18-351

In The Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, ET AL.,

Petitioners,

v.

AMANDA KONDRAT'YEV, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION

MONICA L. MILLER
Counsel of Record
DAVID A. NIOSE
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place N.W.
Washington, D.C. 20036
(202) 238-9088
mmiller@americanhumanist.org

REBECCA S. MARKERT
MADELINE ZIEGLER
FREEDOM FROM RELIGION FOUNDATION
P.O. Box 750
Madison, WI 53701
(608) 256-8900
rmarkert@ffrf.org

Counsel for Respondents

Respondents, Amanda Kondrat'yev, Andreiy Kondrat'yev, Andre Ryland, and David Suhor (hereafter "Respondents"), respectfully oppose Petitioner City of Pensacola's (hereafter "Petitioner" or "City") Motion to Expedite Consideration Of The Petition For A Writ Of Certiorari And To Expedite Consideration Of This Motion. The Petitioner filed this Motion to Expedite Respondents' deadline knowing, yet disregarding, Respondents' objections.[1]

Statement and Summary

1. This case involves a challenge to a 34-foot-tall Christian cross prominently displayed at a city-owned park. Respondents in this case filed the complaint on May 4, 2016, in the United States District Court for the Northern District of Florida. On June 19, 2017, the court ruled in Respondents' favor finding the cross violates the Establishment Clause under Supreme Court and Eleventh Circuit precedent and ordered its removal.

2. The Petitioner appealed to the Eleventh Circuit Court of Appeals in July 2017. Parenthetically, the Petitioner was in no hurry at the appeals stage, and even asked Respondents to consent to extend the briefing schedule. Respondents assented, and asked for an extension in return. On August 22, 2017, the Petitioner filed a joint Motion for Extension in the Eleventh Circuit requesting additional time

[1] The Petitioner omits its exchange with Respondents' lead counsel, Monica Miller, on September 11, 2018. Counsel for Petitioners (Mr. Goodrich) asked Ms. Miller if Respondents would agree to a Motion to Expedite. Ms. Miller informed Mr. Goodrich that Respondents would be unable to expedite briefing. Over the phone, Ms. Miller emphasized that, other issues aside, the time constraints alone would be an issue. The Petitioner's Motion should have reflected the fact the Motion was opposed by Respondents.

(21 days) for briefing, asserting, *inter alia*: "the September 5 due date coincides with the date that undersigned counsel is currently scheduled to reply to dispositive motions briefing in another matter pending in federal court. It is also three business days after one of the undersigned counsel for the Petitioner returns from eight days of previously scheduled travel." (Mot. to Restart or Set Briefing Schedule at 5 (17-3025)).

3. On September 7, 2018, the Eleventh Circuit issued a per curiam decision affirming the "district court's order requiring removal of the Bayview Park cross." (Pet. App. at 10a).

4. On September 13, 2018, the Eleventh Circuit instructed the clerk to withhold the mandate because a poll was requested *sua sponte* on whether to grant rehearing en banc. (Pet. at 35 n.4).

5. On September 17, 2018, the Petitioner petitioned this Court for Certiorari ("Petition") and subsequently filed this "Motion To Expedite Consideration of the Petition for a Writ of Certiorari and to Expedite Consideration of this Motion." In the petition, the Petitioner noted that they "intend to petition [the court below] for rehearing en banc." (Pet. at 35 n.4).

6. The Petitioner asks this Court to shorten the deadline for Respondents' Brief in Opposition to the Petitioner's Petition from October 18, 2018, to September 24, 2018.

ARGUMENT

The Petitioner has utterly failed to demonstrate that expedition is warranted. There are no special circumstances that warrant hastened review of this motion or the Petition. This motion should be denied because (1) the Petitioner fails to cite any emergent, much less compelling, need to disrupt the Court's normal operations; (2) Establishment Clause cases are highly fact-dependent, and a brief in opposition cannot be fully and adequately prepared on an expedited schedule; and (3) the Petitioner's urgent need to move this case forward is belied by its admission in the Petition that it also intends to file for en banc review. Thus, the Petitioner's motion should be denied and this case should proceed in the ordinary course under the rules of this Court.

1. Absent exigent circumstances, there is no reason to expedite review in this case.

This Court's rules give respondents thirty days to respond to a petition for certiorari. SUP. CT. R. 15(3). Yet, the Petitioner asks that the Court shorten that time to a mere six days. If granted, Respondents would have less than a week to read and analyze the Petitioner's Petition, review the authorities cited, outline and draft a Brief in Opposition, edit the Brief in Opposition, and have the Brief in Opposition printed and filed. Respondents need *at least* 30 days to adequately draft, edit, and file their Brief in Opposition to the Petition, and may even need more time in light of the Petitioner's unanticipated early submission of its Petition, the time devoted to opposing this Motion, and lead counsel's October schedule. As it is,

counsel for Respondents may consider requesting an extension for the October 18th deadline due to litigation and other scheduling conflicts. [2] The rushed process proposed by the Petitioner could result in incomplete, and potentially duplicative briefing resulting in more work for the Court. Truncating the briefing schedule would frustrate Respondents' ability to coordinate, eliminate overlapping arguments, and provide a more concise and meaningful response.[3]

Orders to expedite proceedings in this Court are extremely rare and limited to circumstances that do not exist in this case. The Petitioner cites no emergent reason in this case warranting review, nor could it.

The Petitioner's only purported reason for the expedited schedule is because this case involves a cross as does another case already pending petition for certiorari. [4] That is a grossly insufficient basis for expedition. The fact that the two cases involve crosses is not enough to jointly consider them, much less to deprive Respondents of meaningful briefing at the certiorari stage, *infra.*

---

[2] Ms. Miller, lead counsel for this case, has two scheduled work trips to New York City (October 1-2, and October 12-14) in connection with her habeas corpus litigation for the Nonhuman Rights Project, which cannot be rescheduled. In addition to fulfilling her litigation obligations for both the American Humanist Association (where she serves as full-time Senior Counsel) and the Nonhuman Rights Project (contractor) over the next 30 days, Ms. Miller is permanently moving from the Washington D.C. area (where she has resided for the past six years) to Northern California on October 26, and must make necessary arrangements for the move. Ms. Miller drafted the briefs in the present litigation and in pending Bladensburg Cross case (No. 17-1717 and No. 18-18), and presented oral arguments to the Eleventh Circuit.

[3] *See Felkner v. Turpin,* 517 U.S. 1182, 1182 (1996) (Stevens, J. dissenting) ("[i]t is both unnecessary and profoundly unwise for the Court to order expedited briefing" especially if the case, as here, presents "constitutional questions.")

[4] *American Legion v. American Humanist Association* (No. 17-1717) and *Maryland-National Capital Park & Planning Commission v. American Humanist Association* (No. 18-18) (American Legion) (hereafter the "Bladensburg Cross case").

First, the cases involve markedly different legal and factual issues. Even the Petitioner itself insisted to the Eleventh Circuit that the Bladensburg Cross case is materially "distinguishable" from the present case. (Reply Br. at 29-30 (No. 17-13025)).

Second, Establishment Clause cases are highly fact-specific, and this Court has made clear that each decision is dependent on the unique facts at hand. *See Salazar v. Buono*, 559 U.S. 700, 722 (2010) (Kennedy, J.) ("this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules. In light of the . . . highly fact-specific nature of the inquiry, it is best left to the District Court to undertake the analysis in the first instance."); *McCreary Cty. v. ACLU*, 545 U.S. 844, 867–68 (2005) (recognizing the relevant inquiry is based on the specific facts before the Court); *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (acknowledging the "fact-intensive" nature of religious display cases); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one"); *cf. Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) ("The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.")

Third, even assuming, *arguendo*, that the issues were sufficiently similar for joint consideration by this Court, the Petitioner has offered no reason whatsoever for *shortening Respondents' deadline at this stage.* Again, this Court has not granted certiorari in either case. And even if certiorari is granted in both cases, this Court

could simply wait until after certiorari briefing in the present case for joint consideration at the merits stage.

This Court frequently considers petitions for certiorari in cases with similar facts and issues in the same term without expediting the proceedings, or even consolidating the cases. Just in the last Supreme Court term alone, the Court entertained petitions for multiple cases involving similar questions including the gerrymandering cases (*Gill v. Whitford,* 138 S. Ct. 1916 (2018) and *Rucho v. Common Cause,* 138 S. Ct. 2679 (2018)), the travel ban cases (*Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017) and *Trump v. Hawaii,* 138 S. Ct. 542 (2017)), and religious discrimination cases (*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018) *and Arlene's Flowers, Inc. v. Washington,* 138 S. Ct. 2671 (2018)).

2. The Petitioner's Petition is premature, as it intends to seek en banc review.

The Petitioner's allegedly urgent need to have this case expedited is belied by its admission that it intends to file for a rehearing en banc in the Eleventh Circuit. (Pet. at 35 n.4). Thus, this Petition is premature. It would be a waste of this Court's time to expedite proceedings when the en banc question is still unresolved.

CONCLUSION

There is no basis to shorten the period in which Respondents may file their Brief in Opposition to the Petition for Certiorari. Permitting Respondents to respond within the normal timeframe is necessary to provide an opportunity to

respond to the numerous arguments made in the Petitioner's Petition. The Motion therefore should be denied.

September 21, 2018

Respectfully submitted,

MONICA L. MILLER
Counsel of Record
David A. Niose
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place NW
Washington, DC 20036

REBECCA S. MARKERT
MADELINE ZIEGLER
FREEDOM FROM RELIGION FOUNDATION
PO Box 750
Madison, WI 53701