No. 23-481

In The Supreme Court of the United States

TEMPLE OF 1001 BUDDHAS and MIAOLAN LEE,

Petitioners,

vs.

CITY OF FREMONT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner MiaoLan Lee admits that she did extensive construction on her property without obtaining any permits. When the City of Fremont discovered the construction, it initiated code enforcement proceedings. Lee, and an organization she deeded the property to, sued the City under 42 U.S.C. § 1983, alleging that the unpermitted buildings were for private religious use, and that the code enforcement proceedings were animated by religious discrimination. The district court dismissed the claim, and the Ninth Circuit affirmed. Petitioners present two issues:

1. There are three recognized ways to establish § 1983 municipal liability under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 685 (1978): official policy; longstanding practice or custom; and action or ratification by a final policymaker. Can a plaintiff who has not plausibly alleged facts satisfying any of these three categories nonetheless pursue a *Monell* claim?

2. Can a plaintiff pursue a § 1983 religious discrimination claim based on allegations that a city enforced facially-neutral code provisions as to violations on the plaintiff's property but not as to two neighboring properties, without factual allegations showing that the neighbors' violations were similar in scope and nature to plaintiff's?

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INTRODUCTION

Petitioner MiaoLan Lee admits that she undertook extensive construction on her property without obtaining any of the required permits or inspections. That construction included: a new multi-story accessory dwelling unit; a new gazebo surrounded by a new 60,000+ gallon pond; a substantially remodeled and enlarged main residence; a substantially remodeled barn/hall; a new pedestrian suspension bridge across a creek; and a new concrete road connecting the buildings.

The City of Fremont received anonymous emails reporting that this construction was occurring, and that Lee was covertly operating a business from the property and housing workers in the remodeled barn. It investigated, and then initiated code enforcement proceedings. Lee claimed in those proceedings that the unpermitted structures were for her private religious use, and that the proceedings constituted religious discrimination.

The City eventually issued a Notice and Order to Abate Nuisance and a Notice and Order to Vacate as to the unpermitted structures. Lee, and an entity that she transferred the property to during the enforcement proceedings, subsequently filed two lawsuits: a state-court administrative mandamus petition challenging the findings in the Notices and the procedures surrounding them; and a federal-court complaint against the City alleging myriad claims, including religious discrimination under 42 U.S.C. § 1983.

The petition arises from the federal action. The district court dismissed petitioners' § 1983 claim for failure to plausibly allege a basis for municipal liability under *Monell*, 436 U.S. 685, and the Circuit Court affirmed in a non-precedential memorandum disposition. Petitioners seek certiorari on two questions: whether the City can be liable under § 1983 *absent* plausible allegations of an official policy, longstanding practice or custom, or action by a final policymaker; and whether a claim of selective code enforcement compels strict-scrutiny review.

The Court should reject the petition, for multiple reasons. Neither question was raised below. The petition does not assert there is any circuit split on either one. Its *Monell* discussion does not present any workable rule, much less reconcile such a rule with well-settled precedent. Its standard-of-review argument is moot because, with the City as the only defendant, any alleged discrimination is irrelevant absent a basis for *municipal* liability and absent a showing of disparate treatment—both of which the lower courts correctly held that petitioners failed to plausibly allege. There simply is no issue here warranting the Court's review.

SUPPLEMENTAL STATEMENT OF THE CASE

The operative complaint alleges seven causes of action, and spans 211 paragraphs, with many subparagraphs. The petition summarizes many of the

allegations. To avoid redundancy, we provide only the following additional context from the record.

A. Petitioner Lee constructs multiple new structures on her property, and substantially remodels existing buildings, without permits or inspections.

This case involves unpermitted construction on a 29-acre property in the City of Fremont, California. Petitioner Lee purchased the property in 2010. App. 8a.

The property is on a hillside where the slope of the land is 15% or higher, in a very high fire hazard area and an earthquake-induced landslide zone. App. 7a. Uses of the property are limited by its "Open Space" and "Hill (beyond Ridgeline)" zoning designations, and by a "Land Conservation Contract." App. 7a, 119a, 135a.

Lee admits that she built multiple new structures, and remodeled existing structures, on the property without permits or inspections. App. 123a-134a; Ninth Cir. Dkt. 20 at 5-6. The unpermitted construction includes a new two-story accessory dwelling unit ("Retreat House"); a remodeled residence; a remodeled barn ("Meditation Hall"); a remodeled garage ("Main Buddha Hall"); a new 120 square-foot gazebo with a new 60,000 gallon surrounding pond ("God's House"); a new greenhouse; a new tree house; a new driveway connecting the properties; a suspension bridge over a creek; and other hardscaping. App. 123a-134a.

B. City employees seek a warrant to inspect the property based on anonymous reports that Lee is (1) undertaking unpermitted construction, (2) operating a business, and (3) housing workers who are undocumented or on tourist visas.

In October 2017, City employees began attempting to inspect the property. App. 136a, 138a. The petition for certiorari presents petitioners' version of events as alleged in the operative complaint. We add the following to that summary:

In February 2018, a deputy city attorney applied for an inspection warrant of the property. App. 140a; 2-ER-109-16. The district court took judicial notice of the warrant application. App. 35a, n. 1, 38a, n. 4; *see also* App. 7a, n. 2 (granting judicial notice of a notice and order to abate, "as well as other relevant matters of public record"); 2-ER-75-79 (request for judicial notice). The petition does not challenge the propriety of the district court's judicial notice rulings.

The warrant application stated that the City had received complaints that Lee was engaging in "illegal construction, unlawful operation of multiple registered businesses, and possibly human trafficking." App. 38a, n. 4; *see also* 2-ER-113 (application), 120-21 (supporting declaration); App. 138a (complaint alleging prior email to Lee advising that the City had become aware of unpermitted construction, extensive concrete work, construction or alteration of a natural watercourse, and business operating in a residential zone).

A declaration supporting the warrant application attached the anonymous email complaints, which claimed that "[t]he owner runs a company out of his illegal converted barn and garage," that three Vietnamese employees, "2 on visa 1 undocumented," live in a dorm in the barn, and that "[m]ost construction was done by illegal [sic] last year and the year before by illegal vietnamese [sic] workers owner brought from Vietnam under tourist visa." 2-ER-147-63. The emails included photos purportedly from inside the converted barn showing multiple work stations. 2-ER-147-63.[1]

The warrant was granted, and the inspection proceeded. 2-ER-185-86; App. 140a-141a. A month after the inspection, on March 11, 2018, Lee deeded the property to Temple of 1001 Buddhas, a "private religious 501(c)(3)." App. 8a, 118a-119a.

C. The City issues notices to abate, and ultimately, a notice to vacate—and remove all personal property from—three unpermitted buildings.

On March 29, 2018, a City code enforcement officer, Tanu Jagtap, issued a "Notice and Order to Abate Nuisance" outlining twelve violations of zoning and other code provisions. 2-ER-195-242; *see also* App. 35a, 77a, n. 4 (granting the City's requests for judicial

[1] We describe the emails not for the truth of the claims, but to explain what was in the warrant application.

notice of the notice and other documents), 142a-143a (complaint).

The notice referenced a 2013 code enforcement proceeding in which the City worked with Lee to legalize prior unpermitted construction on the property and warned her that future development would likely require a Conditional Use Permit before issuance of a building permit. 2-ER-196; *see also* 4-ER-795 (2013 "Notice and Order to Abate Nuisance" attached to judicially-noticed warrant application, reciting that a barn had been converted to apparent residential use "without first obtaining permits and passing inspections"); App. 135a-136a (complaint allegation that in 2014, Lee obtained permits "to finish improvement work on a dilapidated barn").

The 2018 notice stated that a kitchen and air conditioning had been added to the barn "in conflict with the plans approved by the City during [the] 2013 case" and that the unpermitted construction "unlawfully converts the structure into an accessory dwelling unit, may be impermissible due to zoning restrictions, and does not meet the FMC or CBSC requirements for a habitable structure." 2-ER-208.

The notice also described unpermitted alterations and new construction, including alterations to a "barn/garage/storage building." 2-ER-212. It observed that "[t]his structure appears to be set up as a commercial building to support both business and dwelling use," with a stack of computer components and multiple data ports on the floor, and that City records

showed multiple businesses registered as doing business at the property. *Id.* Other violations described in the notice involved a new 2,500 square foot multi-story dwelling unit, a remodeled house, and construction of an "accessory structure and pools"—all without design review or building permits. 2-ER-195-242.

In May 2018, the City obtained another warrant, to inspect the property to determine compliance with various codes. App. 145a-146a; 2-ER-243-3-ER-363.

After the inspection, in June 2018, City Building Official Gary West issued a Notice and Order to Vacate three buildings: the new multi-story accessory dwelling unit, the three-story building that was formerly a one-story garage, and the two-story building that was formerly a barn. 3-ER-366; *see also* App. 147a-148a (complaint allegations). Code enforcement officer Jagtap also issued an Amended Notice and Order to Abate Nuisance which, among other things, directed petitioners to "cease habitation of all unpermitted structures" and to "[r]emove all non-real property from all unpermitted structures by July 28, 2018." 3-ER-368-420; *see also* App. 148a (complaint).

D. Petitioners challenge the abatement and vacatur notices; all the violations are upheld.

Petitioners administratively appealed the abatement and vacatur notices. 3-ER-484-98; App. 149a. After five days of testimony, the hearing officer upheld all the noticed violations. App. 170a; 3-ER-484-98.

Petitioners then petitioned the Alameda County Superior Court for a writ of mandate and injunctive relief. App. 170a. Their appeal from the denial of that petition is pending in the California Court of Appeal. *See* Cal. Court of Appeal docket for Case No. A167719.

E. This litigation.

1. Petitioners sue the City, alleging 12 claims; the complaint contains no *Monell* allegations.

In addition to challenging the merit of the notices to abate and vacate in state court, Lee and the Temple sued the City in federal court on a raft of theories. 7-ER-1715-54. Their original complaint alleged four § 1983 claims ("Religious Discrimination-Denial of Free Exercise," national origin discrimination, retaliation, and search and seizure); five Religious Land Use and Institutionalized Persons Act (RLUIPA) claims; and three California law claims. *Id.* The complaint did not name any individual defendants. 7-ER-1717.

Petitioners' § 1983 religion claim (the only one at issue here) alleged that the City deprived them of use of their property for religious purposes, motivated by anti-religious animus. 7-ER-1735-36. There were no *Monell* allegations—i.e., no allegation of an official policy, custom or practice, or action by a final policymaker. *Id.*

2. The district court dismisses the complaint with leave to amend.

The City moved to dismiss the complaint on multiple grounds. 7-ER-1680-1714. After the motion was briefed, the court sua sponte ordered supplemental briefing on "whether Lee has plausibly alleged the elements of municipal liability under § 1983." 6-ER-1226 (citing *Monell* and other case law applying it).

Petitioners' supplemental brief argued that "Building Official" Gary West was a final policymaker who acted unconstitutionally, and that the City's municipal code unconstitutionally bars using the property for private religious purposes. 6-ER-1204-10. The City's supplemental brief argued that the complaint's allegations did not establish a basis for *Monell* liability. 6-ER-1198-1203.

The court (Hon. Charles Breyer) granted the motion to dismiss, with leave to amend. App. 73a-110a. On the § 1983 religion claim, the court found petitioners' allegations "appear[] to rest on City employees' individual enforcement decisions and actions," and that the City cannot be liable merely for employing alleged tortfeasors. App. 99a. The court added that the complaint did not establish that West engaged in conduct giving rise to petitioners' claims while acting as a final policymaker. *Id.*, n. 13.

3. Petitioners file a First Amended Complaint.

The next iteration of Petitioners' complaint alleged nine claims: the same four § 1983 claims; three RLUIPA claims; and two declaratory relief claims based on California law. 5-ER-1130-68. Again, the City was the only defendant. 5-ER-1130.

The § 1983 religion claim alleged that the City's zoning ordinance deprived petitioners of use of their property for religious purposes, and that the City, through West, abridged their rights by prohibiting prayer on their property except in two locations. 5-ER-1154. The complaint further alleged that "Defendant's" (defined as the City's) actions were motivated by animus against petitioners' religious beliefs, as evidenced by remarks by "Defendant's agents Morris and Powell" and by not pursuing abatement proceedings against secular uses of property by petitioners' neighbors. *Id*.

4. The district court again dismisses the complaint, this time with limited leave to amend.

The City again moved to dismiss the complaint. 5-ER-1097-1129. As to the § 1983 religion claim, the City argued that the only zoning ordinance referenced in the complaint (Fremont Municipal Code section 18.55.110) does not preclude private religious use of land, and that the complaint allegations did not plausibly establish (1) that West was a final policymaker on code enforcement proceedings, (2) that West's actions

were motivated by anti-Buddhist animus, and (3) that West ratified any subordinate's discrimination. 5-ER-1111-17.

In support of its motion, the City sought judicial notice of the City Attorney's applications for inspection warrants, a police report regarding businesses listed as operating from the petitioners' property, notices to abate and to vacate the property, and documents. 4-ER-730-5-ER-1096.

Petitioners opposed the motion to dismiss, arguing that (1) West and code enforcement officer Jagtap were final policymakers, and (2) enforcement against petitioners but not their neighbor, and West's claimed statement that Lee could only pray in a certain place on the property, established a plausible claim of discrimination. 4-ER-712-18.

The court granted the City's request for judicial notice, and again dismissed the complaint. App. 34a-72a.

As to the § 1983 religion claim, the court found that the Fremont Municipal Code *permits* private religious use on petitioners' property, that petitioners did not allege an official policy or custom of making derogatory remarks about Buddhism or confining prayer to certain buildings on people's property, and that even if West was plausibly a final policymaker on some issues, petitioners "point[] to nothing within the scope of West's policymaking authority that caused any plausible constitutional harm." App. 48a-52a.

The court also observed that petitioners had not alleged that the neighbors' legal violations were as serious as theirs, that West ever made any derogatory remark about Buddhism, or that West ratified Morris' and Powell's remarks. App. 55a-56a. The court found that Jagtap was *not* plausibly a final policymaker, and that even if she were, she never committed or ratified any constitutional tort. App. 59a-60a, n. 11.

The court granted leave to amend the § 1983 religion claim and five other claims, but not claims where amendment would be futile. App. 72a.

5. Petitioners file the operative Second Amended Complaint.

Petitioners' Second Amended Complaint alleged seven claims, including a new § 1983 due process claim and two new claims based on the California Constitution. App. 114a-199a.

On the § 1983 religion claim, petitioners alleged that the City has a custom and practice against allowing religious practice on private property; that West, a policymaker, committed, ratified, or acted with deliberate indifference to his subordinates' actions, and that "the City, acting through its policymakers (including but not limited to Gary West)" has a practice of failing to ensure nondiscriminatory code enforcement. App. 173a-179a.

All the complaint's custom and practice allegations involved the enforcement proceedings in this

case, and the alleged lack of enforcement proceedings against two of petitioners' neighbors. App. 173a-179a. There were no allegations about enforcement proceedings against other property used for religious purposes, or about properties with the same volume of new, unpermitted construction as here. The complaint did not identify any final policymaker other than West, nor did it name West or any other individual as a defendant.

6. The district court again dismisses the complaint, without leave to amend.

The City again moved to dismiss, and sought judicial notice of various official documents in support of their motion. 2-ER-75-3-ER-576.

On the § 1983 religion claim, the City argued that petitioners still had not plausibly alleged facts supporting *Monell* liability, because: (1) the Fremont Municipal Code does not bar private religious use of petitioners' land, (2) there were no allegations of a longstanding custom or that petitioners' neighbors are similarly situated, (3) judicially-noticeable documents undermine any allegation that West was responsible for establishing final policy regarding the enforcement proceedings here, (4) barring petitioners from praying in three condemned buildings did not prevent them from practicing their religion, and (5) there are no allegations showing West ratified any religiously-derogatory comments. 3-ER-560-65.

Petitioners' opposition argued two bases for *Monell* liability: decision of a final policymaker, and longstanding practice or custom. 2-ER-56. Their theory was that West signed off on prosecuting the enforcement action, and that a comment that West's predecessor made in 2014 ("I wish the City did not know about" religious structures on the site) evinced a longstanding policy or custom of anti-religious animus. 2-ER-58-59.

The court granted the City's motion for judicial notice, struck the new claims as beyond the scope of leave to amend, and dismissed the rest of the claims without leave to amend. App. 6a-33a.

On the § 1983 religion claim, the court found that the allegations failed to plausibly establish any longstanding custom against allowing private religious practice on private property, and that even if West was plausibly a final policymaker, there were no plausible allegations of religious bias in his decisions. App. 21a. It noted that petitioners did not allege West was present when other City staff allegedly made derogatory comments, or that West was even aware of them. App. 21a-22a.

The court further found that petitioners did not plausibly allege that their neighbors were "similarly situated with legal and code violations as serious or extensive as those on the Temple's property." App. 22a. Moreover, in context, West's direction to remove religious materials from a condemned building appears to have been encouragement to *protect* the materials, not bias against them. *Id.* Finally, even if West's

enforcement action was based on flawed facts, petitioners are "far from plausibly suggesting that the errors were caused by religious bias." App. 22a-23a.

In short, despite "three increasingly prolix complaints," petitioners' § 1983 religion claim still did not meet the plausibility standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). App. 26a, n. 6.

7. Petitioners appeal; their briefs do not raise the issues now presented in the petition, and their reply did not address the arguments in the appellee's brief.

Petitioners appealed, challenging many of the district court's rulings.

Petitioners' appellate briefs did not argue (as their petition seems to) that a municipal entity can be liable *absent* an official policy, longstanding custom, or decision by a final policymaker. Instead, they argued that they had alleged a "longstanding custom against allowing religious practice on private properties," and a "final policymaker" theory based on West's actions. Ninth Cir. Dkt. 20 at 41-45, 50.

Nor did petitioners' briefs argue, as their petition does, that *Tandon v. Newsom*, 593 U.S. 61 (2021) and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) require strict scrutiny upon a showing of disparate treatment. Instead, they argued that they did not have to "plead and prove the specific circumstances

of every single person that was treated differently" or "that the individuals were identical in every respect," and that their allegations about non-enforcement on a neighboring property were sufficient. Ninth Cir. Dkt. 20 at 51-53.

The City's brief responded that petitioners had not alleged an official policy of disallowing private religious practice, that they could not allege a longstanding custom or practice based only on their experience in *this* enforcement action, that West was not a final policymaker, and that even if he was, there are no plausible allegations that he personally committed discriminatory acts, or knowingly ratified or demonstrated deliberate indifference to them. Ninth Cir. Dkt. 29 at 33-47. The City also argued that petitioners had not alleged other instances of Buddhists being treated differently than similarly situated non-Buddhists, or that the neighboring properties had "similar zoning or code violations and safety issues." *Id.* at 35.

Petitioners' reply on the § 1983 religion claim was just two pages long. Ninth Cir. Dkt. 36 at i, 10-12. They asserted that their complaint needed only to "plausibly suggest an entitlement to relief," and that the district court "already properly found that Gary West is a policymaker" and that they pleaded a longstanding custom against allowing religious practice on private properties. *Id.* at 10-12. That cursory approach left most of the City's analysis unanswered.[2]

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[2] Petitioners' reply was also inaccurate: The district court found only that it was "*plausible* that West *could have* been a

8. The Circuit Court affirms the dismissal in an unpublished, non-precedential memorandum disposition.

The Ninth Circuit affirmed dismissal of the complaint in an unpublished, non-precedential memorandum disposition. App. 1a-5a.

Contrary to the petition's characterization, the decision did not hold that municipalities can avoid liability "when the deprivation of rights is sufficiently diffused across municipal decision-makers" or that "[s]earching review is not required to investigate disparate treatment in connection with an alleged free exercise violation." Pet. i. Nor, contrary to the petition's characterization, did it hold that the City "may freely commission its officers to discriminate . . . as long as the chief building officer does not personally (or directly) engage in these actions vis-à-vis the victim." Pet. 20.

Rather, the decision merely held that petitioners' allegations did not meet the criteria for *Monell* liability based on religious discrimination. Observing that "Lee nowhere squarely disputes that she built numerous structures without permits, in violation of the municipal code," it concluded that petitioners had not plausibly alleged that West's enforcement decisions were

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'final policymaker' for his actions 'overseeing local code enforcement activities' "—and it found that although petitioners "*claim* that the City has a longstanding custom" against allowing religious practice on private property, "they provide no allegation that such a custom ever existed." App. 20a, emphases added.

" 'because of' " the adverse effect on her religious practice. App. 3a. Petitioners did not allege that West himself "shared or approved of" any animus motivating other City employees' disparaging comments about the sincerity of her belief. *Id.*

The decision further held that although petitioners alleged that West ignored construction on neighboring properties, "considering the size and scale of Lee's concededly unpermitted construction, Lee has not pleaded that these neighbors violated policy 'to the same degree' she did, as would be necessary to raise an inference of selective enforcement." App. 4a. Finally, an allegation that a deputy city attorney said once that houses of worship were prohibited on some lands does not constitute such a persistent and widespread practice that it constitutes permanent and well-settled city policy. App. 5a.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Identify Any Unsettled Issue Requiring This Court's Resolution. At Most It Argues That A Non-Precedential Memorandum Misapplied The Court's Precedents.

The gist of the petition is that the Circuit Court panel misapplied this Court's precedents. As we discuss below, that claim lacks merit. But there is also another problem with it: Even if true, it would not

warrant an investment of this Court's limited resources.

The Circuit Court panel affirmed in an unpublished memorandum disposition. App. 1a-5a. The memorandum is not precedential. App. 1a; Ninth Cir. R. 36-3. It therefore has no implications beyond this case.

Nor can petitioners credibly claim that the memorandum signals any broader need for this Court's guidance. Petitioners have not identified any other lower-court decisions making the same supposed errors as the memorandum, nor any split among the circuits on the questions presented in the petition. Instead, petitioners argue that the panel "created" a new exception to *Monell*, and that it failed to conduct an analysis required by "decades" of this Court's jurisprudence. Pet. 1-2, 19-34. These are at best arguments for error-correction—i.e., to correct a stray, incorrect application of well-settled law to the specific allegations here. They do not demonstrate any larger issue requiring this Court's attention.

II. The Petition's *Monell* Question Does Not Warrant Review.

Under *Monell*, 436 U.S. 658, municipalities are liable for constitutional violations only when their deliberate conduct caused the violation. Petitioners correctly stated the rule in their Circuit Court briefing: "*Monell* requires that the constitutional injury results from '[1] an expressly adopted official policy, [2] a

long-standing practice or custom, or [3] the decision of a final policymaker.'" Ninth Cir. Dkt. 20 at 35; *see also Connick v. Thompson*, 563 U.S. 51, 61 (2011) (recognizing these categories).

Now, however, petitioners have shifted positions. They invite the Court to adopt a new, fourth category of *Monell* liability: rights deprivations "distributed across municipal employees instead of perpetuated by a single decision-maker." Pet. i. The Court should decline the invitation.

A. Petitioners Did Not Raise This Issue Below.

Petitioners do not cite anywhere in the lower court briefing that they raised the *Monell* argument that they now advance. To the contrary, as noted above, their prior briefing expressly acknowledged that they had to plead one of the existing three bases for *Monell* liability.

This Court typically does not review issues in the first instance. *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 469-70 (1999) (declining to "decide in the first instance issues not decided below"); *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005) ("we are a court of review, not of first view"). Petitioners have not identified any "exceptional circumstances" warranting a departure from that policy. *United States v. Lovasco*, 431 U.S. 783, 788, n. 7 (1977) (noting the Court does not review questions in the first instance, "[a]bsent

exceptional circumstances"). That itself warrants denying the petition.

B. Although The Petition Proposes Expanding *Monell* Liability, It Neither Offers A Workable Rule Nor Reconciles The Proposed Expansion With Precedent.

The lower courts found that petitioners' allegations did not establish religious discrimination caused by an official policy, a longstanding practice or custom, or the decision of a final policymaker. App. 3a-5a, 18a-24a, 48a-56a, 96a-99a. The petition does not directly argue that those findings were erroneous.

Instead, the petition argues that the Court should clarify that municipalities are liable "where the officials act in concert to perpetuate a yearslong scheme of discrimination, harassment, and unequal treatment of a citizen due to religious animus." Pet. 27. In support of that argument, it asserts that petitioners alleged that "the City of Fremont" made deliberate choices to discriminate. Pet. 23. But despite petitioners' assertion that choices were made by "officers" and "officials," the vast majority of the conduct described was by people *not* alleged to be final policymakers. *See* Pet. 23-26. (As discussed above, the *only* person the operative complaint alleged as a final policymaker was Building Official West.)

Petitioners, thus, are necessarily arguing for *Monell* liability in a new category of cases: those where

the plaintiff alleges misconduct by non-policymakers, *not* tied to any deliberate decision by a final policymaker, official policy, or longstanding, pervasive custom or practice.

Petitioners do not explain how such a rule would work in practice—what level of employee would have to be involved, how many employees or decisions would be required, or any other specifics.

Nor do petitioners attempt to reconcile such a rule with the well-settled principles that (1) § 1983 does not allow *respondeat superior* liability, and (2) a plaintiff must establish that the *municipality* was the moving force behind the injury. *Monell*, 436 U.S. at 691; *Bd. of the Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 404 (1997). Petitioners instead gloss over this by referring to actions of "the City," without specifying *who within the City* can subject the City to liability, short of the city council via official action, or a final policymaker. *See* Pet. 1 (actions by "the City" and unspecified "City officials"), 19 ("the City" deprived petitioners of their rights), 20 ("the City" may commission officers to discriminate), 22 (discrimination by "the City"), 23 ("the City" made choices), 27 (discrimination by "the City").

But the Court could not gloss over these significant gaps in the petition's argument, were it to grant certiorari. The "clari[t]y" that petitioners seek (Pet. 27) would require squaring the proposed expansion with decades of existing law, and crafting workable standards for courts throughout the country to apply. The

petition does not provide any roadmap for doing this. The Court should not wade in without any showing that it is possible, let alone needed.

C. The Memorandum Does Not Allow Municipalities Or Their Officials To Discriminate With Impunity.

The petition asserts the Circuit Court's unpublished memorandum decision allows cities to evade liability for discrimination "by selectively diffusing responsibility," "commission[ing]" their officers to discriminate, and "dispers[ing their] culpable decisionmaking, and that it allows officials to "act in concert to perpetuate a yearslong scheme of discrimination. . . . " *E.g.*, Pet. 2, 19-20, 27. Not so.

Monell liability is available where a municipality has intentionally tapped its employees to discriminate: If the city government *expressly* chose to have its employees discriminate as a matter of course, it would be liable for its official policy. *Monell*, 436 U.S. at 690. If discrimination was "so persistent and widespread as to practically have the force of law," the city would be liable for that longstanding practice or custom. *Connick*, 563 U.S. at 61. And if discrimination was undertaken by, or ratified by, a final policymaking official, the city would be liable on that basis. *Id.* Moreover, any person who discriminates can be sued individually, without satisfying the *Monell* criteria.

Petitioners' § 1983 religions claim failed because it did not fit any of these categories: Despite three tries,

petitioners were unable to allege an official policy, a longstanding, widespread custom, or acts by a final policymaker—and they never attempted to sue any of the individuals who they alleged discriminated against them.

Dismissal of petitioners' claim does not mean that governmental bodies or final policymakers can freely direct their employees to discriminate. It simply reflects that petitioners presented no plausible allegations of such discrimination here. Petitioners therefore could not pursue a claim that required showing that the *City* caused their injury. *Connick*, 563 U.S. at 60 ("local governments are responsible only for 'their *own* illegal acts' "). That case-specific conclusion does not have any of the larger ramifications that petitioners claim.

D. The Memorandum Correctly Applies *Monell*.

As noted above, the petition does not directly challenge the lower courts' conclusions that petitioners failed to plausibly allege any of the well-settled bases for *Monell* liability (i.e., an official policy, a longstanding custom or practice, or action or ratification by a final policymaker). Nor could it, for reasons that the City explained in its appellee's brief, and that petitioners' reply brief left largely unanswered. Among other things:

No official policy. The only official policy petitioners alleged was Fremont Municipal Code section

18.55.110, which prohibits "Quasi-Public" land uses in property zoned as "Hill (beyond Ridgeline)." App. 135a. But petitioners insist that their religious use of the property is *private*, App. 147a, 156a, 165a-166a, 168a, 173a—and as the district court found, the zoning provision allows private religious practice. App. 50a; *see also* Ninth Cir. Dkt. 29 at 53.

No longstanding custom or practice. Petitioners alleged a custom or practice of discriminatory enforcement based solely on *this* code-enforcement proceeding as compared to two neighboring properties, and on a deputy city attorney's stray comment that houses of worship are prohibited on some land. App. 173a-179a. As the Circuit Court found, those allegations do not describe practices "'so "persistent and widespread" that [they] constitute[ ] a "permanent and well settled city policy,'" as would be necessary to establish a custom under *Monell*." App. 4a-5a. Nothing in the petition shows otherwise.

No decision or ratification by a final policymaker. Finally, petitioners alleged that Building Official West was a final policymaker, and committed, ratified, or acted with deliberate indifference to subordinates' actions. App. 174a-179a. The lower courts rejected this claim. App. 3a-4a, 21a-22a. The petition does not develop any argument that they erred in doing so. Nor could it.

As both lower courts observed, there are no allegations that West approved disparaging comments supposedly made by others. App. 3a, 22a. Moreover,

although West allegedly told petitioner Lee she could only pray in her house and one other structure, the "only plausible inference" is that "West was enforcing the City's orders about which structures were safe to use"—and in any event, petitioners could not plausibly allege that the comment was within the scope of West's alleged final policymaking authority, which is to interpret the building code. App. 3a-4a, 22a. Nor does West's instruction to remove religious materials from a condemned building, App. 150a, plausibly evince anti-religious bias by him in his final policymaker role. Petitioners had previously been ordered to remove "all personal property," and had removed everything other than the Buddha statues. App. 148a. West's instruction, thus, was merely to remove the only remaining personal property.

The City's appellate brief also identified numerous other holes in petitioners' "final policymaker" theory, including that they failed to plausibly allege that West was a final policymaker *with regard to any of the allegedly discriminatory conduct*, or that he ratified or was deliberately indifferent to any of that conduct. Ninth Cir. Dkt. 29 at 37-47. The sum total of petitioners' reply was that they only needed to allege plausible claims, and that "[t]he District Court already properly found that Gary West is a policymaker." Ninth Cir. Dkt. 36 at 11.[3] Neither that reply, nor the petition here, shows an error in dismissing petitioners' claim.

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[3] As previously noted, the district court in fact made no such finding: It found only that it was "*plausible* that West *could have*

III. The Petition's Standard Of Review Question Does Not Warrant Review.

Petitioners frame their second question as about the standard of review "upon a showing of disparate treatment among religious and secular institutions. . . . " Pet. i. They argue that *Tandon*, 593 U.S. 61 and *Roman Catholic Diocese*, 592 U.S. 14 require strict scrutiny of any alleged Free Exercise Clause violation. Pet. 2, 29-30. The Court should deny the petition as to this issue, for multiple reasons.

A. Petitioners Did Not Raise This Issue Below.

As with the *Monell* issue, petitioners do not cite any place in the record where they argued this standard-of-review issue. Their opening appellate brief did not make this argument, or cite *Tandon* nor *Roman Catholic Dioceses*. Ninth Cir. Dkt. 20 at vii-viii, 49-53. Nor did their reply brief develop the point or cite those cases, even though the City's brief alerted them to *Roman Catholic Diocese*, by citing it for the proposition that petitioners had not plausibly pled that the City singled them out " 'for especially harsh treatment' compared to secular people who are similarly situated." Ninth Cir. Dkt. 29 at 35-36 (City's brief); Ninth Cir. Dkt. 36 at ii-iii, 10-12 (reply brief).

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been a 'final policymaker' for his acts 'overseeing local code enforcement activities' as the City's building official." App. 20a, emphases added.

Again, the failure to raise this issue earlier is an independent basis for denying the petition. *Nat'l Collegiate Athletic Ass'n*, 525 U.S. at 469-70; *Cutter*, 544 U.S. at 718, n. 7.

B. The Question Is Moot Because Petitioners Have Not Plausibly Alleged Religious Discrimination Attributable To The City Under *Monell.*

The standard of review question is also moot. The City is the only defendant in this case. The City can only be liable under § 1983 for *its own* acts of religious discrimination—i.e., for acts meeting the *Monell* criteria. *Monell*, 436 U.S. at 690-91.

As discussed above (§ II.D), the lower courts correctly found that petitioners failed to allege a basis for *Monell* liability—i.e., that there is no City action that could form the basis of a religious discrimination claim. The case, therefore, does not present the question of what standard of review applies to a religious discrimination claim. The standard of review is wholly irrelevant, because there is no such cognizable claim.

C. The Record Does Not Implicate The Petition's Standard Of Review Question.

Independent of the insurmountable *Monell* obstacle, the petition should be denied because the complaint does not implicate its standard of review question. The petition asks about the standard of review "*upon a showing of disparate treatment among religious and*

secular institutions. . . . " Pet. i, emphasis added. But petitioners did not plausibly allege such disparate treatment here.

Petitioners' theory is that the City vigorously enforced various codes against them, but not against two neighboring properties. As the lower courts held, though, petitioners did not allege that either neighboring property was similarly situated—i.e., that either had "legal and code violations as serious or extensive as those on the Temple's property." App. 22a; *see also* App. 4a (Circuit Court: "Lee has not pleaded that these neighbors violated policy 'to the same degree' she did, as would be necessary to raise an inference of selective enforcement.").

The petition disputes the lower courts' conclusion, pointing to allegations (1) that Lee did not expand the footprint of several preexisting buildings, (2) that one neighbor also had unpermitted structures, and used chemicals, near a waterway, and (3) that "many of the City's allegations" of code violations were untrue. Pet. 31. But again, this ignores the *scope* of petitioners' unpermitted construction relative to the alleged neighboring violations.

Petitioners acknowledge that Lee (1) remodeled her main residence, including converting a garage into living space, a carport into a garage, and a parking space into a media room; (2) built a new two-story accessory dwelling unit; (3) "improved" a hall/garage; (4) built a new 120-square foot gazebo surrounded by a new 60,000+ gallon pond; (5) converted a modular

home carport into a garage; (6) built a large greenhouse; (7) installed solar panels; and (8) built a driveway among the buildings, and a suspension bridge over a creek. App. 123a-134a; Ninth Cir. Dkt. 20 at 5-6.

As the Circuit Court observed, "Lee nowhere squarely disputes that she built numerous structures without permits, in violation of the municipal code." App. 3a. That extensive unpermitted development contrasts sharply with the alleged nonconformities on two neighboring properties: on one property, a garage and cottage, a deck near a creek, and use of a weed control chemical; on the other property, a concrete driveway. App. 120a-121a, 136a. Moreover, petitioners do not allege that there were unregistered businesses operating unlawfully at the neighboring properties, as was reported at petitioners' property prior to the inspections. *See* App. 38a, n. 4; 2-ER-120-21, 147-63.

This situation is nothing like *Tandon* and *Roman Catholic Diocese*, which petitioners rely on. Both of those cases involved official COVID-19 regulations that severely capped attendance at religious gatherings without imposing similar caps on secular businesses. 592 U.S. at 16; 593 U.S. at 63-65. Religious services indisputably were being treated differently than secular businesses, and the question was whether the disparate treatment was permissible. Here, by contrast, petitioners have not plausibly shown religion-based disparate treatment—much less disparate treatment *attributable to the City*. Nor have they shown that enforcing facially-neutral permitting requirements, and zoning, building, and other state and

municipal codes is a "'"gratuitous restriction[]" on religious conduct. . . .'" Pet. 32. The case therefore does not present the question of what standard of review applies to regulations that treat religious property differently than non-religious property, or that discriminate against religion.

D. The Memorandum Correctly Held That Petitioners Failed To Allege A Plausible Religious Discrimination/Free Exercise Claim.

Further supporting denial of the petition, petitioners have not shown any *error* in rejecting their religious discrimination claim. As discussed above (§ II.D), the lower courts correctly held that petitioners failed to plausibly allege that the City is responsible for the conduct underlying their § 1983 religion claim. That failure disposes of the claim. *Monell*, 436 U.S. at 690-91.

Also independently supporting dismissal of the complaint, petitioners failed to plausibly allege that the code enforcement proceedings were *caused by* anti-religious animus. *See* App. 3a (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) for the proposition that "Lee must plausibly allege that West took enforcement actions against her "'because of," not merely "in spite of,"'" the alleged adverse effect on her religious practice).

Specifically: Petitioners did not plausibly allege that West's instruction to remove Buddha statues from a condemned building was motivated by anti-religious animus, given that the Notice and Order to Abate had already directed Lee to remove *all* non-real property, and that Lee had removed all property other than the statues. App. 147a-150a. In other words, even under petitioners' version of events, West was instructing Lee to remove the only remaining non-real property as the Notice had directed.

Likewise, petitioners did not plausibly allege that West's comment that Lee could only pray in two locations was motivated by anti-religious animus or within a "final policymaker" role. App. 4a, 22a. Nor did they sufficiently plead a claim based on selective enforcement, because their allegations did not establish a basis to conclude that their neighbors violated City policy to the same degree they did. App. 4a, 22a; § III.C, *supra*. They simply have not pleaded a plausible claim that they were singled out for adverse treatment because of their religion.

Petitioners' § 1983 religion claim fails on multiple levels. The district court correctly dismissed it, and the Ninth Circuit correctly affirmed.

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CONCLUSION

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

Respectfully submitted,

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