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## Barnes-Wallace v. City of San Diego: "Psychological Injury" and Its Effect on Standing, 44 J. Marshall L. Rev. 507 (2011)

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# BARNES-WALLACE V. CITY OF SAN DIEGO: “PSYCHOLOGICAL INJURY” AND ITS EFFECT ON STANDING

ANDREW MEYER\*

## I. INTRODUCTION

The Presbyterian Church, would, I should think, exclude me from employment as a minister, because I am Jewish, but if they managed a recreational facility open to all without discrimination as the Boy Scouts do, their ministry exclusion would not give me standing to challenge their park management contract. Exclusion from something else entirely, employment as a minister, does not confer standing to challenge any relationship the government has with an organization.<sup>1</sup>

The above hypothetical situation is similar to the facts of *Barnes-Wallace v. City of San Diego*. In that case, the plaintiffs incurred a psychological injury—revulsion—as a result of the exclusionary policies of the Boy Scouts.<sup>2</sup> But, as Justice Kleinfeld states in his dissent, this revulsion should have no bearing on standing to challenge the Boy Scouts’ leases with the City of San Diego.<sup>3</sup> In contrast, the majority holds that this offense is a sufficient “injury-in-fact” to confer standing on the plaintiffs.<sup>4</sup>

Part II of this Comment will examine the history of standing doctrine, from English and early American jurisprudence to the present day law on standing. It will also examine Supreme Court precedent concerning psychological injury, as well as the facts and issues presented in the recent Ninth Circuit court case, *Barnes-Wallace v. City of San Diego*. Part III of this Comment will examine the reasoning of the majority in *Barnes-Wallace* in rejecting the precedent as well as analyze why it should have controlled. It will also discuss the effects this decision has already had and the future effects on standing requirements. Part IV will

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1. *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 797 n.27 (9th Cir. 2008) (Kleinfeld, J., dissenting) (providing an example as to why standing should not be granted to the plaintiffs in the case).

2. *Id.* at 784 (majority opinion).

3. *Id.* at 797 (Kleinfeld, J., dissenting).

4. *Id.* at 785 (majority opinion).

propose that the Supreme Court must sort out the confusion surrounding standing by granting certiorari to make clear that psychological injury will not be sufficient to confer standing.

## II. BACKGROUND

### A. *The Origin and Roots of Standing*

There is much debate concerning whether standing or “injury-in-fact” has historical roots.<sup>5</sup> According to some commentators, there was no separate doctrine of standing or requirement of an “injury-in-fact” from the founding era to near 1920.<sup>6</sup> One example

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5. The debate centers on whether standing has been required for centuries or whether it is a modern innovation of the Supreme Court. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 300-01 (suggesting that standing may have some historical connections, although they are loose connections at best); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691-92 (2004) (arguing that standing is not a modern innovation but rather has roots dating back to eighteenth and nineteenth century courts); Mark Wankum, Comment, *Standing in the Way of Clarity: Hein v. Freedom from Religion Foundation, Inc.*, 30 U. ARK. LITTLE ROCK L. REV. 515, 521-25 (2008) (discussing standing’s evolution from colonial times to the modern day approach); but see Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1543-46 (2008) (arguing that neither historical evidence nor the Constitution supports the modern standing requirements); see generally Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992) (providing an in-depth review of the history of the courts and why the modern standing requirements, especially “injury-in-fact,” cannot be reconciled with the text of the Constitution or historical evidence); compare Sunstein, *supra*, at 169 (stating that the “explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon.”), with Woolhandler & Nelson, *supra*, at 691 (stating that there was “an active law of standing in the eighteenth and nineteenth centuries.”). Of course, the term “standing” was not used very much by early American courts, but this, in itself, does not mean that the concept did not exist. Woolhandler & Nelson, *supra*, at 691.

6. Sunstein, *supra* note 5, at 170. During this period, it was widely believed that the Constitution did not limit Congress’ power to confer a cause of action to citizens. *Id.* Instead of considering whether a plaintiff had an “injury-in-fact,” courts asked whether Congress or another source of law, such as the common law, granted the plaintiff the right to sue. *Id.*; see also Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test for Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1176 (2008) (claiming that the question of whether a party had standing to sue for most of American history was whether the party could show that it had a cause of action); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1988) (explaining that “[w]hat a court looked for was whether the matter before it fit one of the recognized forms of action”); see also Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Resolution*, 40 AM. BUS. L.J. 511, 537 (stating that the right to bring suit has ensured that the parties in the American common law

of not requiring a plaintiff to have suffered a personal "injury-in-fact" in order to bring suit was the early creation by Congress of *qui tam* actions.<sup>7</sup> These actions were well-known in American jurisprudence well before 1920.<sup>8</sup> *Qui tam* literally translates to "who as well for the king as for himself sues in this matter."<sup>9</sup> Under this type of action, a stranger<sup>10</sup> who had not suffered any particular injury (injury-in-fact) was legally able to bring suit against an offender of the law. Today, this type of action is commonly known as a "citizen suit." Over the years, the doctrine of standing has evolved the most in relation to this type of suit.<sup>11</sup>

In contrast, other commentators argue that the standing requirements are not mandated precursors to bring a lawsuit because the text of Article III<sup>12</sup> does not require a plaintiff to show

system have proper incentives to pursue litigation).

7. Sunstein, *supra* note 5, at 175. The purpose was to help in the enforcement of the federal criminal laws. *Id.*; Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life*, 18 DUKE ENVTL. & POL'Y F. 347, 368 (2008) (stating that the purpose of the *qui tam* action was to give citizens the right to bring civil suits against those that violated the criminal law). A few examples included actions surrounding the import of liquor without paying the duties owed on it and trading slaves with foreign nations. Sunstein, *supra* note 5, at 175.

8. "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." Sunstein, *supra* note 5, at 175 (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943)).

9. BLACK'S LAW DICTIONARY 1282 (8th ed. 2004). *Qui tam* is the shortened form of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*. *Id.* A *qui tam* action is "an action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Id.*

10. "One who is not party to a given transaction; esp., someone other than a party or the party's employee, agent, tenant, or immediate family member." BLACK'S LAW DICTIONARY, *supra* note 9, at 1461; *see also* Winter, *supra* note 6, at 1409 (claiming that constitutional problems under Article III were not raised when those who had not suffered any personal injury themselves [strangers] brought suit on behalf of the public).

11. Along with "taxpayer suits," citizen suits are considered generalized grievances that are shared by a large class of citizens, if not all of them. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.5 at 90-91 (3d ed. 2006). Generalized grievances usually deal with the situation of an individual bringing suit, but the only injury is that the government should follow the law. *Id.* at 91.

12. U.S. CONST. art. III, § 2, cl. 2. This clause states,

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same

an injury-in-fact, causation, and redressability.<sup>13</sup> There is another school of thought postulating that the concept of standing was alive in the courts of eighteenth and nineteenth centuries.<sup>14</sup> The concept of standing, to these commentators, has its roots in the distinction between public and private rights.<sup>15</sup> For the most part, these rights were separate, meaning that an individual could assert his own private rights, but the public could not assert the individual's private rights on his behalf.<sup>16</sup> In the context of criminal prosecutions, the rights that were vindicated by the prosecution against criminal behavior were thought to be public rights and not those of the private victim,<sup>17</sup> although the victim may be a witness for the prosecution.<sup>18</sup> This concept of public

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State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.* The three present-day constitutional requirements of standing, however, are supposedly implicit in the "Case" or "Controversy" language of Article III. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) ("This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement . . .").

13. Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 733 (2009).

14. Woolhandler & Nelson, *supra* note 5, at 691.

15. *Id.* at 692. Public rights were rights that belonged to the public in its aggregate as a community. *Id.* at 693 (citing *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829) (contrasting the "public rights belonging to the people at large" and "the private unalienable rights of each individual") (emphasis omitted)). A few examples of public rights that were generally shared were passage on public highways and the free navigation of waterways. Woolhandler & Nelson, *supra* note 5, at 693 (citing *Smith*, 4 Wend. at 21 ("The right to navigate the public waters of the State and to fish therein, and the right to use the public highways . . . belong[] to the people at large.")). In contrast, private rights were held by individuals. Woolhandler & Nelson, *supra* note 5, at 693. A few examples of private rights included an individual's rights in enforcing contracts, in property, and in one's own body. *Id.*

16. See Woolhandler & Nelson, *supra* note 5, at 695 ("Americans of the eighteenth and nineteenth centuries were used to distinguishing between wrongs to private individuals and wrongs to the public at large."). The criminal law and the ability of government to seek criminal punishment are core examples of public rights. *Id.* at 696 (noting that, although crimes impacted private rights, "criminal law enforcement was conceptualized as vindicating a shared public interest . . ."). Many times, the rights of the public as well as an individual's private rights were violated as a result of criminal behavior. *Id.* Because both the rights of the public at large and the private rights of an individual were possibly affected by the same criminal behavior, it could potentially give rise to two different actions — the public's action for punishment of the criminal behavior and the individual's action for compensation from the criminal behavior. *Id.*

17. *Id.* at 697 (citing *Commonwealth v. Duane*, 1 Binn. 601, 603 (Pa. 1809) (Tilghman, C.J.) ("the proceeding by indictment is not the right of the injured party, but of the public.") (emphasis omitted)).

18. See *State v. Rickey*, 10 N.J.L. 83, 84 (1828) (holding that although a people who are the victim of a crime (robbery, for example) may be "interested in the transactions themselves, he [sic] can have no interest in the public

versus private rights was linked to the need to have proper parties before the court to exercise their respective rights, which is seen by this commentator to be the beginning of standing.<sup>19</sup> Despite the debate over standing's historical roots, standing jurisprudence has continued to evolve.

### B. Standing from the "New Deal" Era to the Present Day

Although commentators disagree as to whether standing has historical background, most seem to agree that implied constitutional standing requirements began to emerge after the 1920s.<sup>20</sup> The emergence and subsequent changes in standing are often discussed in relation to taxpayer suits and citizen suits.<sup>21</sup>

One of the first cases to address an issue resembling modern standing was *Frothingham v. Mellon*.<sup>22</sup> Frothingham challenged the constitutionality of a federal act known as the Maternity Act, which appropriated federal tax money to only those states that chose to comply with its provisions.<sup>23</sup> Frothingham challenged the statute as a taxpayer on the basis that it was unconstitutional and would increase her tax burden, both presently and in the future.<sup>24</sup> The Court held that Frothingham had not suffered any direct injury outside her interest in her money in the federal treasury.<sup>25</sup> The Court went on to hold that a taxpayer's interest in the moneys of the federal treasury was so "minute and indeterminable" and the effect was so "remote, fluctuating and uncertain" that there was no basis for the Court to afford relief.<sup>26</sup>

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prosecution.").

19. Woolhandler & Nelson, *supra* note 5, at 691.

20. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988); Sunstein, *supra* note 5, at 179; Wankum, *supra* note 5, at 523.

21. CHEMERINSKY, *supra* note 11, at 91; Ferejohn & Kramer, *supra* note 20, at 1009-10; Wankum, *supra* note 5, at 523.

22. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

23. *Id.* at 479. The Maternity Act was passed in 1921 and essentially provided appropriations to states that chose to comply with its provisions. *Id.*; Wankum, *supra* note 5, at 527. The purpose of the act was to "co-operate" with the states to reduce the mortality rates of infants and mothers and generally protect their health. *Frothingham*, 262 U.S. at 479; Wankum, *supra* note 5, at 527.

24. *Frothingham*, 262 U.S. at 486; Wankum, *supra* note 5, at 527.

25. *Frothingham*, 262 U.S. at 487; Wankum, *supra* note 5, at 527. The Court stated that it had "no power per se to review and annul acts of Congress on the ground that they are unconstitutional." *Frothingham*, 262 U.S. at 488. The Court went on to hold that, without a direct injury, they could not pass judgment on the constitutionality of an act of Congress or they would essentially "assume a position of authority over the governmental acts of another and coequal department . . ." *Id.*

26. *Id.* at 487. The Court contrasted this situation with that of a taxpayer

A similar reasoning concerning citizen suits was applied by the Court in *Ex parte Levitt*.<sup>27</sup> At that point, it seemed clear that taxpayer and citizen suits were constitutionally barred due to a lack of personalized injury.<sup>28</sup> It was also during that time period that justices began linking the requirements of “standing” to Article III and our common law history in order to insulate Progressive and New Deal legislation from invalidation.<sup>29</sup>

Later on, most notably in the era of Chief Justice Earl Warren,<sup>30</sup> there was liberalization in the standing movement.<sup>31</sup> A major deviation from prior thoughts of standing occurred in *Flast v. Cohen*.<sup>32</sup> In *Flast*, the plaintiffs (taxpayers) complained that the

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challenging the use of his money by a municipality. *Id.* at 486. In the situation of a municipality and the monies paid into it through taxes, the Court found that the application of the taxpayer’s money had a direct and immediate effect on the taxpayer, and it was appropriate to prevent the misuse of one’s tax money by seeking an injunction. *Id.*

27. *Ex parte Levitt*, 302 U.S. 633, 636 (1937) (holding that a private individual must show a direct injury, or immediate threat of injury, as a result of the action and that having “a general interest common to all members of the public” is not sufficient). In the case, the plaintiff was filing suit to challenge the appointment of Hugo Black to the Supreme Court, alleging that the appointment was void. *Id.* at 635-36. The plaintiff alleged that Black was ineligible under Article I, section 6, clause 2 of the U.S. Constitution. *Id.*; see CHEMERINSKY, *supra* note 11, at 92 (explaining that the plaintiff alleged that Black was ineligible because, as a Senator, Black had voted to increase the retirement benefits of Supreme Court justices and this violated Article I, section 6, clause 2 of the U.S. Constitution).

28. CHEMERINSKY, *supra* note 11, at 92.

29. Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1001-02 (1997); Sunstein, *supra* note 5, at 179-80; Wankum, *supra* note 5, at 523; see, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (explaining that a court should not decide an issue unless “the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant . . . with what was the business of the Colonial courts of Westminster when the Constitution was framed.”).

30. Earl Warren was nominated by President Dwight D. Eisenhower in 1953 to become the Chief Justice of the Supreme Court after losing the nomination for president to Eisenhower. The Oyez Project, Justice Earl Warren, [http://www.oyez.org/justices/earl\\_warren](http://www.oyez.org/justices/earl_warren) (last visited Apr. 5, 2011). Earl Warren served as Chief Justice from 1953 until he retired from the Court in 1969. *Id.*

31. See Wankum, *supra* note 5, at 524 (explaining that the categories of injuries that would meet the standing requirements were expanded to allow many people affected by the decisions of the government to challenge the government); see also CHEMERINSKY, *supra* note 11, at 91 (stating that the Warren Court expanded the standing of taxpayers).

32. *Flast v. Cohen*, 392 U.S. 83 (1968); see also Brian G. Gilmore, Warth *Redux: The Making of Warth v. Seldin*, 6 HASTINGS RACE & POVERTY L. J. 147, 166-68 (2009) (discussing *Flast* as providing a foundation for Article III standing); Wankum, *supra* note 5, at 531-36 (discussing the different opinions of the justices and their reasoning).

Elementary and Secondary School Act<sup>33</sup> violated the Establishment and Free Exercise Clauses<sup>34</sup> of the First Amendment.<sup>35</sup> This act used federal funds that were appropriated to finance instruction in several subjects in religious schools.<sup>36</sup> In effect, the plaintiffs were challenging a federal statute on the same basis as those in *Frothingham*, as taxpayers.<sup>37</sup> Chief Justice Warren, however, set aside the constitutional implications of earlier decisions and held that barring taxpayer suits was merely a prudential rule—those rules put forth that are based not on the Constitution, but on prudent judicial administration, such as efficient and economic case administration.<sup>38</sup> The Chief Justice established a two-part test in deciding whether a party had standing as a taxpayer, thereby granting standing to taxpayers under certain circumstances, where before there was no such possibility.<sup>39</sup>

Additionally, the Court developed a "legal wrong" or "legal interest" test.<sup>40</sup> This type of test allowed many people intended to be benefitted by certain statutory enactments but affected in a negative way to bring challenges against the government.<sup>41</sup> This

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33. The Elementary and Secondary School Act of 1965 allowed the federal government to provide funds for instruction in secular subjects in parochial schools. CHEMERINSKY, *supra* note 11, at 92.

34. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof . . .").

35. *Flast*, 392 U.S. at 85.

36. *Id.* at 85-86.

37. *Id.* at 91-93.

38. CHEMERINSKY, *supra* note 11, at 63. One example of a prudential standing requirement is that a party cannot raise the claims of third parties before the court, but may raise only its own claims. *Id.*; see also *Flast*, 392 U.S. at 101 (stating that standing requires that a plaintiff have a personal stake in the outcome).

39. *Flast*, 392 U.S. at 102-03. First, the party bringing suit had to show a logical link between his status as a taxpayer and the type of legislation he is attacking. *Id.* at 102. In essence, this meant that a taxpayer could challenge only the expenditure of funds under the Taxing and Spending Clause of the Constitution because those provisions exclusively relied on tax monies. Wankum, *supra* note 5, at 533. Second, the taxpayer has to establish "a nexus between that status and the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102. This means that a taxpayer must assert that Congress is violating a particular provision of the Constitution with the expenditure (such as the Establishment Clause) and not just that Congress has exceeded the scope of its powers granted by the Constitution. Wankum, *supra* note 5, at 533-34.

40. Sunstein, *supra* note 5, at 184; Wankum, *supra* note 5, at 524. A plaintiff could show that he had suffered a "legal wrong" because a common law interest had been violated, such as an interest in property. Sunstein, *supra* note 5, at 181. Additionally, under the Administrative Procedure Act, the "mere existence of an interest protected by statute was sufficient" to confer standing. *Id.* at 182.

41. Sunstein, *supra* note 5, at 184; Wankum, *supra* note 5, at 524.



test is often thought to have gone hand-in-hand with the Administrative Procedure Act (APA),<sup>42</sup> which was an attempt to codify the body of judge-made standing law.<sup>43</sup>

Nevertheless, just as Chief Justice Warren was replaced by Chief Justice Burger,<sup>44</sup> so too was the “legal wrong” test replaced.<sup>45</sup> The Burger Court replaced the “legal interest” test with an “injury-in-fact” test.<sup>46</sup> This change was believed to allow for a broader range of challenges to government regulation because plaintiffs were no longer required to base their claim on a “legal interest.”<sup>47</sup> This revolution in requiring an injury-in-fact instead of a legal interest has remained with the Court to the present day and is alive in the modern test.<sup>48</sup>

### C. Modern Standing Requirements: The Tripartite Test

Presently, the Supreme Court has enunciated several requirements for standing a plaintiff must meet before a federal court will hear the case.<sup>49</sup> Some of these requirements are said to be derived from the Court’s interpretation of Article III;<sup>50</sup> in other words, they are considered constitutional requirements and cannot

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42. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified in scattered sections of 5 U.S.C.) The relevant provision of the APA states, “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702 (2006). This statute was passed because it seemed reasonable that the beneficiaries of a regulation suffered a “legal injury” when their legal interests were not protected by the government because it failed to enforce the regulations or did so to their detriment. See Sunstein, *supra* note 5, at 184 (discussing how the legal injury standard served to combat the problem of agency “capture”).

43. Sunstein, *supra* note 5, at 181.

44. Warren Earl Burger was named to replace Earl Warren as Chief Justice of the Supreme Court in 1969. Chief Justice Burger served as Chief Justice from 1969 until he retired in 1986. The Oyez Project, Justice Warren Burger, [http://www.oyez.org/justices/warren\\_e\\_burger](http://www.oyez.org/justices/warren_e_burger). (last visited Apr. 5, 2011).

45. Stern, *supra* note 6, at 1177-81; Sunstein, *supra* note 5, at 185.

46. Ass’n of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 153 (1970) (stating that the “legal interest” test looked to the merits of the case and that standing was different analysis). The Court held that this legal interest may at times be aesthetic, recreational, economic, or even conservational. *Id.* at 154.

47. A “legal interest” was thought to be synonymous with a “legal right”—“one of property, one arising out of contract, one protected against tortuous invasion, or one founded on a statute which confers a privilege.” *Tenn. Electric Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939); Stern, *supra* note 6, at 1180-81.

48. Stern, *supra* note 6, at 1181.

49. CHEMERINSKY, *supra* note 11, at 63.

50. *E.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (interpreting the language of Article III of the Constitution to limit the power of the judiciary to resolve only “cases” and “controversies”); see also U.S. CONST. Art. III, § 2.

be overridden by a statute of Congress.<sup>51</sup>

Although the "case or controversy" requirement in Article III is somewhat ambiguous, the courts are not without guidance.<sup>52</sup> Over the years, courts have held that the "irreducible constitutional minimum of standing contains three elements."<sup>53</sup> The three constitutional requirements of standing, which have been reiterated over and over in the last few decades, are: (1) the plaintiff must have suffered an injury-in-fact, (2) there must be a causal connection between the plaintiff's injury and the conduct of the defendant complained of, and (3) it must be likely that the plaintiff's injury will be redressed by a favorable decision of the court.<sup>54</sup>

### 1. Valley Forge: *Disregarding Psychological Injury*

Under the first prong, a plaintiff must have suffered an injury-in-fact, that is, an invasion of a legally protected interest<sup>55</sup>

51. CHEMERINSKY, *supra* note 11, at 63; see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that the doctrine of standing has several self-imposed judicial restraints but that it also has its core component directly derived from the Constitution).

52. See *Lujan*, 504 U.S. at 560-61 (providing the three modern-day requirements of standing to be able to sustain a case in federal court); CHEMERINSKY, *supra* note 11, at 63 (enumerating the three constitutional requirements specified by the Supreme Court a plaintiff must satisfy to have standing); see also *Allen*, 468 U.S. at 751 (citing *Valley Forge*, 454 U.S. at 471-76) (stating that the Court's extensive body of case law has developed considerable definitions for the standing concepts).

53. *Lujan*, 504 U.S. at 560.

54. *Lujan*, 504 U.S. at 560-61; see also 32A AM. JUR. 2D *Federal Courts* § 592 (2009) (stating the three constitutional standing requirements as well as providing brief case discussions regarding standing and the injury-in-fact requirement); CHEMERINSKY, *supra* note 11, at 63 (analyzing the three constitutional standing requirements); Johanna Gnall, *Addressing Maryland's Restrictive Environmental Standing: Maryland's Environmental Standing Law Must Be Reformed to Allow an Individual to Have Standing to Sue Based on Aesthetic or Recreational Injury and to Permit an Organization to Have Standing to Sue on Behalf of a Member Asserting an Aesthetic or Recreational Injury*, 16 U. BALT. J. ENVTL. L. 151, 154 (2009) (laying out and describing the three requirements); Preston Carter, Note, *If an (Endangered) Tree Falls in the Forest, and No One Is Around . . .*: Resolving the Divergence Between Standing Requirements and Congressional Intent in Environmental Legislation, 84 NOTRE DAME L. REV. 2191, 2196-99 (2009) (providing a discussion of each constitutional standing requirement); Timothy A. Newman, Note, *Standing to Challenge State and Local Immigration Regulation: How the Notion of Expressive Injury Can Restore Federal Power Over Immigration*, 17 WM. & MARY BILL RTS. J. 1215, 1225 (2009) (giving a brief overview of the constitutional standing requirements).

55. The question often arises as to what sorts of injuries are sufficient to satisfy the requirement of a legally protected interest (injury-in-fact). It seems clear that injuries to statutory rights, constitutional rights, and common law

which is (a) concrete and particularized<sup>56</sup> and (b) actual or imminent, not “conjectural” or “hypothetical.”<sup>57</sup>

In *Valley Forge*, the Department of Health, Education, and Welfare (HEW) acquired control over a tract of surplus governmental property.<sup>58</sup> HEW conveyed a seventy-seven acre tract of this excess government land to the petitioners Valley Forge Christian College<sup>59</sup> for educational purposes.<sup>60</sup> The purpose of this educational institution itself was, as described by petitioners, “to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen.”<sup>61</sup> The respondents Americans United for Separation of Church & State, Inc. (“Americans United”) learned of the conveyance through a news release and brought suit, claiming that the conveyance violated the Establishment Clause of the First Amendment.<sup>62</sup>

The Court rejected the respondent’s claims, holding that it lacked the requisite injury to confer standing because the respondents “fail[ed] 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.”<sup>63</sup> The Court

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rights are sufficient for standing. CHEMERINSKY, *supra* note 11, at 70. Besides these categories, however, there is no formula for determining what injuries are sufficient to confer standing except to identify the types of injuries that the Court has deemed sufficient and those that are insufficient. *Id.*

56. See *Allen*, 468 U.S. at 755-56 (holding that it was insufficient to constitute an injury for standing purposes for plaintiffs when they claimed to be stigmatized by the government’s policies). In this case, plaintiffs challenged tax exemptions given to private schools that discriminated on the basis of race by the Internal Revenue Service (IRS). *Id.* at 739-40. In denying standing, the Court held that an injury such as that being claimed, stigmatic injury, can only afford a basis for standing to “those persons who are personally denied equal treatment.” *Id.* at 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)); see also *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (holding that a plaintiff must allege “specific, concrete facts” to show that he has been personally harmed); *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (stating that a plaintiff must show facts that he or she is directly and adversely affected by the challenged action).

57. *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)); *Lujan*, 504 U.S. at 560.

58. *Valley Forge*, 454 U.S. at 468.

59. Valley Forge Christian College is a nonprofit educational institution which is supervised by a religious organization known as the Assemblies of God. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 469.

63. *Id.* at 485 (second emphasis added). The Court held that this psychological injury is not sufficient to confer standing under Article III. *Id.* at 485-86. This case is often deemed as the authority on the rejection of the psychological injury theory. *Barnes-Wallace*, 530 F.3d at 794-95 (Kleinfeld, J.,

continued, reiterating the need to have a sufficient interest to have standing to sue in federal court.<sup>64</sup> *Valley Forge* presents one type of injury that does not qualify as an injury-in-fact for standing; thus, it is extremely important in the analysis of *Barnes–Wallace*.

Under the second prong, the injury-in-fact claimed by the plaintiff must have a causal connection to the defendant's conduct.<sup>65</sup> In other words, the injury must be "traceable to the challenged action of the defendant, and not the result of the independent action of some third party before the court."<sup>66</sup> The third constitutional requirement a plaintiff must meet is redressability.<sup>67</sup> To satisfy this element, a plaintiff must show that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision of the court.<sup>68</sup>

These three constitutional requirements decide the question of who may sue in federal court.<sup>69</sup> It is these requirements (most notably the injury-in-fact requirement) that will be the focus of the analysis of the subject case of this Comment.<sup>70</sup>

## 2. *Barnes–Wallace: Paving a New Road for Psychological Injury?*

In *Barnes–Wallace*, the city of San Diego leased two areas of public land<sup>71</sup> to the Boy Scouts of America ("Boy Scouts") to

dissenting).

64. *Valley Forge*, 454 U.S. at 486 ("[S]tanding is not measured by the intensity of the litigant's interest [in the alleged violation] or the fervor of his advocacy."); see *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952) (explaining that standing is not about whether a party feels very strongly about their position. It is a determination of whether a party possesses the "requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.").

65. *Lujan*, 504 U.S. at 560.

66. *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); see *Allen*, 468 U.S. at 757 (holding that the causation between the IRS's grant of tax exemptions to racially discriminatory schools and the desegregation of schools is highly speculative and indirect).

67. *Sohn*, *supra* note 13, at 730.

68. *Lujan*, 504 U.S. at 561; *Carter*, *supra* note 54, at 2198; see *Warth*, 422 U.S. at 505-06 (discussing that even if the Court were to invalidate the challenged zoning ordinances, it was "speculative" that low income housing would be built and redress the plaintiff's injury).

69. *Wankum*, *supra* note 5, at 515.

70. *Barnes–Wallace*, 530 F.3d at 784-86 (analyzing the plaintiffs' standing).

71. One area of land is named Camp Balboa and the other is Fiesta Island. *Id.* at 781. Camp Balboa offers many different things for the public including camping, swimming, archery, and a meeting place for community groups. Brief of Boy Scouts of America and Desert Pacific Council, Boy Scouts of America, Defendants-Appellees/Cross-Appellants at 22, *Barnes–Wallace v. Boy Scouts of Am.*, 530 F.3d 776 (9th Cir. 2005) (Nos. 04-55732, 04-56167), 2005 WL 735426 [hereinafter Brief of Defendants-Appellees/Cross-Appellants]. Fiesta Island, on the other hand, houses a facility known as the Youth Aquatic Center, which offers kayaks, canoes, sailboats and rowboats, and classroom

construct and maintain recreational facilities open to the general public.<sup>72</sup> The plaintiffs consisted of a lesbian couple and an agnostic couple who brought suit alleging that the leases of public land to the Boy Scouts, an organization that excludes people because of their sexual and religious orientations, violated the Establishment Clause of the Constitution.<sup>73</sup>

Specifically, the plaintiffs alleged an injury in that they avoided the land leased by the Boy Scouts because they felt an "aversion to the facilities and felt unwelcome there because of the Boy Scouts' policies that discriminated against people like them."<sup>74</sup> The plaintiffs, however, admitted that they had never tried to use the facilities located in Camp Balboa or on Fiesta Island.<sup>75</sup> Additionally, there is no evidence that the Boy Scouts ever turned away any non-Scout group at either facility.<sup>76</sup>

The Ninth Circuit Court of Appeals held that the plaintiffs had alleged a sufficient injury-in-fact because they wanted to use the facilities, but they avoided doing so because they were "offended by the Boy Scouts exclusion . . . of lesbians, atheists and agnostics."<sup>77</sup> In essence, the Ninth Circuit allowed the plaintiffs' offense to the policies of the Boy Scouts (a psychological injury) to show a sufficient injury-in-fact to challenge its leases with the city.<sup>78</sup>

### III. ANALYSIS

It is important to analyze the holding of the *Barnes-Wallace* case<sup>79</sup> to understand its present and future implications on standing doctrine.

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space for community groups. *Id.* at 21. Both Camp Balboa and the Youth Aquatic Center are offered for use on a first-come, first-served basis to Boy Scouts and the public alike, and no group is denied use of the grounds for any reason other than a pre-existing reservation. *Id.*

72. *Barnes-Wallace*, 530 F.3d at 781-82; Brief for the United States as Amicus Curiae Supporting Defendants-Appellees/Cross-Appellants at 2, *Barnes-Wallace v. Boy Scouts of Am.*, 530 F.3d 776 (9th Cir. 2005), (Nos. 04-55732, 04-56167), 2005 WL 735427.

73. *Barnes-Wallace*, 530 F.3d at 780, 783.

74. *Id.* at 783.

75. *Id.* at 782.

76. *Id.*

77. *Id.* at 784. In finding that the plaintiffs had standing, the court distinguished the *Valley Forge* case based on the fact that plaintiffs in this case said that they would like to use the land but avoided doing so, whereas in *Valley Forge*, the plaintiffs did not claim to have an interest in using the land. *Id.* at 785. The plaintiffs in *Valley Forge* were offended by the fact that they believed the Government was endorsing a particular religion by handing over federal land to a religious institution to use for religious purposes, thereby violating the Constitution. *Valley Forge*, 454 U.S. at 485.

78. *Barnes-Wallace*, 530 F.3d at 785-86.

79. *Id.* at 784.

### A. Giant Crosses, Religious Displays, and Boy Scouts?

When alleging violations of the Establishment Clause, issues of standing usually arise in two categories of cases:<sup>80</sup> prayer cases<sup>81</sup> and religious display cases.<sup>82</sup>

In the *Barnes-Wallace* case, the majority analogized the

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80. Marc Rohr, *Tilting at Crosses: Nontaxpayer Standing to Sue Under the Establishment Clause*, 11 GA. ST. U. L. REV. 495, 498–504 (1995).

81. Prayer cases include those that are challenging prayer in a public setting such as a public school or a session of a legislature. *Newdow v. Bush*, 391 F. Supp. 2d 95, 103 (D.D.C. 2005). A few examples of prayer cases, where plaintiffs had standing to challenge the practices, are: *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (holding that currently enrolled students had established standing to challenge a prayer that was said at the graduation ceremony) and *Wynne v. Town of Great Falls*, 376 F.3d 292, 298-99 (4th Cir. 2004) (holding that a plaintiff that regularly attended town council meetings where a prayer was read had standing to challenge it as a violation of the Establishment Clause).

In *Lee v. Weisman*, a principal invited a member of the clergy (a rabbi) to give an invocation and a benediction prayer for the formal graduation ceremony at the plaintiff's middle school. *Lee*, 505 U.S. at 581. The Court found that the prayer at school graduations was essentially a state-sponsored religious activity. *Id.* at 587. The plaintiff had standing because the Court stated that it was likely, if not certain, that a similar invocation and benediction prayer would be recited at her high school graduation. *Id.* at 584. Also, the Court found that the plaintiff had suffered harm because she was essentially forced to sit through and participate in this violation of the Establishment Clause, even if she sat and did nothing. *Id.* at 592.

In *Wynne v. Town of Great Falls*, the plaintiff was a resident of Great Falls, a member of the Wiccan faith, and a frequent attendee of town council meetings for many years. *Wynne*, 376 F.3d at 294. The town council meetings always opened with a prayer that often referred to Jesus Christ, and it was the practice of all attending to stand and bow their heads. *Id.* at 294-95. The plaintiff moved for an injunction to have the town council members cease and desist from holding Christian prayers. *Id.* at 296. The plaintiff was harmed and found to have standing to challenge the violation of the Establishment Clause because the prayers invoked and supported a particular religion and the plaintiff, in order to participate in the meeting, had to sit through the unconstitutional endorsement of Christianity by her local government. *Id.* at 301-02.

82. The religious display cases are those where the plaintiffs challenge the inclusion of a religious display (for example, a cross, menorah, nativity scene, or other religious statuary) on public property. *Newdow*, 391 F. Supp. 2d at 103; see also *Van Orden v. Perry*, 545 U.S. 677, 682 (2005) (allowing the plaintiff, a resident of Austin, Texas, and frequent visitor to the capitol grounds, to challenge the placement of a six-foot-high monument upon which the Ten Commandments were written on the grounds of the capitol); *Adland v. Russ*, 307 F.3d 471, 478-79 (6th Cir. 2002) (holding that the plaintiffs had standing to challenge the maintaining of a monument of the Ten Commandments on capitol grounds when the plaintiffs frequently traveled there on political business); *Books v. City of Elkhart*, 235 F.3d 292, 299-300 (7th Cir. 2000) (finding standing where plaintiffs who used the municipal building to participate in government and fulfill legal obligations challenged the placement of a monument to the Ten Commandments in front of the municipal building).

plaintiff's case to cases where an injury-in-fact was recognized, particularly where a religious display caused a person such distress that he can no longer enjoy the land where the display is located.<sup>83</sup> The majority first compared the plaintiffs' case to *Buono v. Norton*.<sup>84</sup> In *Buono*, the plaintiff was offended by the "establishment" of a cross on federal parkland.<sup>85</sup> Indeed, the plaintiff was so offended that he avoided passing through or visiting the land.<sup>86</sup> The court held that plaintiffs who were "offended by religious displays on government property" had standing to challenge them.<sup>87</sup>

The majority in *Barnes-Wallace* also compared the case to *Ellis v. City of La Mesa*.<sup>88</sup> In *Ellis*, the plaintiffs<sup>89</sup> alleged that they were "deeply offended" by the fact that a cross was displayed on public property.<sup>90</sup> Additionally, all of the plaintiffs alleged that they avoided using the land upon which the crosses were displayed because they were offended by them.<sup>91</sup> The court held that the plaintiffs had suffered an injury-in-fact because they avoided the public land on which the crosses were displayed.<sup>92</sup>

The majority in *Barnes-Wallace* attempted to compare these cases—where a blatant religious display of a giant cross creates so much revulsion and offense to the plaintiffs that they avoid the land—to the facts before it, where the plaintiffs avoided the land because of their offense at the presence of the Boy Scouts on the

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83. *Barnes-Wallace*, 530 F.3d at 784.

84. *Id.*; *Buono v. Norton*, 371 F.3d 543, 543-50 (9th Cir. 2004).

85. *Buono*, 371 F.3d at 544. This case involved a Latin cross that was erected in the Mojave National Park, which is managed by the National Park Service. *Id.* The district court had established that a Latin cross was the "preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002).

86. *Buono*, 371 F.3d at 546. The plaintiff was a practicing Roman Catholic and did not find the cross itself objectionable. *Id.* What the plaintiff did find objectionable was that a cross was located on federal land to the exclusion of other religions' symbols. *Id.*

87. *Id.* at 548 (emphasis added).

88. *Id.*; see generally *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

89. John Murphy was the plaintiff challenging the Mount Helix cross, and Philip K. Paulson with Howard T. Kreisner were the plaintiffs challenging the Mount Soledad cross. *Id.* at 1523.

90. *Id.* In this case, two separate crosses were displayed on public land: the Mount Helix cross and the Mount Soledad cross. *Id.* at 1520. The Mount Helix cross was a thirty-six-foot cross located near the top of Mount Helix and was illuminated every night of the year. *Id.* at 1520-21. The Mount Soledad cross was a forty-three-foot cross located near the top of Mount Soledad, although not illuminated at night. *Id.* at 1521.

91. *Id.* at 1523. Plaintiff Murphy claimed that he would visit the theatre to enjoy the view, but avoided it because of the cross. *Id.* Plaintiffs Paulson and Kreisner claimed that they too would like to enjoy the view from atop Mount Soledad but refused to do so because of the cross's dominance. *Id.*

92. *Id.*

land.<sup>93</sup> Nevertheless, the cases cannot be reconciled with each other based simply on their respective facts.<sup>94</sup>

As other circuits have recognized, religious display and cross cases occupy a special place in standing jurisprudence.<sup>95</sup> Courts have held that, in these cases, the type of "injury that gives standing to plaintiffs . . . is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state."<sup>96</sup> Courts have articulated that the reason religious display cases occupy a special corner is because, in these types of cases, the government "actively and directly communicat[es] a religious message through religious words or religious symbols—in other words, it . . . engage[s] in religious speech that [is] observed, read, or heard by the plaintiffs . . . ."<sup>97</sup> This direct contact with a religious display creates a specific type of injury to a plaintiff different from a citizen's generalized grievance against the government for an alleged violation of the Constitution.<sup>98</sup> It follows that the plaintiffs in *Buono* and *Ellis* had standing because each suffered a personal injury due to his or her direct contact with the *religious displays on government property*.<sup>99</sup>

In *Barnes-Wallace*, the plaintiffs were offended by the exclusion and disapproval of lesbians and atheists by the Boy Scouts.<sup>100</sup> Also, because the Boy Scouts leased public parkland from San Diego, the plaintiffs avoided the land due to their

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93. *Barnes-Wallace*, 530 F.3d at 784; see also *Barnes-Wallace v. City of San Diego*, 551 F.3d 891, 896 (9th Cir. 2008) (O'Scannlain, J., dissenting) (dissenting from denial of rehearing en banc concerning the standing issue).

94. *Barnes-Wallace*, 551 F.3d at 896 (O'Scannlain, J., dissenting).

95. *Id.* (citing *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) ("Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence.")). In *Suhre*, at issue was a display of the Ten Commandments in the main courtroom of the Haywood County courthouse. *Suhre*, 131 F.3d at 1084. The plaintiff was an atheist who had been involved in several legal proceedings and other meetings in the courtroom where he came into direct contact with the Ten Commandments display. *Id.* at 1085. The plaintiff claimed that he was revolted and offended by the display of the Ten Commandments and feared that it influenced juries to make decisions based on religious concepts instead of the law. *Id.*; see also Pamela D. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1351–52 (2001) (explaining that, generally, when the harm is the type suffered by citizens for the failure of government to adhere to the Constitution and laws, it is not sufficient to be a judicially cognizable injury except when dealing with Establishment Clause violations).

96. *Suhre*, 131 F.3d at 1086.

97. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008).

98. *Suhre*, 131 F.3d at 1086. Essentially, direct contact with the religious display takes the injury out of the realm of a generalized grievance—like that asserted by the plaintiffs in *Valley Forge*—and shows a *personal* effect on the plaintiff sufficient to show an injury-in-fact. *Id.*

99. *Buono*, 371 F.3d at 544-48; *Ellis*, 990 F.2d at 1523.

100. *Barnes-Wallace*, 530 F.3d at 784.



revulsion of the Boy Scouts and its policies.<sup>101</sup> The Ninth Circuit held that the plaintiffs' avoidance of public land because of their revulsion toward the Boy Scouts created an injury-in-fact sufficient to confer standing to them.<sup>102</sup>

But in order for the majority's comparison to work, and for the plaintiffs' psychological injuries to be sufficient, the Boy Scouts must be characterized as a "religious display on government property."<sup>103</sup> The activities and/or presence of a group of Boy Scouts cannot be believed to constitute a "religious display on government property."<sup>104</sup>

For one, the Boy Scouts as a group have been characterized by many courts to specifically *not* be a religious organization.<sup>105</sup> To be sure, there is a religious component to the Boy Scouts.<sup>106</sup> Specifically, a Scout must profess to believe in God and agree "to do [his] duty to God . . . ."<sup>107</sup> Nevertheless, these small religious components do not make the Boy Scouts a religious institution.<sup>108</sup>

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101. *Id.*

102. *Id.* at 785.

103. *Buono*, 371 F.3d at 548. The court stated that the plaintiff's injury in *Buono*—his "inability to unreservedly use public land"—created an injury-in-fact because his avoidance of the land and the cross on that land was a personal injury suffered "as a consequence of the alleged constitutional error." *Id.* at 546–47 (emphasis omitted). The court in *Barnes-Wallace* then compared the plaintiff's refusal to go on the land leased by the Boy Scouts in that case as a similar injury sufficient to confer standing. *Barnes-Wallace*, 530 F.3d at 784. Nevertheless, the two cases do not mesh. Applying the holdings from the religious display cases to this case—where there is no giant cross—is an erroneous extension of psychological injury that, in turn, is sufficient to create an injury-in-fact. *Id.* at 796 (Kleinfeld, J., dissenting).

104. *Barnes-Wallace*, 551 F.3d at 897 (O'Scannlain, J., dissenting); see also *Buono*, 371 F.3d at 547-48 (finding large crosses to be religious displays on public property).

105. See *Powell v. Bunn*, 59 P.3d 559, 580 (Or. Ct. App. 2002) (holding that the activities of the Boy Scouts are primarily secular, that is, social and recreational). The court in *Powell* continued by saying that there definitely is a religious component to the Boy Scouts: "a scout must profess to believe in God and must take an oath to do his duty to God . . . . But a Scouts' religious beliefs—both their strength and their substance—are left to him and his family; any exploration of them is done individually and voluntarily." *Id.*; see also *Good News Club v. Milford Central Sch.*, 21 F. Supp. 2d 147, 159–60 (N.D.N.Y. 1998), *rev'd*, 533 U.S. 98 (2001) (stating that scouting is mainly secular in nature); *Good News/Good Sports Club v. School Dist. of the City of LaDue*, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993), *rev'd*, 28 F.3d 1501 (8th Cir. 1994) (stating that the Boy Scouts, being a secular organization, have a primary purpose of developing "skills and moral character not related to any religious faith").

106. Charter and Bylaws of the Boy Scouts of America art. IX, § 1, July 2007, available at <http://www.scribd.com/doc/8919588/Charter-and-Bylaws-of-t-he-Boy-Scouts-of-America>.

107. *Id.*

108. *E.g.*, *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1217 n.10 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (the fact "[t]hat Boy Scouts' oath expresses a belief

Additionally, there were no religious displays whatsoever in either Camp Balboa or Fiesta Island.<sup>109</sup> There were neither giant crosses nor any other items of religious significance at the Youth Aquatic Center on Fiesta Island or in Camp Balboa.<sup>110</sup> As Judge Kleinfeld noted in his dissent, "[N]either a Boy Scout, the Boy Scout emblem (an eagle with a shield on a fleur-de-lis), nor a sign saying 'Boy Scouts' is the central symbol of any religion or sexual preference."<sup>111</sup>

Second, in observing the offending objects in *Barnes-Wallace*, *Buono*, and *Ellis*, it is quite obvious that there is a significant difference between them.<sup>112</sup> Judge Kleinfeld's dissent, although simple at first glance, is precisely on point.<sup>113</sup> Judge Kleinfeld states that a "gigantic cross on a mountaintop carries religious significance that a herd of eleven-year-old boys camping out and swimming does not."<sup>114</sup> The religious display cases were not applicable to *Barnes-Wallace* because there was no religious display causing the plaintiff's psychological injury.<sup>115</sup>

#### B. *The Present and Future Implications of the Barnes-Wallace Decision on Standing Doctrine*

The decision by the majority in this case has had collateral consequences.<sup>116</sup> In the Ninth Circuit, at least one district court has already cited the majority's ruling on standing as binding precedent.<sup>117</sup> In *Trunk v. City of San Diego*, the issue was the Mount Soledad cross located just outside of San Diego,

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in God does not make it a religious institution."); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 768 (1984) ("A simple requirement that members believe in God would not alone make an organization religious . . .").

109. *Barnes-Wallace*, 551 F.3d at 897 (O'Scannlain, J., dissenting); Brief of Defendants-Appellees/Cross-Appellants, *supra* note 71, at 47-48. In fact, the only items that the plaintiffs identified as offending on either property were two small "Scout chapel" signs in Camp Balboa. Brief of Defendants-Appellees/Cross-Appellants, *supra* note 71, at 47-48. Nevertheless, the signs complained of were removed three years before the case came before the court to make room for a climbing wall for the public to use. *Id.*

110. Brief of Defendants-Appellees/Cross-Appellants, *supra* note 71, at 47.

111. *Barnes-Wallace*, 530 F.3d at 797 (Kleinfeld, J., dissenting).

112. *Barnes-Wallace*, 551 F.3d at 897 (O'Scannlain, J., dissenting) (citing *Barnes-Wallace*, 530 F.3d at 797 (Kleinfeld, J., dissenting)).

113. *Barnes-Wallace*, 530 F.3d at 797 (Kleinfeld, J., dissenting).

114. *Id.*

115. *Id.* at 796.

116. *Barnes-Wallace*, 551 F.3d at 893 n.2 (O'Scannlain, J., dissenting).

117. *Id.*; *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1205 (S.D. Cal. 2008), *rev'd*, Nos. 08-56415, 08-56436, 2011 WL 9636 (9th Cir. 2011). The Ninth Circuit reversed on the ground that the monument did not violate the Establishment Clause, not on the issue of standing. *Trunk*, 2011 WL 9636, at \*23.

California.<sup>118</sup> There, one of the plaintiffs, Trunk, claimed that he had suffered an injury-in-fact because he was offended by the memorial.<sup>119</sup> Trunk was offended by the memorial cross because he believed it “sends a message that only Christian War Veterans are being honored or remembered.”<sup>120</sup> Because of the memorial cross, Trunk said that he did not enjoy the memorial or the land where it is located.<sup>121</sup>

In deciding whether the plaintiffs had standing, the court stated, “If Plaintiffs’ claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing.”<sup>122</sup> The court continued by saying that “[i]n the Ninth Circuit . . . merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish ‘injury in fact.’”<sup>123</sup> The fact that lower courts are citing to this case as precedent for psychological injury is contradicting well-established precedent set forth by the United States Supreme Court.<sup>124</sup> Justice Rehnquist<sup>125</sup> delivered the opinion that expressly and clearly indicated that psychological injury that is inflicted by

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118. *Trunk*, 568 F. Supp. 2d at 1202. This is one of the same memorials at issue in *Ellis v. City of La Mesa*. *Id.* The cross is located a few miles from downtown San Diego. *Id.* The cross was officially dedicated as a memorial to fallen veterans of World War I and II as well as to those fallen in the Korean War in 1954, but a cross has been in existence there since 1913. *Id.* at 1203. Since then, visitors to the hill come both to see the memorial and also to take in the panoramic view from the hilltop. *Id.* at 1202. In 2006, Congress exercised its takings power to preserve the cross as a national memorial and acquire the property as federal land. *Id.* at 1204; Act of Aug. 14, 2006, Pub. L. No. 109-272, 120 Stat. 770, 770-72 (2006).

119. *Trunk*, 568 F. Supp. 2d at 1205.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* (citing *Barnes-Wallace*, 530 F.3d at 784-85 (majority opinion)).

124. Over twenty-five years ago, in 1982, the Supreme Court decided *Valley Forge*. 454 U.S. 464. That decision continues to be a valid precedent to this day and has not been overruled.

125. William Rehnquist served as an associate justice on the United States Supreme Court from 1971 through 1986. The Oyez Project, Justice William H. Rehnquist, [http://www.oyez.org/justices/william\\_h\\_rehnquist](http://www.oyez.org/justices/william_h_rehnquist) (last visited Apr. 5, 2011). Justice Rehnquist was nominated in 1971 by President Nixon and was a staunch conservative, often holding out as a lone dissenter from the liberal majority during his early years. *Id.* This was not the case in *Valley Forge*, where Justice Rehnquist wrote for the majority against recognizing psychological injury “produced by observation of conduct with which one disagrees” as a sufficient injury-in-fact to confer standing. *Valley Forge*, 454 U.S. at 485. Four years after the decision in *Valley Forge*, Justice Rehnquist was nominated to become Chief Justice of the Supreme Court. The Oyez Project, Justice William H. Rehnquist, [http://www.oyez.org/justices/william\\_h\\_rehnquist](http://www.oyez.org/justices/william_h_rehnquist) (last visited Apr. 5, 2011). He served as Chief Justice of the Supreme Court from 1986 until he died in 2005. *Id.*

the "observation of conduct with which one disagrees" is not a sufficient injury-in-fact to confer standing.<sup>126</sup>

This type of injury is precisely what the plaintiffs in *Barnes-Wallace* alleged to have suffered:<sup>127</sup> injury due to their observation of the Boy Scouts management of their facilities (built and maintained by the Boy Scouts, no less) located on public land.<sup>128</sup> The Boy Scouts' management of the facilities offends and revolts the plaintiffs because the Boy Scouts have beliefs different from their own and disapprove of people like the plaintiffs.<sup>129</sup> Because of the plaintiffs' own disapproval of the Boy Scouts' beliefs, the plaintiffs chose to avoid the land leased by the Boy Scouts.<sup>130</sup> But the choice to avoid public land because of revulsion at others' beliefs does not, and should not, confer standing.<sup>131</sup>

Additionally, to confer standing to plaintiffs who disagree or are offended by the beliefs of other groups that lease and use public land could lead to an unending parade of lawsuits.<sup>132</sup> Consider the example of a person with anti-homosexual beliefs who claims that his daughter cannot attend school fairs because the school's Lesbian and Gay Alliance have a booth at the fair and he is offended by them.<sup>133</sup> Or consider an anti-Christian person who refuses to use a public train station because part of it is leased to a Christian bookstore and he cannot stand to be around it.<sup>134</sup> By the reasoning of the majority, this avoidance motivated by the offense at others' beliefs (psychological injury) allows plaintiffs to exclude those groups from the public facility, similar to how the plaintiffs in *Barnes-Wallace* want the Boy Scouts off the public

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126. *Valley Forge*, 454 U.S. at 485 (holding that the plaintiffs "fail to identify any personal injury . . . 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 Article III . . .").

127. *Barnes-Wallace*, 530 F.3d at 784.

128. *Id.*

129. *Id.* Although the Boy Scouts disapprove of lesbians, atheists, and agnostics, they did not exclude anyone from using the facilities located on the land at either Camp Balboa or Fiesta Island. *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1282 (S.D. Cal. 2003) ("Plaintiffs point to no evidence that the [Boy Scouts organization] has discriminated against any individual in violation of [the leases].").

130. *Barnes-Wallace*, 530 F.3d at 784.

131. *Id.* at 798 (Kleinfeld, J., dissenting) ("A feeling of revulsion for others who have different beliefs, so strong that one feels degraded or excluded if they are present, does not confer standing.").

132. See Brief for American Civil Rights Union as Amicus Curiae Supporting Defendants-Appellees/Cross-Appellants at 20, *Barnes-Wallace v. Boy Scouts of Am.*, 530 F.3d 776 (9th Cir. 2005) (Nos. 04-55732, 04-56167), 2005 WL 925931 [hereinafter Brief for American Civil Rights Union] ("Standing requirements . . . are meant to prevent parties from bringing to the courts purely philosophical arguments . . . . That is exactly the case here . . .").

133. *Id.* at 16.

134. *Id.*

parkland leased to them.<sup>135</sup>

The dissent states that by allowing the *Barnes-Wallace* plaintiffs' revulsion and consequent avoidance of the land managed by the Boy Scouts to confer standing, "we assist in a campaign to destroy by litigation an association of people because of their viewpoints."<sup>136</sup> By recognizing the plaintiffs' psychological injury as a sufficient injury-in-fact, the majority has undermined the Boy Scouts' constitutional right to gather and reinforce the values they share.<sup>137</sup> Judge Kleinfeld articulated it best in the following excerpt:

San Diego, like many municipalities, leases property to many non-profit groups: San Diego Calvary Korean Church, Point Loma Community Presbyterian Church, the Jewish Community Center, the Vietnamese Federation, the Black Police Officers Association, and ElderHelp. No doubt people can be found in San Diego who do not like Koreans, Presbyterians, Jews, Vietnamese, Blacks, and old people, and who disagree with the beliefs people in these groups share. Their feelings of disagreement or dislike should not be treated as the "concrete injury" that is "an invasion of a legally protected interest" required for standing.<sup>138</sup>

By handing down this decision, the majority of *Barnes-Wallace* has opened the courthouse doors to any and all who claim to be offended by the management and use of public land by groups having differing beliefs and views.

This decision has already had an impact on the courts, so there is reason to believe it will continue.<sup>139</sup> The future implications could be disastrous for the courts because not only does this decision directly contradict valid precedent,<sup>140</sup> it is also counterintuitive to the functions of standing.<sup>141</sup> While the future implications cannot be ascertained yet, it is reasonable to predict that the doctrine of standing will become even more amorphous than before.<sup>142</sup>

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135. *Id.* at 16–17.

136. *Barnes-Wallace*, 530 F.3d at 798 (Kleinfeld, J., dissenting).

137. *Id.*; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that the Boy Scouts enjoy the constitutional right of freedom of expressive association and are, therefore, not required to allow homosexual members into their group); Brief for American Civil Rights Union, *supra* note 132, at 3–4 (explaining that the Boy Scouts should not be penalized for exercising their constitutional right to exclude certain people from their organization).

138. *Barnes-Wallace*, 530 F.3d at 797 (Kleinfeld, J., dissenting).

139. *Trunk*, 568 F. Supp. 2d at 1205.

140. *Valley Forge*, 454 U.S. at 485.

141. See CHEMERINSKY, *supra* note 11, at 61-62 (listing as two functions of standing "restricting the availability of judicial review" and "preventing a flood of lawsuits by those who have only an ideological stake in the outcome.>").

142. See *Flast*, 392 U.S. at 99 (citing *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)).

## IV. PROPOSAL

At issue throughout this Comment has been whether "psychological injury" should suffice to show an "injury-in-fact" in order to confer standing. It should not, except in the very select group of religious display and prayer cases, which must be narrowly construed.<sup>143</sup> Thus, the Supreme Court should grant certiorari and overturn the decision of the Ninth Circuit Court of Appeals in *Barnes-Wallace v. City of San Diego*.<sup>144</sup> The majority in *Barnes-Wallace* has strayed much too far from the precedent set forth in *Valley Forge*,<sup>145</sup> and the Supreme Court should take the case to reaffirm that precedent as well as to clarify that mere offense at others' beliefs will not suffice as an "injury-in-fact."<sup>146</sup>

In this way, the Supreme Court would create consistency in what has become an area of law that has not always been clear or easily discernible.<sup>147</sup> The question of who is able to bring a suit in federal court became clearer with the establishment of the constitutional test in *Lujan*,<sup>148</sup> but what types of injuries present a cognizable injury-in-fact is a question that has not always been answered consistently, as evidenced by the case at issue in this Comment.<sup>149</sup> Throughout history, the Court has adhered to the belief that injuries of the flesh and injuries of the purse suffice to

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143. See *supra* notes 81-82, 95-99 and accompanying text.

144. Judge Kleinfeld's dissent in the original case as well as Judge O'Scannlain's dissent in the Ninth Circuit's refusal to rehear the case en banc opined that the majority had erred in reversing themselves and granting standing to the plaintiffs. *Barnes-Wallace*, 530 F.3d at 794-99; *Barnes-Wallace*, 551 F.3d at 891-98.

145. *Valley Forge*, 454 U.S. at 485. Once again, the United States Supreme Court's precedent states that "the psychological consequence . . . produced by observation of conduct with which one disagrees" is not an injury sufficient to grant standing under Article III. *Id.*

146. *Barnes-Wallace*, 530 F.3d at 798 (Kleinfeld, J., dissenting) ("By treating the Barnes-Wallaces and the Breens revulsion for Boy Scouts and consequent avoidance of a place the Boy Scouts manage as conferring standing, we extend standing to a claim that precedent does not support."); *Barnes-Wallace*, 551 F.3d at 895 (O'Scannlain, J., dissenting) ("By stretching the definition of an injury-in-fact beyond the breaking point to include injuries-in-theory, the majority's opinion is also inconsistent with longstanding Supreme Court precedent.").

147. *Barnes-Wallace*, 551 F.3d at 898.

148. *Lujan*, 504 U.S. at 560-61. *Lujan* established the three constitutional requirements that a plaintiff must satisfy in order to bring suit in federal court. *Id.* Those three requirements are an injury-in-fact, causal connection between the injury and the defendant's conduct complained of, and the likelihood that the court will redress the injury sustained with a favorable decision. *Id.*

149. See Wankum, *supra* note 5, at 562-64 (discussing the confusion caused by permitting taxpayer suits under the Establishment Clause and advocating for the application of the *Lujan* test to them).

allow a party to bring suit.<sup>150</sup> But the problem with suits like the one at issue here is, like with taxpayer suits, the nature of the supposed injury—an injury where it is impossible to show a particular harm besides the plaintiff's "psychological displeasure with the results of a governmental action."<sup>151</sup>

Acknowledging a plaintiff's "psychological injury" may be asking no more of the courts than what they already do in other contexts.<sup>152</sup> One such context, for instance, is the tort of intentional infliction of emotional distress.<sup>153</sup> A cause of action for emotional distress is recognized by the Restatement (Second) of Torts, and it does not require a plaintiff to show a tangible injury in order to bring suit or recover damages from a defendant.<sup>154</sup> The existence of causes of action where purely emotional harms are considered and redressed should enable courts to treat psychological harm analogously—such as the plaintiff's offense and revulsion in *Barnes-Wallace*—and grant standing to those plaintiffs too; is that not a reasonable inference?<sup>155</sup> Perhaps, but many believe that this is not reasonable; nor is it wise to allow this type of emotional injury to qualify as a cognizable injury-in-fact.<sup>156</sup>

The injury recognized by the courts as cognizable in the tort of emotional distress stands as a stark exception to the common law.<sup>157</sup> Because of the judiciary's reluctance to recognize emotional harm as cognizable, the burden to establish a claim for emotional distress is rigorous.<sup>158</sup> In order to state a claim for emotional distress, a plaintiff must show: (1) that the defendant caused severe emotional distress (2) intentionally or recklessly (3) by the defendant's extreme and outrageous conduct.<sup>159</sup> To meet these strenuous requirements and demonstrate that conduct is extreme and outrageous, courts seem to agree that the conduct causing the psychological harm has to be "utterly intolerable" and "go[] beyond all bounds of civilized society."<sup>160</sup> Additionally, a plaintiff must

150. *Id.* at 563. Actions involving money damages and those that involved punishment and/or imprisonment have been around since before the United States was founded. *Id.*

151. *Id.*

152. Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 526 (2002). While this Comment is concerned primarily with the endorsement test, the reasoning could very easily be applied to psychological injury being insufficient to show a cognizable injury-in-fact.

153. *Id.*

154. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

155. Choper, *supra* note 152, at 526.

156. *Id.* at 529-30.

157. *Id.* (citing DAN B. DOBBS, *THE LAW OF TORTS* 822 (2000)) ("It is certainly true that on the whole, courts have been extremely cautious in allowing claims for . . . emotional harm.")

158. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46).

159. DOBBS, *supra* note 157, at 826.

160. Choper, *supra* note 152, at 526 (quoting DOBBS, *supra* note 157, at 827).

show that the distress caused to him by the defendant's misconduct is so severe that "no reasonable person should be expected to endure it."<sup>161</sup>

Under these stringent requirements, although a defendant may have intentionally inflicted offense or humiliation on a person, he may still escape liability because it does not rise to the level of outrageous conduct or cause severe enough distress to the plaintiff.<sup>162</sup> On the other hand, the decision of the majority in *Barnes-Wallace* would allow a plaintiff to bring suit against a defendant based on conduct that is neither outrageous nor intended to cause offense or humiliation to another person.<sup>163</sup> The fact that the judiciary has been quite cautious in allowing emotional distress torts and has developed stringent requirements to further narrow the availability of such torts counsels against broadening the view of psychological harm as sufficient to create a cognizable injury-in-fact;<sup>164</sup> but the majority in *Barnes-Wallace* has chosen to take the exact opposite course, contradicting long-standing precedent.

Finally, the Supreme Court should grant certiorari in order to preserve and strengthen the functions and values served by a limited standing doctrine.<sup>165</sup> Standing is the instrumentality in determining whether the person bringing suit is the proper party

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As a little background, typically, a court will find outrage based upon the degree of misconduct and the relationship shared between the parties. DOBBS, *supra* note 157, at 827. There are four specific situations that usually support a finding of outrage: (1) when the defendant is using a position of dominance to abuse his power or position; (2) when the defendant is intentionally emotionally harming or taking advantage of a plaintiff known to him to be especially vulnerable; (3) when a defendant repeats acts that are merely offensive and can be tolerated when done once, and the plaintiff cannot avoid the defendant's behavior; and (4) when a defendant commits physical violence or threatens serious economic harm to a plaintiff known to have a special interest. *Id.*

161. Choper, *supra* note 152, at 526 (quoting DOBBS, *supra* note 157, at 832).

162. Choper, *supra* note 152, at 526-27. For example, plaintiffs who suffer indignities, insults, or annoyance are usually unable to show that the defendant's conduct was outrageous. DOBBS, *supra* note 157, at 826. Additionally, being given an unfair evaluation and subsequently being discharged from employment may be humiliating to an employee; and although the evaluation may be offensive, this offense and humiliation are not actionable. *Id.*

163. The purpose of the leases granted to the Boy Scouts by the city of San Diego was to develop "cultural, educational, and recreational programs" on the city property for the entire public community. *Barnes-Wallace*, 530 F.3d at 781 (majority opinion). Leasing the properties to the Boy Scouts of America was never meant to cause offense to the plaintiffs, but it was merely a way to meet the city's legitimate goal of establishing recreational facilities for the public on public land. *Id.*

164. Choper, *supra* note 152, at 527.

165. See CHEMERINSKY, *supra* note 11, at 61-62 (citing four different values served by having a limited standing doctrine).



to bring the matter before the court, and there are several values served by limiting who can bring suit in federal court.<sup>166</sup> First, standing doctrine promotes the separation of powers between the branches of government.<sup>167</sup> By restricting who may bring suit, standing is deemed to “limit[] what matters the judiciary will address and minimize[] judicial review of the actions of the other branches of government.”<sup>168</sup> Another value served by the limiting function of standing doctrine, particularly important in *Barnes-Wallace*, is its promotion of judicial efficiency.<sup>169</sup> The standing doctrine prevents a “flood of lawsuits by those who have only an ideological stake in the outcome.”<sup>170</sup> It is especially this value that is disregarded by the Ninth Circuit in *Barnes-Wallace*. As a subsequent district court stated regarding the majority’s opinion, “[i]n the Ninth Circuit, . . . merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish ‘injury in fact.’”<sup>171</sup>

It is a ruling like the one in *Barnes-Wallace*, which strays from binding precedent while trying to distinguish itself, that leaves courts unable to apply the law of standing consistently.<sup>172</sup>

166. *Id.* at 60-61.

167. *Id.* at 61; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers Doctrine*, 17 SUFFOLK U. L. REV. 881, 881 (1983). Then-Judge Scalia stated that standing serves to limit the role of the judicial branch of government and prevent it from encroaching upon the democratic process of the legislative and executive branches. Scalia, *supra*, at 894.

Professor Chemerinsky gives other values that are promoted by limiting the doctrine of standing. CHEMERINSKY, *supra* note 11, at 61-62. One of these values is the ability to “improve judicial decision making by ensuring that there is a specific controversy before the court” and that the person arguing before it has an adequate personal stake in the matter to litigate it effectively. *Id.* at 62. This value is said to “sharpen[] the presentation of issues” that the court “depends [on] for illumination of difficult constitutional issues.” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Another value of standing is the promotion of fairness by “ensuring that people will raise only their own rights and concerns . . . .” *Id.* The Court said this value is important because the rights of others should not be considered by the courts unnecessarily, especially when the holders of those rights do not even want the courts to rule on them. *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). For more explanation on how this value is served by standing, see Brilmayer, *supra* note 5, at 306-10 (explaining in more detail the fairness value or “representation” perspective). Although these values are thought to be best served by a limited standing doctrine, the issue of this Comment is affected by these values only marginally.

168. CHEMERINSKY, *supra* note 11, at 61.

169. *Id.*

170. *Id.* (citing *U.S. v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

171. *Trunk*, 568 F. Supp. 2d at 1205.

172. *E.g.*, *Allen*, 468 U.S. at 751 (“The absence of precise definitions . . .

The Supreme Court seems to believe that the doctrine of standing has been sufficiently defined by developing case law and that "the question of standing can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."<sup>173</sup> While this may be true in some or even many cases, standing and the requirement of an injury-in-fact are not always easily discernible.<sup>174</sup> Because of this, the Supreme Court should grant certiorari not only to correct a misapplication of standing doctrine, but to attempt to clear up some of the confusion surrounding it. The Supreme Court must clarify that "psychological injury," especially in regard to the offense and revulsion one feels at another's beliefs, will never be sufficient to confer standing.

#### V. CONCLUSION

While there is a debate on whether standing has historical roots, it seems the modern test is here to stay. The Court can provide needed guidance to lower courts and give credence to the functions of standing by accepting this case and ruling that "psychological injury" is not a sufficient injury-in-fact. Consistency is what is needed in the application of standing doctrine, and this case could go far in providing it.

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hardly leaves courts at sea in applying the law of standing."). Although the Supreme Court seems to believe this conclusion, it is clear from the majority's decision in *Barnes-Wallace* that the Ninth Circuit does not.

173. *Id.* at 751–52.

174. *Barnes-Wallace*, 551 F.3d at 898.

