

The Amicus Brief, Newport Church of the Nazarene v. Employment Department, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed with the Oregon Supreme Court on January 18, 2000.

IN THE SUPREME COURT OF THE STATE OF OREGON

NEWPORT CHURCH OF THE
NAZARENE, an Oregon nonprofit
corporation,

Appellate Court No.
A99663

Petitioner,
Respondent on Review,

Supreme Court No. S46621

GORDON R. HENSLEY,

Respondent-Cross-Petitioner,
Respondent on Review,

v.

EMPLOYMENT DEPARTMENT,

Respondent-Cross-Respondent,
Petitioner on Review,

BRIEF OF AMICI CURIAE

THE CHRISTIAN & MISSIONARY ALLIANCE, COUNCIL ON RELIGIOUS FREEDOM,
GENERAL CONFERENCE OF SEVENTH-DAY ADVENTIST CHURCH, GENERAL
COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST
CHURCH, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, NATIONAL
ASSOCIATION OF EVANGELICALS, OREGON DISTRICT ASSEMBLIES OF GOD,
PRESBYTERIAN CHURCH (U.S.A.), AND THE PRESBYTERY OF CASCADES

Appeal from Decision of the Court of Appeals on Judicial Review
of the Employment Appeals Board Decision

Opinion filed: June 2, 1999
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Concurring Judges: Haselton, J., Armstrong, J.

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BRIEF OF AMICI CURIAE

I. QUESTION PRESENTED FOR APPEAL

Whether the Court of Appeals erred by holding, for the first time in American jurisprudence, that the First Amendment allows state scrutiny and review of a church's decision to terminate its minister.¹

II. SUMMARY OF ARGUMENT

¹ The amici curiae otherwise adopt the Statement of the Case and Assignment of Error from the brief of the Newport Church of the Nazarene.

Since 1871, the Supreme Court has recognized that the First Amendment guarantees churches the right of self-governance and that civil courts are without jurisdiction over church decisions on matters of "discipline, faith, internal organization, and ecclesiastical rule, custom or law." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The judiciary has also emphasized that a church's unfettered right to choose, discipline and terminate a minister lies at the heart of the First Amendment guarantee of religious self-governance.

In a long line of cases, the courts have given due weight to the inherently religious nature of the church-minister relationship by holding that the First Amendment bars judicial scrutiny of the relationship under various employment-related statutes. The inclusion of ministers within Oregon's unemployment compensation system would intrude upon a church's constitutional autonomy in the same manner as inclusion of ministers within other employment-related statutes.

Given the nature of the First Amendment's guarantee of church autonomy over ministerial employment decisions, the Court of Appeals erred in overriding the church's autonomy. No other court has found any state interest compelling enough to justify state intrusion upon a church's First Amendment right to hire or fire a minister without governmental review. Furthermore, this First Amendment right applies to all ministers, regardless of whether the minister has been ordained by a church. Therefore, the state may exclude all ministers from the unemployment compensation system without violating FUTA or the Oregon Constitution.

The Establishment Clause, totally apart from any Free Exercise Clause considerations, also prohibits the unavoidable entanglement between church and state that would result from including ministers within the unemployment compensation system.

III. ARGUMENT

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITS OREGON FROM SCRUTINIZING, UNDER THE STATE'S UNEMPLOYMENT COMPENSATION SYSTEM, A CHURCH'S DECISION TO TERMINATE A MINISTER'S EMPLOYMENT

A. Long-Standing Precedent Recognizes a Church's Freedom of Self-Governance

In an unbroken line of cases stretching back to 1871, the American judiciary steadfastly has placed matters of church government and administration beyond the reach of civil authorities. The judiciary's refusal to allow the government to intrude on internal

church government stems from *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871). There, in addressing two church factions' dispute over church property, the Supreme Court held:

[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. . .

Id. at 727.

Following *Watson*, in *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 50 S. Ct. 5, 74 L. Ed. 131 (1929), the Supreme Court rejected the petitioner's challenge to the Archbishop of Manila's refusal to appoint petitioner to a chaplaincy. The Supreme Court said:

The decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive. . .

Id. at 16.

In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952), the "principle announced by *Watson* and *Gonzalez* became a constitutional prohibition." *McClure v. The Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972). *Kedroff* held that a New York statute concerning administrative control of church property unconstitutionally interfered with the free exercise of religion: "Legislation that regulates church administration, the operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise of religion." 344 U.S. at 107.

The Supreme Court subsequently reiterated that ecclesiastical decisions are generally inviolate. "[C]ivil 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." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976). In *Milivojevich*, the Illinois Supreme Court had ordered the reinstatement of a defrocked bishop. *Id.* at 708. The Supreme Court, however, held that any judicial inquiry into the "defrockment" of a bishop introduced the "substantial danger that the State will become entangled in essentially religious controversies. . . ." *Id.* at 709. The Supreme Court further noted that "all who unite themselves to such a [religious] body do so with an implied consent to this government, and are bound to submit to it." *Id.* at 711, quoting *Watson*, 13 Wall. at 728-29. Clergy decisions are

"a matter of faith" and "Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance." *Id.* at 715.

The Fifth Circuit succinctly summarized this line of Supreme Court cases:

A common thread runs through these opinions, which is best exemplified by those words used by the Supreme Court in commenting on its holding in *Watson v. Jones*, *supra*. For throughout these opinions there exists '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.' *Kedroff v. St. Nicholas Cathedral*, *supra*, 344 U.S. at 116.

McClure, 460 F.2d at 560.

B. A Church's Unfettered Authority to Choose, Discipline, and Terminate a Minister Lies at the Heart of the First Amendment Guarantee of Religious Self-Governance

In applying the First Amendment guarantee of church autonomy, courts uniformly have recognized that there is no matter more central to religious self-governance than a church's selection of its own clergy.

According to the Supreme Court, "freedom to select the clergy. . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Kedroff*, 344 U.S. at 116. "Because the appointment [of a chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 116, n. 23, quoting *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. at 16-17. Numerous courts have read *Kedroff* and *Gonzalez* as recognizing the central importance of the church-minister relationship. See, e.g., *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) ("the Supreme Court has shown a particular reluctance to interfere with a church's selection of its own clergy"); *Natal v. The Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) ("Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated") (citing *Milivojevich*, *Kedroff*, and *Gonzalez*); see also, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to*

Church Autonomy, 81 Col. L. Rev. 1373, 1398 (1981) ("deciding who will conduct the work of the church and how that work will be conducted is an essential part of the exercise of religion").

The Fifth Circuit elaborated on this principle:

The relationship between an organized church and its ministers is its life blood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

McClure, 460 F.2d at 558-59. Echoing the Fifth Circuit, the Fourth Circuit explained that the "right to choose ministers without government restriction underlies the well-being of religious community." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985), citing *Kedroff*, 344 U.S. at 116. The "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1168. Similarly, the District of Columbia Circuit held that the "determination of 'whose voice speaks for the church' is per se a religious matter." *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356-57 (D.C. Cir. 1990). *Minker* further emphasized:

We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions. This is the view of every court that has been confronted by this genre of dispute.

Id. at 1357 (citations omitted).

In summarizing the law in this area, the Fourth Circuit stated : "[I]t has thus become established that the decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the ken of civil courts." *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997).

C. The Free Exercise Clause Bars the Inclusion of Ministers in the State's Unemployment Compensation System

1. This case falls squarely within the unbroken line of cases recognizing the First Amendment "ministerial exception" from civil employment statutes

Giving due recognition to the core religious dimensions inherent in the church-minister relationship, courts have held that the Free Exercise Clause of the First Amendment bars judicial scrutiny, under various employment-related statutes, of the church-minister employment relationship.

In *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), plaintiff, an ordained priest serving as hospital chaplain in a church-sponsored hospital, claimed that she had been terminated on the basis of age and sex in violation of the Age Discrimination and Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The Eighth Circuit upheld summary judgment against plaintiff:

We believe that the Free Exercise Clause of the First Amendment . . . prohibits the courts from deciding cases such as this one. Personnel decisions by church-affiliated institutions affecting clergy are per se religious matters and cannot be reviewed by civil courts, for to review such decisions would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made. This is precisely the kind of judicial second-guessing of decision-making by religious organizations that the Free Exercise Clause forbids.

Id. at 363.

Similarly, the Fifth Circuit determined that "the Free Exercise Clause of the First Amendment deprives a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy, even when the church's challenged actions are not based on religious doctrine." *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 345 (5th Cir. 1999). In upholding the dismissal of plaintiff's Title VII discrimination claims, the court concluded:

In short, we cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church.

Id. at 350.

In *Young v. The Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994), the court affirmed the district court's dismissal, based on lack of subject matter jurisdiction, of a probationary minister's claims of race discrimination, sex discrimination, and retaliation. Citing *Milivojevich*, 96 S.Ct. at 2382, the court held that "the Free Exercise Clause of the First Amendment forbids a review of a church's procedures when it makes employment decisions affecting its clergy." *Id.* at 187. "In other words, religious bodies may make apparently arbitrary decisions affecting the employment status of their clergy members and be free from civil review having done so." *Id.* In response to plaintiff's arguments that the Free Exercise Clause did not bar her claims, the court cautioned:

To accept the position advanced by [plaintiff] would require us to cast a blind eye to the overwhelming weight of precedent going back over a century in order to limit the scope of the protection granted to religious bodies by the Free Exercise Clause.

Id. at 187-88.

Numerous other federal and state courts likewise have held that the Free Exercise Clause bars application of civil employment statutes to the church-minister relationship. In *EEOC v. Catholic University of America*, 83 F.3d 455, 461 (D.C. Cir. 1996), the court noted that "this circuit and a number of others have long held that the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them." In similar fashion, the Fourth Circuit concluded that "any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's Free Exercise rights." *Rayburn*, 772 F.2d at 1168.

2. The inclusion of ministers within Oregon's unemployment compensation system would burden a church's constitutional freedom in the same manner as inclusion of ministers within other employment-related statutes

As in the numerous other cases recognizing the First Amendment "ministerial exception," inclusion of ministers within Oregon's unemployment compensation system inevitably would require state administrators and the courts to scrutinize churches' ministerial employment decisions and to interpret church rules and doctrine.

In applying the unemployment compensation system to ministers, the Employment Department and courts necessarily would have to

determine whether the church discharged the minister "for misconduct connected with work." ORS 657.176. According to administrative regulation:

Misconduct is a willful violation of the standards of behavior which an employer has the right to expect of an employee. . . . Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct for the purposes of denying benefits under ORS 657.176.

Bunell v. Employment Division, 304 Or. 11, 14, 741 P.2d 887 (1987), citing OAR 471-30-038(3). Furthermore, "where an employer charges a claimant with such misconduct as would bring about his disqualification from unemployment compensation benefits, it is incumbent upon the employer to sustain the charge by a reasonable preponderance of the evidence." Giese v. Employment Division, 27 Or. App. 929, 934, 557 P.2d 1354 (1976). Moreover, "where the conduct or activities for which the claimant is discharged occurred off the working premises and outside the course and scope of employment, the employer must, in order to show that the conduct is work-connected, point to some breach of a rule or regulation that has a reasonable relation to the conduct of the employer's business." Id. at 935.

A few case examples from outside the church-minister context amply demonstrate the inevitable intrusion into religious matters that will occur if the Employment Department and courts apply ORS 657.176 and implementing regulations to the church-minister relationship. In Veneer v. Employment Division, 105 Or. App. 198, 200, 804 P.2d 1174 (1991), the court held that the claimant's admitted use of methamphetamines did not constitute "misconduct connected with work," because the employer failed to carry its burden of proving "that claimant's off-duty controlled substance use affected his work or the workplace." The court also noted that, according to Employment Department policy:

Before benefits are denied for failing a drug test it should be shown that: (1) proper testing and confirmation procedures have been followed; and (2) there is clear objective evidence of impairment (e.g., bizarre behavior, substantial loss of productivity, etc.).

Id. at 200.

If facts similar to Veneer arose in the church-minister context, the church likely would argue that, based on church doctrine, a minister's "off-duty" methamphetamine use is

"misconduct connected with work." In response, the Employment Department and courts would have to examine church doctrine to determine "the standards of behavior which [a church] has the right to expect of [a minister]," and whether the characteristics of the minister's job "might make off-duty drug use intrinsically connected with [job] performance." *Id.* at 204. Furthermore, with an eye toward controlling its unemployment tax rate, the church might secularize its policies or practices to conform to the Employment Department's standards concerning off-duty drug use.

Giese, *supra*, presents another example of the unavoidable intrusion into church doctrine that will occur if ministers are covered by the unemployment compensation system. The court held that the claimant's conviction for "conspiring with others to explode devices designed to damage or destroy certain federal buildings" did not constitute misconduct connected with claimant's work as a university professor, 27 Or. App. at 931, because the employer failed to prove "some breach of a rule or regulation that has a reasonable relation to the conduct of the employer's business." *Id.* at 935. If Giese were applied to the church-minister context, a church challenging payment of unemployment benefits would have to show "some breach of a rule or regulation that has a reasonable relation to the conduct of the [church's] business." Thus, the Employment Department and courts would be required to examine church "rules and regulations" concerning the criminal misconduct to determine whether they bore a "reasonable relation" to the "conduct of the [church's] business." Such an inquiry would place the state in the middle of debates over religious beliefs and church doctrine. Again, in order to control its unemployment tax rate, a church might feel compelled to change or formalize its "rules and regulations" to conform to Employment Department policies.

As a final example, consider a situation where a church dismisses a minister for swearing or committing adultery. Would the Employment Department and courts resolve debates over the meaning and context of the Third and Seventh of the Ten Commandments, Exodus 20:3-17, and whether the church has consistently enforced these "rules," or would the Employment Department and courts simply apply a secular rule that off-duty conduct is not misconduct connected with work? Either way, the government would run roughshod over the church's First Amendment right to make this decision free from governmental oversight or interference.

This inevitable intrusion into church governance matters is precisely the harm that the First Amendment is intended to prevent. The Fourth Circuit's analysis in *Rayburn*, directed at employment discrimination claims in the church-minister context, applies with equal force to this case:

[T]he goals of a church in the selection of its spiritual leaders and of a governmental agency in the performance of its statutory mandate may not be the same. The [administrative agency] may or may not share the values of any given church, whose highest priority is simply one of fidelity to its own beliefs and practices. The danger is that choices of clergy which conform to the preferences of public agencies may be favored over those which are neutral or opposed. The church's selection may at times result from preferences wholly impermissible in the secular sphere. Where goals differ, the temptation for state intrusion becomes apparent. But 'even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of the that goal.' [Citation omitted.] . . . Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise 'that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere.' *McCollum v. Board of Education*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

772 F.2d at 1170-71.

Nor can the Employment Department bolster its position by arguing that religious doctrine will come into play only in the rare unemployment case. In *Combs*, 173 F.3d at 350, the court rejected plaintiff's contention that resolution of her discrimination claim "requires no evaluation or interpretation of religious doctrine." The court concluded that, "in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely non-doctrinal." *Id.* Similarly, the District of Columbia Circuit noted that, "in excepting the employment of a minister from Title VII, 'we need not find that the factors relied upon by [a] Church [are] independently ecclesiastical in nature, only that they [are] related to a pastoral appointment determination.'" 83 F.3d at 461, quoting *Minker*, 894 F.2d at 1357; see also *Rayburn*, 772 F.2d at 1169 (once court finds that job position is "important to spiritual mission" of church, "we may not inquire whether the reason for [the employment decision] had some explicit grounding in. . . theological belief").

3. No compelling state interest justifies this burden on a church's Free Exercise Clause right to make ministerial employment decisions unfettered by governmental review

The court below found that including Mr. Hensley's position as minister within the unemployment compensation system would burden the church's Free Exercise Clause right to "free choice and control of its leaders," and that, "in the context of a discharge of a minister, Church will have to explain, and perhaps even justify, its decision to the state." 983 P.2d at 1081. The court further found that "the disputed state action--i.e., the disqualification inquiry as it relates to ministers--implicates an ecclesiastical matter that goes to the very heart of a religious organization's autonomy." Id. at 1082. Nevertheless, the court held that the intrusion into the church's free exercise rights was "an incidental burden" which is "overbalanced" by "the state's important interest in providing for the economic security of its citizens." Id. The court based its decision on the assumption that excluding Pastor Hensley from coverage in this case "would have the effect of excluding all ministers from the system [due to the equal treatment requirements of Oregon's religion clauses] and thus put Oregon's unemployment compensation system out of compliance with FUTA," thereby "threaten[ing] the economic security of all Oregonians." Id. at 1081-82. The court erred. No court, prior to the decision of the court below, has found that the government's interest in enforcing employment-related statutes justifies the state's intrusion into a church's Free Exercise Clause right to hire or fire a minister free from governmental review. To the contrary, courts uniformly have found that, even in the face of extremely important governmental interests, the First Amendment precludes administrative agencies and courts from scrutinizing employment decisions in the church-minister context. Indeed, in response to arguments similar to those made in this case, courts either have stated in blanket fashion that "decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the ken of civil courts," Bell, 126 F.3d at 331, or that the church's First Amendment right prevails even in "a collision between two interests of the highest order," Catholic University, 83 F.3d at 460. See also Rayburn, 772 F.2d at 1168 (balance weighs in favor of free exercise of religion even though it would be "difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities"). Thus, the First Amendment bars jurisdiction over employment claims in the church-minister context no matter the magnitude of the state's interest in enforcing its employment-related statute.

Even if the First Amendment contemplated a balancing test in this context, which amici curiae deny, the Court of Appeals' balancing analysis in this case fails because the court mistakenly assumed that the exclusion of all ministers would result in Oregon's total inability to provide for the economic security of its citizens. The Court of Appeals first implicitly assumed that the First Amendment ministerial exception applies

only to ministers ordained by churches, not to "other ministers," and that the state would be required to include these other ministers in its unemployment compensation system. Then, based on this narrow interpretation of the First Amendment guarantee, the court found that exempting only church-ordained ministers from the state unemployment compensation system would violate Oregon's constitutional guarantee of equal treatment for all religious organizations, under *Salem College & Academy v. Employment Division*, 298 Or. 471, 695 P.2d 25 (1985), and its progeny. The court then concluded that, in order to satisfy the Oregon Constitution and comply with FUTA, the First Amendment liberties of churches must give way.

The basic underlying premise of the Court of Appeals' decision--that the First Amendment guarantee of church autonomy for ministerial employment decisions is limited to church-ordained ministers--is wrong. According to Catholic University:

The ministerial exception has not been limited to members of clergy. It has also been applied to lay employees of religious institutions whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. . .'

83 F.3d at 461, quoting *Rayburn*, 772 F.2d at 1169. The court then concluded that "the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." *Id.* at 463.

Likewise, in *Starkman v. Evans*, 1999 U.S. App. LEXIS 33989 (5th Cir. Dec. 27, 1999), the court held that the ministerial exception applied to plaintiff, a church choir director. Even though plaintiff was not ordained, the court found that, "[b]ecause the evidence shows that [plaintiff] participated in religious rituals and numerous religious duties, she qualifies as a 'minister' for purposes of the First Amendment Free Exercise Clause exception to employment discrimination claims." *Id.* at *11; see also *Scharon*, 929 F.2d at 362-63 (position of hospital chaplain falls within ministerial exception); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (for purposes of ministerial exception, "ministers" includes non-ordained faculty at Baptist seminary).

This authority establishes that, under the First Amendment, the "ministerial exception" applies equally to all ministers, regardless of whether a particular minister is "ordained by a church." Thus, the state may exclude (indeed, the state is required by the First Amendment to exclude) all "ministers" from

its unemployment compensation system. Because this result is mandated by the United States Constitution, the state's exclusion of all ministers cannot be in violation of FUTA. The exclusion of all ministers would also comply with the Oregon Constitution under the reasoning of Salem College & Academy.

Even assuming, for the sake of argument, that the Court of Appeals correctly assumed that the exclusion of all ministers would render Oregon non-compliant with FUTA, the court failed to balance the appropriate interests. If, despite the First Amendment ministerial exception, federal law actually did require Oregon to include ministers ordained by "non-church religious organizations," the relevant state interest is not safeguarding the federal tax credit for unemployment payments made by Oregon employers. Rather, the relevant state interest is the incidental burden on the state constitutional right, recognized for the first time by the Court of Appeals below, of the as-of-yet-hypothetical "ministers ordained by non-church religious organizations" to be treated the same as ministers ordained by churches for state unemployment tax purposes. If, as the Court of Appeals held, Oregon's interest in complying with FUTA is compelling, then this compliance must be at the expense of imposing an "incidental burden" on the state constitutional right of equal treatment for all religious organizations, and not at the expense of the long-established federal constitutional right of church autonomy over ministerial employment decisions. In other words, Oregon may solve the dilemma perceived by the Court of Appeals by excluding ministers ordained by churches (thereby honoring the churches' First Amendment rights) while including the hypothetical "ministers ordained by non-church religious organizations" (thereby imposing an incidental burden only on the state constitutional right of non-church religious organizations to be treated the same as churches). The state constitutional guarantee of equal treatment for all religious organizations recognized by the court below cannot justify the state's trampling on churches' First Amendment freedom to make ministerial employment decisions without governmental interference.

D. The Establishment Clause Prohibits the Entanglement Between Church and State that Would Result from Including Ministers Within the State's Unemployment Compensation System

The court below held that church autonomy in the context of ministerial employment decisions flows only from the Free Exercise Clause, and that the Establishment Clause has no bearing on the issues in this case. The court's analysis directly conflicts with the holdings by federal courts recognizing the importance of the Establishment Clause in this context. The Establishment Clause requires the exclusion of ministers from the state's unemployment

compensation system even if the Court of Appeals' Free Exercise Clause analysis were upheld.

In *Catholic University*, the court held that "the application of Title VII to [the plaintiff nun's] employment requires an intrusion by the Federal Government in religious affairs that is forbidden by the Establishment Clause." 83 F.3d at 457. The court recognized that the entanglement prohibited by the Establishment Clause has both substantive and procedural dimensions. On the substantive level, applying employment-related statutes to the clergy-church employment relationship violates the Establishment Clause where the church's freedom to choose its ministers is at stake. *Id.* The court concluded, therefore, that the controversy over plaintiff's qualifications for tenure placed the court "in the impermissible position of having to evaluate competing opinions on religious subjects," and that the Establishment Clause prohibits the government from choosing among "competing religious visions." *Id.* at 465 (citations omitted); see also *Scharon*, 929 F.2d at 363 ("The resolution of such charges [of age and sex discrimination] will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators. . . . It is not only the conclusions that may be reached. . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry.") (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 99 S.Ct. 1313, 59 L.Ed. 2d 533 (1979)).

In *Rayburn*, 772 F.2d 1164, the case relied upon extensively by the court below, the Fourth Circuit held that any scrutiny of a church's choice of minister would not only infringe on the church's free exercise of religion, but would also constitute impermissible government entanglement with church authority. "To subject church employment decisions . . . to Title VII scrutiny would also give rise to 'excessive government entanglement' with religious institutions prohibited by the Establishment Clause of the First Amendment." *Id.* at 1169, citing *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971). The court further explained:

While the administrative relationship here constitutes a burden on the religion--and hence implicates free exercise values--we think that the First Amendment is also independently concerned that 'a comprehensive, discriminating, and continuing state surveillance will. . .involve excessive and enduring entanglement between state and church.'

772 F.2d at 1170, quoting *Lemon v. Kurtzman*, 403 U.S. at 619. Although the Employment Department contends that the entanglement will be minimal, courts must recognize that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *McClure*, 460 F.2d at 560, quoting *School District of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L. Ed. 2d 844 (1963).

On the procedural level, both *Catholic University*, 83 F.3d at 467, and *Rayburn*, 772 F.2d at 1171, held that excessive entanglement results from the "legal process pitting church and state as adversaries." *Rayburn* noted the danger that churches, wary of administrative or judicial review of their decisions, "might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." 772 F.2d at 1171. Similarly, *Catholic University* noted that the government's investigation itself "constituted an impermissible entanglement with judgments that fell within the exclusive province of the [religious institution]." 83 F.3d at 467. "Moreover, we think it fair to say that the prospect of future investigations and litigation would inevitably affect to some degree their criteria by which future vacancies in the ecclesiastical faculties would be filled." *Id.* The *Catholic University* court concluded that the Establishment Clause provided a sufficient basis for affirming the trial court's dismissal of plaintiff's employment-related claims.

E. The United States Supreme Court's *Smith* Decision Does Not Alter This Constitutional Analysis

In the decision below, the Court of Appeals noted that it did not consider the application of *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990), because neither party had cited or relied upon *Smith*. The court commented, however, that *Catholic University*, 83 F.3d at 460-63, concluded that *Smith* does not extend to cases involving church autonomy. 983 P.2d at 1080, n.10. To the extent the Employment Department now attempts to rely on *Smith*, any such argument should be rejected.

Catholic University forcefully rejects the argument that the ministerial exception has not survived the Supreme Court's decision in *Smith*. The appellants in *Catholic University* argued that, because Title VII is a "religion-neutral law of general applicability," as in *Smith*, the Free Exercise Clause does not bar its application to ministers employed by religious organizations. *Id.* at 461. The court rejected appellant's argument for three primary reasons.

First, the court emphasized that "the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in Smith and in the cases cited by the Court in support of its holding." *Id.* at 462. The court explained:

The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather it is designed to protect the freedom of the church to select those who will carry out its religious mission. Moreover, the ministerial exception does not present the dangers warned of in Smith. Protecting the authority of a church to select its own ministers free of government interference does not empower a member of that church 'by virtue of his beliefs, to become a law unto himself.'

Id., quoting Smith, 494 U.S. at 885.

Second, Catholic University noted the "long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.*, quoting Kedroff, 344 U.S. at 116. While Catholic University acknowledged that Kedroff and other Supreme Court cases supporting the ministerial exception did not involve neutral statutes of general application, "we cannot believe that the Supreme Court in Smith intended to qualify this century-old affirmation of a church's sovereignty over its own affairs." *Id.* at 463.

Third, Smith does not address the Establishment Clause, which has long been recognized as an independent pillar supporting the First Amendment ministerial exception. Smith itself distinguished its own, purely free exercise issues, from the "hybrid" case where more than one constitutional right is involved. 494 U.S. at 881. The ministerial exception presents exactly that "hybrid" situation, for not only the Free Exercise Clause but also the Establishment Clause are deeply implicated in the application of employment-related statutes to ministerial employment decisions. Catholic University, 83 F.3d at 467.²

IV. CONCLUSION

² Many other cases after Smith have continued to apply the First Amendment ministerial exception. See, e.g., Bell, 126 F.3d at 331, 333; Young, 21 F.3d at 187-88; Scharon, 929 F.2d at 363; EEOC v. Roman Catholic Diocese of Raleigh, 48 F. Supp. 2d 505, 512 (E.D. N.C. 1999) ("no court has rejected the ministerial exception based on Smith").

This Court should reverse the Court of Appeals' decision and find that Mr. Hensley's position as minister is excluded from the state's unemployment compensation system.

Respectfully submitted this ____ day of January, 2000.

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