THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive ·P.O. Box 393 ·Ann Arbor, MI 48106
Tel: (734) 827-2001 ·Fax: (734) 930-7160

December 14, 2009

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Re: ***Catholic League for Religious & Civil Rights v. City & County of San Francisco***
U.S. Court of Appeals No. 06-17328

Dear Clerk:

This letter brief is filed on behalf of Appellants per the court's order of December 11, 2009, requesting the parties to address "whether each of the appellants has standing under *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007), and whether *Vasquez* should be reconsidered." Appellants contend that they have standing under *Vasquez* and other cases, and that *Vasquez* should be reconsidered not for standing purposes, but for the underlying merits of the case, which was dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Similar to *Vasquez*, this case presents a constitutional challenge to an official government act that disfavors religion. Unlike *Vasquez*, however, this case presents a constitutional challenge to an official government act that targets a specific religion (Catholicism) for disfavored treatment.

In *Vasquez*, the court acknowledged that "[a]t its core, the standing doctrine is aimed at improving judicial decision-making by ensuring that there is a specific controversy before the court and that there is an advocate with a sufficient personal concern to effectively litigate the matter." *Vasquez*, 487 F.3d at 1250 (internal quotations and citations omitted). This case meets this "core" requirement: each individual appellant is a devout Catholic who resides in the City and County of San Francisco.[1] As alleged in the complaint:

> Plaintiffs Sonnenshein and Meehan have had direct contact with and have been injured by the offending anti-Catholic resolution, which stigmatizes Plaintiffs on account of their religious beliefs and conveys a message to them that they are outsiders, not full members of the political community. Plaintiffs Sonnenshein

[1] In addition to the standing of the individual appellants, one of whom is a member of the Catholic League, the Catholic League has associational standing to advance its Establishment Clause claim. Associational standing "permits an organization to sue to redress its members' injuries, even without a showing of injury to the association itself." *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003) (citation and quotations omitted). "An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* (internal quotations and citation omitted). The Catholic League meets each of these considerations.

> and Meehan, who are citizens and municipal taxpayers of Defendant City and County 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 Defendants' anti-Catholic resolution, Plaintiffs Sonnenshein and Meehan *will curtail their activities* to lessen their contact with Defendants, thereby causing further harm. Plaintiff Catholic League, through its members, has been similarly injured and harmed by Defendants' anti-Catholic resolution.

(R-1; ER-4-5) (emphasis added). Here, Defendants (Appellees) are using the powers of government and their positions within it to improperly influence Church authority, meddle in Church affairs, and undermine the religious beliefs and practices of Catholics as an *official act of government*. As a consequence, Defendants are treating Appellants as outsiders, not members of the political community, and chilling their access to the government on account of their religious beliefs. Defendants' anti-Catholic resolution might as well be a sign posted on the door of City Hall that reads, "Catholics need not apply."

Throughout its decisions, the Supreme 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., County of Allegheny v. A.C.L.U.,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove," "inhibit," or evince "hostility" toward it. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("hostility"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). 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 Virginia*, 515 U.S. 819, 846 (1995) (emphasis added); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion).

As the Supreme Court stated just four years ago in *McCreary County* v. A.C.L.U., 545 U.S. 844 (2005):

> The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government *weighs in on one side of religious debate*; nothing does a better job of roiling society. . . . [T]he Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in *statements* acknowledging religion.

Id. at 876, 878 (emphasis added).

Government endorsement of a particular religion is prohibited because the endorsement of one religious faith acts as a tacit disapproval of other faiths. Thus, an overt, government-sponsored message of disapproval of the religious beliefs and practices of one faith cannot pass constitutional muster any more than the implied condemnation resulting from the endorsement of another. As Justice O'Connor explained in *Lynch*:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents

> that they are insiders, favored members of the political community. *Disapproval sends the opposite message.*

Lynch, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993), the Supreme Court stated, "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). Indeed, the Supreme Court has described the fundamental principle "that one religious denomination cannot be officially preferred over another" as the "*clearest command* of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The anti-Catholic resolution at issue here violates this principle. Thus, it would be a strange result indeed to find that no one would have standing to challenge a violation of the "clearest command" of the Establishment Clause.

Moreover, in this Circuit, standing to challenge government acts that allegedly "approve" of religion is liberally construed. In fact, the Circuit has been creative in the ways in which it finds standing in such cases. In *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784-85 (9th Cir. 2008) (cert. pending), for example, the court held that lesbian and agnostic parents had suffered an injury-in-fact because they *disagreed with the Boy Scout's religious and moral positions* and therefore avoided public recreational park facilities leased by the city to the Boy Scouts. In his dissent from the denial of rehearing en banc, Judge O'Scannlain, joined by Judges Kleinfeld, Bybee, Callahan, Bea, and Ikuta, described the standing rule of *Barnes-Wallace* as follows: "[A] plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact." *Barnes-Wallace v. City of San Diego*, 551 F.3d 891 (9th Cir. 2008) (O'Scannlain, dissenting). And the "people who hold different views" referred to by Judge O'Scannlain are *private citizens*—the Boy Scouts—not *government officials* who express those "views" in an official resolution adopted as an official act of government, as in this case.

Consequently, if this Circuit is inclined to reconsider the standard for conferring standing to allege an Establishment Clause claim it must do so for ALL Establishment Clause claims, not just those alleging government "disfavor" of religion. Otherwise, denying a plaintiff standing to advance a "disapproval" claim, while permitting broad standing in "approval" cases, including cases advancing such tenuous claims as those in *Barnes-Wallace*, inevitably leads to a view of the law that is itself disapproving of religion.

In *Vasquez*, the plaintiff was a member of the community where the challenged official act occurred (i.e., the removal of a longstanding symbol from the official seal of Los Angeles County for no reason other than it was considered a religious symbol), he had regular contact with the result of this official act (i.e., the revised seal), and he was someone who was "directly affected" by his "unwelcome direct contact" with it because it was now a symbol of an official government act of hostility toward religion.[2] *Vasquez*, 487 F.3d 1251. As the court in *Vasquez* noted,

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[2] This is the point that the panel in *Vasquez* failed to apprehend and why that case should be reconsidered on its merits. The challenge in *Vasquez* was to the official government act of removing the longstanding symbol (i.e., a small cross) from the seal *for no other reason* than it

> The Supreme Court recognized the spiritual interests embodied in the Establishment Clause in *School District of Abington v. Schempp*. In that case, public school students and their parents challenged the school district's practice of opening each day with Bible reading and voluntary prayer. The Supreme Court held that those plaintiffs had standing to sue, even though the students did not quit school in response to the defendant's religious activities. According to the Court, plaintiffs had standing because they were "directly affected by the laws and practices against which their complaints [were] directed," and therefore, had "a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause."

Vasquez, 487 F.3d at 1251 (citations omitted).

In its conclusion, the *Vasquez* court stated, "We join the majority of circuits and hold that, in the Establishment Clause context, spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." *Id.* at 1253. The court reached this result in part because it agreed with the Fourth Circuit's conclusion that "an avoidance requirement for standing would bring Establishment Clause plaintiffs to the verge of civil disobedience and would go beyond what any court heretofore decreed." *Id.* at 1252. Consequently, according to the *Vasquez* court, such a requirement would "impose too onerous a burden upon those seeking to challenge governmental action under the Establishment Clause." *Id.* at 1252 (internal punctuation, citation, and quotations omitted).

In the final analysis, however, it is important to note that the plaintiff in *Vasquez* did allege that he would affirmatively avoid the symbol at issue. *See Vasquez*, 487 F.3d at 1249 ("Vasquez claimed that he was injured by Defendants' conduct because he had 'daily contact' with the revised seal and was forced to 'alter his behavior to avoid this direct injury.'"). Thus, the plaintiff in *Vasquez* and Appellants in this case are, *at a minimum*, in the same position as plaintiffs who have had standing to challenge displays of religious symbols on public land, and they are in a *better* position than the plaintiffs who had standing in *Barnes-Wallace*.

In *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), *cert. granted*, *Salazar v. Buono*, 129 S.Ct. 1313 (2009), for example, the plaintiff, a practicing Catholic, was allegedly so offended by the "establishment" of a cross on remote public land in the Mojave Desert that he avoided passing through or visiting the land. *Id.* at 546-47. The court concluded that the plaintiff's "inability to unreservedly use public land" constituted an injury-in-fact because the plaintiff's avoidance of the land was a personal injury suffered "as a consequence of the alleged constitutional error." *Id.* at 547 (internal quotation marks omitted); *see also Ellis v. La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (finding standing where the plaintiffs avoided using land on which a cross was displayed).

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was a religious symbol. The revised seal thus represents this official act of government hostility toward religion—similar, for example, as to how the Confederate flag, for many, is a symbol of slavery and racism. However, in this case the resolution is not simply a "symbol" with an *implied* message of government disapproval of the Catholic religion, it is an *expressed* message of condemnation of it. One need not surmise or guess at its meaning.

As the D.C. Circuit stated in *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008), "In the religious display and prayer cases, the Government . . . *actively and directly communicat[es]* a religious message through religious words or religious symbols – in other words, it . . . *engage[es] in religious speech that [is] observed, read, or heard by the plaintiffs*."[3] *Id.* at 764 (emphasis added). Here, there is no question that Defendants "engaged in (anti-Catholic) religious speech that was observed, read, or heard by" Appellants. Consequently, based on the reasoning of *In re Navy Chaplaincy*, Appellants have standing in this case. *See also American Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (advancing challenge to resolutions under the Establishment Clause).

In *Barnes-Wallace*, the court compared the plaintiffs' standing to that of the plaintiff in *Buono*. The court stated, "Indeed, the [*Barnes-Wallace*] plaintiffs' emotional injuries are stronger than those of the Catholic plaintiff in *Buono*, because *they belong to the very groups excluded and disapproved of* by the Boy Scouts, and because they would be confronted with symbols of the Boy Scouts' belief system if they used or attempted to gain access to Balboa Park and the Aquatic Center."[4] *Barnes-Wallace*, 530 F.3d at 784 (emphasis added).

In this case, Appellants' "emotional injuries" are significantly stronger that those of the plaintiffs in *Barnes-Wallace* and the plaintiff in *Buono* because Appellants belong to the very religious group disapproved of by *government officials*, and because they would be confronted with more than just "symbols" of the belief system of these officials (i.e., there is an official resolution that was unanimously adopted by these government officials that expressly states this belief system) if they sought access to the government.

In sum, denying (or placing burdens on) access to government is a significantly more egregious injury than denying (or placing burdens on) access to a certain portion of the Mojave Desert as in *Buono* or to recreational facilities as in *Barnes-Wallace*.

In conclusion, each appellant has standing to advance the Establishment Clause claim in this case in light of *Vasquez* and other decisions. Moreover, this Circuit ought to reconsider the merits of *Vasquez* in light of this case.

Sincerely,

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise
Counsel for Appellants

cc: Vince Chhabria, Esq.
Charles S. LiMandri, Esq.

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[3] *In re Navy Chaplaincy* was cited with approval by Judge O'Scannlain in his dissent from the denial of rehearing en banc in *Barnes-Wallace*. *See Barnes-Wallace*, 551 F.3d at 896.

[4] It is important to note that there was no specific "symbol" at issue in *Barnes-Wallace*.