No. ______

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

PETITION FOR WRIT OF CERTIORARI

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

February 15, 2011

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

QUESTIONS PRESENTED

An *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit was presented with the question of whether an official resolution (Resolution 168-06) unanimously passed by the Board of Supervisors for the City and County of San Francisco that *expressly* condemned the religion of its Catholic citizens violates the Establishment Clause.[*] In a fractured opinion, *three* judges found that Petitioners had standing and should prevail on the merits; *three* judges found that Petitioners had standing and should not prevail on the merits; and *five* judges found that Petitioners lacked standing and thus did not reach the merits of the Establishment Clause claim.[**]

1. Whether the Court's modern Establishment Clause jurisprudence involving government speech—whether explicit or symbolic—is unworkable and leads to inconsistent results such that a substantial revision is necessary to ensure uniformity of decisions by the lower courts.

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[*] Resolution 168-06 is set out in full on pages 2, 3, and 4 of this petition.

[**] The confusion over standing is a direct result of the flawed jurisprudence that produced it. Indeed, "offended observer" standing is made possible by the endorsement test, which Justice O'Connor created in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *But see Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.").

2. Whether a double standard exists for Establishment Clause challenges to government speech that disfavors religion, requiring the Court to resolve the conflict by clarifying its jurisprudence and setting forth the appropriate test for such cases.

3. Whether the Court should summarily reverse the *en banc* decision because it directly and sharply conflicts with controlling law and perpetuates a regrettable perception that the Establishment Clause is hostile toward religion.

PARTIES TO THE PROCEEDING

The Petitioners are Catholic League for Religious and Civil Rights, Dr. Richard Sonnenshein, and Valerie Meehan ("Petitioners").

The Respondents are City and County of San Francisco ("San Francisco" or "City"), 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").

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The *en banc* opinion, App. 1a, appears at 624 F.3d 1043.

JURISDICTION

The opinion of the *en banc* court was issued on October 22, 2010. An application filed by Petitioners to extend the time to file the present petition from January 20, 2011 to February 17, 2011, was granted by Justice Kennedy on January 5, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. The Petitioners.

Petitioner Catholic League for Religious and Civil Rights is the Nation's largest Catholic civil rights organization. Founded in 1973, the Catholic League defends the right of Catholics—lay and clergy alike—to participate in American public life without defamation or discrimination. The Catholic League has approximately 6,000 members who reside in San Francisco. Petitioner Richard Sonnenshein is a resident of San Francisco, a Catholic, and a member of

the Catholic League. Petitioner Valerie Meehan is a resident of San Francisco, a third-generation San Franciscan, and a Catholic.

B. The Challenged Resolution.

Petitioners challenge the constitutionality of Resolution 168-06, which the San Francisco Board of Supervisors unanimously adopted on March 21, 2006. The challenged resolution reads in full as follows:

> **Resolution urging Cardinal William Levada, *in his capacity as head of the Congregation for the Doctrine of the Faith* at the Vatican, *to withdraw his discriminatory and defamatory directive* that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.**
>
> > WHEREAS, It is *an insult to all San Franciscans* when ***a foreign country, like the Vatican***, *meddles with and attempts to* ***negatively influence*** *this great City's existing and established customs and traditions* such as the right of same-sex couples to adopt and care for children in need; and
> >
> > WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would

actually mean doing violence to these children" ***are absolutely unacceptable to the citizenry of San Francisco***; and

WHEREAS, Such ***hateful*** *and* ***discriminatory*** rhetoric is both ***insulting*** *and* ***callous***, and shows a level of ***insensitivity*** *and* ***ignorance*** which has *seldom been encountered by this Board of Supervisors*; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, *Cardinal Levada is* ***a decidedly unqualified representative*** *of his former home city, and* ***of the people of San Francisco*** *and the values they hold dear*; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco *to* ***defy*** *all* ***discriminatory directives*** *of Cardinal Levada*; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, *in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (****formerly known as Holy Office of the Inquisition****)*, to withdraw his ***discriminatory*** *and* ***defamatory*** directive that Catholic Charities of the

> Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.[1]

It is important to bear in mind that the "discriminatory directive" that was the subject of this resolution was from the Congregation for the Doctrine of the Faith to a Catholic organization. It was not directed to the City, any other governmental entity or agency, or other private party.

Petitioners object to and have been injured by the anti-Catholic resolution adopted by the City. The City's resolution attacks Petitioners' deeply held religious beliefs, conveys an impermissible, government-sponsored message of disapproval of and hostility toward the Catholic religion, and sends a clear message to Petitioners that they are outsiders, not full members of the political community. App. 7a.

Petitioners Sonnenshein and Meehan have had direct contact with and have been injured by the offending resolution, which stigmatizes Petitioners on account of their religious beliefs. Petitioners Sonnenshein and Meehan, who are citizens and municipal taxpayers of San Francisco, have been injured by the abuse of government authority and the misuse of the instruments of government to criticize, demean, and attack their religion and religious beliefs, thereby chilling their access to the government. As a result of the City's anti-Catholic resolution, Petitioners

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[1] S.F. Res. No. 168-06 (Mar. 21, 2006), available at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions06/r0168-06.pdf. (emphasis added).

Sonnenshein and Meehan have and will continue to curtail their activities to lessen their contact with Respondents, thereby causing further harm. Petitioner Catholic League, through its members, has been similarly injured and harmed by Respondents' actions. *See* App. 43a.

The effect of the City's anti-Catholic resolution, which remains posted on the City's official website, is the same as posting a large sign on the front door to city hall reading, "Catholics are not welcome in San Francisco." *See* App. 16a-17a, n.33 ("The government [cannot] condemn religion by erecting a gigantic sign on city hall of a cross with a line through it: a 'no Christianity' sign with the design of a 'no smoking' sign. The Board's resolution accomplishes the same thing as the aforementioned sign, but even more plainly and unambiguously.").

As summarized by Circuit Judge Kleinfeld:

> Pope Paul III established the Congregation for the Doctrine of the Faith a half millennium ago. It safeguards and promotes Catholic doctrine on faith and morals. In 2003, the Congregation addressed homosexual marriage and adoption, concluding that both were immoral, and that it was the moral duty of Catholics to oppose both. To carry out this doctrinal decision, Cardinal William Joseph Levada directed the Archdiocese of San Francisco that Catholic agencies should not place children for adoption in homosexual households. San Francisco immediately responded with official hostility. The San Francisco Board of Supervisors adopted the resolution giving rise to this lawsuit. The

> resolution urges the Cardinal to withdraw his instructions; denounces the Cardinal's directive as "meddl[ing]" by a "foreign country"; calls it "hateful," "insulting," and "callous"; and urges the local archbishop and Catholic Charities to "defy" the Cardinal's instruction.

App. 4a-5a.

C. The Procedural Posture of the Case.

Petitioners sued the City, claiming that this official government resolution violates the Establishment Clause. The district court dismissed the lawsuit for failure to state a claim upon which relief could be granted, App. 115a-138a, and a panel of the Ninth Circuit initially affirmed, App. 86a-114a. The Ninth Circuit then voted to rehear the case *en banc*, App. 84a-85a, and affirmed the district court's dismissal on differing grounds, as noted previously, App. 1a-83a.

REASONS FOR GRANTING THE PETITION

I. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO "SILLY" RESULTS THAT ARE INCONSISTENT WITH OUR NATION'S HISTORY AND TRADITIONS.

The Court's modern Establishment Clause 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 v. ACLU,* 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part). *See also*

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

This case is a "poster child" for the inconsistent results caused by the Court's muddled Establishment Clause case law. Thus, it provides an opportunity to abandon this unworkable jurisprudence in favor of one that respects our Nation's religious heritage, history, and traditions and that eschews the "crooked lines and wavering shapes" produced by the status quo. Unfortunately, under the current jurisprudence, the closest measure for predicting the outcome of a particular case is the personal predilections of the judge or judges deciding it. *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) ("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.").

While a majority of the *en banc* Court found that Petitioners had standing to advance their Establishment Clause claim,[2] that ruling is hollow comfort given the fact that the circuit court also confirmed the constitutionality of the City's anti-

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[2] As Circuit Judge Kleinfeld noted in his majority opinion on standing, "It would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government's preferment of other religious views." App. 8a.

Catholic resolution. This ruling on the merits is troubling given that under this Court's extant jurisprudence, "a mere message of disapproval, even in the absence of any coercion,[3] allegedly suffices for an Establishment Clause violation under *Lemon*." *See* App. 27a; *see Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J., concurring in the judgment) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.").

As Circuit Judge Kleinfeld appropriately observed:

> The "message" in the resolution, unlike, say, the message that might be inferred from some symbolic display,[4] is *explicit*: a Catholic doctrine

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[3] Though not yet adopted by a majority opinion from this Court, a test focusing on actual legal coercion, rather than endorsement, would perhaps be more faithful to the original meaning of the Establishment Clause. *See Van Orden*, 545 U.S. at 693 (Thomas, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 640-43 (1992) (Scalia, J., dissenting). Indeed, coercion could be found here as between the City and the Archdiocese of San Francisco, to which Petitioners, as Catholics, are members. Nevertheless, as the Court's jurisprudence currently stands, the endorsement enquiry does not require coercion.

[4] It is perhaps ironic (and no doubt tragic for the family members of the servicemen and servicewomen who are honored by the Mt. Soledad war memorial) that the Ninth Circuit recently held unconstitutional the longstanding display of a cross atop Mt.

> duly communicated by the part of the Catholic church in charge of clarifying doctrine is "hateful," "defamatory," "insulting," "callous," and "discriminatory," showing "insensitivity and ignorance," the Catholic Church is a hateful foreign meddler in San Francisco's affairs, the Catholic Church ought to "withdraw" its religious directive, and the local archbishop should defy his superior's directive. This is indeed a "message of . . . disapproval." And that is all it takes for it to be unconstitutional.

App. 27a-28a (emphasis added).

Justice Thomas summed it up best in his concurring opinion in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (2004) "Our jurisprudential confusion has led to results that can only be described as *silly*." (Thomas, J., concurring in the judgment) (emphasis added); *see also Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence").

Indeed, inconsistent results—results which tend to disfavor religion and thus call into question the very

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Soledad in San Diego, California—a *passive* symbol that is an integral part of a national war memorial. *See Trunk v. City of San Diego*, Nos. 08-56415, 08-56436, 2011 U.S. App. LEXIS 53 (9th Cir. Jan. 4, 2011). As Circuit Judge Kleinfeld accurately noted in the present case, "Symbols endorsed or adopted by a government are often ambiguous, but the words in this resolution are not." App. 16a-17a, n.33.

foundation of the Court's jurisprudence[5]—in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., ACLU v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence."); *Am. Jewish Congress v. Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as

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[5] *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting) ("Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century."); *see also Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1236 n.2 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing *en banc*) ("A mode of analysis that ignores this tradition of acknowledgment, and the original understanding of the Establishment Clause that it suggests, is suspect at best.").

if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended—but would have been less so were the crèche five feet closer to the jumbo candy cane."); *Bauchman v. West High Sch.,* 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing *en banc*) ("[U]ntil our superiors speak, we leave the state of the law "in Establishment Clause purgatory.") (quoting *ACLU v. Mercer Cnty.,* 432 F.3d 624, 636 (6th Cir. 2005)).

This case presents an opportunity for the Court to revise its Establishment Clause jurisprudence in cases involving government speech in the context of reviewing *for the first time* a case involving speech that disfavors religion. *See* App. 20a ("We have not found another Establishment Clause case brought by people whose religion was directly condemned by their government."). Petitioners suggest that (a) in cases of government speech that is rationally related to our Nation's long history and tradition of recognizing and accommodating religion, such as those involving the display of religious symbols during national holidays,[6]

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[6] *See Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.").

Ten Commandments displays,[7] the use of a cross in a war memorial,[8] legislative prayer,[9] or the use of words such as "under God" in the pledge of allegiance or "In God We Trust" in our national motto,[10] the Court should adopt a rational basis standard of review; and (b) in cases that do not meet this threshold requirement, such as those involving government speech that expresses hostility toward religion as illustrated by the anti-Catholic resolution at issue here, a strict scrutiny standard should apply. *See* sec. I. B., *infra*. Such an approach is consistent with our history and traditions and the construct of the First Amendment. *See, e.g., Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of

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[7] *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) (upholding the display of a Ten Commandments monument on the grounds of the Texas State Capital and acknowledging the history of such displays).

[8] *See, e.g., Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) ("It is reasonable to interpret the congressional designation [of the cross as a national war memorial] as giving recognition to the historical meaning that the cross had attained.").

[9] *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding the constitutionality of legislative prayer and stating, "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country").

[10] *See generally Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26, 35-36 (2004) (Rehnquist, C.J., concurring) (O'Connor, J., concurring) (acknowledging patriotic invocations of God and official acknowledgment of religion's role in our Nation's history).

religion in general."); *McCreary Cnty.*, 545 U.S. at 887 (Scalia, J., dissenting) ("Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Marsh*, 463 U.S. at 790 ("[H]istorical evidence sheds light . . . on what the draftsmen intended the Establishment Clause to mean."); *see also Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing *en banc*) ("The court's decision in this case perpetuates a regrettable misapprehension of the Establishment Clause: that recognition of the role of religion in this country's founding, history, traditions, and laws is to be strictly excluded from the civic sphere."). And it offers a well-established analytical framework within which to evaluate Establishment Clause claims. This framework would provide needed guidance for the lower courts and would stem the tide of "silly" cases and opinions.

A. THE COURT SHOULD ADOPT A RATIONAL BASIS STANDARD OF REVIEW FOR GOVERNMENT "RELIGIOUS" SPEECH THAT IS REASONABLY RELATED TO OUR NATION'S HISTORY AND TRADITIONS.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343

U.S. 306, 313 (1952). "From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life." *Van Orden*, 545 U.S. at 678 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, "In God We Trust," the display of the crèche during Christmas, *see Lynch,* 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property, *Van Orden*, 545 U.S. at 677, among others, *see also Marsh*, 463 U.S. 783 (upholding legislative prayer); *see also McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, the Court concluded its recitation of examples of government recognition of religion by stating,

> One cannot look at even this brief resume [of historical examples] without finding that *our history is pervaded by expressions of religious beliefs*. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and *hostility toward none*. Through this accommodation, as Justice Douglas observed, governmental action has "[followed] the best of our traditions" and "[respected] the religious nature of our people." [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78 (emphasis added).

As this Court observed: "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion." *Van Orden,* 545 U.S. at 687 (internal quotations, brackets, and citations omitted); *see also Elk Grove Unified Sch. Dist.,* 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); *id.* at 35-36 (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance."); *Van Orden*, 545 U.S. at 688 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."). Governmental suppression of this tradition is the antithesis of the value of religious tolerance that underlies the Establishment Clause. *See, e.g., Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment).

Thus, while it cannot honestly be denied that we are a religious people with a long and rich religious heritage, policy decisions that disfavor religion, such as the resolution at issue here, do not enjoy such a favorable history and should, therefore, be treated differently under the law. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "*forbids* hostility toward any" religion) (internal punctuation, quotations, and citations omitted) (emphasis added); *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (stating that the Constitution "*forbids* an official purpose to disapprove of a particular religion or of religion in general") (emphasis added).

Therefore, this Court should adopt the deferential rational basis standard of review for government "religious" speech that is reasonably or rationally related to our Nation's history and traditions. This standard would respect our Nation's history, it would be consistent with the framework of the First Amendment, and it would provide a well-established test for the lower courts to apply. Moreover, it would remove from the calculus the "complying with the Establishment Clause" claim so often invoked as justification for the government's hostility toward religion. *See Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 174 (3d Cir. 2008) ("The Supreme Court has stated that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.") (internal quotations and citation omitted); *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 604-06 (3d Cir. 2009) (upholding a ban on the performance of traditional Christmas music in public schools and finding that the ban had a legitimate secular purpose of avoiding "a potential Establishment Clause violation"); *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) (holding that a school district's order directing a teacher not to leave his Bible in sight or to read silently from it during classroom hours had a secular purpose in that it was intended "to assure that none of [the teacher's] classroom materials or conduct violated the Establishment Clause"); *see also Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246 (9th Cir. 2007) (holding that the removal of a small, historic cross from the

county seal had a valid secular purpose of avoiding a potential Establishment Clause violation); *but see Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981) (holding that the state's interest in complying with the Establishment Clause did not justify discrimination against a religious group).

On the other hand, government "religious" speech that does not share the same history and tradition, such as the anti-Catholic resolution presently before this Court, should be treated under a higher standard of review.

B. THE COURT SHOULD ADOPT A STRICT SCRUTINY STANDARD OF REVIEW FOR GOVERNMENT "RELIGIOUS" SPEECH THAT IS NOT REASONABLY RELATED TO OUR NATION'S HISTORY AND TRADITIONS.

Government "religious" speech that is not reasonably or rationally related to our Nation's history and tradition of recognizing and accommodating religion should be subject to a heightened level of scrutiny.

For example, because the Constitution *forbids* hostility toward a particular religion or of religion in general—hostility that has no place in our Nation's history and traditions—such practices should be judged under the Establishment Clause by applying a strict scrutiny standard of review. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *see also id*. (observing that "such hostility would bring us into

war with our national traditions embodied in the First Amendment[]"); *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring) (noting that "hostility toward religion . . . has no place in our Establishment Clause traditions"); *cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying strict scrutiny to strike down a law under the Free Exercise Clause that targeted a particular religion). Thus, government speech that explicitly disfavors religion, such as the resolution at issue here, should be held "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id*. at 533. Here, there is no compelling interest—or indeed even a rational basis—to justify the "insolent, stupid, or worse," *see* App. 37a, resolution expressly condemning Petitioners' religion.

Similarly, strict scrutiny should apply to government "religious" speech that favors religion in a way that is inconsistent with our Nation's history and traditions. For example, a heightened level of scrutiny should apply to a government resolution that officially affirmed the Catholic doctrine of transubstantiation, *see, e.g., 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."), or established the official definition of "kosher" for the Jewish faith, *see, e.g., Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (holding that the government violated the Establishment Clause because it suggested a "preference for the views of one branch of Judaism"). Taking an official position on a specific theological proposition is qualitatively different from government speech that is reasonably or rationally related to our Nation's history and tradition

of recognizing and accommodating society's belief in God.

II. THE *EN BANC* DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUIT COURTS, AND IT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

Should the Court decide not to substantially revise its unworkable Establishment Clause jurisprudence, Petitioners contend that the Court should summarily reverse the *en banc* decision because it conflicts with the controlling principles of law set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *Edwards v. Aguillard*, 482 U.S. 578 (1987), and *Epperson v. Arkansas*, 393 U.S. 97 (1968), among others, and it presents an issue of considerable national importance.

A. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE GOVERNMENT SPEECH THAT EXPRESSLY DISFAVORS RELIGION.

This Court has previously stated that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and that we guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (internal quotations and citation omitted). One such way in which these "values" are eroded is by the passage of a government resolution that singles out a

specific religion for disfavored treatment. An evenhanded application of prior precedent should compel a reversal in this case. Unfortunately, with little exception, the application of this Court's modern Establishment Clause jurisprudence has led the law to disfavor religion, thereby encouraging callous acts of religious discrimination such as the challenged resolution at issue here. Indeed, the *en banc* decision, if left unchecked, will further embolden those government officials who are anti-religious (or, worse, anti-Catholic). And it will add further confusion to the Court's already confused Establishment Clause jurisprudence.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, *such hostility would bring us into war with our national tradition* as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993), the Court

acknowledged the following: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or *of religion in general*." (emphasis added).

Despite an occasional appearance of neutrality and suggestion that the Constitution is *not* hostile toward religion, the reality is that this Court's Establishment Clause jurisprudence is frequently used as a blunt instrument against all thing religious in public life.

While some on this Court still believe that our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," *Lynch*, 465 U.S. at 673, this case will afford the Court the opportunity to breathe new and lasting life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts. As this case shows, the Court's prophetic observation in *Lynch* that "[a]nything less would require the callous indifference [that] was never intended by the Establishment Clause," thereby bringing "us into war with our national tradition" has come to fruition. It is time to reverse this harmful and divisive trend.

B. THE *EN BANC* DECISION DIRECTLY AND SHARPLY CONFLICTS WITH ESTABLISHED PRECEDENT AND PROMOTES A PERCEPTION THAT THE LAW IS HOSTILE TOWARD RELIGION.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire

to promote or "advance" religion, *see, e.g., Cnty. of Allegheny,* 492 U.S. at 592, but also actions that tend to "disapprove of," "inhibit," or evince "hostility" toward religion, *see Edwards*, 482 U.S. at 585 ("disapprove"); *Lynch,* 465 U.S. at 673 ("hostility"); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). The Court has also noted that our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion); *see also Church of the Lukumi Babalu Aye, Inc.,* 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general").

A state-sponsored message of disapproval of religion, as evidenced by Respondents' anti-Catholic resolution, sends a message to Petitioners and other Catholics that their religion is disfavored in the community. *See Cnty. of Allegheny,* 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (striking down a law that targeted a particular religious practice).

More recently, in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> [The removal of the religious symbol], based primarily upon the religious nature of the tablets' text would, I fear, *lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions*. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. *And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid*.

Id. at 704 (emphasis added).

While the language from these cases appears to support a "disapproval of religion" claim, the practical reality is that such claims are given little traction by the lower courts, as this and other cases demonstrate. *See Stratechuk v. Bd. of Educ.*, 587 F.3d 597 (3d Cir. 2009) (upholding against an Establishment Clause challenge a school district's ban on the performance of traditional Christmas music in its public schools because the music is associated with a religious holiday); *Am. Family Ass'n v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that San Francisco's resolution condemning a religious organization's advertisement opposing homosexuality did not violate the Establishment Clause); *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246 (9th Cir. 2007) (upholding against an Establishment Clause challenge the government's removal of a small, historic cross from the county seal because the cross was a religious symbol); *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is

. . . violated as much by government disapproval of religion as it is by government approval of religion," but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (upholding a government display of an anti-Catholic statue against an Establishment Clause challenge); *cf. Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009) (upholding the ban of a student performance of "Ave Maria" at a public school graduation). *Compare Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (acknowledging that removing Christian symbols, such as a cross, from all public displays "evinces not neutrality, but instead hostility, to religion" and holding that the inclusion of a Christian cross in the city insignia did not violate the Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) ("Limiting the number of times a religious piece of music can be sung is tantamount to censorship and *does not send students a message of neutrality*. . . . Such animosity towards religion is *not required or condoned by the Constitution*.") (emphasis added); *see also ACLU v. Mercer Cnty.,* 432 F.3d 624, 638-39 (6th Cir. 2005) (upholding the public display of the Ten Commandments and observing that the "repeated reference to 'the separation of church and state'" is an "extra-constitutional construct [that] has grown tiresome"). At a minimum, there is much confusion in the lower federal courts that only this Court can clarify. *Green*, 574 F.3d at 1245 (Gorsuch, J., dissenting from denial of rehearing *en banc*) ("[U]ntil our superiors speak, we leave the state of the law in Establishment Clause purgatory.") (internal quotations and citation omitted).

In the Ninth Circuit, and elsewhere, even the most subtle and inconsequential act *favorable* to religion is

quickly held impermissible, *see, e.g., Trunk*, 2011 U.S. App. LEXIS 53 (declaring the use of a cross in a longstanding war memorial unconstitutional); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008) (prohibiting a football coach's participation in *student-led* prayer by silently bowing his head during grace and taking a knee during locker room prayer); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009) (refusing to allow a parent to read Bible verses to her son's kindergarten class during the student's "All About Me" week); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (allowing an option for student-initiated and student-led prayer at high school football games violated the Establishment Clause), making hostility to religion the standard to comport with the Establishment Clause. This view of the Court's jurisprudence inevitably leads to a view of the law that is disapproving of religion.

Indeed, an official resolution that explicitly condemns Catholics and their religion is not *neutral* toward religion, but rather hostile to it. And even *subtle departures from neutrality* are allegedly prohibited by the Establishment Clause. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534; *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (admonishing the courts to "keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded" and to "guard against other different, yet equally important, constitutional injuries"); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "hostility to the religious"). But these principles are often cast aside in favor of an approach that employs curettage and disinfectant for all that partakes of the

religious in public life—an approach wrought by this Court's muddled jurisprudence.

In the present case, the resolution violates the Establishment Clause *on its face* because it *expressly* and in *explicit terms* condemns Catholics and their religion. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (holding that "the *mere passage* by the District of a policy" that has the "purpose and perception" of favoring religion violates the Constitution) (emphasis added). An examination of the resolution demonstrates that the City's departure from neutrality was anything but "subtle"; it created the very kind of political divisiveness along religious lines that the Establishment Clause was apparently designed to avoid.

Unfortunately, the Ninth Circuit's *en banc* decision represents an entrenched and improper double standard for Establishment Clause cases that requires only a minimal standard of proof for finding a constitutional violation in "approval" cases and a very high standard of proof for finding a constitutional violation in "disapproval" cases. This case presents a perfect opportunity to eliminate this double standard in the lower federal courts by applying the Establishment Clause in an evenhanded manner, as required by this Court's precedent.

In the final analysis, the *en banc* court's decision contravenes this Court's case law prohibiting government disapproval of religion and should be summarily reversed. However, the lack of clarity from this Court, particularly with regard to "disapproval" claims, is undoubtedly a major contributing factor for the fractured opinion below. Therefore, the Court

should grant review of this case to clarify its jurisprudence.

CONCLUSION

While it is evident that the *en banc* decision conflicts with several decisions from this Court and other circuit courts so that consideration is necessary to secure and maintain uniformity of decisions on an important issue of federal law, the crux of the problem is that this Court's Establishment Clause jurisprudence is in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the present Establishment Clause framework, which tends to be hostile toward religion, in favor of a workable standard that is not only capable of consistent application, but that is consistent with our Nation's religious history and traditions.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH 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