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*By Carl H. Esbeck**

The U.S. Supreme Court is quite vigilant in enforcing its justiciability rules concerning standing to sue. For over half a century, however, the Supreme Court has reduced the rigor of its standing rules when a claim is lodged under the Establishment Clause of the First Amendment. The Court famously did so with respect to federal taxpayer standing in the venerable case of *Flast v. Cohen*,[1] but in no instance other than claims invoking the Establishment Clause is federal or state taxpayer standing ever permitted.[2] Less well known is the reduced rigor with which the Court has applied its standing rules when it comes to a plaintiff's "unwanted exposure" to a religious symbol or other speech attributable to the government.

The Roberts Court narrowly construed its prior cases permitting taxpayer standing to challenge government payments for religious purposes in *Hein v. Freedom From Religion Foundation, Inc*.[3] Recently the Court granted certiorari in *Salazar v. Buono*,[4] a case which raises the question of the standing required of a plaintiff in an "unwanted exposure" lawsuit that seeks the removal of a Latin cross on federal property because it is alleged to be in violation of the Establishment Clause.

The Supreme Court's cases on "unwanted exposure" do not require religious coercion or other individualized harm as plaintiff's "injury in fact." Rather, the cases evince a willingness to find standing when a plaintiff's status naturally results in him or her being personally exposed to the government's unwanted religious expression or the plaintiff is forced to assume a special burden to avoid such exposure. The plaintiff in *Salazar v. Buono* lacks that status and, hence, will not likely be found to have standing unless the Court extends its precedents.

I. Statement of the Case

In 1934, the Veterans of Foreign Wars erected a Latin cross on a location known as Sunrise Rock in the Mojave Desert in southeastern California.[5] This was unauthorized by the federal government, which owned the property. The cross is a memorial to members of the armed forces who died in World War I. In 1994, the site where the cross is located became part of the Mojave National Preserve, which is administered by the National Park Service, Department of the Interior. The Mojave National Preserve consists of 1.6 million acres of federal land in the Mojave Desert of southeastern California.

The respondent, Frank Buono, filed this lawsuit in March 2001, seeking a declaration that the Latin cross on government land violated the Establishment Clause, as well as an injunction ordering the permanent removal of the cross. At the time suit was filed, Buono was a retired employee of the National Park Service residing in Oregon. He retired twelve years ago in 1997. When Buono was still employed by the Park Service, he was assigned to the Mojave Preserve from January 22, 1995 to December 10, 1995. It was during this period that Buono learned of the Latin cross and visited the site at Sunrise Rock. Buono first became troubled when there was a request to erect a Buddhist stupa[6] near the cross. When the request was denied, Buono believed it was wrong for the cross to remain while similar access was denied for the stupa. His objections later evolved and expanded. Although retired, Buono retains an active interest in the Mojave National Preserve and visits the Preserve two to four times per year.

Buono is a Roman Catholic and testified that he does not find a Latin cross religiously offensive. Rather, he is offended because the cross remains at Sunrise Rock but similar access is denied to displays such as the Buddhist stupa, and because the National Park Service fails to remove the cross, a symbol of Christianity, from government land. When visiting the Mojave National Preserve, Buono has taken to avoiding Sunrise Rock so as not to be re-exposed to the cross, such avoidance being an added burden because it means not using Cima Road. One can see the Latin cross from the highway where Cima Road passes by Sunrise Rock. Cima Road is the most convenient road for accessing other areas of interest within the Preserve.

The Supreme Court has developed a three-part requirement for standing to sue. The plaintiff must have suffered, or is immediately threatened with, a specific "injury in fact." There must be a causal link between the defendant's conduct and plaintiff's injury. And the plaintiff seeks a remedy of a type traditionally rendered by our courts of law or equity.

The lower federal courts held that Buono has personalized "injury in fact" such that he has standing to bring this claim alleging a continuing violation of the Establishment Clause. The federal district court wrote as follows:

> Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find the cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land.[7]

First quoting with approval this passage by the district court, as well as taking note of Buono's avoidance of Cima Road, the Ninth Circuit Court of Appeals went on to observe that:

> Buono is, in other words, unable to "freely us[e]" the area of the Preserve around the cross because of the government's allegedly unconstitutional actions…. We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact.... Such inhibition constitutes "personal injury suffered... *as a consequence* of the alleged constitutional error," beyond simply "the psychological consequence presumably produced by observation of conduct with which one disagrees."[8]

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Given Buono's testimony that as a Catholic he suffers no religious offense because of the cross, spiritual injury cannot be a basis for "unwanted exposure" standing. That leaves two other possibilities: (1) offense because others cannot erect their symbols near where the cross is located; or (2) offense that the cross, a Christian symbol, stands on government property in violation of the separation of church and state. From the Ninth Circuit's statement quoted above, the circuit court—while noting both offensives as Buono's claimed "injury in fact"—is relying principally on Buono's "unwanted exposure" to the continued presence of a Latin cross on government property. Moreover, notes the circuit panel, Buono found this offense sufficiently weighty that he has taken to avoiding Cima Road and thereby incurring additional travel burdens as he explores the Mojave National Preserve.

Buono lacks third-party standing to complain that others are denied access to Sunrise Rock so that they might erect their own symbols.[9] Thus, Buono's offense that others are denied their rights is a claim of "injury in fact" for the Buddhists who sought to erect a stupa some years back.[10]

The plaintiff's other claim of "injury in fact" is a bit more involved. Buono seeks only injunctive relief from an ongoing injury. He does not seek damages. That leaves Buono's alleged ongoing "injury in fact" as being either: (1) unwanted exposure to the cross because of the government's failure to meet its duty of church-state separation which requires, in his view, removal of the cross from government land; or (2) restricted use of Cima Road to avoid being re-exposed every time he observes the government's failure to remove the cross. The first allegation, however, is a claim of "injury in fact" when a strict separationist is offended by a church-state violation while observing a religious symbol on government land. That is like the claimed "injury" discussed and rejected in *Valley Forge Christian College v. Americans United*.[11] And the second allegation of "injury in fact" is one of restricted use of Cima Road *because of* Buono's offense that the government has failed to remove the cross. Thus the second alleged harm (avoiding offense) logically collapses into the first (being offended).

With respect to the alleged church-state violation observed by Respondents, Americans United for Separation of Church and State, Inc., et al., the *Valley Forge* Court held:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They 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.... It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.[12]

Buono tries to circumvent this passage in *Valley Forge* by asserting he suffers a personal injury in that he does not use Cima Road to avoid re-exposure to the Latin cross.

That is not enough for Buono to secure standing, as the *Valley Forge* Court went on to explain. The Court distinguished the facts before it in *Valley Forge* from that of the parents and school-age children exposed to unwanted prayer and devotional Bible reading in *Abington School District v. Schempp*:[13]

> "The parties [in *Schempp*] are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed." ... The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause—for as *Doremus* [*v. Board of Education*, 342 U.S. 429 (1952),] demonstrated, that is insufficient—but because impressionable schoolchildren were subject to unwelcome religious exercises or were forced to assume special burdens to avoid them. [Americans United, *et al.*] have alleged no comparable injury.[14]

The Supreme Court's "unwanted exposure" precedents require that a plaintiff's status naturally result in being personally exposed to offensive religious expression by the government or forced to assume special burdens to avoid such exposure. In *Schempp*, the claimants' natural circumstance of public school attendance was such that the students were brought into personal exposure to the unwelcomed prayer and biblical devotions or forced to assume special burdens to avoid them.

This sensible rule has developed to prevent standing by contrivance. Requiring "injury" so as to have standing to sue can easily be manufactured if all one has to do is travel several miles to the site of a religious symbol or other expression of the government's and personally observe it on one occasion. Thus, it makes sense that a plaintiff's status (e.g., student, legislator, local municipal citizen) must naturally bring him or her into personal contact with the offending expression.

Buono's ongoing claim is that he will suffer an offense cognizable under the Establishment Clause if he travels to observe the cross which he deems a church-state violation, or he is "forced to assume special burdens to avoid" being re-exposed to the church-state violation. However, Buono's status does not naturally subject him to personal exposure to the cross. Buono's request for injunctive relief means that he necessarily avers an ongoing violation of the Establishment Clause. But he is a retired employee of the National Park Service residing in Oregon. Buono's visits to the Preserve are totally at his own free will. It is not as if Buono is currently employed by the Park Service and his job duties require that, from time to time, he travel Cima Road past Sunrise Rock. Buono's path to standing is foreclosed by *Valley Forge*, as well as that Court's reliance on *Schempp* and *Doremus*.

II. In Cases Raising "Unwanted Exposure" to Religious Expression Attributable to the Government, Reduced-Rigor Standing Has Been Permitted Only Where the Plaintiff's Status Naturally Results In Personal Exposure to the Unwanted Religious Expression

There is a very close connection between "injury in fact" for purposes of standing and damages (or "harm") as a necessary element of every claim under the Establishment Clause and for which plaintiff seeks a remedy. Indeed, they usually have been treated as one and the same by the Supreme Court. Therefore, the standing question in this case puts at issue a crucial element for stating a claim under the Court's modern Establishment Clause.

As with taxpayer standing (discussed Part III, *infra*), the Supreme Court's "unwanted exposure" cases under the Establishment Clause have resulted in reduced-rigor rules with

respect to the "injury in fact" required for standing. However, this reduction in the rigor with which "injury" is assessed is a narrow exception[15]—same as it is with taxpayer standing.[16] Reduced rigor in the required "injury" has been permitted only in cases challenging religious symbols or other expression attributable to the government. And only then does the lesser "injury" suffice where the plaintiff's status naturally results in personal exposure to the unwanted religious expression, or the plaintiff is forced to assume a special burden to avoid re-exposure.

The Supreme Court's cases of "unwanted exposure" to government religious speech are not great in number—just sixteen. Moreover, in nearly all of these cases—just three exceptions—the plaintiff's standing was not challenged on appeal by the government and thus was not an issue argued by counsel and decided by the Court. This second line of cases, therefore, have less to teach us with respect to what the Court minimally requires to have the "injury in fact" required for standing to bring a case of "unwanted exposure" to religious speech by the government. In chronological order the cases are as follows:

1. *McCollum v. Board of Education*[17] invalidated a local school district's program allowing nearby churches to hold optional religion classes in public school classrooms during regular school hours. The plaintiff was a resident and taxpayer of the local school district, and "a parent whose child was then enrolled in the Champaign public schools."[18] Also relevant to plaintiff's subjection to the program to have standing to challenge it, the Court said:

> The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.[19]

The government's challenge to plaintiff's standing was rejected without analysis in a single sentence: "A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit. Coleman v. Miller, 307 U.S. 433, 443, 445, 464."[20] (*Coleman* addressed the jurisdiction of the Court to review actions by state legislators said to have ratified a proposed amendment to the federal Constitution.) Accordingly, we do not have an explanation by the Court with respect to what "injury in fact" is required to file a case of "unwanted exposure" to religious expression by the government.

2. *Doremus v. Board of Education*[21] challenged teacher-led devotional Bible reading in New Jersey public schools. However, the Court did not reach the merits. Some plaintiffs, claiming status as state taxpayers, were dismissed for lack of standing. And a parent of a student subjected to the religious exercise had sued, but his child had subsequently graduated and thus his claim was moot. Accordingly, the case is not an instance where the Court ruled on the "injury in fact," required of a plaintiff claiming "unwanted exposure" to religious speech attributable to the government.

3. *Engel v. Vitale*[22] was a challenge to a statewide program of daily classroom prayer in New York public schools. The plaintiffs were "parents of ten pupils... insisting that use of this official prayer in the public schools was contrary to the beliefs, religion, or religious practices of both themselves and their children."[23] The government did not challenge the standing of the plaintiffs. That is surprising because the objecting parents and their school-age children could obtain an opt-out from the prayer exercise.[24] So once again the case did not present an instance where the Court determined the "injury in fact" required of a plaintiff claiming "unwanted exposure" to religious speech attributable to the government.

The fact that the "observance on the part of the students is voluntary," however, did not escape the Court's notice.[25] The prayer being voluntary would make a difference under the Free Exercise Clause, explained the Court, where coercion is an essential element of the *prima facie* claim. But with respect to the Establishment Clause, coercion or compulsory exposure to the prayer need not be shown.[26] This is because the object of the modern Establishment Clause is to separate church and state so as to prevent injury to either or both, as opposed to being a rights-based claim with its object being to prohibit individual religious harm.[27] In Part III, *infra*, it will be shown how this relates to standing, and thus why the modern Court has fashioned "reduced rigor" standing rules only under the Establishment Clause.

4. *School District of Abington Township v. Schempp*[28] involved consolidated cases from Philadelphia and Baltimore, both challenging daily classroom prayer and devotional Bible reading in public schools. In both instances, the religious exercises were optional.[29] In the Philadelphia case, the plaintiffs were:

> Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna… members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they... regularly attend religious services.... The [two] children attend the Abington Senior High School, which is a public school operated by appellant district.[30]

Also, "Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible 'which were contrary to the religious beliefs which they held and to their familial teaching.'"[31]

In the Baltimore case, the plaintiffs were "Mrs. Madalyn Murray and her son, William J. Murray III, ... both professed atheists."[32] The "petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights 'in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority....'"[33]

The lack of plaintiffs' standing to challenge the religious practices under the Establishment Clause was raised as an issue by the government.[34] The Court reasoned in footnote 9 that the plaintiffs had standing as follows:

> [T]he requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedom are infringed.... The parties here are school children and their parents, who are directly affected by the laws and practices

against which their complaints are directed. These interests surely suffice to give the parties standing to complain.

Thus, standing under the modern Establishment Clause is not only different, but the need for "injury in fact" is of lesser rigor. That much is clear. Footnote 9 cites as authority *McGowan*, *Engel*, and *Doremus*, but as we have seen in none of those cases did the government challenge the plaintiffs' standing to bring an "unwanted exposure" claim.

As in *Engel*, the *Schempp* Court explained its lack of concern that plaintiffs did not prove they were victims of the government's compulsion or coercion. Coercion is an element of a Free Exercise Clause claim which is rights-based, but compulsion is not required to state a claim under the Establishment Clause.[35] This is because the Establishment Clause is about policing the boundary between church and state. "[T]he Court found that the 'first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.'"[36] In Part III, *infra*, it will be shown how this relates to standing, and thus why the modern Court has fashioned "reduced rigor" standing rules only under the Establishment Clause.

5. *Chamberlin v. Dade County Board of Public Instruction*,[37] citing *Schempp*, summarily struck down prayer and devotional Bible reading in the Dade County, Florida public school district. The plaintiffs were parents of school-aged children enrolled in junior high and elementary schools in Dade County.[38] The plaintiffs' standing to raise an "unwanted exposure" claim was not challenged by the government in the Supreme Court, and thus we have no guidance on the needed "injury" from the Court.

6. *Stone v. Graham*[39] struck down a state law requiring the posting of the Ten Commandments in all public school classrooms. Plaintiffs described themselves "as a Quaker, a Unitarian, a non-believer, a mother of school age children and public school teacher, two children of compulsory school age attending public schools, a Jewish Rabbi, and as taxpayers."[40] The plaintiffs' standing to raise an "unwanted exposure" claim was not challenged by the government before the Supreme Court, and thus we have no guidance on the matter from the Court.

7. *Marsh v. Chambers*[41] upheld a state legislative practice of hiring a chaplain to offer a prayer at the beginning of each day when the legislature is in session. The plaintiff was simply described as "a member of the Nebraska Legislature and a taxpayer of Nebraska."[42] The Court also noted that the plaintiff "claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' or peer pressure."[43] Although the government had challenged the plaintiff's standing in the circuit court,[44] it did not again press the issue before the Supreme Court.[45] Although conceded by the state, the Supreme Court nevertheless volunteered the following: "[W]e agree that Chambers, as a member of the legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing to assert the claim."[46] Thus a person vested with the status of a legislator who is regularly in the legislative chamber when the offending prayer takes place is sufficient "injury in fact" to have standing in this "unwanted exposure" case.

8. *Lynch v. Donnelly*[47] upheld a municipal practice of displaying a nativity scene of Mary, Joseph, and the Christ child as part of a larger Christmas holiday scene in a park. The display was located in a private park in the heart of the shopping district.[48] The plaintiffs were described as Pawtucket, Rhode Island "residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself."[49] The Court's majority opinion does not discuss standing, thus it appears the government did not challenge plaintiffs' claimed "unwanted exposure" injury giving rise to standing.

In a now famous concurring opinion, Justice O'Connor first stated her "endorsement or disapproval test." Her test identifies an injury that is personal to certain plaintiffs that the Establishment Clause is said to prevent, namely that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[50] Justice O'Connor goes on with what in her view is the nature of the "injury in fact":

> One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[51]

A violation of the endorsement test always results in a plaintiff's "religious" injury because the test is contingent on "adherence [or nonadherence] to a religion." This "endorsement or disapproval" test has possibilities for identifying the personal religious injury that naturally flows from one's status as local citizen when the church-state matter at issue is "unwanted exposure" to a government's religious expression. But the injury must be religious, unlike that claimed by Buono. That said, it is not clear the extent to which a majority of the current Supreme Court embraces Justice O'Connor's test. The endorsement test would limit "unwanted exposure" standing to instances where there is religious injury. That is contrary to most of the Court's array of sixteen "unwanted exposure" cases collected here. Accordingly, there is no reason to limit "unwanted exposure" standing to instances of religious injury.

9. *Wallace v. Jaffree*[52] struck down a state law requiring that public schools begin the day with a moment of silence by students for prayer or meditation. The law was found to have a religious purpose.[53] The plaintiff challenging the law was a parent who sued on behalf of "three of his minor children; two of them were second-grade students and the third was then in kindergarten."[54] Plaintiff's standing to challenge the state law was not raised by the government. So once again we do not have the benefit of the Court's discussion of what minimal "injury" is required in an "unwanted exposure" claim.

10. *Edwards v. Aguillard*[55] struck down a state law requiring public schools to teach creationism whenever evolution is taught. The law was found to have a religious purpose.[56] The plaintiffs challenging the law "included parents of children attending Louisiana public schools, Louisiana teachers, and religious leaders."[57] The Court went on to observe:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[58]

Thus the "harm" to plaintiffs' school-age children was the natural consequences of their status as students in Louisiana schools.

Once again there was no challenge by the government before the Supreme Court to plaintiffs' standing to call into question the state law. So we can only infer the "injury" needed for standing in a case of "unwanted exposure" to government religious speech.

11. *County of Allegheny v. Greater Pittsburgh ACLU*[59] involved challenges to two local governmental displays during the December holiday season. The Court struck down a nativity scene inside the county courthouse, and upheld an outdoor display of a Menorah, Christmas tree, and liberty banner at a different location jointly operated by the city and county. The plaintiffs challenging both displays were "the Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents" of the city and county.[60] Once again the government did not challenge the plaintiffs' standing before the Court.

12. *Lee v. Weisman*[61] struck down the practice of inviting clergy to offer prayers at public school commencement ceremonies. Attendance at the ceremony was voluntary, and no penalty attached to a student who did not attend.[62] The plaintiffs challenging the practice were "Daniel Weisman, in his individual capacity as a Providence taxpayer and as [father] of Deborah," a student now graduated from the middle school, and enrolled in the high school where a similar prayer arrangement was conducted at its commencement.[63] Plaintiffs' standing was discussed. The Court said:

> We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.[64]

Once again the voluntary nature of the ceremony—hence lack of compulsion—did not make a difference so long as the claim is brought under the Establishment Clause.

13. *Santa Fe Independent School District v. Doe*[65] struck down a public school process whereby a student is elected by fellow students to offer words of inspiration (with prayer as a likely choice) over the loudspeaker system before high school football games. The plaintiffs challenging the practice were "two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic."[66] The government did not challenge the standing of the plaintiffs to bring their claim under the Establishment Clause.

14. *Elk Grove Unified School District v. Newdow*[67] concerned a plaintiff who was denied standing to challenge the words "under God" in the Pledge of Allegiance recited by public school students, including his daughter, at the beginning of each school day. Although the pledge was optional, both the daughter and her mother, who held legal custody, wished to have the daughter recite the pledge. Standing was denied because the plaintiff, although the student's father, was a noncustodial parent having no say in the matter. Accordingly, *Newdow* does not discuss the "injury in fact" needed for standing by a plaintiff complaining of "unwanted exposure" to religious expression attributable to the government.

15. *Van Orden v. Perry*[68] upheld the constitutionality of a Ten Commandments monument, one of several monuments on display on the grounds outside the State of Texas Capitol. The plaintiff challenging the monument was described as follows:

> Thomas Van Orden is a native Texan and a resident of Austin. At one time he was a licensed lawyer, having graduated from Southern Methodist Law School. Van Orden testified that, since 1995, he has encountered the Ten Commandments monument during his frequent visits to the Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.
>
> Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued….[69]

As one trained as a lawyer but without a law office or library of his own, as well as a citizen of Austin, it was natural that he took advantage of the free use of the law library near the Capitol. The government did not challenge Van Orden's standing before the Court.

16. *McCreary County v. ACLU of Kentucky*[70] struck down the Ten Commandments placed in display cases, along with other historical documents, in two county courthouses in the State of Kentucky. The plaintiffs challenging both displays were all too briefly described as "American Civil Liberties Union of Kentucky, et al."[71] The Court also explained that in both counties "the hallway display was 'readily visible to... county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to local taxes, and to register to vote.'"[72] A lower court opinion explains that in addition to the ACLU of Kentucky, the plaintiffs were Lawrence Durham and Paul Lee.[73] From the context it is apparent that Durham and Lee are residents of the county. The lower court said the ACLU had organizational standing because it "has members in Pulaski County who would have standing for the same reason that the named plaintiffs have standing."[74] And the government suggested in its briefs that "the Ten Commandments were posted in order to teach Pulaski County residents about American religious

history and the foundations of the modern state."[75] Although before the district court the government challenged plaintiffs' standing because they lacked the necessary "injury in fact,"[76] having lost the issue at the trial level the government did not raise the standing question before the Supreme Court. One can infer from *McCreary County* that a county citizen who has to visit the site of the offending religious message in order to do necessary legal transactions with the county government has the status and personal "unwanted exposure" so as to have "injury in fact" for purposes of standing.

It is remarkable that in only three out of sixteen cases has plaintiffs' standing been challenged before the U.S. Supreme Court on the basis that there was no "injury in fact" due to "unwanted exposure" to the government's religious speech. The three cases are *Schempp*, *Marsh*, and *Weisman*. These three cases involve plaintiffs who are parents and their school-age children, and a legislator. The rule to draw from *Schempp*, *Marsh*, and *Weisman*, and to a lesser degree the other thirteen cases where lack of standing might have been raised but was not, is that the "injury" required in an "unwanted exposure" case is that the offended plaintiff's status in life must have brought him or her into personal contact with the government's religious symbol or other expression.[77] Following this rule will prevent parties who would contrive their exposure "injury" by going out of their way to travel to the site of a religious symbol and observe it merely to acquire standing. Buono has no such status such that he has "injury in fact" endowing him with a "case" or "controversy" for which he has standing to sue.

III. Why the Court Has Permitted Reduced-Rigor Standing in Only Two Instances, Both Involving Claims under the Establishment Clause

In circumstances very different than the one before the Supreme Court, a claimant under the Establishment Clause can have individualized "injury in fact" that meets all of the normal requirements for standing. These harms run from economic loss, to inability to qualify for public office, to restrictions on academic inquiry.[78] But in each of the six cases set out in the footnote, plaintiffs had conventional "injury in fact" and thus met the usual "case" or "controversy" requirements for standing. That is not so with respect to cases involving "unwanted exposure" to religious symbols or other speech fairly attributable to the government. Only in two types of cases—taxpayer and "unwanted exposure" claims—has the Court applied a reduced-rigor test for "injury in fact" so as to ease the path to reaching the merits of a claim under the Establishment Clause. Why is that so?

The Court's modern view of the Establishment Clause was instituted sixty-two years ago with its decision in *Everson v. Board of Education of the Township of Ewing*.[79] Because both the Free Exercise and Establishment Clauses are pro-religious freedom,[80] the question arose early with respect to how the two Clauses were to be distinguished. The Court's answer came soon in *Engel v. Vitale*[81] and was reaffirmed a year later in *School District of Abington Township v. Schempp*.[82] As the *Engel* Court said:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish any official religion whether those laws operate directly to coerce nonobserving individuals or not.[83]

The Court goes on to explain that the reason that coercion is not a required element of a no-establishment claim is that the Clause is first and foremost about the separation of church and state.[84] Church-state separation is a relationship between two centers of authority. This is not due to any hostility to religion but for the protection of both the freedom of the church and to prevent division within the body politic when government takes sides on explicitly religious questions. Disestablishment deregulated religion, thus protecting both church and state. Individual liberties are protected by the Establishment Clause only as a consequence of keeping these two authorities in right order relative to each other, and sometimes the individual liberties protected are not religious, e.g., economic liberty, access to public office, freedom of academic inquiry, etc.[85]

It thus developed in the Supreme Court that the Free Exercise Clause was confined to addressing those situations where religious practice or observance had come under state coercion. Without evidence of coercion, either standing was denied (consider the discussion in Part II, *supra*, in *Engel* and *Schempp*) or the free exercise claim failed on the merits.[86] The Free Exercise Clause is thus a rights-based claim; it runs in favor of religious individuals and faith groups they form.[87]

The Establishment Clause operates quite differently—all the while retaining its character as pro-religious freedom. The Establishment Clause works to limit the power of government. In that sense, it operates much like a structural clause.[88] Many an individual claimant need not show personal religious harm to win a claim under the Establishment Clause.[89] Indeed, in two lines of cases the claimant does not need to show personalized injury at all—taxpayer and "unwanted exposure" cases. This came about because—unlike free exercise which is rights-based—the Court's modern Establishment Clause is about separation of church and state. When church and state are not rightly ordered, the harm or damage might be other than religious. As this Court said in *McGowan v. Maryland*:[90]

> If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writing of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.[91]

Such oppression often resulted in injury other than religious harm (*McGowan* was economic), indeed it can result in instances where no one has individualized injury and hence no one has conventional standing to sue. This is called a "generalized grievance."[92]

In this regard, the modern Supreme Court's work via the Establishment Clause to keep rightly ordered church and state causes the no-establishment principle to operate in many

respects like the structural clauses of the Constitution which separate the powers of the three federal branches. And just as some violations of separation of powers can occur with no one personally harmed, a "generalized grievance" can and does occur where there is a colorable violation of the modern Establishment Clause but no one with individualized harm. The first such case appeared before the Court in *Flast v. Cohen*,[93] and the Court responded by permitting limited federal taxpayer standing. Stated differently, the surrogate of taxpayer as plaintiff with "injury in fact" permitted the Court to reach the merits of some no-establishment claims that would otherwise be nonjusticiable because no one had individuated injury to acquire standing.[94]

But as the plurality in *Hein v. Freedom From Religion Foundation, Inc.*,[95] recently said, *Flast* inadequately acknowledged—even when limited as it was to claims under the Establishment Clause—the distortion wrought to the doctrine of separation of powers.[96] So *Flast*, while still good law, has not been expanded.

Flast is not the only line of cases where the modern Court reduced the normal rigor of standing when it comes to the Establishment Clause. The other line is where plaintiffs claim injury due to "unwanted exposure" to religious speech but who did not suffer the coercion or compulsion that would normally be associated with the individualized injury required for standing. Early on, as we saw in Part II, *supra*, the most common case was public school students exposed to religion classes, prayer, and biblical devotions, but the exercise was optional. The Court's response was to reduce the rigor of the required "injury in fact" by stating that coercion was not an element of a claim under the Establishment Clause. Like *Flast*, this necessarily required a trade off. With respect to the Court's co-ordinate branches, reducing the rigor of standing was at the expense of the doctrine of separation of powers. With respect to the States, reduced rigor standing was at the expense of federalism. In either instance, reducing the "injury" needed for standing permitted the Court to reach the merits of an Establishment Clause claim that would otherwise be outside the Court's subject matter jurisdiction. Like *Flast*, however, the reduction in the rigor of normal standing requirements was narrow: only where the offended plaintiff's status naturally caused him or her to personally come into "unwanted exposure" to the government's religious expression was standing permitted.

Buono's status does not fit within the limits of the Supreme Court's narrow exception with respect to its "unwanted exposure" cases. He has no responsibilities as a local citizen, such as in *McCreary County*, to frequent the site at Sunrise Rock. He holds no status as a student or student's parent, such as in *McCollum* or *Schempp*, which results in his presence at the site of the Latin cross, nor is he a legislator needing to be present in chambers to do his job as in *Marsh*. Assuming Buono has paid the admission fee to enter the Mojave National Preserve, certainly he has a legal right to be present at Sunrise Rock. But his presence is entirely by his free and unrestrained choice. Such a circumstance is no different than a citizen of India, who as a resident alien with a five-year visa to reside and work in Massachusetts, takes a vacation to Southeast California and pays the admission fee to enter the Mojave Preserve and happens to spot the Latin cross out of the windshield of his automobile as he drives by Sunrise Rock. This is one of those instances where if Buono has Article III standing to sue, then the entire population of people within the jurisdiction of the United States has standing to sue upon a single automobile ride along Cima Road. None of the Court's sixteen cases set out in Part II, *supra*, is nearly so expansive.

CONCLUSION

The Supreme Court will have to expand its law with respect to "unwanted exposure" cases to find Frank Buono has standing to sue. Just the opposite inclination was demonstrated by the Roberts Court in *Hein*, and there is no obvious reason that has changed. *Hein* reaffirmed federal taxpayer standing, as originally announced in *Flast*, when the no-establishment principle was at risk because of congressional appropriation legislation. The plurality in *Hein* was right to do so. At the same time the *Hein* plurality was correct to not expand taxpayer standing into the myriad of discretionary decisions by officials in the Executive Branch. *Flast* represented a tolerably small compromise to separation of powers, in return for the Supreme Court taking its rightful role as a co-equal branch with Congress in the duty to police the boundary between church and state. The plaintiffs in *Hein*, on the other hand, were asking for the Court to toss overboard the doctrine of separation of powers.[97] Frank Buono's assertion of standing in this "unwanted exposure" case is far more like the plaintiffs in *Hein* than in *Flast*.

Further, should the Supreme Court dismiss Frank Buono's complaint for lack of standing there will be no need to resolve the merits of Buono's difficult no-establishment claim involving prickly issues of congressional motive.[98] Generally the Court would welcome the opportunity to not extend itself and resolve a difficult constitutional question on the merits when the matter can so sensibly be disposed of on jurisdictional grounds.

Endnotes

1 392 U.S. 83 (1968).

2 *See, e.g.,* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347-49 (2006) (denying taxpayer standing in complaint alleging a violation of the Dormant Commerce Clause).

3 551 U.S. 587 (2007) (plurality opinion). *See* Carl H. Esbeck, *What the* Hein *Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 Miss. L. J. 199 (2008).

4 129 S. Ct. 1313 (Feb. 23, 2009) (No. 08-472), *cert. granted,* Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008).

5 The facts recited in this Statement of the Case are from uncontested findings of the district court. *See* Buono v. Norton, 212 F. Supp.2d 1202, 1204-07 (C.D. Cal. 2002).

6 A stupa is a mound-like structure containing Buddhist relics.

7 212 F. Supp.2d at 1207.

8 Buono v. Norton, 371 F.3d 543, 547 (9th Cir. 2004) (citations omitted). Subsequent proceedings involving the merits of the Establishment Clause claim appear at *Buono v. Norton*, 364 F. Supp.2d 1175 (C.D. Cal. 2005), and *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008). The government did not continue to challenge Frank Buono's standing in these later proceedings because the district and circuit courts had already ruled adversely on the matter. The government did not thereby waive its objection to Buono's

standing. Standing is derived from the "case" or "controversy" requirement in U.S. Const. Art. III, § 2, cl. 1. That provision defines the subject matter jurisdiction of the federal courts. Because it is structural rather than rights-based, objections to a federal court's lack of subject matter jurisdiction can never be waived. *See* Rule 12(h)(3), Federal Rules of Civil Procedure.

9 *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 510 (1975) (summarizing those limited instances when third-party standing is permitted, none of which remotely apply here).

10 Such an averment states a free speech claim that equal access is being denied to a limited public forum, not a claim under the Establishment Clause about religious speech attributable to the government. *Cf.* City of Pleasant Grove, Utah v. Summum, 129 S. Ct. 1125 (2009).

11 454 U.S. 464, 485 (1982) (holding plaintiffs lack standing to challenge government plans to give surplus land to religious college).

12 *Id*. at 485-86.

13 374 U.S. 203 (1963).

14 *Valley Forge*, 454 U.S. at 487 n. 22.

15 It is a narrow exception because federal courts are of limited jurisdiction per U.S. Const. Art. III, § 2, cl. 1. And, when Article III jurisdiction is pushed to its outer reaches, then separation of powers is necessarily implicated.

16 Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, ___, 127 S. Ct. 2553, 2564 (2007) (plurality opinion) ("In *Flast*, the Court carved out a narrow exception to the general constitutional prohibition against taxpayer standing.").

17 333 U.S. 203 (1948).

18 *Id*. at 205.

19 *Id*. at 209.

20 *Id*. at 206

21 342 U.S. 429 (1952).

22 370 U.S. 421 (1962).

23 *Id*. at 423.

24 *Id*. 423 n. 2.

25 *Id*. at 430.

26 *Id*.

27 *Id*. at 430-32.

28 374 U.S. 203 (1963).

29 *Id*. at 224-25.

30 *Id*. at 206.

31 *Id*. at 208.

32 *Id*. at 211.

33 *Id*. at 212.

34 *Id*. at 224 n. 9.

35 *Id*. at 221, 223.

36 *Id*. at 221.

37 377 U.S. 402 (1964) (per curiam).

38 *See* Chamberlin v. Dade County Board of Public Instruction, 160 So.2d 97, 98 (Fla. 1964).

39 449 U.S. 39 (1980) (per curiam).

40 *See* Stone v. Graham, 599 S.W.2d 157, 159 (Ky. 1980).

41 463 U.S. 783 (1983).

42 *Id*. at 785.

43 *Id*. at 792.

44 *Id*. at 785.

45 *Id*. at 786, n. 4.

46 *Id*.

47 465 U.S. 668 (1984).

48 *Id*. at 671.

49 *Id*. at 671.

50 *Id*. at 687.

51 *Id*. at 687-88 (emphasis added).

52 472 U.S. 38 (1985).

53 *Id*. at 56-60.

54 *Id*. at 42.

55 482 U.S. 578 (1987).

56 *Id*. at 586-94.

57 *Id*. at 581.

58 *Id*. at 584.

59 492 U.S. 573 (1989) (plurality opinion in part).

60 *Id*. at 587.

61 505 U.S. 577 (1992).

62 *Id*. at 583.

63 *Id*. at 584.

64 *Id*.

65 530 U.S. 290 (2000).

66 *Id*. at 294.

67 542 U.S. 1 (2004).

68 545 U.S. 677 (2005) (plurality opinion).

69 *Id*. at 682.

70 545 U.S. 844 (2005).

71 *Id*. at 852.

72 *Id*. (citation omitted).

73 *See* American Civil Liberties Union of Kentucky v. Pulaski County, 96 F. Supp.2d 691 (E.D. Ky. 2000).

74 *Id*. at 694.

75 *Id*. at 698.

76 *Id*. at 694-95.

77 Frequency or regularity of exposure to the offending religious expression attributable to the government in some instances may be evidence that the plaintiff naturally has the status required to have "unwanted exposure" standing. Thus, for example, one would expect that a citizen of a municipality with a Holiday Christmas display to have more frequent exposure to the offending Christmas display on the lawn of the city hall, than say the frequency of exposure of one who lives five hundred miles away. Yet regularity of exposure is not a substitute for the needed status because frequency of exposure can easily be contrived. On the other hand, while personal exposure is always required, regularity of the exposure may be quite limited where a plaintiff is mandated by legal duty to incur exposure to the offending religious symbol or other speech. One example of such duty is where plaintiff's job responsibilities require exposure to the offending religious speech. Another example is where plaintiff's duty, albeit not regular, is as a county citizen called as a juror or witness in a lawsuit and the religious symbol must be passed just once or twice as plaintiff enters the courthouse. *See, e.g.,* Books v. Elkhart County, 401 F.3d 857, 862 (7th Cir. 2005).

78 Consider the department store in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 707 (1985) (increased employment regulation resulting in economic harm), the tavern in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 118 (1982) (denial of a liquor license resulting in economic harm), the public school teacher desirous of expanding the science curriculum in *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968) (hindrances to academic inquiry resulting in criminal charges and loss of job as "injury"), the forced taking of a theistic oath by a

freethinking atheist in *Torcaso v. Watkins*, 367 U.S. 488 (1961) (inability to qualify for public office as "injury"), shuttering one's business on Sunday in *McGowan v. Maryland*, 366 U.S. 420, 422, 430-31(1961) (economic harm to retail stores and criminal fines imposed on their employees), and closing one's retail store on Sunday in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592 (1961) (lost business as economic harm).

79 330 U.S. 1 (1947). Not only did *Everson* incorporate the Establishment Clause making it applicable to state and local governments, but *Everson* looked to the history of disestablishment in the new American states, especially Virginia, for the principles behind the meaning of the Clause. *Id*. at 11-15. *See* Carl H. Esbeck, *The 60th Anniversary of the* Everson *Decision and America's Church-State Proposition*, 23 J. of Law & Religion 15 (2007-08).

80 Just like the First Amendment is pro-freedom of speech and pro-freedom of the press, the First Amendment is also pro-freedom of religion. Now, being pro-freedom of religious is markedly different from being pro-religion. The latter is prohibited by the modern Establishment Clause, thereby maintaining the requisite government neutrality. But the First Amendment is pro-religious freedom. Moreover, this is as true of the Establishment Clause as it is of the Free Exercise Clause. While commonplace to some, others will be surprised to have the Establishment Clause portrayed as pro-religious freedom. This is to say that the separation of church and state, properly conceived, is far more about protecting religious freedom than it is about furthering modernity's project to confine religion.

81 370 U.S. 421 (1962).

82 374 U.S. 203, 221, 223 (1963). *Accord* Lee v. Weisman, 505 U.S. 577 (1992).

83 *Id*. at 430.

84 *Id*. at 425-36.

85 *See* the cases collected in note 78, *supra*.

86 *See* Harris v. McRae, 448 U.S. 297, 320 (1980) (free exercise claim requires compulsion of religious belief); Tilton v. Richardson, 403 U.S. 672, 689 (1973) (plurality opinion) (coercion required to state free-exercise claim); Board of Education v. Allen, 392 U.S. 236, 248-49 (1968) (same).

87 Of course, to state a claim that involved coercion with respect to a religious practice did not mean that every such claim would be successful. And with the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), fewer free exercise claims do succeed.

88 *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998). A more summary statement of the evidence that this Court has applied the Establishment Clause as if it were structural in nature, as well as how such a view explains not only this Court's special standing rules with respect to no-establishment but other validations as well, *see* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. of L. & Politics 445, 453-71 (2002).

89 *See* the cases collected in note 78, *supra*.

90 366 U.S. 420 (1961).

91 *Id*. at 430.

92 A famous trio of "generalized grievances" are represented by *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (colorable violation of structural clause in the Constitution, but no one with individualized injury and hence no one with standing), *United States v. Richardson*, 418 U.S. 166 (1974) (same), and *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam) (same).

93 392 U.S. 83 (1968).

94 There is speculation in *Flast*, repeated in later cases, to the effect that federal taxpayers have a personal right of conscience to not have the taxes they pay be appropriated by Congress to religious organizations, even when the appropriations are for secular purposes. James Madison's *Memorial and Remonstrance*, circulated in Virginia in the summer and fall of 1785, is cited as the origin of this assertion. However, Patrick Henry's bill, successfully opposed by Madison during Virginia's disestablishment struggles in 1784 and 1785, was legislation to impose a religious assessment for the payment of the salaries of Christian clergy. The assessment—or religious tax—was an earmarked tax. The money went into a special trust fund held by the state for the sole purpose of clergy salaries. Indeed, each taxpayer even got to designate which clergyman was to receive his or her tax payment. It was not a general tax the money of which went into the general U.S. Treasury, and from which at a later time Congress would appropriate money for all sorts of matters from B-2 bombers to price supports for dairy farmers. In the instance of an earmarked tax like Henry's, there is a direct causal link between taxpayer and the amount received by his or her clergyman. Causation being necessary to link the act of paying one's taxes under coercion to one's violation of religiously informed conscience. With most federal appropriations today, such as the Elementary and Secondary Education Act of 1965 at issue in *Flast*, there is no such causal link any more than a particular taxpayer is linked to dairy support payments. Justice Harlan, dissenting in *Flast*, saw the fiction in the personal conscience claim right from the start. *Flast*, 393 U.S. at 128-29. For a full account of the historical details, *see* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776 – 1786*, 7 Geo. J. L. & Pub. Pol'y 51, 79-81, 89-92 (2009).

95 551 U.S. 587 (2007) (plurality opinion).

96 *Id*. at __, 127 S. Ct. at 2569-70.

97 Carl H. Esbeck, *What the* Hein *Decision Can Tell Us About the Roberts Court and the Establishment Clause*, 78 Miss. L. J. 199, 217-20 (2008).

98 Question Presented No. 2 in the grant of certiorari in *Salazar v. Buono* reads: "Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands."