No. 22-60

IN THE

Supreme Court of the United States

CHURCH OF SCIENTOLOGY INTERNATIONAL, RELIGIOUS TECHNOLOGY CENTER & CHURCH OF SCIENTOLOGY CELEBRITY CENTRE INTERNATIONAL,

Petitioners,

v.

CHRISSIE CARNELL BIXLER, CEDRIC BIXLER-ZAVALA, JANE DOE #1 & JANE DOE #2,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Second Appellate District, Division Five

BRIEF OF *AMICUS CURIAE* PROFESSORS MICHAEL J. BROYDE AND RONALD J. COLOMBO IN SUPPORT OF PETITIONER

BARRY A. FISHER
Counsel of Record
FLEISHMAN & FISHER
12121 Wilshire Blvd.
Suite 504
Los Angeles, CA 90025
(310) 557-1077
bfshr557@gmail.com

August 16, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

"It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept."[2] Consistent with this, it is the longstanding policy of U.S. law, expressed via the Federal Arbitration Act, "that private arbitration agreements are enforced according to their terms."[3] Yet, in a novel application of the First Amendment, the California Court of Appeal held that freedom of religion absolved certain parties from the binding responsibilities they assumed under validly executed and otherwise enforceable arbitration agreements.[4]

The *amici curiae* question the correctness of the Court of Appeal's decision. Moreover, *amici curiae* criticize the Court of Appeal's decision to promulgate its holding as an *unpublished* one. Justice Kagan's remarks, albeit in a different context, are arguably more apropos here: "That decision does a disservice to our own appellate processes, which serve both to

---

[1] No party or counsel for any party has authored this letter in whole or in part. No party and no counsel for a party has made a monetary contribution intended to fund the preparation or submission of this letter. Counsel of record for all parties received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief.

[2] *In re Marriage of Hibbard*, 212 Cal. App. 4th 1007, 1018 n.5, 151 Cal. Rptr. 3d 553, 561 n.5 (2013), as modified on denial of reh'g (Feb. 8, 2013).

[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (*quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 478, (1989)).

[4] *Bixler v. Superior Ct. for the State of California, Cnty. Of Los Angeles*, No. B310559, 2022 WL 167792, at *10 (Cal. Ct. App. Jan. 19, 2022), review denied (Apr. 20, 2022) (unpublished).

constrain and to legitimate the Court's authority."[5] For the issue in question "is a serious matter" which merits "thorough consideration."[6]

The interest of the *amici curiae* is that of scholars who have written extensively in the field of religious arbitration and religious freedom, including a book and many articles.[7] Were the court to grant plenary review, *amici curiae* plan to submit a more thorough amicus brief on the substantive issues presented. In alphabetical order, *amici curiae* are:

- Michael J. Broyde – Professor of Law at Emory University and Berman Projects Director in the Emory University Center for the Study of Law and Religion

---

[5] *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting) (objecting to the Supreme Court's use of its "shadow docket" to decide cases).

[6] *Id.*

[7] Between us we have written a few books and many articles in the fields of arbitration law and religious freedom. See for example, Michael J. Broyde, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST, Oxford University Press (2017); Ronald J. Colombo, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION (Oxford University Press 2015); Michael J. Broyde, *Religious Alternative Dispute Resolution In Israel And Other Nations With State-Sponsored Religious Courts: Crafting A More Efficient And Better Relationship Between Rabbinical Courts And Arbitration Law In Israel*, Touro Law Review, 36:4 901-942 (2021); Ronald J. Colombo, *The Past, Present, And Future of Christian ADR*, 22 Cardozo J. Of Conflict Res. 45 (2020); Michael J. Broyde, *Faith-Based Arbitration Evaluated: The Policy Arguments For and Against Religious Arbitration in America*, 33 *The Journal of Law and Religion* 340-389 (2019) and much more.

- Ronald J. Colombo – Professor of Law and Dean for Distance Education at the Maurice A. Deane School of Law at Hofstra University

ARGUMENT

I. THE COURT OF APPEAL'S DECISION IS SUBSTANTIVELY PROBLEMATIC

This case raises three important, overlapping issues and resolves them in an unpublished opinion. Even if these issues have been resolved correctly, these matters are too important to be resolved in an unpublished opinion for they would entail a substantial change in both religious freedom jurisprudence and contract law.

First, this opinion rules that there is a constitutionally recognized and protected exit right from civil obligations undertaken in the course of membership in a church or a faith community. Exit rights from any faith – while somewhat intuitive in a constitutional scheme like ours with religious freedom – are underdeveloped and not well analyzed,[8] and this is the first opinion we are aware of to rule that contracts may be breeched in order to facilitate exit from a faith.[9]

---

[8] William Simpson, *Exit Rights, Pluralism, and Equal Citizenship: Why Religious Exemptions Are Still Worth It*, 2 U. PA. J. L. & PUB. AFFS. 257 (2017).

[9] See for example, Rouméas, É. *Enabling Exit: Religious Association and Membership Contract. Ethic Theory Moral Prac* 23, 947–963 (2020). https://doi.org/10.1007/s10677-020-10119-7, and Leslie Green, Rights of Exit, Legal Theory Volume 4, pages 165–185 (1998). One of us wrote about this issue many years ago; see Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters' Rights*, in Religious Human Rights in Global Perspective: Religious Perspectives John Witte, Jr. (Editor), Johan D. van der Vyver (Editor), Eerdmans; Revised

Second, the opinion posits that this constitutional exit right is unwaivable by contract. This is unlike many other constitutional rights, both in the First Amendment and countless other places.[10] Consequently, the opinion creates a constitutional exception to the otherwise binding provisions of the Federal Arbitration Act. Again, this is the first opinion we are aware of to issue such a ruling.

Third, the opinion endorses the unprecedented perspective that religious arbitrations are state actions[11]. The opinion's reliance on *In re Marriage of Weiss*, 42 Cal.App.4th 106, 118 (1996) (a family law case focusing on the best interest of the child in the context of changing faiths by parents) represents a significant expansion of a very narrow doctrine enunciated in one context to a completely different one (religious arbitrations).

---

edition (January 1, 2000) pages 203-233. The academic literature assumes that contracts may not be breeched based on religious freedom exit rights, contrary to the holding of this case.

[10] *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972); *Viola v. California Dep't of Managed Health Care*, 133 Cal. App. 4th 299, 313 (Cal. Ct. App. 2005); *Garrett v. Patterson-UTI Drilling Co*., 299 S.W.3d 911, 916 (Tex. Ct. App. 2009); *Jessee v. Jessee*, 866 S.E.2d 46, 54 (Va. Ct. App. 2021); *Tomasko v. Dubuc*, 145 N.H. 169, 176 (N.H. 2000); Brittany Scott, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, 46 HASTINGS CONST. L. Q. 451 (2019).

[11] Michael A. Helfand, *'The Peculiar Genius of Private-Law Systems': Making Room for Religious Commerce*, 97 WASH. U. L. REV. 1787, 1819 (2020).

II. THE COURT OF APPEAL'S DECISION IS PROCEDURALLY PROBLEMATIC

Compounding the substantive concerns flagged above, the Court of Appeal's election to promulgate its decision as an unpublished one is procedurally problematic. This runs contrary to the Rules of Court[12] and, moreover, sweeps under the rug a rare adverse ruling against a religious community attempting to enforce an arbitration agreement. Countless other faiths

---

[12] As per Cal. R. Ct. 8.1105: "An opinion of a Court of Appeal or a superior court appellate division—whether it affirms or reverses a trial court order or judgment—should be certified for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law." Cal. R. Ct. 8.1105.

At a minimum, it appears as though the first four conditions for publication are met in this case.

routinely see their rights to enforce arbitration agreements upheld,[13] yet here a culturally unpopular religion (the Church of Scientology) does not. This raises the deeply troubling prospect that some faiths are subject to inferior treatment in the courts of California than others, and to disguise that fact, the Court of Appeals declines to publish this opinion.

If the Court of Appeals' holding in *Bixler* is really to be the law of the State of California, the California Supreme Court should review the appellate decision, provide suitable doctrinal guidance, and mandate this holding throughout the State. Such would subject the decision to the attention it deserves, and would subject its important and controversial holdings to appropriate national scrutiny. If, on the other hand, this is simply discrimination against a certain faith, efforts to evade the watchful eye of the U.S. Supreme Court should not be countenanced; this Court should grant certiorari and reverse.

---

[13] *Spivey v. Teen Challenge of Fla., Inc.*, 2013 WL 5584237, at * 992-95 (Fla. Ct. App., Oct 11, 2013); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1242-52 (2011) (examining the deferential treatment United States' courts afford to religious arbitration agreements); Steven C. Bennett, *Enforceability of Religious Arbitration Agreements and Awards*, DISP. RESOL. J., Nov. 2009–Jan. 2010, at 26-30.

CONCLUSION

For the reasons set forth above, *amici curiae* urge the United States Supreme Court to grant review in this case, allow for full and extensive briefing on the issues raised herein, and render a published opinion on the question of exit rights from religious arbitration contracts that serves as binding precedent in all cases in the state.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
FLEISHMAN & FISHER
12121 Wilshire Blvd.
Suite 504
Los Angeles, CA 90025
(310) 557-1077
bfshr557@gmail.com

August 16, 2022