No. 22-35986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE PACIFIC UNIVERSITY,

Plaintiff-Appellant,

v.

ROBERT FERGUSON, in his official capacity
as Attorney General of Washington,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Docket No. 3:22-cv-05540
The Honorable Robert J. Bryan

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL LAW SCHOLARS ELIZABETH A. CLARK, CARL H. ESBECK, AND ROBERT J. PUSHAW IN SUPPORT OF REVERSAL

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STATEMENT OF IDENTIFICATION

Amici are constitutional law scholars whose scholarship and teaching have a particular focus on the First Amendment Free Exercise and Establishment Clauses.[1] For decades, these professors have closely studied constitutional law and religious liberty, published numerous books and scholarly articles on the topic, and addressed it in litigation. The *amici* bring to this case a deep theoretical and practical understanding of the Supreme Court's First Amendment jurisprudence that may help the Court resolve the questions in this case. *Amici* share an interest in advancing the understanding of how courts should handle church-autonomy and ministerial-exception arguments.

Elizabeth A. Clark is Associate Director of the International Center for Law and Religion Studies at the J. Reuben Clark Law School at Brigham Young University. Professor Clark has spoken worldwide and written extensively on church-state issues and is the editor of several books on U.S. and comparative law

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[1] *Amici* file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and all parties to the appeal have consented to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed financial support intended to fund the preparation or submission of this brief. No other individuals or organizations contributed financial support intended to fund the preparation or submission of this brief.

and religion issues. She has testified before the U.S. Congress on religious freedom issues, taken part in drafting legal analyses of pending legislation affecting religious freedom in over a dozen countries, and has written amicus briefs on religious freedom issues for the U.S. Supreme Court.

Carl H. Esbeck is the R.B. Price Emeritus Professor and Isabelle Wade & Paul C. Lyda Emeritus Professor of Law at the University of Missouri. He has published widely in the areas of religious liberty, church-state relations, and federal civil-rights litigation, including authoring articles discussing the ministerial exception and the principles of church autonomy. In 2019, the University of Missouri published Professor Esbeck's *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776-1833*.

Robert J. Pushaw is the James Wilson Endowed Professor of Law at Pepperdine Caruso School of Law and has taught at eight other law schools. He is a prolific constitutional law scholar. Many of his works explore the dangers of government interference with individual constitutional rights, including the institutional free exercise rights of parochial schools.

SUMMARY OF THE ARGUMENT

The First Amendment's church-autonomy doctrine puts decisions by churches and other religious organizations concerning who will hold ministerial positions and the hiring of co-religionists off limits from governmental intrusion. Such decisions are at the heart of how religious organizations implement their religious missions. The church-autonomy doctrine secures the religious individuals' and organizations' freedoms *and* protects the government from becoming enmeshed in religious disputes that they are not equipped to resolve. Although the church-autonomy doctrine has been developed in significant part in the context of judicial actions, the First Amendment applies to all government actions, and the First Amendment policies that animate the church-autonomy doctrine apply with equal force to executive, legislative, administrative, and judicial actions.

Among the federal courts' most important functions is policing the constitutional boundaries on government power. For that reason, federal courts have defended the fundamental rights guaranteed by the First Amendment from adverse action by governmental entities of all stripes. Contrary to the First Amendment, when a branch of state government takes action that would result in the government entangling itself in the fundamental religious questions, the doors

to the federal courts should be open to churches and other religious organizations to obtain relief before irreparable harm occurs.

In the case of government investigations, irreparable harm is done to the First Amendment freedoms and structural safeguards from the inquiry itself and not just when the government decides to pursue an administrative or executive action against a church or other religious organization. There is little difference between a party probing fundamental religious decisions via judicially imposed discovery and a law-enforcement body undertaking the same actions as based on its executive or administrative authority. Both chill the free exercise of religion by subjecting the religious organization and enmeshing the government in ecclesiastical affairs that are outside constitutional limits on government authority. And those harms cannot be undone by after-the-fact judicial disapproval.

Accordingly, when a state attorney general demands wide-reaching information about a religious organization's religious hiring practices, the federal courthouse doors must be open to religious organizations to obtain relief from governmental overreach. That is what should have happened here. Because it did not, the district court's decision should be reversed.

ARGUMENT

I. The church-autonomy doctrine dually protects churches and religious organizations from government interference in their internal religious affairs and protects the government from being drawn into ecclesiastical disputes.

Under our Constitution, the government cannot interfere with the internal affairs of religious organizations, including matters of faith, doctrine, and internal governance. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181-90 (2012) (explaining that the Establishment Clause limits governmental involvement in the affairs of religious groups, and the Free Exercise Clause safeguards the freedom to practice religion, whether as an individual or as part of a group). Indeed, the Constitution guarantees churches' and other religious organizations' "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. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); see also *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999) ("The Free Exercise Clause restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs."). "In tandem, the Religion Clauses establish a 'scrupulous policy . . . against a political interference with religious affairs.' " *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 827 (D.C. Cir.), reh'g

en banc denied, 975 F.3d 13 (D.C. Cir. 2020) (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806)).

The Religion Clauses of the First Amendment give rise to the church-autonomy doctrine, which broadly guarantees the independence of religious entities from government interference with matters of faith, doctrine, polity, church governance, and the decisions regarding who will carry out the church's vision. But, consistent with the First Amendment Religion Clauses that vivify it, the church-autonomy doctrine also prevents the government from entangling itself in ecclesiastical affairs; it protects the government from becoming enmeshed in matters over which it has no competence. "The essence of church autonomy is that [a religious entity] should be run by duly constituted [religious] authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law." Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253 (2009). Indeed, the church-autonomy doctrine "imposes a disability on civil government with respect to specific religious questions." Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1867 (2018).

The policy underlying the church-autonomy doctrine has been described as follows:

> Well understood, "separation of church and state" would seem to denote a structural arrangement involving

> institutions, a constitutional order in which the institutions of religion—not "faith," "religion," or "spirituality," but the "church"—are distinct from, other than, and meaningfully independent of, the institutions of government. What is "at stake," then, with separation is not so much—or, not only—the perceptions, feelings, immunities, and even the consciences of individuals, but a distinction between spheres, the independence of institutions, and the "freedom of the church." [Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment 515, 523 (2007).]

A claim of church autonomy, therefore, "is a claim to autonomous management of a religious organization's internal affairs." Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253 (2009). "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

When the church-autonomy doctrine is raised as a defense in a lawsuit, courts must make a "threshold inquiry" into "whether the alleged misconduct is 'rooted in religious belief.' " *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 657 (10th Cir. 2002) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). Specifically, courts are called upon to decide "whether the dispute . . . is an ecclesiastical one about discipline, faith, internal organization, or ecclesiastical rule, custom or law, or whether it is a case in which [the court]

should hold religious organizations liable in civil courts for purely secular disputes[.]" *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 330 (4th Cir. 1997) (internal citations omitted).

The ministerial exception is a specific application of the church-autonomy doctrine that recognizes a categorical prohibition into government entanglement in religious organizations' decisions about who will serve as the organizations' ministers. In *Hosanna-Tabor*, the U.S. Supreme Court recognized that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so" enmeshes the state in the affairs of religious bodies in the same fashion as deciding doctrinal disputes. 565 U.S. at 188–189. Doing so "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs," thereby interfering with "a religious group's right to shape its own faith and mission through its appointments." *Id*. at 188. This in turn "violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id*. at 189. Because the Establishment Clause "prohibits government involvement in ecclesiastical matters," *id*., it is "impermissible for the government to contradict a church's determination of who can act as its ministers," *Id*. at 185.

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court reaffirmed the structural nature of the ministerial exception and explained that

"[s]tate 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." 140 S. Ct. at 2060. Accordingly, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id*.

Accordingly, the church-autonomy doctrine not only protects churches and religious organizations from government interference in their internal religious affairs, but it also protects the government from becoming enmeshed in ecclesiastical affairs and internal church governance.

II. The federal courts should act as gatekeepers to prevent governmental intrusion and entanglement barred by the church-autonomy doctrine.

While the church-autonomy doctrine "prohibits civil court review of internal church disputes," *Bryce*, 289 F.3d at 655, the doctrine requires courts to intervene as a gatekeeper between religious institutions and other branches of government when the latter seek to delve into the ecclesiastical affairs of churches and other religious organizations.

Federal courts have a "duty to protect constitutional rights." *Turner v. Safley*, 482 U.S. 78, 84 (1987); see also Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Acts*, 57 Rutgers L Rev 945,

948 (2005) (a "court must play the primary role in protecting individual rights."); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (finding that the "constitutional protection" implicated by the church-autonomy doctrine "is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes."). The rights implicated in the Religion clauses are upheld when the government "respects the religious nature" of Americans and "accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

To this end, courts protect the constitutional rights of churches and religious entities from the inherent harm of excessive government entanglement by all three branches. Courts regularly protect religious entities from the judiciary becoming entangled in religious issues. *See*, *e.g.*, *Our Lady*, 140 S. Ct. at 2069 (finding that courts deciding certain questions "would risk judicial entanglement in religious issues"). Similarly, courts protect religious entities from the legislative branch passing laws that infringe upon religious liberty. *See*, *e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices."). Finally, courts are regularly called upon to consider pre-enforcement challenges to acts by the executive branch which may violate the

religion clauses. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (considering a pre-enforcement challenge to the Executive Branch action which the plaintiffs alleged would violate the Establishment Clause).

Thus, when a religious entity alleges that its constitutional rights to be free from government interference in matters of faith, doctrine, polity, or church governance will be violated by government action, courts are required to intervene to determine whether the church-autonomy doctrine, including the ministerial exception, bars the government action at issue before the religious institution's First Amendment rights are violated.

A. Improper government investigations into internal church affairs regarding ecclesiastical matters such as how a religious organization propagates its religious beliefs through its hiring practices may impinge upon the First Amendment.

1. Government investigation of a church or religious organization's religious hiring practices inherently implicates the church-autonomy doctrine.

A government investigation into the religious hiring practices of churches and other religious organizations inherently risks transgressing the structural separation of church and state. As the United States Supreme Court has recognized, the "very process of inquiry" leading to decisions regarding church autonomy "may impinge on rights guaranteed by the Religion Clauses." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *see also Scharon v. St.*

Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (chaplaincy decisions are "per se religious matters and cannot be reviewed by civil courts"; "the very process of inquiry" would violate Religion Clauses); *Natal v. Christian & Missionary All*., 878 F.2d 1575, 1577-1578 (1st Cir. 1989) (civil court cannot "probe into a religious body's selection and retention of clergymen"; the "inquiry" itself is barred). Indeed, several circuit courts have found that government investigations into church employment practices "would almost always entail excessive government entanglement into the internal management of the church." *Gellington v. Christian Methodist Episcopal Church, Inc*., 203 F.3d 1299, 1304 (11th Cir. 2000); see also *EEOC v. Catholic Univ. of Am*., 83 F.3d 455, 466 (D.C. Cir. 1996) ("An excessive entanglement may occur where there is a sufficiently intrusive investigation by a government entity into a church's employment [choices]"). This "excessive entanglement" is a violation of the separation of church and state—the church-autonomy doctrine.

Moreover, "it is well established, in numerous other contexts, that [the government] should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (cleaned up); *Duquesne Univ. of the Holy Spirit*, 947 F.3d at 827 (noting that "trolling through the beliefs of the [religious] University" was "no business of the

State" and that the "very process of such an inquiry . . . would impinge on rights guaranteed by the Religion Clauses" (cleaned up)).

Here, the attorney general is investigating Seattle Pacific University's religious hiring practices that the University ties to putting its religious beliefs into practice and propagating its religious beliefs. This is the very sort of inquiry that the *Catholic University* and *Duquesne University* decisions flagged as constitutionally suspect. This is especially true because, as Justice Alito recently explained, even though the Supreme Court has not determined "whether freedom for religious employers to hire their co-religionists is *constitutionally* required," Courts of Appeals generally have protected this right. *Seattle's Union Gospel Mission v. Woods*,142 S. Ct. 1094 (2022) (Alito, J. concurring in the denial of certiorari) (citing *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991); *Kennedy v. St. Joseph's Ministries, Inc*., 657 F.3d 189 (4th Cir. 2011*); EEOC v. Mississippi College*, 626 F. 2d 477 (5th Cir. 1980); *Hall v. Baptist Mem. Health Care Corp*., 215 F.3d 618 (6th Cir. 2000); *Killinger v. Samford Univ*., 113 F.3d 196 (11th Cir. 1997)).

Even though prosecutors like the attorney general have broad discretion, "a prosecutor's discretion is subject to constitutional contractions." *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985). Just as the Constitution does not permit a racially animated investigation

because of the Equal Protection and Due Process clauses, *Armstrong*, 517 at 464, federal courts must intervene to prevent or limit executive investigations that violate the Religion clauses of the First Amendment. Here, the district court abdicated its constitutional duty by giving short shrift to the University's lawsuit.

2. If a government investigation into a religious entity is warranted, it should be limited in scope

If an executive investigation into a religious institution's ecclesiastical decisions is required, for example, in a purely secular dispute, such an investigation should be appropriately limited. Where the religious institution and government agency disagree about such limitations, judicial intervention is needed to avoid governmental inquiry that entangles the government in questions of ministerial governance, religious competence, and other questions over which it has no expertise. For example, when lawsuits are filed against religious entities, courts carefully ensure that any inquiry is strictly limited to relevant topics that do not violate those entities' rights. *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 957 (9th Cir. 2004) (noting the "restricted inquiry" of the affirmative defense of the ministerial exception); *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008) (finding that the case may only proceed where there is a limited inquiry and the court can prevent a wide-ranging intrusion into sensitive religious matters); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165

(4th Cir. 1985) (explaining that discovery was limited to focus on the nature of an associateship in pastoral care); *Fratello v. Roman Catholic Archdiocese of New York*, 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2016) (observing the court "directed the parties to engage in limited discovery on the issue"). The same approach should guide all branches of government.

Subjecting a religious organization to an investigation about its hiring practices can result in the organization's leaders being deposed on matters of doctrine and religious orthodoxy, as well as the organization's fidelity to its beliefs in practice. Accordingly, lower courts routinely limit discovery to relevant and unrestricted threshold issues to avoid the very harms the church autonomy doctrine, including the ministerial exception, is intended to prevent. *See, e.g.*, *Sterlinski v. Catholic Bishop of Chicago*, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017) ("[D]iscovery must move forward, but only on a limited basis. Before launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid—it is sensible to limit discovery to the applicability of the ministerial exception."); *Collette v. Archdiocese of Chicago*, 200 F. Supp. 3d 730, 735 (N.D. Ill. 2016) ("To help focus the discovery to be taken in this phase, the Court notes that the scope of the issue subject to discovery is narrow."). Courts should similarly limit executive investigations to relevant and unrestricted secular issues, after the determination of

legal threshold issues, to prevent these harms. Indeed, federal courts have a history of weighing in on such questions. See, e.g., *United States v. Mayer*, 503 F.3d 740, 751 (9th Cir. 2007) (explaining how courts "evaluat[e] executive branch investigations that threaten First Amendment rights"); Michael D. Bopp et al, *Trouble Ahead, Trouble Behind: Executive Enforcement of Congressional Investigations*, 25 Cornell J.L. & Pub. Pol'y 453, 490 (2015) ("In sum, the Executive Branch maintains powerful investigative tools, but it also must bear external checks on its ability to intrude into the affairs of private citizens, including pre-enforcement judicial review[.]").

The harm caused to the religious entity by a failure to intervene to limit an investigation constitutes the religious entity's loss of its First Amendment protections, including the protection from a governmental determination on the religious issue of who should be an organization's ministerial employee. While a court can ultimately dismiss any lawsuit filed by an attorney general at the completion of an investigation, it cannot restore the protections of the church autonomy doctrine or the ministerial exception as guaranteed by the Religion clauses. The government and the court will have already trolled through the religious organization's beliefs and practices. That bell cannot be unrung. And the resultant harm affects the religious organization and the governmental entity that has transgressed the structural boundaries on church and state.

B. Unchecked government investigations into religious entities provoke a chilling effect on the free exercise of religion.

A chilling effect "occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulations not specifically directed at that protected activity." See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect*," 58 B.U. L. Rev. 685 (1978). Just as courts have found a "deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association[,]" government investigations into the employment practices and religious beliefs of religious organizations can chill such organizations rights to free exercise. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963).

Inquiries such as the attorney general's may chill a religious organization's articulation and practice of its faith. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343–344 (1987) (Brennan, J., concurring) ("While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as

well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."); *Rayburn*, 772 F.2d at 1171 ("There is the danger that churches, wary of EEOC 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."). Such intrusions into religious organizations' internal affairs chill religious exercise and distort religious communities' process of self-definition, rights guaranteed by our Constitution.

When an individual's or religious organization's First Amendment rights are chilled by government action, federal courts have found sufficient injury to meet jurisdictional standing requirements. For example, in *Presbyterian Church (U.S.A.) v. United States*, this Court found that surveillance "chilled individual congregants from attending worship services, and that this effect on the congregants in turn interfered with the churches' ability to carry out their ministries." 870 F.2d 518, 522 (1989). The impact on the church, according to this Court, constituted a "distinct and palpable" injury which could be traced to the government action and which a favorable judicial decision could redress. *Id.* Similarly, in *Smith v. Brady*, this Court found that a letter demonstrating hostility to the Scientology religion sufficiently intimidated and chilled the recipients' right to the exercise of their

religious beliefs so that the recipients had suffered a cognizable injury. 972 F.2d 1095, 1098 (1992).

Unchecked government investigations into internal hiring practices of religious organizations based on sincerely held religious beliefs will undoubtedly chill the free exercise rights of individual practitioners and organizations alike. Because both the inquiry itself and the threat of enforcement inherently harm religious organizations in a way that cannot later be undone, courts must intervene to prevent these First Amendment violations before they occur. They must also protect the State from the harm it suffers when it entangles itself with a religious organization's internal affairs.

CONCLUSION AND REQUESTED RELIEF

For all the reasons stated above, the *amici* urge this Court to reverse the district court's decision.

Dated: April 10, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Amicus Curiae* Brief complies with the type-volume limitation pursuant to Fed. R. App. P. 29(a)(5). The foregoing brief contains 4,057 words of Times New Roman 14-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2016.

Dated: April 10, 2023

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CERTIFICATE OF SERVICE

This certifies that the Brief of *Amicus Curiae* Constitutional Law Scholars Elizabeth A. Clark, Carl H. Esbeck, and Robert J. Pushaw in Support of Reversal was served April 10, 2023, by electronic mail using the Ninth Circuit's Electronic Case Filing system on all counsel of record.

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