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I. INTRODUCTION

Over the last several decades, America has seen an ongoing conflict between advocates of gay rights and supporters of traditional religion.[1] This conflict, one of many fronts in the "culture war," as it has sometimes been called,[2] has raged in many different contexts through the years.[3] In the political arena and in the courts, religion and the gay movement have battled intensely over issues such as treatment of homosexuality in public schools, portrayal of homosexuality in media,[4] and, more recently, gay marriage and the adoption of children by gay and lesbian couples.[5] Because the conflict involves differing views about some of the most fundamental societal ideals and values,[6] local governments have sometimes felt the need to step into the debate. Such involvement presents particularly difficult questions in trying to balance the free-speech interests of the government with the First Amendment protections afforded religious institutions.[7]

On June 3, 2009, in *Catholic League for Religious and Civil Rights v. City of San Francisco*,[8] the United States Court of Appeals for the Ninth Circuit addressed the question of whether a San Francisco city resolution denouncing a Vatican order not to place adoptive children with same-sex couples was forbidden under the

1. George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 555 (2007).

2. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting); Am. Family Ass'n, Inc. v. City of San Francisco, 277 F.3d 1114, 1126 (9th Cir. 2002) (Noonan, J., dissenting).

3. Dent, *supra* note 1, at 555.

4. *Id.*

5. *See* Jason Scott, *One State, Two State; Red State, Blue State: An Analysis of LGBT Equal Rights*, 77 UMKC L. REV. 513, 517–18 (2008).

6. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42 (1991).

7. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 394 (1994).

8. 567 F.3d 595 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1166 (9th Cir. 2009).

Establishment Clause of the First Amendment. Applying the *Lemon* test, an analysis commonly used by courts in Establishment Clause cases, the Ninth Circuit found that the resolution passed constitutional scrutiny, despite Catholic League's contention that the city was expressing disapproval of Catholicism in violation of the Constitution.[9] This Note will argue that the Ninth Circuit incorrectly decided the case by applying an inherently problematic test, conducting an outcome-driven analysis, and ignoring the correct standard of review. In so doing, the court has arguably sacrificed its required neutrality.

This Note will analyze the Ninth Circuit's decision in *Catholic League* and explain how the court's neutrality was compromised. Part II of the Note presents a summary of the facts and procedural history of the case. Part III then provides some context for the issues involved by discussing the background First Amendment Establishment Clause jurisprudence leading up to the Ninth Circuit's decision. Part IV describes the Ninth Circuit's reasoning and decision in *Catholic League* in detail, and Part V analyzes that decision to explain how the Ninth Circuit went wrong. Finally, Part VI offers a brief conclusion.

II. FACTS AND PROCEDURAL HISTORY

In March of 2006, the Board of Supervisors of San Francisco adopted a non-binding resolution concerning the Catholic Church's position against adoptions of children by same-sex couples.[10] The resolution, entitled "Resolution urging Cardinal Levada to withdraw his directive to Catholic Charities forbidding the placement of children in need of adoption with same-sex couples," aimed harsh language at both the Vatican and Prefect Cardinal William Levada, who was the head of the Congregation for the Doctrine of the Faith at the Vatican.[11] Passed in response to a then-recent directive from Cardinal Levada instructing the Archdiocese of San Francisco that Catholic social services agencies should not place children in need of

9. *Id.* at 597.

10. *Id.*

11. *Id.* at 597–98. The Congregation for the Doctrine of the Faith is an official body within the Catholic Church tasked with promoting and safeguarding the doctrine on faith and morals throughout the Catholic world. *Id.*

adoption with gay or lesbian couples,[12] the full text of the resolution read 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"[13] 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

12. *Id*. at 598.

13. This language was allegedly taken from a 2003 document issued by the Congregation for the Doctrine of the Faith, entitled "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons." *Id*.

> defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.[14]

Not long after the Board adopted this resolution, Catholic League filed suit, claiming that the resolution violated the Establishment Clause by expressing hostility and disapproval towards the Catholic Church and its religious tenets.[15] Catholic League sought nominal damages, a declaration that the resolution was unconstitutional, and a permanent injunction enjoining the resolution and other official resolutions, pronouncements, or declarations against Catholics and their religious beliefs.[16] The Board filed a motion to dismiss for failure to state a claim, and the district court granted that motion.[17] Catholic League then appealed from the dismissal to the Ninth Circuit Court of Appeals.[18]

III. SIGNIFICANT LEGAL BACKGROUND

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion,"[19] and the incorporation doctrine of the Fourteenth Amendment applies that prohibition to governments of the states.[20] There is general agreement that the basic principle behind the Establishment Clause is separation of church and state. However, interpretation of the Establishment Clause by the courts has historically been ambiguous, leaving current jurisprudence in a "confused state."[21] The United States Supreme Court has applied a number of different criteria and tests in analyzing Establishment Clause cases over the years, none of which has been deemed controlling in every case.[22]

The Supreme Court has clearly stated, however, that "the 'First Amendment mandates governmental neutrality between religion and

14. *Id*. at 597–98 (footnote not in original).

15. *Id*. at 598.

16. *Id*.

17. *Id*.

18. *Id*. at 599.

19. U.S. CONST. amend. I.

20. 16A AM. JUR. 2D *Constitutional Law* § 408 (2009).

21. Richard M. Esenberg, *You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 7–8 (2006).

22. *See id*. at 8–9.

religion, and between religion and nonreligion.'"[23] This requirement of neutrality means that government conduct towards religion "must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[24] As the Ninth Circuit noted in its *Catholic League* opinion, the majority of Establishment Clause cases brought before the courts have dealt with questions of whether governmental endorsement of religion exists.[25] The courts rarely need to determine whether government actions have effected a "*disapproval* of religion."[26] Nevertheless, it has long been recognized that "[government] may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion."[27]

Because government disapproval cases are rare, the Ninth Circuit had relatively little precedent to follow in deciding the *Catholic League* case; however, two cases were particularly important in the Ninth Circuit's analysis. The first, *Lemon v. Kurtzman*,[28] sets forth the well-known *Lemon* test as one possible analysis to be used in evaluating Establishment Clause cases. The second, *American Family Ass'n v. City of San Francisco*,[29] is a more recent Ninth Circuit case involving the application of the *Lemon* test to a question of government disapproval. Both of these cases are discussed briefly in turn.

A. Lemon v. Kurtzman

In *Lemon v. Kurtzman*, the Supreme Court considered whether two state statutes that provided government aid to church-related schools violated the Establishment Clause. One of the statutes gave funding to nonpublic schools for the cost of teachers' salaries and

23. McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

24. Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

25. *See* Catholic League for Religious and Civil Rights v. City of San Francisco, 567 F.3d 595, 599 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1166 (9th Cir. 2009).

26. *Id.*

27. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

28. 403 U.S. 602 (1971).

29. 277 F.3d 1114 (9th Cir. 2002).

supplies.[30] The other granted teachers in nonpublic schools a supplement equal to part of their salaries.[31]

In evaluating the constitutionality of those statutes, the Supreme Court used an analysis that has become known as the *Lemon* test. Under the *Lemon* test, government action will pass scrutiny if it meets three conditions. First, the action must have a secular purpose.[32] Second, its primary effect must not be to advance or to inhibit religion.[33] Finally, the statute must not foster "an excessive government entanglement with religion."[34] If a government action fails any of those conditions, the *Lemon* test declares the action to be unconstitutional.[35]

Applying the test in *Lemon*, the Supreme Court determined that the challenged statutes could not withstand constitutional scrutiny. According to the Court, the statutes passed the first condition of having a secular purpose because they were intended to enhance the quality of secular education.[36] The Court found it unnecessary to decide whether the statutes had the primary effect of advancing religion under the second condition, however, because the statutes failed the third and final part of the test by causing excessive entanglement between government and religion.[37]

The *Lemon* test has survived several decades as an important test in Establishment Clause cases; however, it is not the only test the Supreme Court has used.[38] In fact, the Court has stated that the *Lemon* test's three criteria are "no more than helpful signposts."[39] Nevertheless, it was the test the Ninth Circuit chose to apply in *American Family Ass'n v. City of San Francisco*.

30. Lemon v. Kurtzman, 403 U.S. 602, 609 (1971).

31. *Id*. at 607.

32. *Id*. at 612.

33. *Id*.

34. *Id*. at 613.

35. *Id*. at 612–13.

36. *Id*. at 613.

37. *Id*. at 613–14.

38. *See* Newdow v. U.S. Cong., 328 F.3d 466, 485–87 (9th Cir. 2003) (summarizing several tests that the Supreme Court has applied in various Establishment Clause cases, including the "endorsement test" and the "coercion test").

39. Hunt v. McNair, 413 U.S. 734, 741 (1973).

B. American Family Ass'n v. City of San Francisco

In 1998, several religious groups joined together to sponsor an advertising campaign aimed at reaching out to members of the homosexual community.[40] The coalition placed an advertisement in a San Francisco newspaper which stated, among other things, that homosexuality is a sin that can be overcome with the help of Jesus Christ.[41] The advertisement also expressed a desire to help homosexuals avoid the physical and emotional health risks associated with such behavior.[42]

Not long after the advertisement appeared in the paper, the San Francisco Board of Supervisors sent a letter to the religious groups, denouncing their "hateful rhetoric" and claiming that "there is a direct correlation between [their] acts of discrimination . . . and the horrible crimes committed against gays and lesbians."[43] The Board also adopted two resolutions that alleged the groups' advertisements to be "erroneous and full of lies," and to be encouraging of oppression and violence toward gays and lesbians.[44] The Board's angry response to the advertisement prompted the religious groups to bring a lawsuit alleging unconstitutional government hostility towards religion.[45]

In addressing the religious groups' allegations, the Ninth Circuit applied the *Lemon* test. Although acknowledging that it had mostly been used in cases involving government giving preference to religion, the court said the *Lemon* test "accommodates the analysis of a claim brought under a hostility to religion theory as well."[46] Analyzing the purpose factor of the test, the court found that a plausible secular purpose to protect homosexuals from violence existed in the Board's actions.[47] The court further found that the primary effect of those actions was to send a message promoting equality for gays and discouraging hate crimes against them.[48]

40. Am. Family Ass'n, Inc. v. City of San Francisco, 277 F.3d 1114, 1118–19 (9th Cir. 2002).

41. *Id.* at 1119.

42. *Id.*

43. *Id.*

44. *Id.* at 1119–20.

45. *Id.* at 1120.

46. *Id.* at 1121.

47. *Id.*

48. *Id.* at 1122.

Finally, the court said the entanglement factor did not fit very well with the circumstances of the case and clearly did not present a serious issue.[49] Thus, the religious groups had no case.

IV. THE COURT'S DECISION

Seven years after *American Family Ass'n*, the Ninth Circuit's three-judge panel in *Catholic League* also affirmed the district court's ruling in favor of the San Francisco Board, holding that the controversial Board resolution did not violate the Establishment Clause.[50] In reaching that conclusion, the Ninth Circuit followed the analysis it employed in its *American Family Ass'n* decision.[51] As it had done in the prior case, the Ninth Circuit chose to apply the *Lemon* test, and conducted an analysis of whether the resolution violated any of that test's three conditions.[52] What follows is a brief summary of the Ninth Circuit's reasoning and analysis, as well as Judge Berzon's concurring opinion.

A. Purpose

In applying the *Lemon* test, the Ninth Circuit first considered whether the Board's action of adopting the resolution had a secular purpose. Seeking to make this determination from the standpoint of an objective observer, the court first turned to the resolution's text. Although the court acknowledged the strong language of the resolution, it also noted that both the title and preamble seemed to state a purpose to denounce discrimination in adoption.[53] Additionally, the court said, this same secular theme was interwoven throughout the resolution.[54] Turning its attention to timing, the court next pointed out that the resolution was adopted within a short period after Cardinal Levada issued his directive to Catholic Charities.[55] If the Board were trying to attack Catholic beliefs, the court suggested, it would have done so years before, when the

49. *Id.* at 1123.

50. Catholic League for Religious and Civil Rights v. City of San Francisco, 567 F.3d 595, 608 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1166 (9th Cir. 2009).

51. *Id.* at 599.

52. *Id.*

53. *Id.* at 601.

54. *Id.*

55. *Id.* at 601–02.

Congregation for the Doctrine of the Faith had initially voiced its opposition to legalization of gay and lesbian unions.[56] Given the fact that it did not do so, the court found it reasonable to think that the Board was simply responding to the adoption issue, focusing on the secular impact the Catholic policy would have on same-sex couples in the city.[57]

The court also recognized in its analysis that what the Board may have considered to be a secular purpose, Catholic League considered hostile to Catholic religious tenets.[58] Issues touching upon homosexuality are inherently difficult because they can involve the overlap of secular and religious interests, but the court said that "the government is not stripped of its secular purpose simply because the same concept can be construed as religious."[59]

B. Effect

After determining that the Board had a secular purpose in adopting the resolution, the Ninth Circuit once again looked through the lens of the objective observer to examine the resolution's actual effect. Here, however, the court thought it essential to use a "sufficiently broad lens."[60] While acknowledging that even a non-binding resolution could have the effect of conveying a hostile symbolic message, the court nevertheless emphasized that it is not enough that one might simply infer disapproval of Catholic religious tenets as one of the resolution's messages; rather, a message of disapproval must be the *primary* effect.[61]

According to the court, a person viewing the resolution as a whole, having an understanding of its context and unique circumstances, would not conclude that the primary effect of the resolution was religious.[62] Pointing to statements in the resolution that could be taken as hostile to Catholic religious beliefs, the court said such statements "do[] not stand alone," but rather are "embedded in the larger Resolution which is primarily a defense of

56. *See id.* at 602.
57. *Id.*
58. *Id.*
59. *Id.* at 603.
60. *Id.* at 605.
61. *Id.* at 605 n.11.
62. *Id.* at 606–07.

same-sex adoption."[63] Additionally, San Francisco's "tradition of promoting and defending same-sex relationships," as well as the Board's "extensive and persistent practice of passing non-binding resolutions denouncing discrimination against gays and lesbians," led the court to decide that an objective observer would understand the Board's intent to defend the rights of same-sex families;[64] therefore, the effect of the resolution would not be primarily religious.

C. Entanglement

The third and final step in the Ninth Circuit's analysis was to consider whether the resolution fostered excessive governmental entanglement with religion. Catholic League argued that the resolution failed this part of the test by taking an "official position on religious doctrine," thus taking sides in a religious matter.[65] The Ninth Circuit, however, was not persuaded. It concluded that the resolution was simply an expression of the Board's secular view on same-sex adoption, a matter of public policy.[66] Additionally, despite Catholic League's contention that the resolution attempted to influence Church authority and meddle in Church affairs, the court noted that the Board did not attempt to codify or regulate beliefs in any way; thus, it did not cross the line of excessive entanglement.[67] That the resolution was non-binding was important to this conclusion.

D. Judge Berzon's Concurring Opinion

Although the three-judge panel was unanimous in its decision that the resolution passed the *Lemon* test, Judge Berzon found the result "troublesome."[68] Recognizing that the resolutions in *Catholic League* and *American Family* are "near—if not at—the line" that separates establishment of a policy condemning religious beliefs, Judge Berzon wrote a brief, but significant, concurring opinion in which she offered a few "caveats" that she thought should be

63. *Id.* at 606.
64. *Id.* at 605–07.
65. *Id.* at 607.
66. *Id.* at 608.
67. *Id.*
68. *Id.* at 609 (Berzon, J., concurring).

attached to the court's *Catholic League* decision.[69] First, Judge Berzon said, it was significant that the resolution did not call for any regulation; it was mere governmental speech.[70] Second, it appeared that the resolution was not broadcast to the public other than through the Board's enactment of it.[71] It had not been advertised, displayed prominently, or broadcast in any other "more intrusive and permanent way."[72] And finally, the resolution was "not repeated or pervasive, but discrete."[73]

According to Judge Berzon, if any one of these three factors were different, the case may have come out differently.[74] But because the resolution appeared to be "passed but then left dormant," it probably did not pervade public perception of Catholicism and therefore did not violate the Establishment Clause.[75]

V. ANALYSIS

The decision of the Ninth Circuit in *Catholic League* more closely resembled taking sides in the culture war than in neutrally applying the law to the facts of the case. Because the court applied an inherently problematic test, employed an outcome-driven analysis, and ignored the appropriate legal standard, it reached an incorrect conclusion and decision.

A. The Flawed Lemon *Test*

The first mistake the court made was in choosing to use the *Lemon* test. As mentioned previously, application of the *Lemon* test is not mandatory. The Ninth Circuit seemed to use it largely to be consistent with its prior decision in *American Family Ass'n*.[76] However, there are significant neutrality problems with the *Lemon* test, as constitutional scholars have recognized for years.[77] A number

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. 277 F.3d 1114 (9th Cir. 2002).
77. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (listing works of various constitutional scholars "who have

of current and former Supreme Court justices have criticized the test,[78] and the Supreme Court has sometimes declined to use it, choosing instead to apply other standards it has deemed more appropriate.[79]

One of the main criticisms of the *Lemon* test has been that the distinctions courts make when applying the test are difficult to discern.[80] The test has sometimes been used as a convenient weapon to strike down practices with which the courts disagree, and it has not been consistently applied in all circumstances.[81] For example, the Tenth Circuit has held that the depiction of a Christian cross in one corner of a city seal failed the *Lemon* test because of its unmistakable religious significance and the city's pervasive use of the seal, even though the seal allegedly symbolized the city's unique history and heritage.[82] The next year, the same court held that statutes requiring the printing of "In God we trust" on U.S. currency were valid under the *Lemon* test's requirements.[83]

It has also been suggested that the *Lemon* test is particularly unsuitable for use in cases involving government disapproval, as opposed to endorsement, of religion.[84] One reason for this opinion is that government can easily mask a hostile act by construing it to have a legitimate secular purpose.[85] Another possible reason, among others, may be that the primary-effects factor of the test does not lend itself to easy application and can easily be confused with and rely upon the purpose-prong analysis. Thus, if the court finds a

criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

78. *See id.* at 398–99 (identifying opinions of six Supreme Court Justices who have "personally driven pencils through the [*Lemon* test] creature's heart," mostly in response to the test's ad hoc application).

79. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 686 (2005) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.").

80. 16A AM. JUR. 2D *Constitutional Law* § 419 (2009).

81. *See Lamb's Chapel*, 508 U.S. at 399 (Scalia, J., concurring).

82. 16A AM. JUR. 2D *Constitutional Law* § 419 (2009) (citing Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995)).

83. *Id.* (citing Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996)).

84. *See* Andrew R. Cogar, Note, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. VA. L. REV. 279, 307–08 (2002).

85. *See id.* at 309.

convincing secular purpose, it may be inclined to see a primarily secular effect as well. The Ninth Circuit should have taken the opportunity in *Catholic League* to address these flaws of the *Lemon* test in the present setting before blindly applying the test.

B. An Outcome-Driven Analysis

Because the *Lemon* test too easily makes it possible to apply an analysis that is oriented to fit a desired outcome, it is not surprising that the Ninth Circuit failed to neutrally apply the law to the facts in *Catholic League*. That the court employed this kind of outcome-driven analysis is especially evident in light of how its opinion compares with previous ones. For example, despite a significant amount of harsh, angry language directed at the Catholic religion in the resolution adopted by the Board, the court insisted that such language was not the essence of the resolution; rather, the purpose and primary effects of the resolution were secular, and the hostile language had to be viewed in context.[86] However, although this analysis may be mostly in line with the reasoning of *American Family Ass'n*, it does not square well with the court's controversial Pledge of Allegiance decision in *Newdow v. Congress*,[87] where it ruled that a mere two words, "under God," were enough to fail under the *Lemon* test.[88] In fact, in that case, the court rejected the idea that it should look at the Pledge "as a whole," declaring that it need only consider the original legislation that added the two words to the pledge.[89]

The court's overall treatment of the primary-effects prong of the *Lemon* test also seemed particularly outcome-driven in *Catholic League*. In that section of the opinion, the court sought to ascertain the primary effect of the resolution by determining whether it could reasonably be construed as "sending primarily a message of . . .

86. Catholic League for Religious and Civil Rights v. City of San Francisco, 567 F.3d 595, 605–06 (9th Cir. 2009).

87. 328 F.3d 466 (9th Cir. 2002).

88. Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002). This original opinion of the Ninth Circuit was later amended and reprinted; and in the second version the court reached the same result but removed its *Lemon* test analysis, finding it unnecessary due to the results of its application of the "coercion test." *Newdow*, 328 F.3d at 487 (9th Cir. 2002). Upon subsequent appeal to the Supreme Court, the Ninth Circuit's ruling in *Newdow* was reversed. The reversal was based on the plaintiff's lack of prudential standing, however, so the Supreme Court never reached the merits of the case. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004).

89. *Newdow*, 292 F.3d at 610.

disapproval."[90] However, the court's reasoning in making that determination largely mirrored its purpose-prong reasoning, raising the question of whether the court confused the two. For one thing, the court placed significant weight on the resolution's "focus" of promoting and defending homosexual relationships.[91] The court also looked to the Board's historically "extensive and persistent practice of passing non-binding resolutions denouncing discrimination against gays and lesbians," speculating that an objective observer would have understood as much and not taken an anti-religious message from the resolution.[92] It has been observed, however, that "[a]n effect is a result, not a reason."[93] While the Board's focus and history may be indicative of its purpose, it is hard to understand how the court was able to use those factors to derive the primary effects of the resolution. Either the court was confused, or it simply saw what it wanted to see.

C. Ignoring the Correct Review Standard

Just as significant as the Ninth Circuit's results-oriented application of the *Lemon* test was its failure to adhere to the appropriate legal standard for review in *Catholic League*. As noted previously, the underlying issue being reviewed on appeal was whether the district court was correct in granting the Board's motion to dismiss for failure to state a claim.[94] The court clearly understood the legal standard it was to apply, because it stated that it must "accept the allegations in the complaint as true" and "draw all reasonable inferences in favor of the plaintiff."[95] However, the court proceeded to ignore that standard in its subsequent analysis. Judge Noonan, dissenting in *American Family Ass'n*, had essentially the same complaint. He noted that the court, in that case, did not draw all reasonable inferences in favor of the religious groups as it was required to do.[96] For example, the court brushed off the strong

90. *Catholic League*, 567 F.3d at 604 (quoting Vernon v. City of Los Angeles, 27 F.3d 1385, 1398 (9th Cir. 1994)).

91. *Id*. at 605.

92. *Id*. at 606.

93. Cogar, *supra* note 84, at 313.

94. *Catholic League*, 567 F.3d at 598–99.

95. *Id*. at 599.

96. Am. Family Ass'n, Inc. v. City of San Francisco, 277 F.3d 1114, 1126 (9th Cir. 2002) (Noonan, J., dissenting).

language of the Board's letter and resolutions that asserted the message of the religious groups to be directly correlated with violence against homosexuals, suggesting that an objective observer would clearly have understood the overall effect of the resolution as denouncing hate crimes.[97] Additionally, Judge Noonan said, the court did not take seriously the idea that the Board's statements could have influenced media organizations to refuse to run the religious groups' advertisements, as the groups had alleged.[98] In short, according to Judge Noonan, the religious groups were entitled to the benefit of the doubt on some of these issues; it was not appropriate for the court to decide such questions at the onset of the litigation.

Similarly, in *Catholic League*, the court's affirmation of the district court's decision was premature. Although the court was arguably justified in its findings that the resolution had a plausible secular purpose and did not create excessive entanglement, its analysis of the primary-effects factor cannot withstand scrutiny. As discussed previously, the court's reasoning under that prong of the test appears to have been outcome-driven; it did not directly examine the issue. Instead of considering that the resolution truly had a primary religious effect, the court just assumed that an objective observer knowing the focus, intent, and history of the Board's actions would have understood that the resolution's message was not primarily religious.[99]

What the court should have done, and what it was obligated to do, was draw all inferences in favor of Catholic League. Given the resolution's language, it would seem reasonable to conclude that the effects of the resolution may well have been primarily religious. The resolution directly singled out the Catholic religion, stating that its beliefs on adoption were an "insult" to San Franciscans, that they were "absolutely unacceptable," and that "such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered."[100] This kind of language appeared throughout the resolution. If the Board had not filled the resolution with such angry, inflammatory language, the primary effects could have more

97. *Id*. at 1126–27.

98. *Id*. at 1127.

99. *Catholic League*, 567 F.3d at 605–06.

100. *Id*. at 597–98.

easily been inferred as secular, consistent with the Board's claimed purpose. But because the resolution went well beyond simply encouraging adoption by same-sex couples and instead resorted to attacking specific religious beliefs, its primary effects are subject to question. The court's analysis would have been more appropriate in the context of a properly supported motion for summary judgment where discovery had been conducted and documented by affidavit. In the context of a pleadings-based motion to dismiss, however, the court was required to resolve the question in favor of Catholic League.

VI. CONCLUSION

A close examination of the Ninth Circuit's reasoning in *Catholic League* reveals that the case was incorrectly decided. The court applied a flawed test that does not lend itself well to neutral application, used that test to conduct an outcome-driven analysis, and failed to adhere to the correct legal standard. Whether these issues were ignored intentionally or simply overlooked by the court, the result is the same: the Ninth Circuit struck a blow at religion in the ongoing culture war. Moreover, the damage done to religious freedoms is almost as concerning as the damage the court has potentially done to its own legitimacy by abandoning its role of neutrality.

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