 F. Supp. at 655 (citing Valley Forge, 454 U.S. at 472).
43. Id. at 656 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983)).
44. Id. (citing Valley Forge, 454 U.S. at 486-87 n.22). The court distinguished the Supreme Court's standing analysis in Abington School District because in that case, "impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." Id. at 656 n.1.
45. 794 F.2d 265 (7th Cir. 1986).
46. 845 F.2d 1463 (7th Cir. 1988).
establish standing.\textsuperscript{47} Indignation of a government act that one violently disapproves of is not the type of injury that supports standing.\textsuperscript{48} Indeed, in \textit{Fordyce}, the court found that the plaintiffs' allegations boiled down to nothing more than a spiritual injury caused by a display that offended their religious sensibilities. Significantly, there were no allegations that the plaintiffs confronted the display daily, that the display was visible during their normal routine, or that their usual driving or walking routes took them past the display. Finally, the plaintiffs had not alleged that they ever saw the display or endured any special burdens that justify standing to sue.\textsuperscript{49}

\textbf{B. First Circuit}

The case of \textit{Donnelly v. Lynch}\textsuperscript{50} addressed the standing issue; however, it did so primarily in the municipal taxpayer context. In \textit{Donnelly}, it was undisputed that the City of Pawtucket used taxpayer money to maintain the crèche.\textsuperscript{51} Nevertheless, the defendants argued that \textit{Valley Forge} significantly limited a municipal taxpayer's standing to sue.\textsuperscript{52} The court disagreed, noting that although the Supreme Court has recognized a dichotomy in the manner it treats federal, as opposed to municipal, taxpayers for standing purposes, \textit{Valley Forge} has not eliminated that distinction. Thus, a taxpayer of a municipality has an interest in the application of his tax money, which is direct and immediate, and the remedy by injunction to prevent its misuse is not inappropriate.\textsuperscript{53}

Although the court did not base its decision on "citizen" standing because it had found that the plaintiffs had municipal taxpayer standing, the court briefly commented on non-economic citizen

\begin{itemize}
\item \textsuperscript{47} In \textit{City of St. Charles}, the court found that plaintiffs had standing, not because they were deeply offended by a religious display, but because they were forced to alter their behavior to avoid contact with the display. \textit{City of St. Charles}, 794 F.2d at 268. Likewise, in \textit{Zielke}, the appellants conceded that they did not alter their behavior to avoid a Ten Commandments monument, only that they suffered a rebuke to their religious beliefs. \textit{Zielke}, 845 F.2d at 1468-69. Thus, the court held that appellants lacked standing to bring suit. \textit{Id.}
\item \textsuperscript{48} \textit{Fordyce}, 763 F. Supp. at 656 (citing \textit{City of St. Charles}, 794 F.2d at 268).
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} 691 F.2d 1029 (1st Cir. 1982).
\item \textsuperscript{51} \textit{Donnelly}, 691 F.2d at 1030.
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 1031 (citing Frothingham v. Mellon, 262 U.S. 447, 486-87 (1923)).
\end{itemize}
standing. Addressing *Valley Forge*, the court noted that the Supreme Court reasoned that an assertion of a personal constitutional right to a government that does not establish religion is insufficient to satisfy the requirements of Article III as an identifiable personal injury. Thus, any psychological consequence produced by observation of conduct that one disagrees with is insufficient to confer standing upon an individual even if that disagreement may be phrased in constitutional terms and even if the potential litigant has intense constitutional beliefs. The court noted that *Valley Forge* was careful to distinguish *Schempp* because of the impressionable schoolchildren in *Schempp* who were subjected to unwelcome religious services or forced to assume special burdens to avoid them.

C. Second Circuit

The court in *Sullivan v. Syracuse Housing Authority*, ("SHA") reversed a district court decision that had dismissed plaintiff's Establishment Clause claim for lack of standing. Sullivan, a Native American, and not of Christian religion, alleged that SHA unconstitutionally supported Christianity at the Benderson Heights community center. Here, Sullivan alleged that he was deprived of the use of the "public housing facilities" because of the "religious policy" of SHA. The court noted that for constitutional standing purposes, the "actual or threatened injury" alleged need not be economic or monetary in nature. The court also stated that the Supreme Court has recognized that a party "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." Furthermore, the court found that the injury must be "distinct and palpable," and not

54. Id.
55. Id.
56. *Donnelly*, 691 F.2d at 1031.
57. 962 F.2d 1101 (2nd Cir. 1992).
59. Id. at 1108.
60. Id. at 1107 (quoting *Valley Forge*, 454 U.S. at 486).
61. Id. (quoting *Data Processing*, 397 U.S. at 154). Here, the court also cited *Valley Forge* for this proposition; however, *Valley Forge* explicitly stated that a plaintiff's "spiritual stake" that would be sufficient to confer standing cannot be read apart from the context that the term was used in. See *Valley Forge*, 454 U.S. at 486 n.22. The term arose in the case of *Abington School District* and the Court expounded in *Valley Forge* that the plaintiffs in *Abington* had standing not because their claim rested on the Establishment Clause, "but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." Id.
“‘abstract’ or ‘conjectural’ or ‘hypothetical.’”62 Thus, the party asserting the “injury” must have a “direct and personal stake in the controversy” and not merely using the judicial process for the “vindication of the value interests of concerned bystanders.”63

The court stated that Sullivan’s complaint alleged that he had been deprived of his right to use and enjoy the community center.54 In addition, the complaint alleged that religion had been established in a place analogous to his home, and that he finds the establishment of religion offensive.65 Hence, the court stated that Sullivan had a direct and personal stake in the controversy, alleged injuries sufficiently distinct, palpable and concrete to constitute an “actual injury,” and that he is not a simple bystander using the courts to vindicate abstract value interests, or a mere citizen complaining of the nonobservance by others of the Constitution. Finally, the court noted that his alleged injuries were not simply noncognizable psychological consequences produced by observation of personally disagreeable conduct.66

D. Third Circuit

In Cavileer v. City of Pittsburgh,67 the court held that plaintiffs lacked standing to challenge the granting of an access channel to the Christian Associates of Southwest Pennsylvania (“CASP”) by Warner Cable Corporation, who in turn had been awarded a franchise for cable television in the City of Pittsburgh.68 In this case, the plaintiffs argued that the City’s apparent or intentional support of CASP resulted in the discrimination against them and that CASP’s receipt of $60,000 and a channel from Warner had caused them to suffer an injury.69 The court began its analysis by

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62. Sullivan, 962 F.2d at 1107 (citations omitted).
63. Id. (citations omitted).
64. Id. at 1105. Plaintiff, who had been president of the tenants’ association, resigned his position because of certain programs of the SHA alleged to “bring Jesus Christ” to the residents. Id. Additionally, one of plaintiff’s children “was taught to sing Christian hymns by the director while the child was participating in recreational activities at the Center. Id. Because of these allegations, plaintiff states that his use and enjoyment of the public housing facilities has been denied. Id.
65. Id. at 1107.
66. Id.
69. Id. at 210-11. Plaintiffs requested that the court enjoin the City from enforcing the agreement between the city and Warner because the city would be required to confer on CASP that which CASP had previously contracted for with Warner and, because of this, the city has become entangled with a religious organization which creates the appearance of
noting that standing requires a party to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." In addition the court stated that a claimant must assert his own legal rights and cannot stand on the rights of third parties, nor may a court exercise its remedial powers when it is confronted by a generalized grievance rather than a particularized injury to the party before it. As an aside, the court was dumbfounded as to why the plaintiffs alleged that they had taxpayer standing, because a review of the entire record revealed "not one shred of evidence that anything other than private monies [had] been used in the Warner system." Thus, the court first held that plaintiffs lacked taxpayer standing.

The next issue was whether the plaintiffs had alleged an injury in fact sufficient to confer non-economic standing. The court was emphatic in its reliance on Valley Forge and stated that "absent a particularized injury different from that of the rights of the general citizenry to require the government to conduct its affairs in accordance with the law a party lacks standing under Article III." Judge Mansmann also emphasized that the Supreme Court had made it clear that just "because the Establishment Clause was in issue, [does not mean] that the standing requirements under Article III were lessened." Consequently, the judge concluded that although the plaintiffs had alleged a violation of the Constitution, they had not alleged an injury in fact, and, hence, granted defendants' motion for summary judgment dismissing plaintiffs for lack of standing.

government support of a particular religious group. Id.

70. Id. at 211 (quoting Valley Forge, 454 U.S. at 472).
71. Id. (citing Valley Forge, 454 U.S. at 475).
72. Id. at 212.
73. Cavileer, 569 F. Supp. at 212.
74. Id. (citing Valley Forge, 454 U.S. at 482-83). Here, the court found that Cavileer's church was located in the North Hills, which is not in the city limits, and that the church was not a party to the lawsuit. Moreover, Cavileer did not allege that he was ever denied membership in CASP. Plaintiff Houle contended that he was minister of the Metropolitan Community Church of Pittsburgh and was informed that his church was ineligible for membership in CASP. Plaintiff Lane merely alleged that he was a taxpayer and a potential subscriber to Warner. He did not claim affiliation with any church or that he sought or was denied membership in CASP. Thus, the court dismissed Lane as not having standing. Id.
75. Id. (citing Valley Forge, 454 U.S. at 484).
76. Id. at 213. The court found that "[n]one of the three named plaintiffs have claimed that they approached CASP for the purpose of presenting a program of his own over CASP's channel" or that if they applied, that their request would be denied. Id.
The district court in *Americans United for Separation of Church and State v. Reagan,* made some beneficial observations on its interpretation of the standing issue as enunciated by the Court in *Valley Forge.* In this case, plaintiff's complaint was dismissed for lack of standing for being unable to identify any particular "injury-in-fact." In relevant part, the court stated that *Valley Forge* established that "a litigant has no standing to complain about actual or threatened violations of the Constitution . . . unless such violation directly injures that litigant, as distinguished from the public at large" and "there is no relaxation of standing requirements merely because violations of the First Amendment are alleged." Significantly, the court noted, "a citizen does not have standing to litigate alleged violations of the Establishment Clause merely because of an interest in achieving a just society in which church-state separationist values are preserved." Importantly, the court acknowledged its obligation to follow the mandate of *Valley Forge.* Hence, the court dismissed the complaint because there was no particularized injury-in-fact.

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79. *Id.* at 750 (emphasis added). Here, plaintiffs challenged the re-establishment of diplomatic relations between the United States and the Holy See, as well as President Reagan's appointment of William Wilson as the ambassador to the Vatican. Plaintiffs tried in vain to establish an injury-in-fact, alleging in part:

The spiritual and moral teachings of the Catholic faith . . . will be thrust into the public limelight and the political arena in a manner not available to other religions. The Catholic Church will be better able to compete in the religious market place, with corresponding loss of membership and revenue for other religious denominations, because of the actual or symbolic preference Mr. Wilson's appointment connotes. . . . Plaintiffs' religious beliefs and religious institutions are stigmatized because the formalization of diplomatic relations with the Vatican makes it appear that the Catholic Church is more important than other denominations. The establishment of diplomatic relations with the Vatican will have an impact on government policies, and plaintiffs and members of their congregations will be subjected to subtle, indirect pressures to conform to their spiritual and moral beliefs and practices.

*Id.* In response to these allegations, the court stated that they were nothing more than a statement of various reasons why plaintiffs felt that separation of church and state is a good idea. *Id.* at 751.

80. *Id.* at 751. Thus, the court reasoned that just because plaintiffs have strong feelings on this subject does not entitle them to call upon the courts for relief. *Id.* The court further noted that any allegation by the plaintiffs that the challenged actions have caused a decline in membership or revenues of any of the plaintiffs' denominations or organizations would be "patently frivolous." *Id.* Nor were there any allegations that plaintiffs or their organizations have been required to pursue objectionable policies or goals. *Id.* The allegations merely alleged that the challenged actions may create a climate in which these consequences may occur. *Id.*

81. *Id.*
82. *Id.*
Standing in “Religious Display” Cases

Just recently, in ACLU-NJ v. Township of Wall,83 the Court of Appeals for the Third Circuit vacated a decision by the district court that a holiday display did not violate the Establishment Clause, but nevertheless remanded for dismissal based on appellants’ lack of standing. Here, the court made some interesting observations regarding municipal taxpayer standing in addition to its analysis of the citizen standing issue. In Wall, the ACLU rested its standing upon its members, the Millers; thus, it was up to the Millers to establish standing in either capacity.⁸⁴ The court first discussed municipal taxpayer standing by analyzing Doremus v. Board of Education.⁸⁵ The court looked to other circuits⁸⁶ as well and concluded that even if the Township paid its employees to erect the display and spent money lighting the display, it would still result in no more than a de minimis expenditure insufficient to invoke the jurisdiction of the federal courts.⁸⁷

Next, the court addressed standing based upon non-economic injuries. The litigation first involved a 1998 display in which both, Mr. and Mrs. Miller, had numerous contacts with. They testified that they “frequently visit the municipal complex to fulfill personal, professional, and political responsibilities.”⁸⁸ Mr. Miller stated that he believed that the display demonstrated that the Township was closely related to the Christian religion and that it had no business erecting a display of only one religion.⁸⁹ In addition, he averred that the display was “an affront to and rejection of [his] political and philosophical beliefs and an intrusion into the area of [his] religion.”⁹⁰ Likewise, Mrs. Miller stated that the display was an

85. 342 U.S. 429 (1952). In Doremus, the Court stated that although a municipal taxpayer may possess standing to litigate “a good-faith pocketbook action,” the plaintiffs failed to establish a direct monetary injury that would confer standing to raise such a challenge because at best, there was no more than a “potential de minimis drain on tax revenues due to the challenged [Bible] reading.” Wall, 2001 U.S. App. LEXIS 5700 at *8-10 (quoting Doremus, 342 U.S. at 430-433).
86. Most notably, the court cites the Seventh Circuit case of Zielke with approval in which plaintiffs case was dismissed for lack of standing because even though the defendant city had spent money in 1899 to acquire property for a park in which a Ten Commandments monument was displayed, “the city had not spent any funds on maintaining the donated monument.” Wall, 2001 U.S. App. 5700 at *10-11. The approval of the continued validity of this case is important mainly for the citizen or non-economic standing aspect of the issue.
88. Id. at *14.
89. Id. at *15.
90. Id.
endorsement of the Christian religion and that she believes in the prohibition against the establishment of religion. She stated that she was not anti-religious but felt that the display was a rejection of her political views and beliefs respecting the necessity for religious diversity and inclusivity and that the display made her feel "less welcome in the community, less accepted and tainted in some way." The district court found that this evidence sufficed for establishing standing on behalf of the Miller's.

The Court of Appeals, however, noted that the question was a close one. The court stated that a valid argument could be made that the plaintiffs' alleged injuries were nothing more than "psychological consequences ... produced by observation of conduct with which one disagrees" and not sufficient to establish standing. On the other hand, the court cited the Tenth Circuit case of Foremaster v. City of St. George, and the Eleventh Circuit case of Saladin v. City of Milledgeville, as examples of circuits that found standing based on direct and personal contact with an "offensive" display. Nevertheless, the court's decision was only directed at the 1999 display in which Mr. Miller testified that he saw the display, but it was unclear as to whether he observed it for purposes of the litigation or whether he was satisfying a civic obligation at the municipal building. In addition, there was no evidence that Mrs. Miller even saw the 1999 display. Thus, the court held that the plaintiffs lacked standing because their disagreement with the display was not the type of injury that would confer standing.

E. Fourth Circuit

In Suhre v. Haywood County, the district court addressed the non-economic standing issue. Here, the "offensive" display was a Ten Commandments plaque on either side of a Lady Justice

91. Id.
93. Id. The court's discussion surrounding the 1998 display is mostly dicta because the complaint was amended to include the 1999 display which, was the only display pursued on appeal and necessary to the court's decision. Id. at *19-20.
94. Id. at *18 (quoting Valley Forge, 454 U.S. at 485).
95. 882 F.2d 1485 (10th Cir. 1989).
96. 812 F.2d 687 (11th Cir. 1987).
98. Id. at *20.
99. Id.
bas-relief in a courtroom at the Haywood County Courthouse.101 The court found that the Plaintiff's claim that he had standing by virtue of a criminal conviction that may have been the result of the presence of the Ten Commandments in the courtroom and that he felt unwelcome in the courtroom, did not allege an "injury in fact."102 These claims were simply akin to his belief that the government shall have no right to make a law respecting the establishment of a religion.103 The court disagreed with a Georgia district court in the case of Harvey v. Cobb County104 and found that Valley Forge demands more than just unwelcome contact with an offensive object to establish an injury for standing purposes.105 The court noted that the Harvey court relied upon Schempp for standing purposes.106 Finally, the court found that the plaintiff did not have taxpayer standing because expenditures which the taxing authority would incur even absent the allegedly unconstitutional activity cannot satisfy the second element required under municipal taxpayer standing.107

Nevertheless, the court of appeals in Suhre v. Haywood County108 reversed the district court. In analyzing the standing issue, the Fourth Circuit stated that although there is no "sliding-scale" of standing in Establishment Clause cases, the

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102. Id. at *15-16.
103. Id. The court found that there was no evidence that the plaque caused him injury. Most notably, the court stated that voluntary attendance at meetings, either past or prospective, do not meet the test of standing because the only injury which could result would be the spiritual or psychological offense which has been soundly rejected by the Court in Valley Forge. Plaintiff's allegation that he was injured because of his atheistic character also failed. Id. at *23-26.
105. Suhre, 1997 U.S. Dist. LEXIS 5013 at *18. The court criticized the Harvey court stating that:

After citing the Valley Forge decision for the proposition that neither spiritual nor psychological harm resulting from offensive contact is sufficient to establish standing, the court went on to hold that the plaintiff's "unwelcome' contact with the offensive object is enough to establish injury for purposes of standing." This court cannot resolve the discrepancy between the clear language of the Supreme Court decision and the conclusion of the Georgia district court.

Id.

106. Id. at *19. Thus, the court distinguished Schempp because that case involved a law that required participation in a religious exercise as opposed to occasional unwelcome contact with an offensive object. Id.
107. Id. at *29-30. The court noted that the original expenditure and the renovation did not count towards taxpayer standing in this case, because the unconstitutional activity alleged is the continued maintenance of the display. Id.
108. 131 F.3d 1083 (4th Cir. 1997).
inquiry has been tailored to reflect the type of injury those plaintiffs are likely to suffer.\textsuperscript{1}\textdagger\textsuperscript{9} Chief Judge Wilkinson echoed the court in \textit{ACLU v. Rabun County}\textsuperscript{1}\textdagger\textsuperscript{10} and stated that it is "‘the spiritual, value-laden beliefs of the plaintiffs’ [that] are often most directly affected by an alleged establishment of religion.’"\textsuperscript{1}\textdagger\textsuperscript{11} Here, the court relied upon \textit{Schempp} and distinguished \textit{Valley Forge} because there, plaintiffs had no direct contact with the alleged establishment of religion.\textsuperscript{1}\textdagger\textsuperscript{12} The court further opined that the spiritual affront of unwelcome contact with religious symbolism might also be compounded when the display that causes this distress is located within a public facility.\textsuperscript{1}\textdagger\textsuperscript{13} To summarize, the circuit court held that direct contact with a religious display is sufficient and that changed behavior is not necessary for purposes of standing.\textsuperscript{1}\textdagger\textsuperscript{14}

\textbf{F. Fifth Circuit}

In \textit{Murray v. City of Austin},\textsuperscript{1}\textdagger\textsuperscript{15} the court held that plaintiffs had standing to challenge the insignia of the City of Austin, Texas. The court began its analysis by noting that for a litigant to establish

\begin{itemize}
  \item \textsuperscript{109} \textit{Suhre}, 131 F.3d at 1085-86.
  \item \textsuperscript{110} 698 F.2d 1098 (11th Cir. 1983).
  \item \textsuperscript{111} \textit{Id.} at 1086. According to Noah Webster, “the practice of moral duties without a belief in a divine lawgiver, and without reference to his will or commands, is not a religion.” \textit{American Dictionary of the English Language}, 1828.
  \item \textsuperscript{112} \textit{Id.} The Supreme Court rejected the flawed proposition that proximity to the alleged offensive conduct is determinative of standing: Respondent Americans United claims that it has certain unidentified members who reside in Pennsylvania. \textit{It does not explain, however, how this fact establishes a cognizable injury where none existed before.} Respondent is still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution. \textit{Valley Forge}, 454 U.S. at 487 n.23. Moreover, \textit{Valley Forge} stated that the plaintiffs in \textit{Schempp} had standing because they were "forced to assume special burdens to avoid [the religious exercises].” \textit{Id.} at 486 n.22.
  \item \textsuperscript{113} \textit{Suhre}, 131 F.3d at 1087.
  \item \textsuperscript{114} \textit{Id.} at 1089. The court here acknowledged that there is a split in the circuits regarding the standing issue and specifically declined to follow \textit{Zielke} in the Seventh Circuit that stated that changed conduct was necessary to establish an "injury." \textit{Id.} at 1087-88. The court here cited \textit{County of Allegheny v. ACLU}, 492 U.S. 573 (1989) and \textit{Lynch v. Donnelly}, 465 U.S. 668 (1984) as precedent for its holding because these Supreme Court cases proceeded to the merits without any infirmity in plaintiffs’ standing. \textit{Id.} at 1088. However, in \textit{Lynch}, standing was predicated on municipal taxpayer standing and not non-economic citizen standing. \textit{See Donnelly supra}. The court noted that the plaintiff had two types of personal contact, as a user of the courts and as a participant in local politics and government. \textit{Id.} at 1090. Remarkably, the court goes so far as to uphold the plaintiff's conjectural future sightings of the Ten Commandments plaques because he has shown his desire to use the court system if necessary to vindicate his rights. \textit{Id.} at 1091.
  \item \textsuperscript{115} 947 F.2d 147 (5th Cir. 1991).
\end{itemize}
standing he must demonstrate: (1) that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; (2) that the injury "fairly can be traced to the challenged action"; and (3) that the injury "is likely to be redressed by a favorable decision." Moreover, a court should consider: (1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue; (2) whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by legislative branches; and (3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties. However, the court then stated that "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases" and that Murray had alleged sufficient injury to confer standing. The court placed considerable weight on the "fact" that standing was not an issue in Lynch or County of Allegheny.

In Shea v. Brister, the Court of Appeals for the Fifth Circuit held that the attorney/plaintiff did not have standing to challenge a Ten Commandments display in Judge Brister's Harris County, Texas courtroom. Municipal taxpayer standing was not much of an issue in this case as there was no expenditure of public funds in connection with the "acquisition, installation, preservation, maintenance, or display" of the Commandments in the courtroom. Addressing the citizen standing requirements, the court reiterated the elements set forth in Murray. Here, however,

116. Murray, 947 F.2d at 151 (quoting Valley Forge, 454 U.S. at 472).
117. Id. (quoting Cramer v. Skinner, 931 F.2d 1020 (5th Cir. 1991)).
118. Id. (quoting Saladin, 812 F.2d at 691). Murray's allegations were that he lives and works in Austin, receives correspondence from the City, that he has visited the chambers of the Austin City Council and the municipal building, the cross at issue is used only by the Roman Catholic Church, the religious symbol "truly offends him," he does not subscribe to that religious sect, he personally confronts the symbol at many locations, the use of the symbol is an endorsement of Christianity and the Roman Catholic faith, that he did not know that the cross was part of Austin's coat of arms until he did research, he experienced police hostility in the past when he needed protection (he fears that this was a result of his being a well-known atheist spokesperson), and he is distressed that his tax money is used to advertise religion. Id. at 150.
119. Id. at 151-52. As for Lynch, see Donnelly supra the First Circuit and note 108 supra. In County of Allegheny, the Court must have satisfied itself that the plaintiffs had standing, or, it would have lacked jurisdiction; however, its silence on the issue is certainly not precedent that standing is a given in any similar type of case.
120. 26 F. Supp. 2d 943 (S.D. Tex. 1996).
121. Shea, 26 F. Supp. 2d at 945.
122. See supra text accompanying notes 112-14.
the court denied standing because the mere possibility that Shea could be exposed at some time in the future to the display in Brister's courtroom was too remote to establish standing.\textsuperscript{123} The court opined that the mere chance that one of Shea's cases might be assigned to Brister or that he might one day be a litigant or juror in that court was entirely conjecture.\textsuperscript{124} Shea's argument that if he did not have standing, then no one would be able to establish standing failed also.\textsuperscript{125} The court stated that Valley Forge was the seminal decision on standing and that Article III's requirements are not satisfied by the "abstract injury in nonobservance of the Constitution asserted by the citizens."\textsuperscript{126} Moreover, Shea's oath, taken as an attorney, did not grant him the right to air generalized grievances before the court.\textsuperscript{127} Therefore, the court distinguished this case from Suhre and Harvey because in those cases, where standing was allowed, the plaintiffs had direct and possible continued contact with the display.\textsuperscript{128}

In Doe v. Beaumont Independent School District,\textsuperscript{129} although the court of appeals reversed the district court's denial of standing to the plaintiffs, the case is useful for distinguishing between Valley Forge and Schempp. Here, plaintiffs sued for relief from a volunteer clergy-counseling program at the school that plaintiffs alleged they might be exposed to at sometime in the future.\textsuperscript{130} The district court had denied standing to plaintiffs based on the decision in Valley Forge because the plaintiffs only presented a generalized public grievance.\textsuperscript{131} Again, the court cited with approval the legal standard outlined in the two cases supra and added that the actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context."\textsuperscript{132} In fact, the court cited Valley Forge with approval and distinguished Schempp because, in Schempp, the parties were school children and their parents, who were directly affected by

\textsuperscript{123} Shea, 26 F. Supp. 2d at 945-46.
\textsuperscript{124} Id. at 946. See Lujan, 504 U.S. at 560 (stating that an injury must be "actual or imminent, not 'conjectural' or 'hypothetical' " (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); quoting Lyons, 461 U.S. at 102).
\textsuperscript{125} Id.
\textsuperscript{126} Id. (quoting Valley Forge, 454 U.S. at 482).
\textsuperscript{127} Shea, 26 F. Supp. 2d at 946.
\textsuperscript{128} Id. at 947.
\textsuperscript{129} 173 F.3d 274 (5th Cir. 1999).
\textsuperscript{130} Doe, 173 F. 3d at 283-84.
\textsuperscript{131} Id. at 281.
\textsuperscript{132} Id. (quoting Valley Forge, 454 U.S. at 472).
the laws and practices complained of. Nonetheless, defendants argued that the student/plaintiffs were never exposed to any of the counseling and any future exposure was based purely upon random selection. The court found that the plaintiffs had alleged sufficient "threatened" injury in this case because their children were compelled by law to attend the school and were aware or observed conduct to which they disagreed. Moreover, the chances that one of the "Doe" children might be selected for participation in the program is real, and not remote odds like a "lightning strike or a lottery win." Thus, the fact that the plaintiffs were never selected for the counseling was immaterial according to the court. Furthermore, the fact that the plaintiffs were not required to participate in the program even if they were selected did not ameliorate the standing issue because to require the schoolchildren to decline the counseling would label them as "different."

**G. Sixth Circuit**

The case of *Wiley v. Franklin*, stayed the enjoining of the teaching of Bible courses in Hamilton and Chattanooga County public schools for 45 days, including curriculum teaching the Ten Commandments, until the school boards revised the procedure for selection of teachers and revised the curriculum to be more "secular" in nature. Here, the court found that plaintiff schoolchildren and parents had standing as far as the Establishment Clause issue was concerned. The court based its meager standing analysis totally on the *Schempp* case. In this case, it was alleged that each of the minor children was a student in the schools at issue and that they were directly and adversely affected by the practices therein. The court reasoned that these allegations were sufficient under *Schempp* to establish standing.

133. *Id.* at 282 n.20.
134. *Id.* at 283.
135. *Doe*, 173 F. 3d at 283.
136. *Id.* at 283-84.
137. *Id.* at 284.
138. *Id.* at 284-85.
141. *Id.* at 146-47.
142. *Id.* at 146.
143. *Id.* at 146-47 (citing *Schempp*, 374 U.S. at 224 n.9). The court allowed standing to a minor child although the school she now attended did not offer the curriculum, because
In Hawley v. City of Cleveland,\textsuperscript{144} the circuit court reversed the district court's dismissal of plaintiffs' suit, which was based on lack of standing. In this case, plaintiffs sued the city over its agreement to lease space in the airport to the Catholic Diocese of Cleveland.\textsuperscript{145} The court interpreted Valley Forge very narrowly. First, the court began its analysis by stating that a litigant must have "such a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [their] behalf."\textsuperscript{146} Moreover, the court stated that it was necessary that the plaintiff "has shown an injury to himself that is likely to be redressed by a favorable decision."\textsuperscript{147} Addressing the personal stake aspect, the court noted that Appellants alleged that they regularly used the airport and that the presence of the chapel in the airport "impairs [their] use and enjoyment of the public facility."\textsuperscript{148}

Next, the court noted that in Valley Forge, the plaintiffs failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."\textsuperscript{149} In addition, the court emphasized that it was because the plaintiffs in Valley Forge did not allege an "injury of any kind" that they lacked standing.\textsuperscript{150} The court then premised its reasoning as to why Valley Forge's non-economic injury analysis was not a bar in this case by relying on two early 1970s cases: Sierra Club v. Morton;\textsuperscript{151} and SCRAP. The court stated that the plaintiff in Sierra that was denied standing relied upon its status as a "representative of the public," whereas the plaintiffs in SCRAP had standing because they "challenged a proposed railroad freight hike alleging that the increase would discourage recycling of disposable cans and bottles and therefore damage Washington area national parks which they used."\textsuperscript{152} Then, the court relied upon

when the suit was filed, the course was offered at her school. The court also stated that the parents had standing to assert their individual rights as parents whose children attend schools engaged in the complained practices. \textit{Id.} at 147.

\textsuperscript{144} 773 F.2d 736 (6th Cir. 1985).
\textsuperscript{145} Hawley, 773 F.2d at 738.
\textsuperscript{146} \textit{Id.} (quoting Warth, 422 U.S. at 498-99).
\textsuperscript{147} \textit{Id.} at 739 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976)).
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} (quoting Valley Forge, 454 U.S. at 485).
\textsuperscript{150} Hawley, 773 F.2d at 739 (quoting Valley Forge, 454 U.S. at 486).
\textsuperscript{151} 405 U.S. 727 (1972).
\textsuperscript{152} \textit{Id.} at 739-40 (quoting Sierra, 405 U.S. at 735-36 n.8; SCRAP citation omitted).
ACLU v. Rabun County\textsuperscript{153} for the "proposition that a plaintiff challenging sectarian use of public property for impairing his actual use and enjoyment of that property has standing to challenge the impermissible activity."\textsuperscript{154} The court distinguished Valley Forge because in Valley Forge, plaintiffs did not reside in the state where the transaction took place, whereas in Hawley, plaintiffs regularly used the airport and "[e]ven if they can avoid the chapel area by utilizing different concourses or stairways, this impingement on their right to use the airport is sufficient to confer standing since it would 'force them to assume special burdens' to avoid 'unwelcome religious exercises.'"\textsuperscript{155}

In Washegesic v. Bloomingdale Public School Board,\textsuperscript{156} the court, relying upon its interpretation of the standing doctrine, found that the case was not moot.\textsuperscript{157} In this case, plaintiff challenged a portrait of Jesus Christ that had hung in the hallway of the high school he had attended, but since graduated from while the case was pending appeal. Here, the court cited Hawley\textsuperscript{158} with approval and noted that the plaintiff's graduation did not end the case because it still affects his use of the school and potentially affects any member of the public who attends an event at the school.\textsuperscript{159} The court acknowledged conflict in the standing cases. Nonetheless, it misconstrued Valley Forge to mean that psychological harm alone is not always sufficient to confer standing when contact is \textit{indirect}, while Harvey (see infra) stated that "unwelcome direct contact with the offensive object is enough."\textsuperscript{160} Moreover, the court stated that the "use of governmental authority to encourage a sectarian religious view is a sufficient injury if directed toward the plaintiff."\textsuperscript{161} Remarkably, the court opined, "any parent, employee or former student who uses the school facilities and suffers actual

\begin{footnotes}
\item[153. 698 F.2d 1098 (11th Cir. 1983).
\item[154. Hawley, 773 F.2d at 740.
\item[155. Id. (quoting Valley Forge, 454 U.S. at 487 n.22). Contrast this proposition with Zielke infra, in which the court held that the fact that plaintiffs did not alter their conduct, although they could have, does not confer standing because there is no injury. In addition, the court quoted Valley Forge out of context. The language quoted was discussing the difference between captive schoolchildren in Schempp and the Valley Forge plaintiffs.
\item[156. 33 F.3d 679 (6th Cir. 1994).
\item[157. The court stated that "[m]ootness is 'the doctrine of standing set in a time frame.'" Washegesic, 33 F.3d at 682 (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)).
\item[158. The court also cited Rabun with approval.
\item[159. Washegesic, 33 F.3d at 682.
\item[160. Id. (quoting Harvey, 811 F. Supp. at 674).
\item[161. Id.
\end{footnotes}
injury would have standing to sue.\textsuperscript{162}

The court, in *Ganulin v. United States*,\textsuperscript{163} went so far as to presume certain facts in order to find standing for a plaintiff who challenged that Christmas Day is an unconstitutional establishment of religion. In *Ganulin*, the court began its standing analysis by repeating the three elements of *Lujan*.\textsuperscript{164} Despite the Supreme Court's unequivocal language in *Valley Forge* that there is no sliding scale of standing for Establishment Clause claims, the court in *Ganulin* noted that the Sixth Circuit has held that First Amendment plaintiffs do not bear a heavy burden.\textsuperscript{165} Thus, following the circuit court in *Suhre*, the court stated that standing for establishment clause cases can be tailored to reflect the type of injury those classes of plaintiffs are likely to suffer.\textsuperscript{166} Next, the court in a completely illogical statement noted that although “[p]laintiffs must allege more than an abstract injury, [an] actual injury to individual values of an abstract or esoteric nature can provide the basis for standing.”\textsuperscript{167} The court correctly stated that standing cannot be found on the assumption that if the plaintiff lacked standing, no one would be found to have standing.\textsuperscript{168} Moreover, the court also correctly noted that the Supreme Court has held that a claim of harm in the proper application of the Constitution that no more directly benefits the plaintiff than it does the public at large lacks standing.\textsuperscript{169} In addition, the court recognized that *Valley Forge* found that plaintiffs lacked standing because they “failed to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by

\textsuperscript{162} Id. at 683. This court goes well beyond what even the *Schempp* court envisioned for the requirement of standing. Whereas in *Schempp*, the potential plaintiff is a captive audience, here, the potential plaintiff is anyone who could theoretically walk through the school and simply complain that he/she feels that the school has engaged in an unconstitutional establishment of religion. In a sarcastic “concurrence,” Senior Circuit Judge Guy remarked that the portrait had hung on the school wall for 30 years and that a discussion of “‘psychological damage’ resulting from viewing this picture does implicate an ‘establishment’ — . . . not one of religion . . . [but] a class of ‘eggshell’ plaintiffs of a delicacy never before known to the law.” Id. at 684. Moreover, he noted that the portrait “no more conveys the notion of the ‘establishment’ of a religion than a statue of Robert E. Lee in a park suggests that we should dissolve the Union.” Id.

\textsuperscript{163} 71 F. Supp. 2d 824 (S.D. Ohio 1999).

\textsuperscript{164} *Ganulin*, 71 F. Supp. 2d at 827.

\textsuperscript{165} Id. at 828.

\textsuperscript{166} Id. (citing *Suhre*, 131 F.3d at 1086).

\textsuperscript{167} Id.

\textsuperscript{168} Id. (citing *Valley Forge*, 454 U.S. at 489).

\textsuperscript{169} *Ganulin*, 71 F. Supp. 2d at 828 (citing *Lujan*, 504 U.S. at 573-74).
Standing in “Religious Display” Cases

observation of conduct with which one disagrees.”

Nevertheless, the district court stated that direct, personal contact with a religious display was considered a sufficient personal injury under *Suhre* and the Sixth Circuit case of *Washegesic*.

In a case involving a display of the Ten Commandments at a public school, *Doe v. Harlan County School District*, the district court held that the individual plaintiffs met the standing requirements because the plaintiff student must attend her middle school. Here, the court stated that the plaintiffs have suffered, and are under the threat of suffering, concrete injuries sufficient to confer standing. The court noted that plaintiffs in *Harlan County* have more regular contact with the “offensive” materials than those of *Washegesic*. Furthermore, the court stated that unlike the Seventh Circuit case of *Gonzales v. North Township of Lake County, Ind.*, it would have been highly impractical for the plaintiffs to have altered their normal routines, thus direct contact by their virtue of attendance at school sufficed for finding standing.

Likewise, in *ACLU v. McCreary County* and *ACLU v. Pulaski County*, the Eastern District Court of Kentucky found that plaintiffs had standing to challenge modified Ten Commandment

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170. *Id.* (quoting *Valley Forge*, 454 U.S. at 485) (emphasis added).

171. *Id.* at 830. Among other allegations, the plaintiff in this case alleged that the practice “makes Plaintiff feel like an outsider and not an integral part of the political community in the United States.” *Id.* at 829. Here, the district court noted that this allegation sounds like a claim of psychological harm, insufficient to confer standing under *Valley Forge.* *Id.* at 830. The court also noted that if the plaintiff only “seeks to gain a sense of personal satisfaction in seeing that the Constitution is upheld, then he lacks standing.” *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)) (holding that psychic satisfaction is not a sufficient Article III remedy to confer standing). Nevertheless, the court noted that the plaintiff likened his case to that of *Suhre* and *Washegesic*, however, the plaintiff was unable to explain just what kind of contact he was exposed to, so, *sua sponte*, the court presumed that the direct contact of the plaintiff would be the closing of federal buildings, courts, etc., for reasons religious in nature. *Id.* (emphasis added). Stating that it was a close call, the court held that plaintiff had standing because it could not conclude that the plaintiff “could prove no set of facts in support of his assertion of standing.” *Id.*


173. *Harlan County Sch. Dist.*, 96 F. Supp. 2d at 670. Although the court cites no authority for conferring standing on this basis, it is obvious that the facts in this case resembled those of *Schepp*.

174. *Id.* at 669 (citing *O'Shea v. Littleton*, 414 U.S. 488 (1974) (stating that abstract or hypothetical injuries are insufficient to confer standing on a party)).

175. *Id.* at 670.

176. 4 F.3d 1412 (7th Cir. 1993).


displays, set in high traffic areas of their respective courthouses, for the same reasons (and with almost identical language) as the court in *Harlan County School District*. In these cases, the court stated that it would be highly impractical for the plaintiffs to alter their routine because they must enter the courthouse to conduct civic business.\(^{180}\) Furthermore, the court found that the ACLU had organizational standing because as long as the association "alleges that its members . . . are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit" it is a proper party to bring suit.\(^{181}\)

Finally, in *Adland v. Russ*,\(^{182}\) the district court found that plaintiffs had standing to challenge a resolution by the governor of Kentucky that mandated relocation of a Ten Commandments monument, displayed on the Capitol grounds, to a permanent site on the Capitol grounds near Kentucky's floral clock.\(^{183}\) Here, the court accepted the affidavits of the plaintiffs that indicated that they would "travel to the State Capitol frequently, and will endure direct and unwelcomed contact with the monument once it is relocated."\(^{184}\) In addition, the ACLU's 1,800 statewide members who frequently travel to the Capitol would have this contact as well.\(^{185}\) Here, the court merely relied on the case of *Washegesic* to confer standing on the plaintiffs.\(^{186}\)

**H. Seventh Circuit**

In the case of *ACLU v. City of St. Charles*,\(^{187}\) the court held that plaintiffs had standing to enjoin a display of a lighted cross on top of the city's fire department building aerial.\(^{188}\) The court first noted that the ACLU's organizational standing depended entirely upon its members, as it did not allege any injury to itself.\(^{189}\) Here, municipal taxpayer standing was not an issue because it was agreed that any

184. *Id.* at 784.
185. *Id.*
186. *Id.*
187. 794 F.2d 265 (7th Cir. 1986).
188. *City of St. Charles*, 794 F.2d at 268-69.
189. *Id.* at 267.
funds used to supply the electricity to the cross were de minimis.\textsuperscript{190} Next, the court stated that the fact that the plaintiffs did not like the cross being displayed on public property, or that they are offended by such, does not confer standing.\textsuperscript{191} Thus, to be made “indignant by knowing that government is doing something of which one violently disapproves is not the kind of injury that can support a federal suit.”\textsuperscript{192} Nevertheless, the court remarked that it should make a difference if the plaintiff is complaining about an establishment of religion in his own city, town or state because that person may be intensely distressed.\textsuperscript{193} However, avoiding the question of “degrees of distress,” the court explained that the plaintiffs were distressed enough to alter their behavior to avoid seeing the cross and even though that action is a slight cost, it is enough to distinguish them from other objectors to the display.\textsuperscript{194}

The defendants argued that the plaintiffs inflicted this cost upon themselves and could avoid the cost altogether by continuing to follow their usual routes and ignore the cross’ presence.\textsuperscript{195} The court answered by pointing to the \textit{Schempp} case that held that although plaintiffs could have avoided the Bible reading and Lord’s Prayer by placing their children in private secular schools, they did not need to in order to establish standing.\textsuperscript{196} At this juncture, the court totally misread the difference between \textit{Schempp} and \textit{Valley Forge}. The court stated that the injury in \textit{Schempp} was due to the involuntary audience and that if those plaintiffs would not have standing, there would be no judicial remedy against establishments of religion that did not depend on taxpayer money.\textsuperscript{197} Finally, the Seventh Circuit stated that to control the amount of litigation and

\textsuperscript{190} \textit{Id.} at 267-68.
\textsuperscript{191} \textit{Id.} at 268 (citing \textit{Valley Forge}, 454 U.S. at 485-87).
\textsuperscript{192} \textit{Id.} (citing People Organized for Welfare & Employment Rights v. Thompson, 727 F.2d 167, 171 (7th Cir. 1984)).
\textsuperscript{193} \textit{City of St. Charles}, 794 F.2d at 268. How this proposition is reconcilable with the court’s preceding statements or \textit{Valley Forge} is not stated as Judge Posner offers no authority for this statement.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.} To the contrary, the Court in \textit{Valley Forge} explicitly stated that the plaintiffs in \textit{Schempp} “had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them. \textit{Valley Forge}, 454 U.S. at 486 n.22 (emphasis added). Furthermore, in completely unambiguous language, the Court in \textit{Valley Forge} held that “[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” \textit{Id.} at 489 (quoting \textit{Schlesinger}, 418 U.S. at 227).
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steer it towards the people most affected allows a suit by the citizens of St. Charles "rather than by residents of Pasadena who read about the St. Charles cross in the Los Angeles Times — the rules of standing confine the right to sue to persons who can show something akin to a common law injury, that is, an injury to person or property." Here, the court stated that the injury was the free use of the city's streets and sidewalks.

Approximately two years later, in Freedom From Religion Foundation, Inc. v. Zielke, the Court of Appeals for the Seventh Circuit held that plaintiffs lacked standing to challenge a display of a Ten Commandments monument located in a city park because they:

1) failed to allege a distinct and palpable injury resulting from the allegedly unconstitutional action of the City of La Crosse;
2) did not establish that Grams was a municipal taxpayer or that the city had used tax money to erect or maintain the monument;
3) failed to establish standing on the basis of mere proximity to the challenged action; and 4) did not meet the requirements of representational standing for the Foundation.

In this case, the monument at issue was approx. 5' 4" high x 33" wide and 10" deep. The monument is located eight feet from the sidewalk that surrounds the park, is clearly visible from the sidewalk, and is lighted from the roof of the Eagles building across the street from the park. The city owns and maintains the park, but did not buy, nor expend funds on the maintenance of the monument. Grams, a resident of La Crosse, found out about the monument through a friend and went to see it for herself. She testified that she was "offended by the display because she viewed it as a message from the city about the religious beliefs that private citizens should hold."

198. City of St. Charles, 794 F.2d at 274-75.
199. Id. at 275. How the plaintiffs free use of the streets and sidewalks was hindered by the cross other than by psychological harm if they were to continue using them is not explained. The court's holding flies in the face of Valley Forge and is circular.
200. 845 F.2d 1463 (7th Cir. 1988).
201. Zielke, 845 F.2d at 1470.
202. Id. at 1466.
203. Id.
204. Id.
205. Id.
206. Zielke, 845 F.2d at 1466.
and, after no action was taken, filed an action in the district court alleging that the monument was a governmental endorsement and establishment of religion that violated the first and fourteenth amendments to the constitution.  

The court noted that the appellants had to be able to establish some type of direct and palpable injury, even a minor one, as a result of the monument. Here, the Seventh Circuit found that although the appellants alleged that the display was a rebuke to their religious beliefs and that they are offended by it, they did not allege that they had altered their behavior because of the monument. As a result, the court correctly noted that Valley Forge held that “psychological harm” that one may suffer from observing governmental conduct that he or she feels is disagreeable is insufficient to establish standing. Moreover, the court noted that courts should refrain from “adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances’ pervasively shared and most appropriately addressed in the representative branches.” The court stated that had the appellants refused to go to Cameron Park because of the monument, this would have been a distinct and palpable injury because their right to use a public park would have been adversely affected by the display. However, appellants “affirmatively testified that they have not been deprived of the use or enjoyment of Cameron Park [because] . . . they have not altered their behavior in any fashion or suffered any detriment other than mere psychological discomfort.” Following the court in City of St. Charles, the court considered appellants claim that she should have standing because of her close proximity to the monument. Finally, the appellants also failed to satisfy two of the criteria for establishing municipal taxpayer standing: “First, the appellants failed to allege or prove

207. Id.
208. Id. at 1467.
209. Id.
210. Id. at 1467 (citing Valley Forge, 454 U.S. at 485-86; see also City of St. Charles, 794 F.2d at 268) (emphasis added).
211. Zielke, 845 F.2d at 1468 (quoting Valley Forge, 454 U.S. at 475).
212. Id. at 1468 n.3.
213. Id.
214. Id. at 1468-69. This proposition is taken from the proximity of the plaintiffs in Valley Forge to the challenged property transfer. However, had the plaintiffs lived in the region of Valley Forge there is no indication from the case that that fact would have made a difference in the Court's reasoning and should not be taken as implying that the distance in which one lives from an allegedly unconstitutional display makes an otherwise non-injury, an injury. See Valley Forge, 454 U.S. at 487 n.23.
that Grams actually is a La Crosse municipal taxpayer. Second, even if we presume that Grams is a taxpayer, the appellants did not establish that the City of La Crosse has used tax revenues on the allegedly unconstitutional display in Cameron Park." The fact that the City had spent $6,000 in 1899 to purchase the land for the park was inconsequential as the challenged unconstitutional activity is the monument, not the park, and, in this case, it was conceded that no tax money had been spent on the monument.

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The court in *Harris v. City of Zion*, found that plaintiffs had standing to challenge religious imagery on a municipal seal. In this consolidated case, two seals were at issue: (1) Rolling Meadows contained a Latin Cross in the upper right quadrant of the seal; and (2) Zion, had "God Reigns" at the top of the seal and a Latin Cross on the left part of the seal. Plaintiffs alleged that several direct burdens were imposed upon them by the presence of these seals. Kuhn, plaintiff in the *Rolling Meadows* case, stated that he was injured because he had to display the seal, which is on the municipality's vehicle tax sticker, on the windshield of his automobile, he had to dispose of garbage in bags that display the seal, and he attempted to avoid any visual contact with the seal by utilizing alternative travel routes. Harris, plaintiff in the *Zion* case, alleged similar types of "injury." In addition, Harris specifically stated that he avoided the particular route that brought him within visual contact of Zion's water tower, which exhibited the seal.

Here, the majority recognized that an injury-in-fact does not include simple indignation or offense as a basis for standing. Nonetheless, the court found that although the injuries claimed were little more than "identifiable trifles," it was "the willingness of the plaintiffs to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction." In *Harris*, the court stated that for purposes of standing, "it was not necessary to consider whether the plaintiffs could prove the injury, it was enough that they pled good-faith

215. Id. at 1470.
216. Id.
217. 927 F.2d 1401 (7th Cir. 1991).
218. *Harris*, 927 F.2d 1402, 1404.
219. Id. at 1405.
220. Id.
221. Id.
222. Id.
223. *Harris*, 927 F.2d at 1406 (citing *St. Charles*, 794 F.2d at 268).
allegations of damage." The majority and dissent in this case were at odds over the correct interpretation of *Lujan*. The majority relied upon what *Lujan* did not say, i.e., after the *Lujan* court looked at the allegations in the complaint, it searched the affidavits for any saving support; however, the *Lujan* court did not say that if the well-pleaded allegations of the complaint had correctly identified the "agency action," that would not have been sufficient to confer standing. Nevertheless, the majority noted that the defendant cities had failed to challenge the factual allegations of injury in the plaintiffs' affidavits and as a result, waived any claim that Kuhn's or Harris' allegations of injury presented a triable issue. Moreover, unlike the crèche cases, the seal here is displayed year-round all over the city and not just for a few weeks in one place. Notably, the majority expressed its approval of the

224. Id. (citing St. Charles, 794 F.2d at 259). Judge Easterbrook took the majority to task for this assertion and distinguished *St. Charles* because, in that case, plaintiff's detour was conceded, whereas here, defendant cities have not conceded that plaintiffs "rearranged their daily routines to avoid exposure to religious symbols." Id. at 1420 (Easterbrook, J., dissenting). In fact, Harris moved to Zion after being recruited by the "Society" as a potential plaintiff to lend his name to the litigation. Id. Thus, the cost to Harris was what it cost him to expose himself to the seal. Furthermore, Judge Easterbrook noted that in *St. Charles*, it was recognized that "the plaintiff could not prevail without proving the 'detour' allegations of the complaint." Id. To allow standing on mere allegations would permit parties to obtain jurisdiction by consent and would foster collusive litigation. Id. (see 28 U.S.C. § 1359 and Fed. R. Civ. P. 12(b)(1)) (noting that courts do examine the jurisdictional allegations of the complaint).

225. Id. at 1406-07 (citing *Lujan*, 110 S. Ct. at 3189-83). The majority, in a footnote, stated that even if the dissent's interpretation of *Lujan* was correct, the instant cases are distinguishable because they are Establishment Clause cases and not review of an administrative action. Id. at 1407 n.5. What *Lujan* actually says is:

The party invoking federal jurisdiction bears the burden of establishing [the standing] elements. Since they are not merely pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

226. *Harris*, 927 F.2d at 1407-08.

227. Id. at 1408-09.
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Zielke case because the Zielke plaintiffs "never argued that they changed their behavior." Regrettably, the court perpetuated the error of St. Charles through the proposition that if Kuhn and Harris cannot sue to test the constitutionality of a religious symbol, no one would be able to sue.

In Gonzales v. North Township of Lake County, the court found that plaintiffs had standing to challenge the display of a crucifix in a public park. Here, the crucifix was 16 feet tall, sat on a base two feet tall, and was donated to the Township in 1955 by the Knights of Columbus as a war memorial. Three of the plaintiffs alleged that the presence of the crucifix in the Park infringed on their use and enjoyment of the park and offended their moral and religious sensitivities. The other plaintiff, a former Park employee, quit his job after the cross was erected and had gone to the park only three times since leaving. Plaintiffs were unable to establish taxpayer standing because no government money was used to buy the crucifix, no government funds were used to maintain the crucifix, and whatever funds were expended in maintaining the Park area surrounding the crucifix would have been spent regardless of the presence of the crucifix.

The court began its analysis by stating that only a plaintiff with a personal stake, which a plaintiff can establish only if the plaintiff has suffered an injury-in-fact in the case or controversy, has standing. Here, the court correctly noted that at the summary judgment stage, the plaintiff must produce affidavits or documents that support his injury allegation. The court, citing Harris, noted that offense to religious and moral sensitivities is insufficient to confer standing because there must be "a tangible, albeit small cost that validates the existence of genuine distress." Next, the court stated, "an identifiable trifle is enough for standing to fight out a

228. Id. at 1409.
229. Id. Judge Easterbrook correctly cited Valley Forge and Schlesinger in pointing out the majority's error. Id. at 1422 (Easterbrook, J., dissenting).
230. 4 F.3d 1412 (7th Cir. 1993).
231. Gonzales, 4 F.3d at 1414. A plaque on the base of the crucifix designated the crucifix as a war memorial but the plaque was discovered missing in 1983 and had never been replaced. Id.
232. Id. at 1416. The latter plaintiff, the district court held, had standing; however, that court dismissed the other plaintiffs. Id. The court of appeals reversed as to the other plaintiffs and it is their claims that the court mainly addresses here.
233. Id. at 1416.
234. Id. at 1415.
235. Id. at 1415-16 (citing SCRAP, 412 U.S. at 689).
236. Gonzales, 4 F.3d at 1416 (quoting Harris, 927 F.2d at 1406).
question of principle". Thus, the court noted that plaintiffs needed to produce some evidence to support their alleged "use and enjoyment" injury. Here, the court opined that this case was like SCRAP because "plaintiffs' use and enjoyment of a national park was curtailed, not denied, by defendant's actions which was sufficient to confer standing." Therefore, the court held that the prohibition to the plaintiffs of their full use and enjoyment of the Park was an injury in fact.

237. Id. (quoting SCRAP, 412 U.S. at 689 n.14). It should be noted at this juncture, what the court in SCRAP actually stated. The district court had decided that case at the preliminary injunction stage and only had before it the pleadings. Commenting on standing at the pleading stage the Supreme Court stated that:

[PL]eadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.

SCRAP, 412 U.S. at 688-89. In the ensuing footnote the Court stated that: "'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation —even though small—from a person with a mere interest in the problem." Id. at 689 n.14. It appears as though courts regularly misapply SCRAP's meaning to allow standing no matter how slight the alleged injury and its use seems to have led to the "sliding scale" of standing that courts invoke in Establishment Clause claims. Thus, the "identifiable trifle" must still be a sufficient injury to confer standing and, in Establishment Clause cases, the Court in Valley Forge has delineated what does not suffice as a trifle. Even given the fact that someone purports to alter his behavior because of a religious display, does that still not stem from the fact that he finds the display offensive or unconstitutional and that that person suffers only because of his sensibilities? Whereas if 100 other people that walk by the display pay it no heed, meaning that 101 people had been exposed to the same "governmental action," and only one claims an injury, how can that one person actually allege that he has been exposed or harmed in a manner different than the 100 that claim no harm unless it is only because of his sensitivities which is clearly insufficient to confer standing under Valley Forge?

238. Gonzales, 4 F.3d at 1416-17. Comparing the "use and enjoyment" of an area that could possibly be devastated by the taking of greater natural resources from that area, and the "use and enjoyment" of a Park because of the presence of a religious statue, is comparing the proverbial apples and oranges. In the former situation, those people who used that area would be injured regardless of their sensibilities, in the latter situation, there is no injury to anyone by virtue of the statue, only offended feelings of "eggshell" plaintiffs which is insufficient under Valley Forge to confer standing.

239. Id. at 1417. Indeed, the Seventh Circuit granted standing to a plaintiff who was denied access to a beer tent for an hour at an Italian Festival sponsored by the Village of Crestwood because of a Roman Catholic Mass that was to be conducted during that time. Doe v. Village of Crestwood, 917 F.2d 1476 (7th Cir. 1990). It could be argued, however, that in that case, the plaintiff was actually denied access to the facility. In the instant case, how did the government deny plaintiffs access to the Park? It is open to all, unless I suppose one's sensitivities are offended, which, again, is insufficient under Valley Forge to grant standing.
The district court in *Doe v. County of Montgomery*, held that plaintiffs did not have standing to challenge a sign over the main entrance of the Montgomery County Courthouse that contained the words "THE WORLD NEEDS GOD." The sign at issue in this case was approximately 10 feet long by 1 ½ feet tall with the words approximately 1 foot tall. This sign had been over the entrance since 1936. Of note, this courthouse has several entrances, but the sign at issue was placed over the "main, most prominent entrance." In this case, two of the plaintiffs alleged that they were Montgomery County residents. Both objected to the County's sponsorship of the religious message and alleged that they wished to avoid the sign, but must come in to contact with it to participate fully as Montgomery County citizens. Doe alleged that she had been involved in civil and criminal cases and may again be in the future, she is subject to jury duty, and must enter the courthouse to visit the State Attorney, County Clerk, County Treasurer, and Sheriff as well as attend meetings of the County Board. Consequently, "she must come into direct, unwelcome contact with the sign." Roe claimed that he has been called for jury duty and may again be in the future, he had registered to vote at the courthouse as well as obtained absentee ballots there, and must enter for the other reasons stated by Doe. Plaintiff Stein alleged that he was an attorney who lived in Cook County, Illinois, objected to the display, and refused to represent clients whose cases would be heard in Montgomery County. He also alleged that he may have to visit the courthouse in the future to visit the offices of other government officials and will be "deterred from doing so because of the presence of the sign."

The district court began its analysis by referencing the elements of standing found in the *Valley Forge* opinion. The court also noted that to allege a non-economic injury, one must be "directly affected by the laws and practices against which their complaints are directed." The court also recognized that *Valley Forge* narrowed the scope of *Schempp* by stating that the plaintiffs in *Schempp* had
standing not because of any "spiritual stake" grounded in the establishment clause, but "because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them."248 Furthermore, the court stated that the Seventh Circuit had yet to grant standing based on "unwelcome religious exercises" unless the plaintiff has assumed "special burdens to avoid them."249 Thus, a plaintiff must alter her behavior to have standing.250 Here, the court stated that "Plaintiffs have not pled or otherwise indicated that they have been forced to assume any special burden or altered their behavior because of the sign."251 For example, Doe and Roe stated that they wished to avoid the sign, but neither had altered their behavior because of it and psychological harm alone from looking at the sign is insufficient to confer standing.252 Likewise, Plaintiff Stein had given no indication that he ever refused to represent a client because of the sign; therefore, the court found that his "injury" was abstract, conjectural, and hypothetical rather than one that is distinct and palpable.253 Finally, the court held that although the plaintiffs may have been compelled to look upon the sign, they lacked standing "unless they assume[d] some burden to avoid contact [with] the alleged offensive sign."254

The Seventh Circuit affirmed in part and reversed in part.255 The circuit court began its analysis by citing the first two elements of Lujan, i.e., "injury-in-fact" and "actual or imminent" and reiterated Valley Forge's finding that "psychological harm" alone is insufficient to confer standing.256 Next the court invoked SCRAP and asserted

248. Id. (quoting Valley Forge, 454 U.S. at 486 n.22).
249. Id.
250. Id. at 835 (citing Harris, 927 F.2d at 1405; Freedom From Religion Found. v. Zielke, 845 F. 2d 1463 (7th Cir. 1988); ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986); and Gonzales, 4 F.3d at 1416). The court noted that other circuits have construed Valley Forge to find standing solely on direct personal contact with the offensive action. Id.
251. County of Montgomery, 848 F. Supp. at 835.
252. Id.
253. Id.
254. Id. at 836.
256. County of Montgomery, 41 F.3d at 1159. Unfortunately, the court here takes liberty with a footnote in Valley Forge and stated that a "plaintiff" who is subjected to unwelcome religious exercises or forced to assume special burdens to avoid them has demonstrated an injury-in-fact. Id. The footnote actually stated that the plaintiffs in Schempp had standing because "impressionable schoolchildren were subjected to unwelcome religious exercises." Valley Forge, 454 U.S. at 486 n.22. The Seventh Circuit disregards this distinction made by the Supreme Court by stating that "Article III does not differentiate between 'impressionable schoolchildren' and other classes of plaintiffs". County of Montgomery, 41
that an “identifiable trifle” is enough to confer standing. In addition, the court cited several Supreme Court cases in which plaintiffs were deemed to have standing to litigate their claims. However, four of those cases involved “impressionable schoolchildren.” The plaintiffs in *Lynch* were granted standing based on their status as taxpayers, and the standing issue was not even litigated in *County of Allegheny*. Furthermore, the court stated that “altered behavior” or “special burdens” are merely factors in determining whether to grant standing and are not controlling. Thus, the circuit court distinguished *Zielke* by stating that the plaintiffs in that case failed to demonstrate that they were exposed to the monument during their normal routines or in the course of their usual driving or walking routes, whereas here, Doe and Roe allege that they must come into direct and unwelcome contact with the sign to participate in local government and fulfill their legal obligations. Nevertheless, the court did affirm denial of

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F.3d at 1160 n.2. The court totally overlooks the fact that *Valley Forge* was referring to the type of injury and not the class of plaintiffs, i.e., the Supreme Court in *Valley Forge* recognized that there may be actual harm to impressionable schoolchildren who are subjected to unwelcome “religious exercises” but not harm to plaintiffs who merely observe what they perceive to be a violation of the Establishment Clause. These two situations are entirely different; therefore, to lump them together or even opine that a “sign” is a “religious exercise” is indeed reading into the standing doctrine a license to hammer out political differences by way of the judiciary.

257. *County of Montgomery*, 41 F.3d at 1159 (quoting SCRAP, 412 U.S. at 689 n.14). See note 234 supra discussing the “identifiable trifle” of SCRAP.


259. Although the Seventh Circuit opined that there was no difference between “impressionable schoolchildren” and “other classes of plaintiffs,” in order to support its reasoning, the court is reduced to citing high Court cases that involved “impressionable schoolchildren.” Id. at 1161. In addition, the court stated that even though the issue was not litigated in *County of Allegheny* the fact that the Court heard the case, it reasoned, was tantamount to approval of conferring standing on plaintiffs that are “subjected to unwelcome religious exercises.” Id. This statement is preposterous as there is no basis for the premise that if a court allows a plaintiff standing in a particular type of case then any plaintiff has standing that brings that same type of case. See Steel Co., 523 U.S. at 95.

260. *County of Montgomery*, 41 F.3d at 1160-61.

261. Id. at 1161 (citing *Zielke*, 845 F.2d at 1468-69). At this juncture, the court simply misquoted the facts of *Zielke*. In *Zielke*, the plaintiffs alleged that they have suffered a “rebuke to [their] religious beliefs respecting religion by virtue of being subjected to a governmental endorsement of unequivocally religious precepts and confusions.” *Zielke*, 845 F.2d at 1468 (emphasis added). Thus, the court in *Zielke* found that the fact that plaintiffs were subjected to the cross in the park was not sufficient to confer standing because the plaintiffs did not alter their behavior and could not demonstrate that their use and enjoyment of the park was in any way diminished. Id.
standing to plaintiff Stein.\textsuperscript{262}

The latest case in the Seventh Circuit that addressed Article III standing in a religious display situation was \textit{Books v. City of Elkhart}.\textsuperscript{263} Here, the district court granted standing to plaintiffs who challenged the display of a Ten Commandments monument at the city's municipal building.\textsuperscript{264} Once again, the court acknowledged the "irreducible constitutional minimum" elements for standing: injury-in-fact, causation, and redressability.\textsuperscript{265} Furthermore, the court acknowledged that merely observing behavior in which one disagrees is also insufficient to confer standing.\textsuperscript{266} Next, the court discussed the divergence that the Seventh Circuit took on the standing doctrine by its holding in \textit{Doe}.\textsuperscript{267} In addition, the court dismissed the Seventh Circuit's reliance on the Supreme Court cases discussed in \textit{Doe} because they either dealt with some measure of taxpayer standing or involved public school students and their families.\textsuperscript{268} Nonetheless, the court held that even though the plaintiffs in \textit{Books} did not necessarily have to come into direct and unwelcome contact with the Ten Commandments monument, it granted standing based on the court's decision in \textit{Doe}.\textsuperscript{269}

On appeal, the circuit court affirmed the district court's grant of standing to plaintiffs and even broadened its standing application.\textsuperscript{270} Judge Ripple noted that the district court rightly relied upon the \textit{Doe} decision in finding standing and reiterated its reliance upon the Supreme Court cases that the district court found to be distinguishable.\textsuperscript{271} Thus, the court opined that although the plaintiffs

\textsuperscript{262} County of Montgomery, 41 F.3d at 1162.
\textsuperscript{263} 79 F. Supp. 2d 979 (N.D. Ind. 1999).
\textsuperscript{264} Books, 79 F. Supp. 2d at 988.
\textsuperscript{265} Id. at 986-87.
\textsuperscript{266} Id. at 987.
\textsuperscript{267} Id. at 987-88. The court in \textit{Doe} relied upon a passage that discussed allegations regarding the proximity of the plaintiff in \textit{Zielke} to the "offensive" display. Plaintiff had alleged that she lived close to the offending monument; however, the court found that she did not live anywhere near the park and she did not demonstrate that "the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park." \textit{Id.} (quoting \textit{Zielke}, 845 F.2d at 1469). It should be noted that the court in \textit{Zielke} declined to state whether any of these allegations in and of themselves would have been sufficient to confer standing.
\textsuperscript{268} Id. at 988. See supra notes 255-56 and accompanying text.
\textsuperscript{269} Books, 79 F. Supp. 2d at 988. The Elkhart monument was 46 feet away from the main entrance to the building whereas the sign in \textit{Doe} was directly over the door. Both plaintiffs in \textit{Books} alleged that they saw the monument in the course of their daily activities, yet both also admitted that they did not alter their routes because of the monument. \textit{Id.}
\textsuperscript{270} Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000).
\textsuperscript{271} Books, 235 F.3d at 299.
could have altered their path into the municipal building to avoid the monument, they were not obligated to do so to suffer an injury in fact.\textsuperscript{272} Amazingly, the court stated that because the plaintiffs were aware of the words that were written on the monument, walking behind the monument would not eradicate the "injury."\textsuperscript{273} The court concluded that "a plaintiff may allege an injury in fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located."\textsuperscript{274}

\textit{I. Ninth Circuit}

In the case of \textit{Zwerling v. Reagan},\textsuperscript{275} plaintiffs challenged former President Ronald Reagan's proclamation of the year 1983 as the "Year of the Bible". Defendant Reagan moved for judgment on the pleadings asserting that plaintiffs did not have standing.\textsuperscript{276} The court noted that plaintiffs allegations were rhetoric that ignored a requirement of \textit{Valley Forge} that there be an "actual injury redressable by the Court" because "it tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."\textsuperscript{277} Nonetheless, the court decided that plaintiffs had no standing, not based on a "\textit{Valley Forge}" analysis, but because it did not consider the proclamation, or the Congressional action authorizing the proclamation, a "law" respecting the

\texttt{\textsuperscript{272} Id. at 300-01.}
\texttt{\textsuperscript{273} Id.}
\texttt{\textsuperscript{274} Id. at 301. Following this reasoning to its logical conclusion, a plaintiff, if aware of a constitutionally objectionable religious display, would have standing to challenge the display based solely on his right to pass by the object whether he intended to do so or not. This is exactly the type of "injury" that was held to be insufficient in \textit{Valley Forge}. Theoretically, a plaintiff in Chicago could sue the government in Indianapolis if he was aware of a religious display that he objected to solely on his right to visit that governmental building.}
\texttt{\textsuperscript{275} 576 F. Supp. 1373 (C.D. Cal. 1983).}
\texttt{\textsuperscript{276} \textit{Zwerling}, 576 F. Supp. at 1374. Plaintiffs asserted that they were harmed because: (1) the non-Christians and atheists do not accept the Bible as the Word of God; (2) non-Christians are singled out for disadvantageous treatment because of their minority religious status; (3) non-Christian clergymen are disadvantaged by having the prestige and power of the United States endorse the Christian Bible and undermine their ability to provide religious, spiritual and atheist leadership; and (4) Christians have their religious book used for political rather than religious purposes impeding their efforts to promote and engage in beneficial ecumenical dialogue with non-Christians.}
\texttt{\textsuperscript{277} Id. at 1374-75 (quoting \textit{Valley Forge}, 454 U.S. at 472).}
establishment of religion. Thus, the court ruled on the merits under hypothetical jurisdiction.

In the case of Ellis v. City of La Mesa, the Court of Appeals for the Ninth Circuit held that each plaintiff had standing because they: (1) avoided the Mt. Helix Nature Theatre because of a large cross; (2) avoided going to a park because of the cross’ dominance of the hilltop; and (3) would have invited business guests to his home but for the presence of the cross on the insignia. The court noted that to have standing, each plaintiff must “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” Here, the court followed Seventh and Eleventh circuit precedent that held “when a plaintiff alleges that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas.” Thus, the court determined that a party has standing if he “has been injured due to his or her not being able to freely use public areas.”

Consequently, in Zichko v. Clegg, the court held that an Idaho prisoner did not have standing to bring an Establishment Clause claim based on his mere exposure to the county’s Ten Commandments monument. The court relied upon the holding in Ellis and stated that a plaintiff must show that he has personally “suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” In this case, Zichko failed to submit any evidence of injury that he received from exposure, such as “complaining that the monument somehow prevented him from freely using the courthouse, or requesting an

278. Id. at 1375.
279. The Supreme Court has recently held that the practice of invoking hypothetical jurisdiction is not constitutional in the case of Steel Co. v. Citizens For A Better Environment, 523 U.S. 83 (1998).
280. 990 F.2d 1518 (9th Cir. 1993).
281. Id. at 1523. At issue in this consolidation of three cases was a 36 foot cross atop Mt. Helix in a county park, a 43-foot cross on the hilltop of Mt. Soledad in a city park, and a depiction of the Mt. Helix cross on one of the City of La Mesa’s official insignia. Id. at 1520.
282. Id. at 1523 (quoting Valley Forge, 454 U.S. at 472).
283. Id. (quoting Hewitt v. Joyner, 940 F.2d 1561, 1564 (9th Cir. 1992)) (citing ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986), and ACLU v. Rabun County, 698 F.2d 1098 (11th Cir. 1983)).
284. Id. (quoting Hewitt, 940 F.2d at 1564).
alternate route to avoid exposure to the monument."287

Likewise, in Doe v. Madison School District No. 321,288 the court held that plaintiff lacked standing to challenge graduation prayers in the defendant's school district because her children had already graduated from the schools and she did not allege that she planned to attend another graduation ceremony in the future.289 Therefore, the plaintiff did not "allege a direct injury resulting from her inability to attend a public event."290

J. Tenth Circuit

In Anderson v. Salt Lake City Corp.,291 the Court of Appeals for the Tenth Circuit held that plaintiffs had standing to bring suit challenging a Ten Commandments monument. The court found that "standing is clearly conferred by non-economic religious values when the plaintiffs assert a litigable interest under the Establishment and Free Exercise Clauses of the Federal Constitution."292 Therefore, the court held that "the plaintiffs have standing based on their beliefs about religion to question whether those beliefs have been infringed upon by an alleged use of public property for religious purposes."293

In Foremaster v. City of St. George,294 the court found that the plaintiff had standing based on his complaint that the City's subsidy of the exterior lighting of a Mormon temple caused him to suffer economic injury in the form of higher utility rates. The court also found that plaintiff had non-economic standing to challenge the city's use of a logo depicting the local Mormon temple.295 The court discussed Valley Forge's statement that plaintiffs in that case lacked standing because they "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequences presumably

287. Id.
288. 177 F.3d 789, 797 (9th Cir. 1999).
289. Madison Sch. Dist., 177 F.3d at 797. The main crux of plaintiff's argument in this case was her status as a taxpayer, which the court analyzed in detail, but, found that if the plaintiff "identifies no public funds that were spent solely on the challenged activity, then the plaintiff has not alleged a taxpayer injury." Id.
290. Id.
291. 475 F.2d 29, 31 (10th Cir. 1973).
293. Id. This case was decided nine years before Valley Forge.
294. 882 F.2d 1486, 1488 (10th Cir. 1989).
295. Foremaster, 882 F.2d at 1490-91.
produced by observation of conduct with which one disagrees." 296

Acknowledging that the circuits have interpreted this requirement in different ways, the court relied upon the Sixth Circuit case of Hawley discussed above. Thus, the court held that direct, personal contact sufficed as non-economic injury. 297

In Arizona Civil Liberties Union v. Dunham, 298 the court addressed a standing question similar to the one faced by the Ninth Circuit in Zwerling. 299 In this case, the court vacated a previous order dismissing the case for lack of standing on motion for reconsideration. In an amazing about face, the court completely skewed Supreme Court precedent on the standing issue in favor of how other circuits have interpreted those cases in the Establishment Clause context. The crux of the court's reversal of itself in this case stems largely from its emphasis on the "proximity" of plaintiffs to the challenged proclamation and "whether the psychological injuries of plaintiffs ... differed from those experienced by the plaintiffs in Valley Forge". 300

The court began its analysis like many of the other courts, distinguishing between Schempp and Valley Forge. 301 Probably the

296. Id. at 1490 (quoting Valley Forge, 454 U.S. at 485 (emphasis in original)).
297. Id.
299. See Zwerling for comments on the doctrine of "hypothetical jurisdiction." But see Reagan, supra (3d Cir.) (challenging presidential establishment of relations with the Holy See dismissed for lack of standing for inability to allege an "injury-in-fact").
300. Dunham, 112 F. Supp. 2d at 928. In Valley Forge, had the Dunham court bothered to examine the case itself, it would have found the following: Respondent Americans United claims that it has certain unidentified members who reside in Pennsylvania. It does not explain, however, how this fact establishes a cognizable injury where none existed before. Respondent is still obligated to allege facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution. Valley Forge, 454 U.S. at 487 n.23 (emphasis added). Thus, the Supreme Court did not base its decision on the proximity of plaintiffs to the challenged action. To the contrary, the Court searched for evidence of an injury other than psychological or constitutional differences that plaintiffs had with the challenged conduct. Moreover, Valley Forge did not distinguish between varying levels of psychological injury, rather, the Court unambiguously stated that "[plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III ..." Id. at 486 (emphasis added).
301. Dunham, 112 F. Supp. 2d at 929. Two errors that the court made in this case was its failure to recognize footnote 23 of Valley Forge (quoted in note 270 supra) that even if the plaintiffs in Valley Forge lived in Pennsylvania, it would have made no difference in the Court's decision, and that the plaintiffs in Schempp were "subjected to unwelcome religious exercises". Id. In this case, the proclamation was not a religious exercise and the fact that these plaintiffs suffered nothing else besides psychological injury is clearly insufficient to
most glaring error that this court made in its standing analysis was its reliance on the merits of Establishment Clause claims in *Allegheny County* and *Lynch*, instead of determining whether an actual particularized injury had been suffered by one of the plaintiffs.\(^{302}\) Next, the court relied upon the 1983 Eleventh Circuit case of *Rabun County* that held that "standing exists if the claimants were 'subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.'"\(^{303}\) The

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302. *Id.* Indeed, the court quotes Justice O'Connor's endorsement test rationale that stated that when a government endorses a religion "[i]t sends a message to nonadherents that they are outsiders, not full members of the political community . . . ." *Id.* (quoting *Lynch*, 465 U.S. at 688). Thus, the circuit court analysis is circular: if one alleges that certain governmental conduct makes him feel like a political outsider, it not only confers standing, but it also goes towards the merits of an endorsement analysis. Thus, under this standing "test," one need only allege an element of endorsement analysis in order to obtain standing, regardless of whether the person actually suffered a "distinct and palpable injury to himself." The Court flatly rejected this argument in *Valley Forge* and demands a showing of injured plaintiffs instead. *Valley Forge*, 454 U.S. at 489-90; see also the discussion in section 2 *supra* and note 20. In fact, it may be argued that the only reason one may alter his behavior to avoid contact with a religious display is because of a psychological or constitutional difference one has with the display. After all, if two people walking side by side down the street both witness the same display, what prompts one to avoid the display and not the other unless it is a psychological or constitutional difference one may have that the other does not have with the display? It cannot be realistically argued that an inanimate object by itself can cause a distinct and palpable injury to one person and not another outside of some other government conduct that distinguishes between the two individuals. Hence, what one is left with is a generalized grievance, common to all members of society and better addressed by the legislative branch of government instead of using the federal courts as debating societies. Even in civil rights discrimination claims, one does not have standing to bring a discrimination case just because one is a member of a protected class outside of some injury personal to that person, e.g., if a black person from one state were denied admission to a state university of another state based upon that person's race, another black person that lived in the same city as the offending university would not have standing to litigate a discrimination claim even though he was closer in proximity to the alleged discriminatory conduct unless the university had directed its discriminatory conduct to that person as well. *Cf.* Allen v. Wright, 468 U.S. 737, 755 (1984) (denying standing to plaintiffs who claimed that they were stigmatized by racial discrimination because none of the plaintiffs could show that they had personally been denied equal treatment by the challenged discriminatory conduct). Thus, proximity without injury is meaningless. By the same token, if one were a resident of East McKeesport, PA and Allegheny County refused him services because he was not a member of a particular religious faith, that person would have standing to challenge the government's conduct as opposed to a person that lived closer to the county seat who was not personally subject to the county's allegedly illegal conduct.\(^303\)

303. *Id.* (quoting *Rabun County*, 698 F.2d at 1108 (quoting *Valley Forge*'s discussion distinguishing *Schempp*)). Again, a religious display involves no "religious exercise" nor does it "force" anyone to do anything, one may look or not look as one wishes. Indeed, the relevant definition of "force" is "[t]o compel through pressure or necessity." *American Heritage Dictionary* 522 (2d college ed. 1982). "Th[is] verb[ ] means to make a person or thing follow a prescribed or dictated course. Force, is broadly applicable to any such act and usually implies the exertion of physical strength or the operation of circumstances that
court then noted that the Ninth Circuit had adopted the “avoidance” standard, however it recognized that it was inapplicable to the case at hand because plaintiffs have not been interfered with in their use of public property.\textsuperscript{304} The court found that plaintiffs’ injury in this case was analogous to the injury in \textit{Saladin} because plaintiffs were made to feel like “second class citizens” by coming into direct contact with the Bible Week Proclamation.\textsuperscript{305} Indeed, the court held that only local residents

permit no alternative to compliance.” \textit{Id.} at 523. The keyword in the definition is “compel” which, although “often interchangeable with force, stresses the power or strength of what causes compliance and is especially applicable to an act dictated by a person in authority.” \textit{Id.} Thus, a simple study of the English language reveals that an inanimate object is unable to “force” or “compel” and, therefore, makes \textit{Schempp} inapposite to the issue of standing in religious display cases. Although it may be argued that a “stop sign” or “traffic lights” force or compel people to take certain actions, the people directly affected by those inanimate objects know that there is a “law” being enforced through them, whereas, with a religious display, no law is being thrust upon the public. In addition, the court cited the case of \textit{Saladin v. City of Milledgville}, 812 F.2d 687 (11th Cir. 1987) that also relied upon the appellants allegations of endorsement, in order to find standing. This rationale was disposed of in note 299 \textit{supra}. Again, the injury alleged in \textit{Saladin} was that the seal gave the plaintiff “[t]he feeling of being a second class citizen.” \textit{Saladin}, 812 F.2d at 692-93. How plaintiff’s hurt feelings are not a psychological injury is mysterious legal analysis.

\textit{Dunham}, 112 F. Supp. 2d at 930. The court noted that the Ninth Circuit has yet to address the issue as to whether unwelcome direct contact with religious displays is sufficient to confer standing. \textit{Id.}

\textit{Allen} v. \textit{Wright}, 468 U.S. 737, 753-55 (1984) as support for its proposition that the plaintiffs suffered a particularized injury because they were made to feel like “outsiders” and not merely an “abstract injury” insufficient for standing purposes. \textit{Dunham}, 112 F. Supp. 2d at 933. However, the Supreme Court in \textit{Allen} was very explicit in its explanation of the standing requirement in a racial discrimination equal protection case: Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that the sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to “\textit{those persons who are personally denied equal treatment}” by the challenged discriminatory conduct. \textit{Allen}, 468 U.S. at 755 (emphasis added). Thus, the fact that the plaintiffs in \textit{Allen} suffered a stigmatizing injury was insufficient to confer standing without some particular discriminatory government action directed to them personally. Likewise, in religious display cases, the fact that a plaintiff belongs to a group dedicated to the separation of church and state and is stigmatized or made to feel like an outsider because of a religious display, that fact alone is insufficient to confer standing without some governmental action directed personally toward that individual. If it were otherwise, why make plaintiffs go through the motions and allege whatever is necessary to confer standing, and, instead, just allow any plaintiff to bring an action against a religious display merely because he is offended. Yet, this is exactly what the Court in \textit{Valley Forge} found to be insufficient for standing purposes in Establishment Clause cases. Furthermore, the \textit{Allen} Court opined:

If 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 by its grant of a tax exemption to a racially discriminatory
“directly affected” by the town’s action would have standing to challenge the proclamation. Finally, the court held that if the 1997 Proclamation was declared unconstitutional, the Plaintiffs were awarded nominal damages, and future Bible Week proclamations of a similar nature are enjoined, the traceability and redressability elements of standing are satisfied.

In the case of Schmidt v. Cline, the court recognized that although Tenth Circuit precedent allows standing to plaintiffs who allege a “direct, personal injury resulting from the challenged [governmental] conduct,” the plaintiffs lacked standing to challenge the display of a poster that a county treasurer displayed in her office that displayed the words “In God We Trust.” The court announced the irreducible minimum elements of standing and noted that “standing may be predicated upon non-economic injury.” The court also recognized that a claim that the Constitution has been violated does not confer standing.

In this school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents claim . . . . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition 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.” Constitutional limits on the role of federal courts preclude such a transformation. Id. at 755-56 (citation omitted). Cf. Valley Forge, 454 U.S. at 489-90 n.26 (stating that an alleged violation of a “personal constitutional right” to a government that does not establish religion is insufficient to confer standing upon an individual).

Dunham, 112 F. Supp. 2d at 905. The court’s reasoning here is untenable as well. If the stigmatic injury alleged by plaintiffs is sufficient to confer standing because they are residents, why would not a person visiting the town of Dunham for a week not have standing to bring an action against the town? Valley Forge and Allen both hold that it is not proximity, but an injury suffered by a plaintiff as the result of government conduct directed at a particular individual that satisfies the injury prong of standing. On the one hand, there could be two people suffering the same stigmatic injury for the same length of time, yet, under the Dunham court’s reasoning, only one person would have standing based upon his residency. On the other hand, if the visiting person were denied the services of the town because he did not observe the proclamation issued by the town, that person should have standing regardless of his residency because, in that instance, the person had suffered a direct, palpable injury. Hence, it is not proximity that matters, but a real, personal injury.


Schmidt, 127 F. Supp. 2d at 1172, 1175 (citing Foremaster, 882 F.2d at 1490-91).

Id. at 1172 (citing Valley Forge, 454 U.S. at 486).

Schmidt, 127 F. Supp. 2d at 1172 (citing Valley Forge, 454 U.S. at 485). Nonetheless, the court failed to understand the Valley Forge Court’s discussion of Schempp. In Schempp, the plaintiffs were directly affected by the laws and practices of Abington Township School District because they were subject to unwelcome “religious exercises” and had to assume special burdens to avoid them, not because they came into direct contact with an inanimate religious display.
case, plaintiff Stearns alleged no contact at all with the display, only that she objected to the defendant's acts.\textsuperscript{312} Moreover, both plaintiffs failed to allege that they continued to suffer any emotional, psychological, spiritual, or other non-economic harm from defendant's alleged acts.\textsuperscript{313} What the court did find decisive in denying plaintiffs standing was that their assertions failed to "demonstrate that they face a likelihood of future harm as a result of defendant's conduct, as is necessary to warrant injunctive relief."\textsuperscript{314} Moreover, "[a]llegations of defendant's acts directed toward the general public or persons other than these plaintiffs, whether years before the lawsuit was filed, or during the pendency of this suit, do not relate to the standing of these plaintiffs to maintain this suit."\textsuperscript{315} Thus, the "sole threat of future harm to plaintiffs is hypothetical, not real and immediate."\textsuperscript{316} Finally, the court was unable to envision what type of relief would redress plaintiff's alleged harm, and, therefore, found that plaintiffs had no standing.\textsuperscript{317}

K. Eleventh Circuit

\textit{ACLU v. Rabun County Chamber of Commerce, Inc.,}\textsuperscript{318} is cited extensively for its holding that because plaintiffs would not camp in a public park that contained a display of a lighted cross, they showed sufficient injury in fact to separate them from the general public who may be merely offended by the display.\textsuperscript{319} In this case, the court recognized that \textit{Valley Forge} emphasized that there is no "sliding scale" of standing, and that "a mere spiritual stake in the

\textsuperscript{312} Id. at 1173.

\textsuperscript{313} Id. Given the holding of \textit{Valley Forge}, it is unclear why the court should even concern itself with those psychological "harms." Plaintiff Schmidt has had personal contact with acts of the defendant such as: 1) the "defendant wrote plaintiff Schmidt a letter on her official letterhead in which defendant questioned plaintiff's integrity and patriotism, criticized plaintiff's religious beliefs, and revealed defendant's 'religious motivation' for hanging the posters;" 2) "defendant mailed plaintiff Schmidt a tract about the Bible;" 3) "defendant made 'disparaging remarks about plaintiff Schmidt's religious faith and practices;" and 4) "defendant sent plaintiff Schmidt another letter in which she 'likened herself and her official mission to those of Jesus Christ.'" \textit{Id.} Here, the court mentioned that even though plaintiff Schmidt's contact with the alleged offensive acts were "less direct, more limited, more infrequent, and more avoidable than the contact in \textit{Foremaster}" and not on a daily basis, that did not make her standing claim insufficient. \textit{Id.} at 1174.

\textsuperscript{314} Schmidt, 127 F. Supp. 2d at 1174.

\textsuperscript{315} Id.

\textsuperscript{316} Id. at 1175.

\textsuperscript{317} Id.

\textsuperscript{318} 698 F.2d 1098 (11th Cir. 1983).

\textsuperscript{319} Rabun County, 698 F.2d at 1108.
outcome nor an intense commitment to separation of church and state is a ‘permissible substitute for a showing of injury itself.’”\textsuperscript{320}

In addition, the court noted that the psychological consequence of observing conduct with which one disagrees is not a sufficient injury for standing purposes.\textsuperscript{321}

The court relied on \textit{Sierra Club} to differentiate between a “representative of the public” and individual members of that club whose use of the park would be affected by the government’s action.\textsuperscript{322} However, the death knell for the defendants in this case was the court’s application of \textit{Schempp}. The court stated that because the plaintiffs in this case were “forced to assume special

\textsuperscript{320.} \textit{Id.} at 1103 (quoting \textit{Valley Forge}, 454 U.S. at 765-66).

\textsuperscript{321.} \textit{Id.} (citing \textit{Valley Forge} 454 U.S. at 766). Here, the plaintiffs consisted of five residents of Georgia and the ACLU of Georgia. The plaintiffs alleged that their beneficial right of use and enjoyment of a state park had been deprived and that, therefore, they have suffered an injury in fact. \textit{Id}. All of the plaintiffs alleged that they would not use the park on account of the cross, but only two of the plaintiffs were actually campers who refused to camp in the park. \textit{Id.} at 1103-04.

\textsuperscript{322.} \textit{Id.} at 1104 (citing \textit{Sierra Club}, 405 U.S. at 735-36). Notably, however, the Eleventh Circuit failed to distinguish between the types of harm between a case that involves actual adverse impact to the environment as the result of a road to be constructed in a National Park, and the psychological consequence of observing conduct with which one disagrees and thereby refusing to use a park merely because it contains a “religious” display. On the one hand, any two people who use the park in the first example would have standing because their use of the park has actually been diminished by the government action of altering the ecology of the park. There would be no need to delve into the subjective thoughts of the person asserting standing. On the other hand, if two people see a religious display in a park and the one person avoids using the park because the display offends him, his actions are the result of a psychological consequence of observing conduct with which he merely disagrees which, is insufficient for standing purposes. In other words, the first example shows that anyone using the park has been deprived somewhat of the beneficial use and enjoyment of the park; however, the second example shows that it is the person’s spiritual, psychological, or constitutional beliefs that are relied upon to determine whether his use of the park is diminished. These are examples of what \textit{Valley Forge} has held to be insufficient to confer standing. The court also cited \textit{Duke Power Co. v. Carolina Environmental Study Group, Inc.}, 438 U.S. 59 (1978) for the proposition that “outside the context of taxpayer standing cases, a noneconomic injury was sufficient to confer standing to assert any type of constitutional right.”\textit{Rabun County}, 698 F.2d at 1105 (purporting to cite \textit{Duke}, 438 U.S. at 78-79). What the Court actually stated in \textit{Duke} was that “[w]here a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.”\textit{Duke}, 438 U.S. at 80-81. Thus, reading what the Court actually stated, there must be more than just a “constitutional right” for standing; moreover, the court’s reliance on this language is somewhat suspect given that \textit{Valley Forge} had already been decided at the time and delineated the elements of standing in an establishment clause case. \textit{See Valley Forge}, 454 U.S. at 472. The court also relied on \textit{Allen v. Hickel}, 424 F.2d 944 (D.C. Cir. 1970) as precedent, a case that granted standing to plaintiffs who alleged that they avoided a national park to avoid looking at a crèche. This circuit court case preceded \textit{Valley Forge} by 12 years.
burdens” to avoid the cross, their injury was similar to the injury of the schoolchildren in *Schempp*. Moreover, the court opined that the plaintiffs had demonstrated an “individualized injury” and not a “mere psychological reaction” suffered as a consequence of the challenged action.323

In the case of *Harvey v. Cobb County*,324 a Ten Commandments display was at issue. First, the court addressed the standing issue.325 The court paid lip service to *Valley Forge*, but then decided the citizen standing issue in relation to Harvey on the basis of *Schempp* and the *Rabun County* decision.326 In this case, the court did not require the plaintiffs to allege that they assumed any special burden to avoid the plaque.327 The court stated that it was enough that Harvey’s law practice brought him into direct unwelcome contact with the panel on a regular basis, which sets him apart from the general public, and, thus, he had citizen standing.328 The court stated that Cunningham had taxpayer standing because of the above “cleaning and moving expenditures” that the court said constituted the use of tax revenues, however

323. *Rabun County*, 698 F.2d at 1107-08. Why the plaintiffs needed to avoid the park, if not because of the consequence of their psychological reaction to viewing the cross, was not explained. In *Schempp*, by statute, schoolchildren were under state compulsion to attend school, required to hear and/or recite Bible verses and recite the Lord’s Prayer or ask to be excused therefrom. *Schempp*, 374 U.S. at 209-12. In religious display cases, there are no religious exercises that anyone is forced to participate in, i.e., there is no statute or ordinance mandating compulsory viewing of the object, one may look or not look as they please. The burden that the school children assumed in *Schempp* was necessary to avoid what were otherwise requirements of religious participation mandated by the state. Thus, one is not forced to undergo any burden to avoid compulsory religious exercises in a religious display case, because looking upon the object is not mandatory. Neither are the plaintiffs in this case “impressionable schoolchildren.” The only thing “forcing” these plaintiffs to assume any burden of not seeing the object is their own psychological reaction to the challenged conduct.

325. Plaintiff Harvey is a criminal defense attorney that has a statewide practice and has had 5 or 6 cases in the past year in the courthouse, with another scheduled. *Harvey*, 811 F. Supp. at 673. He passes by the panel on a regular basis while there and does not avoid or “seek out the panel.” *Id.* He is “offended” by the display of “a religious symbol . . . in a secular courthouse.” *Id.* He believes that it sends a message to some of his clients that they are “starting unequal” in the Cobb County Court system. *Id.* Harvey has not modified his behavior or altered his law practice because of the panel. *Id.* Plaintiff Cunningham is a taxpayer in Cobb County. *Id.* In the past three years he has been in the State Court Building approx. twenty times and has seen the panel many times. *Id.* He has been there as a defendant and as a juror. *Id.* He views the panel as “purely religious” and as indicative of the influence of religion in general and Christianity in particular on “our government” and court system. *Id.* He has not modified his behavior because of the display. *Id.*

326. *Id.* at 674-75. See supra notes 315-20 and accompanying text.
327. *Id.* at 675.
328. *Id.*
small and indirect.\footnote{329}{Id. at 675-76.}

In \textit{Alabama Freethought Ass'n v. Moore},\footnote{330}{893 F. Supp. 1522, 1545 (N.D. Ala. 1995).} the court dismissed plaintiffs' challenge to a Ten Commandment's plaque in Judge Roy Moore's courtroom and the opening prayer used in his courtroom for lack of standing. Plaintiffs' alleged that they must assume special burdens to avoid the conduct of prayer and observation of the plaque. They felt that defendant's conduct symbolized government endorsement and approval of religion and they were offended.\footnote{331}{Moore, 893 F. Supp. at 1524-25.} Notably, the court examined in detail just exactly where, when, why, and how each plaintiff's daily routine brings them into contact with the complained of practice.\footnote{332}{Id. at 1533-42.}

The district court analyzed plaintiffs' claims under "citizen" and "taxpayer" standing. The court found that the constitutional minimum requirements for standing are: (1) an injury in fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable ruling that is not too speculative.\footnote{333}{Id. at 1530 (citing \textit{Lujan}, 504 U.S. at 560; \textit{Simon}, 426 U.S. at 41-42; \textit{Allen}, 468 U.S. at 752; and \textit{Valley Forge}, 454 U.S. at 472).} In addition, where a plaintiff seeks declaratory and injunctive relief (i.e., "forward-looking relief"), the injury-in-fact must be particularized and imminent; there must be a "real and immediate threat of future harm."\footnote{334}{Id. (citing \textit{Adarand Constructors, Inc. v. Pena}, 115 S. Ct. 2097, 2104-05 (1995); \textit{Lujan}, 504 U.S. at 566 n.2).} For taxpayer standing, plaintiffs must allege and prove: (1) that the complaining party is a municipal taxpayer, and (2) that municipal funds are being spent on the challenged activities.\footnote{335}{Id. at 1532.}

Here, plaintiffs did not have standing because they neither alleged nor provided evidence that their business affairs or other activities include their making regular appearances in defendant's courtroom.\footnote{336}{Moore, 893 F. Supp. at 1540-41.} Neither did plaintiffs allege or offer evidence that they would be subjected to undue burdens to avoid the allegedly offensive conduct.\footnote{337}{Id. at 1541.} Furthermore, there was not a scintilla of evidence that plaintiffs must come into direct and unwelcome
contact with the plaque to participate in their local government and fulfill their legal obligations. Moreover, plaintiffs' allegations that defendant's display and conduct offends them is no more than a subjective complaint of harm, and is not sufficient to establish the objective injury-in-fact necessary to establish standing. Indeed, "plaintiffs' status as active participants in public debate, and as vociferous opponents of defendant's activities, is simply too thin a mantle in which to cloak their standing to litigate . . . . 'Standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.'" The court dismissed plaintiffs' taxpayer standing allegations by noting that they did not allege that a measurable appropriation of tax revenue is being spent on defendant's display or that any money whatsoever is spent on maintaining the plaque.

IV. HOW "RELIGIOUS DISPLAY" NON-ECONOMIC STANDING SHOULD BE ANALYZED — A TYPICAL SCENARIO

The typical "religious display" scenario usually arises when an organization such as the Americans United for Separation of Church and State or the ACLU files a civil complaint in any one of the 97 United States District Courts alleging that some type of "display" violates the Establishment Clause of the First Amendment. Because of the proliferation of lawsuits involving

338. Id. The court distinguished Rabun County on the basis that none of the instant plaintiffs were repeatedly subjected to the allegedly unconstitutional conduct in their regular course of business or pleasure. Id. at 1540.

339. Id.

340. Id. (quoting Valley Forge, 454 U.S. at 486).


342. This organization of approximately 60,000 members, formed coincidentally in 1947 (the same year Everson v. Board of Educ., 330 U.S. 1 (1947) was decided), purports to protect the religious liberty that "[o]ur forefathers fought, bled and died" for. About AU, at http://www.au.org/about/htm (last visited Aug. 28, 2001). AU's actions and ideology show that nothing could be further from the truth. AU filed a civil complaint challenging a plaque affixed to the Allegheny County Courthouse entitled The Commandments in the Western District of Pennsylvania on March 20, 2001. See Modrovich v. Allegheny County, No. 01-531 (W.D. Pa. filed Mar. 20, 2001).


345. On October 30, 2001, both AU and the ACLU of Alabama joined forces in filing a lawsuit to remove a granite monument of the Ten Commandments that Chief Justice Roy Moore of the Alabama Supreme Court had erected in the rotunda of the Alabama Judicial Building in Montgomery, Alabama. Steve Benen, Monumental Mistake: Alabama Chief
various displays of the Ten Commandments in recent years, the article will use such a scenario as the basis for the type of allegations normally asserted in those cases.

As illustrated in the preceding survey of circuit and district court decisions involving the citizen standing, plaintiffs will raise a variety of allegations in an effort to obtain standing in “religious display” cases. For example, a plaintiff may allege that he has seen the display a specific number of times and, in addition, may allege that his future travels will take him past the display. On the other hand, a plaintiff might allege that he routinely sees the display as a result of his normal daily activities. Often, but not always, there will be allegations that the plaintiff must alter his route to avoid “contact” with the display. Next, the plaintiff normally avers that the display is an endorsement of religion and that because he does not believe or agree with the “religious” nature of the display, the government must, therefore, view him in one of three ways: (1) as someone on the margins of society; (2) that the government is trying to establish an official religious tradition; and/or (3) that the government does not view him as a legitimate member of the community. Finally, a plaintiff may include allegations that the display is offensive and that he disagrees with it either philosophically and/or constitutionally.

The problem with these typical allegations is that they do not establish any injury caused by the display unless the court considers the underlying merits of the plaintiff’s claim. The allegations of endorsement, being on the “margins of society,” establishing an “official religious tradition,” and not being viewed as a legitimate member of the community are “buzz-words” that go to the merits of the plaintiff’s Establishment Clause claim.


347. “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . . .” Lynch, 465 U.S. at 688 (O’Connor, J., concurring); see County of Allegheny, 492 U.S. at 623-36 (detailing the endorsement analysis) (O’Connor, J., concurring). Any allegation that the government views such a Plaintiff as someone on the margins of society is nothing short of ludicrous. That exceedingly rare term has been used in only a handful of state and federal court opinions to refer to persons who are among the
Allegations such as these do not assert any type of palpable injury to the plaintiff as a result of viewing the display. Although many of the court cases analyzed herein have allowed plaintiffs to establish standing on the barest supporting allegations in Establishment Clause cases, this relaxed standard has allowed the federal courts to become political debating arenas for those who have philosophical differences with the government.

In order to illustrate why the Court has interpreted the Article III case or controversy requirement to insist on the demonstration of an injury-in-fact before a court can address the merits of the plaintiff's claim, consider the following. One of the plaintiff's allegations in a "religious display" case obviously will aver that the challenged display is religious. However, the issue of religiosity of the display is a core element of an Establishment Clause test. Thus, a plaintiff would have to admit that he has no case if, after passing the standing threshold, he is unable to prove that the display somehow has a religious purpose, has the principal or primary effect of advancing religion, or excessively entangles the government with religion. Thus, the allegation that the display is "religious" is irrelevant to the standing issue because the plaintiff must first allege a distinct and palpable injury to himself, caused by the display, before he can argue the merits of his Establishment Clause claim.

In other words, assume that a plaintiff, who happens to be a Quaker, has filed suit challenging a display that consists of several war memorial monuments on the basis that they violate the Establishment Clause. For instance, he alleges that the government, through the monuments, is promoting religious traditions that have conceded the necessity of war, but because the plaintiff's religious beliefs consider war to be sinful, the government's display is highly offensive to the plaintiff and thus, constitutes an establishment of religion. At first blush, this plaintiff's complaint would appear easy to dismiss because it would seem that there is no way that the display of war memorials could violate the Establishment Clause.

criminal element of society or those in the depths of poverty in our society. See United States v. Hauptman, 111 F.3d 48, 52 (7th Cir. 1997) (using the term "margins of society" as the general phrase to complete an ejusdem generis of the specific terms "ignorant, impoverished, desperate, and deranged"); see also Commonwealth v. Means, 773 A.2d 142 (Pa. 2001). A Plaintiff would be hard pressed to provide evidence to support his belief that the government viewed him, or ever viewed him, as such.

348. See Lemon, 403 U.S. at 612-13. The Lemon test is normally applied in some fashion to "religious display" cases.
However, may the court just assume jurisdiction and dismiss the case based on the assumption that the case appears unlikely that the Plaintiff could prevail? The answer is that courts are no longer permitted to assume hypothetical jurisdiction and, therefore, the court would have to address whether this plaintiff has standing to proceed with his claim in federal court. Thus, the court must assure itself that the plaintiff has standing before it could consider the merits of whether the war memorial monuments actually established a religious tradition or even consider whether the government justifies participation in war because of the religious beliefs of the local politicians. Moreover, even though plaintiff's chances of prevailing on the merits may look bleak, it is doubtful that it could be said that plaintiff's claim is "entirely frivolous."

Consider also a government display that honors famous humanists. Would a fundamentalist Christian plaintiff be able to assert that the display violates the Establishment Clause because the government appears to be establishing the religion of secular humanism? The Supreme Court of the United States has recognized that secular humanism is a religion for First Amendment purposes. Certainly, a complaint challenging such a display would appear to be meritorious provided that the plaintiff could satisfy the standing requirements.

Consequently, the plaintiffs' allegations in these cases, if similar to the allegations in most "religious display" cases, would perhaps include the following. Plaintiffs may state that they are offended by war or humanism and, every time they see war or humanism honored by the government, they are offended. In addition, these plaintiffs would most likely allege that because of the presence of the war memorial monuments or humanism display, the government is endorsing religions that do not consider war sinful or the religion of secular humanism, and therefore, makes them feel like outsiders in the political community and/or on the margins of society. Would these allegations be sufficient to confer standing?

349. See supra notes 275-79 and accompanying text.
350. See Steel Co., 523 U.S. at 95.
351. See Id. at 97, n.2. An increased burden on plaintiffs to show a real, distinct, and palpable injury would also make it unnecessary in most cases for the court to determine whether a claim is frivolous because unless plaintiff's burden was met, the case could be dismissed on standing.
352. See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (stating that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others").
An objective look at plaintiffs' "injuries" in these two hypothetical situations, reveal that the only "injuries" asserted by the plaintiffs is that they have been offended and that they allege that the constitution has been violated because of the "religious" nature of the displays and that the displays endorse religion. Under Valley Forge, plaintiffs who "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees," have not alleged an injury sufficient to confer standing, "even though the disagreement is phrased in constitutional terms."\(^3\) Thus, plaintiffs allegations of religiosity and endorsement go to the merits of the underlying establishment clause claim and not to the issue of standing.

However, because several circuits have found allegations such as these sufficient to confer standing, as illustrated by the hypotheticals, there is virtually no limit to the displays that an imaginative plaintiff could challenge in federal court. In other words, if the district courts were to acknowledge standing based on mere statements of the elements of a cause of action, almost anyone could manufacture standing merely by reciting the elements of Lemon or the endorsement test or any number of "tests" the Court has announced from time to time without the need for showing a distinct and palpable injury to himself. Clearly, the function of the federal courts is not to be the debating forum on whether plaques, memorials, or other types of displays on government property violate the Constitution. Although these hypothetical suits may sound a bit far-fetched, they illustrate the following point: the underlying Constitutional claim one is bringing makes no difference, "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself."\(^4\) Thus, take away plaintiffs reliance upon the claim that the Establishment Clause has been violated, either in these hypothetical cases, or in the actual "religious display" cases that are filed, and there is simply no injury. Plaintiffs allege that the Constitution has been violated — they allege nothing else.

Many of the cases examined herein take into account the regularity of the plaintiff's contact with the "offensive" display. To begin with, intermittent viewing of the display or purposeful

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353. Valley Forge, 454 U.S. at 485-86 (emphasis added).
354. Warth, 422 U.S. at 501.
viewing of the display for litigation should be entirely insufficient to establish any type of injury in fact. Additionally, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Moreover, vague allegations of incurring an injury at some obscure, indefinite time in the future is far too speculative to satisfy the imminence requirement of standing. Likewise, a plaintiff who avers that he plans to purposefully walk by the display in the future is nothing more than an attempt to manufacture an alleged injury. This is simply an unacceptable manipulation of Article III's standing requirement designed to make a mockery of the judicial system by plaintiffs whose only "injury" is an admitted philosophical and constitutional difference with the government and the way they feel the constitution ought to be interpreted. More commonly, however, the plaintiff will allege that he passes the display virtually every day. Again, should it really matter whether a plaintiff passes a display once, or passes it twice every day, if there is no distinct, palpable injury as a result of his viewing the display?

Some of the court cases examined herein have found an injury-in-fact if the plaintiff was "forced" to change his behavior or alter his route because of the display. The position of this paper is that if a plaintiff alters his route to avoid contact with a display, that is nothing more than the psychological consequence of viewing a display that one finds offensive; therefore, because "psychological offense" is insufficient for standing under Valley Forge, this allegation should not be considered evidence of an injury-in-fact. Nonetheless, at the very minimum, a plaintiff should have to allege, plead, and prove a change of behavior, because of the display, for evidence of an injury. This line of reasoning is consistent with the Seventh Circuit's decision in Zielke where the court dismissed plaintiffs' case for lack of standing because the plaintiffs

355. The case of ACLU-NJ v. Township of Wall ACLU-NJ, No. 00-2075, 2001 WL 320914 (3d Cir. Apr. 3, 2001) is instructive. In ACLU-NJ, the court noted that the plaintiffs lack of contact with the alleged offensive holiday display was insufficient to establish Article III standing. Id. at *7. In addition, the court noted that contact with a display only for the purposes of litigation does not support the evidentiary requisite of proof needed to sustain plaintiff's burden for obtaining standing. Id.


357. Id. at 1536 n.26. Indeed the Moore court stated that "[i]mmimence . . . has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." Id. (quoting Lujan, 504 U.S. at 565 n.2).
“conced[ed] that they did not alter their behavior in any manner as a result of the Ten Commandments monument; they allege[d] only that they have ‘suffered a rebuke to [their] religious beliefs.’”358 The court may have found a distinct and palpable injury if plaintiffs had refused to go to the park where the Ten Commandments monument was displayed because they would have alleged that their right to use the public park had been adversely affected by the monument’s presence.359 Consistent with this analysis, a plaintiff that alleges that he intends to continue walking the same route and continue to pass the display on a regular basis has shown no change in behavior and therefore, not even the most minimal averment of injury.

Along this line, even if plaintiff walks by the plaque daily, his proximity to the plaque is not relevant in determining whether he has suffered an injury-in-fact. For example, plaintiffs allegations that they live in and/or work in the geographical proximity of the display and see the display regularly, are no different than the AU’s members in Valley Forge who lived in Pennsylvania and may have seen the college or even may have lived next to the college. The Court found that these allegations are irrelevant because they do not “establish[] an injury where none existed before.”360 Thus, whether a plaintiff passes by the plaque every day, or whether he has seen it only once, is immaterial without any allegation that the plaque has injured him apart from any psychological and constitutional differences that the plaintiff avers. On the other hand, if a Maryland resident visiting the State of Indiana were forced by a government official in Indianapolis to read or obey a “religious display,” that person may have a cognizable injury even though he has only seen the display once, despite the fact that he is a Maryland resident.

358. Zielke, 845 F.2d at 1468. Nevertheless, the Seventh Circuit in the Books case disregarded its own precedent and allowed standing to the plaintiffs in that case based on an imaginative reading of Doe v. County of Montgomery, 41 F.3d 1156 (7th Cir. 1994). In County of Montgomery, the court held that plaintiffs’ had standing because they could not avoid coming into direct contact with a sign over the entrance to the courthouse that read: “THE WORLD NEEDS GOD.” County of Montgomery, 41 F.3d at 1159 (emphasis added). In Books, however, the court stated that even though the plaintiffs could have altered their route to avoid the monument, they need not do so because the plaintiffs were merely aware of the text of the monument even if they don’t see it. Books, 235 F.3d at 300-01 (emphasis added).

359. Zielke, 845 F.2d at 1468.

360. Valley Forge, 454 U.S. at 487 n.23; see also City of Edmond, 134 L. Ed. 2d at 802 (Rehnquist, C. J., dissenting from denial of certiorari) (stating that plaintiffs “mere presence in the city, without further allegations as to injury, quite clearly fails to meet the standing requirements laid down in cases such as Valley Forge”).
Plaintiffs may also allege that they must come into contact with the "religious display" to participate as citizens in the government. However, if the plaintiffs have not been coerced to look at the display, participate in any governmental "policies or goals" regarding the display, or alter their behavior in any way because of the display's presence, how does mere contact with the display establish an injury? Of course, plaintiffs may feel stigmatized because the display offends their own beliefs or lack thereof. Nonetheless, the court addressed this argument stating that even if plaintiffs felt "stigmatized" by the government's action, "such [stigmatizing] injury accords a basis for standing only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct'".361 Thus, the display must also be a substantial factor in the causation chain. If the display is merely one of a multitude of items that offend a plaintiff because of his different beliefs, there is an ample likelihood that the removal of the display would only lessen a plaintiff's offense somewhat, and not totally redress his alleged offended feelings. Consequently, if the government has never treated the plaintiff differently than the citizens at large, and he has never been denied equal services despite his "different" beliefs, the plaintiff is simply indistinguishable from the public at large and unable to show any particularized injury-in-fact.

V. CONCLUSION

Religious display suits actually provide no concrete benefit to the plaintiffs and, like many suits that are "brought to . . . 'determine questions of law in thesi,' . . . [they] are most often inspired by the psychological smart of perceived official injustice by the government-policy preferences of political activists."362 Clearly, the relief that most plaintiffs request through their allegations, removal of the display, would not remedy their alleged injuries and, at most it would make them feel less offended. "[A]lthough a suitor may derive great comfort and joy from the fact that [the Establishment

361. Reagan, 786 F.2d at 201 (quoting Allen, 468 U.S. at 755; quoting Heckler v. Mathews, 465 U.S. 728, 739-40 (1984)) (brackets in original). Indeed the Allen Court recognized that "[i]f the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular [religious] group" and "[t]he recognition of standing in such circumstances would transform the federal courts in to 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Allen, 468 U.S. at 755-56 (quoting SCRAP, 412 U.S. at 687 (1973)).

362. Steel Co., 523 U.S. at 103 n.5 (quoting Marye v. Parsons, 114 U.S. 325, 330 (1885)).
Clause not be violated], that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that *psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.*\(^3\)

Potential plaintiffs may argue that in religious display cases, if they do not have standing to sue, how will anyone ever be able to challenge a "religious display"? This argument was also answered in *Valley Forge*:

> This philosophy has no place in our constitutional scheme. . . . Respondents' claim of standing implicitly rests on the presumption that violations of the Establishment Clause typically will not cause injury sufficient to confer standing under the "traditional view of Art. III. But "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

\(\ldots\) [W]e are unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit.\(^6\)

Thus, absent any allegations that plaintiffs have truly suffered some type of palpable injury from the plaque, reliance upon the political process, not the courts, is not only proper; it is totally consistent with our form of government. Indeed, the fact that there is no palpable injury in most religious display cases is a strong indication that there has been no violation of the Establishment Clause. Citizens who harbor this type of generalized grievance against religious displays are directed to seek legislative solutions, not judicial ones. The federal courts are not "college debating societies" designed for the pleasure of would-be Establishment Clause watchdogs.

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363. *Id.* at 107 (emphasis added).


> In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

*Id.* at 179.