SC98307

IN THE SUPREME COURT OF MISSOURI

JOHN DOE 122,

Plaintiff/Appellant,

vs.

MARIANIST PROVINCE OF THE UNITED STATES, and CHAMINADE COLLEGE PREPARATORY, INC.,

Defendants/Respondents.

BRIEF OF AMICI CURIAE THE THOMAS MORE SOCIETY AND CHRISTIAN LEGAL SOCIETY FOR DEFENDANTS/RESPONDENTS

Carl H. Esbeck
R.B. Price Emeritus Professor of Law
John K. Hulston Hall, room 203
Ninth and Conley Streets
Columbia, MO 65211
(573) 882-6543

Timothy Belz #31808
J. Matthew Belz #61088
Counsel of Record
Clayton Plaza Law Group
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 726-2800
Fax: (314) 863-3821
tbelz@olblaw.com
jmbelz@olblaw.com

Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE

The Thomas More Society ("TMS") is a national public interest law firm dedicated to restoring respect in law for religious liberty. Incorporated as a 501(c)(3) not-for-profit corporation in Illinois with offices in Chicago, TMS pursues its organizational mission through litigation, education, and related activities. It has represented many individuals and groups in the federal and state courts, and filed many *amicus curiae* briefs, with the aim of protecting the rights of individuals and groups to freely exercise their right to express and practice their religion as guaranteed by the First Amendment. TMS has ecclesiastical clients and, under plaintiff/appellant's claims and advocacy, these entities would be compelled to alter their ecclesiastical structures and to suffer excessive government entanglement. TMS thus has a substantial interest in this case.

The Christian Legal Society, founded in 1961, is a nonprofit, nondenominational professional association of Christian attorneys, law students, and law professors with chapters nationwide and at over 90 law schools. There are attorney chapters in St. Louis, Kansas City, and Springfield, and student chapters at all four law schools located in Missouri. Since 1975, The Center for Law & Religious Freedom, the legal advocacy and information arm of the Christian Legal Society, has argued in state and federal courts throughout the nation for the protection of religious liberty and church-state relations rightly understood. Using a network of volunteer attorneys and professors, the Center provides accurate information to the public and political branches regarding the law pertaining to religious freedom. The Center has filed numerous briefs *amicus curiae* on behalf of religious individuals and organizations of Christian and non-Christian faiths.

SUMMARY OF ARGUMENT

This Court correctly held in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997), that recognition of a tort of negligent supervision when the claim is lodged against a bishop or other religious official with respect to overseeing a priest, pastor, or others in ministry is barred by the First Amendment to the United States Constitution. This doctrine of church autonomy is grounded in Western civilization and manifested in events at America's constitutional founding when the First Amendment was adopted and initially applied. Since then nearly a dozen U.S. Supreme Court cases, from *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872) to *Jones v. Wolf*, 443 U.S. 595 (1979), have outlined the scope of church autonomy. After this Court decided *Gibson*, the U.S. Supreme Court proceeded to refine the boundaries of church autonomy in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012), and promises to further do so in the consolidated appeals of *Our Lady of Guadalupe School v. Morrissey-Berru*, U.S. S. Ct. No. 19-267 (ministerial exception asserted in age discrimination case against religious school brought by teacher who had religious responsibilities), and *St. James School v. Biel,* U.S. Sup. Ct. No. 19-348 (ministerial exception asserted in disability discrimination case against religious school brought by teacher who had religious duties).

A survey of these U.S. Supreme Court cases yields relatively few—yet important—subject matters involving churches within which government officials, including the courts, are barred categorically from exercising jurisdiction. These limited but forbidden topics entail: (1) taking up the validity, meaning, or importance of religious questions, and resolving doctrinal disputes; (2) the selection of ecclesiastical polity,

including the proper application of procedures set forth in a church's organic documents, bylaws, and canons; (3) the selection, credentialing, promotion, overseeing, or retention of clerics and others in ministry; and (4) the admission, discipline, or expulsion of church members.

Category (3) is implicated here. Specifically, the First Amendment bars a civil court's regulation of the office of bishop or other religious official via a tort sounding in negligence. A tort standard of negligence invites agents of the state—a judge or jury—to sit in judgment over the ecclesial decisions of a bishop or other church official. It is inevitable that these finders of fact will be asked to second-guess a bishop's judgments, weigh what is "foreseeable" and what is "due care," and to re-write the description of the office. This is the church's office, not the state's. If there is to be separation of church and state, the state cannot weigh and ultimately determine what is a "reasonably prudent bishop."

As this Court also held in *Gibson*, a claim of intentional failure to supervise is different. An intentional tort enforces a bright-line rule, not a balancing test centered on reasonableness. There is no sifting through the daily tasks of bishops by finders of fact with an eye to what, in the bishops' discharge of their ecclesial offices, they should have done if proceeding with "due care." This is the longstanding juridical distinction between a bright-line rule and a balancing test. To be sure, in an intentional failure case the facts may still be contested concerning if and when the bishop received knowledge of, for instance, alleged sexual abuse. Resolving that question, however, does not require the

judge or jury to step into the shoes of bishops and second-guess how they might have better performed their ecclesiastical duties.

ARGUMENT

I. CHURCH AUTONOMY IS GROUNDED IN WESTERN CIVILIZATION AND AMERICA'S CONSTITUTIONAL FORMATION.

A. Western History to the American Founding

The principle that government may not interfere with internal church affairs "has long meant … that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg *et al.*, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175 (2011). In particular, "[t]he freedom to select religious leaders was a landmark in the development of limited government in the West." *Id*. at 180. That freedom has its origin in a long and bloody history of conflict between state and religious authorities.

1. Antiquity

In ancient Rome, "religion was an affair of the community as a whole," and "[n]o form of social life was wholly secular." ROBERT LOUIS WILKEN, LIBERTY IN THE THINGS OF GOD: THE CHRISTIAN ORIGINS OF RELIGIOUS FREEDOM, at 7 (Yale U. Press 2019). The coins used for currency throughout the Roman Empire, for example, depicted the image of the emperor on one side and liturgical instruments used for offerings and sacrifices on the other. Religion was simply "part of the fabric" of Roman life. *Id.* at 7-8.

The institutional separation between Church and State emerged in the second century during the persecution of Christians in Rome and Carthage. Tertullian, an early Christian apologist, was "the first in the history of Western civilization to use the phrase 'freedom of religion.'" *Id.* at 11; *see* TERTULLIAN, THE APOLOGY OF TERTULLIAN FOR THE CHRISTIANS (T. Herbert Bindley trans., 1890). This phrase referred "to the freedom of the community of Christians to have its own protected space and follow its distinctive way of life," which included the rights "to assemble for worship, to organize, [and] to choose leaders." WILKEN at 12–13.

Early Christians recognized a "dual loyalty" to Church and to State by which they would "obey the 'magistrates, princes and powers'" on certain matters, while recognizing a separate sphere of authority on matters of institutional religion. *Id.* at 15–16. Civic leaders gradually came to recognize this distinction as well. In the early fourth century, Emperors Constantine and Licinius issued the Edict of Milan (A.D. 321), which granted "to the Christians and to all others full authority to observe that religion which each preferred . . . freely and openly, without . . . molestation." UNIVERSITY OF PENNSYLVANIA, DEPT. OF HISTORY: TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY (U. of Penn. Press reprint, 2013) vol. 4, at 28-30. This freedom referred "not simply [to] individuals but [to] the . . . Church, the body (*corpus*) of Christians." WILKEN at 23. The recognition of church autonomy was "no less novel than the general policy on freedom in religious matters, for it suggests that the emperors sensed . . . that a new form of religion existed in their midst, having its own corporate life independent of the state" and transcending national boundaries. *Id.*

At the end of the fifth century, tensions mounted when Emperor Anastasius opposed the Council of Chalcedon, a major gathering of Christian bishops. *Id.* at 34. In response, Pope Gelasius I "took the unprecedented step of writing a letter directly to the emperor instructing him on the limits of his authority in religious matters." *Id.* While Anastasius was "permitted honorably to rule over human kind," Gelasius reminded him that "in things divine" the emperor must "bow [his] head humbly before the leaders of the clergy." J. H. ROBINSON, READINGS IN EUROPEAN HISTORY, at 72–73 (Ginn & Co. 1905). Gelasius's letter "would shape Christian thinking on the relation between civil and ecclesiastical jurisdiction throughout the Middle Ages and into the sixteenth century." WILKEN at 34–35. The distinction between a religious authority "charged with leading people to salvation," and a secular power "maintaining order and providing conditions for the Church to carry out its mission," came to be called "the doctrine of the two swords." *Id.* at 35.

2. The Middle Ages

In Medieval Europe, "[c]onflict between the two swords" of Church and State "was inescapable" and culminated in the Papal Revolution. *Id*. In 1059, Pope Nicholas II "for the first time forbade lay investiture . . . thereby taking the power to appoint the pope away from the emperor." HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION, at 520 (Harvard U. Press 1983). Sixteen years later, Pope Gregory VII challenged the authority of kings to invest bishops with the ecclesial symbols of their office, *id.*, on the ground that "lay investiture threatened the freedom of the Church and inverted the right ordering of Church and society." WILKEN at 36. He thus

acted "to strip the king of spiritual authority and reduce him to the status of a layman." *Id.* The pope's efforts reaffirmed the principle that, while the king governed secular affairs, the church was to govern itself. This distinction "would be infused with new life during the Reformation" of the sixteenth century. *Id*. at 36–37.

Europe continued to endure a series of "conflict[s] over the government's intervention in [religious] decision making." Berg at 179. Neither state nor religious authorities were "wholly victorious." BERMAN at 520. Instead, the conflict gradually led to a "'duality' of jurisdictions that 'profoundly influenced the development of Western constitutionalism.'" Berg at 180 (citation omitted). The inability of either side to achieve complete victory "established [the] 'principle that royal jurisdiction was not unlimited,'" and that "'it was not for the secular authority alone to decide where its boundaries should be fixed.'" *Id.* (citation omitted).

3. England: Mother of American Law

In 1215, King John's nobles were in revolt and he was forced to sign the *Magna Carta*, the fountainhead of English due process and the rule of law. The ancient charter runs for over sixty clauses of enumerated rights, but the very first clause secures church autonomy: "that the English Church be free"—which at the time meant free under the papacy from control by the king. This development came about when Pope Innocent III had placed all England under interdict and excommunicated John. John had earned this sanction by refusing to accept the pope's nominees for Archbishop of Canterbury. The king counterattacked by putting his own nominees in clerical offices. But the nobles, cut

off from the sacraments of the church, pressured John, who in time relented. BERMAN at 262-63.

The most notorious conflict between secular and religious authorities occurred when Pope Clement VII refused to annul the marriage of Catherine to Henry VIII. In response, Henry removed the church from the pope's authority and directed clergy to acknowledge the king as the "sole protector and supreme head" of the new Church of England. WILKEN at 120–21. Parliament quickly adopted the Act of Succession (1534), which declared Henry's marriage "void and annulled" and required the king's subjects to renounce allegiance to any "foreign authority or potentate." *Id.* at 122. When Henry's Lord Chancellor, Thomas More, and the Bishop of Rochester, John Fisher, refused to abjure allegiance to Rome, they were executed. *Id.* at 123.

Nevertheless, by the late sixteenth century "the language of two realms, one spiritual the other political, had become commonplace," and Catholics in England used this language to defend the Roman Church from persecution. *Id*. at 127. Baptists, Quakers, and other Protestant separatists similarly invoked this language as they struggled to resist the Crown's impositions. Although the separatists recognized the king's "power and authority" to make ordinances and civil laws, *id.* at 139, they maintained that the king and clerics were "not to intermeddle with one another's authority, office and functions," *id.* at 142. Well-versed in the texts of Christian antiquity, the separatists recognized that "[t]he plea for liberty of conscience is no new doctrine." TRACTS ON LIBERTY OF CONSCIENCE AND PERSECUTION: 1614–1661, at 11 (Edward Bean Underhill ed., 1813–1901).

Despite the pleas for autonomy from Catholics and dissenting Protestants, the Crown sought to remain involved in religious governance. From the time of Elizabeth I, the Crown "maintained control of ecclesiastical affairs" of the Church of England by ordaining the clergy, issuing licenses to preach, and overseeing church-related schools. WILKEN at 158. When James I ascended to the throne in 1603, he insisted it was "the chiefest of all kingly duties . . . to settle the affairs of religion." DOCUMENTS ILLUSTRATIVE OF ENGLISH CHURCH HISTORY, at 513 (Henry Gee & William John Hardy eds., 1896).

4. The English Civil War

Because the Crown sought to maintain a hand in religious authority, controversy continued to roil seventeenth-century England. A leading source of strife involved clashes between Episcopal and Presbyterian teachings on church polity. Episcopal polity, associated with the Catholic and Anglican churches, called for placing ecclesiastical authority in bishops. In contrast, Presbyterian polity, associated with the Puritans, Pilgrims, and other Reformed Protestants, called for governance by an assembly of elders, *i.e.*, presbyters, meeting only occasionally and with authority only when assembled with a quorum.

When the Puritans asked James I to relieve them of the burden of episcopacy, he refused, declaring that he was opposed to a Presbyterian form of church polity. WILKEN at 136. When James attempted to impose episcopal polity on Presbyterian Scotland, it drew immediate opposition from Parliament. FELIX MAKOWER, THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND, at 71 (1895). The conflict

came to a head in 1640, when James' successor, Charles I, dissolved Parliament and ordered all clergy to swear an oath upholding the episcopacy. *Id.* at 75–76. The Scots then invaded England, Parliament executed the king's chief minister, and civil war ensued. *Id.* at 77–79; *see* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1412 (2004). This ended badly for Charles I, who was beheaded in 1649. After a short period for an English Commonwealth under Oliver Cromwell, the monarchy was restored in 1660 under Charles II.

5. From Locke to the Colonies in America

The worst of England's religious struggles were resolved by the Act of Toleration (1689) in the wake of what the victors called the Glorious Revolution of 1688. *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 355 n.59 (1984). The English deposed the suspected Catholic, James II, and placed on the throne the Protestant William of Orange and his wife Mary. Writing to justify and secure the fruits of that Revolution, John Locke penned his influential *A Letter Concerning Toleration*, advocating church-state separation as the only path toward civic peace. According to Locke, "it is utterly necessary that we draw a precise boundary-line between (1) the affairs of civil government and (2) the affairs of religion." John Locke, *Toleration* 3 (1690) (Jonathan Bennett ed., 2010), http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf. Otherwise, there will be "no end to the controversies arising between those who have . . . a concern for men's souls and those who have . . . a care for the commonwealth." *Id.*

Locke insisted that religious institutions be free to control their clergy, members, and internal affairs. A church is a "free society" of people "who voluntarily come together to worship God in a way that they think is acceptable to Him and effective in saving their souls." *Id.* at 5. "[S]ince the members of this society . . . join[] it freely and without coercion, . . . it follows that the right of making its laws must belong to the society itself." *Id.* This authority of self-governance includes the church's authority to select its lay members, and to disassociate from anyone who declines to follow its rules. A church's power of excommunication—"the power to remove any of its members who break its rules"—is thus fundamental and immutable, as "the society would collapse" if its members could "break [its laws] with impunity." *Id.* at 7.

Ideas similar to Locke's found expression in the British colonies of North America. In *The Bloudy Tenet of Persecution for Cause of Conscience*, the founder of Rhode Island, Roger Williams, made a two-part case for noninterference with church affairs. "First, it was best for the state because conformity in religious matters was impossible due to its personal nature, and state attempts to compel conformity would lead only to repression and civil discord." Esbeck, *Establishment Clause Limits* at 357–58. Second, it "was best for religion because it sealed the church from co-optation by the state and left it free to pursue its mission, however perceived." *Id.* at 358. These ideas spread throughout the North American colonies during the First Great Awakening of 1720–1750. *Id.* at 357. "The leaders of the movement insisted that the Church should be exalted as a spiritual and not a political institution." *Id.* at 358 (internal quotation marks omitted).

In 1784-86, Virginia famously threw off its established Church of England, deregulated religion, and instituted voluntarism in the funding of religious institutions. This was a triumph for an alliance of Protestant dissenters and James Madison. *See* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 GEORGETOWN J.L. & PUB. POLICY 51, 94-96 (2009) (detailing the successful biblical arguments for disestablishment by Baptists and the Hanover Presbyterians).

B. American's Constitutional Formation

1. Church-State Events Before the War of Independence

The struggle for freedom of the church started well before the American Revolution. American colonies with state churches had laws setting educational and other credentials for ministers. These were among the perceived evils that eventually spurred the First Amendment's adoption. As such, the public would have understood government "credentialing" of ministers as an aspect of "an establishment of religion." The First Amendment's restraints on government arose in significant part from disputes between established colonial churches and religious dissenters, including "New Light" Congregationalists in Connecticut and Baptists in Massachusetts and Virginia. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437-43 (1990) (describing the dissenting "evangelical impetus toward religious freedom"). For example, from 1740 to 1754, the "New Light" Congregationalists separated from the "Old Light" establishment, dissatisfied with its "'formality' [and] spiritual dullness." 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH

AND STATE, at 351 (1971) (quotation marks in original). The New Lights emphasized that God's spirit spoke "to men's hearts or souls, to their spiritual emotions, not to their understanding or minds." *Id.* Naturally, this attitude was reflected in who they elected to lead their church and preach their scriptures. The New Lights opposed the formally trained "legal preacher," preferring a "layman who had experienced conversion" personally. *Id*. They loathed the "implication that since only an exceptionally intelligent and well-educated man could fathom the doctrinal mysteries of religion, the laws of nature, and the philosophy of science, salvation was only for the elite, the intelligentsia." *Id.* at 352. They believed that "the learned clergy had lost touch with the spiritual needs of the common man and no longer really served as ministers of God to them." *Id.* Similar views about ecclesial office—locating its foundational authority in a divine call more than in formal learning—arose among the so-called Separate Baptists, who likewise grew as a result of revivals to become a large dissenting group in both New England and the South. *See id.* at 423-28. New England colonial legislatures, which reflected the views of the "Old Lights," responded by taking steps to restrict or disfavor informally trained ministers. *Id.* at 363. In 1742, Connecticut passed a law prohibiting "itinerants" from preaching without approval of an established parish. That same year, it also passed legislation "preventing any church or parish from choosing a minister who lacked a college degree" or was not "'educated at some university, college, or publick [*sic*] academy.'" *Id.* at 363, 472-73 (quotation omitted). The only alternative for a prospective pastor was to have "obtained testimonials" from the majority of "settled ministers of the

gospel" in the county where he sought to minister finding him "to be of sufficient learning to qualifie [*sic*] him for the work of such ministry." *Id.* at 473.

Likewise, Massachusetts passed a law in 1760 preventing legal recognition of a parish ministers unless they had "academy or college training, or had obtained testimonials from the majority of the ministers already settled in the county." JACOB C. MEYER, CHURCH AND STATE IN MASSACHUSETTS, at 51 (1930). The law disqualified ministers without formal credentials, primarily Baptists, from receiving funds that were collected by each town's authorities for support of worship. *Id.* Isaac Backus, a leader among the colony's Baptists, cited the law as an example of how the "blend[ing]" of "civil and ecclesiastical affairs . . . depriv[ed] many of God's people of that liberty of conscience which he has given them." Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), reprinted in ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-89, at 303, 316-17 (William G. McLoughlin ed., 1968). Backus argued that by requiring "each parish to settle a minister" but then disqualifying teachers who lacked the government's preferred training, the law violated the principle that God "gives gifts unto men in a sovereign way as seems good unto him." *Id.* at 317 (italics removed); *see also* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY, at 202-03 (reprint 1968) (describing a 1650 Massachusetts civil court decision forbidding installation of a parish minister because he was "'lacking in such abilities, learning, and qualifications as are requisite and necessary for an able ministry of the people'") (quotation omitted). Virginia also narrowly defined the "ministers" who enjoyed autonomy, by dictating where ministers were permitted to

preach and jailing the (mostly itinerant, non-establishmentarian) unlicensed ministers. Berg at 183, 188.

These disputes helped lead to the adoption of the First Amendment. Members of these dissenting religions feared a federal government capable of resurrecting such legal restrictions on their faiths. James Madison owed his 1788 election to Congress to disgruntled Baptists who supported his candidacy to address their grievances with the established church in Virginia. McConnell, *Origins* at 1476-77 (attributing Madison's "narrow margin of victory" partly to Baptist support given after he "championed a constitutional provision for religious liberty as a campaign issue"). Likewise, New England dissenters feared the prospect of a powerful federal government and pushed for greater protection under the new Constitution. John Leland, a Baptist minister in both Massachusetts and Virginia, opined that the original Constitution provided no "Constitutional defense" against religious oppression of the type Baptists had already suffered. THOMAS S. KIDD & BARRY HANKINS, BAPTISTS IN AMERICA: A HISTORY, at 73 (2015). Madison then made good on his promise to dissenters, introducing what became the Bill of Rights and taking a leading role in securing Congress's approval. He later reported that a Baptist leader assured him the Bill of Rights "'had entirely satisfied the disaffected of his sect.'" McConnell, *Origins* at 1487 (quoting Nov. 20, 1789, letter from Madison to President Washington). In short, conceptions of the office of "minister" based on conventional wisdom—especially laws setting qualifications and duties for a minister—were among the key evils to which the First Amendment was a response.

2. Events on the Heels of American Independence

Once the American colonies won their independence, the Confederation Congress endorsed the principle of noninterference in internal church governance. In the early 1780s, the French minister to the Confederated States petitioned Congress to approve a Catholic Bishop for America. Carl H. Esbeck, *Religion During the American Revolution and the Early Republic*, 1 LAW AND RELIGION, AN OVERVIEW, at 57, 72–73 (Silvio Ferrari & Rinaldo Cristofori eds., 2013). In response, Congress passed a resolution directing Benjamin Franklin (then ambassador to France) to notify the Vatican's representative that "the subject of [this] application . . . being purely spiritual[] . . . is without the jurisdiction and powers of Congress." *Id.*

"It was against this background that the First Amendment was adopted." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 183 (2012). "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices." *Id.* at 184 (citation omitted). "This understanding of the Religion Clauses was reflected in . . . events involving James Madison, the leading architect of the religion clauses of the First Amendment." *Id.* (internal quotation marks omitted).

Shortly after the Louisiana Purchase (1803), The Most Rev. John Carroll—first Roman Catholic Bishop in the United States—asked Secretary of State James Madison for advice on whom he should appoint to head the church in New Orleans. Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J. L. & PUB. POL'Y 821, 830

(2012). Madison responded that the "selection of [religious] functionaries . . . is entirely ecclesiastical," and thus the government cannot be involved. *Letter from James Madison to John Carroll* (Nov. 20, 1806) THE RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY OF PHILADELPHIA, vol. 20, at 63–64 (1909). Madison subsequently wrote a private letter offering his opinion as a private citizen on the matter. Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776–1833, at 273, 283–85 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019). But when writing in his official capacity, "[h]e declined even to express an opinion on whom Carroll should select." McConnell, *Reflections* at 830.

President Thomas Jefferson took the same view of the Establishment Clause. In 1804, the governor of Orleans Territory wrote to Secretary of State Madison to inform him that local government authorities had shut the doors of a Catholic parish church "in response to a conflict between two priests concerning who was the rightful leader of the congregation." Pybas at 281. Although the territorial governor was pleased with this manner of handling the dispute, Jefferson, who learned about it from Madison, was not. *Id.* at 282. In a July 5, 1804, letter to Madison, Jefferson wrote:

> [I]t was an error in our officer to shut the doors of the church. . . . The priests must settle their differences in their own way, provided they commit no breach of the peace. . . . On our principles all church-discipline is voluntary; and never to be enforced by the public authority.

Id.

Just eight days later another event projected the Establishment Clause of the First Amendment into the Louisiana territory. Jefferson penned another letter, this time in response to a letter from the Ursuline Nuns of New Orleans. Jefferson assured the nuns that the Louisiana Purchase—and the transfer of control from Catholic France to the United States—would not undermine the rights of their religious school and the glebe lands that supported it. Jefferson took the opportunity to expand on church-government relations by further noting that the nuns, now as U.S. citizens, had a "broad right of self-governance and religious liberty." Pybas at 281; *see also id.* at 280. As the president explained, "[t]he principles of the [C]onstitution . . . are a sure guaranty to you that [your property and other rights] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority." Pybas at 281. Thus, Jefferson understood church-state separation as guaranteeing the autonomy, not just of churches but religious schools as well.

There was yet another event in territorial Louisiana, this one involving an interim vicar general, appointed in 1805, and his difficulty with a rebellious priest. The priest was deemed apostate by the vicar general but could not easily be recalled from his post because the priest had the unflagging support of local parishioners. The vicar general reported the problem to the territorial governor and added that the priest was sowing sedition because of suspected allegiance to Spain. Chastened by his earlier mishandling of religious affairs to the disappointment of Jefferson, the territorial governor refused to

get involved in the religious dispute. However, the governor did summon the priest for an interview to assure his loyalty to the United States. Pybas at 282-83.

In 1811, Congress passed a bill incorporating the Protestant Episcopal Church in the District of Columbia. *Hosanna-Tabor*, 565 U.S. at 184–85. President Madison vetoed the bill "on the ground that the particular by-laws involved the government overseeing clerical appoints, for such 'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates . . . the article of the Constitution of the United States, which declares, that Congress shall make no law respecting a religious establishment.'" *Id.* (quoting 22 ANNALS OF CONG. 982–83 (1811)). Madison explained:

> The bill enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same*; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises [*sic*].

Id. at 185 (quoting 22 ANNALS OF CONG. 983) (emphasis added). This episode demonstrates that the principle of non-entanglement extends beyond the appointment of clergy; it broadly forbids government from interfering in "the organization and polity of the church." *Id.* (quoting 22 ANNALS OF CONG. 983).

There never was a federal establishment so there never was a federal disestablishment. However, the disestablishment process in the original thirteen states reveals the founding generation's understanding that noninterference with church officials is vital to religious autonomy. Because the Bill of Rights did not apply to state

governments,[1] almost half the states still maintained established religions at the time of adoption of the First Amendment. *See* CARL H. ESBECK AND JONATHAN J. DEN HARTOG EDS., DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833, at 3-4, 8-12 (U. of Missouri Press 2019) (separate chapters on each of the original thirteen states, as well as seven newly admitted states). Accordingly, disestablishment continued to occur on a state-by-state basis through state law reform—Massachusetts being the last to dismantle its establishment in 1833. Each of the states that first maintained an established church and later adopted a state constitutional amendment forbidding establishment of religion—South Carolina, New Hampshire, Connecticut, Maine, and Massachusetts—enacted at the same time a provision that all "religious societies" have the "exclusive" right to choose their own ministers. A church's freedom to select and supervise those with ministerial responsibilities was thus part of what it meant to disestablish the state church.

In summary, this is not just about the Free Exercise Clause and individual religious claims. Rather, the culmination of our Western legal history confirms "a constitutional order in which the institutions of religion—not 'faith,' 'religion,' or 'spirituality,' but the 'church'—are distinct from, other than, and meaningfully independent of, the institutions of government." Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?* 22 ST. JOHN'S J. LEGAL COMMENT,

[1] The Supreme Court's incorporation of the Establishment Clause through the Fourteenth Amendment making it binding on the states did not take place until the mid-twentieth century. *See Everson v. Board of Education*, 330 U.S. 1, 14–15 (1947).

515, 523 (2007). "Church autonomy inheres in the church as a body and involves more than rights of individual conscience." Paul Horwitz, *Essay: Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1058 (2013). Religious freedom thus "involve[s] a structural as well as an individual component, one that recognizes the limits of the state and the separate existence of the church." *Id*. "[E]arly American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2011–2012 CATO SUP. CT. REV. 307, 313 (2012). "And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." *Id.*

II. U.S. SUPREME COURT CASE LAW ON THE DOCTRINE OF CHURCH AUTONOMY

A. SCOTUS Cases Decided Before *Gibson v. Brewer*

In *Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1872), the Supreme Court laid down the first broad principles of judicial abstention concerning matters of dispute within religious bodies over polity, ecclesiastical oversight, and doctrine:[2]

> [W]henever 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 as binding on them, in their application to the case before them.

[2] In *Watson,* the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment. This is because *Watson* was decided prior to *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). In following the old rule of *Swift v. Tyson*, 41 U.S. (l6 Pet.) 1 (1842), federal courts sitting in diversity could deviate from state substantive law. Further, the First Amendment Religion Clauses had not yet been applied to the states through the Fourteenth Amendment.

Id. at 727. This post-Civil War case involved a struggle between two factions of a local Presbyterian Church for control of the church building. Title to the property was in the name of the trustees of the local church. However, the deed and charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws." *Id.* at 683. The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that the Assembly possessed "the power of deciding in all controversies respecting doctrine and discipline." *Id.* at 682. Following the Civil War, the General Assembly ordered the members of all local congregations who believed in a divine basis for slavery to "repent and forsake these sins." *Id.* at 691. A majority of the local church members were willing to comply with the directive. A minority faction, however, deemed the resolution of the Assembly a departure from the doctrine held at the time when the local church first joined with the general church. The minority's legal theory was that the general church held an interest in the property of the local church subject to an implied trust. The condition said to be implied was that the church adhere to its original doctrines. Any departure from doctrine by the general church meant a breach of trust and thus forfeiture of its interest in the property occupied by the local church. Accordingly, the minority faction claimed that the majority relinquished any right to control the property when the general church repudiated the original, proslavery doctrine. Because they were the "true church," the minority faction maintained that they should be awarded the local church real estate. *Id.* at 691-94.

The implied trust theory, with its origin in English law *(id.* at 727-28) and its established Church of England, was rejected by the U.S. Supreme Court because its departure from doctrine feature required the civil adjudication of a religious question. The *Watson* Court gave three bases for refusing to take subject matter jurisdiction of the case: (1) civil judges are unschooled in religious doctrine, and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law *(id.* at 729, 730, 732); (2) for the civil law to award the property to the faction adhering to original doctrine would entail the government " taking sides," thereby "establishing" one creedal position while severely inhibiting changes in religious doctrine *(id.* at 728, 730, 735); and (3) both clerics and lay members of a church have voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the system of polity of the entire church and its internal administration *(id.* at 729).[3] These bases for church autonomy are rooted, said the Court, in the American political system that—unlike the English system—separates the institutions of church and of state, thereby sharply

[3] *See also Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714-20 (1976) (civil courts will not get involved in telling general church that it is misapplying its own rules or canons). The Supreme Court has held that consent to be governed by the church polity and its authorities is sufficient to protect an individual member's free-exercise right, so long as the member has the unmitigated right to leave the church at any time. *Order of Saint Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914). Departing from a church, of course, means a cleric or church member leaving behind the "work of one's hands," both spiritual and material. But being willing to leave behind one's spiritual and material works is what is impliedly consented to at the outset when one voluntarily joins both the church-wide units and local congregations of a denomination. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses*, 81 COLUM. L. REV. 1373, 1403 (1981).

limiting the involvement by civil courts in the affairs of religious bodies *(id.* at 728-29, 730).

The Court in *Watson* thereby said that the application of church autonomy law may relate to one or more of the above-stated rationales: lack of judicial competence on church procedures and doctrinal questions; refusing to "take sides" in disputes or to inhibit inevitable changes in religious doctrine; and the implied consent of individuals to be bound by the internal decision making processes and chain of command within the church's polity.

The elevation of *Watson* to a principle of First Amendment stature began with *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94 (1951). In *Kedroff,* the Supreme Court struck down a New York statute that displaced control of the Russian Orthodox Churches in the state from the central governing hierarchy located in the Soviet Union with a church sub-organization limited to the diocese of North America. The felt need to transfer control of ecclesiastical authority was linked to the Marxist Revolution of 1917 and doubt concerning whether Moscow had "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body." *Id.* at 106. Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the members," but transferred control over domestic churches by legislative fiat *(id.* at 119), the Court held that the statute violated the "rule of separation between church and state" *(id.* at 110). The *Watson* Court had repudiated the English implied-trust rule used to sanction the departure from doctrine standard, but only as a matter of federal common

law. A number of states had continued to follow the implied trust rule as a matter of their own common law. *Kedroff,* however, clearly foreshadowed the sweeping aside of the common law in those states still following the English rule.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Church,* 393 U.S. 440 (1969), the rule of church autonomy in *Watson* was unequivocally elevated to a First Amendment principle. *Presbyterian Church* presented a church dispute between a general church and two of its local congregations over the authority to control the local churches' properties. The controversy began when the local churches claimed that the general church had violated the organization's constitution and had departed from original doctrine and practice. *Id.* at 442 n.l. Georgia followed the implied trust rule with its requisite fact-finding into alleged departures from doctrine. On the basis of a jury's finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations. On appeal, the U.S. Supreme Court held that the First Amendment does not permit a departure from doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state" *(id.* at 445-46), "leaves the civil court *no* role in determining ecclesiastical questions in the process of resolving property disputes" *(id.* at 447) (emphasis in original).

In a dispute more akin to the ecclesiastical differences in *Kedroff,* the Supreme Court in *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976), rejected an Illinois bishop's resistance to a top-down reorganization of the American-Canadian Diocese of the Serbian Eastern Orthodox Church and his removal from

office. *Milivojevich* involved the concerns of internal church administration and clerical appointment, matters also insulated from civil review under the First Amendment. *Id.* at 709, 713, 720, 721. In *Milivojevich,* there was no dispute between the parties that the Serbian Eastern Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the ecclesiastical body in Europe that had decided the bishop's case. *Id.* at 715. Nor was there any question that the matter at issue was a religious dispute. *Id.* at 709. Nevertheless, the state court decided in favor of the defrocked bishop in Illinois because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner. On appeal, the U.S. Supreme Court rejected an "arbitrariness" exception to the judicial deference rule of *Watson* when the question concerns church polity or supervision of a bishop. *Id.* at 712-13. When the issue is within one of the spheres of church autonomy, there may be no examination by civil courts into whether the church judicatory body properly followed its own rules of procedure. *Id.* at 713. For a civil court to accept jurisdiction over such subject matters is not "consistent with the constitutional mandate [that] the civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.*

In reasoning similar to *Watson,* the *Milivojevich* Court explained that the bases for a First Amendment prohibition to civil jurisdiction are three-fold. First, civil courts cannot delve into canon law or church documents. *Id.* These matters are too sensitive to permit any civil probing because inquiry may prove intrusive and thus have the court

"taking sides" in a religious dispute. Second, civil judges have no training in canonical law and theological interpretation. *Id.* at 714 n.8. Finally, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness'" cannot be borrowed from American civil law as if they were twigs to be grafted onto a church's polity and thereby "modernize" the church with no concern for the principle of church-state separation. *Id.* at 714-15. The U.S. Supreme Court also reversed the state court's undoing of the diocesan reorganization, holding that the Illinois court had impermissibly "delved into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs." *Id.* at 721. The enforcement of church documents, often unclear to a civil judge, cannot be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity." *Id.* at 723.

The U.S. Supreme Court held that states are permitted, in limited instances, the option of devising "neutral principles of law" that when properly followed permit the adjudication of intrachurch disputes affecting property.[4] *Jones v. Wolf,* 443 U.S. 595, 602-06 (1979). As the High Court said, examining church charters, constitutions, deeds, and trusts to resolve property disputes permitted courts the option to use "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* The method's advantage is that it sometimes "obviates

[4] The Court made it clear that a neutral-principles approach is not mandated by the First Amendment. Rather, in internal church property disputes the rule of neutral principles is a permissible alternative to reliance on the judicial-deference rule. *Jones v. Wolf*, 443 U.S. at 602.

entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes . . . ." *Id.* at 605. However, a neutral principles option may not be used in a manner that transgresses into any of the spheres of church autonomy. *Id.* at 602 ("It is clear . . . that 'the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.'").

In *Watson v. Jones,* the rule of judicial deference was encouraged as a means of resolving a dispute while respecting church autonomy doctrine. In *Jones v. Wolf*, the neutral principles rule, when workable, was devised as an alternative to judicial deference. Neither of these two rules is an exception to the doctrine of church autonomy. Rather, the rules are alternative means of fulfilling the requirements of church autonomy. "[T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Jones*, 433 U.S. at 604. *See also Milivojevich,* 426 U.S. at 712-13 (that "the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures" and that is an inquiry prohibited by the First Amendment); *Md. & Va. Churches of God v. Church at Sharpsburg,* 396 U.S. 367, 369 (1970) (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to

decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."); *id.* at 369 n.2 ("Only express conditions [in a church document] that may be effected without consideration of doctrine are civilly enforceable" by a civil court.). In other words, an adjudication concerning property is not "neutral" unless it avoids interference with doctrine, polity, the church/clergy relationship, and church membership.

B. SCOTUS Cases Decided Since *Gibson v. Brewer*

Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997), was decided by this Court in 1997. In January 2012, the U.S. Supreme Court issued its unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012). In the near term, the High Court promises to further ground church autonomy in Western history and the American founding in the consolidated appeals of *Our Lady of Guadalupe School v. Morrissey-Berru*, U.S. Sup. Ct. No. 19-267 (ministerial exception asserted in age discrimination case against religious school brought by teacher who had religious responsibilities), and *St. James School v. Biel,* U.S. Sup. Ct. No. 19-348 (ministerial exception asserted in disability discrimination case against religious school brought by teacher who had religious duties). Oral argument is expected later this term and a decision in June 2020.

Hosanna-Tabor involved a fourth-grade teacher, Cheryl Perich, suing her employer, a religious school, alleging retaliation for having asserted her rights under the Americans with Disability Act (ADA), 42 U.S.C. §§ 12101 *et seq*. The Equal Employment Opportunity Commission filed the original suit, and the teacher intervened

as a party. In the lower federal courts the church-related school raised the "ministerial exception," which recognizes that under the First Amendment religious organizations have the authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, retention, and all the other terms and conditions of employment. As a matter of church autonomy, the ministerial exception overrides not just the ADA but a number of venerable employment nondiscrimination civil rights statutes.[5]

The Supreme Court, in an opinion by Chief Justice Roberts, wrote that "[r]equiring 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 the selection of those who will personify its beliefs," *Hosanna-Tabor*, 565 U.S. at 188. The Court said that although "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Accordingly, in a lawsuit that strikes at the ability of the church to govern the church, any balancing of interests between a vigorous eradication of employment discrimination, on the one hand, and institutional religious freedom, on the other, is a balance already struck on the side of ecclesial freedom. "When a minister who

[5] *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; The Equal Pay Act of 1963, 29 U.S.C. § 206(d); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; 42 U.S.C. §§ 1981 and 1981a.

has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us." *Id*.

In *Hosanna-Tabor*, the U.S. Department of Justice's Office of the Solicitor General (OSG) claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the OSG, was that the government be neutral with respect to religion and religious organizations. That was successfully done here, said the OSG, when Congress enacted the ADA, which by its terms treated religious organizations just like every other employer when it came to discrimination on the basis of disability. By extension, the same would be true of federal and state civil rights statutes prohibiting discrimination on the bases of sex, age, race, and so forth. The OSG allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were still subject to the ADA. *Id*. at 188-89. In the great cause of equal treatment, intoned the OSG, the government statutes could be blind to religion and religious organizations. To be sure, Congress could choose to accommodate religion, conceded the OSG, but the First Amendment did not require it to do so.

The Court's reaction to the OSG's argument for a religion-blind government was to call the proposition "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.* Solicitude, of course, means attentive care or protectiveness. Religious organizations have freedom of expressive association, not merely to the same degree as other expressional groups, but are accorded much more. The very text of the First

Amendment recognizes the unique status of organized religion, a status that makes a properly conceived separation of church and state desirable because the right ordering of these two centers of authority is for the good of both.[6] So the *Hosanna-Tabor* Court held that the First Amendment requires a ministerial exception. *Id*. at 188-90.

Before proceeding to examine more closely the facts that convinced the Court that this fourth-grade teacher was a "minister," the Chief Justice had to distinguish *Employment Division v. Smith,* 494 U.S. 872 (1990). In *Smith*, the State of Oregon listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* were Native Americans and held jobs as counselors at a private drug rehabilitation center. *Id*. at 874. They were fired for illegal drug use (peyote), and later denied unemployment compensation by the state because they were fired for cause. Male members of the Native American Church ingest peyote in the course of a sacrament. The *Smith* Court held that the Free Exercise Clause was not implicated when Oregon enacted a neutral law of general applicability that happened to have an adverse impact on the religious practice of peyote use.[7]

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[6] *See, e.g., McCollum v. Bd. of Educ*., 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."). *McCollum* held that for a public school to open its curriculum to the teaching of elective religion classes was in violation of the Establishment Clause. *Engel* held that teacher-led prayer in a public school classroom violated the Establishment Clause.

[7] The *Smith* decision is up for reconsideration in *Fulton, Sharonell, et al. v. Philadelphia, Pa., et al.*, No. 19-123 U.S. Sup. Ct., petition for a writ of certiorari granted February 24,

In *Hosanna-Tabor*, Chief Justice Roberts admitted that the ADA was a general law of neutral application that happened to have an adverse effect on Hosanna-Tabor's ability to fire a classroom teacher. 565 U.S. at 189-90. But then, for a unanimous Court, he drew this distinction between *Hosanna-Tabor* and *Smith*: "The present case, in contrast [to *Smith*], concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id*. at 190. The referenced effect was a civil court ordering a church to retain a minister it did not want—historically an act of establishment. Accordingly, there is a subject-matter class of cases to which the rule in *Smith* does not apply. The supervising and eventual firing of Perich was characterized as "internal," meaning a decision within the church's autonomous sphere of self-governance.

Obviously, a sacrament is an important religious practice. Obviously, the Native American plaintiffs suffered a burden on religious conscience that was unrelieved by the rule in *Smith*. But the point of church autonomy is not to relieve religious burdens on *individuals*. If it were, then *Hosanna-Tabor* would have been at odds with and thereby overruled *Smith*. That did not happen. Rather, *Hosanna-Tabor* distinguished *Smith*. What was remedied in *Hosanna-Tabor* was not a burden on an individual's religion but the government's intrusion into the internal autonomy of churches and other religious groups. "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." 565 U.S. at 194.

2020. The *Fulton* case will not be argued until October 2020, and a decision is not expected until early next year.

The *Hosanna-Tabor* Court went on to provide another example where *Smith* does not apply: in lawsuits over church property, the government must not take sides on the question concerning the rightful ecclesiastical authority to resolve the property dispute. These two examples—a church selecting its own minister and a church determining the ecclesiastical judicatory with final authority to solve property disputes—are contrasted with the religious practice at issue in *Smith*, namely: an individual's ingestion of peyote as part of a sacrament. The Court distinguished *Hosanna-Tabor* from *Smith* because the decision to hire, oversee, and fire a minister is about who governs the church. It is about institutional autonomy.

It follows that *Hosanna-Tabor* requires determining what subject matters fall into the description "internal church decision." *Id.* at 190. To answer that question there is help from another quarter: Justice Alito's concurring opinion, joined by Justice Kagan, said that this subject matter class of cases recognizes a "religious autonomy" found in the Establishment and Free Exercise Clauses that together protect "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* at 712 (Alito, J., concurring).[8]

A survey of the High Court's cases yields relatively few—yet important—subject matters within which civil officials have been barred categorically from exercising

[8] *See also Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.") (Brennan, J., concurring) (internal quotations and citation omitted).

jurisdiction: (1) taking up the validity, meaning, or importance of religious questions, and resolving doctrinal disputes;[9] (2) the selection of ecclesiastical polity, including the proper application of procedures set forth in a church's organic documents, bylaws, and canons;[10] (3) the selection, credentialing, promotion, overseeing, discipline, or retention of clerics and other ministers;[11] and (4) the admission, discipline, or expulsion of church

[9] *Md. & Va. Churches of God v. Church at Sharpsburg,* 396 U.S. 367, 368 (1970) (per curiam) (avoid doctrinal disputes); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440, 449-51 (1969) (rejecting rule of law that discourages changes in doctrine); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (courts are not arbiters of scriptural interpretation).

[10] *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (same); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts not allowed to interfere with merger of two Presbyterian denominations).

[11] In addition to *Hosanna-Tabor*, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976) (civil courts may not probe into defrocking of cleric); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (courts not to probe into clerical appointments); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directed to archbishop to appoint petitioner to ecclesiastical office). *See NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 472 (1892) (refusing to apply general law preventing employment of aliens to church's clerical appointment); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1872) (unconstitutional to prohibit priest from assuming ecclesiastical appointment because of refusal to take civil oath).

members.[12]

The types of lawsuits that come under the doctrine of church autonomy are relatively few—but highly sensitive—because, *inter alia*, no reply is permitted raising opposing government interests. That is, once it is determined that a suit falls within the subject matter class of church governance, there is no judicial balancing. There is no balancing because there can be no legally sufficient governmental interest. The First Amendment has already struck the final balance. *Hosanna-Tabor*, 565 U.S. at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."). In this regard, the Court lectured OSG counsel concerning her argument that the school's religious reason for firing Perich was pretextual, that is, claiming the hiring was not for religious reasons. "This suggestion misses the point of the ministerial exception," wrote the Chief Justice.

> The purpose of the [ministerial] exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.

Id. at 194-95 (internal citation omitted). The church autonomy doctrine recognized in *Hosanna-Tabor* is categorical. If the aggrieved employee is a minister, the matter before

[12] *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. ... [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872) (court has no jurisdiction over church discipline or the conformity of church members to the standard of morals required of them).

the court is nonjusticiable. The lawsuit is at an end. Neither the government nor the employee is permitted to counter that there is an offsetting compelling interest.

The decision in *Hosanna-Tabor* is not about an individual constitutional right to religious liberty that is subject to weighted balancing—but about a structural restraint limiting the scope of the government's authority. Lower courts applying *Hosanna-Tabor* have properly interpreted the ministerial exception not as a personal right, but as a structural limitation on government action. *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses."); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (recognizing that the ministerial exception is a structural protection "rooted in constitutional limits on judicial authority").

That *Hosanna-Tabor* is a constraint on the regulatory power of the government explains why the case is based in part on the Establishment Clause. The text of that clause bespeaks a structural limit on authority: "Congress shall make no law" about a given subject matter described as "an establishment of religion." As Chief Justice Roberts wrote, "[T]he Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers, and "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions." 565 U.S. at 188-89. The Chief Justice gave examples in which the English Crown had interfered with the appointment of clergy in the established Church of England. *Id.* at 182-85. The Establishment Clause was adopted, inter alia, to deny such authority to our national

government. *Id.* at 183-85. A tort sounding in negligence that would have the finder of fact—a state agent—determine who is a "reasonably prudent bishop" or what is "reasonably foreseeable by the bishop" is a law "respecting an establishment of religion" outside the government's authority and thus not allowed by the First Amendment.

Weighted balancing by the Supreme Court (*i.e.,* compelling interest, least restrictive means) is not done in cases decided under the church autonomy doctrine. In *Hosanna-Tabor*, there is a welcome absence of verbal balancing tests, such as, prohibiting "endorsement" of religion that lessens the perceived standing of religious minorities in the political community; the "principal or primary effect must be one that neither advances nor inhibits religion"; and enjoining "excessive government entanglement with religion." Balancing tests are still valid under the Free Exercise Clause, but not in cases where the subject matter warrants the categorical protection of what Justice Alito calls "religious autonomy." *Id.* at 198. In such cases, the First Amendment, understood within the Western liberal tradition and America's state-by-state disestablishments that gave rise to church-state separation, has determined that hiring, promotion, supervising, and dismissing a bishop is one of those areas of authority that has not been rendered unto Caesar.

The tort of negligent supervision imposes an assumption by the finder of fact—essentially a majoritarian assumption—that certain training and the manner of being a bishop or other religious leader is deviated from only upon risk of suffering a judgment for damages. Even the threat of such a lawsuit and its attendant penalty in damages is chilling. America's colonial-era laws similarly used narrow definitions of "minister" to

deny congregations the choice of preacher they wished to call to lead their church. In the case at bar, the appellant would impose through a petit jury similar majoritarian standards for church officers or expose them to lawsuits that undermine the church's ability to choose how it defines its leaders and administers the faith. The offense is the same in each case: subjecting churches to a legal burden regarding their chosen leaders based on the leaders' lack of jury-approved conduct and foresight. In the American system, however, churches do not have to align with popular or majoritarian thinking or forfeit their freedom.

C. Mistakes by Appellant/Petitioner and His Amici

1. Appellant (Substitute Brief at 18, 22, 24-25) mistakenly relies on *Employment Division v. Smith*, 494 U.S. 872 (1990),[13] concerning the constitutionality of a law "generally applicable, neutral as to religion."[14] As discussed above in Part II.B, a unanimous U.S. Supreme Court in *Hosanna-Tabor* refused to apply *Smith* in a church autonomy case. 565 U.S. at 189-90. In *Hosanna-Tabor*, the OSG correctly pointed out that the Americans with Disabilities Act was a generally applicable law, neutral as to religion. *Id.* at 190. It follows, maintained the OSG, that the rule in *Smith* required a

[13] Again, the rule in *Smith* is up for reconsideration in *Fulton, Sharonell, et al. v. Philadelphia, Pa., et al.*, No. 19-123 U.S. Sup. Ct., petition for a writ of certiorari granted February 24, 2020.

[14] At times Appellant conflates *Smith* and its rule of "generally applicable law, neutral as to religion" with *Jones v. Wolf* and its rule of "neutral principles of law." *See, e.g.*, Appellant's Substitute Brief at 22. Apart from both using the word "neutral," the two rules are quite different in purpose and application. This is illustrative of how Appellant's exposition of the law is confused.

judgment that the ADA did not violate the Free Exercise Clause. *Id*. at 189-90. Chief Justice Roberts, for the Court, was incredulous, observing that the government's proposition was "untenable," "remarkable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id*. at 189. Where the doctrine of church autonomy applies, the rule in *Smith* is not followed. The law at issue in *Hosanna-Tabor* implicated church autonomy (who could be a minister at a religious school), whereas the law at issue in *Smith* did not implicate church autonomy (could two individuals, Native American drug counselors, be fired for peyote use). *Id*. at 189-90. As previously noted above in Part II.B (see text of this brief at footnotes 9-12), church autonomy doctrine applies to four types of subject matters: doctrinal questions, organizational polity, clergy and other ministers, and church membership and excommunication.

It is no answer to say that the bishop's or other religious official's supervisory role at issue here does not involve conduct derived from a religious belief. *See* Appellant's Substitute Brief at 34, 36; Appellant's Amici at 6-7, 8. The OSG tried that distinction in *Hosanna-Tabor*, and the Supreme Court unanimously rejected it with these words: "The purpose of the [ministerial] 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. The doctrine of church autonomy is not about protecting religiously based practices as such; it is about protecting matters within the scope of the church's internal governance. In this case, the church's internal governance means that a religious official at the Catholic school is shielded from being sifted and second-guessed by a finder of fact and

ultimately measured by the contextual standard of "reasonably prudent care." The church gets to define its ecclesial offices, not the state.

2. Appellant (Substitute Brief at 24, 30, 31-33) relies on the rule of "neutral principles of law."[15] The rule, however, is not an exception to the doctrine of church autonomy. As explained above (Part II.A), both the rule of judicial deference (*Watson v. Jones*) and the rule of neutral principles (*Jones v. Wolf*) are two means of resolving disputes between religious factions without invading church autonomy. As was made clear in *Jones v. Wolf*, neither rule works when its application fails to avoid entanglement with one or more of the four subject matters that fall within the circumference of church autonomy: doctrine, polity, clergy, and members. *Jones*, 433 U.S. at 604 ("[T]here may be causes where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."); *see also Milivojevich*, 426 U.S. at 712-13; *Church at Sharpsburg*, 396 U.S. at 369 and n.2 (Brennan, J., concurring).

The tort of negligent supervision is not a neutral principle, for its implementation will trench on church autonomy, specifically redefining the office of bishop. If this Court

[15] On several occasions, Appellant refers to the doctrine of church autonomy as the rule of "judicial abstention." *See, e.g.*, Appellant's Substitute Brief at 24, 31. This causes confusion. Church autonomy is not only applicable to the judiciary, but to all branches of government. Even more important, the word "abstention" wrongly suggests that church autonomy is a discretionary matter. Rather, it is required by the First Amendment.

thought it clarifying to do so, it could declare that the tort of intentional failure to supervise is a neutral principle. For the reasons explained in Part III, below, the intentional tort avoids invading the sphere of church autonomy.

3. In passing, Appellant (Substitute Brief at 24, 30) briefly suggests that claims that involve "third-party harm" are not subject to the doctrine of church autonomy. There is no basis in the U.S. Supreme Court case law for a "third-party harm" exception to church autonomy. As discussed in Part II.A, above, neither the judicial-deference rule nor the neutral-principles rule is an exception to the doctrine of church autonomy. Rather, the two subordinate rules are alternative means of resolving an intra-church dispute without invading church autonomy. By the same reasoning, the presence of third-party harm does not invent an exception to church autonomy. It is a distinction without a difference. As the High Court noted in *Hosanna-Tabor*, there is little doubt that the teacher at the Lutheran school had a strong interest in avoiding harm by way of disability discrimination. 565 U.S. at 196. But in choosing between an individual's strong interest in not suffering harm and church autonomy, "the First Amendment [has already] struck the balance" in favor of religious freedom. *Id*. There is no subsequent balancing of these harms against that which the First Amendment protects. The case is decided.

4. One of the most important holdings in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997), was that a claim of negligent supervision resulted in judicial inquiry that put the government's seal of approval on "one model for church hiring, ordination, and retention of clergy." *Id.* at 247. Nowhere in Appellant's Substitute Brief is this important constitutional violation addressed. A judge or petit jury, representing a cross-section of

the community, will inevitably tend to impose a majoritarian standard for what is "foreseeable" and what is "due care." This will favor one way to do religion over other models. Yet, at the heart of religious freedom is the protection of minority religions. Moreover, this inquiry invites the jury's entanglement into the polities of religious organizations, hence, weighing the virtue of episcopal polity against congregational, presbyterial, or some other hybrid way of organizing the church. The First Amendment does not permit favoring one denominational model over others. *See Larson v. Valente*, 456 U.S. 228 (1982) (unconstitutional discrimination when state statute is harmful only to new religious movements); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (unconstitutional for ordinance to permit use of city park for religious worship services but not type of meetings practiced by minority sect). It has long been the case that a law is unconstitutional when it prohibits "the Church's choice of its hierarchy." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 119 (1952). Indeed, this state's own Constitution is explicit in prohibiting such religious preferences. MO. CONST. art. I, sec. 7 ("[T]hat no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.").

III. INTENTIONAL TORTS ARE MARKEDLY DIFFERENT FROM NEGLIGENCE CLAIMS, FOR THEY LAY DOWN BRIGHT-LINE RULES THE ENFORCEMENT OF WHICH DO NOT INVADE CHURCH AUTONOMY.

As this Court also held in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997), a claim of intentional failure to supervise is by its nature different from a negligence claim. An intentional tort enforces a bright line, not a balancing test centered on contextual reasonableness by the "duly prudent" person. There is no sifting through the daily tasks

of bishops by finders of fact with an eye to what, in the bishops' discharge of their ecclesial office, they should have "foreseen" or done if proceeding with "due care." This is the venerable distinction between a bright-line rule and a balancing test. To be sure, in an intentional failure case the facts may still be contested concerning whether the bishop received actual knowledge in advance of the alleged sexual abuse. Resolving that question, however, does not involve asking the jury to step into the shoes of bishops and second-guess how they might have better executed their ecclesiastical office.

The jurisprudential distinction between a bright line and a balancing standard is familiar and longstanding. "The speed limit is 60 miles per hour" constitutes a bright line. In contrast, a balancing test is required when the standard is that "automobiles shall proceed at a safe speed under the current circumstances." The distinction is real. Given the democratic process and its need for reaching consensus and compromise in order to make law, to successfully enact a bright-line rule is more difficult. However, once legislated, bright lines are far easier to interpret and enforce with consistency. Balancing tests are just the opposite, that is: easy to enact democratically because the line-drawing is postponed to the future, but once the future has arrived the standard is difficult to interpret and apply.

Enforcement of the bright-line rule of intentional failure to supervise does not invade the sphere of internal church governance—but a contextual balancing standard does. The tort of intentional failure to supervise enforces a bright line, whereas the tort of negligent supervision inevitably enmeshes courts and juries in the ecclesiastical thicket, which the First Amendment flatly forbids.

CONCLUSION

Amici respectfully suggest that the judgment of the Missouri Court of Appeals, Eastern District, dismissing appellant's claim of negligent supervision of employees and negligent supervision of children (Counts II and IV) be affirmed as required by the doctrine of church autonomy rooted in the First Amendment to the United States Constitution.

CLAYTON PLAZA LAW GROUP

Carl H. Esbeck
R.B. Price Emeritus Professor of Law
John K. Hulston Hall, Room 203
Ninth and Conley Streets
Columbia, MO 65211
(573) 882-6543

/s/ Timothy Belz
Timothy Belz #31808
J. Matthew Belz #61088
Counsel of Record
Clayton Plaza Law Group
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 726-2800
Fax: (314) 863-3821
tbelz@olblaw.com
jmbelz@olblaw.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing Amici Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains approximately 12,674 words as determined by Microsoft Word. The foregoing Brief also complies with Supreme Court Rule 55.03. The font is Times New Roman, 13-point type.

s/ Timothy Belz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Amici Brief was filed electronically and served by operation of the Court' s electronic filing system this 27th day of March, 2020 on all registered parties.

s/ Timothy Belz