No. 11-1066

In the Supreme Court of the United States

ERWIN LUTZER,

Petitioner,

v.

RICHARD A. DUNCAN,

Respondent.

On Petition for a Writ of Certiorari
to the Appellate Court of the State of Illinois,
Second District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ALLIANCE DEFENSE FUND IN SUPPORT OF PETITIONER

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MOTION OF ALLIANCE DEFENSE FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, Alliance Defense Fund ("ADF") respectfully requests leave to file the accompanying *amicus curiae* brief.

In support of this motion, ADF affirms that it requested consent to file an *amicus curiae* brief from each of the parties to this case. Petitioner consented to the filing of this brief, but Respondent withheld consent.[*]

ADF is a not-for-profit public interest organization devoted to defending, protecting, and advocating religious freedom through strategic planning, training, and funding to attorneys and organizations seeking to protect religious civil liberties. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in the right of churches to decide their internal affairs without government interference.

ADF requests opportunity to present an *amicus curiae* brief because it is keenly interested in protecting the religious liberties of individuals and churches and assisting the Court in reaching a just result. As set forth in the accompanying brief, this case implicates the free exercise rights of churches nationwide. In particular, resolution of the issues presented in the instant case will have a significant impact on the rights of churches to appoint and

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[*] A copy of the consent letter received from Petitioner's counsel is submitted with this Motion and *Amicus Curiae* Brief.

remove ministers as dictated by their religious beliefs and ecclesiastical polity. ADF's brief will assist the Court in considering these issues in light of the church autonomy doctrine and over one hundred years of Supreme Court precedent.

Given that this case raises such crucial religious liberty issues, and that Respondent will not be prejudiced by the filling of this brief, ADF respectfully requests that this Court grant its motion for leave to file this brief *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF also litigates cases to protect the First Amendment rights of churches and pastors. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in these topics, and whose churches have a right to decide their internal affairs without government interference. ADF's allies include more than 1,200 lawyers and numerous public interest law firms, many of whom have been recently pressed into service to represent individuals and churches whose religious freedoms are threatened.

ADF has had direct involvement through its own efforts and the efforts of its allied organizations in numerous cases involving the First Amendment rights of churches and pastors and has a great interest in ensuring that those constitutional rights are fully protected. ADF believes strongly in the principle of church autonomy and has committed itself to protecting the right of America's churches to govern themselves according to the dictates of their faith.

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[1] Pursuant to Rule 37 of the Rules of this Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party 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 other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This case involves the straightforward application of a well-established constitutional principle: the state defers to churches on matters of internal church governance. This Court has long-recognized that the Religion Clauses oppose civil interference in purely ecclesiastical matters, particularly the selection of a minister. These well-established principles of church autonomy and judicial deference were most recently reaffirmed by this Court in *Hosanna-Tabor v. EEOC*.

The Illinois Appellate Court ignored these constitutional principles in adjudicating the case below. Moody Church's decision to rescind the ordination of Richard Duncan for conduct unbefitting a minister is a matter of internal church governance – it should not be subjected to judicial review. Nor can these constitutional protections be circumvented by attacking the communication of that internal church decision to the parties affected. The decision and its internal communication are two parts of an indivisible whole. The lower court erred egregiously in imposing damages against the pastor of Moody Church, Dr. Erwin Lutzer, for his role in exercising pastoral oversight of Duncan.

In light of this error, this Court should grant Lutzer's petition for certiorari and reverse the lower court's ruling.

ARGUMENT

I. The Church has exclusive authority over matters of internal church governance based on a long, unbroken line of Supreme Court precedent.

Church and state are two distinct spheres of sovereignty. Each sphere is free from the external control of the other in matters central to its purpose and mission.

Recognition of this jurisdictional autonomy profoundly shaped the First Amendment. Against the backdrop of perceived abuses in English church-state relations, the Religion Clauses were instituted to "foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)); *see also Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 703 (2012) (noting that in adopting the First Amendment, "the founding generation sought to foreclose the possibility of a national church.") Church and state were not only each mutually foreclosed from interfering in the internal affairs of the other, but religious organizations were given "special solicitude" under the First Amendment. *Hosanna-Tabor*, 132 S.Ct. at 706.

This Court has long-recognized the differing spheres of authority between church and state. A line of cases stretching over one hundred years acknowledges the same fundamental truth – civil government should not intrude into internal matters of church governance.

This Court first recognized the principle of church autonomy in 1871 during a property dispute between two factions of a local Presbyterian Church, each claiming to be the true congregation. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 717-18. The lower court had entangled itself in the midst of the dispute, and disregarded the ruling of the Presbyterian General Assembly as to which party was the true congregation. *See id.* at 720-21. This Court affirmed reversal of the lower court, *see id.* at 735, and noted that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them." *Id.* at 727. A court's authority extends to adjudicating the property dispute in light of – but not in spite of – the ecclesiastical decision. It "would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Id.* at 729.

Significantly, *Watson* was not decided on constitutional grounds. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115 (1952). It nonetheless "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for

themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

Over forty years later, this Court reexamined the church autonomy doctrine in light of a 14-year-old's claim to a Roman Catholic chaplaincy. *See Gonzalez v. Archbishop of Manila*, 280 U.S. 1 (1929). The ecclesiastical office was devised to the boy by will, but the Archbishop of Manila refused to appoint young Gonzalez to the chaplaincy because he failed to satisfy Canon Law requirements. *See id.* at 12-13. After finding that civil jurisdiction over the trust was proper, the Court noted that "[b]ecause the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16. The Court found that Gonzalez was not entitled to the chaplaincy or its income. *See id.* at 19.

A property dispute in *Kedroff v. Saint Nicholas Cathedral* officially enshrined church autonomy principles as constitutional rules. *See* 344 U.S. 94, 154-55 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection."). State law attempted to transfer control of the New York Russian Orthodox churches from the patriarch of Moscow to a convention of North American churches. *See id.* at 119. This Court declared the state law unconstitutional. *See id.* "Legislation that regulates church administration, the operation of the churches, the appointment of clergy . . . prohibits the free exercise of religion." *Id.* at 107-08. Even in ecclesiastical decisions with

incidentally secular effects such as property possession – "the church rule controls." *Id*. at 120-21.

Church autonomy also extends to civil assessment of whether a church adhered to its own tenets of faith and practice. In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, Georgia law implied a trust of local church property for the benefit of the congregation on the condition that it adhere to the denominational tenets of faith. *See* 393 U.S. 440, 450-51 (1969). This Court struck the law because it required civil courts to interpret church doctrines and their significance to the religion at issue – an exercise forbidden by the First Amendment. *See id*. "If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interest in matters of purely ecclesiastical concern." *Id*. at 449.

Not only is a court restrained from assessing tenets of faith, it also should refrain from analyzing internal governing laws to determine whether a church abided by its own rules. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), a bishop of the Serbian Orthodox Church challenged his defrocking as procedurally and substantively defective under internal church regulations. *See id*. at 697-98. This Court rejected any argument that the state could probe into such internal ecclesiastical laws. *See id*. at 708. "[R]eligious controversies are not the proper subject of civil court inquiry, and . . . civil court must accept

the ecclesiastical decisions of church tribunals as it finds them." *Id*. at 713.

Thus, this Court has recognized, affirmed, and protected the sphere of church sovereignty in internal ecclesiastical matters for well-over one hundred years.

II. Because the Church's selection of its ministers is a purely ecclesiastical decision, the court below erred in interfering and must be reversed.

The selection of a minister is particularly central to ecclesiastical sovereignty. Although *all* internal ecclesiastical matters – theology, church discipline, government, practice – are eminently important, no First Amendment right is more vital to church autonomy than the right of churches to choose the individual who will represent their religious beliefs and shape their mission and ministry. "The relationship between an organized church and its ministers is its lifeblood." *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972). State intrusion into this intimate relationship destroys ecclesiastical sovereignty and violates the First Amendment. *See Kedroff*, 344 U.S. at 116.

This Court has recognized church autonomy over each aspect of the ministerial process, including selecting, credentialing, ordaining, and disciplining a minister. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (selecting a minister), *Gonzalez v. Archbishop of Manila*, 280 U.S. 1 (1929)

(credentialing a minister), *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (disciplining a minister), *Hosanna-Tabor v. EEOC*, 132 S.Ct. 694 (2012) (revoking ordination of a minister).

Churches are constitutionally free to fill their pulpits as they see fit without interference from the civil government. In resolving a dispute over who constituted the proper archbishop in the Russian Orthodox Church, *Kedroff* held that "[f]reedom to select the clergy . . . we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." 344 U.S. at 116.

Church autonomy also protects ministerial credentialing and conditions of appointment. "Because the appointment [of a ministerial office] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Gonzalez*, 280 U.S. at 16-17.

This is precisely what Moody Church did. As the ecclesiastical body that ordained Duncan to Gospel ministry, Moody evaluated Duncan in light of the church's credentialing requirements and found that he no longer possessed the qualifications essential to pastoral ministry. Although Gonzalez sought a ministerial office and Duncan was removed from one, their situations are parallel: both were deemed unqualified for the ministerial office by church standards. *See id*. at 13. Both sued for monetary compensation in civil court. *See id*. at 10. The Court

held that Gonzalez was not entitled to monetary compensation because the church's ministerial credentialing controlled. *See id.* at 17. This Court should conclude that Duncan likewise has no claim.

The discipline of ministers is also protected by the church autonomy doctrine. "[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline . . . ." *Serbian Eastern*, 426 U.S. at 713. When confronted with a disgruntled, defrocked bishop claiming lack of procedural and substantive due process, this Court found: (1) "questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern" and (2) decisions to defrock the bishop were "made by the religious bodies in whose sole discretion the authority to make those ecclesiastical decisions was vested . . . ." *Id.* at 717-18. Even though the bishop's termination had an effect on control of church property, the Court held that "civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject to judicial abrogation, having been reached by the final church judicatory in which authority to make the decision resides." *Id.* at 720.

Like the church in *Serbian Eastern*, Moody Church has the authority to ordain ministers. Ordination is a church's "stamp of approval" that the individual has met specific qualifications for ministry and the church governing body is satisfied that the individual is "called" to minister. A church's oversight of the minister does not terminate with the ordination. If the church determines that a minister no longer possess the qualifications necessary for

spiritual leadership, it is within the church's authority to later rescind that ordination. The decision to revoke an ordination and the means of doing so are core ecclesiastical matters. When Moody Church could no longer recommend Duncan as fit for ministry, it was within the Church's discretion to rescind Duncan's ordination and communicate that decision to the Hope Church leadership.

The decision to rescind ordination and the communication of that decision to the parties directly involved are two parts of an indivisible whole. Duncan cannot surreptitiously attack a purely ecclesiastical decision by challenging its communication to the very individuals who requested such action. Lutzer did not publish the revocation to the public at large. He did not even communicate the revocation to the entire congregation of Hope Church, although it would have been within his pastoral rights to do so. Rather, Lutzer communicated the decision Moody Church made to rescind Duncan's ordination to Hope Church leadership – the very individuals who requested Moody's involvement. How a church carries out its internal decisions is just as protected by church autonomy as the decisions themselves, otherwise church autonomy would be nothing more than a fictitious doctrine. This Court has not permitted exceptions to church autonomy based on how an ordination or church discipline procedure is conducted, especially when the challenged action involves communication between a church and its leadership. For the Illinois state courts to intrude into this internal ecclesiastical matter is to subvert church autonomy.

III. This Court recently reaffirmed its deference to church autonomy over internal ecclesiastical decisions in *Hosanna-Tabor v. EEOC*.

Hosanna-Tabor involved an ordained Lutheran minister whose "call" to the ministry was rescinded in light of actions deemed to be unbefitting her position. *See id*. at 699-700. In addressing her employment discrimination claims, the Court firmly underscored church sovereignty over the choice of a minister:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over selection of who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 706.

This Court could not speak more clearly to the issues central to this case. The termination of a

minister, including how that termination is accomplished, is just as internal and ecclesiastical a decision as selecting and calling the minister. "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 702.

Moody Church has the authority to choose who will personify its beliefs, shape its faith and mission, and minister to the faithful. *See id.* at 706. Revoking Duncan's ordination was a religious firing because he no longer met the ecclesiastical qualifications for his office. Duncan's assertion that the firing was pretextual and animosity-driven – even if such assertions were true – misses the point of the ministerial exception. *See id.* at 709. The purpose of the exception is not to safeguard only those decisions that were made for religious reasons, but to ensure the sovereignty of the church to select and control who will represent its beliefs – a matter strictly ecclesiastical. *See id.*

Imposing damages against Lutzer for an internal decision of the Church violates the First Amendment rights of both Moody Church and Lutzer. Duncan, conversely, has no "right" to a ministerial office or ordination, nor does he have a "right" to punish Moody Church or Dr. Lutzer for conducting his termination according to their religious beliefs.

This Court cannot decide Duncan's claims based on neutral principles of law that do not require intruding into ecclesiastical matters. Nor could the Illinois courts. Duncan claims damages for false-light-invasion-of-privacy and conspiracy. This Court cannot reach the issue of false light without

inquiring into Moody's standards for holding ministerial office, its procedures for terminating a minister, and its application to Duncan's situation – all of which are internal church matters upon which the state has been careful not to intrude. Secondly, the court cannot reach the conspiracy claim without peering into internal church government and evaluating whether Lutzer properly followed Moody's disciplinary procedures. These matters are of purely ecclesiastical concern, and should not be subject to judicial review.

The Illinois Appellate Court erred in imposing damages against Lutzer for exercising pastoral oversight of Duncan. This Court should remedy this error by granting Lutzer's petition for certiorari and reversing the judgment below, or, at the least, grant, vacate, and remand this case to the lower courts for proceedings consistent with this Court's most recent decision in *Hosanna-Tabor v. EEOC*, which stood in complete agreement with this Court's unbroken line of precedent protecting church autonomy in matters of internal church governance.

CONCLUSION

In light of the unbroken line of Supreme Court precedent protecting church autonomy over internal ecclesiastical decisions, particularly the selection of a minister, *amicus curiae* Alliance Defense Fund respectfully requests that this Court grant Lutzer's petition for review and reverse the judgment below, or, in the alternative, grant the petition, vacate the judgment, and remand the case to the court below for further proceedings consistent with *Hosanna-Tabor v. EEOC*.

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