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 FIRST LIBERTY INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.[1] First Liberty provides pro bono legal representation to individuals and institutions of all faiths — Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

As an amicus, First Liberty maintains an interest in preserving the freedom of all faith traditions to convey their religious missions to the next generation. The religious ministries and schools that we represent seek the freedom to operate in communities that share a common commitment to their religious beliefs and principles, independent of government control and intervention. One of the core features of the First Amendment is that the government must respect the autonomy of religious ministries and schools.

SUMMARY OF ARGUMENT

As explained by Professor Douglas Laycock's influential 1981 article Towards a General Theory of the Religion Clauses, the right to religious autonomy (which he calls church autonomy) is an often overlooked right guaranteed by the First Amendment.[2]

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[1] Attorneys from First Liberty Institute authored this brief as amicus curiae. No attorney for any party authored any part of this brief, and no one apart from amicus curiae made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief and were timely notified.

[2] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981).

According to the paper, the Free Exercise Clause protects religious liberty in three ways. First, it protects the acts of an individual's religious exercise itself, such as the right to pray, worship, etc. Next, it protects the right to exercise religion in community, which requires at a minimum the freedom to make doctrinal decisions and the freedom to choose how to structure one's own institutions to best accomplish their religious goals (the right to religious autonomy). And finally, the Free Exercise Clause protects the right not to be forced by government to violate one's conscience (the right to conscientious objection).[3] Though the focus of religious liberty litigation – then as now – is often on conscientious objection litigation designed to protect people and groups from being forced to violate their sincere religious beliefs, it is important to recognize that the Free Exercise Clause protects all three of these fundamental interests.

As Professor Laycock acknowledged in a subsequent paper, the right to religious autonomy also safeguards important Establishment Clause interests.[4] The clause prohibits the government from establishing a church, which would include interfering with how religious organizations have chosen to exercise their religion. The right to religious autonomy protects the separation of church and state by requiring the government not to

[3] *Id.* at 1388-90.

[4] Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J. L. & Pub. Pol'y 253, 260, 262 (Winter 2009).

usurp the religious functions of religious organizations and enabling religious organizations to be left alone.[5]

A religious organization's right to choose who will convey its message is one of the most important features of religious autonomy. After all, religious leaders and teachers are the people most responsible for carrying out the missions of mosques, synagogues, churches, and other religious ministries. The First Amendment's ministerial exception doctrine is the recognition of a religious organization's right to choose its own ministers and not have an unwanted minister forced upon it by the government.

Although the ministerial exception may also protect the right of conscience, it is fundamentally grounded in the right of religious organizations to an independence from government control. Acknowledging this fundamental purpose of the ministerial exception will help the Court define the scope of how the ministerial exception should be applied here.

Viewing the ministerial exception in the larger context of the religious autonomy doctrine makes it clear that a minister must be defined primarily by the performance of religious functions, rather than by indicators of religious function such as religious titles.

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[5] Professor Laycock notes that rights under the Religious Clauses sometimes may be overcome by government, but only for sufficiently compelling reasons. Laycock, *Towards a General Theory of the Religion Clauses*, *supra*, at 1374.

ARGUMENT

I. The Free Exercise Clause Protects Not Only the Right of Conscience, but Also the Right to Religious Autonomy.

Not all religious liberty violations involve harm to a person's conscience. Conscience harms arise when the government compels a person or a group of people to do something their religion forbids or to refrain from doing something that their religion mandates under the threat of penalty. Such coerced violation of one's sincerely-held beliefs is a particularly egregious burden on religious believers, but it is not the only way religious liberty may be infringed.[6]

The Free Exercise Clause guards against other kinds of harm as well. For instance, religious organizations may be harmed by government interference itself, regardless of whether the harm also burdens the conscience. Most decisions by religious organizations are made to further their religious goals, but not all of these decisions are *required* by their religion.[7] For instance, a religious ministry may be

[6] After *Employment Division v. Smith*, 494 U.S. 872 (1990), most conscientious objection claims now arise under the Religious Freedom Restoration Act, 42 U.S.C § 2000bb-1, rather than under the Free Exercise Clause.

[7] The Religious Land Use and Institutionalized Persons Act, meant to restore interests protected by the Free Exercise Clause pre-*Smith*, defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see also* Laycock, *Towards a General Theory of the Religion Clauses*, *supra*, at 1390 (making the point that religious exercise may be burdened even if that exercise is not compelled or required by religious doctrine).

motivated by its faith to help find homes for children in need of adoption or foster care. That ministry may not believe itself to be violating its conscience if it is pressured to exit that field and instead focus its charitable calling in another direction. In this situation, the ministry still faces a very real burden. It is harmed by the governmental interference with the religious organization's desired way to achieve its goals, even if there is no compelled violation of conscience.[8] The religious autonomy doctrine recognizes that religious organizations should be free to organize in the way they choose, and need not make the argument that they are required by religious doctrine to organize in that specific way.

Moreover, requiring a religious ministry to prove to a court that its religion requires a particular course of action in order to receive protection adds an extra layer of government interference and invites differential treatment among different faiths. Not all religious traditions are structured in such a way as to have firm rules or doctrines. Judicial scrutiny into whether a religion truly requires a course of action is asking secular courts to weigh in on ecclesiastical decisions that they are not competent to make. The mere process of judicial scrutiny into religious decisions invites such problems. *See NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

[8] Very often, both forms of harm may be present.

For these reasons, the Free Exercise Clause protects religious autonomy — the freedom to make internal decisions, "to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."[9] In short, the First Amendment protects the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-86 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

II. The Establishment Clause Also Protects Religious Autonomy by Guarding Against State Control of How Religious Organizations Operate.

The Establishment Clause also necessitates the religious autonomy doctrine. The clause prevents governments from breaching the wall of separation between church and state to control a religious organizations' internal decisions, such as who should teach the faith or how it should be taught. "When government decides a religious question and enforces its decision," it violates not only the Free Exercise Clause, it also "violates the Establishment Clause by performing an essentially religious function."[10]

Evaluating the Court's religious autonomy decisions shows that they are based in both Religion Clauses.

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[9] Laycock, *Towards a General Theory of the Religion Clauses*, *supra*, at 1389 (footnotes omitted).

[10] Laycock, *Church Autonomy Revisited*, *supra*, at 264.

Most of the religious autonomy cases that have made their way to the Supreme Court involve church schisms and property disputes. *See Watson v. Jones*, 80 U.S. 679, 727 (1872); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976). As summarized by Professor Michael McConnell and Luke Goodrich, "[t]hese decisions constitutionalized two related principles: first, that civil courts should not decide ecclesiastical questions; and second, that churches have a First Amendment right to be free from state interference in their internal affairs."[11] When courts decide ecclesiastical questions, it violates the Establishment Clause by entangling the government in religious matters; and the Free Exercise Clause protects the converse right to be free government interference in internal affairs.[12]

Recently, in *Hosanna-Tabor*, this Court reflected that prior religious autonomy decisions radiate "a spirit of freedom for religious organizations" and "an independence from secular control or manipulation." *Hosanna-Tabor*, 565 U.S. at 185-86 (quoting *Kedroff*,

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[11] Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 316 (2016).

[12] *Id.*

344 U.S. at 116). In summary, both Religion Clauses work together to protect religious autonomy.

III. The Ministerial Exception Is Grounded Primarily in the Right to Religious Autonomy.

The Free Exercise Clause protects mosques, synagogues, churches, and other religious organizations' right to freely convey their religious teachings through their ministers. The Establishment Clause prevents governments from breaching the wall of separation between church and state to intrude upon these religious organizations' interactions with their ministers. Rooted in both of these religion clauses,[13] the "ministerial exception" bars courts from hearing claims involving the church-minister employment relationship in order to ensure that religious organizations retain the right to choose their ministers. This independence, this religious autonomy, is the key principle that grounds the ministerial exception.

Because the harm to be avoided is the harm that comes from government interference with internal religious affairs, the ministerial exception applies to all aspects of the employment relationship between a religious organization and its ministers. A religious organization need not point to a particular religious rationale for its employment decisions in order to receive constitutional protection. As the unanimous

[13] Laycock, *Church Autonomy Revisited*, *supra*, at 262 ("Imposing unwanted religious leaders is first and foremost a Free Exercise Clause problem. But it is also an Establishment Clause problem, because in the established church, the government picks the ministers.").

Supreme Court held: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful–a matter 'strictly ecclesiastical,'. . .–is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-95 (quoting *Kedroff*, 344 U.S. at 119).

A church's choice of minister, and its choice to part ways with a minister, is not protected only when it can articulate a religious rationale that would satisfy a reviewing court.[14] Rather, its relationship with its minister is held sacred, protected from the scrutiny of the courts in order to avoid the dangers of interfering with religious autonomy.

IV. Because of the Purpose of the Ministerial Exception, a Minister Must Be Defined by Virtue of Religious Functions.

The question before the Court is who should be considered a "minister." To define the term, it is important to remember the fundamental interest that the ministerial exception is designed to protect. That interest is in the autonomy to make their own religious decisions about doctrine and structure. Any definition of minister that confines ministers to particular titles

[14] The "prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree." *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (in the context of Title VII's statutory religious exemption).

or that prefers ministers in particular organizational structures, such as hierarchical, formal churches, must be rejected. Likewise, any definition that requires judicial scrutiny into religious doctrinal questions must also be rejected.

Justices Samuel Alito and Elena Kagan defined the term with religious autonomy in mind in their concurring opinion in *Hosanna-Tabor*:

> Religious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance. Different religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of "employees" whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.

Hosanna-Tabor, 565 U.S. at 200 (Alito, J., concurring). As this concurrence identifies, ministers must include at least the organization's leaders and teachers, because these are the people responsible for "worship services," performing "religious ceremonies and rituals," and "conveying the tenets of the faith to the next generation." *Id.*

Thus, who is considered a minister must be determined by virtue of their religious function as a leader or teacher, with deference to the religious organization's perception of its own beliefs and structure. Aspects like titles, religious training, and credentials can provide evidence of religious function, but are not themselves the end goal and should not be formulaically required as in the Ninth Circuit opinions below. Sometimes a title, such as a Roman Catholic Priest or Nun, may make religious function readily apparent without need for further inquiry. However, requiring minsters to hold religious-sounding titles would pressure religious organizations to operate in more formal or traditional ways and favors some organizational structures over others. "Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Amos*, 483 U.S. at 336.

Within religious education, such as Catholic schooling, nothing is more important than who teaches the faith. As recognized in a question recently posed by Justice Stephen Breyer during the argument in *Espinoza v. Montana Department of Revenue*, "there is nothing more religious, except perhaps for the service in the church itself, than religious education. That's how we create a future for our religion." Oral Argument Transcript at 62:3-6, No. 18-1195 (Jan. 22, 2020). For this reason, teachers at faith-based schools who teach religion must be considered ministers. The teachers at issue in the instant cases teach religion for several hours per week, and thus easily qualify as ministers.

Moreover, all teachers at religious schools are responsible for conveying the faith in some capacity. As noted by Professor Laycock, even teachers not responsible for teaching religious courses are required, at the very least, to refrain from dis-promoting the faith or counter-evangelizing because such actions would run counter to the core mission of religious schooling.[15] Students often look up to their teachers for moral and spiritual guidance, whether that teacher teaches English or Bible studies. For these reasons, the Court should clarify that all teachers at religious schools are ministers for the purpose of the ministerial exception. Such a clear holding would protect faith-based schools across the country from needless and intrusive litigation about who it has chosen to convey the faith to the next generation.

Finally, requiring religious organizations to prove in extensive detail how each teacher promotes the religion in order to qualify for constitutional protection defeats the purpose of the ministerial exception. Any formulation that requires extensive scrutiny could have a particularly severe impact on minority and less-

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[15] "Not every religious school can or will insist that every teacher actively promote religion. But nearly all will at least require every teacher not to interfere. A religious school might hire a nonbelieving math teacher, but it is not likely to permit him to flaunt his nonbelief, to denigrate the church that runs the school, or to set a bad moral example. Thus, even the nonbelieving math teacher has some intrinsically religious responsibilities. And . . . [the line drawing question may lead to] intolerable litigation over the religious content of each teacher's instruction. Churches have strong claims to autonomy with respect to employment of teachers." Laycock, *Towards a General Theory of the Religion Clauses*, *supra*, at 1411.

understood faiths. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 732 n.8 (9th Cir. 2011) (O'Scannlain, J., concurring) (noting that questions about what constitutes religious activity "might prove more difficult when dealing with religions whose practices do not fit nicely into traditional categories"). Such questions would be exceptionally difficult to answer in the context of certain faith traditions, such as the Native American traditions at issue in *Stately v. Indian Community School of Milwaukee, Inc.*, 351 F.Supp.2d 858, 862 (E.D. Wis. 2004). The case involved a school that mixed the spiritual and cultural heritage of various Native American tribes as well as other religions. The court noted that the "line between sacred and profane does not exist in Native American cultures," recognizing "the interconnectedness of Native American culture and religion." *Id.* at 867-868. There, the court properly held that the First Amendment foreclosed an inquiry into whether the school's actions were religious enough for constitutional protection.

In short, religious organizations must remain free to decide internal questions of doctrine and structure free from government control and interference. Nowhere is this more important than the decision of who conveys the faith to the next generation.

CONCLUSION

For these reasons, the Court should reverse the Ninth Circuit decisions below.

Respectfully submitted,

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