No. 10-553

In the

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of the *Petitioner*.

Steven W. Fitschen
Counsel of Record
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Sources:

INTEREST OF *AMICUS CURIAE*[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see

---

[1] Petitioner and both Respondents have consented to the filing of this Brief. The letters of consent from Counsel for the Petitioner and both Respondents have been lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

religion treated as the Framers of the First Amendment intended and seeks to clarify what the religion clauses of the First Amendment really mean.

SUMMARY OF THE ARGUMENT

This Brief expands upon one argument raised in the Brief for the Petitioner Hosanna-Tabor (the "Church"), and one point raised in the Church's Petition for Writ of Certiorari. Specifically, this Brief describes the division within the federal courts of appeal as to whether the ministerial exception is grounded in the Free Exercise Clause only, or upon a combination of the Free Exercise and Establishment clauses. After noting that the overwhelming majority of the courts of appeals ground the exception in both the Free Exercise or the Establishment Clauses, the Brief surveys scholarship and historical documents to conclude that the strongest evidence exists that the ministerial exception is constitutionally required under both religion clauses of the First Amendment. This conclusion is bolstered by the prominence of the "two kingdoms" theory in the Founding era, a theory positing the existence of two jurisdictionally distinct sovereigns—one, a sovereign over earthly or temporal matters (*i.e.*, the civil government), the other, a sovereign over spiritual matters (*i.e.*, religious institutions).

Finally, as a result of the two kingdoms theory and the nature of the First Amendment religion clauses' jurisdictional limit, this Brief concludes by explaining that the jurisdictional limitation implies

the proper disposition of a ministerial exception case is for courts to dismiss the case at the earliest possible juncture because they simply lack power to adjudicate matters affecting the internal governance of religious institutions. Furthermore, the application of the exception should be broad and robust, in light of the history supporting the jurisdictional independence of religious institutions from the civil government.

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER CASES INVOLVING THE INTERNAL AFFAIRS OF RELIGIOUS INSTITUTIONS BECAUSE THE RELIGION CLAUSES OF THE FIRST AMENDMENT CREATE A STRUCTURAL BARRIER TO SUCH JURISDICTION.

Although this Court has not ruled on a ministerial exception case, it should not be assumed that a lack of review from this Court indicates that the doctrine is somehow novel or without proper foundation in the Constitution. Rather, the ministerial exception is implicit within the First Amendment and fosters the type of religious self-governance the Founders intended. As set out more fully in the Church's Brief, (Br. of Pet'r at 15-37), the federal courts of appeals have correctly concluded that the Constitution requires judicial abstention in most disputes between religious institutions and their employees, despite the fact that the circuits do not fully agree on the precise origin of the exception in the Constitution. The majority of the lower courts

have correctly grounded the exception in the Free Exercise Clause and the Establishment Clause.[2] This grounding of the exception in the religion clauses of the First Amendment arises out of a prominent view at the Founding that religious institutions possessed a God-ordained authority, equal to the authority of the civil authority, to self-govern their internal affairs. This "two kingdoms" perspective (*i.e.*, the kingdom of the spirit and the kingdom of the temporal) created the basis for independent religious governance from the civil government. This independence implies that "civil courts are not . . . competent to adjudicate religious questions, and [consequently, they must] defer to religious tribunals on matters of religious law." Angela C. Carmella, *Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, & the Common Good*, 110 W. Va. L. Rev. 403, 413 (2007).[3]

---

[2] As explained briefly below and as the Church argued in its Brief, at 33-37, the right to religious association may provide an additional basis for the exception. To the extent the ministerial exception is *also* grounded in those association protections, *see infra* at n.9, this additional grounding only strengthens the arguments set forth *infra* at 23-27.

[3] The institutional independence of religious institutions and the state are not the same as complete separation of everything religious from everything governmental—a notion not at all required by the Constitution. The Constitution, under the Establishment Clause, clearly permits governmental acknowledgment, accommodation, and encouragement of religion. *See* Steven W. Fitschen, *Religion in the Public Schools after* Santa Fe Independent School District v. Doe*: Time for a New Strategy*, 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001).

Therefore, because the ministerial exception is one manifestation of the institutional independence of religious groups from civil government, cases implicating the exception should be dismissed at the earliest possible state. This is so because the dispute simply lies outside the bounds of the court's authority (*i.e.*, the dispute lies within a different "kingdom"), thereby preventing the court from considering the case. Thus, once a court finds that the case qualifies for application of the exception, its only option should be for that court to recognize its lack of power to rule and dismiss the case.

A. The Federal Courts of Appeal Have Grounded the Ministerial Exception, Variously, on Free Exercise and Establishment Clause Principles.

Although every court of appeals to have faced the question has recognized the ministerial exception,[4] the basis for recognizing the exception has varied slightly within the courts. In order to give this Court perspective on the lower court's holdings, your *Amicus* will first briefly outline the division below, followed by highlighting the significant similarities within the circuits.

---

[4] The Federal Circuit has not ruled on whether the constitution requires application of the ministerial exception in cases involving the internal governance of religious institutions. As the Church pointed out in its Petition for Writ of Certiorari, however, the absence of ministerial exception cases is the result of the Federal Circuit's limited jurisdiction. (Pet. for Writ at 9.)

1. Nine courts of appeal have noted Free Exercise and Establishment Clause bases for application of the ministerial exception.

The Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have noted that the ministerial exception is grounded on both Free Exercise and Establishment Clause principles of the First Amendment. *Rweyemamu v. Cote*, 520 F.3d 198, 208-09 (2d Cir. 2008); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 306, n.7 (4th Cir. 2004); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000);[5] and *EEOC v. Catholic University*, 83 F.3d 455, 460-61, 465, 467 (D.C. 1996).

---

[5] The Eleventh Circuit has recently reiterated the Free Exercise and Establishment Clause bases for the ministerial exception in an unpublished opinion in *McCants v. Alabama-West Florida Conf. of the United Methodist Church*, 372 Fed. App'x. 39, 42 (11th Cir. 2010).

2. Three courts of appeal have grounded the ministerial exception on Free Exercise principles alone.

The First, Third, and Fifth Circuits have recognized that if they were to interfere with the ministerial employment decisions of churches, they would violate the church's rights under the Free Exercise Clause. *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3rd Cir. 2006); and *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999).

It is important here to note that, although these circuits have only explicitly grounded their understanding of the ministerial exception upon Free Exercise principles, none of these three circuits have *rejected* the Establishment Clause as an appropriate additional basis for the ministerial exception. *See, e.g., Petruska*, 462 F.3d at 310-11 ("Because we conclude that Petruska['s] . . . Title VII, civil conspiracy, and negligent retention and supervision claims are barred by the Free Exercise Clause, we need not address those claims further [under the Establishment Clause]."). Further, each has even included language in their reasoning sounding very much in *Establishment Clause* principles.

For example, the First Circuit explained that where a case involves a dispute over church "doctrine and practice," "judicial intervention comprises impermissible entanglement in the

church's affairs. *Natal*, 878 F.2d at 1577. *See also, Petruska*, 462 F.3d at 307 (explaining that decisions about who will perform "constitutionally protected spiritual functions" are "protected from governmental interference."); and *Combs*, 173 F.3d at 351 (invoking disestablishment principles in protecting "the constitutional mandate to preserve the separation of church and state").

* * *

Put simply, even where the circuits have appeared to lack complete unity over the grounding of the ministerial exception, the various courts' conclusion is uniform—namely, the First Amendment requires the ministerial exception. In other words, no circuit, once faced with the opportunity to apply the ministerial exception, has rejected its viability as a constitutional doctrine. Thus, as the Second Circuit noted, the ministerial exception does not simply express a prudential doctrine of "self-abnegation" because courts know they lack "'competen[ce] in . . . ecclesiastical law and religious faith.'" *Rweyemamu*, 520 F.3d at 205 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872).) Rather, as will be argued below, the Constitution compels the courts' abstention because to do otherwise would breach a jurisdictional barrier between religious institutions and the civil government.

B. The Ministerial Exception Arises Implicitly, but also Necessarily, Out of the Free Exercise and Establishment Clauses of the First Amendment.

Justice Douglas was not engaging in hyperbole when he observed that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The truth of the maxim can be observed in no clearer relief than in the religion clauses of the First Amendment. As will be described below, the circuit courts of appeal are correct to have interpreted the ministerial exception as a necessary implication arising from the Free Exercise and the Establishment Clauses of the First Amendment. Further, this constitutional imperative is not surprising in light of the nature of religion and the common view at the nation's Founding that the church and the state exist as two separate but equal sovereign institutions, each with its own exclusive jurisdiction over some matters.

In light of this reality, this Court has refused to impute any legislative "purpose[s] of action against religion . . . because this is a religious people." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465 (1892). Statements regarding religion in the Founding documents generally, and the language of the religion clauses of the First Amendment specifically, grant the free exercise and disestablishment of religion a position of paramount importance. These various statements speak a "universal language . . ., affirm[ing] and

reaffirm[ing] that this is a religious nation." *Id.* at 470.

Thus, the logical path connecting the right to robust protections for the internal governance of religious institutions (of which the ministerial exception is one) to the First Amendment religion clauses is actually quite simple. Church autonomy cases in general, and ministerial exception cases in particular, are those implicating the internal governance of religious institutions.[6] Such matters are within the "kingdom of the church," and are therefore outside of the "kingdom of the state." Understanding the ministerial exception under a "two kingdoms" approach logically leads to the conclusion that the exception applies to all lay employees.

However, should this Court disagree that the exception should stretch that far, it surely covers Respondent Perich, who was a "called teacher." As the Church set forth more fully in its brief, called teachers do "sacred" work because they "teach the faith in word and deed" and because they "perform part of the pastoral functions of the church." (Br. of Pet'r at 4.) Respondent Perich also needed to have her call "extended" to her by vote of a local congregation, at which time she was "installed [into the] office via the public rite of 'commissioning,' and [was then] recognized as a 'Minister of Religion, Commissioned.'" (Br. of Pet'r at 6.)

---

[6] The Seventh Circuit has highlighted this point by opining that the ministerial exception is actually better termed the "internal affairs" doctrine. *Schleicher v. The Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008).

This jurisdictional division, derived from the two kingdoms theory, motivated the first Congress to codify a jurisdictional barrier in the First Amendment that protected the affirmative right of religious institutions to govern their affairs and protected the negative right to be free from state interference with those affairs. However, your *Amicus* hastens to add that the barrier is absolute only insofar as the matter in dispute is within the rightful authority of the religious institution. Religious institutions are subject to the civil government in matters properly within the civil realm, such as maintaining the public—as opposed to private—order.

Further, recognition of the jurisdictional division has pedigree in an early landmark opinion of this Court, which opinion acknowledges a practical reality arising out of jurisdictional questions. In *Marbury v. Madison*, 5 U.S. 137, 163 (1803), this Court noted the guiding principle that "all possible injuries whatsoever, that *did not fall within the exclusive cognizance* of either *the ecclesiastical*, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice," thus recognizing the jurisdictional limitations of the civil court. (emphasis added). As far as the civil courts were concerned, ecclesiastical disputes clearly fell within that category of cases "com[ing] under the description of *damnum absque injuria*—a loss without an injury," *id.* at 164, because those injuries were subject to the courts of the church. This same

principle extends to all internal proceeding of a church, and not just its formal judicial proceedings.

Of course, as noted above, religious institutions are not *absolutely* immune from the civil courts' jurisdiction. As Thomas Jefferson urged in The Virginia Act for Establishing Religious Freedom, government should refrain from interfering in religious exercise *except when* "when [religious] principles break out into overt acts against peace and good order." *http://religiousfreedom.lib.virginia.edu/sacred/vaact.html*. Jefferson later reaffirmed his understanding of the nature of the jurisdictional divide when he noted in a letter to the Reverend Samuel Miller that "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." 11 The Writings of Thomas Jefferson 428 (Albert Ellery Bergh, ed., 1905). Thus, religious institutions can come under the jurisdiction of the civil courts in some cases, but only when they act *ultra vires* of their proper sphere of authority.

1. Although the Founders held ideologically diverse views on the relationship between church and state, the First Amendment religion clauses arose because of the widely-held "two kingdoms" view that the church and state were sovereign over jurisdictionally separate spheres.

.

As just noted, one of the animating forces behind the religion clauses of the First Amendment

was the recognition that any given sovereign operates within limited jurisdictional boundaries. These bounded areas of jurisdiction, often referred to as "two kingdoms," suggested a jurisdictional divide between civil and religious institutions and "rested on a jurisdictional notion that there is a realm of religious belief and experience beyond the power of government." Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1623 (1989). The "two kingdoms" idea can be found in papal teachings as early as the fifth century, and it persisted through the Reformation and remained a dominant view during our nation's founding. Michael W. McConnell, *Religion & Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1245-46 (2000); Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine & the Theological Heritage of the Separation of Church & State*, 35 N. Ky. L. Rev. 67, 71-72 (2008).

For instance, St. Augustine recognized a "city of God" separate from a "city of man." *Id.* (alluding to a distinction made in Augustine's classic book, *City of God*). By the late fifth century, Pope Gelasius articulated "'two powers by which the world is chiefly ruled, the sacred power of the prelates and the royal power.'" *Id.* at 72 (quoting Arthur Hyman, *Philosphy of the Middle Ages*, 715 (1983)). Even during a season when papal supremacy was at its height, the "two kingdoms" concept endured, in that the "spiritual sword" was wielded "'*by* the church'" and the temporal or civil sword was wielded by the government "'*for* the church.'" *Id.* (quoting Jarislav

Pelikan, *The Christian Tradition*, 322 (1989) (emphasis added)).

During the 13th century, the Magna Carta became the embodiment of jurisdictional independence of the spiritual kingdom from the civil kingdom, while, contemporaneously, English jurist Henry de Bracton acknowledged that the developing common law courts were only competent to judge temporal, as opposed to spiritual, matters. *Id.* at 72-73. It was during this time that courts became increasingly clear in their reasoning that "'some wrongs were not within the jurisdiction of the civil government court.'" *Id.* at 73 (citation omitted). *Cf., Marbury*, 5 U.S. at 164.

During the Reformation, Martin Luther and John Calvin both advocated jurisdictionally distinct realms of authority for the church and the state. *Id.* at 74-76. Calvin noted that "'Christ's spiritual kingdom and the civil jurisdiction are things completely distinct,'" *id.* at 75 (quoting John Calvin, *Institutes of the Christian Religion*, 4.20.1 (J.T. McNeill, ed., F.L. Battles, trans. 1993)), and Luther contemplated church and state as distinct institutional equals, *id.* at 76.

As the American colonial period commenced, the two kingdoms concept persisted in England and Scotland through the efforts of theologians Andrew Melville, Alexander Henderson, and George Gillespie, each arguing for the independence of the church from the control of the monarch. *Id.* at 77-79. It was in this spirit that the English Puritans, Pilgrims, and other separatists brought the two

kingdoms worldview to the American colonies, which worldview would have tremendous influence over the Founders when they drafted the early documents of the nation. *Id.* at 80-82.

By the time of the Founding, three ideologically diverse groups[7] arose on the scene, and each was motivated by somewhat different convictions. It was this diversity of views, however, that ultimately resulted in the principles enshrined in the religion clauses of the First Amendment.

At the more religious end of the continuum, "pietistic separationists" (usually dissenters from established churches) were gravely concerned about

---

[7] One of the obvious difficulties in discerning what the Founders intended for any given constitutional precept is that their views and intentions were not monolithic. For instance, institutional independence of church and state was tremendously important to some, but not all, Founders. But this difficulty in discerning intent is not the same as impossibility. Because

> [a]ll three traditions contributed to the historical meaning of the religion clauses, . . . all three are therefore relevant for constitutional interpretation. Any attempt to reduce the Founders' views to one position or to read the beliefs of certain Founders, no matter how prominent, into the first amendment is likely to produce indefensible and culturally unacceptable results.

Adams & Emmerich, 137 U. Pa. L. Rev. at 1594. Although reducing the Founding views into these three camps is still an oversimplification of the actual diversity of views, the camps accurately reflect the major driving influences of the religion clauses and are, therefore, useful for the instant analysis.

the state dictating matters properly within the spiritual kingdom. Adams & Emmerich, 137 U. Pa. L. Rev. at 1622-23. This brand of separationists believed that "there is a realm of religious belief beyond the power of government," and that "state intrusion into this realm threaten[s] authentic faith . . . ." *Id.* at 1623. Further, disestablishment was necessary to "'keep the holy and pure religion of Jesus Christ from contamination by the slightest taint of earthly support.'" *Id.* at 1622 (quoting Roger Williams). Established churches patterned after those in England "threatened 'not only the purity but also the very life and being of religion.'" *Id.* (quoting Roger Williams). Put differently, the religious separationists had clear free exercise and disestablishment concerns with regard to church and state relations.

Further, because the religious separationists were dissenters, they had particular concern about the majority coercing the minority to violate their consciences. Adams & Emmerich, 137 U. Pa. L. Rev. at 1591-92. Pertinent here, if this case is decided on a narrow ministerial exception rather than a broad view of the ministerial exception as just one component of church autonomy, such a precedent would bode poorly for minority religions today. Such religions are often powerless to advocate for their own exemption in a matters concerning that institution's corporate conscience. However, a proper understanding of the constitutional grounding of church autonomy will protect minority religions.

At the other end of the continuum were more secular separationists who, although not "irreligious," were influenced by the Enlightenment thinkers and were suspicious of religious institutions corrupting government functions. *Id.* at 1583-84, 1618. These Enlightenment separationists included Thomas Jefferson, Thomas Paine, and to a certain extent, James Madison. *Id.* at 1583.

Thomas Paine, for instance, excoriated the "union of church and state as 'a sort of mule-animal, capable only of destroying, and not of breeding up.'" *Id.* at 1584 (quoting Thomas Paine). Madison, for his part, strongly advocated for "protecting the purity of both government and institutional religion," a feat best accomplished by encouraging a "multiplicity of [religious] sects" and by maintaining "'a perfect separation between ecclesiastical and civil matters.'" *Id.* at 1586-87 (quoting an 1822 letter from James Madison to Edward Livingston). Again, as with the religious separationists, the Enlightenment separationists had both free exercise and disestablishment concerns.

The third group, sometimes referred to as "political centrists," included Founders such as George Washington, John Adams, and Benjamin Franklin. *Id.* at 1588. These men did not espouse a separationists' mentality as the two previously-mentioned groups did; rather, they manifested great respect for religion and regarded it as "an essential source of personal and social morality." *Id.* at 1595. Further, they were united with the separationists in the view that "the republic could not survive without religion's moral influence." *Id.* Although the

political centrists appeared most concerned about free exercise, their rhetoric could not be termed "anti-disestablishment."

In light of the separationists' zeal for jurisdictional independence of the church and state, combined with the political centrists' respect for religion within public life, it is no surprise that "the two-kingdoms view of competing authorities is at the heart of our First Amendment." McConnell, 21 Cardozo L. Rev. at 1246. It is similarly no surprise, in light of the three groups' views discussed above, that the First Amendment ended up protecting the free exercise of religion and ensuring religious independence through required disestablishment, since the religion clauses represent the workable consensus of all three groups.

James Madison's Memorial and Remonstrance Against Religious Assessments reflects the same view:

> "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."

Id. (quoting James Madison, *Memorial & Remonstrance*).

Similarly, John Locke, the political philosopher who greatly influenced many of the Founders, "'esteemed it above all things necessary to

distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.'" *Id.* at 1248 (quoting John Locke, *Essay on Toleration*). In short, a dominant view at the Founding demanded that the "state should . . . confine itself to matters of worldly concern, to avoid invading the province of the spiritual sovereign." *Id.* at 1246. Thus, religious liberty was "defended not on the basis of the rights of the believer, but on the sovereignty of God over matters spiritual." *Id.*

By affirming the two kingdoms view, the Founders resolved the tension between church and state by acknowledging that the state's authority is limited by a greater sovereign—namely, God—who instituted dual sovereigns to govern, respectively, spiritual matters and civil matters. The Founders concluded that these two equal lesser sovereigns could exercise authority only within their proper jurisdictional boundaries, and the religion clauses created a structural framework for insulating the operations of religion from the operations of the civil government.

Further, "[c]hurches and other religious organizations are among the mediating structures in a culture, occupying the space between the individual and government . . . ." Carl H. Esbeck, *Tort Claims Against Churches*, 89 W.V. L. Rev. 1, 11 (1986). These mediating institutions "reflect upon, advocate, and teach ideas about the good life," and are vital to the existence of liberal government. McConnell, 21 Cardozo L. Rev. at 1256. In fact, liberal government "depends upon these private

institutions for the formation of good citizens." *Id.* Significantly, a government's attempt to control a mediating institution like a church spells the end of the very liberalism it attempts to perpetuate through its control. *Id.*

It is important to note that, by highlighting mediating institutions, your *Amicus* is not arguing that these help to directly explain the meaning of the First Amendment religion clauses. After all, "mediating institutions" as a term of art was not used in the Founding era. However, the institutions themselves existed, and the concept of mediating institutions is a modern progeny of the two kingdoms concept. Given the fact that the two kingdoms theory was enshrined in the First Amendment, modern-day political and legal commentators rightly evaluate rights due mediating institutions in light of the First Amendment religion clauses.

Further, many Protestants hold to a theory of diversity of obligation (similar to the mediating institution idea) known as sphere-sovereignty. Promoted by Dutch theologian and political leader Abraham Kuyper, sphere-sovereignty describes the interplay between the various sectors of life—the concept that each "sphere" (or sector) of life has its own distinct areas of authority or competence. David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 Emory L.J. 1471, 1507-08 (2008). Sphere sovereignty posits that the "state's role is to restrain sin" by very limited means. *Id.* at 1508. Under sphere sovereignty theory, the state may only act to "(1) to compel mutual respect of boundary lines when the spheres clash; (2) to defend

individuals and weak ones against the abuse of power within a sphere; and (3) to ensure that each citizen helps to bear the personal and financial burdens necessary to maintain the unity of the state." *Id.*

Similar concerns can be seen as well in Catholic social teaching on the mediating institutions mentioned above. As Professor Kathleen Brady commented,

> [m]any scholars in recent years have emphasized the importance of religious groups and other voluntary associations for sustaining a well-functioning democratic order. Religious groups are among the "mediating structures" or institutions of "civil society" that stand between the individual and the state and transmit the values, skills, and attitudes necessary for self-government. As the source of moral values, they function as "seedbeds of civic virtue." As training grounds for the exercise of democratic skills and responsibilities, they are "schools for democracy."

Kathleen A. Brady, *Religious Organizations & Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U.L. Rev. 1633, 1700-1701 (2004) (citations omitted).

Such a modern understanding of the importance of these institutions or "spheres" comports well with a historically supported

understanding of the purposes of the religion clauses of the First Amendment. As Professor Mary Ann Glendon explained concerning religious disestablishment, it is "reasonable to suppose that 'the people' were to be protected, not only in their solitary individual religious beliefs and practices, but in the associations and institutions where those beliefs and practices were generated, regenerated, nurtured, promoted, and transmitted." Mary Ann Glendon, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 543 (1991) ("the people" being a reference to the use of the phrase in the First Amendment's Assembly Clause). Furthermore, these protections set forth in the Bill of Rights (including, obviously the religion clauses) are "structural," and they create a "charter of 'positive protection' for certain structures of civil society," most notably including religious organizations. *Id.* ("positive protection" being a phrase used by Justice Stewart in his concurring opinion in *Sherbert v. Verner*, 374 U.S. 398, 416 (1963).).

These positive protections are appropriate because the Founders understood that "certain intermediate associations—religious groups foremost among them—were designed in part to promote self-government by fostering participation in public life, protecting the seedbeds of civic virtue, and educating citizens about their rights and obligations." *Id.* at 544. In other words, individual free exercise "cannot be treated in isolation from the need of religious associations and their members for a protected sphere within which they can provide for the

definition, development, and transmission of their own beliefs and practices."[8] *Id.*

Thus, it is not difficult to see how the institutional independence of the religious sphere from the civil sphere implicates the doctrine of the ministerial exception. Matters properly within the jurisdiction of religious organizations (*i.e.* those matters implicating their internal governance) would be necessarily *outside of* the jurisdiction of the civil governments, including the civil courts. Therefore, the ministerial exception simply recognizes the court's "lack of power to regulate religious societies in areas within their exclusive province, a jurisdictional restraint that dates to America's disestablishment." Carl H. Esbeck, *Dissent & Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U.L. Rev. 1385, 1583-84 (2004).

2. Because religion operates to bind the consciences of its adherents, the Founders properly protected collective consciences by way of the institutional independence of religious institutions from the state's authority.

Religion, almost by definition, binds the conscience. Although one's being conscience-bound may sound quaint to some modern ears, consideration of matters of conscience would have

---

[8] Although the quotation obviously implicates associational rights, as noted *infra*, n.9, the rights at issue still arise from the text of the Free Exercise and Establishment Clauses and institutional protections they provide.

been unremarkable to those who drafted and ratified the religion clauses of the First Amendment. "Liberty of conscience was invoked repeatedly by both Federalists and Antifederalists in the legislative history of the religion clauses," and most notably, it appeared in the context of both "establishment prohibition[s] and free exercise guarantee[s]." Adams & Emmerich, 137 U. Pa. L. Rev. at 1600. Groups as varied as the ultra-religious pietists and the comparatively non-religious "separationists" equated liberty of conscience with religious liberty and believed it to be an "inalienable right encompassing both belief and practice." *Id.* at 1599.[9]

Some saw the civil magistrate as having a "duty to remove legal obstructions to religious exercise and foster an environment conducive to the 'free and absolute permission of the *consciences* of all men, in what is merely spiritual.'" *Id.* at 1625 (quoting Roger Williams, *The Hireling Ministry None*

---

[9] Some evidence exists that the religion clauses were meant primarily to protect corporate, as opposed to individual, rights, *see* McConnell, 21 Cardozo L. Rev. at 1246 (noting religious liberty was "defended not on the basis of the rights of the believer, but on the sovereignty of God over matters spiritual."); and Glendon, 90 Mich. L. Rev. at 543 ("it [is] reasonable to suppose that 'the people' were to be protected, not only in their solitary individual religious beliefs and practices, but in the associations and institutions where those beliefs and practices were generated, regenerated, nurtured, promoted, and transmitted."). However, it is sufficient for the purposes of this Brief to note that the individuals' collective consciences are what give expression to the institutional exercise and disestablishment of religion that the First Amendment protects.

of Christs (London 1652)) (emphasis added). Significantly, this concern for liberty of conscience carried weight different from that which comes from merely taking a side on other debatable matters. This is why those who argue that religion is just like other ideologies and undeserving of higher protections are wrong. As was noted in the Memorial and Remonstrance, the "duty of every man" is to pay "homage" to God, and the duty is "precedent both in order of time and degree of obligation." McConnell, 21 Cardozo L. Rev. at 1246. Such devotion has never been true of other ideologies generally. Therefore, the First Amendment stands for special treatment of religion, protestations to the contrary notwithstanding.

For the Christian, for instance, as Abraham Kuyper once remarked, "'Oh, no single piece of our mental world is to be hermetically sealed off from the rest, and there is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry: Mine!'" David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship*, 57 Emory L.J.1471, 1507 (2008) (quoting Kuyper). Religion places "uncompromising claims" upon adherents "concerning the nature and limited role of the state, and qualifications are placed [by religion] on the individual believer's allegiance to the state and its civic demands for compliance with public duties." Esbeck, 89 W.V. L. Rev. at 3. These demands further illustrate the drive for disestablishment. As Elisha Williams, a New Light Congregationalist noted

> "If Christ be the Lord of the conscience, the sole King in his own kingdom; then it will follow, that all such as in any manner or degree assume the power of directing and governing the consciences of men, are justly chargeable with invading his rightful dominion; He alone having the right they claim. Should the king of France take it into his head to prescribe laws to the subjects of the king of Great Britain; who would not say, it was an invasion of and insult offer'd to the British Legislature."

McConnell, 21 Cardozo L. Rev. at 1246 (quoting Elisha Williams).

Thus, a predictable tension exists between the state's accommodating conscience-bound citizens whose first allegiance is to God and His precepts while at the same time exercising its rightful duty to keep order. And the First Amendment religion clauses were intended to relieve just this tension. As noted above, the Free Exercise and Establishment Clauses operate to shield religious institutions from state interference, thereby allowing full expression of the collective conscience of the religious institution, free to govern its affairs apart from state entanglement.[10]

---

[10] *See supra* n.9 (noting that individual rights of conscience are protected via the corporate protections contained within the religion clauses of the First Amendment).

* * *

In summary, when one considers that the Founders 1) uniformly had a high view of religion and respect for the collective rights of conscience, and 2) overwhelmingly saw the institutions of government and church as jurisdictionally distinct, the necessary implication of the ministerial exception becomes clear. In fact, the religion clauses of the First Amendment make no coherent sense apart from an understanding of structural protection for religious institutions arising out of a theory of dual sovereignty. This dual sovereignty, rightly understood, logically mandates judicial abstention from cases implicating the internal governance of religious institutions.

Furthermore, because of the nature of this jurisdictional division, the ministerial exception, as a subset of the broader principle of church autonomy, is driven primarily by whether the dispute arises out of its internal governance and not primarily out of the particular duties an employee may perform. If the dispute is a matter of internal governance, then the civil must refrain from hearing the dispute. And here, where the Church dismissed the Respondent, who was extended a "sacred" call by the local congregation to be a "commissioned" minister, (Br. of Pet'r at 4, 6), a civil court should have nothing to say about that call being revoked.

C. Courts Lack Jurisdiction to Hear Ministerial Exceptions Cases Because the Constitution Bars the Civil Courts from Interfering with the Internal Affairs of Religious Institutions.

The purpose of laying out the overwhelming strength of the case for the ministerial exception as essential to religious liberty and institutional independence between governmental and religious authority is to assist this Court in guiding lower courts in resolving such cases. As the Church briefly described in its Petition for Writ of Certiorari, the various courts of appeals are split on how to dispose of cases implicating the exception. (Pet. for Writ at 33.) Your *Amicus* will set forth the three views the courts of appeal have articulated and conclude by demonstrating that the ministerial exception cases—and all church autonomy cases—ought to be dismissed at the earliest possible opportunity, with the court rightly noting its lack of power over the dispute, thereby obviating the need for expensive discovery or factfinding.

1. Courts of appeals have variously held that application of the ministerial exception dictates that the court should a) dismiss the case for lack of jurisdiction, b) dismiss the claim for failure to state a claim, or c) dismiss the case because the constitution bars employment discrimination claims for ministerial employees.

The circuits have approached disposing of ministerial exception cases in three basic ways.

First, five circuits, the Second, Fifth, Sixth, Seventh, and Eleventh, have held that courts lack jurisdiction over cases in which the ministerial exception applies, warranting dismissal under Rule 12(b)(1). *Rweyemamu*, 520 F.3d 198, 200-01, 210; *Combs*, 173 F.3d at 345, 350-1; *Hollins*, 474 F.3d at 225, 227; *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185, 188 (7th Cir. 1997); and *McCants*, 372 Fed. App'x. at 42.

Second, four other circuits, the First, Third, Ninth, and Tenth, have held that the ministerial exception warrants dismissal for failure to state a claim for which relief can be granted under Rule 12(b)(6). *Natal*, 878 F.2d at 1578; *Petruska*, 462 F.3d 299, n.1; *Werft*, 377 F.3d at 1100, 1104;[11] *Skrzypczak*

---

[11] The Ninth Circuit has also recently affirmed dismissal of a ministerial exception case under 12(c) (judgment on the pleadings), the defendant having filed an answer to the plaintiff's complaint. *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 2006 U.S. Dist. LEXIS 92708, *4-5 (W.D. Wash. Dec. 21, 2006), aff'd *Alcazar*, 627 F.3d at1291.

v. Roman Catholic Diocese, 611 F.3d 1238, 1242 (10th Cir. 2010). The Tenth Circuit converted the defendant-appellant's 12(b)(1) motion to a 12(b)(6) motion, holding that it properly had "power over the case," but that no claim could be sustained under the facts. *Id.*

Third, three other circuits, the Fourth, Eighth, and D.C., have held that the ministerial exception creates a constitutional bar to employment discrimination claims, reading an exception into the various employment statutes for religious institutions. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169-71 (4th Cir. 1985); *Scharon*, 929 F.2d at 363; and *Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1358-59 (D.C. Cir. 1990). Although, as noted above, the Fifth Circuit most recently has dismissed a ministerial exception case under 12(b)(1), *Combs*, 173 F.3d at 345, 350-1, that court appeared to implement a constitutional bar in *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

In laying out these three approaches, your *Amicus* has tracked the framework described by the Second Circuit. *Rweyemamu*, 520 F.3d at 206, n.4. Unfortunately, this framework can be confusing for several reasons. First, several circuits no longer fit in the category the *Rweyemamu* court placed them, and other circuits are now on record. For instance, as noted above, the Fifth Circuit has dismissed cases variously on constitutional bar grounds and lack of jurisdiction under 12(b)(1) grounds. Also, the Eleventh Circuit has been added to the 12(b)(1) lack

of subject matter jurisdiction category, and the Fourth, Eighth, and D.C. Circuits have been added to the constitutional bar category. Second, confusion arises because courts have appeared to use certain language imprecisely. *See, e.g., Petruska*, 462 F.3d at 302 (dismissing for *failure to state a claim* because "*the First Amendment bars* Petruska's claims" (emphasis added)); *Rweyemamu*, 520 F.3d at 200-01, 209 (affirming the district court's dismissal for lack of subject matter jurisdiction while also noting that "the ministerial exception *bars* Father Justinian's Title VII claim." (emphasis added)); and *Combs*, 173 F.3d at 345, 351 (affirming the district court's dismissal for lack of subject matter jurisdiction while also opining that "we are persuaded that the First Amendment continues to give the church the right to select its ministers free from Title VII's restrictions.").

Further complicating matters, the Fourth, Eighth, and D.C. circuits have not explicitly rejected a 12(b)(1) or 12(b)(6) approach to dismissing a ministerial exception case; instead, they simply note that the constitution prevents the courts from ruling in such cases. *Rayburn*, 772 F.2d at 1171 ("we hold that the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected here."); *Scharon*, 929 F.2d at 363 ("This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids."); and *Minker*, 894 F.2d at 1359 ("We hold that the interpretation of the appointment and antidiscrimination provisions of the Book of Discipline is inherently an ecclesiastical

matter; it follows that this court lacks jurisdiction to hear Minker's contract claim.").

2. Because the church and state are jurisdictionally distinct sovereigns, the courts should dismiss ministerial exception cases for lack of jurisdiction.

As has been set forth in I.B above, constitutional jurisdictional independence prevents civil courts from interfering with the internal governance of religious institutions. Further, this jurisdictional independence serves to inform this Court what disposition is appropriate in a case against a religious institution and at what stage that disposition is appropriate—namely, swift dismissal of the case at the earliest possible stage for lack of jurisdiction. Practically speaking, it does not matter whether this Court views a court's lack of authority over the internal governance of a religious institution as a lack of *subject matter* jurisdiction or whether this Court recognizes the Constitution *bars* ministerial employees from bringing suit in employment matters. What is important, however, is for this Court to recognize the jurisdictional nature of its decision.

Put differently, because the issue of sovereignty lies at the heart of the ministerial exception cases, it becomes plain that in such cases the court simply lacks the power to rule. This lack of power lies not in the fact that the courts cannot decide employment matters generally (*i.e.* Article III power); instead, the power of internal governance

lies with the religious institution to manage its affairs.

Further, the consideration of the jurisdictional basis for the exception helps to illustrate why dismissal under 12(b)(6) provides insufficient protection to a religious institution. For instance, dismissal for failure to state a claim under 12(b)(6), although sometimes practically disposing of the case in a manner similar to dismissal under 12(b)(1), will also sometimes permit a ministerial exception case to continue inappropriately. Because dismissal under 12(b)(6) should ordinarily be without prejudice, a plaintiff would thereby have opportunity to re-plead and allege new facts after a 12(b)(6) dismissal. *See, e.g., Holley v. Crank*, 386 F.3d 1248, 1257 (9th Cir. 2004). Amendment is forbidden only when it is clear that such an amendment would be futile. *Id.*

Unless a court is clear on the jurisdictional barrier between it and the religious institutions, amendments could go on for several iterations until it is clear that no facts support the plaintiff's claims. If a plaintiff is permitted to plead new facts, the defendant church would then face the costly burden of defending those amended pleadings, possibly needing to respond to demands for discovery, to prevent inquiry into motives for the church's decision—all burdens the jurisdictional independence logically excludes from the civil sphere.

Significantly, when a court abstains from adjudicating a ministerial exception case, a court is

not yielding *its* authority to a different sovereign; rather it is *acknowledging* the authority already vested in the religious institution. The court is simultaneously acknowledging its own preexisting lack of authority.

And regardless of whether this Court dismisses for lack of subject matter jurisdiction under 12(b)(1) or for lack of jurisdiction under a more general constitutional affirmative defense, the key is to recognize why dismissal at the earliest stages of the litigation is so vital—namely, that religious institutions operate as a separate kingdom or sovereign, and it is no small matter for a court to interfere in the internal governance of that kingdom. And as the Church set out more fully in its Brief, at 16-19, the ministerial exception merits broad application to a wide variety of employees conducting a wide variety of duties.

Ultimately, this case is about whether the Constitution requires a broad and robust protection for the internal governance of religious institutions, and the clear answer to the question is a resounding "yes." Religious institutions are given heightened protection under the Constitution because the Founders recognized that society and government function best when the church operates independent from the civil government. Instead of agonizing over whether dismissal under 12(b)(1) or a constitutional bar is technically correct, this Court can appropriately resort to *Marbury* again. Federal courts simply may not take "cognizance" of "ecclesiastical matters," *Marbury*, 5 U.S. at 163, and the instant matter is an ecclesiastical one. The same

jurisdictional separation contemplated at our nation's Founding rightly continues today and rightly deserves the protection the Founders intended.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Church's Brief, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,
this 20th day of June, 2011,

Steven W. Fitschen
Counsel of Record for *Amici Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133