Nos. 19-267, 19-348

IN THE
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, *Petitioner*

v.

AGNES MORRISSEY-BERRU, *Respondent*

ST. 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* PROFESSOR JOHN D. INAZU IN SUPPORT OF PETITIONERS

Jon Endean
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018

Zachary G. Parks
Counsel of Record
John S. Playforth
Carol A. Szurkowski
Brendan Duffy*
COVINGTON & BURLING LLP
850 Tenth Street N.W.
Washington, DC 20001
(202) 662-6000
zparks@cov.com

Counsel for Amicus Curiae

FEBRUARY 10, 2020

* Admitted only in Texas; not admitted in the District of Columbia, and supervised by principals of the firm.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

Professor John D. Inazu is the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis.[2] He is widely considered one of the nation's leading authorities on the First Amendment's Assembly Clause. In his ten years as a law professor, he has published two books on the subject: *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale University Press, 2012) and *Confident Pluralism: Surviving and Thriving Through Deep Difference* (University of Chicago Press, 2016). He has also authored twelve articles that analyze the Assembly Clause and related rights.[3]

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

[2] Professor Inazu submits this brief in his individual capacity, not as a representative of Washington University.

[3] *The Strange Origins of the Constitutional Right of Association*, 77 Tenn. L. Rev. 485 (2010); *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565 (2010); *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149 (2010); *Factions for the Rest of Us*, 89 Wash. U. L. Rev. 1435 (2012); *Virtual Assembly*, 98 Cornell L. Rev. 1093 (2013); *The Freedom of the Church (New Revised Standard Version)*, 21 J. Contemp. Legal Issues 335 (2013); *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. Rev. 787 (2014); *More is More: Strengthening Free Exercise, Speech, and Association, 99 Minn. L. Rev. 485 (2014); The First Amendment's Public Forum*, 56 Wm. & Mary L. Rev. 1159 (2015); *A Confident Pluralism*, 88 S. Cal. L. Rev. 587 (2015); *Re-Assembling Labor*, 2015 U. Ill. L. Rev. 1791 (with Marion Crain); and *Unlawful Assembly as Social Control*, 64 UCLA L. Rev. 2 (2017).

Professor Inazu has lectured on the Assembly Clause at Yale Law School, Harvard Law School, Stanford Law School, Duke Law School, the University of Virginia, the Newseum, the United States Department of State, and the United States Commission on Civil Rights, and he has written about the Assembly Clause for *The Atlantic, The Washington Post*, and *USA Today*.

These cases present an important opportunity to recognize the role that the Assembly Clause has historically played, and should continue to play, in protecting the rights of religious groups. Accordingly, Professor Inazu urges the Court to consider the Assembly Clause dimensions of these cases.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188 (2012), this Court correctly recognized a "ministerial exception" that "precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers."

The Court should now recognize that the protections of the ministerial exception and the Religion Clauses are complemented by additional protections rooted in the First Amendment's Assembly Clause. The text and history of the Assembly Clause confirm its role in protecting the rights of religious groups to form and gather, publicly and privately, free of government intrusion. In addition, early state court decisions frequently invoked analogous state assembly rights to protect religious societies' prerogatives to define their own memberships without government interference.

After repeatedly recognizing the significance of the Assembly Clause during the first half of the Twentieth Century, the Court's First Amendment doctrine shifted toward a "right of association." Although initially rooted in part in the Assembly Clause, modern applications of this right have focused on protecting *expressive* associations and have anchored those protections in Free Speech principles. The protections granted by the Assembly Clause, however, extend more broadly.

These cases present an important opportunity to recognize the role that the Assembly Clause was intended to play—and should play—in protecting the rights of religious groups. This Court should reverse both of the consolidated cases and make clear that the Assembly Clause complements the ministerial exception's protections of the right of religious groups freely to define their membership.

ARGUMENT

I. The Assembly Clause Complements The Ministerial Exception And Further Supports Reversal In These Cases.

The Assembly Clause protects private groups, including religious groups, from government interference. These protections are evident in early Congressional debates regarding the enactment and meaning of the Assembly Clause, as well as in early state court decisions upholding assembly rights. Modern First Amendment doctrine recognizes a form of the right of assembly through the right of association, but that right has more recently been confined to "expressive association." The Assembly Clause, however, protects a right to assemble and associate that is not so limited. Properly understood, the Assembly Clause strengthens the ministerial exception and supports reversal in these cases.

A. The Assembly Clause was originally understood to protect the rights of religious groups.

Congressional debates over the Assembly Clause demonstrate that the right of assembly was intended to protect meetings of religious groups; that it was intended to shield private groups from government interference; and that it was understood to protect religious groups' ability to determine their own membership. These same purposes are echoed in early state court cases recognizing the right of assembly.

1. Early Congressional debates show that the Assembly Clause was meant to protect groups' rights to form and to meet without government interference.

The First Congress's deliberations over whether to include the Assembly Clause in the Bill of Rights illustrate that the Clause's drafters understood that it would play an important role in protecting religious groups.

During the debates over the Bill of Rights in the House of Representatives, Theodore Sedgwick of Massachusetts objected to including a separate right of assembly as redundant, given the inclusion of the Speech Clause. Sedgwick argued, "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae." 1 Annals of Cong. 759 (1790). John Page of Virginia recognized the significance of assembly and responded,

> [Sedgwick] supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by

> inserting the privilege in the declaration of rights.

Id. at 760.

Page's "mere reference" to a man's right to wear his hat was "equivalent to half an hour of oratory" before the First Congress, as his contemporaries would have immediately understood him to be referring to the trial of William Penn. Irving Brant, *The Bill of Rights: Its Origin and Meaning* 55 (1965). In 1670, Penn and fellow Quakers had sought to enter their London meetinghouse to worship, only to find their entrance blocked by a company of soldiers enforcing an English law that forbade religious gatherings by "Nonconformists." Undeterred, Penn began preaching his sermon to the Quakers assembled in the street, at which point he was arrested, taken to the courthouse, and charged with unlawful assembly. *Id.* at 56–57; *see also* Joseph Barker, *Life of William Penn: The Celebrated Quaker and Founder of Pennsylvania* 42–43 (1847).

Penn was convicted of contempt of court for refusing to remove his hat in the courthouse, due to his Quaker belief that hats should be removed only before God and not before other men. *See* Barker at 44. The jury eventually acquitted Penn of the unlawful assembly charge, but not without drama: the judge forced Penn to sit hidden from view of the jury and then imprisoned the jury for failing to return a guilty verdict. Brant, *supra*, at 61.

Following Page's reference to Penn's trial for unlawful assembly, the House defeated Sedgwick's motion to strike the Assembly Clause by a "considerable majority." 1 Annals of Cong. 761 (1790). With the significance of Penn's case in mind, the First Congress thus contemplated two important functions of the Assembly Clause. First, the assemblies that the Clause was meant to protect included religious groups. Second, the Clause was not duplicative of rights guaranteed by the Free Exercise or Free Speech Clauses, but served as a separate, important safeguard. As Page put it, "[i]f the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." *Id.* at 760.

Not long after the Bill of Rights was ratified, the Assembly Clause faced a test of its protections for unpopular groups. During the 1790s, Democratic-Republican societies, consisting mainly of political opponents of the Washington administration, sprang up throughout the country. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 190 (1997). They held public and private meetings to discuss political ideas, and they organized parades and demonstrations. Inazu, *Forgotten Freedom of Assembly*, *supra*, at 578. When President Washington learned that several members of the Democratic-Republican societies had participated in the 1794 Whiskey Rebellion, he condemned these "self-created societies" and called on Congress to take action against them. *See* Currie, *supra*, at 190; Inazu, *Liberty's Refuge*, *supra*, at 26–28. The Federalist-controlled Senate quickly rebuked the societies, but the

House extensively debated the societies' constitutional right to exist. *Id.*; *see also* 4 Annals of Cong. 891, 900–47 (1794). James Madison argued that a House censure would have dire consequences and described Washington's condemnation as "perhaps the greatest error of his political life." Letter from James Madison to James Monroe (Dec. 4, 1794), in 15 The Papers of James Madison 406 (Charles F. Hobson et al. eds., 1985). The House ultimately drafted a response to Washington that omitted any censure of the societies, thereby acknowledging the right of like-minded citizens to organize groups whose views were unpopular with the government. 4 Annals of Cong. 947 (1794); *see also* Michael W. McConnell, *Freedom by Association*, First Things, Aug. 2012.

2. Throughout the Nineteenth Century, state court decisions relied on assembly rights to protect the rights of religious organizations to meet and to determine their own membership.

Early state courts applied assembly protections to religious groups' rights to self-organize.[4] For example, in two cases in the 1830s, the Supreme Judicial Court of Massachusetts upheld the rights of parishes to determine their membership. The first case turned on whether a newly-married man was entitled to

[4] The most notable exceptions to the protection of assembly rights in state courts were cases involving gatherings of African Americans in the antebellum South, where legislatures increasingly sought to prevent free and enslaved blacks from congregating, and state courts generally upheld these laws. *See* Inazu, *Liberty's Refuge*, *supra*, at 31–32.

membership in a given parish. The court reasoned that, under the state's religious freedom act,

> [t]o form an original society several persons must agree to unite; the society then exists to some purposes, and may be called together and organized under the statute. . . . [A]ll those persons who had thus agreed and associated, would have a right to assemble and act, *and no others*.

Leavitt v. Truair, 30 Mass. 111, 113 (1832) (emphasis added). Six years later, the court reaffirmed the rights of congregations to select their members. In a case challenging the election of parish officers on the grounds that many voters were not members of the parish, the court, citing *Leavitt*, held that non-members of the parish had no right to vote in those proceedings because "no person can thrust himself into any such body against its will." *Inhabitants of First Parish in Sudbury v. Stearns*, 38 Mass. 148, 153 (1838).

In 1877, the Supreme Court of New Hampshire cited *Leavitt* and *Stearns* in declining to intervene in a religious society's refusal to admit certain members. The court grounded its reasoning in principles of voluntary association:

> The action of the society, in refusing to admit some of the plaintiffs to membership, cannot be controlled or restrained by an injunction of the court. The right of admission to membership is voluntary and mutual between the society and individuals desiring to become members. No

> one can be compelled to join the society or remain a member in it against his wish, nor can the society be compelled to admit any one against its will, fairly expressed at a regular meeting by a majority vote. This principle is inherent in every voluntary association.

Richardson v. Union Congregational Soc'y of Francestown, 58 N.H. 187, 189 (1877).[5]

The freedom of religious organizations to select their members became the foundation on which the right of other organizations freely to assemble was built. For example, an Illinois court considering a challenge to a board of trade's decision to suspend certain of its members reasoned:

> It is true, that the [board of trade] is organized under a statutory charter, and so are churches, masonic bodies, and odd fellow and temperance lodges; but we presume no one would imagine

---

[5] *See also Anderson v. City of Wellington*, 19 P. 719, 721–22 (Kan. 1888) (striking down city ordinance that forbade the gathering of crowds without the prior consent of the mayor, noting that under the ordinance, "[e]ven the Sunday-School children cannot assemble at some central point in the city, . . . without permission first had and obtained. . . . It is an abridgment of the rights of the people. . . . It discourages unity of feeling and expression on great public questions, economic, religious, and political."); *In re Frazee*, 63 Mich. 396, 404–05 (1886) (construing similar city ordinance to restrict public gatherings only as necessary to maintain public order, noting that "[i]t is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisance, or create or manifestly threaten some tangible public or private mischief, that the law interferes."); *Rich v. City of Naperville*, 42 Ill. App. 222, 223–24 (1891) (striking down similar ordinance).

> that a court could take cognizance of a case arising in either of those organizations, to compel them to restore to membership a person suspended or expelled from the privileges of the organization. They being organized by voluntary association, and not for the transaction of business, but for the purpose of inculcating their precepts and trusts, not for pecuniary gain, but for the advancement of morals and for the improvement of their members, they are left to adopt their constitutions, by-laws and regulations for admitting, suspending or expelling their members.

People ex rel. *Rice v. Bd. of Trade of Chicago*, 80 Ill. 134, 136 (1875).

Similarly, a Missouri court declined to interfere in the membership determinations of an Odd Fellows Lodge, comparing the Lodge to a Baptist Church—both of which were "competent" to set their own membership requirements. *State* ex rel. *Poulson v. Grand Lodge of Missouri I.O.O.F.*, 8 Mo. App. 148, 155–56 (1879). The court concluded, "[t]o deny to [the Lodge] the power of discerning who constitute its members, is to deny the existence of such a society . . . ." *Id.* at 156.

B. Modern First Amendment doctrine focuses on a right of "expressive association" that is narrower than the right of assembly.

The right of assembly rose to prominence in this Court's decisions in the early Twentieth Century, and became known in popular culture during the

1930s as one of the "Four Freedoms." *See* Inazu, *Liberty's Refuge*, *supra*, at 52–57. After the Court incorporated the right of assembly in 1937, it clarified the scope of that right in several subsequent decisions. But beginning in 1958, the Court introduced a new right of association, derivative, in part, of the Assembly Clause. As more cases were litigated and decided using the rubric of the right of association, the Assembly Clause itself faded from view. Thus, although this Court has never held that the right of association either supersedes or fully incorporates the rights protected by the Assembly Clause, the practical effect of this history has been that the assembly right itself has received scant attention in recent decades from either litigants or courts.

1. The Court's Assembly Clause jurisprudence was robust and distinct during the 1930s and 1940s.

While state courts had applied state rights of assembly throughout the Nineteenth Century, the federal Assembly Clause was not incorporated until 1937. In *De Jonge v. Oregon*, 299 U.S. 353 (1937), this Court overturned the conviction of Dirk De Jonge, who had been arrested for organizing a Communist Party meeting. *Id.* at 357. The Court grounded its holding in both the Free Speech Clause and the Assembly Clause. *Id.* at 365. The Court held:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free

> press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

Id.

Several months later, the Court again relied on the Assembly Clause to reverse the conviction of another Communist Party member. *Herndon v. Lowry*, 301 U.S. 242, 250, 264 (1937). The Court held that the "power of a state to abridge freedom of speech and of assembly is the exception rather than the rule," *id.* at 258, and ruled that as applied to Herndon, the Georgia statute forbidding incitement to insurrection "unreasonably limits freedom of speech and freedom of assembly and violates the Fourteenth Amendment," *id*. at 259.

For the next decade, the Court continued to invoke the Assembly Clause to strike down state and local laws. *See, e.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939) (invalidating city ordinance forbidding the leasing of space for public meetings advocating obstruction of the government, and holding "it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States"); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (striking down application of state statute restricting solicitation of labor union members because "[t]he right thus to discuss, and inform people concerning, the advantages

and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly").

2. The modern right of association is partially anchored in the Assembly Clause.

The Court's understanding of the Assembly Clause from 1937 and 1945 did not last. Instead, the Court shifted to a newly recognized right of association and paid little attention to its Assembly Clause roots.

The Court first recognized a right of association in *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). That case challenged an Alabama law that would have compelled the NAACP to make its membership rolls public. A unanimous Court held that this Alabama law was unconstitutional, reasoning that compelled disclosure of the rolls would likely "affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462–63. Justice Harlan's opinion cited *De Jonge* and *Thomas* for the principle that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *Id.* at 460.

Cases following *NAACP v. Alabama* confirmed that the right of association was grounded partially in the Assembly Clause. In *Bates v. City of Little Rock*,

361 U.S. 516, 527 (1960), the Court struck down another ordinance requiring disclosure of NAACP membership rolls. The Court reasoned that "[l]ike freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry," *id.* at 522–23, and then cited both *NAACP v. Alabama* and *De Jonge* as having established the right of association, *id.* at 523.

Three years later, the Court again struck down a state law requiring the NAACP to reveal its membership rolls, this time relying on the NAACP's "strong associational interest in maintaining the privacy of membership lists," without referencing the Assembly Clause. *Gibson v. Florida Legislature Investigation Comm.*, 372 U.S. 539, 555–56 (1963). Justice Douglas's concurrence, however, emphasized the support to be found in the Assembly Clause for the NAACP's claims:

> Joining a lawful organization, like attending a church, is an associational activity that comes within the purview of the First Amendment . . . . 'Peaceably to assemble' as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically. . . . But today, as the Court stated in *De Jonge v. Oregon*, 'The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.' Assembly, like speech, is indeed essential 'in order to maintain the opportunity for free political

> discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.'

Id. at 562 (Douglas, J., concurring) (citations omitted).

For the next two decades, most of the protections afforded by the Assembly Clause were analyzed under the right of association. *See, e.g.*, *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221–22, 225 (1967) (striking down Illinois law preventing union members from collectively hiring an attorney as inconsistent with both "the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments," and with the right of association). References to the Assembly Clause were largely relegated to dicta. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) ("[T]he right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen.").

3. The Court's decision in *Roberts v. United States Jaycees* formed a conceptual framework for the right of association distinct from the assembly right.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court announced a new framework for the right of association, dividing it into two categories: "intimate association" and "expressive association."

Since *Roberts*, much of the Court's jurisprudence on the assembly right has been subsumed within the contours of expressive association.

In *Roberts*, the United States Jaycees threatened to revoke the charters of its Minneapolis and St. Paul chapters for violating the national organization's prohibition on admitting women. 468 U.S. at 614. The chapters filed a discrimination claim with the Minnesota Department of Human Rights under Minnesota's antidiscrimination statute, and the national organization sued to prevent enforcement of the Minnesota law, arguing that enforcement would violate the Jaycees' rights of free speech and association. *Id.* at 615.

In ruling against the national organization, the Court grouped its association cases into two distinct categories. One line of cases protected "intimate associations," or those "intimate human relationships [that] must be secured against undue intrusion by the State." *Id.* at 617–8. Few courts have extended the right of intimate association beyond family relationships. Inazu, *Liberty's Refuge*, *supra*, at 237–38 n.41 (collecting cases).

The other line of cases protected "expressive associations," which are afforded "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. For these associations, the freedom of association is "an indispensable means of preserving other individual

liberties." *Id.* Because local chapters of the Jaycees were "large and basically unselective groups," the Court held that if the Jaycees were to receive protection under the right of association, it would have to be as an expressive association. *Id.* at 621.

While the Court observed that "[f]reedom of association . . . plainly presupposes a freedom not to associate," the Court held that such freedom was not absolute and infringements on such freedom might be permissible if they "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. On this basis, the Court ruled against the Jaycees, permitting enforcement of the Minnesota antidiscrimination statute. *Id.* at 631.

Since *Roberts*, courts have seldom looked to earlier case law concerning the Assembly Clause; rather, they have applied the analytical framework of *Roberts* to decide cases in which a group invokes associational rights.

This doctrinal approach has severely and sometimes incoherently limited associational protections. For example, when members of the Top Hatters Motorcycle Club were denied entry to the Gilroy Garlic Festival because their vests bore the club's insignia, the Top Hatters sued the town hosting the festival for violating their right to expressive association. *Villegas v. City of Gilroy*, 363 F. Supp. 2d 1207 (N.D. Cal. 2005), *aff'd sub nom. Villegas v. Gilroy Garlic Festival Association*, 541 F.3d 950 (2008). The court denied

their claims after concluding that the motorcycle club did not qualify as an expressive association. *Id.* at 1219. This interpretation had a paradoxical result: while the Top Hatters were denied entry precisely *because* of the message expressed on their vests, they nevertheless failed to obtain protection under the right of association because, in the court's view, they were not an expressive association.

The Court's 2000 decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), is the most significant decision to uphold the right of expressive association. The decision permitted the Boy Scouts of America to select their own leaders against a New Jersey public accommodation law that would have compelled the Scouts to include a gay scoutmaster. *Id.* at 645. The Court noted that the protection "of expressive association is not reserved for advocacy groups." *Id.* at 648. It found that the Scouts was an expressive association because it "engages in expressive activity." *Id.* at 650.

Notably, what is lost in this post-*Roberts* doctrine of expressive association is any consideration of the right of assembly or its underlying values. Although the Court in *NAACP v. Alabama* understood the freedom of association as reflecting in part the right of assembly, the modern focus on expressive association relies almost exclusively on principles arising out of the Free Speech Clause.

These developments leave religious groups, among others, without the full protections afforded by

the Assembly Clause. While the Religion Clauses provide religious groups some important protections (including the ministerial exception), neither the Religion Clauses nor the right of expressive association represents the full scope of First Amendment protections guaranteed to religious groups.

C. The Court should expressly recognize the Assembly Clause roots of the right of association in assessing the scope of the ministerial exception here.

The current understanding of expressive association should not prevent this Court from considering the role of the Assembly Clause in ensuring the rights of religious groups to choose their own leaders and members.

From its earliest days, this Court has made abundantly clear that "every word and sentence" in the Constitution "was the subject of critical examination and great deliberation." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 133 (1819). For this reason, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

The Court has applied this principle in addressing other long-dormant rights. For example, the Court determined in 2008, for the first time, that the Second Amendment secures the rights of individuals to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Court rejected the argument

that the question was well-settled simply because the Court had not fully considered the scope of the Second Amendment in the past:

> We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. . . . Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, *see Near v. Minnesota* ex rel. *Olson*, 283 U.S. 697 (1931), and it was not until after World War II that we held a law invalid under the Establishment Clause, *see Illinois* ex rel. *McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203 (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

554 U.S. at 625–26. Likewise, in *United States v. Jones*, this Court reinvigorated the trespass doctrine—and with it, the original, property-based focus of the Fourth Amendment. 565 U.S. 400 (2012).

So too here. This Court should consider the Assembly Clause in assessing the scope of the ministerial exception. The right of assembly is included in the Bill of Rights, and draws on over three centuries of Anglo-American precedent protecting

groups—especially religious groups—from government intrusion.[6] As a result, analysis of *both* the Religion Clauses and the Assembly Clause provides a particularly robust explanation for why a religious organization must have the right to determine its membership without state interference.

D. The Assembly Clause also prevents the state from interfering in Petitioners' decisions regarding whom they empower to carry out their religious missions.

The Assembly Clause serves a purpose distinct from other rights guaranteed under the First Amendment, and as the Clause's history indicates, that purpose includes protecting the ability of the private groups of civil society to determine their own membership against government interference. The protections of the Assembly Clause are not absolute, nor is the category of groups protected by it unlimited. *See* Inazu, *Liberty's Refuge*, *supra*, at 166–68 (offering

---

[6] In fact, the importance of assembly to religious groups predates William Penn's case by centuries. For example, early Christians described their gatherings as an *ekklesia*—a term that named both "the occasional gathering [and also] the group itself." Wayne A. Meeks, *The First Urban Christians: The Social World of the Apostle Paul* 108 (1983); *see also* Robert Louis Wilken, *Liberty in the Things of God: The Christian Origins of Religious Freedom* 12–13 (2019) ("The phrase 'freedom of religion' enters the vocabulary of the West with reference to the privileges of a community, not to the beliefs of individuals. This is a point of some importance. Tertullian was defending the rights of Christians to assemble for worship, to organize, to choose leaders, to care for one another, even to have their own burial places for their dead.").

constraints on the definition of an "assembly" for purposes of the Assembly Clause). *Cf. Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment) (suggesting a "dichotomy between rights of commercial association and rights of expressive association"). Religious groups, however, have long been understood as paradigmatic examples of civil society groups protected by the right of assembly, *see supra* Part I.A, and in *Hosanna-Tabor*, the Court implicitly recognized that religious schools (such as Petitioners) are also religious groups, *see* 565 U.S. at 190–94.

Petitioners in these cases have a right of assembly that does not depend on the schools' "expressive" dimensions. Rather, the right of assembly should protect Petitioners' ability to shape and control their core beliefs and practices through their employment decisions. Teachers and other employees can shape institutional beliefs and practices in ways that may not be outwardly expressive.

In *Morrissey-Berru v. Our Lady of Guadalupe School*, for example, the teacher "committed to incorporate Catholic values and teachings into her curriculum . . . , led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year." 769 F. App'x 460, 461 (9th Cir. 2019). Likewise, in *Biel v. St. James School*, the teacher taught her students Catholic doctrine and practice for about two hours each week, included religious symbols in the classroom, took her students to Mass, and joined her

students in religious prayer. 911 F.3d 603, 605–06 (9th Cir. 2018).

Yet in both cases, the court focused on the teacher's titles and lack of substantial religious training, rather than giving due weight to the role of teachers and other employees in shaping, formally and informally, the Catholic school communities' internal beliefs and practices. If religious groups such as Petitioners cannot decide who may embody and carry out the religious purposes of the group (in these cases, teaching and instructing children in accordance with Petitioners' religious principles), the integrity of religious groups to define themselves on their own terms cannot be sustained. This Court accordingly should recognize that the Assembly Clause prevents the state from interfering with Petitioners' selections of whom they empower to carry out their missions.

II. *Hosanna-Tabor* And Other Supreme Court Decisions Establish That The Assembly Clause, Along With The Religion Clauses, Provides Support For A Robust Ministerial Exception.

Hosanna-Tabor grounded the ministerial exception in the Free Exercise and Establishment Clauses. But the Court's reasoning implicitly recognized the importance of the Assembly Clause in strengthening the ministerial exception. As this Court noted, the First Amendment "gives special solicitude to the rights of religious *organizations*." *Hosanna-Tabor*, 565 U.S. at 189 (emphasis added). It is exactly this special solicitude for the association of

religious believers in *groups* that the Assembly Clause protects.

In *Hosanna-Tabor*, the government had argued against a freestanding ministerial exception by suggesting that "religious organizations could successfully defend against employment discrimination claims in [certain] circumstances by invoking the constitutional right to freedom of association." *Id*. In rejecting this "untenable" position, the Court rightly declined to adopt "the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." *Id*.

Other than noting that "[t]he right to freedom of association is a right enjoyed by religious and secular groups alike," *id.,* the Court did not explore the relationship between the ministerial exception and associational rights. These cases provide an apt vehicle for doing so, and the strongest connection lies in reconsidering the Assembly Clause roots of the doctrine of expressive association.

The Court has long held that the right of association protects the rights of certain relationships and groups "against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts*, 468 U.S. at 618. The Court has further noted that certain groups "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical

buffers between the individual and the power of the State." *Id.* at 618–19. And these types of associations, the Court has emphasized, must be protected from "unwarranted state inference." *Id.* at 619.

There can be no debate that members of religious groups form "deep attachments and commitments" and that they "share[] not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of [their lives]." *Id.* at 620. Indeed, the relationship among religious leaders and members fits squarely within the type of protected association that has played "a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Id.* at 619; *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* 63 (2007) ("Priests and their counterparts play an amalgam of these relational and guidance roles: They act as moral advisors, as sources of consolation, as role models, best friends, and mentors").

The Court has long protected this type of religious association in the context of resolving ecclesiastical property disputes. For example, the Court has noted:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and

> for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.

Watson v. Jones, 80 U.S. 679, 728–29 (1871). Likewise, the Court has recognized "a spirit of freedom for religious organizations" that includes the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). And the Court has explained that courts "have no power to revise or question ordinary acts of church discipline, or of *excision from membership*." *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872) (emphasis added).

These decisions support protection of a relationship-based right of association for religious organizations rooted in the Assembly Clause.

Justice Alito's concurrence in *Hosanna-Tabor* is also consistent with the conclusion that a reinvigorated right of association, grounded in the Assembly Clause, provides support for a robust ministerial exception. Justice Alito explained that the Supreme Court has "long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs" and that the right of association "applies with special force with respect to religious groups."

565 U.S. at 199–200.[7] And Justice Alito focused on the fact that the rights protected by the First Amendment "surely include the freedom to choose who is qualified to serve as voice for their faith." *Id.* at 200–01. It is this freedom, bolstered by both the Religion Clauses and the Assembly Clause, that helps give breadth to the ministerial exception.

Hosanna-Tabor and this Court's prior precedent are both consistent with the conclusion that a meaningful right of association, properly rooted in the Assembly Clause, buttresses the protections of the ministerial exception. The Court should take this opportunity to recognize the role the Assembly Clause plays, both historically and doctrinally, in supporting a robust ministerial exception—an exception which protects the right of religious groups to control who teaches their faith and how they pass on that closely held belief to the next generation.

---

[7] The four considerations identified in *Hosanna-Tabor* for determining whether the ministerial exception applies also suggest that both the Religion Clauses *and* the Assembly Clause bolster the exception. Those four considerations are (1) "the formal title given Perich by the Church"; (2) "the substance reflected in that title"; (3) "her own use of that title"; and (4) "the important religious functions she performed for the Church." 565 U.S. at 192. Although the latter two considerations focus on religious exercise, the first two pertain to a Church's right to self-organize. This is precisely the type of right that the Founders intended to be protected by the Assembly Clause.

III. Recognizing The Role Of The Assembly Clause Would Help Ensure Adequate Protection For The Rights Of Religious Groups.

Recent cases before this Court and lower courts have considered the right of religious groups to gather and engage in worship, prayer, and other activities. Acknowledging the role of the Assembly Clause within freedom of association jurisprudence would clarify that those activities deserve protection for their own sake, and not merely due to their incidental expressive value.

A. *Christian Legal Society v. Martinez* illustrates the risks of assessing religious groups' right of association claims without regard to the Assembly Clause.

The limitations of the right of expressive association are strikingly illustrated by *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010). There, this Court considered the challenge of the Christian Legal Society (CLS) to a public law school's refusal to recognize CLS as a registered student organization. *Id.* at 672–74. CLS required members to sign a "Statement of Faith" and pledge to limit sexual activity only within a marriage between a man and a woman. *Id.* at 672. The school rejected CLS's application because it claimed these requirements violated the school's nondiscrimination policy, which required all student groups to permit any student to become a member, even if the student did not adhere to the group's beliefs. *Id.* at 672–73. The

school then denied CLS access to funding and facilities on the same basis as other groups. *Id.* at 673–74.

In rejecting CLS's challenge, this Court explicitly conflated its analysis of CLS's expressive association claim and its speech claim. *Id.* at 680–83. The decision states that CLS's "expressive-association and free-speech arguments merge," and "[i]t therefore makes little sense to treat CLS's speech and association claims as discrete." *Id.* at 680. The Court thus did not consider CLS's right to exist as a group and to determine its own membership other than as a means to the speech-based end of expressive association. *See id.* at 678–83. Having merged CLS's speech and expressive association claims, the Court proceeded to analyze those claims under a Free Speech limited public forum analysis. *Id.* at 680. Using that framework, the Court held that because the nondiscrimination policy did not engage in viewpoint discrimination, the school's application of the policy to CLS, and its consequent refusal to recognize CLS as a student organization, did not violate any part of the First Amendment. *Id.* at 694–97.

Christian Legal Society illustrates the cost of ignoring the Assembly Clause roots of the right of association. The ability of religious groups to use public spaces on the same terms as other groups is at the core of what the Assembly Clause was meant to protect. *See supra* Part I.A.1 (discussing William Penn's case). Analyzing the First Amendment's several freedoms through the singular lens of Free Speech public forum doctrine leads to outcomes that other Clauses were meant to guard against.

B. Lower court decisions upholding prohibitions on worship in public spaces illustrate the risks of assessing religious groups' First Amendment claims without regard to the Assembly Clause.

Two recent circuit court decisions have gone even further: they have upheld local regulations that specifically prohibit public meeting spaces from being used for religious services. The Ninth Circuit, in *Faith Center Church Evangelistic Ministries v. Glover*, held that a county could prohibit a library meeting room from being used for religious services. 480 F.3d 891 (9th Cir. 2007), *reh'g en banc denied*, 480 F.3d 891 (9th Cir. 2007). The Second Circuit later upheld a similar city ordinance prohibiting the after-hours use of school facilities for religious worship services. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 650 F.3d 30 (2d Cir. 2011).

Both decisions positioned the religious groups' claims squarely within a Free Speech framework. *See Glover*, 480 F.3d at 906 ("[O]ur inquiry ends if Faith Center's religious services do not constitute 'speech' subject to First Amendment protection."); *Bronx Household*, 650 F.3d at 38 ("[T]he fact that a reasonably excluded activity [religious worship services] includes expressions of viewpoints does not render the exclusion of the activity unconstitutional if adherents are free to use the school facilities for expression of those viewpoints in all ways except through the reasonably excluded activity.").

Neither the Second nor the Ninth Circuit considered whether, besides the groups' rights to express their beliefs, they also had a separate right to assemble on public property. Indeed, neither court so much as hinted that any freedom of association principles might be at stake in the religious groups' claims.

The Second and Ninth Circuits' failure even to acknowledge that associational considerations might have been implicated in these cases is all the more notable because both courts discussed at length *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court held that a public university's regulation forbidding the use of campus facilities for religious worship was impermissible under the First Amendment, *id.* at 265–67, and it explicitly grounded that holding in *both* the freedom of speech and the freedom of association, *id.* at 273 n.13 ("Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case."). Both circuit courts even quoted *Widmar*'s holding that "religious worship and discussion . . . are forms of speech *and association* protected by the First Amendment." *Bronx Household*, 650 F.3d at 54 (Walker, J., dissenting); *Glover*, 480 F.3d at 897 (Bybee, J., dissenting) (quoting *Widmar*, 454 U.S. at 269) (emphasis added). Yet both courts still failed to address the right of association, and instead assumed that their inquiries need only assess compliance with Free Speech principles. *See Bronx Household*, 650 F.3d at 33 ("[B]ecause Defendants reasonably seek . . . to avoid violating the Establishment Clause, the exclusion of religious worship services is a reasonable content-

based restriction, which does not violate the Free Speech Clause."); *Glover*, 480 F.3d at 906; *see also Every Nation Campus Ministries at San Diego State University v. Achtenberg,* 597 F. Supp. 2d 1075, 1083 (S.D. Cal. 2009) (in case presenting similar facts to *CLS v. Martinez*, holding that "state action that burdens a group's ability to engage in expressive association need not always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum.") (quoting *Truth v. Kent Sch. Dist.* 542 F.3d 634, 652 (9th Cir. 2008) (Fisher, J., concurring)).

The First Amendment protects the rights of religious groups to form, gather, and worship in public spaces, through the Assembly Clause as well as the Religion Clauses and the Speech Clause. But the speech-focused framework under which religious groups' claims have been analyzed places undue weight on the expressive dimensions of religious groups' activities, and gives little, if any, weight to those groups' right to form, to shape their identities, and to meet and conduct activities (including prayer and worship). Many of these core religious activities principally benefit the members of the group themselves, and may not have any outward-facing expression. A renewed recognition of the Assembly Clause's role in protecting groups' private, non-public activities is therefore in order.

Christian Legal Society, *Glover*, and *Bronx Household* demonstrate that the current focus on speech and expression neglects other important values and rights underlying the First Amendment's

protections for groups. Professor Michael McConnell has aptly summarized the current landscape:

> Theodore Sedgwick would be horrified. He thought that freedom of speech was broad enough to protect the right of groups to organize and meet. It turns out, though, that according to the Supreme Court, freedom of speech protects only the message itself and not the process of organizing the message through the association of like-minded individuals. John Page and the First Congress were prescient in seeing that separate protection for assembly (as well as religion, press, and petition) would be necessary to prevent the government from using various 'pretexts' to suppress assemblies that are contrary to the views of those in power.

McConnell, *Freedom by Association*, *supra*. Restoring a First Amendment framework that acknowledges the role of the Assembly Clause will help ensure that the rights of religious groups to meet and to worship are protected as they were intended to be. These cases present an ideal opportunity to issue needed corrective guidance.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the Ninth Circuit in both of the consolidated cases.

Respectfully submitted,

Jon Endean
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018

Zachary G. Parks
Counsel of Record
John S. Playforth
Carol A. Szurkowski
Brendan Duffy*
COVINGTON & BURLING LLP
850 Tenth Street N.W.,
Washington, DC 20001
(202) 662-6000
zparks@cov.com

Counsel for Amicus Curiae

FEBRUARY 10, 2020

* Admitted only in Texas; not admitted in the District of Columbia, and supervised by principals of the firm.