No. 23-2606

In the United States Court of Appeals for the Ninth Circuit

Union Gospel Mission of Yakima, Wash.,
Plaintiff-Appellant,

v.

Robert Ferguson, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington
Case No. 1:23-cv-3027-MKD

BRIEF OF *AMICUS CURIAE* THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFF/APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus makes the following disclosures under R. App. P. R. 26.1 and 9th Cir. R. 26.1:

1. Is any *Amicus* a subsidiary or affiliate of a publicly owned corporation?

No. Each *amicus* is a natural person, and as such has no parent company and has not issued stock.

2. Is there a public corporation, not a party to the appeal or an *Amicus*, that has a financial interest in the outcome?

None known.

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INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Montgomery, Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists, or files *amicus* briefs, in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case because the Foundation believes that the right of religious organizations to hire on the basis of religious belief and practice is at the core of the Religion Clauses of the First Amendment. If the state can dictate who a religious organization must hire, then the state has established its own religion. The Foundation files as *amicus curiae* in this case to highlight that the true meaning of the Establishment and Free Exercise clauses forbids the state from interfering with the autonomy of religious organizations.

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[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

Under the Founders' understanding of the Establishment and Free Exercise Clauses of the First Amendment, religious organizations have the autonomy to hire based on religious faith and practice without any interference from the state. The Founders understood the Religion Clauses to enshrine a jurisdictional separation of Church and State that leaves the state without jurisdiction to interfere with the hiring practices of religious organizations.

I. The Founders' understanding of the First Amendment Religion Clauses.

The United States Supreme Court has instructed that Establishment Clause claims must be reviewed on the basis of the Founders' original understanding. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2428 (2022). The Founders viewed Church and State as distinct institutions with separate jurisdictions. When Jefferson spoke of a "wall of separation between church and state," he meant a jurisdictional separation. The Founders inherited this jurisdictional understanding of Church and State from a lineage as long as the institutions themselves—from ancient times, through the medieval period, to the Reformation, and up to the Founding era of eighteenth century America.

The ratification of the Constitution by the States was predicated on the understanding that it would be accompanied by a Bill of Rights, enshrining certain inalienable rights and ensuring their protection from the new federal government.

While drafting and ratifying the First Amendment, the Founders' understanding of history shaped the Religion Clauses. The Founders would have never tolerated a state that influenced the hiring practices of religious organizations.

A. The Founders' understanding of the plain meaning of the Establishment and Free Exercise Clauses.

In order to understand the plain meaning of the Religion Clauses to the Founders, the text must be defined. The text of the Establishment and Free Exercise Clauses of the First Amendment is: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." James Madison defined religion in his *Memorial and Remonstrance* as "the duty which we owe to our Creator, and the manner of discharging it, [which] can only be directed by reason and conviction, not by force or violence." *Quoted by Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 64 (1947). This definition was well known to the Founders and was verbatim George Mason's definition of religion as included in the 1776 Virginia Bill of Rights.[2] Justice Joseph Story acknowledged this to be the Founders' definition of religion in his 1833 Commentaries on the Constitution.[3]

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[2] *See* 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Law of the States, Territories, and Colonies* 3814 (Francis Newton Thorpe ed., 1st ed. 1909).

[3] Joseph Story, 3 *Commentaries on the Constitution* § 1870.

The United States Supreme Court has adopted the Founders' definition of religion before. In 1878, the Supreme Court stated that the meaning of religion must be found by analyzing the precursors to the First Amendment Religion Clauses. *Reynolds*, 98 U.S. at 163 (1878). Then in 1890, the Court expressly adopted the Founders' definition. As the Court stated, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will." *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated on other grounds by Romer v. Evans*, 517 U.S. 620 (1996).

When read with the Founders' definition of religion in mind, the plain meaning of the Religion Clauses is clearer: Congress shall make no law respecting the establishment of [*the duties which we owe to our Creator and the manner of discharging those duties*], or prohibiting the free exercise of [*the duties which we owe to our Creator and the manner of discharging those duties*]. In the Founders' minds, these clauses were complementary and meant to reinforce one another. *See Kennedy*, 142 S. Ct. at 2426 ("the Clauses have 'complementary' purposes, not warring ones"). By applying the Founders' definition of religion, the Religion Clauses' complementary nature is more readily apparent.

B. The Founders' understanding of history rooted the Religion Clauses in a jurisdictional separation of Church and State.

Another fundamental basis of the Founders' understanding of the Religion Clauses is that they did not view Church and State simply as man-made institutions. They did not accept Rousseau's enlightenment notion that the State is above all other institutions, including the Church.[4] Instead, the Founders were well versed in historic theology, and, like the people of their time and those before them, they understood Church and State as divinely established institutions, each with distinctive authority and distinctive limitations.[5]

This institutional separation goes back to the ancient Hebrews as seen in the Old Testament in which Israel's kings were of the Tribe of Judah while Israel's priests were of the Tribe of Levi; these were separate offices and separate jurisdictions, but both were subject to the will of God and the Law of God. On several occasions, God disciplined kings severely for usurping the functions of the priesthood. For example, when King Saul offered sacrifices instead of waiting for

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[4] Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984), demonstrated that Americans writers from 1760-1805 most frequently cited the Bible (34%), Montesquieu (8.3%), Blackstone (7.9%), Locke (2.9%), and Roussseau least of all (0.9%).

[5] The influence of the Bible on the Founders and its relevance to law is well established; Congress even declared 1982 the "Year of the Bible" due to its influence on the Founding. Pub. L. No. 97-280 (1982).

Samuel the priest, God cut off his descendants from the kingship forever. And, when King Uzziah tried to usurp the functions of the priesthood by burning incense on the altar in the Temple, God smote him with leprosy, and he remained a leper all the days of his life. *II Chronicles* 2:19-23 (King James).

This institutional separation continued in the New Testament. When the Pharisees asked Jesus about paying taxes to the Roman government, He pointed to Caesar's image on a coin and answered, "Render therefore to Caesar the things which are Caesar's; and to God, the things that are God's." *Matthew* 22:21 (King James). Lord Acton said that Christ's statement,

> gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but he also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church.[6]

In ancient and medieval thought, Church and State were separate kingdoms, and neither controlled the other. The Church often influenced temporal rulers by admonition, reprimand, discipline, excommunication, and interdiction. Kings sometimes insisted they had the power to approve appointments to ecclesiastical offices within their realms, although church officials often disputed this. But in the

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[6] Lord Acton, *The History of Freedom in Antiquity* (1877), in *The History of Freedom and Other Essays* 1 (John Neville Figgis & Reginald Vere Laurence eds., 1907).

West, as a rule, kings and princes did not become popes and bishops, and popes and bishops did not become kings and princes. Of course, a noted exception to this rule occurred in AD 1534 when King Henry VIII of England separated the Church of England from the Roman Catholic Church and proclaimed himself as the head of the Church. The Founders' belief in the separation of Church and State was in part a reaction against this union of Church and State in England.

As children of the Protestant Reformation,[7] the Founders understood that God had established two kingdoms, Church and State, each with distinctive authority. As Martin Luther said, "these two kingdoms must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other."[8] And John Calvin, in his *Institutes of the Christian Religion,* stated that "[t]here are in man, so to speak, two worlds, over which different kings and different laws have authority."[9]

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[7] Dr. M.E. Bradford established that the fifty-five delegates to the Constitutional Convention included 28 Episcopalians, 8 Presbyterians, 2 Lutherans, 2 Dutch Reformed, 2 Methodists, 2 Roman Catholics, one uncertain, and 3 who might be Deists. *A Worthy Company: Brief Lives of the Framers of the United States Constitution* pp. iv-v (Plymouth Rock Found., 1982). Yale History Professor Sydney E. Ahlstrom has said, "85 or 90 percent" of the Founders held Reformation beliefs. *A Religious History of the American People* I:169 (Image Books, 1975).

[8] Martin Luther, *Secular Authority: To What Extent It Should Be Obeyed*, 1523, *reprinted in Works of Martin Luther* III:237 (Baker Book House, 1982).

[9] John Calvin, *Institutes of the Christian Religion,* III:19:15 (1537).

This understanding of Church and State as two separate kingdoms, both established by God but with separate spheres of authority, shaped the Founders on a foundational level. As Yale History Professor Sydney E. Ahlstrom has noted, "no factor in the "Revolution of 1607-1760" was more significant to the ideals and thought of colonial Americans than the Reformed and Puritan character of their Protestantism; and no institution played a more prominent role in the molding of colonial culture than the church."[10]

C. The Founders' understanding of the Religion Clauses' jurisdictional separation of Church and State is reflected in their own words and actions.

Throughout his *Memorial and Remonstrance*, Madison emphasized the distinct jurisdictional separation between Church and State, stating that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Everson*, 330 U.S. at 64. And, as discussed *supra*, Madison's definition of religion within his *Memorial and Remonstrance* was the primary definition the Founders were familiar with when Madison introduced the First Amendment on the floor of Congress in June 1789.

Thomas Jefferson's often misunderstood "wall of separation," must also be viewed in this context: as a jurisdictional separation between the two kingdoms,

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[10] Ahlstrom, *supra*, at I:423.

Church and State. While Jefferson's statement has been wrongly construed at times as a one-sided total limitation on the Church in the public sphere, this was not his intention. Rather, written in 1802 while he was President, Jefferson's statement was a reassurance concerning government overreach over the Church:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state.[11]

Jefferson's understanding that the "wall of separation" was meant to protect the Church from State intrusion is also apparent from his later writing:

> I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. . . . Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government.[12]

Two days after writing his letter to the Danbury Baptists, President Jefferson attended a church service conducted by a Baptist minister *within* the House of

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[11] *Reynolds*, 98 U.S. at 164 (quoting Thomas Jefferson's letter to the Danbury Baptist Association (Jan. 1, 1802)).

[12] *From Thomas Jefferson to Samuel Miller, 23 January 1808*, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-7257 (last visited Nov. 14, 2023)

Representatives.[13] Jefferson would continue to attend such church services held in State buildings throughout his Presidency.[14] Clearly, Jefferson did not consider such public recognitions and worship of God within government to offend the separation of Church and State. In fact, his actions are fully within his understanding of the jurisdictional separation of Church and State as he described them in the Virginia Bill for Religious Freedom in 1777. In 1878, the Supreme Court quoted Jefferson:

> that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.

Reynolds, 98 U.S. at 145 (quoting Bill for Establishing Religious Freedom, 1 Jeff. Works 45; 2 Howison, History of Va. 298). This Court followed Jefferson's words by stating: "In these two sentences is found the true distinction between what properly belongs to the church and what to the State." *Id.*

The *Reynolds* Court continued, commenting on Jefferson's words following the ratification of the First Amendment,

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was

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[13] William Parker & Julia Perkins Cuttler, *Life Journals and Correspondence of Rev. Manasseh Cuttler* 45 (1888).

[14] See James H. Hutson, *Religion and the Founding of the American Republic* 84 (1998).

> deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Id. at 164. This is a recognition of the separate jurisdictions of Church and State; the State only has authority over actions of the Church that, as Jefferson phrased it, were "overt acts against peace and good order."

II. Supreme Court precedent recognizes that religious organizations have the right to hire employees on the basis of religious belief, practice, and observance.

Beginning with *Reynolds* in 1878, the Supreme Court recognized that the Religion Clauses enshrine the jurisdictional separation of Church and State as understood by the Founders. Rather than an amorphous and subjective "test," the Founders' true instruction for the Religion Clauses is this: Congress shall make no law respecting an establishment of the duties which we owe to our Creator, and the manner of discharging those duties, or prohibiting the free exercise of the duties which we owe to our Creator, and the manner of discharging those duties *unless those duties break out into overt acts against peace and good order*.

The Supreme Court upheld laws against polygamy in *Reynolds* using this Founding understanding of the Religion Clauses. *See id.* at 13-15. The Court, finding that "polygamy has always been odious" among the English forefathers and a punishable offence against society at common law, held that polygamy as a practice was an overt act against peace and good order akin to human sacrifice and self-

immolation. *Id.* at 15-16. In reviewing the common law, the Court expressly noted the jurisdictional separation of Church and State reflected in the ecclesiastical courts which held exclusive jurisdiction over ecclesiastical rights, matrimonial causes and offences against marriage, as well as testamentary causes and settlements of decedent estates. *Id*. at 14.

After *Reynolds*, the Supreme Court continued to apply the Founders' understanding of jurisdictional separation of Church and State under the Religion Clauses. In 1892, the Court overturned the application of national immigration law to an alien pastor from England who had been contracted to work with a church in New York. *Holy Trinity Church v. United States*, 143 U.S. 457. After finding that the statute's language could not be construed to include more than manual laborers, the Court found that "beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people." *Id.* at 465. The Court found that the colonial records, state constitutions, and the Declaration of Independence show "a constant recognition of religious obligations." *Id.* at 465-71. Comparing these recognitions of God to the Establishment and Free Exercise Clauses of the First Amendment to the Constitution, the Court went on to say:

> There is no dissonance in these declarations. There is a universal language pervading them all having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They

> speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. Com.*, 11 Serg. & R. 394, 400, it was decided that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; not Christianity with an established church and tithes and spiritual courts, but Christianity with liberty of conscience to all men."

Id. at 470. The Court then applied the Founders' understanding of jurisdictional separation to hold that a valid immigration law could not be applied to the Church where "the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against." *Id.*

Even as recently as 2020, the Supreme Court has recognized the jurisdictional separation of Church and State enshrined in the Religion Clauses, holding that "State interference [with matters of faith and doctrine], 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. The First Amendment outlaws such intrusion." *Our Lady of Guadalupe Sch. v. Morrisey-Berru* 140 S. Ct 2049, 2060 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 186 (2012)).

In *Hosanna-Tabor*, the Court held that there is a "ministerial exception" which precludes the application of employment discrimination laws to the Church. 565 U.S. at 187-88 (2012). The Court held that the Religion Clauses require that "the

authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952)—is the church's alone." *Id.*

The *Hosanna-Tabor* Court's "ministerial exception" is really just a label on what the Founders would have considered a necessary and obvious result of the jurisdictional separation of Church and State. *Hosanna-Tabor* illustrates how this jurisdictional separation is inherent in both Establishment and Free Exercise:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-89. The Court distinguished its decision in *Hosanna-Tabor* from *Smith* by stating that, while the discrimination law was a valid and neutral law of general applicability, "a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government's interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190.

While this case deals with "non-ministerial" employees, under the Founders' understanding of the Religion Clauses, this makes no difference. The state is without jurisdiction to interfere in Appellant's hiring practices as a religious organization. The line between what a religious organization's activities are religious or non-

religious is a line that the state is without jurisdiction to analyze. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987).

CONCLUSION

This Court should reverse the decision of the District Court.

Respectfully submitted,

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November 15th, A.D. 2023

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 32(a)(7), Fed. R. App. P., because, excluding the parts of the document exempted by Rule 32(f), Fed. R. App. P., and 6th Cir. R. 32(b)(1), this document contains 3525 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE REGARDING SERVICE

I certify that on November 15th, A.D. 2023, a true copy of this document is being filed electronically (via CM/ECF) and will thereby be served on all counsel of record.

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