EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER

CASE OF FERNÁNDEZ MARTÍNEZ v. SPAIN

(*Application no. 56030/07*)

WRITTEN COMMENTS OF THIRD-PARTY INTERVENERS CHAIR FOR LAW AND RELIGIONS OF THE UNIVERSITÉ CATHOLIQUE DE LOUVAIN AND THE AMERICAN RELIGIOUS FREEDOM PROGRAM OF THE ETHICS AND PUBLIC POLICY CENTER

I. Introduction

1. Interveners the Chair for Law and Religions of the Université catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center submit these comments in accordance with leave granted by the Court on 20 December 2012 under Rule 44 § 2 of the Rules of the Court. Interveners seek to assist the Court in reaching a just and equitable result and properly interpret Convention obligations.

2. To that end, we offer a comparative view that stresses commonalities across Europe and the United States in protecting the right of religious communities to autonomy in their internal affairs, particularly as this relates to religious teaching. Comparative perspective in this matter is particularly significant because of the broad ramifications this case has for the protection of religious autonomy in member States. These protections take different forms in different States, but remain a hallmark of the constitutional orders of the West. The Court has repeatedly stressed that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection Article 9 affords." *Religionsgemeinschaft der Zeugen Jehovas and Others* v. *Austria*, App. No. 40825/98 (ECtHR, 31 July 2008) § 78.[1]

3. Interveners have extensive experience in the field of freedom of religion or belief, including protection of the autonomy of religious communities under international, European, and American law. Working with prominent European and American experts on freedom of religion or belief, Interveners conclude that despite stereotypical assumptions of divergence between American and European church-state jurisprudence, the reality is one of substantial convergence, particularly when it comes to the autonomy of religious groups. European precedents were presented and argued to the Supreme Court in the most recent autonomy case in the United States (*Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 132 S.Ct. 694 (2012)), and for the same reason, we hope comparative analysis will be helpful here.

4. The Third Section's judgment is consistent not only with this Court's prior decisions but also with settled principles of international law. Rejecting it would unnecessarily thrust European governments and courts into countless religious disputes, drawing judges and other government officials into the business of second-guessing and superintending the internal decisions of religious communities about who has authority to teach and represent their beliefs. Indeed, overturning ecclesiastical decisions as to who may teach religious beliefs puts public authorities in the ill-fitting role of ultimate religious arbiter. This is inconsistent with the Court's repeated insistence that states maintain a neutral posture in religious matters. *See, e.g.*, *Svyato-Mykhaylivska Parafiya* v. *Ukraine*, App. No. 77703/01 (ECtHR, 14 September 2007) § 113; *Metropolitan Church of Bessarabia* v. *Moldova*, App. No. 45701/99 (ECtHR, 13 December 2001) §§ 118, 123. This is particularly inappropriate where the religious community's ability to determine the nature and transmission of its doctrines and practices is at stake, and where long-established expectations within the community recognise religious authority to determine such matters. The State (and indeed, in cases like this one, the Court) would be forced to evaluate the theological and moral judgments that underlie employment decisions regarding religious personnel, and ultimately to adjudicate what messages religious communities are allowed to

[1] Links to available digital versions of materials cited in this intervention are provided at http://www.iclrs.org/fernandez_martinez.

communicate to their own members and to others. Such an outcome would run counter to fundamental principles enshrined in international human rights law, the ECHR, and the constitutional traditions of Europe and North America.

II. The right to religious autonomy under international law

4. In international human rights law, the right to religious autonomy is grounded in the fundamental right to freedom of religion or belief articulated in Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights, which provide *inter alia* that "Everyone shall have the right to freedom of thought, conscience and religion . . . [and] freedom, either individually *or in community with others* and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." (emphasis added). In its General Comment on Article 18, the UN Human Rights Committee notes that "the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the *freedom to choose their religious leaders, priests and teachers* … ." Gen. Cmt. 22 (48), UN Doc. CCPR/C/21/Rev.1/Add.4 (1993) (emphasis added).

5. This right to choose "leaders, priests and teachers" has been specifically held by the UN Human Rights Committee to protect the autonomy of religious communities in dealing with teachers who do not conform to religious requirements. In *Delgado Páez v. Colombia* (UNHRC, Comm'n No. 195/1985, UN Doc. CCPR/C/39/D/195/1985 (1990), the claimant served as a teacher of religion at a secondary school in Colombia, but his theological views created conflicts with local ecclesiastical authorities. The Committee held that requiring the claimant to teach the Catholic religion in its traditional form did not violate Delgado's right to freedom of expression or freedom of religion or belief.

6. The institutional autonomy requirement is also reflected in commitments of participating States in the Organisation for Security and Cooperation in Europe. Thus, participating States commit that they will "respect the right of religious communities to . . . select, appoint and replace their personnel in accordance with their respective requirements and standards . . . ." Vienna Concluding Document, Principle 16d.

III. European law guarantees the autonomy of religious communities in matters involving religion teachers

7. Respect for the autonomy of religious communities is firmly entrenched in the Convention. This Court has held that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords." *See, e.g., Obst* v. *Germany*, App. No. 425/03 (ECtHR, 23 September 2010) § 44; *Religionsgemeinschaft* §§ 61, 79. This includes broad autonomy protections in particular for a religious community's relationship with its clergy and those serving in other administrative and teaching roles. *See, e.g., Serif* v. *Greece*, App. No. 38178/97 (ECtHR, 14 December 1999); G. Robbers, ed., *Church Autonomy: A Comparative Study* (Peter Lang 2001); Overview of Church Autonomy in Europe, in W.W. Bassett, W.C. Durham, and R.T. Smith, *Religious Organizations and the Law* (West/Thomson Reuters 2012) § 9.90 (Table 9.91), available at http://www.religlaw.org/documentphp?DocumentID-5990.

8. Moreover, this Court has made it clear that the "State's duty of neutrality and impartiality . . . is incompatible with any power on the State's part to assess the legitimacy of religious beliefs. *Svyato-Mykhaylivska Parafiya* § 113; *Metropolitan Church* §§ 118, 123. Particularly where, as here, the underlying dispute is rooted in religious questions such as whether celibacy should be optional for priests, the meaning of "scandal," and the role of a married priest, States must abstain from judging the merits of such disputes.

9. While there is variation among European jurisdictions as to the precise scope of religious autonomy doctrine when it comes to employees carrying out primarily secular tasks, there is strong convergence when it comes to protecting autonomy of religious communities in managing interactions with their clergy and those who serve in leadership or religious teaching capacities. *See, e.g.*, *Obst* (leadership); *Siebenhaar* v. *Germany*, App. No. 18136/02 (ECtHR, 3 February 2011) (teaching). In this regard, it is widely held that both teaching and life conduct which are contrary to the religion's principles constitute legitimate reasons for withdrawal of *missio canonica* (for Catholics) or *vocatio* (for Protestants) or taking other steps resulting in termination. *See, e.g.*, Decision of the German Federal Labor Court of 25 May 1988, 7 AZR 506/87; Decision of Italian Court of Cassation, 24 January 2003, n. 2803 (teaching authorisation certificate can be revoked not only for reasons connected to teaching activity but also for reasons concerning teacher's private life); Norwegian Supreme Court 1986, *Norsk Retstidende* 1986, 1250 (private educational institutions run by religious organisations may require loyalty to institution's religious and moral values in relation to employment).

10. The guarantee of the right to institutional autonomy in such settings is a vital aspect of freedom of religion or belief, and is critical to the identity, authenticity and expressive integrity of religious communities. Religious communities constitute and renew themselves through their clergy and those carrying out administrative and teaching functions, such as teaching children the moral precepts of their particular faith. These communities must be able to rely on the loyalty of those serving in these capacities, because compliance with church discipline goes directly to the religious community's credibility. *Obst* §§ 48-49. Religious communities are not free to be themselves and to follow their own beliefs and practices if the State interferes in these sensitive relationships. In many if not all religious traditions, who has authority to teach the faith to the next generation is a matter of central doctrinal and practical concern. State intervention in this sphere thus strikes at the core of religious freedom.

11. The recent set of decisions from this Court regarding the autonomy of religious communities in personnel matters underscores the validity of these principles. Thus in *Siebenhaar* this Court held that the religious autonomy rights of a Protestant church running a nursery outweighed the individual right to religious freedom of one of its teachers who began promoting the views of a different religion. Significantly, the fact that the Protestant employer in *Siebenhaar* allowed some deviation from its religious principles (the applicant was Catholic when hired) did not prevent the church from terminating Siebenhaar when it concluded that she had deviated too far from its religious requisites for personnel. Similarly, the Catholic Church in the present case gave substantial latitude to Fernández Martínez, but was within its rights to terminate him when he publicly opposed Catholic doctrine. In *Rommelfanger* v. *Germany*, App. No. 12242 (ECtHR, 9 June 1989), the State's autonomy-based decision not to intervene when a Catholic hospital terminated a doctor who had publicly criticised the hospital's pro-life policies did not even rise to the level of an admissible claim.

12. In *Obst*, this Court dealt with a case involving the termination of the head of public relations for the Mormon Church for all of Europe on grounds of his violation of church behavioural standards. Like a religion teacher, Obst had significant responsibilities for representing the church and disseminating its teachings and views. The Court held that German courts had appropriately weighed Obst's privacy rights against the Article 9 and Article 11 rights of the church, and were justified in concluding that the religious autonomy rights of the church outweighed the Article 8 rights of the terminated employee.

13. Even in *Schüth* v. *Germany*, App. No. 1620/03 (ECtHR, 23 September 2010),where the Article 8 claims of a choirmaster prevailed over the claims of the Roman Catholic Church under Article 9, the result might have been different had German courts taken all relevant considerations into account in their balancing of the rights. That is, properly understood, *Schüth* stands for the proposition that courts must monitor whether matters legitimately fall within the sphere of religious authority when other correspondingly fundamental rights are at issue, but not that they may intermeddle in a religious community's substantive resolution of its own religious questions. In the present case, the Spanish courts did balance the key considerations, and, as in *Obst*, the factors calling for protection of religious autonomy were clearly and overwhelmingly in favour of the Church.

14. The case for protecting religious autonomy in the present case is even stronger than in the above-referenced cases because unlike the applicants in other cases, the Applicant here was former clergy but sought to continue teaching religious subjects. The Applicant was fully aware that his lifestyle was not consistent with the beliefs of the Catholic Church, and that the accommodation he had enjoyed would be put at risk if he made a public issue ("scandal") of the practices involved. Public statements critical of important religious beliefs cause particular problems for the credibility of an ethos community, and as this Court has recognised, are an acceptable basis for imposing rigorous obligations of loyalty. *Obst* § 51. The Church's withdrawal of the Applicant's authorisation to teach (*missio canonica*) in the present case was based on reasonable and foreseeable religious considerations. As the Spanish court noted in deciding this case, it would be unreasonable for a religious community to select and continue those competing to be its teachers without taking into account their attitudes, actions, and willingness to provide loyal representation of the Church and its values. *See* Judgment of the Third Section § 28.

15. Several further considerations buttress the state's decision to support religious autonomy in this case. First, in reaching its decision, the Spanish Court was required to take into account not only the interests of the Applicant and the Church, but also the interests of other parents and children. They, after all, have a right under Article 2 of the First Protocol to the ECHR, which assures that "the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." This right has further constitutional and legal grounding in the Spanish setting (*see* Const. of Spain, art. 27.3). Confessional teaching of religion in public schools is not only understood as legally required state cooperation with churches; it reflects legal requirements that the state respect and facilitate the religious choices of parents and children. Parents who choose Catholic education defer to Catholic authorities to provide those teachers that are qualified to teach Catholic religion to their children. Giving priority to the Applicant's rights would mean ignoring the choices of other parents and children in this area. Individual teachers who deviate in theory or practice (or both) from the teachings of the community should not be allowed to use litigation to pressure the com-

munity to accept alternative versions of how its beliefs should be taught and exemplified. The rights of such individuals to withdraw and pursue their own beliefs and lifestyles must be respected, but such protection does not include the right to erode religious autonomy and authenticity by coercing the religious community to structure itself and its understanding of how (and by whom) its beliefs should be taught in a manner that is at odds with those beliefs.

16. Second, there are strong constitutional and legal provisions in Spain (as in many other countries) that pay special heed to the place of religion and religion teachers in educational systems and should be accounted for in balancing religious autonomy with other constitutional or legal claims. These were addressed at length in the Third Section decision and need not be repeated in detail here. In Spain, as in other countries, these provisions reflect distinctive religion-state configurations that emerged over many years. The status and legal rights of religious communities under these diverse religion-state regimes was recognised by Declaration 11 annexed in 1997 to the Treaty of Amsterdam and is explicitly protected by Article 17 of the Lisbon Treaty. In Spain's case, this includes a constitutional commitment that "public authorities shall take into account the religious beliefs of Spanish society and shall keep the appropriate relationships of cooperation with the Catholic Church and the other religious denominations" (Const. of Spain, art. 16.3). At the same time, there are broad guarantees of individual religious freedom and autonomy for religious communities. *See* Organic Law on Religious Freedom of 1980, art. 6. Commitments of this type underscore the significance of according religious autonomy concerns great weight in any constitutional balancing exercise. The interests of those adhering to other values are best protected by protecting rights of exit, not by empowering those who disagree with a community's values to interfere with the community's autonomy, particularly where matters as significant as transmission of its beliefs are involved.

17. Third, respecting religious autonomy rights is required in light of treaty and contractual obligations the state has assumed. As part of its general structuring of religion-state relations, Spain entered into the 1979 Concordat with the Holy See (comprised of four Agreements, one of which is the Agreement on Education and Cultural Affairs), and into similar agreements with federations of other religious communities in 1992. These spell out the form that state cooperation with the various religious communities will take. The Concordat with the Holy See has treaty status, and the other agreements are given functionally equivalent respect, but it is the Concordat that is relevant to this case. Article III of the 1979 Agreement on Education and Cultural Affairs provides that "[Catholic] religious teaching shall be provided by the persons appointed, each academic year, by the academic authorities among those proposed by the diocesan bishop for that teaching." In other words, the state authorities hire religion teachers, but only those considered appropriate by the ecclesiastical authorities. Implementation of this rule obviously lies at the heart of this case. The resulting praxis has consistently been understood as the necessary and appropriate approach for protecting both religious autonomy and parental rights over their children's moral and religious education. Article III's recognition of such autonomy is also consistent with Article VI of the same concordatarian Agreement, which provides that "ecclesiastical authorities are competent to determine the contents of Catholic religious instruction, as well as to propose the relevant textbooks and other teaching materials". Similar rules with respect to religious autonomy apply to the other religious communities that have signed a cooperation agreement with the state. Thus, Article 10.2-3 of the 1992 Agreements with the Evangelical, Jewish and Islamic federations provides that the respective religious federation is competent to designate religion teachers and also to

determine the contents and textbooks of religious teaching. Different states may determine that they will structure religious education in different ways. The point here is that Spain's treaty and contractual obligations to protect religious autonomy in respect of teaching religion are an additional factor that must be weighed in any decision that would compromise such autonomy.

18. Such treaty and contractual obligations to respect the authority of religious communities in determining the content and personnel of religious education for those wishing to receive such education are commonplace throughout Europe. Consistent with Catholic canon law provisions establishing diocesan authority over Catholic religious teaching, *see* Judgment of Third Section § 42, numerous countries have Concordats with the Holy See that recognise the authority and the autonomy of Church authorities with respect to the appointment and dismissal of teachers of Catholic religion in public schools. *See, e.g.*, the following Concordats of the Holy See with various European states: Austria, art. 1, 3(2) (1962) and art. 2 (1971); Bosnia and Herzegovina, art. 16 (2006); Croatia, art. 3, 2 (1996); Malta, art.2 (1989); Poland, art. 12, 3 (1993); Portugal, art. 19, 3-4 (2005).

19. In Italy such matters are governed by the Accordi di Villa Madama (1984), which reformed the 1929 Concordat between the Catholic Church and the Italian State, and in the Intese (agreements) with other religious groups. The Additional Protocol to the Accordi (n.5) specifies that this teaching will be given "by the teachers who are recognised by the ecclesiastical authority as being qualified thereto and who are appointed, in agreement therewith, by the school authority." Law 186/2003 on the legal status of teachers of Catholic religion provides that "the revocation of the aptitude certificate by the diocesan bishop . . . [is] grounds for cancellation of the employment relationship."

20. In Germany, such concordats and agreements are entered into by the individual Länder, consistent with Article 7 of Germany's Basic Law, which provides that "[w]ithout prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned." *See, e.g.*, Agreement with the Land Mecklenburg-Vorpommern, art. 4 (22 December 1997), AAS (1998) 98-116.

21. Regardless whether particular states have adopted concordats and specific agreements, the pattern of giving religious autonomy special protection when it comes to teachers of religion is widespread. *See generally* G. Robbers, ed., *Religion in Public Education* (Proceedings of the European Consortium for Church and State Research 2011); D. Davis and E. Miroshnikova, eds., *The Routledge International Handbook of Religious Education* (Routledge 2012). For example, in Germany, the relevant religious communities supervise the religious contents of the curriculum as well as the teaching of the teacher. Teachers of religion are appointed by the state in cooperation with the relevant religious community, and are in the main state public officials. The teacher needs the consent of the relevant religious community to teach, called *missio canonica* for the Roman Catholic Church and *vocatio* with respect to Protestant churches. If the *vocatio* or *missio canonica* is withdrawn, the teacher loses the right to teach that religion. Either teaching or personal conduct contrary to the religion's principles may justify withdrawal of *missio canonica* or *vocatio.* The state courts will not override the religion's decision. *See, e.g.*, German Federal Labor Court, BAG, 25.5.1988, 7 AZR 506/87.

22. Belgium has a somewhat more complex system that varies regionally. Whilst there is no recent case law about a conflict between individual *privacy* of a religion teacher in

public schools and religious autonomy, the Belgian Conseil d'Etat permanently confirmed the primacy of religious autonomy over other individual rights of religion teachers, *e.g.*, over due process requirements. The Conseil d'Etat held by decision of 6 March 1998 (*Bouillon*) that a teacher of Protestant religion might be disciplined at the request of religious authorities on suspicion of sexual abuse, without government review of the religious body's procedure. Recently, on 29 November 2007 (*appl. Claes*), the Conseil d'Etat confirmed church autonomy rights as against the privacy rights of a religion teacher whose remarriage violated Catholic doctrine (C.E. 20 Dec. 1985, *appl. van Peteghem*).

23. Moreover, in compliance with the European Union's Employment Equality Directive 2000/78, most European countries have adopted anti-discrimination legislation providing exemptions where religious characteristics constitute genuine and determining occupational requirements of a particular job. Authorisation by the relevant community is an obvious example of such a genuine and determining occupational requirement for teachers of religion. *See* L. Vickers, *Religious Freedom, Religious Discrimination, and the Workplace* (Hart Publishing 2008) 214. Thus, for example, the Belgian Anti-Discrimination Law of 10 May 2007 (art. 13) has incorporated the faith-based organisation exemption and the specific loyalty obligation provided by EU Directive 2000/78/CE, art. 4. Similarly, the Norwegian Labour Environment Act § 13-3, 1 provides that "Discrimination that has a legitimate aim is not a disproportionate intervention in relation to the person or persons so treated and that is necessary for performance of work or profession, is not regarded as discrimination under this Act" (2005/06-17 nr. 62).

24. European law does not connect state support for religious education with plenary authority to override the autonomy of religious communities to decide who may teach religion. States can reduce or diversify funding, but may not control teaching roles. Recognition of religious autonomy with regard to the issue of religious instruction in public schools is consistent with the rules on public funding of private schools. Thus Article 115 of Spain's 2006 Organic Law on Education, continuing a legislative line that dates back to the mid 1980's, recognises that all private schools, irrespective of whether they receive public funding, are entitled to have their own ethos (religious or other).

25. In its religious autonomy cases, the Court has emphasised that States have a greater margin of appreciation when there is no consensus among member States on the relative importance of the issues at stake or how to best protect them. But there is broad European consensus respecting religion teachers: churches have latitude to order their relations with their clergy and to decide who teaches their faiths. Indeed, case law typically protects religious autonomy not only with respect to the members of the clergy, but also with respect to school teachers, teachers of religious doctrine, and others holding high leadership or representational positions, or others (such as doctors and nurses at religious hospitals) who may be involved in religiously sensitive procedures. *See generally* G. Robbers, *Church Autonomy* (surveying religious autonomy rights in the United States and over 20 European jurisdictions); H. Warnink, ed., *Legal Position of Churches and Church Autonomy* (Uitgeverij Peeters 2001); Bassett *et al.* § 9.90 (Table 9.91) (summarizing religious autonomy principles in 33 Council of Europe jurisdictions).

IV. United States law guarantees the autonomy of religious communities in matters involving religion teachers

26. In *Hosanna-Tabor*, the Supreme Court for the first time addressed a constitutional

doctrine that had long been recognised by the lower courts: the "ministerial exception." This doctrine states that otherwise applicable laws prohibiting employment discrimination cannot be applied to "ministerial" employees—a term that refers to teachers as well as ordained clergy—without violating the United States Constitution.

27. The plaintiff in *Hosanna-Tabor*, like the Applicant, was a teacher of religion in a primary school, although she also taught a number of secular subjects. Her *vocatio* was revoked by the defendant Lutheran congregation for what it deemed insubordination. The teacher claimed it was instead disability discrimination. On review by the Supreme Court, the government took the novel position that there was no such thing as a ministerial exception. Put another way, the government argued that freedom of religion principles simply did not apply to church employment relationships. The Supreme Court rejected the government's arguments in a unanimous decision, calling the government's position, "untenable," "remarkable," and "extreme" *Hosanna-Tabor*, 132 S.Ct. at 706, 709. The Supreme Court held that there is a ministerial exception, and it applies to a teacher of religion like the plaintiff in *Hosanna-Tabor* and the Applicant here.

28. The Court explained that the ministerial exception serves *two* important constitutional interests: (1) the necessary religious freedom of churches and other religious bodies to exercise control over internal matters of governance such as who teaches religious precepts, and (2) the need to avoid putting government in the role of second-guessing religiously significant decisions such as who should be a minister or teacher of religion. *Hosanna-Tabor*, 132 S.Ct. at 703 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."). The Court stressed that state interference with the selection process for employees with ministerial teaching responsibilities "intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 132 S.Ct. at 706. It rejected the government's argument that there was nothing special about a religious employment relationship: "That . . . is hard to square with the text of the First Amendment itself, which gives *special solicitude* to the rights of religious organisations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organisation's freedom to select its own ministers." *Id.* at 706 (emphasis added).

29. The Supreme Court also drew a contrast between "government regulation of . . . outward physical acts" and "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S.Ct. at 707. American constitutional law concerning religious groups makes substantial use of this internal-external distinction. Like the absolute right of the individual to believe, the Supreme Court has made clear that a religious group has an absolute right to choose the people that "personify its beliefs." *Hosanna-Tabor*, 132 S.Ct. at 706; *cf. Cantwell* v. *Connecticut*, 310 U.S. 296, 304-5 (1940) ("[The First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."). Put another way, just as individuals can make up their own minds about what they believe or do not believe, churches can make up their own minds about their doctrines, teachings and beliefs without government interference. Precisely because the faith and mission of the church is taught to others by specific personnel entrusted with those responsibilities, their selection and governance fall within the range of internal affairs that are protected by the right to institutional autonomy.

V. Discussion

30. In contrast to the pragmatic and sensitive approach of European and American courts, the Applicant would have the Court sit in judgment over ecclesiastical decisions, thereby drawing the Court into a human rights thicket. But *Hosanna-Tabor* and the relevant European cases offer an alternative perspective that indicates why the better approach is to leave religious questions entirely to religious bodies. Indeed, looking at the American case law together with the Court's precedents points to a possible convergence of European and American religious freedom jurisprudence on a right of church autonomy that is an inherent part of the right to collective religious activity.

A. The problem of government interference with decisions about who may teach religious beliefs is common to all pluralistic democratic societies.

31. Disputes over internal church governance occur on both sides of the Atlantic, showing that the issue is not an artefact of particular legal systems, but is universal to all pluralistic democratic societies. Although *Hosanna-Tabor* interprets the United States Constitution, the question for this Court under the Convention is fundamentally the same: Who ultimately decides who will teach the faith? Either it will be the Church, or it will be the State. That presents the same legal problem in any pluralistic democratic state.

32. Of course, some States are involved in clergy selection through a formally established church, and such establishments are not necessarily prohibited by the Convention. But to subject a nominally autonomous church to control over internal church governance is inconsistent with the principles of pluralism embodied in the Convention. Churches must have the power to select and control the message of those who personify them and carry out their missions. As was stressed in *Hosanna-Tabor*, this autonomy flows not just from the prohibition on establishment but also from the guarantee of the freedom of religion.

B. The conflict between government regulation and internal church governance can only be solved by leaving ecclesiastical matters entirely to the churches.

33. In contrast to the Applicant's suggested approach, *Hosanna-Tabor*'s solution to the question of clergy selection is simple and elegant. The Supreme Court rejected the premise that courts must engage in the messy and often impossible business of weighing the relative value of religious freedom against other values (such as those underlying employment discrimination laws) and then strike an uncertain balance. Instead, the Supreme Court's hands-off approach in *Hosanna-Tabor* leaves what is really a private law matter—who has the authority to teach a particular set of religious beliefs—to the relevant ecclesiastical authorities. There is no more need for courts to decide how a church organises itself to carry out its religious mission than there is for courts to decide which political or social beliefs a nongovernmental organisation should espouse. This approach of leaving ecclesiastical decisions to ecclesiastical authorities is reflected in both the decisions of the Spanish courts and the decision of the Third Section in this case.

34. The increasing number of legal disputes in this area result from increasing religious diversity in America and in Europe. In pluralistic democracies that include every world religion, a judge cannot hope to determine the qualifications to teach every religion. The hands-off approach is the only way for judges to be truly neutral in a pluralistic society.

That is one of the primary lessons of *Hosanna-Tabor*, and may be of some use to this Court as it confronts the issue of increasing religious diversity within Europe.

35. Moreover, there is a hazard in insisting on overly particularized balancing of factors in the religious autonomy setting. If difficult personnel decisions are subject to constant judicial second-guessing, the risks of liability and the financial and morale costs of litigation are sufficient in themselves to substantially erode autonomy rights. The mere threat of litigation may thus be sufficient to chill exercise of legitimate autonomy rights. Clear standards that adequately protect autonomy rights are therefore imperative.

C. European and United States law concerning religious autonomy is converging.

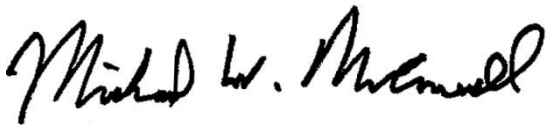
36. One final point is pertinent. Although building from different foundations, there appears to be a remarkable convergence of Supreme Court jurisprudence and ECtHR jurisprudence in the area of collective religious freedom. European law has long distinguished between the *forum internum*, where the freedom to believe is absolute, and the *forum externum*, where the freedom to manifest those beliefs is necessarily limited. *See, e.g.*, *Işık* v. *Turkey* App. No. 21924/05 (ECtHR, 2 February 2010) ("In contrast to manifestations of religion, the right to freedom of thought, conscience and religion within the *forum internum* is absolute and may not be subjected to limitations of any kind."). American law also makes this distinction, but with different vocabulary. *Cantwell*, 310 U.S. at 304-5 ("[The First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."). The distinction between the *forum internum* and the *forum externum*, usually thought of in connection with individuals, thus extends by analogy to the collective internal beliefs of religious communities, and the processes by which those beliefs are formed and articulated.

37. Left open until recently has been the question of the nature of the protection due to religious groups in formulating their beliefs, for example in deciding what the group's creed is. Put another way, is there a *forum internum* for churches? Interveners submit that what the Supreme Court described in *Hosanna-Tabor* as "internal church decision[s] that affect[ ] the faith and mission of the church itself" is a fruitful method of demarcating the boundaries of a religious group's *forum internum*. *Hosanna-Tabor*, 132 S Ct at 707. Just as an individual must be absolutely free to choose her religious beliefs, a church or other religious body must also be free to choose the people who teach and personify its beliefs. Government should not interfere with a group's freedom to formulate a creed by employment discrimination laws, labour laws, or other means. Although the United States Supreme Court did not use the European term "*forum internum*," that was by analogy what it was describing. This striking convergence with European precedent is a further indication of the universality of the problem, and the universality of its solution through autonomy for religious groups in their internal decisions about belief and teaching.

V. Conclusion

38. For the reasons stated above, the Grand Chamber should hold that Spain did not violate the Convention.

For the Interveners:



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