No. 10-553

In The
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, *PETITIONER,*
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISION, *et al.*, *RESPONDENTS.*

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN HUMANIST ASSOCIATION AND AMERICAN ATHEISTS, INC., AMERICAN ETHICAL UNION, ATHEIST ALLIANCE OF AMERICA, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, SECULAR STUDENT ALLIANCE, AND SOCIETY FOR HUMANISTIC JUDAISM, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTERESTS OF *AMICI CURIAE* [1]

This *amici curiae* brief in support of the Respondents is being filed on behalf of the American Humanist Association, American Atheists, Inc., the American Ethical Union, the Atheist Alliance of America, the Military Association of Atheists and Freethinkers, the Secular Student Alliance, and the Society for Humanistic Judaism. *Amici* comprise a diverse array of secular organizations that advocate on behalf of religious liberty and equality and offer a unique viewpoint concerning the history of religious freedom and civil liberties and rights in the United States of America.

This case concerns core humanist and atheist interests regarding the equal, fair and just application of our anti-discrimination laws to all employers, both secular and religious.

Amici wish to bolster the principle of religious neutrality—that government may not prefer religion over nonreligion—by informing the Court that we support the Sixth Circuit's decision vacating the District Court's order entering summary judgment on behalf of the defendant and instructing the

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[1] *Amici* file this brief with the consent of all parties. Consents of the parties are on file with the Clerk of the Court. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The *amici* have no parent corporations, and no publicly held companies own 10% or more of their stock.

District Court to rule on the merits of the plaintiff's claim. We do not, however, support the Sixth Circuit's application of the ministerial exception because this doctrine is based on a misreading of the Constitution. A decision of this Court recognizing the ministerial exception would have the constitutionally impermissible effect of denying equal protection of the laws to the employees of religious organizations and of advancing religion by creating special rights for religious defendants, and in so doing undermine the rule of law.

SUMMARY OF ARGUMENT

One of the foundational principles of a just society is the rule of law. This principle ensures that the democratic judgments regarding important social norms and values embodied in the law are enforced equally against all, whether rich or poor, powerful or weak, famous or humble.

Equality before the law also means that our laws are enforced equally against religious and nonreligious citizens. As this Court has emphasized, religious defendants do not have a special right to ignore a law just because they claim that complying with it would conflict with their religion:

> "Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[2]

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[2] *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds* v. *United States,* 98 U. S. 145 (1879) (rejecting the argument that a law against polygamy could not be constitutionally applied to those whose religion was said to command the practice)).

The Americans with Disabilities Act[3] (the "ADA"), like other federal statutes prohibiting discrimination in employment, such as Title VII of the Civil Rights Act of 1964 ("Title VII"),[4] was enacted to ensure fair treatment of and equal opportunity for groups of citizens who long had been denied these unjustly.

Despite the clarity with which this Court spoke in *Smith* as to the rule of law, lower federal courts have taken it upon themselves to invent and apply a doctrine that gives religious employers a special right to ignore federal antidiscrimination statutes. This so-called "ministerial exception" is said to require those courts to permit religious employers to discriminate on the basis of race, gender, age[5] or disability if done in connection with the employment of an employee deemed "ministerial."

Despite the assertions of its creators, this judicially-created doctrine is unjustified by the First Amendment's Religion Clauses.[6] Because the ADA and Title VII already contain an express exception permitting *religious* discrimination by religious employers, the only thing that the ministerial exception adds is to permit them to discriminate on

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[3] 42 U.S.C. §12101 *et seq*.

[4] 42 U.S.C. §2000e *et seq*.

[5] Discrimination on the basis of age is prohibited by the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. §621 *et seq*.

[6] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I.

the basis of race, gender, or disability *without* religious justification. Conduct undertaken without religious motivation, however, is not protected by the Free Exercise Clause.

In addition, the ministerial exception conflicts with another constitutional value of the highest order: the Fourteenth Amendment's guarantee of equal protection of the laws.[7] In addition to undermining statutes that protect equality, the creation and application of the ministerial exception doctrine by the courts, in and of itself, directly violates the Equal Protection Clause by judicially enforcing a private right to discriminate.

Finally, the specific manner in which the ministerial exception operates in the judicial context, by denying to courts jurisdiction to hear employment discrimination cases, unjustly denies to victims of illegal discrimination their day in court.

The ministerial exception doctrine has no basis in those provisions of the Constitution which are said to require it. Instead, it violates the constitutional rights of those to whom it denies redress for violations of federal law. This Court should therefore reject it and allow courts to adjudicate suits challenging illegal discrimination by religious employers in a manner, described herein, consistent with the First Amendment.

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[7] The Equal Protection Clause provides that a state cannot "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

ARGUMENT

I. THE "MINISTERIAL EXCEPTION" IS NOT JUSTIFIED BY THE FIRST AMENDMENT.

Federal statutes such as the ADA and Title VII prohibit discrimination in employment on the basis of race, gender, religion or disability.[8] These statutes apply to religious employers but expressly provide them with exemptions that permit them, if they so choose, to discriminate on the basis of religious views with regard to any employment decision.[9]

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[8] The ADA generally prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. §12112(a). Title VII generally prohibits employers from "discriminat[ing] against any individual with respect to . . . employment, because ["a motivating factor" for such decision was] . . . such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a) and (m).

[9] The ADA provides that it does not "prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." It further provides that "under [the ADA], a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 §U.S.C. 12113(c). Title VII exempts from its general requirement of non-discrimination any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. 2000e-1(a).

Notwithstanding these express statutory exceptions, however, the lower federal courts have taken it upon themselves to add a further exception of their own creation: the so-called "ministerial exception." This judicial doctrine requires courts to permit religious employers to discriminate not only on the basis of religion but also on *any* basis (including discrimination on the basis of race, gender, age or disability in violation of the ADA, Title VII or the ADEA[10]) when such action is in connection with the employment of a "minister" or similar employee, often broadly defined. The ministerial exception is a purely judicial creation said by these courts to be required by the Free Exercise Clause and/or the Establishment Clause of the First Amendment. It is applied to bar federal courts from even hearing and deciding a case regarding ministerial employment.[11]

In addition to slamming the courthouse door in the face of the victims of illegal discrimination in employment, the ministerial exception has also been used to bar state common law tort claims against religious defendants for their employment-related conduct. For example, it has been used to shield the

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[10] The ADEA generally prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1).

[11] The lower courts are split as to whether the ministerial exception is available to be raised by motion pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction) or 12(b)(6) (failure to state a claim) of the Federal Rules of Civil Procedure. A successful motion under either rule results in the dismissal of the plaintiff's case before discovery and trial.

Catholic Church from suits relating to its employment of priests who have sexually abused children, leaving their victims without a legal remedy. See *e.g. Doe v. Roman Catholic Archdiocese of St. Louis*, 2011 WL 2620382 (Mo. App. E.D.) (holding that "the First Amendment bar[s] the assertion of tort claims against a religious institution based on its alleged negligence in supervising, retaining, or hiring sexually abusive clerics," citing *Gibson v. Brewer*, 952 S.W. 2d 239 (Mo. 1997) (holding that permitting a similar tort suit against the Catholic Church would unconstitutionally "inhibit religion and result in one model of supervision" of employees[12])).

A. The Free Exercise Clause does not give religious employers a special right to be exempt from complying with laws, such as federal anti-discrimination statutes, that do not discriminate against religious conduct.

This Court made clear in *Smith* that the Constitution requires that our laws apply to and govern the conduct of all equally, religious and secular alike. The Free Exercise Clause does not give religious defendants a special right to ignore a law by claiming that complying with it conflicts with their religion. As this Court recognized, doing so would undermine the rule of law, permitting anyone who wants to break the law able to claim some

[12] Presumably, this would be the "model of supervision" ***that does not result in the sexual molestation of children***. It is simply not an outrageous state intrusion to insist that a religious organization follow this particular "model" of employment practices.

"religious" reason that he must be allowed to do so. Pursuant to *Smith*, a Free Exercise Clause challenge to a law is *only* available if the law is not neutral and of general applicability (*i.e.* only if it discriminatorily singles out particular religious conduct *as such* for regulation). If a law is "not specifically directed at . . . religious practices," it does not violate the Free Exercise Clause. *Id.* at 878. In other words, it is only when "the object of a law is to infringe upon or restrict practices *because of* their religious motivation, [that] the law [is] . . . not neutral," and therefore unconstitutional. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (emphasis added).

Accordingly, when considering an asserted Free Exercise Clause defense to the application of a law to a defendant who claims that the law inhibits in some way his free exercise of religion, a court, applying the *Smith* test, must reject this challenge unless the defendant can prove that the law was enacted with the purpose of discriminating against a particular religious practice because of its religious nature. Religion-neutral laws that incidentally burden religion are not unconstitutional.

In refusing to require courts to undertake a strict scrutiny analysis of any law to which a defendant asserts a right to a religious exemption, this Court reasoned that doing so "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," noting in particular that this would include "laws providing for equality of opportunity for the races." *Id.* at 889. The Court

unequivocally concluded that "[t]he First Amendment's protection of religious liberty does not require this." *Id.*

By way of comparison, this Court further noted that applying strict scrutiny to racial discrimination produces as a result the "constitutional norm" of "equality of treatment," while doing so to privilege free exercise rights would produce the "constitutional anomaly" of a "private right to ignore generally applicable laws." *Id.* at 886.

This Court has repeatedly shown courage and resolve in upholding the validity of *Smith's* ruling in favor of the rule of law in the face of a political backlash led by religious special interest groups seeking special rights to break the law.[13] We simply

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[13] Following *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), which this Court struck down as applied to the states by *City of Boerne v. Flores*, 521 U.S. 507 (1997), but which remains applicable to federal action (see *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418 (2006)). RFRA provides that "a person whose religious exercise has been burdened in violation [thereof] may assert that violation as a claim or *defense* in a judicial proceeding and obtain appropriate relief *against a government*." 42 U.S.C. 2000bb-1(c) (emphasis added). The parties to this case have *not* asserted it as a defense, and so it is inapplicable here. RFRA only permits a court to rely on such a defense, when invoked, "to provide relief against a government," not against a private plaintiff, barring its application in the vast majority of religious employer discrimination suits between private parties. Even if it were applicable, RFRA requires a "case-by-case consideration of religious exemptions to generally applicable rules," not a blanket exemption that operates to prevent a court from hearing and deciding a case, as the ministerial exception does. *Gonzales* at 436.

ask that it do so once again, and do so with respect to laws which the Court has already expressly recognized as applying to religious defendants.

Applying the *Smith* test, antidiscrimination statutes such as the ADA are neutral laws of general applicability, and thus do not violate the Free Exercise Clause. These laws apply to virtually all employers and exist to eliminate the significant social harm caused by employment discrimination. They do not single out religion for negative treatment or have the purpose of suppressing religious practice. To the contrary, the ADA and Title VII provide express exemptions permitting *religious* discrimination by religious employers as an accommodation of their supposed special needs. Courts that have considered this question have reached the same conclusion.[14]

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[14] See *Smith v. Raleigh Dist. of North Carolina Conference of United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999), (holding that "Title VII is a neutral, generally applicable federal law"); *Lukaszewski v. Nazareth Hosp.,* 764 F. Supp. 57 (E.D. Pa. 1991) (holding that "[t]he ADEA is a neutral law of general applicability"); *Stouch v. Brothers of Order of Hermits of St. Augustine*, 836 F. Supp. 1134 (E.D. Pa. 1993) (same); A female former associate pastor brought an action against her church and pastor under state civil rights act for sexual harassment and retaliation. *Black v. Snyder,* 471 N.W. 2d 715 (Minn. Ct. App. 1991) (holding that state law against sexual harassment was "valid, generally applicable, and facially neutral"). See also Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law,* 75 Fordham L. Rev. 1965, 1983 (2007) (stating that "[u]nder *Smith* . . . the free exercise clause should not shield religious practices from Title VII.").

This conclusion accords with this Court's recent decision in *Christian Legal Soc. Chapter of the University of California v. Martinez,* 130 S. Ct. 2971 (2010). In *CLS*, the Court rejected an assertion that the Free Exercise Clause required a state school to exempt a religious group that sought to discriminate in choosing its members from the school's nondiscrimination policy, stating that *Smith* "unequivocally" required this result. *Id. at* 2993 n.24. The Court expressly contrasted this policy to the statutory exemption provided by Title VII for religious discrimination by religious employers.[15] The Court noted that "[i]n seeking an exemption from [a governmental nondiscrimination] policy, [the religious plaintiff] . . . seeks *preferential*, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." *Id.* at 2995 n.27 (emphasis added).

In this case, the religious defendant similarly demands a special, judicially-mandated right to an exemption from a rule requiring nondiscrimination based on an assertion that the Free Exercise Clause commands it. The result should be no different. *Smith* was clear in its command: no free exercise right to break the law exists. The ADA and other antidiscrimination statutes deserve to be, and under

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[15] It is not the role of judges to create free exercise exceptions to statutes. Although Congress may do so, as it did in crafting limited exceptions in the ADA and Title VII permitting religiously motivated discrimination by religious employers, this does not mean that such exceptions are "constitutionally required, and that the appropriate occasions for [their] creation can be discerned by the courts." *Smith* at 890.

Smith must be, enforced fairly, and equally, against all.

B. The Free Exercise Clause does not create an inviolable right to church autonomy.

In seeking to justify their creation of the ministerial exception doctrine, many lower courts have overstated the holdings of some of this Court's cases. These cases, all of which predate *Smith*, deal with the role of civil courts in resolving internal church disputes and assert a supposed church right to freedom from such involvement.[16] See *e.g. Tomic v. Catholic Diocese of Peoria*, 442 F. 3d 1036, 1037 (7th Cir. 2006) (asserting that "[f]ederal courts are secular agencies . . . [that] do not exercise jurisdiction over the internal affairs of religious organizations"). These courts oddly cite as support for this position *Jones v. Wolf*, 443 U.S. 595 (1979) (holding that courts may resolve church property disputes by applying neutral principles of civil law),[17] *Serbian Eastern Orthodox Diocese for the*

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[16] Although *Smith* involved an individual, there is no support in the Free Exercise Clause, or this Court's cases interpreting it, for drawing a distinction between the rights it grants to religious individuals and those it grants to religious organizations; its terms make unconstitutional any "prohibit[ion of] the free exercise [of religion]." Religious organizations, of course, are composed of individuals, and the same concerns regarding the rule of law that animated *Smith* apply: allowing a religious organization complete autonomy in its internal affairs permits it, or its members acting on its behalf, to become a law unto itself.

[17] To the extent that any of the cases preceding *Jones* could be read to require deference to church authority in resolving disputes, this was overruled. See *Jones* at 605 (stating that

United States and Canada v. Milivojevich, 426 U.S. 696 (1979) (holding that courts may resolve church disputes but in so doing must accept a church's determination "as to issues of religious doctrine"), *Kedroff v. St. Nicholas Cathedral of the Russian Eastern Orthodox Church in the United States*, 344 U.S. 94 (1952) (same), *Gonzalez v. Roman Archbishop of Manila*, 280 U.S. 1, 16 (1929) (holding that civil courts have jurisdiction to hear church disputes but must accept as conclusive church rulings on "matters purely ecclesiastical"), and *Watson v. Jones*, 80 U.S. 679 (1872) (stating that "courts when . . . called on [to resolve a dispute involving a church] must perform their function as in other cases" but they tr[y] the civil right, and no more, taking the ecclesiastical decisions . . . as it finds them").

These cases involve disputes over church property[18] and pit one faction of a church against another, not the church against the state. They do not involve an attempt by the state to enforce a neutral law of general applicability governing church

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"[w]e cannot agree that the First Amendment requires . . . a rule of compulsory deference to religious authority in resolving church property disputes.")

[18] The one case, to involve something slightly different than church property *per se*, turned on an interpretation of estate and trust law. See *Gonzalez* at 16 (stating that "the fact that the property of the chaplaincy was transferred to the spiritual properties of the Archbishopric affects not the jurisdiction of the court, but the terms of the trust.") It did not involve the First Amendment and so cannot be read to stand for the proposition that the Religion Clauses require a right to church autonomy. To the contrary, the court held that civil courts had jurisdiction to resolve the dispute at issue.

conduct. Rather than supporting the overblown reading given to them by courts such as the Seventh Circuit in *Tomic*, these cases stand instead for the common proposition that "[t]here can be little doubt about the general authority of civil courts to resolve" disputes involving religious organizations, but in doing so such courts are prohibited by the Religion Clauses "from resolving [such] . . . disputes *on the basis of religious doctrine*." *Jones* at 602 (citing *Milivojevich*, emphasis added). Courts instead "defer to the resolution of religious doctrine" by the church at issue, thereby avoiding "completely [any] . . . entanglement" concerns. *Id.* at 602, 603.

This Court in *Jones* also expressly and conclusively rejected the proposition, advanced by the dissent in that case, that "civil courts must defer to the 'authoritative resolution of a dispute within the church itself'" to comply with the First Amendment. *Id.* at 605. This radical concept of complete autonomy in internal church affairs is without basis in the Religion Clauses, which require no such "compulsory deference to religious authority." *Id.* On the contrary, applying "neutral principles" of civil law to church disputes "cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Id.* at 606 (emphasis added).

This idea that the "Religion Clauses . . . are meant to protect churches and their members from civil law interference," advanced by the *Jones* dissent, was rightly rejected. *Id.* at 613 n.2. This is

because "[c]ivil courts do not inhibit the free exercise of religion merely by opening their doors to disputes" involving churches. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). The only restriction that the First Amendment imposes on such courts is that they resolve such "disputes without resolving underlying religious controversies over religious doctrine." *Id*.

In a secular state such as ours, religious organizations are not above the law and civil courts do not decide questions of religious doctrine. Our courts, however, have the power and duty to resolve legal disputes involving religious organizations and individuals by applying the civil law, just as they do in cases involving secular organizations and individuals. If, in the course of doing so, a court encounters a disputed question of religious doctrine, the resolution of which is necessary to decide the case, it accepts the resolution of this issue provided by the religious organization without further inquiry. It then proceeds to determine the legal rights of the parties and decide the case. In so doing, it complies with the Constitution. See *Jones*.

C. The Establishment Clause offers no basis for the ministerial exception because it exists to ensure that the state remain secular, not to grant special rights to religion.

Some lower courts have justified their creation of a ministerial exception by asserting that it is

required by the Establishment Clause.[19] These courts focus on the third prong of the test first described by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which warned that "excessive entanglement" of government with religion violates the Establishment Clause. In doing so, they miss the bigger picture: their reading turns the Establishment Clause on its head, with the perverse result that a constitutional provision intended to keep the state secular instead is read to require the state to privilege religion. (State interference with the free exercise of religion is, of course, already restricted by the Free Exercise Clause, rather than the Establishment Clause, and courts therefore analyze it by applying the *Smith* test, not the *Lemon* test).[20]

Assuming the continuing validity of the entanglement test,[21] which has been inconsistently

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[19] See *e.g. Rayburn v. General Conf. of Seventh-Day Adventists,* 772 F. 2d 1164, 1169-70 (4th Cir. 1985).

[20] The threat of entanglement of church and state in this context is better seen as an issue of free exercise rather than establishment. The threat is not the government will *endorse* a particular religious doctrine in settling a dispute involving a religious organization in violation of the Establishment Clause, but that it might *impose its interpretation* of that doctrine on a dissenting religious organization in resolving that dispute in violation of the right of the religion to develop and articulate its own theology under the Free Exercise Clause.

[21] Members of this Court have criticized the validity of the entanglement prong of the *Lemon* test as a separate element of Establishment Clause jurisprudence. See *e.g. Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) (stating that "the 'entanglement' prong of the *Lemon* test has been much criticized over the years."); *Committee for Public Ed. & Religious Lib. v. Nyquist*, 413 U.S. 756, 822 (1973) (White, J.,

applied (or not) by this Court, not all entanglement between church and state violates the Establishment Clause. Because "[i]nteraction between church and state is inevitable," this Court has "always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (citation omitted); see also *Walz v. Tax Commission of City of New York,* 397 U.S. 664, 674, 676 (1970) (stating that the "complexities of modern life inevitably produce some contact" between church and state and so the "test is inescapably one of degree") and *Larkin v. Grendel's Den, Inc.* 459 U.S. 116, 123 (1982) (stating that some "entanglement between church and state authority is inevitable in a complex modern society").

In light of this inevitable contact and interaction between institutions of church and state, this Court has made clear that "excessive entanglement" is something more than a single, discrete instance of state involvement in the affairs of a religious organization. It is instead a "comprehensive, discriminating, and continuing state surveillance" amounting to an "enduring

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dissenting) (questioning the validity of entanglement as a separate "constitutional criterion"); *Aguilar v. Felton,* 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting) (questioning "the utility of entanglement as a separate Establishment Clause standard in most cases"); and *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (stating that the prohibition against excessive entanglement should not be read to "ignore the myriad state administrative regulations *properly placed* upon sectarian institutions") (emphasis added).

entanglement." *Lynch v. Donnelly*, 465 US 668, 684 (1984) (quoting *Lemon*).

A court case against a religious defendant under an antidiscrimination statute such as the ADA does not involve such "continuing state surveillance." It involves a discrete factual inquiry. In hearing such a case, a court need not resolve questions of religious doctrine. Rather, it can (and should) focus on a factual inquiry into the motivation for the alleged discrimination. If the plaintiff's injury was caused by and grounded in religious doctrine, the court may, applying the *statutory* exception permitting such discrimination, conclude that the plaintiff has failed to state a claim under the statute and dismiss the case. If the factfinder concludes following trial, however, that the plaintiff's injury was instead motivated by animus against a class otherwise protected by the statute, the court can proceed to judgment. In neither instance must the court resolve a disputed religious question; if such a question arises, it should simply defer to the resolution of such theological question provided by the church defendant.

A purely factual judicial inquiry, limited in time and scope to a single instance of reviewing the past discriminatory action of the defendant toward the plaintiff, is simply not the sort of "comprehensive and continuing state surveillance" that *Lemon* excessively entangles the state with a religious organization.

As this Court itself has recognized, the state does not excessively entangle itself with a religious

entity merely by investigating its workplace practices in response to allegations of illegal employment discrimination. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986). In *Dayton,* a religious school argued that an exercise of jurisdiction over it to investigate and enforce a statute prohibiting sex discrimination would violate the Religion Clauses, asserting that the exercise of jurisdiction would result in "excessive entanglement" with religion. *Id.* at 622. This Court disagreed, stating: "the [state] violates no constitutional rights by merely investigating the circumstances of [the plaintiff's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628. The Court reached a similar conclusion in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-6 (1985), holding the non-entanglement principle "does not exempt religious organizations from such secular governmental activity" as the requirements of the Fair Labor Standards Act because such "factual inquiries . . . bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement."

Accordingly, judicial investigation of alleged employment discrimination, limited in scope to factual inquiries and in time to the particular case before a court, does not amount to excessive entanglement of the state with religion in violation of the Establishment Clause. This conclusion makes eminent sense in light of the overarching purpose of

the Establishment Clause: to prevent government promotion of religion.

In fact, turning to the ministerial exception itself (rather than the application of antidiscrimination statutes to religious employers that it stymies, discussed above), the judicial invention and application of the doctrine itself raise serious Establishment Clause concerns.

In addition to the prohibition against entanglement discussed above, any governmental action "which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose [and not] . . . advance . . . religion in its principal or primary effect." *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989), citing *Lemon*. This means that government cannot "advance," "promote," "endorse," "prefer" or "favor" religion. *Id.* at 590-593. Underlying this, as "the touchstone for our [Establishment Clause] analysis[,] is the principle that the First Amendment mandates governmental neutrality between religion and . . . nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

A statute that expressly grants a special exemption to religious groups from a restriction otherwise imposed on secular entities may or may not be a permissible "accommodation" of religion.[22]

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[22] Note that courts, when responding to a Free Exercise Clause claim that a statute *fails* to sufficiently accommodate religion, as in this case, are to conduct their analysis under *Smith*. If the statute is neutral and generally applicable, a court cannot

This Court has emphasized that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman,* 505 U.S. 577, 587 (1992). Accommodation is permitted only when it "alleviates *exceptional* government-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added). An accommodation which "conveys a message of endorsement" of the religious practice being accommodated advances religion in violation of *Lemon*. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

And, "[o]f course, in order to perceive government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." *Amos* at 348 (O'Connor, J., concurring) (emphasis in original). Because the ministerial exception is broader than the statutory exemption of religious discrimination by religious employers in the ADA and Title VII,[23] it applies to discrimination that almost always has no religious basis. Unless a church's religious doctrine requires discrimination on the basis of race, gender, age or disability, such discrimination cannot be said to be part of the free exercise of religion when it is

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create a religious exemption that the legislature has not. *Smith* at 890.

[23] This Court upheld the narrow exemption granted by Section 702 of Title VII in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

not, by definition, undertaken on the basis of religious views.

By providing an exemption for religious organizations that protects illegal conduct not required by religious views, the ministerial exception provides those religious organizations "with a legal weapon that no atheist or agnostic can obtain," and that amounts to "governmental preference for religion" in violation of the Establishment Clause. *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

D. The Free Speech Clause does not require the ministerial exception.

Because "[a]n individual's freedom to speak [and] to worship . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed," this Court has found to be implicit in the First Amendment a right to expressive association. *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984).

This freedom to associate also "plainly presupposes a freedom not to associate." *Id.* at 623. This "right . . . is not, however, absolute. Infringements on [it] may be justified by regulations adopted to serve compelling state interests" so long as such regulations are narrowly tailored. *Id.*

The state's interest in "eradicating [private] discrimination" is, as this Court has repeatedly recognized, just such a "compelling interest of the

highest order." *Id.* at 623, 624.[24] This interest recognizes "the importance, both to the individual and to society, of removing barriers to economic advancement and . . . social integration that have historically plagued certain disadvantaged groups." *Id*. at 626.

The ministerial exception may be characterized as a First Amendment right to discriminate in choosing the members of a private organization as an act of religious expressive association. Under *Roberts*, however, this does not end the analysis. Because eradicating race and gender discrimination is clearly a compelling state interest, it justifies the application of federal statutes such as Title VII to religious employers despite the incidental burdens this may place on their right to expressive association.[25] The

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[24] See also *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 17 n.5 (1988) (recognizing "the State's 'compelling interest' in combating invidious discrimination" when considering a challenge to an antidiscrimination law on expressive association grounds) and *Board of Directors of Rotary Intern. v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (holding that the application of a state law to require a Rotary Club to admit women did not violate the right of expressive association because, "even if [it] does work some slight infringement on . . . members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women"). *Duarte* cited *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976) (*per curiam*) as standing for the proposition that the "right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas."

[25] In refusing to permit an application of a state's public accommodations law to require that the Boy Scouts admit a

compelling nature of this interest is not diminished by the religious nature of the defendant. See *Bob Jones University v. U.S.,* 461 U.S. 574, 604 (1983) (holding that an IRS decision to refuse to grant tax-exempt status to a university that racially discriminated on the basis of its religious views did not violate the Free Exercise Clause because the government's compelling interest in eradicating discrimination "substantially outweighs *whatever burden* denial of tax benefits places on [the university's] exercise of their religious beliefs") (emphasis added).

In addition, religious organizations that do not have religious beliefs *requiring* discrimination on a

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homosexual member, this Court noted that its decision in *Roberts* relied on a conclusion that the defendants in that case had not demonstrated "any serious burdens on the male members' freedom of associative expression" that would result from a decision to require them to admit women to their organization. *Boy Scouts of America v. Dale*, 530 U.S. 640, 680 (2000). In applying these cases to the ministerial exception, it should be noted that (1) religious defendants in a case involving employment discrimination *not* based expressly on religious doctrine (such as this one) cannot assert that state prohibition of such discrimination causes them to violate an associational value and (2) this Court has applied a lower level of scrutiny to discrimination on the basis of sexual orientation, which was at issue in *Dale*, than it has to that based on race or gender. See *Romer v. Evans*, 517 U.S. 620 (1996). In addition, this Court, in considering the spectrum of associational interests protected by the First Amendment, has placed those relating to employment decisions on the least important and protected end thereof, noting that "the Constitution undoubtedly imposes constraints on the state's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees." *Roberts* at 618.

basis other than religion cannot invoke the right to expressive association to justify such discrimination. Absent such beliefs, such discrimination cannot be said to be a part of the group's right to express its views regarding its discriminatory beliefs under the First Amendment. One does not have a right to expressive association in connection with views one does not hold.

II. THE MINISTERIAL EXCEPTION CONFLICTS WITH THE CORE VALUES OF THE FOURTEENTH AMENDMENT.

A. **The ministerial exception conflicts with a national value of the highest order: equality.**

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1. The same restriction applies to federal action under the Fifth Amendment.[26] Under the Equal Protection Clause, state action that treats persons differently on the basis of suspect classifications is subject to strict scrutiny. See *e.g. Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Suspect

[26] The Due Process Clause of the Fifth Amendment "forbid[s] [federal] discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (quoting *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954)); see also *Buckley v. Valeo,* 424 U.S. 1, 93 (1976) (stating that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment") (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). For simplicity's sake this brief refers to these rights interchangeably.

classifications include race and religion.[27] Governmental discrimination on the basis of gender is subject to similar heightened judicial scrutiny. See *e.g. U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (holding that gender-based classifications must serve "important governmental objectives" and the discriminatory means employed must be "substantially related" to the achievement of those objectives).

Underlying these legal tests is a fundamental democratic ideal of the American republic, forged in the crucible of the Civil War: that "we are a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The ideal of equality is embodied not only in the constitutional guarantee of equal protection of the law, which restricts the ability of the state itself to discriminate, but also in the statutes enacted by Congress outlawing discrimination in those areas of private life fundamental to equality of opportunity, such as employment and housing. These laws are the culmination of a long struggle for equality in American society. They represent a collective decision to reject a past shamefully rife with discrimination by providing its victims today with recourse to the courts to remedy it. They embody

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[27] This Court has expressly listed religion as among those inherently suspect classifications that trigger strict scrutiny. See *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (referring to "inherently suspect distinctions such as race, *religion*, or alienage") and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (referring to an "un-justifiable standard such as race, *religion*, or other arbitrary classification") (emphases added).

our social commitment to legal equality for all and are not to be cast aside lightly by this Court.

B. **The creation and application of the ministerial exception by the courts itself violates the Equal Protection Clause.**

The Equal Protection Clause itself applies only to state actors and not private ones. See *e.g. Civil Rights Cases,* 109 U.S. 3 (1883). Although at first blush it may therefore appear that racial and gender discrimination by religious employers involves purely private conduct that does not implicate the government, and therefore the Constitution, this in fact is not the case. By inventing the ministerial exception doctrine and applying it to provide judicial protection (and therefore incentive) to private employment discrimination, courts themselves, as arms of government, violate the Equal Protection Clause.

The conclusion "that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1879) (stating that state action may "be executive, legislative, or judicial").

The sort of judicial action prohibited by the Fourteenth Amendment includes "[t]he action of state courts in . . . depriving parties of . . .

substantive rights . . . [in violation of] the due process of law." *Shelley* at 16.

As this Court explained in *Shelley*, however, violations of due process are not the only sort of judicial action that can violate the Fourteenth Amendment:

> [E]xamples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that *the action of state courts in enforcing a substantive common-law rule formulated by those courts* may result in the denial of rights guaranteed by the Fourteenth Amendment.

Id. at 17 (emphasis added).

The ministerial exception, created by judges and applied to reject discrimination claims, is just such a "substantive common-law rule" formulated and enforced by the courts. The lower federal courts have used it to slam the courthouse door in the face of plaintiffs seeking a remedy for racial and gender discrimination in employment, denying them a hearing on the merits of their claims. As in *Shelley,* this underlying discrimination itself is private, but it is the action of the court that makes its consequences real by giving the defendant the force

of law to rebuff challenges to it. A court that uses the ministerial exception to deny an otherwise available legal remedy to discrimination actively abets it, and in so doing provides the requisite state action required to find a violation of the Fourteenth Amendment. These courts act to block suits seeking redress for employment discrimination despite the fact that it is a state actor's "constitutional obligation . . . to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood v. Harrison*, 413 U.S. 455, 467-68 (1973).

There is no basis to reject this conclusion simply because the ministerial exception itself does not *cause* the private discrimination to occur, instead only shielding it *post hoc* from liability. Even absent "a precise causal relationship" between state action and private discrimination, such state action violates the Equal Protection Clause if it "has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466. This is true even when the state actor is not acting with discriminatory intent but instead with the object of promoting something it sees as a supposedly worthy goal, such as church autonomy. As this Court noted in *Norwood*, "[t]he Equal Protection Clause would be a sterile promise if state involvement in possible private [discriminatory] activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." *Id.* at 467.

The ministerial exception enables a religious defendant to completely escape liability for illegal

racial or gender discrimination without even allowing the plaintiff a trial on the merits of his claim. Therefore the exception undoubtedly facilitates, reinforces, supports and aids such discrimination. To say this is in fact to understate the exception's effect; the exception amounts to a judicially created and enforced right to break the law with impunity. That a court in doing so claims to be protecting the free exercise of religion is no justification; as discussed above, the ministerial exception is not required by the Religion Clauses.

In applying the ministerial exception, a common-law rule created and applied by the judicial arm of the state, courts facilitate private employment discrimination on the basis of race and gender by refusing to apply federal laws making such conduct illegal. This judicial action is itself subject to the constraints of the Fourteenth Amendment. Accordingly, when the courts apply the ministerial exception, they violate the Equal Protection Clause of the Fourteenth Amendment by facilitating discrimination on the basis of race and gender.

III. IF FOUND TO BE CONSTITUTIONALLY REQUIRED, THE MINISTERIAL EXCEPTION SHOULD BE DRAWN MUCH MORE NARROWLY THAN THE DOCTRINE CREATED BY LOWER COURTS.

As this Court recognized very early in its history, it is a foundational element of our judicial system that citizens have the right to bring suit in the federal courts created by the Constitution to

protect their federal legal rights. This is because "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 5 U.S. 137, 166 (1803).

Congress enacted statutes such as the ADA and Title VII to overcome a long history of discrimination in private employment in the United States, and to make certain that those who still suffer such harms have legal recourse. These anti-discrimination statutes make concrete and real the promise of equality made by the Fourteenth Amendment. In enacting these statutes Congress has justly extended this promise to the private sphere of employment, by giving plaintiffs the enforceable legal right to fight back against workplace bigotry.

When courts apply the ministerial exception to deny justice to those discriminated against by an employer simply because that employer is a religious organization, they frustrate the legal process expressly created by Congress to prevent these wrongs. As this Court recognized in *Smith*, it is not the role of judges to create Free Exercise exceptions to statutes. Although Congress may do so, as it did in crafting limited exceptions in the ADA and Title VII permitting *religiously motivated* discrimination by religious employers, this does not mean that such exceptions are "constitutionally required, and that

the appropriate occasions for [their] creation can be discerned by the courts." *Smith* at 890.[28]

Furthermore, the assertion that federal courts lack subject matter jurisdiction to hear claims brought under federal anti-discrimination statutes is nonsensical.[29] The Constitution grants such jurisdiction, providing that the federal "judicial Power shall extend to *all* Cases . . . arising under . . . the Laws of the United States." U.S. Const. Art. III, §2 (emphasis added). Congress statutorily established the procedure for this "federal question" jurisdiction, giving federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 42 U.S.C. §1331.

Other lower courts apply the ministerial exception as a reason to grant a defendant's Rule 12(b)(6) motion, asserting that the plaintiff has failed to state a claim. This procedural approach

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[28] This court reiterated this holding in *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (stating that "the political branches could shield religious exercises through *legislative* accommodation," citing *Smith* at 890) (emphasis added). Of course, even such legislative accommodations "must be measured so that it does not override other significant interests." *Id*. at 722. These interests include the Establishment Clause, which prohibits accommodations that "unyielding[ly] weigh the interests of [religion] over all other interests." *Id.* (internal quotation marks omitted).

[29] Even some courts that have adopted the ministerial exception have admitted that "it is beyond cavil that a federal district court has the authority to review claims arising under federal law." *Petruska v. Gannon University*, 462 F. 3d 294, 302 (3rd Cir. 2006).

denies the plaintiff a chance to present his or her case, cutting short the factual inquiry, in the form of discovery and trial, needed to determine whether a defendant's motivation for discrimination was religious, and therefore protected by the Free Exercise Clause, or not.

The ministerial exception should not be construed to operate in this manner; if this Court finds it necessary, it should use it to restrict the inquiries made by a court at trial, not to deny the plaintiff a trial altogether. The interests it supposedly protects can be protected in this manner without denying victims of discrimination their day in court.

This Court has previously recognized that suits brought under federal anti-discrimination statutes, such as Title VII, can be structured in such a manner as to protect important interests of the defendant without barring suit altogether. See *Webster v. Doe*, 486 U.S. 592, 604 (1988) (noting that "Title VII claims attacking the hiring and promotion policies of the [Central Intelligence] Agency are routinely entertained in federal court" and that the court "has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support [his] . . . claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"). If an employment discrimination suit may be brought against the CIA and the factual inquiry structured in such a way as to permit discovery and trial without imperiling the most critical of competing

interests, national security, surely a court can conduct a factual inquiry into the employment practices of a church relating to a single plaintiff while balancing the need for justice and enforcement of the law against the much weaker countervailing interest of a supposed special "right" to privacy in a religious organization's internal affairs.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the judgment of the United States Court of Appeals for the Sixth Circuit, to the extent that it concludes that the First Amendment does not bar petitioner's suit, be upheld.

Respectfully submitted,

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APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association ("AHA") advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy. Most recently, the American Humanist Association filed *amicus curiae* briefs with the Court in *Christian Legal Society v. Martinez*, *Salazar v. Buono*, *Pleasant Grove City v. Summum*, and *Arizona Christian School Tuition Organization, et al. v. Winn*, *et al.*

American Atheists, Inc. ("American Atheists"), is a volunteer organization active in protecting the rights of Atheists and promoting tolerance and understanding of the Atheist viewpoint. Founded in 1963 by Madalyn Murray O'Hair, American Atheists has been dedicated to the separation of church and state and a tireless advocate of the Atheist cause. American Atheists' perspective is rooted in the

philosophy of materialism, which holds that nothing exists but natural phenomena.

The American Ethical Union ("AEU") is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. AEU has participated over the years in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

Atheist Alliance of America (the "Alliance") is an umbrella organization for independent local groups and individuals throughout the United States. Its objectives are to help democratic atheistic societies become established and work in coalition with like-minded groups, to protect the constitutional and civil rights of atheists, to inform the general public on the importance of the separation of church and state, and to work through community actions to project a positive image of atheism.

The Military Association of Atheists and Freethinkers ("MAAF") is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to our community services, MAAF takes action to educate and train both the military and

civilian communities about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports separation of church and state and First Amendment rights for all service members.

The Secular Student Alliance ("SSA") is a network of over 250 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at U.S. high schools and colleges. The mission of the SSA is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism ("SHJ") mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The SHJ's members want to ensure

that they, as well as people of all faiths and viewpoints, will not be discriminated against by government favoring of any one religion over another or theistic religion over humanistic religion.