No. 04-952

In The
Supreme Court of the United States

CHOLLA READY MIX, INC.,

Petitioner,

v.

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; and ROBERT GASSER, Arizona Parks Department Compliance Officer,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a decision by state officials to bar a landowner from using his private property because some American Indians assert that the land is "sacred" violates the Establishment Clause notwithstanding claims by state officials that the "sacredness" of the land is historically and culturally important to those Indians?

2. Whether a complaint alleging an Establishment Clause violation, which satisfies notice pleading, may be dismissed for not alleging facts sufficient to establish a *prima facie* case under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), given the holding of this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)?

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner, Cholla Ready Mix, Inc., has never issued shares to the public. It does not have a parent corporation, nor is there any publicly-held company that owns ten percent or more of its stock.

Respondents include: Victor Mendez, Secretary of the Arizona Department of Transportation ("ADOT"); Jeff Swan, ADOT Holbrook District Engineer; William Belt, ADOT Environmental Planning Services Department; Thor Anderson, ADOT Official; Richard Duarte, ADOT Environmental Planning Section Manager; Bettina Rosenberg, ADOT Historic Preservation Coordinator; James Garrison, Arizona State Historic Preservation Officer; and Robert Gasser, Arizona Parks Department Compliance Officer.

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PETITION FOR A WRIT OF CERTIORARI

Cholla Ready Mix, Inc. respectfully petitions this Court for a *writ* of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1-15) from which review is sought is reported at 382 F.3d 969 (9th Cir. 2004). The opinion of the District Court (App., *infra*, 16-19) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on September 1, 2004. A timely petition for rehearing *en banc* was denied on October 14, 2004 (App., *infra*, 23-24). The jurisdiction of this Court is invoked under 28 U.S.C. §1254. Jurisdiction in the District Court was based on 28 U.S.C. §1331. Jurisdiction before the Ninth Circuit was based on 28 U.S.C. §1291.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, provides in pertinent part: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

The relevant provisions of the 2000 Arizona Department of Transportation Standard Specifications for Road and Bridge Construction are reproduced at App., *infra*, 26-48.

STATEMENT OF THE CASE

Woodruff Butte is private property owned by Petitioner, Cholla Ready Mix, Inc. ("Cholla"), located south east of Holbrook, Arizona. App., *infra*, 56. Cholla is owned by Dale McKinnon and his family, which first leased and then purchased Woodruff Butte to mine the unique and valuable aggregate found there. App., *infra*, 56.

In 1990, the Hopi, Zuni, and Navajo Indian tribes (collectively, "Tribes") passed resolutions against the mining of Woodruff Butte because they considered it to be a place of religious significance or "sacred." App., *infra*, 57. In or around 1990, the Arizona State Historic Preservation Officer declared Woodruff Butte eligible for listing on the National Registry of Historic Places ("NRHP") over the objections of Mr. McKinnon. Woodruff Butte has yet to be listed on the NRHP. App., *infra*, 57.

In June 1991, the Arizona Department of Transportation ("ADOT") granted Cholla a commercial source number allowing aggregate mined from Woodruff Butte to be used in state highway projects. App., *infra*, 57. Nonetheless, beginning in 1992, ADOT officials began adopting strategies to discourage potential purchasers of aggregate from using Woodruff Butte because of its purported religious significance to the Tribes. App., *infra*, 59-63. These strategies culminated in 1999 when ADOT promulgated new commercial source regulations, under which all existing

commercial source numbers, including that of Cholla, would expire at the end of that year. App., *infra*, 65. Thereafter, commercial source numbers could be obtained only if the applicant submitted an environmental assessment that considered the potential impacts of mining to locations eligible for listing on the NRHP; only Woodruff Butte met this description. App., *infra*, 65.

On June 26, 2000, as a result of ADOT's new regulations and policy against the mining of Woodruff Butte, ADOT denied Cholla's application for a new commercial source number for Woodruff Butte despite Woodruff Butte's previous status as an approved aggregate source site. App., *infra*, 67. The rejection of Cholla's commercial source number application by ADOT was premised solely on the purported religious significance of Woodruff Butte to the Tribes. App., *infra*, 67-69.

On June 25, 2002, Cholla filed suit alleging that these actions and the policy against the mining of Woodruff Butte, as applied, violated Cholla's rights under the Establishment Clause, federal civil rights laws, and the Arizona Constitution.[1] On September 30, 2002, Arizona officials ("Respondents") filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Cholla subsequently filed a motion for leave to amend its Original Complaint. Cholla's First Amended Complaint alleged more fully the injuries it has suffered, including violation of its rights under the

[1] Cholla sued state and federal officials, but the federal defendants were dismissed by joint stipulation of the parties; the state officials are the only remaining defendants in the case. For purposes of this petition, Cholla seeks review only of the dismissal of its allegations and claim for relief under the U.S. Constitution's Establishment Clause. *See*, App., *infra*, 68-69.

Establishment Clause. App., *infra*, 49-82. On January 17, 2003, the District Court granted Cholla's Motion for Leave to File a First Amended Complaint; nonetheless, in the same Order, the District Court granted Respondents' Motion to Dismiss. App., *infra*, 16-19.

On February 3, 2003, Cholla filed a Motion for Reconsideration, which included an alternative request for certification of final judgment pursuant to Federal Rule of Civil Procedure 54(b). On February 21, 2003, the District Court denied Cholla's Motion for Reconsideration but granted Cholla's request for certification of final judgment against Respondents. App., *infra*, 20-21. On March 7, 2003, Cholla timely filed its Notice of Appeal with the Ninth Circuit.

On September 1, 2004, the Ninth Circuit affirmed the dismissal of Cholla's Complaint and its Establishment Clause claim, App., *infra*, 1-15, holding that "no evidence could bolster Cholla's Establishment Clause claim because it is premised on flawed analysis of the governing law." App., *infra*, 8. The Ninth Circuit described that "governing law" as providing that "the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups." App., *infra*, 13.

In addition, although the Ninth Circuit, in determining whether the District Court had erred in granting Respondents' Rule 12(b)(6) motion, was required to assume the truth of the allegations in Cholla's Complaint and to construe those allegations liberally, the Ninth Circuit evaluated the strength of Cholla's Establishment Clause claim. In so doing, the Ninth Circuit held that Cholla's

Complaint was deficient because Cholla had failed to set forth a *prima facie* case for an Establishment Clause claim under *Lemon v. Kurtzman*, 403 U.S. 602 (1971); for example, Cholla had not alleged that Arizona officials were not motivated by a secular purpose. App., *infra*, 9.

Finally, the Ninth Circuit addressed the merits of Cholla's Establishment Clause claim. To do so however, given the stage of the proceedings, that is, prior to discovery and the completion of a factual record, the Ninth Circuit assumed facts not in evidence. For example, although Cholla alleged that Woodruff Butte is private property to which no American Indians have access, App., *infra*, 56, the Ninth Circuit held that Respondents were motivated by a desire to "avoid interference with a group's religious programs" or to "accommodate [a] religious minority to let them [*sic*] practice their religion without penalty." App., *infra*, 9.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE ESTABLISHMENT CLAUSE JURISPRUDENCE OF THIS COURT AND THE OTHER CIRCUITS.

Notwithstanding that the matter before it came pursuant to a Rule 12(b)(6) motion to dismiss and that no discovery or fact finding had been conducted, the Ninth Circuit issued the following broad legal holding on the merits:

> In conclusion, the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because

> the site's importance derives at least in part from its sacredness to certain groups.

App., *infra*, 13. The Ninth Circuit cites no authority for this broad holding, which conflicts with the holdings of this Court, the Ninth Circuit, and other Circuits.

A. The Ninth Circuit's Holding Ignores the Test Set Forth by this Court in *Lemon v. Kurtzman*.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court held that government action does not offend the Establishment Clause if it: (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement with religion.

1. The Ninth Circuit's Holding Conflicts Regarding "Secular Purpose."

The Ninth Circuit's holding that a "secular purpose" is served when governments seek to accommodate groups' religion practices, App., *infra*, 9, ignores the requirement that the accommodation doctrine does not come into play unless and until some action, by government, has barred the practice of religion and the government accommodates religion by removing that bar. *See, Lee v. Weisman*, 505 U.S. 577, 607 (1992) (scope of accommodation permissible under the Establishment Clause requires the lifting of a discernible burden on the free exercise of religion); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 601 n. 51, 59 (1989) (government efforts to accommodate religion are constitutional only if they "remove burdens on the free exercise of religion").

Moreover, the Ninth Circuit cites no legal precedent holding that a "secular purpose" is served when governments bar people from using their private property "to accommodate" (or to avoid interference with) religious groups. App., *infra*, 9. The accommodation doctrine provides no such authority.

2. The Ninth Circuit's Holding Conflicts Regarding "Primary Effect."

The Ninth Circuit's claim that "the central role of religion in human societies" supports its holding that the Establishment Clause does not bar Respondents' prohibition against Cholla's use of its property contains not a single legal precedent; instead, the Ninth Circuit waxes eloquent about religious sites that are also historic. App., *infra*, 10.

Not surprisingly, given the controversial nature of Establishment Clause jurisprudence, "the central role of religion in human societies" has not prevented this Court, the Ninth Circuit, and other federal circuits from holding that government often improperly abandons its neutrality regarding religion. *See, Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (finding that the Establishment Clause "compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents"); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002) ("a significant factor in evaluating whether a governmental program violates the Establishment Clause is its neutrality toward religion"); *U.S. v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (Establishment

Clause "insures governmental neutrality in religious matters").

Moreover, the Ninth Circuit's determination that Establishment Clause complainants, in order to maintain their constitutional challenge to government action, must assert that the government refuses to advance their religion is totally without merit. App., *infra*, 11. Advancement of any religion, not the advancement of some religions and not of others, is the gravamen of an Establishment Clause violation. *See, Board of Educ. of Kiryas Joel Village School Dist.*, 512 U.S. at 696.

Finally, the Ninth Circuit cites no case, because none exists, holding that a government does not violate the Establishment Clause when it bars a person from using his private property because others consider his land "sacred." App., *infra*, 8-13.

3. The Ninth Circuit's Holding Conflicts Regarding "Excessive Entanglement."

The Ninth Circuit's holding that Respondents' actions on behalf of the Tribes in barring Cholla's use of its private property was a "routine administrative contact[]" does not find support in the cases upon which the Ninth Circuit relied. App., *infra*, 12. In fact, the lead role of the Indians in Respondents' actions against Cholla constitutes the "excessive entanglement" against which this Court has ruled. *See, Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (demands for privacy in a National Forest considered sacred by Indians cannot justify the government's closure of public lands, even temporarily); *see also, Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) ("Issuance of regulations to exclude

tourists completely . . . for the [] purpose of aiding [Indians'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause").

Moreover, the Ninth Circuit's assertion as to the types of allegations that must be made to show "excessive entanglement," App., *infra*, 13, finds no support in Establishment Clause jurisprudence. *See, Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) ("what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion").

B. The Ninth Circuit's Holding Contains None of the Analysis Required by this Court and the Circuits if Challenged Religious Symbols Contain Historical and Cultural Features.

1. The Mere Presence of Historical or Cultural Features Does Not Automatically Render the Display of a Religious Symbol Constitutional.

This Court's Establishment Clause analysis asks whether the government has "demonstrate[d] a preference for one particular sect or creed []" that may reasonably be perceived as governmental endorsement of religion, *Allegheny County*, 492 U.S. at 605; *see also, Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), because the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief. . . ." *Allegheny County*, 492 U.S. at 593-94. This Court applies this analysis even when the religious symbols in question have historical or cultural features.

For example, in *Allegheny County*, this Court held that a crèche, which was topped with an angel bearing a banner proclaiming "Gloria in Excelsis Deo!", violated the Establishment Clause because the display could be seen as a governmental observance of Christmas "as a Christian holy day." *Id.* 601. Thus, despite the crèche's historical and cultural significance in the Christian religion, its display by the county was unconstitutional. *Id.* at 598.

In another example, the Ninth Circuit held that, although a cross may have historical and cultural significance as a war memorial and, thus, a purportedly secular purpose, observers might reasonably perceive a governmental display of such a religious symbol on public property as government endorsement of the Christian faith. *See, Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (presence of cross designated as a war memorial in a national preserve violated the Establishment Clause); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (Latin cross in a city park that was a memorial in honor of veterans violated Establishment Clause). In both *Buono* and *Separation of Church and State Committee*, the Ninth Circuit held that, despite the historical and cultural significance of the symbols as war memorials, the display of these symbols violated the Establishment Clause under *Lemon* and *Alleghany* because a person could reasonably perceive the governments' display of the crosses as endorsement of religion. *See, Buono*, 371 F.3d at 550; *Separation of Church and State Committee*, 93 F.3d at 619-20.

The Ninth Circuit's ruling in *Cholla* that Respondents may bar Cholla from using its land because Cholla's land is both sacred and historically and culturally important to American Indians conflicts with the holding of this Court

in *Allegheny County*. This Court should grant this petition to resolve this conflict.

2. Two Cases Now Before this Court Present the Issue of Whether the Presence of Historical or Cultural Features in a Religious Symbol Save It from a Ruling that Its Display is Unconstitutional.

There are two cases whose petitions for *writ* of *certiorari* were granted that are now before this Court: *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004); and *ACLU of KY, et al. v. McCreary County, et al.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004).

Both cases speak to the very issue addressed by the Ninth Circuit in its broad ruling, that is, whether the mere presence of historical or cultural features in a religious display save it from a ruling that its display is unconstitutional.[2] App., *infra*, 13. For example, in *Van Orden*, the State of Texas argues that a monument that contains the Ten Commandments has historical significance and

[2] *Van Orden* and *McCreary County* ask whether the display, in a public place, of a monument that includes the Ten Commandments, which Jews and Christians believe were written in stone by God, constitutes government endorsement of religion. *Cholla* asks whether Respondents' endorsement of the religious beliefs of some American Indians that Woodruff Butte, a geological feature, is "sacred" is unconstitutional. Neither the monument in *Van Orden* or *McCreary County*, nor the geological feature in *Cholla* is, in and of itself, offensive to the Constitution. When a government, however, endorses the significance that religious adherents affix to either of those pieces of stone then that government has run afoul of the Establishment Clause. *See, Allegheny County*, 492 U.S. at 590-91.

therefore does not offend the Establishment Clause. *See, Van Orden*, 351 F.3d at 177. In *McCreary County*, three Kentucky counties argue that their display of the Ten Commandments serves a secular purpose because the Ten Commandments were: "part of the foundation of American Law and Government . . . [and] played a significant role in the foundation of our system of law and government[] and . . . in the development, origins or foundations of American or Kentucky law. . . ." *McCreary County*, 354 F.3d at 446-47.

Given that the question in *Cholla* is remarkably similar to that presented in *Van Orden* and *McCreary County*, this Court should hold *Cholla* aside until those cases are decided. At that time, *certiorari* should be granted in *Cholla* and it should be reversed and remanded to the Ninth Circuit with instructions to follow the rulings in *Van Orden* and *McCreary*.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *SWIERKIEWICZ v. SOREMA* AND *CONLEY v. GIBSON*.

A. Cholla's Establishment Clause Claim May Not be Held to a Heightened Pleading Standard.

1. This Court has Barred a Requirement that a Plaintiff Plead a *Prima Facie* Case.

In *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), this Court unanimously rejected any requirement that a plaintiff plead facts establishing a *prima facie* case, as required for a limited number of exceptions under Federal Rule of Civil Procedure 9(b), because that requirement

would substitute an "evidentiary standard [for] a pleading requirement." *Swierkiewicz*, 534 U.S. at 510.[3] Instead, federal courts should "rel[y] on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 513. Furthermore, "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case." *Id.* Finally, because a "*prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard. . . ." *Id.*

Nonetheless, the Ninth Circuit ignored the holding of this Court in *Swierkiewicz* and held that Cholla's First Amended Complaint was inadequate because Cholla had failed to establish a *prima facie* Establishment Clause case under *Lemon*. App., *infra*, 8-13. For example, according to the Ninth Circuit: "Cholla has alleged no facts that would support a conclusion that [Respondents] were not motivated at least in part by [a] secular purpose[,]" App., *infra*, 9; "[t]here is no suggestion that [Respondents] favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups[,]" App., *infra*, 11; "Cholla has not alleged facts that would support an inference that [Respondents'] actions foster excessive government entanglement with religion[,]" App., *infra*, 12; and "Cholla does not allege that [Respondents] participate in the Tribe's religious practices, inquire about the substance of their

[3] Although *Swierkiewicz* addressed heightened pleading requirements in discrimination cases, it declared that "complaints in these cases, *as in most others*, must satisfy only the simple requirements of Rule 8(a)." *Swierkiewicz*, 534 U.S. at 513 (emphasis added).

religious views, or monitor their religious practices." App., *infra*, 13.

The *prima facie* case under *Lemon* that the Ninth Circuit demands Cholla allege, however, is an evidentiary standard, not a pleading requirement. This Court has never ruled that the requirements for establishing a *prima facie* Establishment Clause violation under *Lemon* also apply to the pleading standard that plaintiffs must satisfy in order to survive a Rule 12(b) motion to dismiss. Instead, this Court has held that heightened pleading standards conflict with Rule 8(a)(2), which provides that a complaint must only include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz*, 534 U.S. at 512.

In *Swierkiewicz*, this Court ruled that "Rule 8(a)'s simplified pleading standard applies to all actions, with limited exceptions." *Id.* at 513. The only notable exception lies in Rule 9(b), which provides for greater particularity in all pleadings of fraud or mistake. However, this Court has refused to extend such exceptions to other actions. *See, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (courts could not impose a heightened pleading standard on plaintiffs alleging § 1983 claims against municipalities); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (courts should not establish heightened pleading standards regarding improper motive in constitutional tort cases brought against individual defendants). Just as Rule 9(b) makes no reference to claims of employment discrimination, municipal liability under § 1983, or improper motive in constitutional tort cases, neither does it mention an Establishment Clause claim. Thus, as in these cases "as in most others," Cholla "must satisfy only the simple requirements of Rule

8(a)" instead of pleading a *prima facie* Establishment Clause case. *See, Swierkiewicz*, 534 U.S. at 513.

2. An Establishment Clause Claim May Not Require Proof of All the Elements of *Lemon v. Kurtzman*.

This Court instructed in *Swierkiewicz* that "the precise requirements of a *prima facie* case can vary depending on the context and were never intended to be rigid, mechanized, or ritualistic." 534 U.S. at 512 (internal quotations omitted). This Court's Establishment Clause jurisprudence demonstrates the wisdom of *Swierkiewicz* since the *Lemon* framework does not apply in every Establishment Clause case.

For instance, if the nature of the religious activity is so pervasive as to conflict with settled Establishment Clause precedent, then a plaintiff may prevail without proving all of the elements of the *Lemon* test. *See, Lee*, 505 U.S. at 577 (striking down graduation prayer without applying *Lemon*); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer in Establishment Clause challenge without applying *Lemon* because of the unique history of the practice); *Larson v. Valente*, 456 U.S. 228 (1982) (when a government statute or practice explicitly discriminates against a certain religious group, the *Lemon* test is not useful). Furthermore, this Court has employed variations of the *Lemon* test in cases involving government speech on religious topics. *See, Allegheny County*, 492 U.S. at 573 (applying endorsement test, which is refinement of second prong of *Lemon* test, in case involving religious symbols on government property); *Lynch*, 465 U.S. at 687, 694 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine

whether it constitutes an endorsement or disapproval of religion.").

B. Cholla's Complaint Meets Notice Pleading Requirements as Defined by this Court's Holding in *Conley v. Gibson*.

Rule 8(a)(2) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief," which "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In its Complaint, Cholla satisfied the requirements of Rule 8(a)(2) by establishing that it is entitled to relief for its Establishment Clause claim and by putting Respondents on notice as to the nature and basis of Cholla's claim. For example, Cholla's Complaint alleges, in part:

> 88. Defendants maintain a policy against the use of Woodruff Butte as a materials source.
>
> 89. The reason for this policy is that Defendants believe Woodruff Butte is considered sacred by the Hopi, Zuni, and/or Navajo Indian Tribes based on religious grounds.
>
> 90. ADOT actively maintains a policy and has implemented this policy against use of Woodruff Butte by first promulgating, then subsequently enforcing the challenged regulations against Cholla.
>
> 91. The purpose of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is not secular. It is in fact based on specific religious grounds.

> 92. The principle and/or primary effect of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is the advancement and/or protection of religion.
>
> 93. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number foster an excessive governmental entanglement with religion.
>
> 94. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, constitute governmental endorsement of religion pursuant to the beliefs and practices of Hopi, Zuni, and/or Navajo Indian Tribes.
>
> 95. As a direct result of the challenged regulations and Defendants' formulation, implementation, and enforcement of their policy, Cholla is unable to bid for and/or win materials subcontracts for ADOT highway construction contracts. The effect of this direct result violates Cholla's rights against establishment of religion under the First Amendment to the United States Constitution.

App., *infra*, 68-69.

Nonetheless, the Ninth Circuit ignored the liberal notice pleading requirements defined by this Court in *Conley* and, instead, subjected Cholla's Complaint to a more rigid pleading standard. In so doing, the Ninth Circuit erroneously held that Cholla's Complaint was inadequate because Cholla had failed to allege a *prima facie* case under *Lemon*. *See, Swierkiewicz*, 534 U.S. at 512. For example, although Cholla alleged that Respondents' policy and

actions barring Cholla's use of its private property were "not secular" and, were "in fact based on specific religious grounds," App., *infra*, 68, the Ninth Circuit faulted Cholla for not speculating on what "secular purposes" Respondents might argue they had sought to serve and for not setting forth in its Complaint "facts that would support a conclusion that [Respondents] were not motivated at least in part by" secular purposes. App., *infra*, 9.

In another instance, although Cholla alleged that the purpose and primary effect of Respondents' actions was the "advancement" and "endorsement of religion pursuant to the beliefs and practices of [the] Tribes[,]" App., *infra*, 69, the Ninth Circuit held that Cholla's Complaint was incomplete because "there is no suggestion that [Respondents] favor tribal religion over other religions." App., *infra*, 10-11.

In a third example, although Cholla alleged that the "challenged regulations, [Respondents'] policy, and the denial of Cholla's application for a commercial source number foster an excessive governmental entanglement with religion," App., *infra*, 69, the Ninth Circuit held that Cholla should have plead "that [Respondents] participate in the Tribe's religious practices, inquire about the substance of their religious views, or monitor their religious practices." App., *infra*, 13.

Rule 8(a)(2) and this Court's holding in *Conley* were satisfied by Cholla's allegations and claim for relief under the Establishment Clause. Accepted as true, Cholla's allegations suggest a violation of the Establishment Clause under each part of the *Lemon* test. Cholla is not required, as the Ninth Circuit demands in this instance, to anticipate the "facts" that Respondents may allege in their

defense and allege facts that will refute Respondents' "facts." *Id.* Such a requirement of "greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz*, 534 U.S. at 515 (internal quotations omitted).

C. The Ninth Circuit Failed to Accept the Allegations of Cholla's Complaint as True and Instead Assumed Facts Not in Evidence.

In determining whether the District Court properly dismissed Cholla's Complaint pursuant to Respondents' Rule 12(b)(6) motion, the Ninth Circuit was required to accept as true all of the factual allegations contained in Cholla's Complaint. *See, Leatherman*, 507 U.S. at 164. Nonetheless, the Ninth Circuit not only attacked, rather than assume, the truth of Cholla's allegations, the Ninth Circuit also speculated as to facts that would result in a finding that Cholla's Complaint was without merit.[4]

1. The Ninth Circuit Assumed Facts Regarding a "Secular Purpose."

The Ninth Circuit held that Respondents had a "secular purpose" in barring Cholla's use of its private property, that is, to carry out "state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American

[4] The Ninth Circuit held, for example, that Cholla's allegation, in its Complaint, that "[t]he principle and/or primary effect of [Respondents' actions] is the advancement and/or protection of religion," App., *infra*, 69, is without merit. App., *infra*, 10.

groups and the nation as a whole." App., *infra*, 9. That conclusion is based on what Respondents argued in their Motion to Dismiss. State Defendants' Motion to Dismiss at 10-13. Cholla alleged in its Complaint, however, that the sole reason for the bar on Cholla's use of its property was that Cholla's land is sacred to the Tribes. App., *infra*, 68. It is this allegation by Cholla that must be assumed to be true, not Respondents' arguments. *See, Leatherman*, 507 U.S. at 164.

Furthermore, the Ninth Circuit, citing *Kong v. Scully*, 341 F.3d 1132, 1140 (9th Cir. 2003), held that Respondents may have been motivated by a desire to "avoid interference with a group's religious programs," and, citing *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002), that Respondents may have been seeking the "[a]ccomodation of a religious minority to let them [*sic*] practice their religion without penalty." App., *infra*, 9. The Ninth Circuit reached this conclusion contrary to the facts alleged in Cholla's Complaint. For example, Woodruff Butte is private property; therefore, no one has access to Woodruff Butte to conduct a "religious program[]" or "to practice [] religion without penalty." App., *infra*, 56. Thus, these could not have been the "secular purposes" that motivated Respondents to bar Cholla from using its property.

2. The Ninth Circuit Assumed Facts Regarding "Primary Effect."

The Ninth Circuit, as part of its lengthy discourse on the "central role of religion in human societies," declared, "[t]he Establishment Clause does not require governments to ignore the historical value of religious sites." App., *infra*,

10. In so holding, the Ninth Circuit assumed that Cholla's private property has "historical value" and "historical significance" to some American Indians. App., *infra*, 10. Cholla's Complaint, however, alleges that the sole reason for Respondents' policy against the use of Woodruff Butte is the advancement and protection of the Tribes' religion. App., *infra*, 57, 66-69.

Furthermore, the Ninth Circuit, in holding that Respondents' actions do not advance religion, assumed that Respondents barred Cholla from using its private property in order not to "interfere with the Tribes' religious practices. . . ." App., *infra*, 11. No such fact was ever adjudicated. Yet, the one fact that is known because it was alleged in Cholla's Complaint – that Woodruff Butte is private property – demonstrates that "the Tribes' religious practices" could not have taken place there and, thus, would not be "interfere[d] with" by Cholla's use of its property.

3. The Ninth Circuit Assumed Facts as to "Excessive Entanglement."

Cholla alleged, in response to assertions by the Tribes that Woodruff Butte – Cholla's private property – is "sacred" to them, that Respondents did as the Tribes demanded, that is, Respondents barred Cholla from using its private property. App., *infra*, 54-55, 57, 64-65, 67. Cholla also alleged that Respondents' actions fostered excessive government entanglement with religion. App., *infra*, 69. Nonetheless, the Ninth Circuit ignored the facts in Cholla's well-pled Complaint and assumed that Cholla's only factual allegation was that "the Tribes were consulted." App., *infra*, 12.

Moreover, the Ninth Circuit assumed that the nature of the Tribes involved here was "pervasively sectarian" and hence, when Respondents did as the Tribes asked, Respondents were not excessively entangled with religion. App., *infra*, 12. The nature of the Tribes, as well as the nature of the demands they made in this case, require factual finding, not assumptions at this stage of the proceedings.

The Ninth Circuit's holding that Cholla must allege a *prima facie* Establishment Clause case under *Lemon* to survive a Rule 12(b)(6) motion to dismiss conflicts with this Court's Establishment Clause jurisprudence and its holdings in *Swierkiewicz* and *Conley*. Accordingly, this Court should grant the Petition to resolve these conflicts.

CONCLUSION

For the foregoing reasons, Cholla Ready Mix, Inc., respectfully requests that this Court grant this petition for a *writ of certiorari*.

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