No. 23-481

IN THE

Supreme Court of the United States

TEMPLE OF 1001 BUDDHAS; MIAOLAN LEE,

Petitioners,

v.

CITY OF FREMONT,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

The City's opposition raises broader issues than those posed by the Petition and the Ninth Circuit's decision. In addition to overlooking that the publication status of the lower court's decision does not undermine reviewability by this Court, the City's opposition wrongly argues that certain of the Petition's arguments and issues were not presented before the courts below. However, this argument rests on a mischaracterization of the Petition as advocating for a "new, fourth category of *Monell* liability" "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." Opp. at 21–22. However, Petitioner does not seek an entirely new basis of liability under *Monell*, but rather seeks clarification of *Monell*'s application to city officials acting in concert to erode religious freedom. Petitioners directly presented this argument regarding *Monell* liability before both the district court and the Ninth Circuit.

Moreover, review is further supported by the fact that, just days ago, the California Court of Appeal, in a published decision, reversed the trial court and invalidated the City of Fremont's "Notice and Order to Abate Nuisance" issued to Petitioners. *See Temple of 1001 Buddhas, et al. v. City of Fremont*, No. A167719, 2024 Cal. App. LEXIS 155 (Mar. 6, 2024). The state appellate court's reversal will provide Petitioners an opportunity to challenge the City's notices and the underlying violations for which they were cited. With the administrative agency's sustaining of these notices now set aside, the Ninth Circuit's reasoning (and the

opposition's arguments) that the City's actions were motivated by violations of the municipal code rather than religious discrimination may yet come unraveled.

Because this Court's review is needed to determine whether the City can escape *Monell* liability under the Ninth Circuit's novel and restricted view, the Petition's second issue regarding whether searching review is required is not moot. The California Court of Appeal's new decision also undermines the Ninth Circuit's holding that Petitioners failed to allege disparate treatment. Indeed, with the agency's sustaining order now set aside, the bases for the City's Notice and Order to Abate Nuisance may be rejected, which would strongly corroborate Petitioners' allegations that they experienced harsh treatment because of their religious beliefs and practices.

The Ninth Circuit's decision below opens a dangerous avenue for local governments to discriminate against the faithful under the auspices of municipal building codes. This Court should grant certiorari to provide guidance on the important issues raised in the Petition, or, in the alternative, should grant, vacate and remand with instructions to the Ninth Circuit to consider the California Court of Appeal's recent decision and how it may affect its previous reasoning.

I. The Unpublished Status of the Ninth Circuit's Decision Does Not Weaken the Case for This Court's Review.

The City of Fremont argues that this Court should sidestep review of the Ninth Circuit decision, and its crimped reading of *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) because

the lower court's ruling is an unpublished memorandum disposition. Opp. at 19. However, the City's opposition ignores that publication is not a requirement for this Court's review. *See, e.g., Harris v. Forklift Sys.*, 510 U.S. 17, 20 (1993) (reversing and remanding an unpublished decision of the Sixth Circuit regarding actionable conduct as "abusive work environment" harassment); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (reviewing an unpublished court of the District of Columbia Circuit decision on standing and justiciability). Multiple Justices have noted specifically how the unpublished status of the lower court's opinion should not prevent review where the issues presented hold general importance. *See, e.g.*, *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting) ("I realize that we cannot act as a court of simple error correction and that the unpublished intermediate court decision below lacks significant value as precedent. Nonetheless, the matter has a general aspect.").

In fact, Justice Thomas has considered how the unpublished status of a decision may present additional reasons *for* granting review. *See Plumley v. Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas, J., dissenting). In dissenting from this Court's denial of review, Justice Thomas described the lack of precedential force of the Fourth Circuit's unpublished decision as "yet another disturbing aspect . . . and yet another reason to grant review."). He explained that the lower court may have avoided creating precedent for the Circuit entirely and that the preservation of the Court's ability to change its course in the future warranted review. *Id.* at 1132.

The City is also mistaken that the decision below "has no implications beyond this case." Opp. at 19. If allowed to stand, the Ninth Circuit's decision discourages local governments from abiding by the "commit[ment] to religious tolerance" that the Free Exercise Clause demands, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993), and now leaves open the opportunity for local officials elsewhere in the Ninth Circuit to act with hostility towards the faithful so long as that hostility is diffused among decision-makers. These likely effects are exactly the kind of broad-reaching impact that warrants this Court's review. *See Smith v. United States* 502 U.S. 1017, 1019–20, n.* (1991) (Blackmun, J., dissenting) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion.").

II. The Petition's Issues Were Raised Below and Even if They Had Not Been, This Court Should Choose to Grant Review Given Their Importance.

Contrary to the City's opposition, Petitioners did argue in the district court and Ninth Circuit that the City was liable under the *Monell* analysis set forth by this Court. *See* N.D. Cal. Dkt. 39 at 8–12; Ninth Circuit Dkt. 20 at 35–54; Ninth Circuit Dkt. 36 at 11–12. Specifically, in their opposition to the City's motion to dismiss Petitioners argued for municipal liability under the "series of acts and actions which [Official] West either signed off on or participated in []" and that the

involvement of other officials and their actions, including West's predecessor, sufficiently constituted a "custom and practice" under *Monell*. N.D. Cal. Dkt. 39 at 8–12. Similarly, in the briefing before the Ninth Circuit, Petitioners argued that West was a "final policymaker" for *Monell* purposes and that the district court's conclusions as to West's motivation for his behavior (*i.e.*, whether the actions of multiple City officials acting in concert amounted to West to be motivated by religious bias in issuing the orders for Petitioners to Abate Nuisance and Vacate) was an improper factual determination. Ninth Circuit Dkt. 20 at 41–45. Moreover, Petitioners' reply brief before the Ninth Circuit also argued that the City's actions constituted a custom or practice for purposes of liability under *Monell*. Ninth Circuit Dkt. 36 at 11–12.

The issue, as mischaracterized by the City, of Petitioners seeking a "new, fourth category of *Monell* liability," was not raised below because that is an inaccurate characterization of Petitioners' argument. The Court should reject the City's attempt to reframe the issue to argue that Petitioners did not address that specific issue.

Even if the Petition presents issues that were not argued in the courts below (it does not), this Court can and should grant review. Opp. at 20, 27–28. In fact, this Court did so in each case the City relies on for its argument that the Court should not review an issue in the first instance. Opp. at 20 (citing *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) and *Cutter v. Wilkinson*, 544 U.S. 709 (2005)).

Likewise, City's reliance on *United States v. Lovasco*, 431 U.S. 783, 788, n.7 (1997) is inapposite to

whether certiorari should be granted here. Opp. at 20–21. In *Lovasco*, this Court noted in a footnote that there were no exceptional circumstances warranting addressing *in its opinion* an issue not raised below. 431 U.S. at 788, n.7. In other words, that specific arguments were not raised before the lower courts did not preclude this Court from granting review, as review *was* in fact granted in each case the City relies on. *Id.*; *see also Nat'l Collegiate Athletic Ass'n*, 525 U.S. at 469–70; *Cutter*, 544 U.S. at 718, n. 7.

III. The Petition Does Not Argue For a "New, Fourth Category" of Liability Under *Monell* but Instead for Clarification of the Existing Third Category.

In mischaracterizing the Petition as one that "proposes expanding *Monell* liability[,]" the City argues that Petitioners are "necessarily arguing for *Monell* liability in a new category of cases." Opp. at 21. Not so.

Rather than seeking expansion of liability under *Monell* in the form of a "new, fourth category," Opp. at 21, Petitioners simply seek this Court's review of the Ninth Circuit's application of *Monell* that allows municipalities to evade liability under section 1983 and the Free Exercise Clause Pet. at 19 ("The decision below carves out an exception to section 1983 municipal liability . . . in contravention of *Monell* and its progeny"). Thus, because the Petition does not seek to extend *Monell* liability to a "new category of cases: those where the plaintiff alleges misconduct by non-policy-makers, *not* tied to any deliberate decision by a final policy-maker, official policy, or longstanding, pervasive custom or practice[,]" Opp. at 21–22, Petitioners

need not present any sort of workable rule or reconciliation of such "new" liability with this Court's precedents.

In holding that municipalities are not liable where a city's officials act in concert with one another to perpetuate a years-long scheme of discrimination, harassment, and unequal treatment of a citizen due to religious animus, the Ninth Circuit essentially excepted the City from liability where it normally would be found under the third prong of the *Monell* analysis. If left to stand, the Ninth Circuit decision creates an exemption under the "final policymaker" prong, holding that there is no liability where the decisions of a "final policymaker" were dispersed across multiple actors. This troubling conclusion warrants this Court's review, as it is the only Court situated to determine whether such a modification of *Monell*'s third prong is appropriate under its precedent.

Indeed, just days ago the California Court of Appeal reversed the state court's denial of Petitioners' request for relief from the administrative appeal of the City's issuance of citation notices for violations of the municipal code. *See Temple of 1001 Buddhas, et al. v. City of Fremont*, No. A167719, 2024 Cal. App. LEXIS 155 (Mar. 6, 2024). In a decision certified for publication, the Court of Appeal reversed in part the trial court's denial of Petitioners' request for a writ of mandamus. After holding that the City's appellate procedure before a single officer conflicted with California Building Code section 1.8.8, the state Court of Appeal remanded the case with instructions to compel the City to set aside the administrative decision sustain-

ing City's nuisance determinations regarding Petitioners. *Temple of 1001 Buddhas*, 2024 Cal. App. LEXIS 155 at *41–42. The Court of Appeal further ordered the trial court to order a writ of administrative mandate compelling the City to provide for appeals of the NOA and NOV as required under section 1.8.8 of the California Building Code. *Id*. at *42.

The Court of Appeal's reversal and order to set aside the administrative decision sustaining the City's nuisance determinations and provide a compliant appellate procedure will allow Petitioners soon to appeal the City's determinations under a proper procedural framework. A pending decision could untether the City's arguments and the Ninth Circuit's core reasoning as to whether West was motivated by discrimination in issuing its nuisance citations. Accordingly, the recent Court of Appeal decision demonstrates significant potential that a new, proper administrative appeal may result in different conclusions regarding the bases of the City's nuisance citations.

The California Court of Appeal's reversal also supports the Petition's arguments that the Ninth Circuit impermissibly departed from this Court's standard for municipal liability under section 1983. The Court should grant certiorari to affirm the *Monell* standard, or, if such a standard for *Monell* liability is indeed different for city officials acting in concert against religious freedom, to clarify it.

IV. The Petition's Second Issue is Not Moot and is Directly Implicated by the Record, Especially Considering the California Court of Appeal's New Decision.

For the reasons stated above, the Ninth Circuit's novel reading of *Monell* allowing the City to evade liability under section 1983 does not render the Petition's second issue regarding the level of review for Petitioners' disparate treatment allegations moot. Opp. at 28. Contrary to the City's opposition, but for the Ninth Circuit's clear departure from *Monell*, it would have been liable under the third "final policymaker" prong. Accordingly, whether a searching review is required to determine if a religious institution was singled out with especially harsh treatment is ripe for review.

Moreover, the California Court of Appeal's new reversal could potentially alter the underlying support of the Ninth Circuit's decision—namely, that the City's citations for violations of the municipal code were valid. The Court of Appeal's disposition requiring the trial court to set aside the administrative order sustaining the City's citations suggests otherwise, and Petitioners soon will directly attack the validity of the notices issued by the City. This possibility, acknowledged by the Court of Appeal, could critically alter the underlying reasoning of the Ninth Circuit in concluding, without searching review, that Petitioners had not adequately alleged disparate treatment. Such a possibility strengthens the Petition's arguments that this Court is best situated to answer the questions surrounding the critical level of review given to disparate treatment allegations.

V. In The Alternative, This Court Should Grant, Vacate, and Remand, Instructing the Court of Appeals to Consider the California Court of Appeal's New Decision.

If this Court does not find a sufficient basis for its plenary review, it should alternatively grant, vacate, and remand with instructions for the Ninth Circuit to consider and apply the recent California Court of Appeal's published decision in *Temple of 1001 Buddhas, et al. v. City of Fremont*, No. A167719, 2024 Cal. App. LEXIS 155 (Mar. 6, 2024). This Court should instruct the Ninth Circuit to consider what impact the appellate court's reversal may have on its previous conclusions regarding Petitioners' allegations surrounding *Monel* liability and the level of review of disparate treatment allegations.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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