Nos. 19-267 & 19-348

In the

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES MORRISSEY-BERRU,
Respondent.

SAINT JAMES SCHOOL,
Petitioner,
v.
DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes a proper understanding of the Religion Clauses of the First Amendment. The Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *American Legion v. American Humanist Association*, 139 S.Ct. 2067 (2019); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

SUMMARY OF ARGUMENT

The Establishment Clause was meant both as a federalism protection – allowing the continuation of state supported establishments – and a protection against federal intrusion into the operation of religious organizations. There can be no Freedom of Religion where the federal government claims the power to intrude on a faith organization's decisions over who will convey the organization's message and who will pursue the organization's mission.

---

[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

ARGUMENT

I. The Ministerial Exception Serves the Purpose of the Religion Clauses by Ensuring that the Federal Government Does Not Interfere with Individual Freedom of Religion

A. The Establishment Clause protects religious institutions from federal interference.

One purpose of the Establishment Clause was to promote federalism – to keep the federal government from interfering with state support of religion. *Zelman v. Simmons-Harris*, 536 U.S. at 678, 679 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. at 50 (Thomas, J., concurring). There was also the fear at the founding, however, that the federal government would impose its own rules on religious bodies, significantly interfering with individual liberty.

Antifederalists were alarmed at the Constitution's failure to secure the individual rights of Americans and were concerned that the federal government would have the power to declare a national religion, thus squelching the practices of religious minorities. *See Letters from the Federal Farmer (IV)* (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist 245, 249 (Herbert J. Storing ed., 1981); *see also Essay by Samuel, Indep. Chron. & Universal Advertiser (Boston),* Jan. 10, 1788, reprinted in 4 The Complete Anti-Federalist, *supra*, at 191, 195. Though not hostile to state establishments, the antifederalists were concerned that a federal government might "[M]ake everybody worship God in a certain way, whether the

people thought it right or no, and punish them severely, if they would not." *Letters from a Countryman (V)*, N.Y, J., (Jan. 17, 1788), reprinted in 6 The Complete Anti-Federalist, *supra,* 86, 87.

Acting upon these concerns, at least four states submitted amendments concerning religious liberty along with their official notice of ratification of the Constitution. *See Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion, according the dictates of his conscience.."); *New Hampshire Ratification of the Constitution* (June 21, 1788), reprinted in 1 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 325, 326 (Jonathan Elliot ed., 2d ed., William S. Hein & Co., Inc. 1996) ("Congress shall make no laws touching religion, or to infringe the rights of conscience"); *New York Ratification of Constitution* (July 26, 1788), reprinted in The Founders' Constitution, *supra* 11-12 ("That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."); *Proposed Amendments to the Constitution, Virginia Ratifying Convention* (June 27, 1788), reprinted in The Founders' Constitution, *supra* 15-16 ("[A]ll men have an equal, natural, and unalienable right to the free exercise of religion...").

After debate over the exact wording of the Religion Clause in the House and the Senate, both houses agreed to the final conference committee report framing the Religion Clauses as we know them today: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I; 1 Annals of Cong. 88 (Joseph Gales ed., 1789). The key term for purposes of this case is "establishment."

Since many states had significant experience with religious establishments, the term and its scope were well-understood. Some establishments involved governmental coercion that compelled a *form* of religious observance. Thus, some states sought to control the doctrines and structure of the church. South Carolina did this through its 1778 Constitution requiring a church to ascribe to five articles of faith before being incorporated as a state church. S.C. Const. of 1778 art. XXXVIII, reprinted in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1626 (Ben Perley Poore ed., The Lawbook Exch. Ltd. 2d ed. 2001) (1878). Other states, like Virginia, sought to control the personnel of the church and vested the power of appointing ministers of the Anglican Church in local governing bodies known as vestries. Rhys Isaac, *Religion and Authority: Problems of the Anglican Establishment in Virginia in the Era of the Great Awakening and the Parsons' Cause*, 30 Wm. & Mary Q. 3 (1973).

> [In] the Anglican establishment [in] Virginia . . . the governor, legislature, and gentry exercised direct authority over the established church and the power of licensing over preachers of dissenting denominations. The

> establishment was localized and more democratic in New England, but even there the government set standards for licensing ministers and regulated ministerial tenure (hence ministerial independence) and itinerancy.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1438-39 (1990) . In fact, "so subservient was the established Church that in 1783 its clergy asked the legislature for permission to make changes in the prayer book." *Id*. at 1436. Against this backdrop, a fear of federal establishments is certainly understandable.

States that had establishments feared federal interference. *Letters of Agrippa (XII)*, Mass. Gazette, (Jan. 11, 1788), reprinted in 4 The Complete Anti-Federalist, *supra,* 93, 94. That fear was also shared by states that had no establishment. The Supremacy Clause gave Congress power to impose a federal establishment that would overrule both states with establishments and states that had chosen to do away with the idea of an official church.

James Madison responded to these concerns by arguing that there was "not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." James Madison, Debate in Virginia Ratifying Convention, reprinted in 5 The Founder's Constitution at 88 (Phillip Kurland and Ralph Lerner, eds.) (Univ of Chicago Press (1987)). The First Amendment's "no law respecting an establishment of religion" provision of the Religion Clause was meant

to protect against what Madison called "a most flagrant usurpation." Although Madison did not believe the Religion Clauses were necessary, the absence of the protections of the Establishment Clause would, at the very least, have given Congress the power to regulate the content of religion in the District of Columbia, the armed forces, and the territories. Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm & Mary Bill Rts J. 73, 137 (2005).

This fact was brought home to Madison early in the life of the new Constitution. Serving under President Jefferson, Madison sent a letter to the Bishop of Baltimore declining to opine on the selection of ecclesiastical officers for the Catholic Church in New Orleans. President Jefferson declined to comment because of his view that the Constitution had a "scrupulous policy" against interference with "religious affairs." Letter from James Madison to Bishop Carroll, November 20, 1806, reprinted in 20 Records of the American Catholic Historical Society of Philadelphia at 63 (1909).

This episode was recounted by this Court in its decision in *Hosanna-Tabor*. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 184 (2012). The Court did not note, however, that Madison sent along a private letter to accompany the official correspondence, noting that the selection of officials for the New Orleans Church and its control by the Archdiocese of Baltimore were subjects that touched on political and foreign policy concerns. Private letter of James Madison to Bishop Carroll, November 20, 1806, reprinted in 20 Records of the American Catholic Historical Society of Philadelphia at 65. Even in the face of such secular concerns, however,

Madison and Jefferson held to the opinion that the Constitution forbade interference with ecclesiastical matters.

This Court recounted a second incident during Madison's presidency. In 1811, Madison vetoed a bill incorporating the Protestant Episcopal Church in what was part of the District of Columbia at that time. *Hosanna-Tabor*, 565 U.S. at 184-85. This congressional action confirms the fears that Professor Natelson documented in his article. *The Original Meaning of the Establishment Clause*, *supra*. The enactment vetoed by Madison covered every aspect of the operation of the church, including selection and removal of ministers. *Hosanna-Tabor*, 565 U.S. at 185. Such a regulation was, in Madison's view, a clear violation of the Establishment Clause.

This Court's decision in *Hosanna-Tabor* recognized that the application of employment laws to individuals within a religious organization who are tasked with "ecclesiastical" functions would put the courts or federal agencies in charge of deciding who should remain in ministry. This is the very thing that James Madison had concluded the Establishment Clause forbids. This Court agreed but did not fully define the reach of the so-called "ministerial exception." Specifically, this Court refused to "adopt a rigid formula for when an employee qualifies as a minister." *Id*. at 190. Part of the problem lies in the use of the term "minister," which is a title common to many Protestant denominations, but which is foreign to many other world religions. *Id*. at 198 (Alito, J., concurring). To ensure that the "ministerial exception" can function as a protection against Establishment Clause violations, the exception must be applied broadly.

B. The ministerial exception keeps government out of religious matters and should be applied broadly.

The "ministerial exception," formally recognized in *Hosanna-Tabor*, exempts a religious organization from certain employment discrimination laws when the employee who is suing the organization is one of its "ministers." *Id.* at 190. But what is a minister?

In his concurrence, Justice Alito noted that the designation "minister" is "rarely if ever used … by Catholics, Jews, Muslims, Hindus, or Buddhists" to designate those who carry out important ecclesiastical functions. *Id.* at 198 (Alito, J., concurring). Thus, "[d]ifferent religions will have different views on exactly what qualifies . . ." as a "minister" in the sense that the Court was using that term. *Id.* at 200 (Alito, J., concurring).

Among the factors that this Court found important in identifying who is a "minister" is the employee's role in "conveying the Church's message and carrying out its mission." *Id.* at 192. Those factors cannot be reduced to the employee's title or process of selection. As Justices Alito and Kagan noted in their concurrence, "The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Id.* at 202 (Alito, J., concurring). The ministerial exception implements that constitutional command.

Any attempts of the judiciary to create a standard to determine a definition of a "minister" would put the religious groups who have different beliefs in danger

of having the federal government interfere in their ecclesiastical decisions. *See id*. at 197 (Thomas, J., concurring).

Though the Court had declined to adopt a "rigid formula," it pointed to four "considerations" that it found significant in the *Hosanna-Tabor* case: 1) the formal title given to the employee by the organization; 2) the substance reflected in that title; 3) the employee's own use of that title, and 4) the important religious functions the employee performed for the organization. *Id*. at 192.

The decision below demonstrates the danger of courts applying these "considerations" as rigid factors. Such an approach is ultimately untenable because not all religious organizations have a title such as "minister" to define those for who carry out their religious organization's mission. Far more important than these "considerations" was the finding that that the employee played a role of "conveying the [religious organization]'s message" and "carrying out its mission." *See id*. at 192.

An example that illustrates this point is the manager of the "bishop's storehouse for the Church of Jesus Christ of Latter Day Saints. One mission of that church is to provide welfare, and the church does so via "bishops' storehouses," which are "place[s] where those in need can go to obtain food and other supplies at the recommendation of their bishop."[2] Each storehouse is "filled with commodities provided by . . . gen-

[2] Provident Living, The Bishops' Storehouse (Last Visited Feb. 4, 2020) https://providentliving.churchofjesuschrist.org/bishops-storehouse?lang=eng.

erous donations from members." *Id.* Such commodities "can also be sent to those affected by natural disasters, wars, or economic crises at a moment's notice." *Id.* Typically, these storehouses are operated by volunteers and are occasionally overseen by a paid manager. *Id.* Since the manager does not have a title akin to "minister" but rather the secular title of "manager," a court would be in the position of deciphering the significance of the employee's position. This in turn would require inquiry into the doctrines of the church to determine whether providing welfare in this manner is truly part of the church's mission or message. But only the church can make that determination.

Another example is in the Catholic faith. Within Catholicism people who are not members of the clergy have the "duty of working to extend the divine plan of salvation to all men of each epoch and in every land."[3] Thus, individual Catholics who work for a Catholic organization are often charged with conveying the church's message by "working to extend the divine plan of salvation." These members of the laity who work for a Catholic organization are charged with carrying out the message of the church by "zealously participate[ing] in the saving work of the church." Therefore, the only entity or organization capable of determining who within the Catholic organization would qualify as a "minister," is the Catholic church itself.

Furthermore, as Justices Alito and Kagan noted, within Islam the religious rites of the Islamic faith can

---

[3] Lumen Gentium, Chapter IV: The Laity, 33 (Last Visited Feb. 2, 2020) https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html

be performed by any Muslim, so while there is no ordained clergy there are still those recognized as religious leaders within Islam who have studied the teachings of the Qur'an. *Hosanna Tabor*, 565 U.S. at 713 n. 3 (Alito, J., concurring); *citing*, 10 Encyclopedia of Religion 6858 (2d ed. 2005). The Jehovah's Witnesses consider all the baptized members of the faith as "ministers." *Id.* at 202 n.4.

As illustrated here, there is no one definition of "minister" that will make an appropriate bright line rule for all faith traditions. Courts cannot be in the business of deciphering the significance of a potentially ministerial position. Instead, courts should defer to the individual religious organizations' determination of who qualifies as a "minister." The important point is who is conveying the faith's message, and who is carrying out its mission. But these considerations cannot be left to the courts to decide.

II. Courts Must Defer to a Religious Organization's Sincere Determination as to Who Qualifies as a "Minister."

The decisions of this Court already establish that courts may not examine religious doctrine to determine an individual's claim that his religion prevents or compels some action. *E.g., Frazee v. Illinois Dep't of Employment Sec.,* 489 U.S. 829, 833 (1989) (finding because Appellant "unquestionably had a sincere belief that his religion prevented him from [working on Sunday], he was entitled to invoke the protection of the Free Exercise Clause), *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (finding that Petitioner terminated his employment for religious reasons when he did so "because of an honest conviction that such work was forbidden by

his religion") and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (finding that Petitioners "sincerely believ[ed]" that providing their employees with insurance coverage offering abortifacients landed on "the forbidden side of the line" as to their religious beliefs).

Furthermore, this Court noted in *Employment Division v. Smith,* that determining religious doctrine is not the role of a judge. The plaintiff in *Smith* argued that if a course of conduct is "central" to an individual's religion, then the Court should require the government to show a compelling interest in prohibiting the conduct. *Employment Division v. Smith*, 494 U.S. 872, 887 (1990). The Court rejected that argument, finding that "[j]udging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'" (quoting *United States v. Lee,* 455 U.S. 252, 263 n. 2 (1982)). *Id*. Such evaluations are not permissible, because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id*. Therefore, the "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id*.

For the same reason, courts cannot evaluate the plausibility of an individual's religious claim, or the "centrality" of his course of conduct to his religion, courts must defer to a religious organization's good-faith understanding of who conveys its message and carries out its mission—that is, who is its minister for the purposes of the ministerial exception. It is not

within the "judicial ken" to question a church's determination of who is and who is not its minister.

The ministerial exception applies to all employees of a religious body who are engaged in conveying the message of the faith or carrying out its mission. The courts must defer to the good-faith determination of the religious organization as to which of its employees are so engaged. *See Hosanna-Tabor*, 565 U.S. at 196.

CONCLUSION

The ministerial exception implements the religious freedoms of the Establishment Clause – the freedom from government interference in the selection and retention of individuals who will convey the message of a religious organization or pursue its mission. The court should defer to the good-faith determination of the religious organization as to who those individuals are within the organization.

February 2020

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae