No. 24-154

In the
Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC.; BARRON COUNTY DEVELOPMENTAL SERVICES, INC.; DIVERSIFIED SERVICES, INC.; BLACK RIVER INDUSTRIES, INC.; and HEADWATERS, INC.,

Petitioners,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICUS CURIAE* NATIONAL LEGAL FOUNDATION *in Support of Petitioners*

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Counsel for *Amicus Curiae*

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STATEMENT OF INTEREST[1]

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Wisconsin, seek to ensure that First Amendment freedoms are protected in all places.

SUMMARY OF ARGUMENT

This case demonstrates the need for a vibrant understanding and application of the church autonomy doctrine: a secular court has decided that Catholic Charities is not performing "typically religious" work, even though the charity's work has traditionally been performed as a religious ministry and is still considered to be so by the sponsoring church. Stating the holding should, and must, defeat it.

We write not to repeat the advocacy of the Petitioners and other *amici* that the decision of the Supreme Court of Wisconsin cannot stand under the United States Constitution. We make two, complementary points.

First, this Court should begin to see its

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

precedent in the church autonomy area, including in its ministerial exception cases, as a whole. It should reinvigorate its longstanding holdings that secular courts may not second-guess religious organizations when they determine the workings of their ministries, as long as those determinations are sincere.

Second, this Court should recognize that the church autonomy doctrine is satisfactorily founded upon the Free Exercise Clause alone. This Court improperly incorporated the Establishment Clause in *Everson v. Board of Education of Ewing*,[2] and it should not rely on the Establishment Clause in its decision here, unnecessarily reinforcing *Everson*'s error.

ARGUMENT

I. Secular Courts Have No Authority to Second-Guess the Sincere, Good-Faith Determinations of Religious Organizations

At bottom, the error of the Supreme Court of Wisconsin was to second-guess the sincere, good-faith decision of Catholic Charities that its offered services to the poor were an extension of its religious duties and beliefs. The court trespassed on forbidden

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[2] 330 U.S. 1 (1947). While the Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), quoted both Religion Clauses of the First Amendment and referred to them as having been incorporated through the Fourteenth Amendment, *id.* at 303, it did not specifically refer to the Establishment Clause as having been incorporated until its decision in *Everson*.

territory.

From the beginning of the Republic, churches have been responsible for and subject to their own polity and praxis, with which the government has neither the aptitude nor the authority to interfere.[3] A key teaching in this area of the law, collectively denominated as "church autonomy doctrine,"[4] is that secular courts do not have the wherewithal to evaluate church beliefs and practices. As this Court stated in *Thomas v. Review Board*,[5]

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.
> . . . .

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[3] *See, e.g.*, Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 24 (R. Ketcham ed. 2006) (the idea that a "Civil Magistrate is a competent Judge of Religious truth" is "an arrogant pretension" that has been "falsified"); *see generally* Michael W. McConnell, *Religion & Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1245-46 (2000); Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine & the Theological Heritage of the Separation of Church & State*, 35 N. Ky. L. Rev. 67, 71-72 (2008).

[4] *See* Carl. H. Esbeck, *An Extended Essay on Church Autonomy*, 22 Federalist Soc'y Rev. 244 (2021).

[5] 450 U.S. 707 (1981).

> Courts are not arbiters of scriptural interpretation.[6]

When this is true for individuals, as in *Thomas*, it must be all the more true for established religious organizations. The only legitimate probe for a secular court in such a situation is to assure itself that the religious organization's claims are made sincerely or, as it is sometimes put, honestly or in good faith.[7]

This Court has strayed slightly from this touchstone in its ministerial exception cases. This precedent is an outworking and subset of the church autonomy doctrine, as this Court correctly recognized from its initial opinion in the area in *Hosanna- Tabor Evangelical Lutheran Church and School v. EEOC*[8] that, once the religious organization's choice of a minister in its employ is found to be legitimate, then the organization's choice is sacrosanct, so to speak, i.e., it is authoritative and cannot be overcome by any balancing of secular interests against those of the organization.[9]

This Court strayed, though, in *Hosanna-Tabor* in this respect: its factual analysis to determine if the teacher involved there was appropriately deemed a "minister" of the church and school gave leeway to the

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[6] *Id.* at 714, 716.

[7] *Id.* at 716 ("honest conviction"); *see generally* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185 (2017).

[8] 565 U.S. 171 (2012).

[9] *Id.* at 196. ("[T]he First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."); *see* Esbeck, *supra* note 4.

courts to assess for themselves whether a particular position is "central" or "religious" enough to qualify. Some courts have relished the task, showing a somewhat remarkable blindness for how religions operate by engaging in the presumption, as the Supreme Court of Wisconsin did here, that, when the government or secular entities have begun providing services, even when religious entities have performed them first and for years, those services are no longer primarily "religious," even when performed by religious organizations.[10]

To the extent that this Court's factual analysis in *Hosanna-Tabor* focused only on the honesty and sincerity of the religious organization's requirement that the employee share its religious beliefs, that

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[10] Good examples are provided by the Massachusetts Supreme Judicial Court in *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000 (2021), in which that court second-guessed the Christian college in holding that a social work professor's position and duties, which included integrating the Christian faith into her teaching and scholarship, were not "religious" enough to qualify her as a "minister" for the exception, and the Supreme Court of Washington in *Woods v. Seattle's Union Gospel Mission,* 197 Wash. 2d 231, 481 P.3d 1060 (2021), in which that court thought further factual development was needed as to whether an applicant for a lawyer position serving in the non-profit, Christian legal aid center was a "minister." Justices of this Court issued statements when denying petitions for certiorari in both cases. *See Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Alito, J., joined by Thomas, Kavanaugh, and Barrett, JJ.); *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094 (2022) (Alito, J., joined by Thomas, J.).

analysis was appropriate.[11] Obviously, a secular court is no better positioned to determine that question than whether a church as part of its religious ministry should aid the poor in a certain way. And, in its more recent ministerial exception case, *Our Lady of Guadalupe School v. Morrissey-Berru,*[12] this Court appropriately gave greater weight to the decision of the religious organization as to whom its ministers are:

> In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.[13]

Your *amicus* submits that, consistent with other precedents of this Court, a religious organization's good faith decision as to its mission and employees dedicated to that admission is more than simply "important"; it is conclusive. As this Court has acknowledged, religious institutions have the "power

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[11] *See Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) ("the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister"); *id.* at 199, 205-06 (Alito, J., concurring) (exception applies if "religious group believes" employee performs key functions described; judiciary may not second-guess church's doctrine of internal dispute resolution).

[12] 591 U.S. 732 (2020).

[13] *Id.* at 757.

to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[14]

The church autonomy doctrine is undergirded by a simple, albeit profound, principle: the secular courts have neither the competence nor authority to invalidate or invade a religious organization's determination as to the scope of its beliefs and practices and the selection of those who perform its religious functions. The Supreme Court of Wisconsin violated that principle, and its decision must be reversed.

II. This Case Is Controlled by the Free Exercise Clause, and This Court Should Not Rely on the Establishment Clause When Reversing the Decision Under Review

This Court when ruling in this case should not rely on the Establishment Clause. It is an open secret that this clause was wrongly incorporated through the

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[14] *Kedroff v. St Nicholas Cathedral of Russian Orthodox Ch. in N. Am.*, 344 U.S. 94, 116 (1952) (quoted in *Hosanna-Tabor*, 565 U.S. at 186); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (noting that a court is not equipped to determine what duties are "secular" and what are "religious" as it would be an "intrusive inquiry into religious belief"); *id.* at 342-43 (Brennan, J., concurring) ("if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities").

Fourteenth Amendment,[15] and, although this case does not provide the vehicle to overrule *Everson*, this Court should embrace a suitable opportunity to do so. In the meantime, it should stop relying on the clause as if it were properly incorporated, similar to the way that this Court stopped using the now abrogated *Lemon* test.[16] This Court's recent interpretations of the Free Exercise Clause confirm that it, buttressed by its complementary Rights of Free Speech and Assembly, is alone sufficient to sustain a robust protection for church autonomy and other religious freedoms.

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[15] *See* Frederick W. Claybrook, Jr., *The Time Is Ripe to Disincorporate the Establishment Clause*, 25 Federalist Soc'y Rev. 191 (2024); Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 Federalist Soc'y Rev. 26 (2021); The Cambridge Companion to the First Amend. and Religious Liberty (Michael D. Breidenbach & Owen Anderson eds., 2020) (hereinafter "The Cambridge Companion"); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. Pa. J. Const. L. 585 (2006); Philip Hamburger, Separation of Church and State (2002); Leonard Levy, The Establishment Clause: Religion and the First Amendment (1986); Robert Cord, Separation of Church and State: Historical Fact and Current Fiction (1982).

[16] *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530-42 (2022) (noting that the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), had not been used by this Court in a decade and criticizing lower court for continuing to apply it).

A. The Establishment Clause Is Not Properly Incorporated Under the Fourteenth Amendment

In early America, the states controlled the question of whether to establish a specific religion, and the First Amendment prohibited Congress from getting involved. This Court's incorporation of the Establishment Clause turned this original purpose on its head. After *Everson*, the states were *prohibited* from aiding religion. At least two justices have directly commented on this incongruence, most notably Justice Thomas,[17] and multiple justices have

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[17] *Town of Greece v. Galloway,* 572 U.S. 565, 606 n.1 (2014) (Thomas, J., concurring in part and concurring in the judgment); *see also, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50-51 (2004) (Thomas, J., concurring) (noting that the Establishment Clause is a federalism provision designed to keep the national government out of establishment matters and that, at least on its face, it does not protect individual rights); *Utah Hwy. Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of cert.); *McDonald v. Chicago*, 561 U.S. 741, 876 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Cutter v. Wilkinson*, 544 U.S. 709, 726-29 (2005) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-80 (2002) (Thomas, J., concurring). Justice Stewart, sixteen years after *Everson*, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), noted incorporation's incongruence with the original federalism purpose of the clause: "the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Id.* at 310 (Stewart, J., dissenting).

commented on the confused state of this Court's Establishment Clause precedent in the wake of *Everson*.[18]

The Establishment Clause varies in kind from other rights incorporated through the Fourteenth Amendment. Indeed, it is not described as a freedom or a right at all. It is nonsensical to suggest that the Constitution recognized a right in an individual to either regulate a state establishment or not to establish a national religion. Establishments are by definition the work of governments, not individuals.[19] Thus, the interests protected by the Establishment Clause do not fit neatly into the rationale supporting incorporation under the Fourteenth Amendment. That amendment, by its terms, protects *individual*

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[18] *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("[I]n the 38 [now 78] years since *Everson* our Establishment Clause cases have been neither principled nor unified."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 688 (2002) (Souter, J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment); *see generally* James A. Davids, *Faith in Prison Programs, and Its Constitutionality Under Thom. Jefferson's Faith-based Initiative*, 6 Ave Maria L. Rev. 341, 382-86 (2008).

[19] *See* Esbeck, *supra* note 15, at 38 ("[T]he object of the participial phrase 'respecting an establishment' is not about acknowledging an intrinsic human right, but is a reference to a discrete subject matter ('an establishment of religion') that is being placed off limits to or outside the government's authority."); *see also Elk Grove*, 542 U.S. at 50-51 (Thomas, J., concurring) ("The Establishment Clause does not purport to protect individual rights.")

rights. But the Establishment Clause is a structural provision; in other words, it is a provision directed to governments that was expressly designed to protect the rights of state governments against encroachment by the federal government.[20] To infer an individual right *not* to have a state establish a religion turns the Establishment Clause inside out, allowing that alleged individual right to override the protection the clause expressly gave to state governments to establish religion. To maintain the original meaning and purpose of the clause, any individual right emanating from the Establishment Clause would have to be limited to a right to prohibit the *federal* government from establishing a *national* religion.[21] But incorporation would not be needed to vindicate such a right. The clause itself, combined with existing

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[20] *See Elk Grove*, 542 U.S. at 50-53 & n.4 (Thomas, J., concurring); *see also* Muñoz, *supra* note 15; Esbeck, *supra* note 15, at 38 ("This difference in the nature of these participial phrases [in the Free Exercise and Establishment Clauses] leads to a difference in their function: creating a structural relationship versus acknowledging an intrinsic right."); Steven W. Fitschen, *From Civil Rights to Blackmail: How the Civil Rights Attorney's Fees Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's Most Historic Civil Rights Statutes*, 29 Wm. & Mary Bill of Rights J. 107, 150-55 (2021) (discussing scope of Privileges or Immunities Clause of the Fourteenth Amendment and marshalling evidence that the Framers did not consider the Establishment Clause to contain personal rights covered by the amendment).

[21] *See Elk Grove*, 542 U.S. at 51 (Thomas, J., concurring) (suggesting the Establishment Clause at most arguably contains that individual right).

standing rules, would enable complainants to sue under the federal Establishment Clause to prevent the establishment of a national religion.[22]

The *Everson* Court did not identify and attempt to resolve these anomalies of incorporation of the Establishment Clause. It recited the reasons for incorporation of the Free Exercise Clause in protecting individual rights and simply concluded,

> There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones*, 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[23]

This reasoning is unpersuasive. The free exercise cases upon which *Everson* relied protected only individual rights, most of them invalidating restrictions against door-to-door evangelism by individuals and *West Virginia State Board of*

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[22] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & Politics (UVa) 445 445 (2002) (collecting Establishment Clause standing cases to vindicate it as a structural restraint).

[23] *Everson*, 330 U.S. at 14-15 (footnotes omitted).

Education v. Barnette protecting school children from being forced to salute the flag.[24] Ironically, the *Everson* Court recognized all of these as dealing with "an *individual's* religious freedom."[25] And the very language the *Everson* Court quoted from *Watson v. Jones* recognized that the Establishment Clause provided, not an individual right, but a *structural* restraint.[26] The *Everson* Court certainly did not grapple with the central issue: when a major purpose of the Establishment Clause was to keep the *federal* government's hands off how the *States* dealt with establishing religion—i.e., when it was required to allow pro-establishment actions by the States—how could it possibly be proper to convert that shield for the States into a sword granting the federal government jurisdiction to forbid their establishments?[27] And this Court since *Everson* has

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[24] *See id.* at 15 n.22 (citing *Cantwell*, 310 U.S. 296 (door-to-door evangelization by individuals); *Jamison v. Tex.*, 318 U.S. 413 (1943) (same); *Largent v. Tex.*, 318 U.S. 418 (1943) (same); *Murdock v. Pa.*, 319 U.S. 105 (1943) (same); *Follet v. McCormick*, 321 U.S. 573 (1944) (same); *Marsh v. Ala.*, 326 U.S. 501 (1946) (same); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (forced flag salute by individuals struck down as compelled speech)). The *Everson* Court also cited for support *Bradfield v. Roberts*, 175 U.S. 291 (1899), with a "*cf.*" signal. *Bradfield* upheld incorporation of a Catholic hospital by the District of Columbia against an Establishment Clause attack. D.C. is a federal territory, not a state, and so this decision is irrelevant to the incorporation question.

[25] 330 U.S. at 15 (emphasis added).

[26] *Id.* (recognizing that the "structure of our government" provides for separate spheres of civil and religious authority).

[27] *See Schempp*, 374 U.S. at 310 (Stewart, J., dissenting).

neither attempted to answer that fundamental question nor made any principled defense of its incorporation of the Establishment Clause.

B. No Reliance Interests Support Continuing the Improper Incorporation of the Establishment Clause

Some commentators, while acknowledging the improper incorporation of the Establishment Clause, also note that incorporation has had the benefit of protecting some individual rights.[28] This assertion is invalid. In a similar vein, and equally invalidly, this Court in *Engel v. Vitale*[29] pointed to its view of a favorable result to justify striking down New York State's prayer for public school children as violative of the Establishment Clause. It recounted the multiple State establishments during the colonial period and labeled it "an unfortunate fact of history" that the States, often founded by nonconformists persecuted in their native lands, would almost uniformly favor by law their own religious beliefs when they achieved political power in the colonies, a favoritism that continued in most nascent States.[30]

But simply liking the anti-establishment result does not provide a principled basis for overriding the

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[28] *E.g.*, Nathan S. Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience (2023) (hereinafter "Agreeing to Disagree"); Esbeck, *supra* note 15, at 39.

[29] 370 U.S. 421 (1962).

[30] *Engel*, 370 U.S. at 426-29.

purpose of the clause to protect state prerogatives.

The Establishment Clause, while preventing the *federal* government from putting its weight behind any particular denomination, also protected the rights of the states to make up their own minds on the matter.[31] And the inference that disincorporating the Establishment Clause would upset substantial expectations or reliance interests in this area is also unfounded. Where compulsion is involved, the results praised by the *Engel* Court and the commentators can be accomplished by the protections afforded by the properly incorporated Free Speech, Free Exercise, and Freedom of Assembly Clauses of the First Amendment, particularly as those rights have been explained in more recent precedent of this Court.

1. Church Autonomy Cases Are Fully Supported Without an Incorporated Establishment Clause

Church autonomy precedent predates *Everson*, and it does not rely on the Establishment Clause, but, rather, the Free Exercise and Peaceable Assembly Clauses. This Court, in *Kedroff v. St Nicholas Cathedral,* observed that the Constitution provides "a spirit of freedom for religious organizations, an

[31] Justice Joseph Story in his *Commentaries* wrote that an attempt by the federal government to disallow the states from favoring Christianity officially—as many of them did when the Establishment Clause was adopted—would have "created universal disapprobation," and that "the general, if not universal, sentiment" at the time was "that Christianity ought to receive encouragement from the state." 3 Joseph Story, Commentaries on the Const. of the U.S. 78 (1833).

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."[32]

The *Kedroff* Court identified the constitutional font for its pronouncement solely as the Free Exercise Clause. Looking back to *Watson v. Jones*,[33] the progenitor of the doctrine that applied federal common law, the *Kedroff* Court observed that *Watson*

> 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. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the *free exercise* of religion against state interference.[34]

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[32] 344 U.S. 94, 116 (1952) (footnote omitted); *see also Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 713-14, 724 (1976). *Milivojevich* also did away with the ability of courts to determine whether an internal church decision was "arbitrary," as it would intrude into religious questions beyond a secular court's ken, leaving courts only able to review church decisions for collusion and fraud. *See id.* at 712-16.

[33] 80 U.S. (13 Wall.) 679 (1872). The Court's more recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* also relied on *Watson v. Jones.* 565 U.S. 171, 185 (2012).

[34] 344 U.S. at 116 (footnote omitted) (emphasis added); *see also Presbyterian Church in the U.S. v. Mary Elizabeth*

In *Kedroff*, this Court also "converted the principle of *Watson* . . . into a constitutional rule."[35]

While some of this Court's later church autonomy cases identified the constitutional locus of the that doctrine more generally as found in the "First Amendment" generically,[36] the fact remains that this Court in *Kedroff* found the Free Exercise Clause wholly sufficient to support the doctrine. And there is no reason why the Free Exercise Clause would be inadequate for this task, especially when augmented by the incorporated Free Speech Clause and the Peaceable Assembly Clause, the latter of which protects the associational rights of individuals and institutions.[37] Indeed, *Watson* itself echoed the protections of those clauses:

> Laws then existed upon the statute-book [in England] hampering the *free exercise* of religious belief and worship in many most oppressive forms, and though Protestant

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Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969) (noting that *Watson* had "a clear constitutional ring").

[35] *Presbyterian Church*, 393 U.S. at 447.

[36] *See, e.g.*, *Milivojevich*, 426 U.S. at 712; *Presbyterian Church*, 393 U.S. at 449.

[37] *See DeJonge v. Ore.*, 299 U.S. 353, 364 (1937); *compare id. with Bouldin v. Alexander*, 82 U.S. 131, 139-40 (1872) ("[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *see generally* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652 (2021); John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly (2012).

> dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. . . .
>
> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to *teach* any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. . . . The *right to organize voluntary religious associations* to assist in the *expression and dissemination* of any religious doctrine, and to create tribunals for the decision of controverted questions of faith *within the association* . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and 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.[38]

In the church autonomy context, the incorporated Free Exercise, Free Speech, and Peaceable Assembly Clauses operate cooperatively.

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[38] 80 U.S. at 728-29 (emphasis added). Of course, even without a constitutional underpinning, the *Watson* church autonomy privilege would remain the law and not need incorporation of the Establishment Clause to support it, as *Watson* predated *Everson*.

These cognate freedoms[39] do not need an incorporated Establishment Clause to protect religious associations from state interference.

2. Religious Question and Ministerial Exception Precedent Is Fully Supported Without an Incorporated Establishment Clause

Other subcategories of the church autonomy doctrine are also adequately grounded in the Free Exercise Clause. This Court in *Thomas* based its application of the "religious question doctrine" that prevents courts from making religious judgments squarely and sufficiently on the employee's free exercise.[40] This Court has claimed that the ministerial exception rests on both clauses,[41] but, upon examination, it is clear that the Establishment Clause adds nothing to what the Free Exercise Clause (buttressed by the Free Speech and Peaceable Assembly Clauses) protects. Indeed, before this Court took up the issue, the First, Third, and Fifth Circuits grounded their recognition of the ministerial exception in the Free Exercise Clause alone.[42]

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[39] *See DeJonge*, 299 U.S. at 364 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

[40] *Thomas*, 344 U.S. at 116; *see also Milivojevich*, 426 U.S. at 713-14, 724.

[41] *See Hosanna-Tabor*, 565 U.S. at 184, 188-89; *Our Lady*, 591 U.S. at 745-47.

[42] *See Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999).

In *Hosanna-Tabor*, this Court stated, "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[43] Similarly, this Court later said in the same opinion:

> 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.[44]

This Court repeated in *Our Lady*, "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."[45] One immediately notices the overlap in coverage. When the Free Exercise Clause "prevents [the government] from interfering with the freedom of religious groups to select their own" key employees, it necessarily stops

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[43] 565 U.S. at 184. In this and other language recognizing a religious organization as being a "group" or "association," this Court implicitly acknowledged that the ministerial exception is also supported by the Freedom of Assembly Clause.

[44] *Id.* at 188-89.

[45] 591 U.S. at 745-47.

the government from "appointing" them, even though this Court characterizes the Establishment Clause as the source of the latter prohibition.[46] When the Free Exercise Clause forbids the government from imposing an "unwanted" employee on the religious organization, the Establishment Clause does no more when it "prohibits government involvement in such ecclesiastical decisions"[47] or from "dictat[ing]" or "influenc[ing]" them.[48] The incorporated Establishment Clause plays a duplicative, not a necessary, role in such a case.

3. Religious Discrimination Cases Are Fully Supported Without an Incorporated Establishment Clause

This Court, in a recent series of cases, has reaffirmed that the government may not discriminate against a religious organization solely because of its religious nature. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, it disallowed the state from barring a church school from receiving a public benefit solely because of its religious nature.[49] In *Espinoza v. Montana Department of Revenue*, this Court held that the state could not deny tax credits for participation in a school scholarship program solely because religious schools would benefit.[50] In *Fulton v. Philadelphia*, it prohibited the city from refusing to allow Catholic Social Services to continue to serve foster care needs because of its religious beliefs about

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[46] *Hosanna-Tabor*, 565 U.S. at 184.
[47] *Id.* at 188-89.
[48] *See Our Lady*, 591 U.S. at 745-47.
[49] 582 U.S. 449 (2017).
[50] 591 U.S. 464 (2020).

same-sex marriage when the city could make exceptions, in its discretion, for other perceived violations of its anti-discrimination laws.[51] And in *Tandon v. Newsom*[52] and *Roman Catholic Diocese of Brooklyn v. Cuomo*,[53] the Court instructed, in the context of Covid-19 restrictions, that governments may not treat secular activity more favorably than comparable religious activity.

In none of these cases was the Establishment Clause a necessary pillar supporting the decision; indeed, in some cases, that clause was rejected as a defense to the free exercise violations. The Court based its decisions in *Fulton, Tandon*, and *Brooklyn Diocese* expressly and solely on the Free Exercise Clause.[54] In *Trinity Lutheran*, it held that the Free Exercise Clause does not allow a state to deny a generally applicable benefit due to an individual's or organization's religious status; it overrode a state Establishment Clause defense in the process, even citing *Everson* for the proposition.[55] Similarly, in *Espinoza*, the Court relied on the Free Exercise Clause to override the State's Blaine Amendment that prohibits aid to sectarian schools,[56] noting that the

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[51] 593 U.S. 522 (2021).
[52] 593 U.S. 61 (2021).
[53] 592 U.S. 14 (2020).
[54] *Fulton*, 593 U.S. at 532-36; *Tandon*, 593 U.S. at 62-64; *Brooklyn Diocese*, 592 U.S. at 16.
[55] *Trinity Lutheran*, 582 U.S. at 455-61.
[56] 591 U.S. at 474-78 (citing *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 449 (1988) (The Free Exercise Clause protects against laws that "'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other

Establishment Clause "is not offended when religious observers and organizations benefit from neutral government programs."[57]

In short, disincorporating the Establishment Clause would not undercut the freedom of religious organizations from discrimination due to their religious nature and practice. Those freedoms are independently and adequately supported by other First Amendment protections properly incorporated against the States through the Fourteenth Amendment.

4. Unwinding the Improper Incorporation of the Establishment Clause Would Eliminate the False Tension Between It and the Free Exercise Clause Found in Some Cases While Leaving Properly Incorporated Clauses as a Check Against State Action Coercing Religious Observance

It has become almost a hackneyed expression that the Establishment and Free Exercise Clauses sometimes work at cross-purposes.[58] This perceived

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citizens.'"); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (same)).

[57] *Id.* at 474. The same is true when there is discrimination against religious speech, press, and assembly. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (speech); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (press); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (assembly).

[58] *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 181 (citing *Cutter*, 544 U.S. at 719, and *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion)) ("Numerous cases

tension was not noticed until the Court began incorporation under the Fourteenth Amendment, for the simple reason that both the Free Exercise and Establishment Clauses negated federal power.[59] Once the Court incorporated those clauses (and the Speech and Assembly Clauses) against the states, however, some potential for conflict arose. It became especially acute during the reign of "strict separation," as that theory interpreted any government recognition of religion or religious observance as a forbidden "establishment," even as it encroached on free exercise and evenhanded treatment of religious organizations when it came to otherwise available public benefits.

With disincorporation of the Establishment Clause, some tension would remain between state anti-establishment interests and the properly incorporated Free Exercise, Speech, and Assembly Clauses, but the resolution of that tension will hardly ever be in doubt: the federal provisions will trump state ones when there is conflict,[60] as "strictest

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considered by the Court have noted the internal tension" between the clauses.).

[59] *See generally* Esbeck, *supra* note 15, at 37-38.

[60] U.S. Const. art. VI, para. 2 (Supremacy Clause). It appears that this potential tension was observed by Congress during its consideration in 1875 of the federal Blaine Amendment. The House version incorporated against the states the language of both the Establishment and Free Exercise Clauses: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The Senate amended the proposal to prohibit it from being "construed to prohibit the reading of the Bible in any school or institution." *See* Agreeing to Disagree, *supra* note 28, at 82-83.

scrutiny" will be applied.[61] The stringency of that test is demonstrated in *Espinoza*, where the Court brushed aside as unworthy of consideration the state's proffered interest in having a greater-than-constitutionally-required separation between church and state by enforcing its "no aid to religion" provision: "An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not 'state experimentation in the suppression of free speech,' and the same goes for the free exercise of religion."[62] Thus, any so-called balancing of free exercise and anti-establishment interests will be largely pro forma, as even state laws championing anti-establishment interests carry no weight against the First Amendment's free exercise protections.

The key to proper interpretation in these contexts is to recognize the following balance struck by our constitutional design: (a) we live in a diverse society and must practice tolerance toward each other, even when that means being exposed to people and ideas with which we differ, especially if we are in a minority; and (b) the properly incorporated clauses of the First Amendment prohibit compelled or coerced speech, religious exercise, and assembly. This Court in *Kennedy v. Bremerton School District* made the

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[61] *See Espinoza*, 591 U.S. at 484 (citing *Trinity Lutheran*, 582 U.S. at 458; *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546 (1993); *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

[62] *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000)).

toleration point, while rejecting a strict separation view:

> Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.[63]

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[63] 597 U.S. at 542-44; *see also Town of Greece*, 572 U.S. at 566-67 ("From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine."). This result was nascent in the Court's approach in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), in which it rejected an Establishment Clause challenge based on an assertion that allowing a religious club after-school use on the same basis as other clubs would constitute a prohibited "endorsement": "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Id.* at 118.

Of course, if the Establishment Clause had not been incorporated improperly in *Everson*, in Coach Kennedy's case there would have been no "tension" with the Free Exercise Clause to be manufactured, even if unsuccessfully, by the school district and the lower courts.[64] The school district took no direct action when he knelt at midfield after games; it only allowed individual religious speech on an evenhanded basis, and so no compulsion was present. If the school district had required all team members to pray with Coach Kennedy upon pain of benching, the Free Speech Clause and Free Exercise Clauses would have come into play to prohibit the school district from compelling speech and religious exercise. The fact that people voluntarily joined Coach Kennedy on the field to show their support after the school district threatened to fire him did not convert his practice into state action.[65]

5. The States Have Uniformly Adopted Anti-establishment Provisions, Almost All by Constitution

Finally, disincorporating the Establishment Clause will not harm any reliance interests or instigate a regime of "anything goes" at the state level, for the simple reason that all the states currently

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[64] *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 750 F.3d 184 (2d Cir. 2014), is another example of a manifestly incorrect decision defeating free exercise rights by use of supposed Establishment Clause concerns. In *Bronx Household*, New York City refused to allow a church to rent school facilities for worship services after school hours when the facilities were generally available for rent by others.

[65] *See Kennedy*, 597 U.S. at 540-42.

have their own religious freedom protections. When the original States adopted the First Amendment, several of them still had church establishments of one variety or another.[66] The trend was against them, though, and in 1833 Massachusetts became the last state to disestablish formally.[67] Now, all States have religious freedom protections in their constitutions, including non-establishment provisions.[68]

CONCLUSION

Everson's incorporation of the Establishment Clause, seven decades ago, has the benefit of age. But it was wrong from the start, and it has not aged gracefully. Instead, it has involved the federal courts in a multitude of state-action cases that State courts are well equipped to handle under their own religious freedom and anti-establishment principles. Moreover, the First Amendment's Free Exercise, Speech, and Assembly Clauses provide oversight on improper coercion or discrimination by the States, as this Court has demonstrated repeatedly and recently in *Espinoza*, *Carson*, *Tandon*, and *Kennedy*. The time is ripe for this Court to overrule *Everson* and to disincorporate the Establishment Clause.

Your *amicus* recognizes that that issue is not

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[66] *See generally* Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776-1833, 3-17 (Carl H. Esbeck & Jonathan J. Den Hartog, eds. 2019).

[67] *See* John Witte Jr. & Justin Latterell, *The Last American Establishment*, in *id.* ch. 21, at 399-424.

[68] *See* Claybrook, *supra* note 15, at 228-29 & n.191 (collecting all state constitutional religion clauses).

presented squarely in this case. But it is coming. Your *amicus* urges this Court when deciding this case not to rely unnecessarily on the improperly incorporated Establishment Clause when reversing the Supreme Court of Wisconsin's violation of the Free Exercise Clause.

Respectfully submitted this
3d day of February 2025,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
(Counsel of Record)
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(301) 622-0360
rick@claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org