

No. 18-500

In The
Supreme Court of the United States

—◆—
THE FIRST PRESBYTERIAN CHURCH U.S.A.
OF TULSA, OKLAHOMA, and JAMES D. MILLER,

Petitioners,

v.

JOHN DOE,

Respondent.

—◆—
**On Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Oklahoma**

—◆—
**BRIEF OF AMICUS CURIAE,
OKLAHOMA WESLEYAN UNIVERSITY,
IN SUPPORT OF PETITION**

—◆—
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INTEREST OF AMICUS CURIAE¹

“Unapologetic in our commitment to the truth of Christ and the truth of Scripture, OKWU models a way of thought, a way of life, and a way of faith. This is a place of serious study, honest questions, and critical engagement, all in the context of a liberal arts community that honors the Primacy of Jesus Christ, the Priority of Scripture, the Pursuit of Truth, and the Practice of Wisdom.”²

OKWU is a private evangelical Christian university of the Wesleyan Church located in Bartlesville, Oklahoma. It is owned and operated by the Wesleyan Church.³ It was founded by the Wesleyan Church through a series of mergers of colleges in California, Colorado, and Oklahoma. It became known as Bartlesville Wesleyan College in 1968, after the Pilgrim Holiness Church and the Wesleyan Methodist Church merged to become the Wesleyan Church. In 1972, OKWU merged with Miltonvale Wesleyan College in Kansas. OKWU then became a four-year college. In

¹ Counsel for Amicus Curiae, Mark D. Spencer, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the Amicus Curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. All counsel of record received timely notice (more than ten days) of the intent of Amicus Curiae to file this brief. Counsel for Petitioner and Respondent consent to the filing of this brief.

² ABOUT OKWU (Nov. 12, 2018), <https://www.okwu.edu/about>.

³ THE WESLEYAN CHURCH (Nov. 12, 2018), <https://www.wesleyan.org>.

August 2001, Bartlesville Wesleyan College became Oklahoma Wesleyan University. OKWU has approximately 1,200 students, and it offers 35 majors in its undergraduate program. The school also offers graduate degrees. OKWU has students who are “members” of many different Protestant denominations (Wesleyan, Baptist, Methodist, Presbyterian, etc.), as well as Catholics and members of non-denominational evangelical churches.

As a religious institution, OKWU has established standards for students, faculty, administration, and staff. These include, for example, standards for acceptance, termination, academic performance, conduct, interaction, discipline, and educational and aspirational standards. These standards might seem quaint, outdated, or even oppressive to some persons who are unaffiliated with the school or the Wesleyan Church. Regardless, these standards result from *deeply-held* religious beliefs and convictions which must be respected by *governmental* institutions.

OKWU did not develop its standards or its code of conduct without a firm theological basis. Its standards are rooted in, and are based on, the Disciplines of the Wesleyan Church, which likewise encourage, discourage, permit, and prohibit certain conduct among its members. It is not merely a set of campus-based restrictions OKWU arbitrarily decided would be the best way to manage and operate a university. They reflect,

and put into practice, the deeply-held and longstanding religious doctrine of the Wesleyan Church.⁴

OKWU has labored for almost three decades under the Oklahoma Supreme Court’s improper interpretation of the religious autonomy doctrine – and has in fact altered its *inherently religious* conduct due to what is best described as judicial policing of church practices.

OKWU is not alone. There are numerous religious colleges and universities in Oklahoma.⁵ This list does not include the hundreds of private religious elementary and secondary schools in the State. Nor does it include the various cathedrals, kingdom halls, meeting houses, monasteries, mosques, nhà thờ họ, shrines, synagogues, temples, and tabernacles that

⁴ See, e.g., OUR BELIEFS AND CORE VALUES (Nov. 12, 2018), <https://www.wesleyan.org/about/our-beliefs>; see also ARTICLES OF RELIGION (Nov. 12, 2018), <https://www.wesleyan.org/about/articles-of-religion>.

⁵ These include: Bacone College (American Baptist Churches USA); Hillsdale Free Will Baptist College (Free Will Baptist); Mid-America Christian University (Church of God (Anderson)); Oklahoma Baptist University (Baptist General Convention of Oklahoma); Oklahoma Christian University (Church of Christ); Oklahoma City University (United Methodist Church); Oral Roberts University (evangelical); Phillips Theological Seminary (Christian Church (Disciples of Christ)); Southern Nazarene University (Nazarene); Southwestern Christian University (International Pentecostal Holiness Church). Tribal colleges include College of the Muscogee Nation (Muscogee (Creek) Nation); Comanche Nation College (Comanche Nation); and Pawnee Nation College (Pawnee Nation). Closed universities include Phillips University (Christian Church (Disciples of Christ)); and St. Gregory’s University (Roman Catholic, Benedictine).

have populated the State since it was opened to non-native settlement in the Land Run of 1889. Nor does it include the Buddhist, Christian, Hindu, Islamic, Jewish, and other religions practiced in Oklahoma.

The Oklahoma Supreme Court has addressed the religious autonomy doctrine three times: *Guinn v. Church of Christ*, 775 P.2d 766 (1989); *Hadnot v. Shaw*, 826 P.2d 978 (1992); and this case. The Court's recent reaffirmation of its narrow view of the religious autonomy doctrine, as one that applies to "consenting members only," means that there is little chance of correction, and Oklahoma religious institutions and their members including OKWU will have to suffer the effects of the *Guinn-Hadnot-Doe* trilogy unless and until this Court intervenes.

Compounding the problem, Oklahoma is situated in the Tenth Circuit, which has not recognized the "consenting members only" approach. Instead, the Tenth Circuit takes a broader approach that "This church autonomy doctrine prohibits civil court review of internal church disputes involving *matters of faith, doctrine, church governance, and polity*." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) (emphasis added, citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116-17 (1952)). The fact that Oklahoma religious institutions and their members including OKWU are subject to different standards for judicial intervention and review necessitates examination and resolution by this Court of the issues presented.

Finally, the question of whether the religious autonomy doctrine is jurisdictional, or is merely an affirmative defense (which can be intentionally or accidentally waived, and on which defendants arguably have the burden of proof), is a matter of concern for Oklahoma religious institutions like OKWU because they are now obvious targets of *Guinn-Hadnot-Doe* lawsuits. Being subjected to court systems to assert affirmative defenses in general constitutes an unwieldy expenditure of time and money that religious organizations cannot afford, and which diverts scarce funds that should be used toward the educational or religious mission of the institution.

OKWU has a substantial interest in ensuring that it is allowed to operate autonomously, within the confines of its deeply-held doctrine, without fear of accountability to state judicial officers and juries who might or might not agree with, or even understand, such doctrine.



SUMMARY OF THE ARGUMENT

The Oklahoma Supreme Court's decision in *Doe v. The First Presbyterian Church U.S.A.*, Case No. 115182, 2017 OK 106, ___ P.3d ___, is an extension of Oklahoma's irreconcilable and anomalous interpretation of the religious autonomy doctrine. This interpretation imposes untenable secular burdens not only on traditional churches, congregations, sects, and other discrete places of worship, but on other more complex religious institutions including private religious

schools. Oklahoma’s interpretation of the religious autonomy doctrine was first articulated three decades ago in *Guinn v. Church of Christ*, 775 P.2d 766 (1989), and is based on an overly-narrow and restrictive concept of the “church.” This interpretation has chilled the free exercise of OKWU’s religious expression, and OKWU and other religious institutions have been *coerced and forced to alter their religious practices* under *Guinn* and its progeny to include the instant case.

Additionally, Oklahoma’s position that the religious autonomy doctrine is an affirmative defense places an added burden on institutions in situations where they should not be subject to suit in the first place. This drains scarce resources from churches and religious institutions including OKWU.

ARGUMENT

Under the religious autonomy doctrine, “it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, – a matter over which the civil courts exercise no jurisdiction, – a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, – becomes the subject of its action.” *Watson v. Jones*, 80 U.S. 679, 733 (1871). A history of religion in Oklahoma provides a backdrop for the *Guinn-Hadnot-Doe* trilogy.

Oklahoma's religious profile varies markedly from national norms. The state's residents identify themselves as Southern Baptist almost seven times more often than other Americans, but Churches of Christ, Methodist, Pentecostal, and Holiness groups are also much more common in Oklahoma than elsewhere. Correspondingly, Oklahomans are much less often associated either with mainstream Protestant churches, Roman Catholicism, or Judaism. Nevertheless, Baptists are not as dominant in Oklahoma as they are in many surrounding states. The resultant mix is made even richer by the continuing strength of American Indian spirituality and religious influences. Such differences stem from the state's unique history and remain a major shaper of its people and institutions.

....

The most important factor shaping missionary responses after 1890 was the rapid influx of white populations. Indian Territory [pre-statehood] population grew more than ten fold, swelling from 71,000 in 1880 to 733,000 in 1906. The vast majority of the increase came from railroad workers, coal miners, farmers, and their families who entered the territory under tribal permit laws. Correspondingly, a series of land runs and other land openings in western Oklahoma after 1889 provided homes for 681,000 people by the eve of 1907 statehood. This flood of people overwhelmed available resources in the main-line denominations, which were unable to

replicate their denominational structures or place the number of trained clergy required to serve burgeoning settlements. Episcopalians, for example, did not establish a bishopric for Oklahoma until 1895, well after both territories were largely settled. Under these circumstances, the organizational flexibility of the Baptists, Methodists, and comparable groups helped to assure their relative dominance in the emerging state.

Before that time, however, territorial-era migrations contributed to the state's ethnic and religious mix. The migration of African Americans to the [pre-statehood] Twin Territories added to already significant numbers of tribal freedmen and their descendants who clustered in All-Black towns, where African Methodist, Episcopal, Baptists, and similar groups dominated. In Indian Territory coal mining drew southern and eastern European populations, many with Catholic, Orthodox, or other religious convictions. The ancestors of much of the state's present Jewish population arrived during the same period. Saints Cyril and Methodius, a Russian Orthodox church at Hartshorne, reflects the regional diversity of eastern Oklahoma. Western Oklahoma communities frequently contain other ethnic churches such as those established by Mennonites and by other denominations characteristic of the Germans from Russia who established farms and communities on the plains.

Alvin O. Turner, RELIGION, *The Encyclopedia of Oklahoma History & Culture*.⁶

Despite the rich religious mixture, Oklahoma remains dominated by protestant denominations. According to the Pew Research Foundation, 79% of Oklahomans identify as Christian (Evangelical Protestant 47%, Mainline Protestant 18%, Historically Black Protestant 4%, Catholic 8%, Mormon 1%, Orthodox Christian 1%, Jehovah’s Witness <1%, Other Christian <1%).⁷ Other religions (Jewish, Muslim, Buddhist, Hindu, and Other World Religions) are each <1%.⁸ Unaffiliated (no religion, atheist, and agnostic) are 18%.⁹ The small Oklahoma towns that dot the prairie contain the frequent local selection of Baptist, Church of Christ, Lutheran, Methodist, and other denominational churches.

Not surprisingly, when the Oklahoma Supreme Court decided *Guinn v. Church of Christ*, 775 P.2d 766 (1989), it took a more pastoral, late 19th to mid-20th Century, heartland view of the concept of a “church”: a “church” is a building, in a particular town, containing a congregation – a group of people who consent to assemble and worship together. Methodist ministers who rode the circuit went from one “church” to another.

⁶ Available at <http://www.okhistory.org/publications/enc/entry.php?entry=RE024>.

⁷ *Adults in Oklahoma*, PEWFORUM.ORG, <http://www.pewforum.org/religious-landscape-study/state/oklahoma> (last visited Nov. 12, 2018).

⁸ *Id.*

⁹ *Id.*

People can join a “church,” or they can leave the “church,” for example, if they decide to move away. People are only subject to church “discipline” when they are “consenting” formal “members” of the “church.” *Guinn* effectively held that when a person leaves a “church,” that person is erased not only from the church’s rolls, but from its memory as well. If the “church” speaks “tortiously” of the former member, within the membership or even outside the membership to other churches of the same denomination, the church can be haled into a state court to account for its conduct and have the state adjudicate its liability to the former member:

WHEN PARISHIONER WITHDREW HER MEMBERSHIP FROM THE CHURCH OF CHRIST AND THEREBY WITHDREW HER CONSENT TO PARTICIPATE IN A SPIRITUAL RELATIONSHIP IN WHICH SHE HAD IMPLICITLY AGREED TO SUBMIT TO ECCLESIASTICAL SUPERVISION, THOSE DISCIPLINARY ACTIONS THEREAFTER TAKEN BY THE ELDERS AGAINST PARISHIONER, WHICH ACTIVELY INVOLVED HER IN THE CHURCH’S WILL AND COMMAND, WERE OUTSIDE THE PURVIEW OF THE FIRST AMENDMENT PROTECTION AND WERE THE PROPER SUBJECT OF STATE REGULATION.¹⁰

¹⁰ Under the Oklahoma Supreme Court’s analysis, even the Apostle Paul could be haled into court for publishing the statement in chapter 4 verse 10 of his second letter to Timothy, that

775 P.2d at 777-78 (capitalization in original).¹¹ In other words, a “church” operates much like a fraternal organization or a social club, where members join, leave, or are expelled. Once they exit, the church no longer has any business with or concern for them. The Oklahoma Supreme Court’s decision necessarily leaves some churches which do not have such a formalized structure for membership outside of protection from the religious autonomy doctrine. Thus, it follows that the Court’s definition also leaves other devoutly religious institutions like OKWU, which do not categorize its campus community body as “members,” out as well. As a protection rooted in the First Amendment, other religious institutions should have that protection.¹²

Demas, having loved this present world, forsook him and departed for Thessalonica.

¹¹ As noted in *Guinn*, 766 P.2d at 768 & nn.1, 2, the Church of Christ of Collinsville was exercising a biblical commandment: “If your brother sins, go and show him his fault in private; if he listens to you, you have won your brother. But if he does not listen to you, take one or two more with you, so that by the mouth of two or three witnesses every fact may be confirmed. If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector.” Matthew 18:15-17 (NASB).

¹² Closely-held, for-profit corporations can enjoy First Amendment religious protection, and can be exempt from a regulation to which its owners religiously object. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). *A fortiori*, not-for-profit religious universities enjoy First Amendment protection. *See, e.g.*, 42 U.S.C. §2000e-1(a) (exempting from certain federal employment discrimination laws a “religious corporation, association, educational institution, or society with respect to the employment

To compound the error, *Guinn* espouses the viewpoint that, to be exempt from state regulation under the religious autonomy doctrine, the “church’s” actions must be rooted in some kind of formal writing that can be cited, much like an attorney cites legal authority in support of a proposition in a brief:

The Church of Christ’s right to discipline Parishioner springs directly from the *contract of membership*. The terms of a *contract of membership* are contained in the *customs and usages which have evolved from any written laws*. The Church of Christ views the Bible as its only source of doctrine and has no written rules or bylaws. It is undisputed the Church of Christ practices the Biblically based disciplinary procedures which include the practice of withdrawal of fellowship.

...

Parishioner does not assert the Elders deviated from the Church’s *rules and regulations* for discipline. Rather, she contends that because she was not instructed when she joined the Church that it considers its members as lifetime members and thus has no doctrinal

of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”); 20 U.S.C. §1681(a)(3) (establishing an exemption for “an educational institution which is controlled by a religious organization” from Title IX’s prohibition against discriminating based on sex education program or activity).

provision for withdrawal of membership, she *did not submit to this doctrinal belief*.

775 P.2d at 795 (emphasis added). But of course, a person does not have to cite a written church law, rule, regulation, or scripture, before he can place a cross on his desk, or before she can place a scriptural plaque on her wall, in the workplace or elsewhere. These are examples of the *free* exercise of religion.

This formalistic “consenting members only” – “written laws” approach was reaffirmed in *Hadnot v. Shaw*:

At the point when the church-member relationship is severed through an *affirmative act either of a parishioner’s withdrawal or of excommunication* by the ecclesiastical body, a different situation arises. In the event of withdrawal or of post-excommunication activity unrelated to the church’s efforts at effectuation of valid judicature, the absolute privilege from tort liability no longer attaches. Any action at this point, if it is to be protected, must be justified by other means. Under these circumstances conditional privileges may be applicable. The church may take such steps as are reasonable to protect itself and to complete the process occasioned by the withdrawal or other termination of the consensual relationship with a member. *Until an affirmative notification of membership withdrawal is received the church need not reassess the course of its legitimate ecclesiastical interest.*

826 P.2d 978 (1992) (*italics in original and emphasis added*). In other words, church membership, and the attendant risk of tort liability, hinge on the existence of formal notice. Once this formal notice is given or received, the church has a state-imposed duty to “reassess the course of its legitimate ecclesiastical interest.” The state will be the ultimate arbiter of whether the church’s “reassessment” – of its ecclesiastical interest – was valid or legitimate.

In this case, Doe was not a member of the First Presbyterian Church, but he chose to avail himself of one of its practices: baptism. He does not like the way the church handled its religious practice because it published his name. He says the church agreed to keep the baptism secret but the church disagrees.¹³ This dispute triggers review by state tribunals – with the church being relegated to a position akin to a ward of the state, much like a corporation or business entity, that is free to operate without state supervision as long as it does not overstep state-imposed tort boundaries. *Doe* exemplifies a perniciously secularizing exclusivity separating religion from public life, ghettoizing Christian baptism into a purely secret sphere – a “church’s” internal discussions and activities are shielded from

¹³ The Oklahoma courts will now have to wade into the thicket of whether the alleged promise of secrecy came from a “formal” promise from the church’s clergy (Mr. Miller), and/or from a member of the church (Mrs. Slick). This will require judicial examination of non-secular issues like whether these individuals had the *authority* to make the alleged promises about baptism-secrecy to non-members who voluntarily seek to partake in the church’s formal baptism rituals.

judicial scrutiny, but its outward conduct (celebratory, evangelical, disciplinary, or otherwise) can expose it to liability. It also separates local from global church membership and in effect denies existence of the latter.¹⁴

This obviously creates untenable problems for formal churches, but the problem is likewise untenable, and indeed compounded, for non-formal churches such as many nondenominational churches or informal “house churches.” This includes, for example: ministers who perform marriage counseling with church members and their non-member spouses; children of non-member church guests who might be exposed to ideas deemed to be “offensive” while visiting Sunday School; Catholic clergy who do not recognize “withdrawal” from the Church by a Catholic; an orthodox Jewish rabbi who feels compelled to discuss a former temple

¹⁴ This attitude denies exercise of basic Christian doctrine (based upon New Testament texts and ancient creeds of both east and west) regarding the single Church, the mystical “Body of Christ” shared by all Christians apart from regulated ecclesial institutions, what many term the “catholic/universal Church” and the “communion of saints” throughout time and space. No secular judicial view limiting individual “membership” to a local church assembly can overrule the biblical view of each Christian’s membership in the universal Church; each baptized member of the global Church is linked with all other Christians apart from any constituent local ecclesial portion. Members of the global Christian assembly of believers all share “jurisdiction” over each other (e.g., Ephesians 5:21) above any purely local agreement. See J.N.D. Kelly, *Early Christian Creeds* (3d ed., 1972; New York: reprint Continuum, 2006), 384-97; John Wesley, “Sermon 39: Catholic Spirit,” in vol. 5 of *The Works of John Wesley* (ed. T. Jackson; 3d ed., 1872; reprint Grand Rapids: Baker, 492-504 (1996)).

member's violation of Halakhah with another orthodox rabbi in the former member's new temple; a Native American band, who communicates to another tribal band, concerning religious disciplinary action that has been taken on a tribal member.¹⁵

The problems created by *Guinn-Hadnot-Doe* are even more pronounced in the context of complex religious organizations and universities. A religious university's policies and mission in the community, including its interaction with unaffiliated parties, can be an essential part of the university's discipleship. This includes things like evangelism, outreach, teaching and guidance. This may necessarily involve interaction which appears to be prohibited by *Guinn-Hadnot-Doe*. A deeply-religious school like OKWU does not have "members," as defined by the Oklahoma Supreme Court, and what it does have – students, faculty and staff, not to mention alumni and former students – cannot be adequately defined in the *Guinn-Hadnot-Doe* context. In addition, it's likely that OKWU interacts at least as frequently with the press, unaffiliated third parties, and the community at large as many, if not most, churches do. Therefore, because the religious autonomy doctrine applies to religious institutions

¹⁵ The repression of Native American religious beliefs and practices led to the enactment of the American Indian Religious Freedom Act, 42 U.S.C. § 1996. The repression of religious beliefs and practices in prisons led to the enactment of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, *et seq.* The absence of a federal protective act does not mean that states are free to impose repressive doctrines on mainstream religious institutions.

other than “churches,” then the Oklahoma Supreme Court’s definition of, and limitations respecting, the religious autonomy doctrine are inconsistent with common practice of many of those other religious institutions, including OKWU.

OKWU is a religious institution, as devout as any church and more devout than many. The university community engages daily in practices and customs that reflect its religious mission and are rooted in the doctrine of the Wesleyan Church. The Four Pillars of the university: the Primacy of Christ, the Priority of Scripture, the Pursuit of Truth, and the Practice of Wisdom, are incorporated into everything it does, from the classroom, to the athletic fields, to its community service, to its student programs and activities.

Thus the university has an “OKWU community” of students, faculty, staff, alumni, parents, friends, and the like, but it does not have “members” in the *Guinn-Hadnot-Doe* sense. OKWU students, faculty, staff, and administration also interact with members outside the OKWU community daily, and often that interaction involves matters of faith and discipleship and quite often involves defending its deeply-held religious beliefs and practices.

Thus, the university is concerned that the narrow guardrails of “membership” and “formal notice” established in *Guinn-Hadnot-Doe*, do not take into account the broader factual realities of a deeply-religious institution like OKWU. But they should. Otherwise, the university is required to alter its behavior in carrying

out its mission. “Litigation, actual or threatened, against a religious organization carries the possibility of distorting a faith community’s ‘process of self-definition,’ thereby posing ‘the danger of chilling religious activity.’”¹⁶

A few examples of how the limited application of the religious autonomy doctrine might apply to a religious institution like OKWU are as follows:

Baptism/Ceremonies. OKWU periodically conducts large group baptisms in a pond on campus. Pictures of the event are published in the campus newspaper, in promotional materials, in the president’s annual report and elsewhere. It is a source of pride that identifies what the institution stands for and proclaims to the community that the university is doing its foundational work of expanding Christ’s kingdom. In other words, the pictures are a *celebration* and a *memorialization* of the event which are part of OKWU’s *free exercise* of its religious activity (just as a participant might exercise her First Amendment right to take pictures of her baptism). OKWU has, and might in the future, permit persons who are unaffiliated with the university to participate. Some of those unaffiliated persons might object, after-the-fact, to the publication of the pictures because they wished to keep their identities secret, because they feel the photographs are

¹⁶ Victor Schwartz & Christopher Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80(2):6 U. CIN. L. REV., 6-7 (2012) (quoting *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 343-44 (1987) (Brennan, J., concurring)).

unflattering, because they have changed their minds, or because they were not compensated for the use of their image. In the context of this case, OKWU should not be exposed to liability under Oklahoma negligence law for failing to obtain permission to publish from “Muslim-looking” or “Muslim-sounding” participants who might later be targeted for radical Islamic retaliation. *Guinn-Hadnot-Doe* thus coerces and forces OKWU to *alter its religious activity* by not publishing pictures or obtaining prior consent or celebrating its institutional identity as a university dedicated to its Christian mission.¹⁷

Promotional Literature. OKWU publishes photographs and videos of campus life which can include on-campus pictures of school-affiliated persons, former (*i.e.*, unaffiliated) students and faculty members, and unaffiliated visitors.¹⁸ This could include Muslims or former Muslims who prefer to keep their identities secret when visiting a Christian school. It could simply include persons who do not wish to have their likenesses published.

Many of the photographs and videos depict worship services, Chapel assemblies, or other religious activities. Promotional literature furthers the school’s religious mission by defining its Christian mission and

¹⁷ OKWU also conducts ceremonies in which the names or likenesses of unaffiliated persons including visitors or guests might be disclosed or published. This includes orientations, graduations, Christmas, Easter, and other holiday ceremonies.

¹⁸ *See, e.g.*, OKLAHOMA WESLEYAN UNIVERSITY (Nov. 12, 2018), <https://www.okwu.edu>.

thus appealing to prospective students who might find the university's identity to be consistent with their faith and will enroll in the school. This is part of the school's broader evangelical and educational mission not only to students who are members of the Wesleyan Church, but to the Bartlesville community, the State of Oklahoma, the world, and to people of related faiths or other faiths. The same considerations that apply in baptism situations apply.

Campus Publications. The *Eagle* is the school-sanctioned/sponsored "student led hub for Oklahoma Wesleyan University."¹⁹ Names or likenesses of unaffiliated persons may appear in this publication, and unaffiliated persons might read it. The *Eagle* is entitled to freely criticize, *on a religious basis* (not simply a *speech* basis), alumni, former faculty members, or unaffiliated persons for their expressions or conduct that is contrary to the tenets of the school's faith, without fear of liability under Oklahoma defamation or privacy law. OKWU should not be haled before state judicial tribunals to account for alleged breaches of "secrecy promises" by student authors, who might or might not have school-granted authority to make them.

Sermons/Chapel. OKWU conducts Chapels weekly on Wednesdays and Fridays, which are mandatory for students. OKWU also conducts or sponsors seminars, such as the annual Josh McDowell Institute, symposia, and other religious and educational events. In an academic setting, these events often involve

¹⁹ See OKWU EAGLE (Nov. 12, 2018), <http://eagle.okwu.edu>.

discussion and expression of theologically-based opinions on topical issues that might include discussion about unaffiliated persons and entities within the context of the university's religious beliefs and doctrine. Those discussions and expressions might be heard by unaffiliated persons, but because they are essential to OKWU's mission and identity as a devoutly faithful institution, they should not be scrutinized under state defamation or privacy law.

Teaching/Academics. Faculty, students, and guests often discuss or express faith-based opinions about unaffiliated persons or entities in classrooms, lectures, and seminars. Similar faith-based discussions and opinions might be expressed in academic papers, outlines, materials, and other literature. OKWU faculty interject matters of faith in every discipline, including mathematics and biology, for example, because expressions of faith are part of the school's *overarching* religious mission of reaching and educating students and others, regardless of whether they are members of the Wesleyan church, or other churches or religions. Religious schools should have autonomous academic and religious freedom to express those opinions in classrooms, and should not be subject to judicial scrutiny if unaffiliated persons find these expressions offensive, defamatory, or invasive.

Enforcing Its Codes. OKWU students, faculty, staff, and administration agree, as a condition to attending or working at the university, not to use alcohol, drugs, tobacco, or other mood-altering substances while attending, or working for, the university. Students and

employees agree in writing to comply with the defined codes of conduct, which describe the terms and means of enforcement of such requirements. Furthermore, the respective codes prohibit sexual activity outside of traditional marriage, and enforce Biblical precepts regarding sexuality, gender, and the right to life. The codes also, importantly, restrict the student's or employee's rights to promote or speak in support of issues that are antithetical to the lifestyles and conduct required by the codes. These restrictions apply not just to periods while such persons are on campus, but at all times and in all places. The restrictions are consistent with OKWU's mission to be an example of Christ's call to holiness to all in the community.

There are innumerable potential disputes that could arise from OKWU's enforcement of its policies, or its communication of its disciplinary actions between members of the campus community, and/or supposedly "unaffiliated" persons such as alumni, former students, spouses of students, members of the community at large, or the press. Those disputes could give rise to actions in tort or in contract. But if, and to the extent, OKWU is taking its action in furtherance of its deeply-held religious beliefs regarding holiness, as expressed in its codes of conduct, those disputes should not be matters for the state courts to adjudicate. *Doe's* reliance on "membership" and "notice," which are inapplicable and ill-suited to apply to a religious institution like OKWU, would have the effect of diminishing, if not abrogating, the First Amendment protections that must be afforded to the university

under this Court's definition of the religious autonomy doctrine.

Termination/Expulsion/Resignation. Consistent with the prior discussion about OKWU's codes of conduct, it is an essential consequence that failure to abide by those codes would likely result in the expulsion of student or the termination of employees and faculty members. Or such persons, who feel the school's standards are oppressive or wrong, could withdraw or resign. When this happens, according to *Guinn-Hadnot-Doe* (but without regard to the realities of a student's attendance or a person's employment at a religious institution like OKWU), the affiliated person's "membership" in the religious institution has been formally "withdrawn," triggering the need for an institutional "reassessment" of the situation. This would be an unacceptable coercion designed to mitigate the university's right to establish its identity as a devoutly religious institution. And, in the event that a terminated student or faculty member was demonstrative in his or her objection to OKWU's policies, it could serve to improperly muzzle the university from explaining the reasons for his or her termination to the campus community or to unaffiliated persons.

Communication with Wesleyan Schools and Other Religious Institutions. In *Guinn*, "As part of the disciplinary process the same information about Parishioner's transgressions was sent to *four other area Church of Christ congregations* to be read aloud during services." 775 P.2d at 769 (emphasis added). In other words, the information was sent outside the four

walls of the “church” to other congregations *within the same denomination* (the Church of Christ). This offends the principle that a “church” or other religious institution does, and must, extend beyond its building, and beyond the discrete membership of the congregation or institution that occupies it.

OKWU is owned and operated by the Wesleyan Church. So are Indiana Wesleyan University (Marion, IN), Southern Wesleyan University (Central, SC), Kingswood University (Sussex, NB), Houghton College (Houghton, NY), and Wesley Seminary (Marion, IN).²⁰

If a male professor were to have an extramarital affair with a female student, and resigns from OKWU in disgust of perceived overly-restrictive policies, OKWU might feel compelled to notify other Wesleyan universities about the situation in the event he applied for a teaching position at one of those denominationally-affiliated schools. This activity would be taken within the denomination (*i.e.*, the broader “Church”), and not merely within the “four walls” of the OKWU campus. The *Guinn-Hadnot-Doe* trilogy chills this type of frank conversation, and the fidelity OKWU would feel to its mission, the missions of its sister institutions, and the Wesleyan Church, within the broader “Church.”

OKWU considers the broader “Church” to include the entire Body of Christ, which can include other

²⁰ WESLEYAN COLLEGES AND UNIVERSITIES (Nov. 12, 2018), <https://secure.wesleyan.org/college>.

denominations. Essential to full-orbed Christianity is incarnation of spiritual love into a community linking proclamation (*e.g.*, public baptism) and constructive discipline so that all siblings in the global family of Christ mutually edify one another. Emphatically, Christians are biblically required not only to hold privately but also to express publicly this obedient love. OKWU is free to communicate with members of the Church free of state regulation.²¹



²¹ Christians are obligated to practice reciprocally loving concern even should one withdraw membership from a local church. When queried regarding the greatest law, Jesus prescribed supremacy of love for God and neighbor, and there is no law greater than these. Matthew 22:37-40. This law of love (James 2:8) necessarily requires, lest one lack love, constructive reproof of siblings in the faith straying from the path of true life. The quoted law's immediately preceding context in the Holiness Code makes this clear, and this concept of loving reproof is specifically reiterated by Jesus (Matthew 7:5; 18:15-16; Luke 17:3; Revelation 3:19), Paul (Galatians 6:1; 2 Thessalonians 3:15; 1 Timothy 5:20; Titus 1:13), and James 5:19. Moreover, Jesus commanded love be done specifically in order to display it to the wider, non-Christian public. Matthew 5:16; John 13:34-35; 17:20-23, etc. As such, it is the only particularly prescribed evangelistic methodology in Scripture and cannot be abandoned. Thus, Christians in local bodies should not be forbidden from speaking with any global Christian about any Christian whom they must love (even one who has departed their local body or denomination but is still a member of the universal Body of Christ).

CONCLUSION

The *Guinn-Hadnot-Doe* doctrine is premised on formalistic notions of the concept of the church that ultimately run afoul of the First Amendment. This is manifest in the context of a complex religious school or institution. *Doe* exemplifies the growing danger of opening churches up to lawsuits from opposing ideologies, individuals disgruntled over theological matters, and others. Oklahoma religious institutions and their members will be burdened with these rulings until the Oklahoma Supreme Court changes its mind, which is unlikely, or until this Court reverses. OKWU urges the Court to grant the Petition.

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