Nos. 19-267 & 19-348

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES MORRISEY-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

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BRIEF *AMICI CURIAE* OF THE CENTER FOR INQUIRY, INC., AMERICAN ATHEISTS, INC., AND THE AMERICAN HUMANIST ASSOCIATION, IN SUPPORT OF RESPONDENTS

NICHOLAS J. LITTLE
CENTER FOR INQUIRY, INC.
1012 14th St. NW,
Suite 205
Washington, DC 20005

EDWARD TABASH
Counsel of Record
11500 West Olympic Blvd.,
Suite 400
Los Angeles, CA 90064
(310) 279-5120
etabash@centerforinquiry.org

[Additional Counsel Listed On Inside Cover]

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

ALISON M. GILL
AMERICAN ATHEISTS
718 7th St. NW,
Washington DC 20001

MONICA L MILLER
AMERICAN HUMANIST
ASSOCIATION
1821 Jefferson Place NW,
Washington DC 20036

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STATEMENT OF INTEREST

This amici curiae brief in support of the respondents is being filed on behalf of the Center for Inquiry (CFI), American Atheists, Inc. (American Atheists), and the American Humanist Association (AHA). Amici are non-profit corporations and have been granted 501(c)(3) status by the IRS. None has a parent company nor have they issued stock.[1]

CFI is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

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

The AHA is a national nonprofit membership organization based in Washington, D.C. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. The AHA has tens of thousands of members and over 242 local chapters and affiliates across the country. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity.

The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in the U.S. Supreme Court.

SUMMARY OF ARGUMENT

The legal relationship between church and state in the United States stands at a crossroads. The great achievement spearheaded by Thomas Jefferson and James Madison, guaranteeing both religious freedom and government neutrality "between religion and religion, and between religion and nonreligion," *Epperson v. Ark.*, 393 U.S. 97, 104 (1968) is under threat. The separation of church and state, that cornerstone of the American republic, which has spared the United States from the religious conflict and destruction all too familiar to the Europe from where the Framers descended, is at risk. In case after case, religious groups have sought to expand the "play in the joints," *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), that exists between the First Amendment's Free Exercise Clause and its Establishment Clause. Indeed, they have sought to widen that gap to such a degree that the Establishment Clause risks becoming

a dead letter, that would prevent nothing more than the creation of a government-run Church of the United States of America.

Religious groups have sought access to state funding across the board. When it comes to access to public funds, the notion that religious groups should be treated differently than secular ones raises howls of religious protest. Churches claim they must be treated exactly the same as comparable non-religious groups. They want religious providers of services to the public to have equal access to funding. They do not want religious groups to be excluded from state subsidies. Religious schools demand access to public money that is distributed in the form of vouchers and scholarships. Religious groups are insistent that when it comes to lining up for the financial benefits of participation in modern society, they shall not be denied their place.

Yet when the question of bearing the responsibilities of membership in society is raised, the response from religious groups is fundamentally different. It is then that they demand special treatment. They want to be recognized as different and to be exempt from the application of the basic laws that allow for a functional, pluralistic society. At the same time religious providers of social services seek money from tax payers for their work. They seek the ability to refuse to provide a full range of program services and the right to refuse not only to provide services to a particular individual but also to refuse referral or even disclosure that such services can be received elsewhere. Religious employers seek, and have frequently attained, exemptions from the civil rights laws society has deemed necessary to protect those susceptible to suffering discrimination. Religious individuals claim that their businesses should be exempt from laws

governing the provision of health care coverage to their employees. They further claim even when exemptions are granted that those exemptions do not go far enough, and that signing a form to take advantage of such an exception is, in itself, a religious imposition.

But in the cases now before this Court, the Catholic schools in question seek to push the envelope even further. They seek to take the ministerial exception, a historically-rooted doctrine which, grounded in the First Amendment, defends the right of religious ministries to determine their own leaders without government interference, and expand it into an all-encompassing special privilege. If the Court accepts the arguments of petitioners, it opens the door to a ministerial exception that cannot be sensibly limited. It tells those employees of religious groups that they have no recourse to the courts, no access to justice, if their employers decide to terminate them for any reason, be it gender, race, or based on a medical condition. Employers need not even advise these employees that the employers have retained such an absolute right of termination. The ministerial exception as envisioned by the petitioners goes far beyond defending their right to make merely religious-based decisions. Instead, it is one that allows them *carte blanche* to determine which employees are subject to the exception, in order to be able to terminate them for any reason.

Lawyers for petitioners, the Becket Fund for Religious Liberty, have been honest about petitioners' aim here. They do not seek a narrow ministerial exception that protects religious groups against government interference in the selection of their leaders and

preachers. Instead, they describes the ministerial exception as "something of a misnomer." Brief of Pet at 7, n.1. They want complete "ecclesiastical immunity." *Id.* Petitioners in this case seek to lift religious employers completely out of the realm of legal accountability and government regulation, and create a special legal right so that, if the employer merely defines a position as "ministerial," any legal inquiry must come to a halt.

The scope of this expansion would be staggering. Religious schools dominate the area of private education. However, any such decision could not logically be limited to education. If a teacher who a Catholic school did not require to be a Catholic is deemed ministerial and subject to exclusion from legal recourse, how can employees at religious hospitals be expected to have greater rights? Can a hospital group define its employees as ministerial, spreading their mission through their healing work and thereby exempt itself from all employment discrimination laws? Decisions such as *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) have blurred the boundaries between religious non-profit employers and for-profit ones, leaving no clear line as to who would or wouldn't qualify for such an exemption.

This Court in these and other cases must decide if the Establishment Clause still applies. If petitioners receive the "ecclesiastical immunity" they seek, then teachers at secular private schools will be protected by civil rights protections such as the Americans with Disabilities Act and the Age Discrimination in Employment Act, while otherwise identical educators in religious private schools will not be. This differen-

tial treatment, based solely on religion, would constitute a violation of the neutrality that the Establishment Clause guarantees. Amici accept the necessity of the ministerial exception pertaining to true religious leaders. However, its expansion as sought here would violate the Establishment Clause.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES A NARROW MINISTERIAL EXCEPTION

Amici do not come before this Court to argue that there is no ministerial exception. As this Court ruled in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the exception "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' is the church's alone." 561 U.S. 171, 194-95 (2012) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)). It would be clearly inappropriate in a country founded upon religious freedom and secular government for the government to require, for example, that the Roman Catholic Church should ordain women priests, or that an Orthodox synagogue should appoint a female rabbi. Such decisions go to the heart of the doctrines of religious organizations.

No religious group could be considered truly free if its leadership were appointed by the state. Indeed, such conflicts have characterized the relationships between church and state since at least the Eleventh Century and the Investiture Controversy that pitted Pope Gregory VII against Holy Roman Emperor Henry

IV.[2] It was such battles that Chief Justice Roberts referenced in his opinion in *Hosanna-Tabor*, 561 U.S. at 182-84, and which formed "the background [against which] the First Amendment was adopted." *Id.* at 183.

The Framers, then, were fully aware of the dangers of having the government choose religious leaders. Not only would such a selection deny religious freedom for the religions themselves, it would also represent the very establishment that the Bill of Rights sought to oppose. In Britain, after all, Church of England bishops were appointed by the head of state, and took seats in the upper chamber, the House of Lords. The right of a religion to pick its own leaders, spokespeople, or ministers is central to the religious freedom and freedom from establishment guaranteed by the First Amendment.

A. The Establishment Clause limits the scope of the ministerial exception

Were this narrow exception all that petitioners are seeking, this would be an easy case. However, petitioners seek to expand this idea of freedom to select their religious leaders into a blanket "ecclesiastical immunity," a broad doctrine which would isolate and protect any religious group from state scrutiny of any of its employment decisions, regardless of whether religious doctrines are involved.

Such an expansive protection from society's rules has no basis in the Constitution. This Court has made clear that the First Amendment provides no exemptions from laws of general applicability. *Employment*

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[2] Uta-Renate Blumenthal, *Investiture Controversy*, Encyclopaedia Brittanica, https://www.britannica.com/event/Investiture-Controversy (last visited Mar. 3, 2020).

Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-9 (1990). The ministerial exception, therefore, cannot emanate from a free exercise right to be exempt from laws such as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-29 (1967), the Americans with Disabilities Act (ADA), 24 U.S.C. § 12101 et seq. (1990), or Title VII of the Civil Rights Act (Title VII), 42 U.S.C. § 2000e et seq. (1964). There exists no such free exercise right to avoid complying with these laws of general applicability.

Any claim to a constitutionally mandated, free exercise exception here must coexist with the restrictions that the Establishment Clause places upon government action. As the first freedom referenced in the Bill of Rights, the Establishment Clause requires that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. As this Court has ruled, this prevents government favoritism and support either for one religion over others, or in favor of religion in general. *Epperson*, 393 U.S. at 104 ("The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."). An exemption going beyond the constitutional norm of equal applicability of all laws to all individuals and organizations violates the Establishment Clause.

The harm to be avoided is not state adjudication of matters involving religious groups. Such adjudication is commonplace, and, as this Court has long held, "[c]ivil courts do not inhibit the free exercise of religion merely by opening their doors to disputes." *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). What civil courts may not constitutionally do, however, is rule on matters that are "purely ecclesi-

astical." *Gonzalez v. Roman Archbishop of Manila*, 280 U.S. 1, 16 (1929). Where such a question of doctrinal interpretation exists, the matter is internal to the religious group, and "civil courts must defer to the 'authoritative resolution of a dispute within the church itself.'" *Jones v. Wolf*, 443 U.S. 595, 605 (1979).

B. Any ministerial exception must be narrow

If the purpose of a ministerial exception is to prevent the state's appointing religious leaders and officiants, and thereby interfering with the conduct of religious practice, its scope must be limited to only such situations. To do otherwise would simply be to grant legal privileges to only religious organizations as opposed to non-religious ones. This would constitute a violation of the government neutrality guaranteed by the Establishment Clause. A violation of the Establishment Clause would occur if a secular private school is subject to the strictures of the Americans with Disabilities Act when determining whether to end the employment of a woman with breast cancer, but a religious school is not.

Exceptions are by their nature narrow. They are departures from the norm of universal applicability, which is the very principle that underlies a nation of laws. If cast as broadly as the "ecclesiastical immunity" sought by petitioners, the exception would swallow the rule in its entirety. Granting religious groups the right to ignore employment protection laws when it comes to decisions regarding their leaders is sufficient. It cannot, though, be extended to allow all employees in any capacity to be regarded as religious leaders for the sole purpose of depriving them of generally applicable employment rights, unrelated to a denomination's doctrine.

There is then a clear dividing line when seeking to limit the scope of the ministerial exception. It exists as needed to prevent the type of harm to religious freedom that occurs when courts attempt to rule on "purely ecclesiastical" matters. *Gonzalez*, 280 U.S. at 16. The ministerial exception should not be available to religious groups if doctrinal questions are not involved. Here, neither petitioner presents any religious practice issue that should be beyond the power of civil courts to adjudicate.

The legislative exemptions present in Title VII and the ADEA already include such a restriction. In creating the exemptions, Congress took the notion of a ministerial exception, and applied it to all employees of religious non-profits, but specifically limited to the granting of employment preference to co-religionists. In *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 482 U.S. 327, 330 (1987), this Court held that this did not violate the Establishment Clause.[3] The situation here, however, is much broader. There is no claim that these teacher terminations were based on theological considerations. Petitioners seek instead a sweeping right to ignore employment law in any situation.

That this Court has chosen to extend the ministerial exception beyond the clear line requirement of a religious doctrinal issue in *Hosanna-Tabor*, does not, however, mean that it should continue to be expanded without limit. *Hosanna-Tabor,* 565 U.S. at 194. As Justice Alito noted in concurrence, "religious authorities must be free to determine who is qualified to serve

[3] Amici believe this decision to be incorrect, and that such a broad reaching exemption violates the government neutrality towards religion guaranteed by the First Amendment.

in positions of *substantial religious importance*." *Id.* at 200 (Alito, J. concurring) (emphasis added). Where a position does not meet this high bar, there can be no exception. As the Court has recognized, there is no hard and fast rule as to which positions are of substantial enough religious importance. However, it should be necessary, though not sufficient, that a religious group considers a position religious enough to require that it be filled by a member of that faith. If a religious organization determines that any person is eligible for a particular position (as was the case with Respondent Biel, *Biel v. St. James. Sch.*, 911 F.3d 693, 605 (9th Cir. 2018), then it stretches credulity for that same religious group to later claim that a civil court would threaten its religious freedom and independence by adjudicating a matter concerning the termination of such employees.

To keep within the proper boundaries, and not the sweeping immunity petitioners admit to seeking, Brief of Pet. at 7 n.1, the ministerial exception should apply only in cases where the position has a true, unmistakable religious purpose. Petitioners should not be able simply to point to a single or a limited religious element in a position, such as supervising prayers, or teaching religious classes along with secular subjects, and then assert a claim that a job is now so central to the religious mission that no court can adjudicate the legality of termination of employment. Petitioners claim not only that their schools may legally terminate teachers for religious reasons, they further insist that they may terminate teachers for explicitly non-religious reasons. If upheld, petitioners' position would allow unlimited scope in terminating any employee, regardless of that employee's actual duties.

II. A BROAD EXEMPTION WOULD CAUSE MAJOR DAMAGE

A. Religious schools dominate the private school sector

Private education plays a very significant role in the U.S. system. In 2015-16, one quarter of American schools, or almost 35,000 individual schools, made up the private sector for Pre-Kindergarten to Grade 12.[4] These schools enrolled over 5,750,000 students, or more than 10% of the total school enrollment in the nation.[5] Of these students, 78.4% attend religious private schools.[6] Private schools provide almost a half million full time equivalent teaching positions, of which 69.8% are at religious schools.[7]

Of course, private education in the United States is not limited to pre-kindergarten through 12th grade. At the level of higher education, there are 1,700 private, non-profit colleges and universities.[8] Of these schools, nearly 1,000 have a religious affiliation.[9] The degree of religiosity of each particular institution of higher

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[4] *Facts*, Council for American Private Education, https://www.capenet.org/facts.html (last visited Mar. 6, 2020).

[5] *Id.*

[6] *Characteristics of Private Schools in the US*, National Center for Education Statistics (Aug. 15, 2017), *available at* https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2017073.

[7] *Id.*

[8] Morgan Wegner, *Secular Students at Religious Colleges*, Best Colleges Blog (May 31, 2019), https://www.bestcolleges.com/blog/secular-students-at-religious-colleges/.

[9] *Colleges and Universities with Religious Affiliations*, Encyclopedia.com, (Jan. 26, 2020), https://www.encyclopedia.com/education/encyclopedias-almanacs-transcripts-and-maps/colleges-and-universities-religious-affiliations.

learning of course varies. Some schools were founded by a religious group and have largely moved away from association with that group. Others remain closely tied both in the public eye and in their demographics with a particular religious organization.[10] Others still maintain a strict religious code of conduct.[11]

Millions of students in America are educated at religious institutions. Hundreds of thousands of teachers, lecturers, and professors are employed by them. The days of Catholic schools being staffed completely by nuns who have dedicated their lives to service to the Church are long gone. In 2018, teachers from religious orders (nuns and monks) numbered only 3,000 in the US Catholic school system, only 3% of Catholic school staff.[12] The number of nuns in the nation has fallen from 180,000 in 1965 to 45,000 in 2018.[13] And the average age of those remaining as teachers has risen. In one order it was 71 in 2008 and 77 in 2018.[14]

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[10] The University of Notre Dame, for example, reports that 80% of its student body is Roman Catholic. Ellie Domborwski, *Catholicism at Notre Dame*, The Observer (Feb. 8. 2019), https://ndsmcobserver.com/2019/02/catholicism-at-notre-dame/.

[11] For example, Brigham Young University forbids behavior by students including sexual relations outside of heterosexual marriage, use of profane and vulgar language, and the consumption of coffee or tea. *Church Educational System Honor Code*, BYU University Policies, https://policy.byu.edu/view/index.php?p=26 (last visited Mar. 6, 2020).

[12] Melanie Burney and Kristen Graham, *Catholic schools have fewer nuns, but those who remain inspire*, Philadelphia Inquirer, (Apr. 21, 2018) *available at* https://www.inquirer.com/philly/news/new_jersey/catholic-school-teachers-nuns-decline-holy-cross-academy-new-jersey-20180421.html.

[13] *Id.*

[14] *Id.*

It seems unlikely that the trend of religious schools' employing lay teachers will reverse itself.

Any decision by this Court that allows religious schools to claim immunity from the protections for their teaching employees afforded by labor and civil rights laws will adversely impact high numbers of teachers. While this Court referenced the importance of certainty for the employer, *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission" *citing Amos*, 483 U.S. at 336), no consideration was given to the absence of certainty for an employee. Whether civil rights laws will protect an employee against dismissal is an extremely important factor that allows that individual to plan for the future. A lay teacher, whose job title contains no religious reference, and who was not even required to be a member of the faith of her employing organization, would have no advance warning that a diagnosis of breast cancer would lead to her termination, which would also result in the loss of her health insurance coverage.

B. Religious hospital groups are widespread

Sweeping as the impact of petitioners' claimed "ecclesiastical immunity" would be on the large numbers of Americans employed in the private education sphere, there is nothing in the theology or legal theory of the ministerial exception that would limit its scope to only religious schools. Religious groups maintain that religious schools are integral to their mission. Such schools are one of the core ways in which they spread their faith. However, religious organizations also provide a range of other services and equally see such services as required by their faith and integral to

proselytizing. Religiously affiliated providers are common in health care in the United States, from hospital groups, to care facilities for the elderly, to social service providers. All these areas would be adversely impacted by an unlimited ministerial exception.

In 2016, after a long period of hospital consolidation resulting from significant growth of religiously affiliated hospital groups, one fifth of hospital beds in the United States were located in religiously affiliated hospitals.[15] Three quarters of these religious hospitals were part of Catholic groups, and four of the ten largest health care systems in the United States were Catholic.[16] Between 2001 and 2016, while the number of hospitals overall shrunk, the number of Catholic hospitals in the US rose by 22%. In Washington state, for example, more than 40% of hospital beds in 2016 were in Catholic hospitals.[17] From 2001 to 2011, looking only at acute care facilities, the number of secular non-profit facilities fell by 12%. The number of public facilities fell by 31%, and the number of Catholic nonprofit acute care facilities rose by 16%.[18]

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[15] *The Growth of Religious Health Care Systems*, Advancing New Standards in Reproductive Health, UCSF, https://www.ansirh.org/research/growth-religious-healthcare-systems (last visited Mar. 6, 2020).

[16] *Id.*

[17] Anna Barry-Jester & Ameia Thomson-DeVeaux, *How Catholic Bishops are Shaping Healthcare in Rural America*, FiveThirtyEight (July 25, 2018), https://fivethirtyeight.com/features/how-catholic-bishops-are-shaping-health-care-in-rural-america/.

[18] Nina Martin, *The Growth of Catholic Hospitals by the Numbers*, ProPublica (Dec. 18, 2013), https://www.propublica.org/article/the-growth-of-catholic-hospitals-by-the-numbers.

In hospitals in the United States, over three million people are employed in the area of "Healthcare practitioners and Technical Occupations."[19] Assuming staffing rates are stable between religious non-profit hospitals and others, this represents over 670,000 workers employed by religious non-profit hospitals to provide health care to patients, and thus to further the religious based mission of the organization. This number, of course, does not include groups such as counsellors and educators employed by the hospitals, who equally can be seen as advancing the religious goals of the organization.

Moreover, approximately 85% of non-profit retirement communities are religiously based.[20] Religious organizations exist across the entire spectrum of providing services. For example, religious communities in the United States provide 130,000 alcohol recovery programs, 120,000 programs to help the unemployed, and 26,000 active ministries for people living with HIV.[21] These programs range from small volunteer run groups to larger, more established endeavors with multiple paid employees. All of these health care and social service programs can claim their employees are acting to spread their religious

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[19] *May 2018 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 622000 – Hospitals*, U.S. Bureau of Labor Statistics, *available at* https://www.bls.gov/oes/2018/may/naics3_622000.htm.

[20] *Religious exemptions and LGBT service providers*, SAGE (Jan. 4, 2018), https://www.sageusa.org/news-posts/religious-exemptions-and-lgbt-elder-services/.

[21] Brian Grim, *Religion may be bigger business than we thought. Here's why*, World Economic Forum (Jan. 5, 2017), https://www.weforum.org/agenda/2017/01/religion-bigger-business-than-we-thought/.

mission in the same way as would a teacher at a religious school. The expansive ecclesiastical immunity sought by petitioners would then apply to all such workers. Millions of American employees would thus be removed from the coverage of civil rights employment laws.

C. An expansive exception may not be limited to non-profit organizations

A ministerial exception that was extended to include teachers, doctors, nurses, alcohol and drug counsellors, retirement home coordinators, job skills trainers and countless other types of workers employed by non-profits would be damaging enough to the system of laws designed to protect employees against discrimination. But as a result of recent legal decisions, it is unclear that such an exemption could even be limited to the non-profit sphere.

In *Hobby Lobby*, 573 U.S. at 690, this Court allowed a for-profit closely held corporation to sue for an exemption under the Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb et seq. (1993). The arts and crafts store had sued, demanding the same exemption from the contraceptive mandate of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18001 et seq. (2010), which religious non-profits had been offered by the Department of Health and Human Services. *Hobby Lobby*, 573 U.S. at 698-99. Hobby Lobby's statement of purpose commits its religious owners to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with religious principles." *Id.* at 703.

In finding that RFRA protected private, for-profit corporations, this Court noted that, as with religious non-profits, "furthering [for-profit corporations'] reli-

gious freedom also 'furthers individual religious freedom." *Id.* at 709. Because the owners of the corporation were so closely identified with it, their religious goals and missions were the goals and missions of the corporate entity. Requiring the corporation to provide insurance that includes methods of contraception alleged to be abortifacients was no different in this Court's majority opinion than requiring the individual owners to do so.

Applying the same rationale to the current situation, it is reasonable to wonder if a private, for-profit organization, run on religious principles, could equally claim that both its religious freedom and its ability to further a religious mission were unconstitutionally restricted by government interference in that organization's employment decisions. A broad ministerial exception, such as that suggested by Justice Thomas would require civil courts "to defer to a religious organization's good-faith understanding of who qualifies as its minister," *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J. concurring). If for-profit corporations can assert the same rights as religious organizations, then the religious owners of a for-profit corporation would be entitled to the same accommodation of their good faith determination of who best serves and advances the religious mission of the corporation.[22]

If this Court gives petitioners the expansive ecclesiastical immunity which they seek, there is no limit to how far this can reach. Allowing such a broad exemption, even if it could be restricted only to the field of

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[22] While *Hobby Lobby*, 573 U.S. at 717, dealt with a closely held corporation, the case does not explicitly exclude publically traded for-profit corporations from the same protections. Instead, the Court noted that "it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims." *Id.*

religious education, would already adversely impact the lives of large numbers of American workers. Worse yet, it is far from certain that it would even be possible to restrict such immunity to only the sphere of religious education. It would undermine the very purpose of civil rights laws regarding employment and also privilege religion in such a way that would violate the Establishment Clause. Any exception granted must therefore remain quite narrow, tightly defining those leadership positions covered. Otherwise, we will have an expansive immunity that cannot be contained, and that jeopardizes the rights of countless employees.

III. THE PURPOSE OF THE CIVIL RIGHTS LAWS

Religious freedom is indeed a critical value in our society. However, such freedom coexists with multiple other values of equal importance. Therefore, when determining the extent of a claimed religious exemption that impacts third parties, this Court must take great care to ensure that the harm to those other individuals is avoided as much as possible.

There is no doubt that the exception sought here harms third parties. The claimed right to hire and fire at will, completely immunized from legal scrutiny, is a right to discriminate against individuals who would otherwise be protected by our nation's civil rights and employment laws. Such harm has long been recognized by this Court as a variable that must be considered. *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (striking down a Sabbath day law as a violation of the Establishment Clause because it "took no account of the interests of the employer or *those of other employees who do not observe a Sabbath*.")(emphasis added); *T.W.A. v. Hardison*, 432 U.S. 63, 81 (1977) (Sabbatarian employee had no right to a change in

shift structure as that change would "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath."); *United States v. Lee*, 455 U.S. 252, 261 (1982) (despite religious objections, Amish employers must pay social security contributions for their employees because not doing so would harm those employees' interests and would "operate [] to impose the employer's religious faith on the employees.")

Congress has, over decades, worked to develop a comprehensive structure of employment protection through the civil rights non-discrimination laws. The underlying concern behind these laws is the most crucial value of equality. Just as our nation was born on the principal of freedom of conscience in matters of religion, additionally, "we are a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). That path to equality has been long and tortuous, strewn with many setbacks along the way. Full equality for all has not yet been achieved. Our commitment to equality, generally, even as embodied in the Fourteenth Amendment, is further bolstered by the mandate of the religion clauses of the First Amendment requiring the equality of both believers and nonbelievers. Such equality is not served if only religious claimants have exemptions from generally applicable laws that are unavailable to anyone else.

In seeking to defend equality, Congress has enacted a series of laws designed to protect equal opportunity for all, not just confined to their relations with the government, but also in fundamental areas of life where such equality has been historically absent. These laws, which are designed to protect the fundamental human dignity of everyone, regardless of race or religion, sex

or age, disability or other protected characteristics, have long been upheld by this Court and repeatedly recognized as serving "compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

Where claims of religious freedom have come into conflict with the government interest of preserving equality, religious freedom has never been seen as entitled to some automatic priority which would immunize the religious from having to abide by laws binding on everyone else. *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968) (describing as "patently frivolous" the notion that the Civil Rights Act was invalid and could not force a restaurant to serve African American customers because of the owner's religious belief in segregation); *Bob Jones University v. U.S.*, 461 US. 574, 604 (1983) ("[A] fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits" places on a university which defended its racially discriminatory policies on religious grounds.)

Religious organizations already have the right not to hire a woman priest or imam, based on the tenets of their religion. The expanded ecclesiastical immunity now sought by petitioners is the ability to hire and fire[23] anyone, for any reason whatsoever, even if that reason is unavailable to other employers under any civil rights law, and for the terminated individual to have no legal recourse to challenge a religious employer's decision.

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[23] Such an exception would go beyond hiring and firing, to include differential treatment with respect to pay and benefits, and even allowing harassment.

The exception must be narrowly confined to pertain to only those employees whose positions involve actual religious leadership. As this Court has interpreted the exception, no religious justification is required to invoke it. "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." *Hosanna-Tabor*, 565 U.S. at 194. As applied, it has been held to negate the need to "preclude any inquiry whatsoever into the reasons behind a . . . ministerial employment decision." *Aliciea-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698,703 (7th Cir. 2003). Petitioners here, by claiming protection under the ministerial exception, do not claim a religious reason for having terminated respondents. The logical result of petitioners' claims would be that even if they terminated respondents for being diagnosed with breast cancer, or for being elderly, it simply does not matter.

There are already many cases of the ministerial exception being claimed in such non-religious situations. *E.g.*, *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1246 (10th Cir. 2010) (female employee paid less than equivalent male employee); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657 (7th Cir. 2018) (teacher terminated after diagnosis of brain tumor); *Rosati v. Toledo, Ohio Cath. Diocese*, 233 F. Supp. 2d 917, 919 (N.D. Ohio 2002) (trainee nun terminated, resulting in loss of health insurance, after diagnosis of breast cancer); *Gomez v. Evangelical Lutheran Church in Am.*, No. 1:07CV786, 2008 U.S. Dist. LEXIS 61143, at *5 (M.D.N.C. Aug 7, 2008) (Title VII claims of minister alleging racial abuse barred by ministerial exception).

When determining how far any exemption should go, this Court must examine the costs of that exemp-

tion, especially those to be borne by innocent third parties. Granting petitioners the sweeping immunity they seek will adversely impact job security for millions of Americans, including those, such as racial minorities, women, the disabled, and the elderly, for whom Congress has enacted legislative protections. To allow religious organizations *carte blanche* to discriminate in employment decisions regardless of theological justifications, and then to refuse to look further, granting deference "to a religious organization's good-faith understanding of who qualifies as its minister," *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J. *concurring*), is a recipe for unlimited immunity. This will engender the return of invidious discrimination to large swathes of the workforce.

IV. RELIGIOUS GROUPS HAVE SOUGHT TO PLAY BOTH SIDES OF THE FENCE

The guaranteed freedom of religion is balanced by the government neutrality promised in the Establishment Clause.

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson, 393 U.S. at 103-04.

This neutrality is characterized by a balancing act. The more special advantages and benefits that are given to religious groups and individuals in the name

of protecting religious freedom (as opposed to comparably placed secular groups and individuals), the further the balance tilts towards the religious favoritism prohibited by the Establishment Clause. In between the protection of religious freedom guaranteed by the Free Exercise Clause, and the government neutrality mandated by the Establishment Clause, there exists a space where government action is permitted, but not constitutionally required.[24] This Court has referred to this area of permitted, though not mandated action as "room for play in the joints." *Walz*, 397 U.S. at 669. Recently, however, religious groups have been seeking to place a finger on the scales and to distort the balance, pushing for ever more benefits and privileges for religion alone. They have sought both to reduce the realm of government actions prohibited by the Establishment Clause and increase those commanded by the Free Exercise Clause. In doing so, they distort *Walz*'s "play in the joints," *id.*, and seek to eliminate *Epperson*'s guarantee of government neutrality. 393 U.S. at 104. If these attempts are successful, religious groups will have succeeded in writing the Establishment Clause out of the Constitution.

A. Demands for exemptions from laws of general applicability

Religious groups have repeatedly demanded exemptions from society's laws, both for individual adherents of their faith, and for organizations. As discussed *supra*, this Court has determined that there is no

[24] Of course, the scope of this space remains under dispute, with amici seeking its reduction from the present understanding, as well as opposing its existence. Current law, however, recognizes such space.

constitutionally mandated requirement for exemptions from laws of general applicability, unless they were designed for the purpose of discriminating against religion. *Smith*, 494 U.S. at 886. In his opinion, Justice Scalia warned that the alternative was grim indeed, as "[a]ny society adopt[ing] such a system would be courting anarchy." *Id.* at 888. He noted that America's religious diversity, as well as its commitment to religious freedom, would make such a system of exemptions impossible. *Id.* ("[P]recisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.")

Ignoring this warning, however, Congress passed RFRA, and religious organizations have used both that statute (along with the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq. (2000) and the state level equivalents) and claims under the First Amendment to continue to seek exemptions from generally applicable laws and policies. In *Hobby Lobby*, 573 U.S. 682, and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), for-profit and non-profit religious groups respectively demanded to be exempt from complying with the Affordable Care Act's Contraceptive Mandate.[25] In *Holt v Hobbes*, 574 U.S. 352, 356 (2015), a Muslim prisoner was granted an exemption from a prison rule prohibiting the wearing of beards. Religious groups have repeatedly claimed a right of individual businesses, most notably in the

[25] The non-profits, in fact, demanded an exemption from the exemption, claiming that signing a form indicating they wished not to comply was, itself, a religious burden. *E.g. Geneva College v. Sec'y United States H.H.S.*, 778 F.3d 422, 428 (3rd Cir. 2015).

area of marriage services, to be exempt from state laws prohibiting discrimination based on sexual orientation. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (baker who refused to provide a same sex couple with a wedding cake claimed religious freedom and freedom of speech required him to be exempted from state nondiscrimination statute); *Washington v. Arlene's Flowers, Inc.*, 193 Wn.2d 469 (Wash. 2019) (florist denied exemption from anti-discrimination statute after refusal to provide flowers for same sex couple), *petition for cert filed*, Sept. 11, 2019. Religious groups that provide social services, such as adoption agencies, have challenged rules that require all receivers of government funds to provide such services without discrimination. They claim that the enforcement of such a requirement violates their religious freedom. *E.g. Fulton v. City of Phila.*, 922 F.3d 140, 147 (3d Cir. 2019) (refusing injunction sought by Catholic adoption agency which refused to place children with same sex couples), *cert. granted by Fulton v. Phila.*, 2020 U.S. LEXIS 961 (U.S., Feb. 24, 2020).

In all these cases, religious groups have asserted that religious adherents, alone, should not be required either to engage in activity or refrain from activity that government may require or prohibit with respect to everyone else. For only the religious to have such exemptions violates the Establishment Clause.

B. Demands for access to public funding

This Court has historically often held that government bodies may not provide funding to religious groups, for to do so would violate the Establishment Clause. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions,

whatever they may be called, or whatever form they may adopt to teach or practice religion."); *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971) (striking down a state law that reimbursed religious schools for teachers' salaries.). Yet this apparently self-evident notion, along with stricter requirements held by 38 states in the form of No Aid provisions in their constitutions, have come under serious challenge as religious organizations, while simultaneously claiming a right to be exempt from many of society's laws, have demanded access to society's pocket book in the form of funding for religious activities.

These funding claims have taken many forms. Religious schools have insisted they are entitled to receive tax payer dollars through voucher programs which are made available to students in any state. *E.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (upholding the constitutionality of school vouchers' in Ohio being used at religious schools, provided the aid was given to parents, not to the schools). Religious organizations have pushed for more direct access to government money. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017), this Court ruled that Missouri could not exclude a church from a program that provided public funds for the resurfacing of children's play areas, despite that state's No Aid provision, because this exclusion would violate the rights of the church. More recently, in *Espinoza v. Montana Dept. of Revenue*, 393 Mont. 446 (2018), *cert. granted* June 28, 2019 (Docket No. 18-1195, arguments heard Jan. 22, 2020), this Court heard arguments that religious freedom similarly mandated a state to allow religious schools to receive money from its voucher program, again despite a state No Aid clause. Religious groups have moved from arguing that states may fund religious activities if they choose,

to arguing that if states fund any activities, they cannot exclude religious groups from also receiving such funds. And, as seen *supra* in *Fulton*, 922 F.3d 140, religious groups now claim that once they receive such funds, they are entitled to special exemptions from the requirements placed on secular recipients, which are meant to guarantee equal treatment for the beneficiaries of such publicly funded services.

C. The future of the proper interpretation of the Establishment Clause is uncertain

The Establishment Clause, in the sense of government neutrality "between religion and religion, and between religion and nonreligion," *Epperson*, 393 U.S. at 104, is under serious attack. In order to defend this fundamental constitutional principle, this Court must act to defend the principle of neutrality. Such neutrality is violated if petitioners are granted a special right to ignore civil rights laws dealing with employment discrimination for any position which they choose to define as sufficiently ministerial. No secular group is granted this right. Nor should it be. In order to preserve the true meaning of the Establishment Clause, and to show neutrality towards nonreligion, this Court must therefore limit any ministerial exemption to cases in which it is strictly necessary to defend the freedom of a religious organization to appoint its own leaders without government interference. Any definition of what constitutes a leader must be sufficiently narrow so that the exception remains just that. It must be a true exception to the rule, not a sweeping "ecclesiastical immunity" that grants religious organizations, religious non-profits, and even religious owned for-profit corporations the right to ignore the rules that

Congress has put in place to defend the fundamental constitutional value of equality.

CONCLUSION

For the above reasons, this Court should affirm the judgments of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NICHOLAS J. LITTLE
CENTER FOR INQUIRY, INC.
1012 14th St. NW,
Suite 205
Washington, DC 20005

ALISON M. GILL
AMERICAN ATHEISTS
718 7th St. NW,
Washington DC 20001

EDWARD TABASH
Counsel of Record
11500 West Olympic Blvd.,
Suite 400
Los Angeles, CA 90064
(310) 279-5120
etabash@centerforinquiry.org

MONICA L MILLER
AMERICAN HUMANIST
ASSOCIATION
1821 Jefferson Place NW,
Washington DC 20036

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