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* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

JOHN A. EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, and Regulations

Other Authority

INTEREST OF AMICUS CURIAE[1]

The Foundation for Moral Law is an Alabama-based-legal organization dedicated to religious liberty and to the strict interpretation the Constitution as intended by its Framers. The Foundation believes religious liberty is the God-given right of all people as claimed in the Declaration of Independence and protected by the First Amendment. Because churches have a unique place in the world, governmental entities should not dictate employment decisions to churches.

SUMMARY OF THE ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.,* 565 U.S. 171, 181 (2012), this Court recognized that the First Amendment's Establishment and Free Exercise Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers."

The Ninth Circuit decisions below are inconsistent with *Hosanna-Tabor* and, as Petitioners have ably demonstrated, with the holdings of seven other circuits. This Court should reverse the Ninth Circuit

---

[1] Pursuant to Rule 37.3, *Amicus* has notified all parties of intent to submit this Brief and has requested consent from all parties. All parties have consented. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

ruling so persons and churches in the Ninth Circuit will have the religious freedom guaranteed elsewhere throughout the United States.

Although *Hosanna-Tabor* was a victory for religious liberty, the decision did not go far enough. This Court held that government may not regulate a church's employment of religious ministers. But as the cases below and cases in many other circuits demonstrate, so long as the "ministerial exception" remains the test, courts will be forever involved with difficult questions as to who is a "minister" and who is not. In so doing, the courts will unceasingly entangle themselves with complex questions of church doctrine, church tradition, and church polity that courts have neither the jurisdiction nor the competence to analyze -- the very entanglement that the First Amendment forbids.

To truly safeguard religious liberty and to extricate itself from this entangling quagmire, this Court should take the next logical step and hold that church employment decisions are *per se* protected by the religion clauses of the First Amendment and are therefore removed from the jurisdiction of government.

If the Court is unwilling to take this step at this time, the Court should reverse the Ninth Circuit and hold that courts should defer to churches' determinations as to who is and is not a "minister" unless there are compelling reasons to hold otherwise.

ARGUMENT

I. Education is a vital church function.

In *Everson v. Board of Education,* 330 U.S. 1 (1947), this Court held that the Establishment Clause does not prohibit the state from busing children to and from parochial schools. Justice Jackson dissented, noting that the schools of the Roman Catholic Church are a vital component of the Church's ministry. He noted at 22-23,

> Under the rubric "Catholic Schools," the Canon Law of the Church, by which all Catholics are bound, provides:
>
> 1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)
>
> 1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine.
>
> The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)
>
> 1217. Catholic children shall not attend non-Catholic, indifferent schools

> that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)
>
> 1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church.
>
> The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.
>
> They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)
>
> (Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of New York and others, 1940.)

Justice Jackson concluded at 24,

> I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the

> Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

This view of education is not limited to Roman Catholics. As Justice Frankfurter recognized in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 213-14 (1948),

> Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.
>
> The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started

> with a religious orientation. When the common problems of the early settlers of the Massachusetts Bay Colony revealed the need for common schools, the object was the defeat of "one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures." The Laws and Liberties of Massachusetts, 1648 edition (Cambridge 1929) 47.

Martin Luther wrote concerning education,

> Above all things, the principal and most general subject of study, both in the higher and lower schools, should be the Holy Scriptures.
>
> ...
>
> But where the Holy Scripture does not rule I certainly advise no one to send his child. Everyone not unceasingly occupied with the Word of God must become corrupt; therefore we must see what people in the higher schools are and grow up to be. ... I greatly fear that schools for higher learning are wide gates to hell if they do not diligently teach the Holy Scriptures and impress them on the young folk.[2]

---

[2] 6 Martin Luther, *Luther's Works* 461-62 (Weimar ed. 1883); cf, Ewald M. Plass, *What Luther Says: A Practical In-*

Because education is a vital component of church ministry, and because the teacher is the primary person who conveys education to children, churches naturally regard their teachers as essential ministers. In the popular mind the term "minister" is commonly identified with ordained and robed clergy; but the Greek words translated "minister" in the New Testament are *diakanos* (meaning servant, teacher, or minister) and *huperetes* (meaning minister, officer, or servant).[3]

As this Court observed in *Hosanna-Tabor,* the Lutheran Church - Missouri Synod (LC-MS) has an elaborate system for "called teachers" which includes special training and formal ordination similar to that of a pastor. Because *Hosanna-Tabor* was the first Supreme Court case involving a ministerial exception for teachers, some read the decision to mean that any church whose teachers do not undergo similar training and ordination do not qualify for the ministerial exemption. But this Court never said the LC-MS system constitutes the minimum standard for the ministerial exemption. Rather, the issue is whether the teacher fulfills a religious function. Clearly, by any objective analysis, as Petitioners have demonstrated in their brief, as Judge Fisher wrote in

---

Home Anthology for the Active Christian 449 (Concordia 1959, 1986).

[3] *Strong's Exhaustive Concordance of the Bible,* Greek Dictionary of the New Testament, entries 1247-49, 5255-57; Bauer, Arndt & Gingrich, *A Greek-English Lexicon of the New Testament and Other Early Christian Literature* 182-83 (University of Chicago Press 1957, 1969); 2 Gerhard Kittel, ed., *Theological Dictionary of the New Testament* 81-93 (Eerdmans 1965, 1987).

his dissenting opinion, and as nine judges noted in their dissent on the decision to deny rehearing en banc,[4] the churches expected Morrissey-Berru and Biel to fulfill religious functions, and in fact they did so.

II. Examining the ministerial exception leads to excessive entanglement of government with religion.

How a church prepares, chooses, calls, titles, and recognizes its teachers varies greatly from one denomination to another and depends upon many factors. Some churches place greater emphasis on formal training and academic degrees for their pastors and teachers. Others, especially those which are less hierarchical and liturgical, may rely less upon formal training and ordination and more upon the leading of the Holy Spirit. That does not mean their teachers are any less "ministers" than their more formal counterparts. Requiring church schools to follow practices similar to those of the Lutheran Church-Missouri Synod in *Hosanna-Tabor* could tempt churches to depart from their own ecclesiastical polity by creating titles, certificates, and job descriptions that would make their teachers similar to the "called teachers" of *Hosanna-Tabor*.

In some more formal churches, many church functions are reserved for those ordained for the task. Similar functions might be performed by laypersons in other churches. Churches differ as to the purpose,

---

[4] *Biel v. St. James School*, 926 F.3d 1238, 1239 (9th Cir. 2019).

conditions, and methods of ordination; for example, some encourage lay preaching to develop the spiritual gifts of laypersons, while others forbid preaching by unordained persons because they could lead others astray with false doctrine. Some have strict requirements as to who may administer the Lord's Supper; others do not, partly because of their differing views of the Lord's Supper.[5]

Most Christian schools would not require a science teacher to be an ordained minister, but many regard the world view implicated in science teaching–Biblical creation vs Darwinian evolution, for example–as central to the mission of the school. Most would not require a health teacher to be an ordained minister, but many consider the teaching of health, which involves sex education, abstinence, traditional family, and LGBTQ issues, to be central to the Christian worldview they wish to inculcate to their children. Some regard their art program, in which the teacher presents the Christian worldview of the great art masters and how that worldview influenced

---

[5] Petitioners observe on pp. 11-12 of their brief that the teacher at Guadalupe is required to teach her students to "'recognize the presence of Christ in the Eucharist,'" "'experienc[e] the water, bread, wine, oil and light' -- symbols of the seven Catholic sacraments -- 'with the[ir] senses'," and "'celebrate the sacrament[s],' including by 'participating in the prayer service related to' the sacraments," and other religious teachings. These involve teaching the highly complex Catholic doctrine of transubstantiation and contrasting it with the Lutheran view of the "real presence" of Christ in the sacrament, the Calvinist view of the spiritual presence, the Baptist view that the bread and wine are symbols of the body and blood of Christ, and other positions.

their art, as a vital highlight of the Christian mission of the church's school. Others regard music, literature, government, social studies, and other subjects as having strong religious implications. Even mathematics may involve religious questions as to how the laws of mathematics came into being and why they work the way they do.[6]

How can a court determine whether teaching these subjects is a religious function? To do so, the court would have to examine in minute detail the doctrines of the particular church or denomination, the sources of those doctrines, what qualifications the church believes its teachers need in order to teach those subjects competently and from a correct doctrinal position[7], why this church does or does not require its teachers to undergo formal ordination in contrast to other servants of the church who may or may not need ordination, and a host of other questions. This could require extensive study of church documents, possibly in their original languages, and deposing expert witnesses who may have conflicting opinions. Parsing doctrinal questions, and telling churches how they should teach their doctrines to their children, is simply not

---

[6] See, for example, James Nickel, *Mathematics: Is God Silent?* (Ross House books 2001); Vern Poythress, *Redeeming Mathematics: A God-Centered Approach* (Crossway 2015).

[7] The Ninth Circuit strongly emphasized that the religious training of the teachers at Guadalupe and St. James was not as lengthy as that of the teacher at Hosanna-Tabor. The Foundation respectfully suggests that the responsibility of determining the length and content of the training of its ministers lies with the church and not with the state or the courts.

the function of the courts. It involves entanglement of the courts with the church in ways the First Amendment was intended to prohibit.

Justice Alito, joined by Justice Kagan, recognized this problem and wrote concurring in *Hosanna-Tabor* that the exception "should apply to any 'employee' who ... serves as a messenger or teacher of [the organization's] faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). He added that "[r]eligious autonomy means that religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance," including "those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 200. Justice Thomas said in his concurrence that when courts apply the ministerial exception, they must "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196 (Thomas, J., concurring). These concurrences are most helpful, but they still leave it to the courts to determine whether a church is acting in "good faith." As this Court said in *United States v. Ballard,* 322 U.S. 78, 86-87 (1944),

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not

> mean that they can be made suspect before the law.

In *Sterlinski v. Catholic Bishop of Chicago,* 934 F.3d 568 (7th Cir. 2019), Judge Easterbrook writing for the Seventh Circuit affirmed the District Court's dismissal of Sterlinski's lawsuit alleging that his firing as a church organist constituted unlawful employment discrimination. Sterlinski alleged that his previous position as music director involved ministerial discretion, but after he was demoted to organist his work consisted simply of "robotically playing the music that he was given" and the church therefore was not entitled to the ministerial exception. Judge Easterbrook maintained that the ministerial exception did apply to an organist because an effective organist puts his heart into his music:

> a church may decide that any organist who plays like a robot *ought* to be fired. Performers must put their hearts into playing, or they won't be effective. A priest who delivered the homily in a monotone would not advance the church's religious mission; no more does an organist who proclaims that he plays mechanically.

Id. at 571. The Ninth Circuit's reasoning in *Biel* could lead to the conclusion that a Catholic Church must hire an atheist or a Hindu even though the teacher's duties include teaching religion classes, so long as the teacher agrees to teach the doctrine

contained in the textbook. But the church might well decide that even though a nonbeliever could teach the doctrine contained in the book, she would not put her heart into her teaching as a believer would.

Judge Easterbrook also wrote critically of the Ninth Circuit *Biel* decision:

> Sterlinski wants us to decide for ourselves whether an organist's role is sufficiently like that of a priest to be called part of the ministry. That's the path followed by a divided panel in *Biel v. St. James School,* 911 F.3d 603 (9th Cir. 2018), rehearing en banc denied (over the dissent of nine judges). 926 F.3d 1238 (2019). *Biel* did not involve an organist. We cite it, rather, because it holds that a court will decide for itself whether a given employee served a religious as opposed to a secular function.

However, Judge Easterbrook stopped short of advocating a completely hands-off approach. Citing *Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985), in which this Court declined to hold that the Alamo Foundation was exempt from minimum-wage laws because of the First Amendment, he says "The answer lies in separating pretextual justifications from honest ones," apparently concluding that Alamo's position was pretextual and not honest (a conclusion this Court did not reach in *Alamo*). However, Alamo did

not claim a ministerial exemption. Rather, Alamo claimed that the persons who worked in their enterprise (mostly former drug addicts, derelicts and criminals) were volunteers who worked as a means of rehabilitation. This Court agreed with the District Court that the Alamo Foundation was a business enterprise and that "by entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees." *Tony & Susan Alamo Foundation*, 471 U.S. at 294. That case did not address church employment decisions in other than marketplace activities.

The *Sterlinski* opinion has much of value, but it does not explain how to distinguish good-faith claims of ministerial exception from pretextual claims, a distinction that could multiply the problems of entanglement.

So long as the courts have to wrestle with questions of who is and who is not a "minister," they will forever entangle themselves with issues of church doctrine, church tradition, and church ecclesiastical polity. The way out of this quagmire is to hold that, because of the Establishment and Free Exercise Clauses, questions of employment in religious schools are outside the jurisdiction of civil government.[8]

---

[8] In so holding, this Court need not address questions such as government jurisdiction over health and safety issues in employment or employment in commercial enterprises operated by churches.

III. Exempting church employment is the way to avoid the entanglement problems of the ministerial exception.

Before the First Amendment was applied to the states by the incorporation doctrine, this Court heard few religious liberty cases. One of the earliest, *Church of the Holy Trinity v. United States,* 143 U.S. 457 (1892), involved a religious exemption from a statute. The issue was whether the Church of the Holy Trinity could call a rector and pastor from England and despite a federal labor statute that prohibited hiring foreign workers. The statute contained exceptions for actors, artists, singers, and domestic servants, but none for pastors/rectors. However, this Court, after a lengthy unfolding of the historic influence of Christianity upon American laws and institutions, concluded that "this is a Christian nation" and asked, "In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?" *Id.* at 471. The Court answered its question with a resounding "no" and carved out an exception for churches calling foreign pastors. The Court concluded at 472,

> Suppose, in the Congress that passed this act, some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its service as pastor and priest, or any

Episcopal church should enter into a like contract with Canon Farrar; or any Baptist church should make similar arrangements with Rev. Mr. Spurgeon; or any Jewish synagogue with some eminent Rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was in effect the meaning of this statute. The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.

> The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Without specifically invoking the First Amendment, the Court in effect rewrote the statute and carved out an exception for churches calling foreign pastors, an exception that was not in the statute itself as passed by Congress.

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), involved the NLRB's exercise of jurisdiction over lay faculty members in Catholic high schools. The NLRB policy was to decline jurisdiction over religiously sponsored organizations "only when they are completely religious, not just religiously associated." The Board had concluded that these schools were not "completely religious" and therefore assumed jurisdiction and ordered elections as to whether their teachers should have union representation. Chief Justice Burger stated the issues at the outset at 491:

> We granted certiorari to consider two questions: (a) whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment?

As to the first question, the Court said the statute could be reasonably construed either way, to authorize NLRB jurisdiction over religious schools that were not "completely religious" or to not authorize such jurisdiction, because "Congress simply gave no consideration to church-operated schools." *Id.* at 504. As to the second question, the Court said that if the Act does not authorize such jurisdiction, there is no First Amendment violation; but if the Act does authorize such jurisdiction, there could be a First Amendment violation.

The Court quoted the Court of Appeals as saying, "At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems." *Id.* at 496. This Court then stated at 500, "In a number of cases, the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy,* 2 Cranch 64, 6 U.S. 118 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."[9]

Because both constructions were reasonably possible, the Court construed the NLRB statute in the manner that avoided the constitutional issue. By holding that the NLRB did not have jurisdiction over religious schools even if they were not "completely

---

[9] Chief Justice Burger correctly says this is the "essence" of Chief Justice Marshall's admonition even though Marshall in *Charming Betsy* spoke of a statute being construed to violate international law.

religious," the Court did not have to address the second question, whether the statute would be constitutional if it did give the NLRB jurisdiction over such schools. This principle of judicial restraint is sometimes called the "duty to save" the statute by giving it the construction by which it would be constitutional.[10]

To avoid a possible conflict with the First Amendment the Court thereby read into the NLRB statute an exception for religious schools even if they were not "completely religious."

The Foundation urges the Court to do the same here: to hold that employment issues in church schools are outside the jurisdiction of government because of the religious liberty guaranteed by the First Amendment.

IV. This step is justified because religious liberty is the first and foremost right guaranteed by the Constitution.

Religious liberty is the first of all human rights because rights themselves are the gift of God, and because religious liberty involves matters eternal rather than merely matters temporal.

---

[10] Adrian Vermeule, *Saving Constructions*, 85 Geo L.J. 1945 (1996-97). *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Construction Trades Council,* 485 U.S. 568, 575 (1988): "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

The foundational document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and says the rights of human beings are "unalienable" because they are "endowed by their Creator." Justice Douglas wrote in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952) that "We are a religious people whose institutions presuppose a Supreme Being," and in *McGowan v Maryland,* 366 U.S. 420, 562 (1961) he wrote in dissent,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Freedom of religion and freedom of expression were not given to us by the government through the First Amendment; they are, as the Declaration of Independence says, "endowed by [the] Creator." Government through the Constitution only "secures" the rights that God has already granted. And the recognition of these rights predates the Constitution by centuries if not millennia.

(A) The Biblical Foundations of Religious Liberty

We cannot fully appreciate the importance of religious freedom (sometimes called liberty of

conscience) to the Framers of the Constitution without recognizing the role the Bible played in their thought. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentences of the statute stated:

> Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States....

Professors Donald S. Lutz and Charles S. Hyneman conducted a thorough search of the writings of leading American political figures from 1760-1805 and found that 34% of all quotations in the Framers' writings came from the Bible.[11]

Liberty of conscience is a central principle the Framers derived from the Scriptures. In 1751 the Pennsylvania Assembly commissioned a bell to commemorated the 50th anniversary of the Charter of Privileges of 1701 and inscribed on the bell *Leviticus* 25:10: "Proclaim liberty throughout [all] the land unto all the inhabitants thereof." As they well knew, the words immediately preceding this verse are "And ye shall hallow the fiftieth year," the year of

---

[11] Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, American Political Science Review 189, 189-97 (1984); *see also* Charles S. Hyneman and Donald S. Lutz, *American Political Writing During the Founding Era,* Vols. I & II (Liberty Press 1983); Eran Shalev, *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War* (Yale University Press 2013).

jubilee. The bell rang again in July 1776 to celebrate the Declaration of Independence and is now known as the Liberty Bell.

The Hebrews observe the Passover to commemorate Moses leading the people out of bondage in Egypt into liberty in the Promised Land. Christians likewise cite these passages as well as New Testament passages such as "If the Son, therefore, shall make you free, ye shall be free indeed" (*John* 8:36), and "Stand fast, therefore, in the liberty with which Christ hath made us free, and be not entangled again with the yoke of bondage" (*Galatians* 5:1).

Civil and religious authority were to some extent separated in Israel; kings came from the tribe of Judah and priests came from the tribe of Levi. This separation is reenforced in *II Chronicles* 19:11 in which King Jehoshaphat, having reconstituted the judges, declares to the people,

> And behold, Amariah the chief priest is over you in all matters of the Lord; and Zebadiah the son of Ishael, the rule of the house of Judah, for all the king's matters...

The Bible values liberty of conscience so highly that duty to obey God is placed above duty to obey civil government, and sometimes disobedience to tyrants is obedience to God. Jesus told the Pharisees to "Render to Caesar the things that are Caesar's, and to God the things that are God's" (*Mark* 12:17).

When the apostles were prohibited from preaching the Gospel, they answered, "We must obey God rather than men" (*Acts* 5:29). In *Exodus* 1:17 we read that the Hebrew midwives "feared God, and did not as the king of Egypt commanded them [to kill the male Hebrew babies]." Daniel faced execution in a den of lions because he prayed to God in violation of King Darius's command (*Daniel* 6), and his companions Shadrach, Meshach, and Abednego faced execution in a fiery furnace rather than worship a graven image as commanded by King Nebuchadnezzar (*Daniel* 3). The early Christians, and Christians throughout the centuries into the present, have faced "dungeon, fire, and sword" rather than compromise their consciences.

(B) Medieval and Reformation Foundations of Religious Liberty

Medieval Catholic theologians and statesmen gave recognition to liberty of conscience and religious liberty, sometimes as a barrier to tyranny and sometimes as protection for the Church as it stood against the power of the State.[12]

The Magna Carta of 1215, by which Englishmen secured their ancient right against the tyranny of Norman rulers, began with a declaration that the

---

[12] *See generally* Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans 1999); James J. Walsh, *The Thirteenth, Greatest of Centuries* 338-91 (2nd ed., Catholic Summer School Press 1909).

Church should be forever free from government encroachment:

> 1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs for ever.[13]

Note that the Magna Carta recognizes the liberty of the church as an institution to be free from government control. Although sometimes violated, this principle remained in effect until 1534, when at the insistence of King Henry VIII Parliament passed the Act of Supremacy separating the Church of England from the Roman Catholic Church and making the king the Supreme Head of the Church. The First Amendment to the U.S. Constitution 205

---

[13] Magna Carta, art. I (1215); *reprinted in* 2 John Eidsmoe, *Historical and Theological Foundations of Law* 904 (Nordskog 2016).

years later was in part to prevent this kind of government infringement upon the church in America.

Martin Luther (1483-1546), as he stood before the Diet of Worms and refused to recant his writings, stood firm on liberty of conscience:

> My conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I cannot do otherwise, God help me. Amen.[14]

In his letter *Temporal Authority: To What Extent It Should Be Obeyed* he declared, "The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul."[15]

Calvinists (who constituted a strong majority of America's early settlers and the founding generation[16]) likewise believed in liberty of conscience. *The Westminster Confession of Faith*, drafted by the Westminster Assembly in 1643 at the

---

[14] Martin Luther, Speech Before the Diet of Worms (Apr. 18, 1521).

[15] Martin Luther, *Temporal Authority: To What Extent It Should Be Obeyed* (1523), *reprinted in* O'Donovan, *supra* note 12, at 591.

[16] Dr. Loraine Boettner, *The Reformed Doctrine of Predestination* 382 (Presbyterian and Reformed 1972).

call of the Long Parliament, declares in Chapter XX, Section 2:

> II. God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men, which are, in anything, contrary to his Word; or beside it, if matters of faith, or worship. So that, to believe such doctrines, or to obey such commands, out of conscience, is to betray true liberty of conscience: and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[17]

The following year (1644) John Milton, the Puritan author of *Paradise Lost* and a member of Oliver Cromwell's cabinet, strongly opposed Roman Catholics, Anglicans, and Royalists, but he defended freedom of conscience, and he declared in a speech for Parliament:

> What should ye do then, should ye suppress all this flowery crop of knowledge and new light sprung up and yet springing daily in this city? Should ye set an oligarchy of twenty engrossers over it, to bring a famine upon our minds again, when we shall know nothing but what is measured to us by

---

[17] *Westminster Confession of Faith*, ch. XX, § 2 (1643); reprinted in *Trinity Hymnal* 860 (Great Commission Publications 1990, 1999).

> their bushel? ... Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[18]

John Bunyan (1628-1688), the Puritan author of *Pilgrim's Progress,* convicted in 1660 of unauthorized preaching and failure to attend the Church of England, declared before the court:

> ...a man's religious views -- or lack of them -- are matters between his conscience and his God, and are not the business of the Crown, the Parliament, or even, with all due respect, M'lord, of this court. However much I may be in disagreement with another man's sincerely held religious beliefs, neither I nor any other may disallow his right to hold those beliefs. No man's rights in these affairs are secure if every other man's rights are not equally secure.[19]

Cambridge Puritan theologian William Perkins (1558-1602) declared that "God hath now in the New Testament given a liberty of conscience."[20] Perkins

---

[18] John Milton, *Areopagitica* (1644); *available at* The Online Library of Liberty; https://oll.libertyfund.org/quotes/51.

[19] John Bunyan, October 3, 1660; Transcript of Trial before Judge Wingate; *available at John Bunyan on Individual Soul Liberty,* www.pastorjack.org/?tag=individual-soul-liberty.

[20] 1 William Perkins, *Works* 529 (London, 1612-1618); *quoted by* L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea* 4, 21 (Presbyterian and Reformed Publishing 1992).

said further that God sometimes requires us to disobey, because sometimes "men are bound in conscience not to obey."[21]

Bishop Joseph Hall (1574-1656) insisted that "Princes and churches may make laws for the outward man, but they can no more bind the heart than they can make it."[22] Bishop George Downame (1560-1634) explained that "The conscience of a Christian is exempted from human power, and cannot be bound but where God doth bind it."[23]

John Locke (1632-1704), a major influence on the American founding generation,[24] wrote that "religion is the highest obligation that lies upon mankind,"[25] that "there is nothing in the world that is of any consideration in comparison with eternity,"[26] that "the care of each man's salvation belongs only to himself,"[27] and that no life lived "against the dictates of his conscience will ever bring him to the mansions

---

[21] 1 Perkins, *Works* 530; *quoted by* Van Til, *supra* note 20, at 23.

[22] 6 Bishop Joseph Hall, *Works* 649 (London 1863), *quoted by* Van Til, *supra* note 20, at 41.

[23] Bishop George Downame, *The Christian's Freedom* 102, 104 (London 1635), *quoted* by Van Til, *supra* note 20, at 41.

[24] See Donald S. Lutz, *The Origins of American Constitutionalism* 141-42 (1988). Lutz concluded that the founding generation quoted Locke more than any other source except the Bible, Montesquieu, and Blackstone. *Id.*

[25] John Locke, *A Letter Concerning Toleration* 46 (Patrick Romanell ed. 1955) (1688-89).

[26] *Id.* at 46.

[27] *Id.*

of the blessed."[28] The son of a Puritan lawyer, Locke was very much influenced by the Puritan tradition.

(C) The Colonial Foundations of Religious Liberty

While much of the groundwork for liberty of conscience was laid by the Puritans of England, Van Til says "Liberty of conscience triumphed in America, while it failed in England."[29] And the colonial charters and constitutions at the time of the American War for Independence clearly recognize and protect liberty of conscience, although some do so within the bounds of Christian orthodoxy:

Pennsylvania:

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority

---

[28] *Id.* at 34.

[29] Van Til, *supra* note 20, at 128.

> can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.[30]

Maryland:

> XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights....[31]

New Jersey:

> XVIII. That no person shall ever, within this Colony, be deprived of the

---

[30] Pennsylvania Constitution of 1776, Declaration of Rights, § II, avalon.law.yale.edu/18th_century/pa08.asp

[31] Maryland Constitution of 1776, art. XXXIII. avalon.law.yale.edu/17th_century/ma02.asp

> inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience; nor, under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.[32]

North Carolina:

> XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.[33]

Georgia:

> Art. LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the

---

[32] New Jersey Constitution of 1776 art. XVIII. avalon.law.yale.edu/18th_century/nj15.asp

[33] North Carolina Constitution and Declaration of Rights of 1776 art. XIX. avalon.law.yale.edu/18th_century/nc07.asp

> peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.[34]

South Carolina:

> XXXVII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.[35]

Massachusetts:

> Part the First, Declaration of Rights:
>
> Article II. It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the

---

[34] Georgia Constitution of 1777, art. LVI, avalon.law.yale.edu/18th_century/ga02.asp

[35] South Carolina Constitution of 1778 art. XXXVIII. avalon.law.yale.ed/18th_century/sc02.asp. Art. XXXVIII continues with provisions as to what constitutes orthodoxy.

> manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[36]

New York:

> XXXVIII. And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[37]

---

[36] Massachusetts Constitution of 1780, Declaration of Rights, art. II, www.nhinet.org/ccs/docs/ma-1780.htm

[37] New York Constitution of 1777, art. XXXIX,

Virginia:

> Declaration of Rights, Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other.[38]

In light of this Biblical, Reformation, and colonial background, it is understandable that James Madison submitted the religious liberty article of the Bill of Rights with this original wording:

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

Because there was no verbatim transcript of the first session of Congress, it is unclear exactly how or

---

avalon.law.yale.edu/18th_century/ny01.asp

[38] Virginia Constitution of 1776 and Declaration of Rights, §16. https://law.gmu.edu/assets/files/academic/founders/VA-Constitution

why the phrase "equal rights of conscience" was changed to "free exercise." It seems likely that the Framers used the term "exercise" because they wanted to be sure that religious liberty included not only the right to believe but also the right to act in accordance with that belief, although such action is implied in the term liberty of conscience.

Otherwise, religious liberty is meaningless. So long as there is no machine that can read the thoughts of the heart, there is liberty of conscience everywhere in the world. Even in totalitarian nations like North Korea and Iran, a person is free to believe whatever one chooses so long as he or she does not say or do anything about it. Religious liberty is meaningful in a legal and political context only when it extends to words and actions.

Thomas Jefferson's "wall of separation" metaphor comes from an 1801 letter by Jefferson to the Danbury Baptists in which he assures them that they need not fear the new federal of government because the First Amendment provides a "wall of separation" protecting the Danbury Baptists from government encroachment.[39]

On February 21, 1811, President James Madison vetoed a bill "incorporating the protestant Episcopal Church in the Town of Alexandria in the District of Columbia," because the bill "exceeds the rightful authority, to which Governments are limited by the

---

[39] Daniel L. Driesbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* 47-54, 113-24 (Crossway Books 1987).

essential distinction between Civil and Religious functions...."[40]

The Framers clearly regarded religious liberty as the first and foremost of our freedoms. Religious liberty has eternal, not merely temporal consequences; and as J. Howard Pew has noted, "From Christian freedom comes all other freedoms."[41]

CONCLUSION

Because religious liberty is the first and foremost of our God-given rights guaranteed by the Constitution, it is entirely appropriate that this Court invoke the First Amendment to establish that church employment matters are exempt from government control. By so doing, the Court can extricate itself from the quagmire of having to perpetually examine church doctrine, tradition, and polity to determine who is and is not a minister for purposes of a ministerial exception.

If the Court is not willing to take that step, the Foundation urges the Court to defer to the determinations of church authorities that their employees are ministers absent compelling reasons to the contrary.

---

[40] James Madison, Veto Act on Incorporating the Alexandria Protestant Episcopal Church (Feb. 21, 1811), *available at* https://millercenter.org/the-presidency/presidential-speeches/february-21-1811-veto-act-incorporating-alexandria-protestant.

[41] J. Howard Pew, *quoted by* Van Til, *supra* note 20, at 3.

Respectfully submitted,

JOHN A. EIDSMOE*
**Counsel of Record*
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*