No. 10-1034

In the Supreme Court of the United States

CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, DR. RICHARD SONNENSHEIN, and VALERIE MEEHAN,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, AARON PESKIN, in his official capacity as President, Board of Supervisors for San Francisco, and TOM AMMIANO, in his official capacity as a Supervisor, Board of Supervisors for San Francisco,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001
rmuise@thomasmore.org

Attorney for Petitioners

April 6, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT IN REPLY

While the United States Constitution does not require a complete separation of church and state, according to this Court, "it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), including, one must assume, the Catholic religion. Respondents ignore this clear constitutional command and offer an untenable justification for adopting an official resolution that expressly and in stark terms condemns the Catholic Church, Catholic religious leaders, and Catholic religious beliefs.

More important, perhaps, for purposes of deciding whether the Court should grant review of this case is the fact that Respondents' very own arguments and the procedural history of this case belie Respondents' claim that this case presents "no important or recurring question that requires resolution." Resp. Br. at 19.

Indeed, this case comes to this Court only after the Ninth Circuit granted Petitioners' request for rehearing *en banc* and affirmed the lower court in an exceedingly fractured decision, with *three* judges finding that Petitioners had standing and should prevail on the merits, *three* judges finding that Petitioners had standing and should not prevail on the merits, and *five* judges finding that Petitioners lacked standing and thus did not reach the merits of the Establishment Clause claim.

Unfortunately, the troubling outcome of this case was made possible by the unintelligibility of this

Court's Establishment Clause jurisprudence. The conflict between the judges on the Ninth Circuit, let alone the conflict that is found across the federal circuit courts in general, *see, e.g.,* Pet. at 9-11, amply demonstrates that the Court's extant jurisprudence is incapable of consistent application, and, therefore, provides no standard whatsoever. In fact, as this case and Respondents' arguments demonstrate, *see* Resp. Br. at 19-20, this flawed jurisprudence unfortunately permits a double standard that perpetuates a regrettable perception that the Establishment Clause is hostile toward religion.

In sum, this Court should grant review of this case and abandon its unworkable tests in favor of a view of the Establishment Clause that produces results consistent with our Nation's religious heritage—a view which underlies the First Amendment itself. As Justice Thomas noted in his concurring opinion in *Van Orden v. Perry*, "The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . [A] more fundamental rethinking of our Establishment Clause jurisprudence remains in order." *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring). Petitioners respectfully submit that this case provides an ideal opportunity for this Court to fundamentally rethink its jurisprudence and to provide much needed guidance to the courts below that is capable of consistent and evenhanded application.

ARGUMENT IN REPLY

I. THE CHALLENGED RESOLUTION, WHICH REPRESENTS AN OFFICIAL POSITION OF THE CITY ON A MATTER OF CATHOLIC DOCTRINE, CONVEYS THE UNMISTAKABLE MESSAGE OF HOSTILITY TOWARD THE CATHOLIC RELIGION.

According to this Court, the Establishment Clause prohibits "practices suggesting 'a denominational preference.'" *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (stating that "strict scrutiny" applies in such cases) (citation omitted); *see also Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). This constitutionally-mandated neutrality is allegedly violated when either the "purpose" or the "effect" of the "practice under review . . . conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor J., concurring in the judgment); *see McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.") (internal quotations and citation omitted); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("*Lemon*'s 'purpose' requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting [or disapproving] a particular point of view in religious matters.").

Consequently, it is utterly disingenuous to ignore, as Respondents do, the plain language of the resolution, *which speaks on behalf of the City*. The plain language describes a Catholic religious doctrine duly communicated by the organization of the Catholic Church in charge of clarifying such doctrine as "hateful," "defamatory," "insulting," "callous," and "discriminatory," and showing "insensitivity and ignorance." The plain language describes the Catholic Church as a hateful foreign meddler in San Francisco's affairs. The plain language demands that the Catholic Church "withdraw" its religious directive and calls for the local archbishop to defy his superior's directive. Indeed, the plain language of the resolution even goes so far as to rekindle an old anti-Catholic bigotry by referring to the Congregation for the Doctrine of the Faith as the "formerly known . . . Holy Office of the Inquisition." Pet. App. at 5a-6a. These are not "isolated statements," as Respondents suggest.[1] *See* Resp. Br. at 8. Rather, these statements exemplify the purpose and effect of this resolution: an official denunciation of the Catholic Church because of its particular religious beliefs.

Indeed, it is perhaps worth reminding this Court that the "directive" that resulted in this official condemnation by government officials was not, as Respondents mischaracterize it, "the Vatican's attempt to influence policy within San Francisco." Resp. Br. at 12. Rather, the directive was issued from the

---

[1] Respondents' argument is akin to asking the Court to ignore the written commandments when reviewing a challenge to a Ten Commandments display or to ignore Jesus, Mary, and Joseph when reviewing a challenge to a crèche display.

Congregation for the Doctrine of the Faith to Catholic Charities, a Catholic organization. As a result, the challenged resolution is a *direct* interference by the government in the affairs of the Catholic Church. It is difficult to conceive of a more egregious violation of the Establishment Clause. *See generally Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (stating that the First Amendment expresses "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

Moreover, this case does not present a situation in which legislators were merely exercising their "right to speak out on matters affecting the people they represent." Resp. Br. at 24. The challenged resolution represents an official position of the City on a question of Catholic religious doctrine. If the law were as Respondents suggest, then a legislator could exercise his "right to speak" by displaying a crèche on government property during Christmas or a Latin Cross during Easter, particularly if his constituents were Christian, or a Menorah during Hanukah if he represented a largely Jewish community. The fact that some people in San Francisco—even a majority of the people—might be virulently anti-Catholic does not immunize the City when it takes an official position that conveys this sentiment.

In sum, Respondents have offered no principled explanation under this Court's extant Establishment Clause jurisprudence as to how (or why) the Constitution could (or should) permit the government

to convey an *express* message of disfavor of the Catholic Church through an official resolution as in this case, but then prohibit an *implied* message of favor toward religion through other government practices, such as the passive display on government property of the crèche, a cross, or the Ten Commandments—practices which are routinely held unconstitutional by this and other courts in countless other cases. *See, e.g., McCreary Cnty.*, 545 U.S. at 844 (striking down a Ten Commandments display); *Cnty. of Allegheny v. ACLU,* 492 U.S. 573 (1989) (striking down the display of a crèche); *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (striking down the display of a cross that is part of a national war memorial). Indeed, there is no principled explanation, only an obvious conclusion: the Court's jurisprudence is in "hopeless disarray," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *Cnty. of Allegheny,* 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part).

II. RESPONDENTS' BRIEF HIGHLIGHTS THE FLAWED DOUBLE STANDARD THAT EXISTS UNDER THE COURT'S CURRENT JURISPRUDENCE AND THE COGNIZABLE INJURY INVOLVED IN THIS CASE, WHICH COMPEL THIS COURT TO GRANT REVIEW.

Respondents make the following relevant (and quite telling) observation and argument:

> The overwhelming majority of Establishment Clause cases involve allegations by a plaintiff that the government has favored religion –

> typically through a religious display, an invocation to which the plaintiff was subjected, or the expenditure of tax dollars in furtherance of some policy. . . . When, in contrast, the government is alleged to have disfavored religion, the claim is almost invariably brought under the Free Exercise Clause, *because the government has imposed an actual restriction on religious speech or conduct*. . . . In this case, *a government entity has engaged in nothing more than speech*, and the speech is alleged to disfavor religion. That type of First Amendment claim is almost nonexistent.

Resp. Br. at 19-20 (emphasis added).

Whether intended or not, Respondents' argument highlights the unprincipled double standard that currently exists under the Court's flawed jurisprudence. This Court has never required a plaintiff to show that "the government has imposed an actual restriction" on him before it has struck down a challenged government practice that allegedly favors a particular religion. Indeed, in the vast majority of cases in which an Establishment Clause violation was found "a government entity has engaged in nothing more than speech," whether that be the passive display of a religious symbol on government property or less, simply *permitting* a student-led, non-denominational prayer at a high school football game, *see, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down a policy that permitted student-led, student-initiated prayer at high school football games).

Respondents provide further support for granting review of this case in their argument on standing. As noted, "The City argued below, and continues to agree, that petitioners had standing" to challenge the resolution at issue. Resp. Br. at 25. As Respondents correctly argued:

> For standing purposes, it must be assumed, . . . that the resolution was a denunciation of the Catholic religion. . . . A Catholic resident of the City must have standing to challenge an official resolution denouncing his religion, just as a non-Catholic resident must have standing to challenge a resolution proclaiming Catholicism the official religion of San Francisco. A contrary conclusion would insulate government officials from suit even when they violate the Establishment Clause at its very core, by "establishing" an official religion. . . . [W]hile those offended by religious displays may be made to feel like outsiders, a plaintiff whose religion is officially denounced by his legislature is the direct target of religious discrimination. Although his actual contact with the resolution is more attenuated, the alleged injury is heightened, and far more specific to the plaintiff.

Resp. Br. at 25, 26, 28.

Thus, as Respondents acknowledge here, a citizen of San Francisco suffers a cognizable injury under the Establishment Clause if the City passes "an official resolution denouncing his religion." Consequently, in direct contravention to their earlier argument, Respondents acknowledge that the City need not

"impose[] an actual restriction" on Petitioners for them to have suffered this constitutional injury, which would apparently distinguish this Establishment Clause case from a case arising under the Free Exercise Clause.

At the end of the day, the mental gymnastics that Respondents must engage in to fit the outcome of this case within some established legal framework illustrates all too well the fundamental flaws of that framework and compel this Court to grant review of this case.

CONCLUSION

As this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and abandon its unworkable tests in favor of a standard that is consistent with our Nation's religious heritage and capable of consistent application.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
(734) 827-2001
rmuise@thomasmore.org