

**BRIEF OF *AMICUS CURIAE***

*presented to*

**THE INTER-AMERICAN COURT OF HUMAN  
RIGHTS**

*in the case of*

***SANDRA PAVEZ PAVEZ v. REPÚBLICA DE  
CHILE***

**No. CDH-26-2010**

*presented by*

**THE BECKET FUND FOR RELIGIOUS LIBERTY**

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## I. Introduction

1. *Amicus curiae* The Becket Fund for Religious Liberty submits this brief under Article 44 of the Rules of the Court. *Amicus* seeks to assist the Court in reaching a just and equitable result and properly interpreting Convention obligations.
2. To that end, drawing from decades of work in religious freedom across the globe, we offer the Honorable Court a survey of the comparative law in the area. We argue that there are important commonalities across international, American, and European law in protecting the right of religious communities to autonomy in their internal affairs, particularly as it relates to religious teaching. These protections take different forms in different States, but continue to be a hallmark of the constitutional orders of the West. Thus, we see a global consensus around an international standard protecting the right of religious communities to choose who can teach their doctrine without interference from the state. This standard is crucial for the protection of religious liberty.
3. Comparative perspective in this matter is particularly important because of the broad ramifications this case has for the protection of religious autonomy around the world. Given the importance of the Court, the case could also have impact in places where religious minorities are persecuted and denied their rights. This Court has had little occasion to consider the rights of religious communities under Article 12 of the American Convention on Human Rights, so this is an opportunity to protect the existence of those religious communities in American States and elsewhere.
4. Founded in 1994, *Amicus* is a non-profit legal institute dedicated to protecting the free expression of all religious faiths. *Amicus* has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, Zoroastrians, and others, in litigation in courts in the Americas, Europe, and Asia. *Amicus* has extensive experience in the field of freedom of conscience and religion, including protection of the autonomy of religious communities under international, European, and American law.
5. *Amicus* has won multiple lawsuits at the Supreme Court of the United States on behalf of Christians, Jews, and Muslims. Among those cases were two leading religious autonomy cases in the United States, *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). *Amicus* has also represented applicants and filed third-party intervenor briefs in multiple European Court of Human Rights cases involving religious freedom, including religious autonomy cases. *See, e.g., Şahin v. Turkey*, App. No. 44774/98 (ECtHR, 10 November 2005) (represented

medical student seeking right to wear Muslim headscarf); *Juma Mosque Congregation and Others v. Azerbaijan*, App. No. 15405/04 (ECtHR, 8 January 2013) (represented pro-democracy mosque shut down by Azerbaijan’s government); *Sindicatul “Păstorul cel Bun” v. Romania*, App. No. 2330/09 (ECtHR, 9 July 2013) (third-party intervenor brief); *Fernández Martínez v. Spain*, App. No. 56030/07 (ECtHR, 12 June 2014) (third-party intervenor brief).

6. In *Amicus’s* submissions to international courts, it presented those courts with comparative precedents regarding the autonomy of religious organizations. We believe comparative analysis will similarly be helpful to the Court in resolving this case.
7. The Commission’s Report in this case is inconsistent with settled principles of international law. Reinforcing its conclusions would unnecessarily thrust governments across the Americas 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, all to the detriment especially of religious minorities with little influence in government affairs. The Commission’s report puts public authorities in the ill-fitting role of ultimate religious arbiter. Here, where the religious community’s ability to determine who passes on the faith to the next generation and how that transmission takes place is at stake, the protection of religious autonomy is particularly important. Indeed, choosing who teaches the faith is an extraordinarily sensitive issue for religious organizations, one that is at the core of their identities. Governments should hesitate before becoming involved in such quintessentially religious questions.
8. That is all the more so because the religious decision in question has long been solely in the realm of churches, synagogues, mosques, and other religious organizations. The state (and in cases like this one, the Court) should not be forced to evaluate the theological and moral judgments that underlie religious organizations’ decisions regarding personnel, or ultimately to adjudicate what messages religious communities are allowed to teach about their faith and doctrine. Such an outcome would run counter to the fundamental principles enshrined in international human rights law, the American Convention on Human Rights, and the constitutional traditions of democratic western governments.

**II. The American Convention on Human Rights, all of the leading international and European human rights instruments, and the laws of OAS and non-OAS states protect the autonomy of religious institutions, and in particular the right to control religious education, as a fundamental human right.**

9. The documents binding on this Court, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, recognize that the government must protect the right of autonomy for religious communities.
10. A comparative review of international human rights instruments and the laws of states around the world reveals a consensus among developed democracies that recognizes communal religious rights, the autonomy of religious communities to make decisions about their own leaders, and the need for the state to refrain from interfering with religious communities' choices regarding who teaches the faith and passes it on to the next generation.
11. This comparative review also reveals that nations who respect the rights of religious autonomy for religious institutions are also likely to provide robust protection for the right of its LGBTQ citizens.

**A. The American Convention on Human Rights protects the autonomy of religious institutions, particularly in matters regarding religion teachers.**

12. Protection for the autonomy of religious communities is firmly entrenched in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.<sup>1</sup> Article 12 of the Convention states that “[e]veryone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.”<sup>2</sup>
13. The right to “profess and disseminate one’s religion ... together with others, in public or private” necessarily includes the right of autonomy for religious institutions.<sup>3</sup> This includes broad autonomy protections, especially for a religious community’s relationship with its clergy and those serving in other administrative and teaching roles.

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<sup>1</sup> See American Convention on Human Rights, art. 12.1, <https://perma.cc/NM6F-RDMG>; American Declaration of the Rights and Duties of Man, art. 3, <https://perma.cc/LZ84-65DG>.

<sup>2</sup> American Convention on Human Rights, art. 12.1.

<sup>3</sup> *Id.*

14. Article 12.4 of the Convention affirms that “[p]arents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.”<sup>4</sup> Thus, the Convention explicitly recognizes the rights of parents and children to receive religious education taught by authentic leaders who follow the doctrines of their faith.
15. The Court and the Commission have long recognized the importance of collective as well as individual rights. For example, in *Loren Laroye Riebe Star v. Mexico*, the Commission considered the case of three priests who were expelled from Mexico due to their human rights work in the State of Chiapas. The Commission held that the priests’ rights had been violated under Article 12, in part because their expulsion cut them off from contact with their parishioners and prevented them from freely associating for religious purposes.<sup>5</sup>
16. Similarly, in *Jehovah’s Witnesses v. Argentina*, Jehovah’s Witnesses challenged Argentina’s prohibition of “all the activities of the Jehovah’s Witnesses, all their literature, and the closing of their Kingdom Halls and District Office.”<sup>6</sup> The Commission found that Argentina violated the right to freedom of religion and worship under the American Declaration of the Rights and Duties of Man.<sup>7</sup> The Commission also found a violation of the right to association, recognizing the importance of the ability of religious groups to exist and associate together freely.<sup>8</sup>
17. This Court has also recognized the communal aspect of the right of conscience and religion in its decisions. For example, in *Masacres de Río Negro vs. Guatemala*, the Court addressed the 1980 and 1982 massacres of a Mayan community by Guatemalan forces as part of an armed civil conflict.<sup>9</sup> In addition to the other significant human rights abuses perpetrated in those incidents, the Court recognized that the Mayan communities suffered “cultural and religious values and practices.”<sup>10</sup>

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<sup>4</sup> American Convention on Human Rights, art. 12.4.

<sup>5</sup> IACHR. *Case of Loren Laroye Riebe Star v. Mexico*, n° 11.610, Report No. 49/99, ¶ 105 (April 13, 1999).

<sup>6</sup> IACHR. *Case of Jehovah’s Witnesses v. Argentina*, n° 2137, OEA/Ser.L/V/II.47, doc. 13 rev. 1 (Nov. 18, 1978).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> IACHR. *Case of Río Negro Massacres v. Guatemala*, n° 250 (Sept. 4, 2012).

<sup>10</sup> *Id.* at ¶ 61.

18. The Court also found that because the Mayans were not buried according to the religious traditions required by their community, as part of the collective rights of indigenous communities, Guatemala had violated Article 12 of the Convention.<sup>11</sup>
19. The Court recognized that religious beliefs are a part of Mayans’ “cultural identity or integrity,” and thus are a part of the “fundamental and collective right of the indigenous communities that must be respected in a multicultural, pluralist, and democratic society.”<sup>12</sup>
20. Without a recognition of the right of religious communities to institutional autonomy, the communal dimension of the right of conscience and religion would not be able to protect the religious values of a community. Just as in the case of the *Masacres de Río Negro*, a loss of “religious values and practices” is tied to the loss of the “social, economic and political institutions” of a community.<sup>13</sup> Guaranteeing the institutional rights of a community is critical to its identity, authenticity, and expressive integrity.
21. Because the Court sets lasting precedent for American States and often looks to other international courts in the process, this case is an opportunity to offer protection to religious institutions and their ability to maintain their existence by passing down their faith, including the precepts, values, and doctrines essential to the faith, by being allowed to choose who teaches the faith to younger generations.

**B. All of the other leading human rights instruments protect the autonomy of religious institutions.**

22. The right of religious communities to religious autonomy—that is, the right to exist, perpetuate their beliefs, and carry out their religious practices—has long been enshrined in international human rights law, including in the Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; European Convention on Human Rights and the Concluding Document of the Vienna Convention. Each of those documents, along with other sources of international human rights law, emphasize religious freedom and the autonomy of religious communities as fundamental to human dignity and flourishing.

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<sup>11</sup> IACHR. *Case of Río Negro Massacres v. Guatemala*, n° 250 (Sept. 4, 2012), at ¶¶ 160, 165.

<sup>12</sup> *Id.* at ¶ 160.

<sup>13</sup> *Id.*

23. Because of its international focus, this Court often looks to international human rights instruments when adjudicating cases.<sup>14</sup> Article 29 of the American Convention provides that the Convention is interpreted in light of the “exercise of any right or freedom recognized by virtue of . . . another convention to which one of the said states is a party.”<sup>15</sup> It also takes into account “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”<sup>16</sup>
24. Thus, the Convention considers other international human rights instruments as part of a “complete legal framework, within the scope of interpretation permitted under Article 29.”<sup>17</sup> This Court thus interprets the Convention in light of other international instruments and with guidance from parallel international human rights bodies.

### **Universal Declaration of Human Rights**

25. The Universal Declaration of Human Rights defines religious freedom as a basic human right deserving of recognition and unique protection. Article 18 of the Universal Declaration states that the right to “freedom of thought, conscience and religion” includes freedom to manifest religious beliefs not just individually but “*in community with others* and in public or private.” (emphasis added).<sup>18</sup>
26. This definition guarantees not only that individuals can hold their beliefs privately but also that religious communities can practice and teach their beliefs publicly. According to the U.N. Human Rights Committee, the Universal Declaration specifically established that religious communities’ freedom of “teaching” and “practice” enshrined in Article 18 includes the “freedom to choose their religious leaders, priests and teachers.”<sup>19</sup>

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<sup>14</sup> See, e.g., IACHR. *Case of Martínez Esquivia v. Colombia*, n° 412, ¶¶ 89-93 (Oct. 6, 2020); IACHR. *Case of Fernández Prieto and Tumbeiro v. Argentina*, n° 411, ¶ 104 (Sept. 1, 2020); IACHR. *Case of López Soto v. Venezuela*, n° 362, ¶¶ 184, 189 (Sept. 26, 2018); IACHR. *Case of Río Negro Massacres v. Guatemala*, n° 250, ¶ 173 (Sept. 4, 2012), <https://perma.cc/GXH2-6D8N>.

<sup>15</sup> American Convention on Human Rights, art. 29, <https://perma.cc/NM6F-RDMG>.

<sup>16</sup> *Id.*

<sup>17</sup> IACHR. *Case of Loren Laroye Riebe Star v. Mexico*, n° 11.610, Report No. 49/99, ¶ 54 (Apr. 13, 1999), <https://perma.cc/3DGE-FL7M>.

<sup>18</sup> Universal Declaration of Human Rights, art. 18, available at <https://perma.cc/6TED-XACD>.

<sup>19</sup> U.N. Human Rights Committee, Gen. Cmt. 22 (48), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), <https://perma.cc/RNU6-ACR9>.



27. According to the U.N.'s Special Rapporteur on Torture, "the human rights to privacy, freedom of expression, religion, assembly and association lie at the very heart of a democratic society."<sup>20</sup> Government restraint of religious expression is only justified when it involves "incitement to hatred or violence or a direct threat to national security or public safety."<sup>21</sup> Thus, the U.N.'s broad commitment to religious freedom expressed in the Universal Declaration, including the right of religious communities to choose their leaders and teachers, holds a widely recognized place in international law.
28. The Universal Declaration describes the right to education in Article 26(2), specifying that it "shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms."<sup>22</sup> Article 26(3) protects the rights of parents: "[p]arents have a prior right to choose the kind of education that shall be given to their children."<sup>23</sup> This includes the right to choose religious education that accords with the beliefs and values that parents are teaching their children.

### **International Covenant on Civil and Political Rights**

29. The International Covenant on Civil and Political Rights ("ICCPR") also protects autonomy for religious groups by way of protecting a collective right to practice religion.<sup>24</sup> With similar language to the Universal Declaration, the ICCPR articulates the fundamental right to freedom of religion or belief in Article 18:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest

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<sup>20</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Manfred Nowak (Special Rapporteur on Torture), *Civil and Political Rights, Including the Question of Torture and Detention: Mission to China*, U.N. Doc. E/CN.4/2006/6/Add.6, ¶ 65 (Mar. 10, 2006).

<sup>21</sup> Manfred Nowak (Special Rapporteur on Torture), *Civil and Political Rights, Including the Question of Torture and Detention: Mission to China*, U.N. Doc. E/CN.4/2006/6/Add.6, ¶ 65 (Mar. 10, 2006).

<sup>22</sup> Universal Declaration of Human Rights, art. 26, available at <https://perma.cc/6TED-XACD>.

<sup>23</sup> *Id.*

<sup>24</sup> All but three member states of the OAS have either ratified or accessed to the ICCPR. Fifteen OAS member states have ratified the ICCPR and sixteen member states have accessed to it. Two (Cuba and Saint Lucia) have signed it but not ratified it. The only OAS country not to sign the ICCPR is Saint Kitts and Nevis.

his religion or belief in worship, observance, practice and teaching.<sup>25</sup>

30. Like the Universal Declaration, the ICCPR emphasizes that freedom of religion exists not just for individuals but for religious communities. Both documents also include “teaching” as one of the specific areas where religious communities are free to manifest their beliefs. Thus, religious freedom is not limited to houses of worship but extends into classrooms where students learn the faith.
31. The ICCPR specifically protects religious education in Article 18(4), guaranteeing that parents may “ensure the religious and moral education of their children in conformity with their own convictions.”<sup>26</sup>
32. The ICCPR created the United Nations Human Rights Committee to oversee the application of the ICCPR.<sup>27</sup> The Human Rights Committee offers general comments interpreting the provisions of the ICCPR, as well as concluding observations responding to annual reports by states, and it also adjudicates individual complaints. It has consistently interpreted Article 18 of the ICCPR to protect the autonomy of religious organizations, especially when choosing who is qualified to teach the religious group’s beliefs to the next generation. In 1992, for example, the Human Rights Committee explained 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.”<sup>28</sup>
33. The Human Rights Committee has also specifically upheld this right to choose “leaders, priests and teachers” to protect the autonomy of religious communities in dealing with teachers who do not conform to religious requirements. For example, in *Delgado Paez v. Colombia* (UNHRC, Comm’n No. 195/1985, U.N. 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 the local authorities. The Committee held that requiring the claimant to teach the Catholic faith in accordance with church authorities did not violate Delgado’s right to freedom of expression or freedom of religion or belief. Thus, the Catholic Church had the authority to hold its own teacher accountable to

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<sup>25</sup> International Covenant on Civil and Political Rights, art. 18 (Dec. 16, 1966), S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, <https://perma.cc/T5LF-PL64>.

<sup>26</sup> International Covenant on Civil and Political Rights, art. 18.

<sup>27</sup> *Id.*, art. 40(b)(4).

<sup>28</sup> U.N. Human Rights Committee, Gen. Cmt. 22 (48), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), <https://perma.cc/RNU6-ACR9>.

the mission and purpose for which it had employed him—to accurately and faithfully teach its beliefs.

34. The Human Rights Committee has also held that religious instruction from a particular faith perspective in public schools does not violate the guarantee of religious freedom in Article 18 of the ICCPR, as long as the rights of parents and students to object to religious instruction are honored. *See Erkki Hartikainen v. Finland*, (UNHRC, Comm’n No. 40/1978, U.N. Doc. CCPR/C/OP/1 at 74 (1984); *see also Lerivag v. Norway*, U.N. Doc. CCPR/C/82/D/1155/2003 (finding that religious instruction program violated Article 18 because partial exemption system was not effective enough).

### **The European Convention and European Court of Human Rights**

35. The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the member states of the Council of Europe and also protects the autonomy of religious institutions. The European Convention has language analogous to the Universal Declaration and the ICCPR, guaranteeing in Article 9 that “[e]veryone has the right to freedom of . . . religion,” which includes “freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”<sup>29</sup>
36. In April 2020, the European Court of Human Rights, the body established by the European Convention to interpret the European Convention and to adjudicate cases brought under its provisions, updated its Guide to Article 9. Regarding marriage, the Guide states that Article 9 “depends on each particular religion to decide on the modalities of religious marriage. In particular, it is up to each religion to decide whether and to what extent they permit same-sex unions.”<sup>30</sup>
37. The European Convention protects religious education in Protocol No. 1, Article 2: “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>31</sup> According to the Guide on Article 9, this provision means that “the right of parents to ensure the education of their children in conformity with

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<sup>29</sup> European Convention on Human Rights, art. 9, <https://perma.cc/U2V9-VV4E>.

<sup>30</sup> European Court of Human Rights, Guide on Article 9 of the Convention – Freedom of thought, conscience and religion, § 107, <https://perma.cc/34NE-7RGD>.

<sup>31</sup> European Convention on Human Rights, Protocol No. 1, art. 2, <https://perma.cc/U2V9-VV4E>.

their own religious and philosophical convictions was one of the attributes of parental authority[.]”<sup>32</sup>

38. The European Convention also provides for the right to “freedom of association with others” in Article 11. The European Court of Human Rights has indicated that Article 9 “must be interpreted in the light of Article 11.”<sup>33</sup> That interpretation means that religious communities “will be allowed to function peacefully, free from arbitrary State intervention.”<sup>34</sup>
39. According to the European Court of Human Rights’ Guide, not only is religious autonomy important for religious communities, but “[t]he *autonomous existence of religious communities* is indispensable for pluralism in a democratic society.”<sup>35</sup> The Guide goes on to explain that “[w]ere the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable[.]”
40. Because the right to religious education is so fundamental, the European Court has made clear that “[i]n the specific case of religious education teachers, it is not unreasonable for a church or a religious community to expect particular loyalty of them in so far as they may be regarded as its representatives.”<sup>36</sup>
41. This principle means that the church has the ability to ask teachers to respect the doctrines of the faith in public and private choices. As the Guide to Article 9 explains, “in order to remain credible, religion must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers[.]”<sup>37</sup>
42. This principle of religious autonomy applies to employee relationships; “religious communities can demand a certain degree of loyalty from those working for them or representing them,” which often includes “doctrinal standards of behaviour by which their followers must abide in their private lives.”<sup>38</sup> According to the European Court, religious communities do not surrender their

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<sup>32</sup> European Court of Human Rights, Guide on Article 9 of the Convention – Freedom of thought, conscience and religion, § 110, <https://perma.cc/34NE-7RGD>.

<sup>33</sup> *Id.* at § 199.

<sup>34</sup> European Court of Human Rights, Guide on Article 9 of the Convention – Freedom of thought, conscience and religion, § 199, <https://perma.cc/34NE-7RGD>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at § 225.

<sup>38</sup> *Id.* at § 224.

autonomy when they hire employees. On the contrary, they are free to hold those employees accountable to doctrinal standards that impact their employees' personal lives.

43. The European Court, while recognizing the fundamental right of nondiscrimination, has also recognized that the “autonomous existence of religious communities” is “at the very heart of” the religious freedom protection afforded by the European Convention.<sup>39</sup> Fundamental within that autonomy is broad protection in particular for a religious community’s relationship with its clergy and those serving in teaching and administrative roles.<sup>40</sup>
44. This principle of church autonomy is in turn rooted in the idea 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.”<sup>41</sup>
45. For example, in *Obst v. Germany*, the head of public relations for the Church of Jesus Christ of Latter-day Saints in Europe was terminated because he violated church behavioral standards.<sup>42</sup> Like a religion teacher, Obst had significant responsibilities for representing the church and disseminating its teachings and views. The European Court held that German courts had appropriately weighed Obst’s privacy rights against the religious autonomy rights of the church and had correctly concluded that the church’s religious autonomy rights must be interpreted in light of their right to association under the European Convention, and that the church’s autonomy was “indispensable to pluralism in a democratic society.”<sup>43</sup>
46. In *Siebenhaar v. Germany*, the European Court found 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 was promoting the views of a different religion.<sup>44</sup> The Court found that the church’s requirements for a kindergarten teacher were acceptable in part because they were aimed at

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<sup>39</sup> European Court of Human Rights, *Obst v. Germany*, App. No. 425/03 (ECtHR, 23 September, 2010), § 44, <https://perma.cc/LVX5-X2PH>.

<sup>40</sup> European Court of Human Rights, *Serif v. Greece*, App. No. 38178/97 (ECtHR, 14 December, 1999). <https://perma.cc/M4Z5-B2EW>.

<sup>41</sup> European Court of Human Rights, *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 (ECtHR, 14 September 2007), § 113, <https://perma.cc/WG5W-ZC6J>.

<sup>42</sup> European Court of Human Rights, *Obst v. Germany*, App. No. 425/03 (ECtHR, 23 September 2010), <https://perma.cc/LVX5-X2PH>.

<sup>43</sup> *Id.*, § 44.

<sup>44</sup> European Court of Human Rights, *Siebenhaar v. Germany*, App. No. 18136/02 (ECtHR, 3 February 2011), <https://perma.cc/A5CJ-EA7P>.

preserving the credibility of the church in the eyes of the public and the parents of her students.<sup>45</sup>

47. In *Sindicatul “Păstorul cel Bun” v. Romania*, the European Court considered whether Orthodox priests in Romania could form a trade union that was prohibited by the Romanian Orthodox Church.<sup>46</sup> The Romanian courts had rejected the trade union’s petition, but the Third Section of the European Court held that the priests must be allowed to unionize. The Grand Chamber of the European Court then reviewed the case and overturned the Section’s decision, upholding Romania’s determination. The Grand Chamber held that the right of a religious community to exist without interference from the state concerns not just the communities themselves, “but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected . . . all other aspects of the individual’s freedom of religion would become vulnerable.”<sup>47</sup> The Grand Chamber also noted that when it comes to the relationship between church and state, “the role of the national decision-making body must be given special importance” particularly given the “wide variety of constitutional models governing relations between the State and religious denominations” in Europe.<sup>48</sup>
48. Similarly, in *Fernández Martínez v. Spain*, the European Court considered the application of a Catholic priest who was removed from a position teaching the Catholic religion and ethics in a state-run school for violating his vows of celibacy.<sup>49</sup> The Court balanced the applicant’s right to respect for his private life with the right of the church to internal religious autonomy.<sup>50</sup> The Court found that “[i]t is therefore not the task of national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them.”<sup>51</sup> It further found that “it is not unreasonable for a church or religious community to expect particular loyalty of religious-education teachers in so far as they may be regarded as its representatives.”<sup>52</sup> The

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<sup>45</sup> *Id.*, § 46.

<sup>46</sup> European Court of Human Rights, *Sindicatul “Păstorul cel Bun” v. Romania*, App. No. 2330/09 (ECtHR, 9 July 2013), <https://perma.cc/9TUZ-RECB>.

<sup>47</sup> European Court of Human Rights, *Sindicatul “Păstorul cel Bun” v. Romania*, App. No. 2330/09 (ECtHR, 9 July 2013), § 136, <https://perma.cc/9TUZ-RECB>.

<sup>48</sup> *Id.* at § 138.

<sup>49</sup> European Court of Human Rights, *Fernández Martínez v. Spain*, App. No. 56030/07 (ECtHR, 12 June 2014), <https://perma.cc/R4RW-GJE5>.

<sup>50</sup> *Id.*, § 123.

<sup>51</sup> *Id.*, § 128.

<sup>52</sup> *Id.*, § 137.

Court credited the church's understanding of the problem that the applicant "could be understood" to have been advocating a "change in the Church's rules."<sup>53</sup> Based on these conclusions, the Court decided that the Spanish courts had correctly weighed the competing rights and upheld the church's dismissal of the priest.

49. These cases demonstrate the European Court's strong commitment to protecting the communal and associational aspects of religious freedom. The European Court has given great weight to claims of religious autonomy in general, has decided in favor of states protecting religious autonomy, and has treated as especially weighty the right of churches and other religious organizations to decide who is qualified to teach their faith. Further, the European Court has never overturned a case where the state protected the autonomy of a church to decide who teaches its faith, regardless of whether the person teaches at a state or private school.

### **European Union**

50. The European Union has also "expressed its respect for the autonomy of religious communities."<sup>54</sup> Declaration No. 11 of the Final Act of the Treaty of Amsterdam states that "[t]he European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."<sup>55</sup> In EU Council Directive 2000/78/EC, Article 4(2) provides that Member States can maintain laws protecting churches' ability to hire and fire based on religious beliefs:

[I]n the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.<sup>56</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> Matthew K. Richards, Scott E. Isaacson, David A. Peterson, Victor van Vuuren, *Religious-Based Employment Practices of Churches: An International Comparison in the Wake of Hosanna-Tabor*, 26.2 *Temple Int'l & Comp. L.J.* 263, 276 n.80 (2012).

<sup>55</sup> Treaty of Amsterdam, 1997 O.J. (C 340) 1, 133, <https://perma.cc/9P5V-FA3Q>.

<sup>56</sup> EU Council Directive 2000/78/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>.

51. This Directive recognizes not only a church’s ability to hire according to religious beliefs, but also to hold its employees accountable during the course of their employment, thus upholding “the right of churches and other public or private organisations, the ethos of which is based on religion or belief . . . to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.”<sup>57</sup>

### **Concluding Document of the Vienna Convention**

52. In Article 11 of the Concluding Document of the Vienna Convention, adopted in 1989, the states participating in the Organization for Security and Cooperation in Europe (OSCE) agreed to “respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.”<sup>58</sup> Today, 57 states are members of the OSCE, including the United States and Canada.
53. In Article 16 of the Concluding Document, the Participating States promised “to ensure the freedom of the individual to profess and practice religion or belief.” This included an agreement to “respect the right of these religious communities” to “organize themselves according to their own hierarchical and institutional structure,” and to “select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State.”<sup>59</sup> Thus OSCE states have specifically affirmed the right of religious communities to choose and replace their personnel according to their own requirements.
54. Thus, the member States of the Council of Europe, the European Court of Human Rights, the European Union, and the OSCE have all recognized the principle of religious autonomy, particularly in the context of employment decisions by churches and other religious organizations. The leading human rights instruments around the world not only promote the fundamental right of religious freedom, but also the autonomy of religious institutions to choose teachers whose lives align with their doctrines, and the right of parents to choose religious education for their children.

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<sup>57</sup> *Id.*

<sup>58</sup> Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Followup to the Conference, Jan. 17, 1989, Principle 11 [hereinafter Vienna Concluding Document], <https://perma.cc/HT53-PTVW>.

<sup>59</sup> Vienna Concluding Document, Principle 16D, <https://perma.cc/HT53-PTVW>.



### C. The laws of OAS States guarantee the autonomy of religious communities in matters involving religious teachers.

55. Many OAS States have commitments to religious freedom enshrined in their constitutions. Article 29(b) of the American Convention instructs that it shall not be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party.”<sup>60</sup> This Court thus must consider the rights and freedoms recognized in the laws of OAS States in its decisions. The laws of several OAS States regarding religious liberty are described below.

#### United States of America

56. The United States Constitution explicitly protects religious freedom. The First Amendment to the Bill of Rights states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>61</sup> These two clauses, known as the Establishment Clause and the Free Exercise Clause, work together to protect religious autonomy as “a two-way street, protecting the autonomy of organized religion and not just prohibiting governmental ‘advancement’ of religion.”<sup>62</sup> As the United States Supreme Court has held, “[t]he 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.”<sup>63</sup>
57. The framers of the United States Constitution explicitly departed from British and early colonial practice of state-controlled churches and declined to establish a state-sponsored Church, which guaranteed that the government was removed entirely from decisionmaking in all religious faiths, including majority and minority churches.<sup>64</sup> This decision ensured that the new government “would have no role in filling ecclesiastical offices.”<sup>65</sup>
58. United States law draws a distinction between “two separate polities, the secular and the religious . . . acknowledging the prerogatives of each in its own

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<sup>60</sup> American Convention on Human Rights, art. 29, <https://perma.cc/NM6F-RDMG>.

<sup>61</sup> U.S. Const. amend. I.

<sup>62</sup> Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harvard Journal of Law & Public Policy 821, 834 (2012).

<sup>63</sup> United States Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 184 (2012).

<sup>64</sup> United States Supreme Court, *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) (citing *Hosanna-Tabor*, 565 U.S. at 183).

<sup>65</sup> *Hosanna-Tabor*, 565 U.S. at 184.

sphere.”<sup>66</sup> “[C]ivil authorities have no say over matters of religious governance,” and “secular judges must defer to ecclesiastical authorities on questions properly within their domain.”<sup>67</sup> In other words, “civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them.”<sup>68</sup> Because the spheres of church and state are distinct, it would be “wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions.”<sup>69</sup> This distinction allows religion to exist in the public square while also protecting the identity and authority of religious institutions.

59. To respect this concept of separate spheres, the religious autonomy doctrine in the United States bars claims regarding employment against churches by any personnel, including non-ministers, when the employment decision “involv[es] matters of faith, doctrine, church governance, and polity” that could affect the church’s practice of the faith.<sup>70</sup> The United States Supreme Court recognized the doctrine of religious autonomy in 1871 and has since upheld it in many cases involving employment, property, church discipline, and financial disputes.<sup>71</sup>
60. Religious autonomy is such an important interest in United States jurisprudence that United States courts do not use a balancing test or proportionality analysis. Instead, a categorical immunity applies under the United States Constitution. This is not a “general immunity from secular laws,” but an “independence from secular control or manipulation,” so that religious institutions can “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>72</sup> When the religious autonomy

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<sup>66</sup> United States Court of Appeals for the Seventh Circuit, *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013).

<sup>67</sup> *Id.*

<sup>68</sup> United States Supreme Court, *Serbian East Orthodox Diocese for U.S. of America & Canada v. Milivojevic*, 426 U.S. 696, 709 (1976).

<sup>69</sup> United States Supreme Court, *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-46 (1969).

<sup>70</sup> United States Court of Appeals for the Tenth Circuit, *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002); *see also Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 n.4 (10th Circuit 2010).

<sup>71</sup> *See, e.g.*, United States Supreme Court, *Watson v. Jones*, 80 U.S. 679, 728-29 (1871); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952); *Milivojevic*, 426 U.S. at 709.

<sup>72</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Kedroff*, 344 U.S. at 116.

doctrine applies, “there is no balancing of competing interests, public or private,” but it operates as a “complete immunity” and a “strong hands-off principle.”<sup>73</sup> In other words, civil courts lack the authority to punish religious organizations for personnel decisions based on religious doctrine.

61. The United States Supreme Court has also recognized a related doctrine: the “ministerial exception.” This doctrine bars all employment claims by “ministerial” employees—a term that refers to religious functionaries broadly, not just ordained clergy—because this would violate the United States Constitution. Although related to the religious autonomy doctrine, the ministerial exception goes a step further by shielding religious institutions from employment lawsuits where the employment decision was made for *any* reason—not just a religious or doctrinal reason. This is because making decisions about *who* teaches the faith is inherently an internal religious matter.
62. In the 2012 case *Hosanna Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, a religion teacher who also taught secular subjects had her vocation revoked by the defendant Lutheran congregation, because she refused to use the church court system to resolve her local church dispute.<sup>74</sup> The teacher claimed it was disability discrimination, and a federal anti-discrimination agency sued on her behalf. At the Supreme Court, the federal government argued—akin to the Commission in this case—that freedom of religion principles simply did not apply to church employment relationships. The Supreme Court unanimously rejected those arguments, calling them “untenable,” “remarkable,” and “extreme.”<sup>75</sup> The Supreme Court held that the ministerial exception applies to a religion teacher like the plaintiff in *Hosanna-Tabor* and the Petitioner here.
63. The Supreme Court explained that the ministerial exception serves two important constitutional interests: (1) protecting the freedom of religious bodies to exercise control over internal matters of governance, and (2) preventing governments from second-guessing or entangling itself in religiously significant decisions such as who should teach the faith.<sup>76</sup> State interference with selecting employees with ministerial responsibilities would “interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>77</sup>

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<sup>73</sup> *Korte*, 735 F.3d at 678.

<sup>74</sup> *Hosanna-Tabor*, 132 S. Ct. at 694.

<sup>75</sup> *Hosanna-Tabor*, 132 S. Ct. at 706, 709.

<sup>76</sup> *Id.* at 703.

<sup>77</sup> *Id.* at 706.

64. Notably, the Supreme Court 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.”<sup>78</sup> Internal church decisions that affect the church’s faith and mission are largely immune to government regulation, while physical acts in the world external to the church can be regulated. This internal-external distinction marks an important milestone in United States constitutional law concerning religious groups. 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 carried out by employees entrusted with those responsibilities, their selection and governance fall within the range of internal affairs that are protected by both the ministerial exception and religious autonomy. Those employees include those who are entrusted to teach the faith to children, the next generation of believers, in both church and school settings.
65. In July 2020, the United States Supreme Court decided another important religious autonomy case, *Our Lady of Guadalupe School v. Morrissey-Berru*, where it upheld religious organizations’ freedom to make employment decisions consistent with their values, ensuring that when it comes to teaching the faith, churches can choose who to hire and fire without fear of being sued.<sup>79</sup> The case arose in two Catholic elementary schools in Los Angeles, California, operated by their local parishes and committed to providing faith-based Catholic education. Both employees were teachers who were responsible for teaching religion along with other subjects, leading their students in prayer, and participating in worship. When the schools declined to renew the teachers’ contracts due to poor performance, they sued, alleging age and disability discrimination.
66. By a strong majority vote of 7-2, the Supreme Court held that the teachers’ employment-discrimination claims could not be adjudicated by secular courts, because the teachers’ duties were inherently religious, and thus the ministerial exception applied even though the teachers did not have the title of “minister” or formal religious training. Rejecting a narrow definition of “minister,” the Court made clear that the employee’s duties matter more than title or training. “[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”<sup>80</sup> When teachers are entrusted with the

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<sup>78</sup> *Id.* at 707.

<sup>79</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2049.

<sup>80</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

important religious mission of imparting the faith, schools are free to hold them accountable without facing years of litigation.

67. The Court took into account Catholic canon law in its decision, considering that “local bishops must satisfy themselves that ‘those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill.’ Code of Canon Law, Canon 804, § 2 (Eng. transl. 1998).”<sup>81</sup> The Court reaffirmed both the ministerial exception and the longstanding principle of religious autonomy “with respect to internal management decisions that are essential to the institution’s central mission,” finding that “a component of this autonomy is the selection of the individuals who play certain key roles.”<sup>82</sup> Thus, especially for teachers entrusted with imparting the Catholic faith to children, their lifestyles and conduct outside the classroom are a significant reflection of their religious witness to the students they teach.

### Canada

68. Canada has consistently recognized that religious freedom is not only an individual right but a collective right to be exercised in community with others, which extends to both Catholic and Protestant schools. Historically, Canada has a long tradition of “separate schools” which receive state funds but are fully operated by church denominations. Today, religious-state partnerships remain widespread, especially in elementary and secondary education where many provinces provide direct funding to Catholic and other religious schools.
69. Section 2 of the Canadian Charter of Rights and Freedoms provides that “[e]veryone has the following fundamental freedoms: (a) freedom of conscience and religion, (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.”<sup>83</sup>
70. The Supreme Court of Canada has interpreted Section 2(a) to extend to religious communities, not merely individuals. “Religious freedom under the Charter must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.”<sup>84</sup> The Charter also contains specific protections for denominational schools: “Nothing in this Charter abrogates or

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<sup>81</sup> *Id.* at 2065.

<sup>82</sup> *Id.* at 2060.

<sup>83</sup> *Canadian Charter of Rights and Freedoms*, s. 2, <https://perma.cc/P4QJ-NP9X>.

<sup>84</sup> Supreme Court of Canada, *Loyola v. Québec*, [2015] 1 S.C.R. 613, at ¶ 60, <https://perma.cc/5N2Z-QPWU>.

derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”<sup>85</sup>

71. Both the Supreme Court of Canada and the Court of Appeal of Ontario have held that Section 29 of the Charter and Section 93 of the Constitution Act work together to protect the religious autonomy of denominational schools. “It is this essential Catholic nature which is preserved and protected by s. 93 of the Constitution Act, 1867 and s. 29 of the Charter.”<sup>86</sup>
72. Canadian courts have respected the right of religious schools to prefer teachers of the same religion when hiring and promoting. This “bona fide occupational qualification,” which has parallels in the United States and the EU Directive mentioned above, *supra* at ¶¶ 50-51, extends not only to beliefs but to the conduct of teachers outside the classroom. In *Daly v. Ontario*, the Supreme Court of Ontario upheld Roman Catholic schools’ longstanding right to prefer Roman Catholics in employment decisions.<sup>87</sup> “Roman Catholic separate schools have a distinctive philosophy and their own traditions . . . . [A] separate school board can require as a matter of contract that its employees respect the philosophy and traditions that shape its mandate.”<sup>88</sup> According to the Court, “taking religious belief into account in making employment decisions with respect to teachers is a denominational aspect of the rights conferred by s. 93(1)” of the Constitution.<sup>89</sup>
73. In *Caldwell v. Stuart*, the Supreme Court of Canada considered the case of a teacher fired for marrying a divorced man against Catholic teaching, and rejected her discrimination complaint, holding that:

[T]eachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the behaviour in the school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education. Fulfillment of

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<sup>85</sup> *Canadian Charter of Rights and Freedoms*, s. 29, <https://perma.cc/P4QJ-NP9X>.

<sup>86</sup> Ontario Court of Appeal, *Reference re an Act to Amend the Education Act*, 53 O.R. (2d) 513, [1986] O.J. No. 2355, *affirmed*, *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148, <https://perma.cc/9VT8-FTG7>.

<sup>87</sup> Supreme Court of Ontario, *Daly v. Ontario*, 1997 CanLII 12210 (ON SC), <https://perma.cc/F5EQ-SQC5>.

<sup>88</sup> *Id.*

<sup>89</sup> Supreme Court of Ontario, *Daly v. Ontario*, 1997 CanLII 12210 (ON SC), <https://perma.cc/F5EQ-SQC5>.

these purposes requires that Catholics observe the Church's rules regarding marriage.<sup>90</sup>

Thus, when the Catholic Church is deciding who should teach the faith to students, its authority extends beyond beliefs into important aspects of their teachers' lives, especially marriage.<sup>91</sup>

74. In *Syndicat Northcrest v. Amselem*, the Supreme Court of Canada held that “[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”<sup>92</sup>
75. In *Highwood Congregation of Jehovah's Witnesses v. Wall*, a member of a close-knit religious community sued after he was disfellowshipped for engaging in what the Congregation viewed as unrepentant sin.<sup>93</sup> The Supreme Court of Canada held that it could not review the dispute because it lacked jurisdiction, holding that “religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.”<sup>94</sup>
76. In *Loyola High School v. Québec*, a private Catholic high school run by the Jesuit Order requested an exemption from Québec's secular Program on Ethics and Religious Culture which required teaching all religions from a neutral perspective, because it contradicted the school's core mission of teaching from a Catholic perspective. The Supreme Court of Canada held that Québec's actions

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<sup>90</sup> Supreme Court of Canada, *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, 15 D.L.R. (4th), <https://perma.cc/4BSV-3UC7>.

<sup>91</sup> See also Ontario Court of Appeal, *Re Essex County Roman Catholic Separate School Board and Porter et al.*, 1978 CanLII 1323 (ON CA), 21 O.R. (2d) 255, <https://perma.cc/8XBZ-J9W7> (upholding Catholic school board's decision to fire two teachers for entering civil marriages outside of church authority, because “[s]erious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties since within the denominational school religious instruction, influence and example form an important part of the education process”); see also Alberta Court of Queen's Bench, *Casagrande v. Hinton Roman Catholic Separate School District No. 155*, 1987 CanLII 3358 (AB QB), <https://perma.cc/6PY5-SNJS> (upholding Catholic school board's right to terminate employment contract of teacher who had engaged in “conduct prohibited by Catholic teaching and doctrine,” specifically pre-marital sex resulting in two pregnancies out of wedlock).

<sup>92</sup> Supreme Court of Canada, *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at ¶ 50, <https://perma.cc/MML5-GF6W>.

<sup>93</sup> Supreme Court of Canada, *Highwood Congregation of Jehovah's Witnesses v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, <https://perma.cc/8BEA-4E2Q>.

<sup>94</sup> *Id.* at ¶ 39.

represented “a disproportionate, and therefore unreasonable interference with the values underlying freedom of religion of those individuals who seek to offer and who wish to receive a Catholic education at Loyola.”<sup>95</sup> While the government could require Loyola to offer a course explaining other religions, it could not “prescrib[e] to Loyola how it is to explain Catholicism to its students.”<sup>96</sup>

77. Because religious freedom rights belong not only to individuals but also to religious institutions, the government was bound to respect “the Charter-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education.”<sup>97</sup> Not only were the school’s rights at stake, but so were the rights of the students and parents who wanted their children to receive a Catholic education.<sup>98</sup>
78. Converging with United States law on religious autonomy, here Canada also respected the separate spheres of church and government decision-making: “A secular state does not—and cannot—interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests.”<sup>99</sup> This understanding of religious freedom exercised in community with others echoes Article 18 of the UDHR, Article 18 of the ICCPR, and Article 9 of the European Convention on Human Rights. The two concurring judges in *Loyola* quoted these instruments, emphasizing that “the freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.”<sup>100</sup>

## Chile

79. Chile’s Constitution protects freedom of conscience and the free exercise of worship. Article 19.6 of the Constitution guarantees to all persons:

Freedom of conscience, manifestation of all creeds and the free exercise of all cults which are not opposed to morals, good customs or public order;

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<sup>95</sup> *Loyola High School v. Québec*, at ¶ 6.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at ¶ 34.

<sup>98</sup> *Id.* at ¶ 54 (“[P]arents have the right to choose establishments that, according to their own convictions, best respect the rights of their children.”).

<sup>99</sup> *Id.* at ¶ 43.

<sup>100</sup> *Loyola High School v. Québec*, at ¶ 94.



Religious communities may erect and maintain churches and their facilities in accordance with the conditions of safety and hygiene as established by the laws and ordinances.

With respect to assets, the churches and religious communities and institutions representing any cult shall enjoy the rights granted and acknowledged by the laws currently in force. Churches and their facilities assigned exclusively for religious activities shall be exempt from all taxes[.]<sup>101</sup>

80. Notably, the Chilean Constitution protects not only religious individuals but also religious communities, specifically recognizing their right to build and maintain facilities, their tax-exempt status, and their rights based on other laws.

81. Chile also has its own Law of Religion which explicitly recognizes that religious organizations are free to choose their employees and leaders:

Under the freedom of religion and worship, it is recognized that religious organizations have full autonomy for the development of their own ends and, among others, the following rights to: a) exercise control over their ministry . . . ; b) establish their own internal organization and hierarchy; and c) train, appoint, elect and designate individuals for positions and offices.<sup>102</sup>

82. This law applies directly to this case, because the Catholic Church has “full autonomy” to exercise control over who teaches its religious precepts to students in Chilean schools. Notably, this law uses the broad language of “autonomy” to acknowledge that the decision-making authority of religious organizations takes place in a separate sphere from decisions by the government or other employers. The law’s application is also broad; instead of singling out priests or religious ministers, a religious organization’s ability to “train, appoint, elect and designate” employees extends to all important offices, including teachers.

### **Colombia**

83. Colombia’s Constitution also protects the religious freedom of individuals and communities. Article 19 provides: “Freedom of religion is guaranteed. Every individual has the right to freely profess his/her religion and to disseminate it

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<sup>101</sup> Political Constitution of the Republic of Chile [C.P.], art. 19.6, <https://perma.cc/6S4F-TQDY>.

<sup>102</sup> L. 19638 art. 7, 1 October 1999, Diario Oficial [D.O.] (Chile).

individually or collectively. All religious faiths and churches are equally free before the law.”<sup>103</sup>

84. Colombia has additional laws that promote harmony between the government and religious institutions by specifically protecting the autonomy and freedom of the Catholic Church. In 1973, Colombia entered a Concordat with the Holy See. Officially approving the Concordat, Article 10 of Law 20 “guarantees the Catholic Church the freedom to found, organize and direct, under the dependence of the ecclesiastical authority, educational centers at any level, specialty and branch of education, without prejudice to the right of inspection and surveillance that corresponds to the State.”<sup>104</sup>
85. Besides protecting the Church’s ability to decide and direct who teaches the faith, the law also guarantees that “[t]he Catholic Church will preserve its autonomy to establish, organize and direct faculties, institutes of ecclesiastical sciences, seminaries and houses of formation of religio[n].”<sup>105</sup> The word “autonomy” here is key, because it recognizes the Church’s sphere of governance, which is separate and free from government interference, especially when it comes to choosing teachers and holding them accountable to faithfully teach and abide by Church doctrine.
86. In 1994, Colombia enacted the Statutory Law of Religious Liberty. Article 2 ensures that “[t]he government would protect individuals in their beliefs, as well as churches and religious groups and facilitate their participation in achieving the common good. Similarly, it will maintain harmonious relations and common understanding with the churches and religious entities existing in Colombian society.”<sup>106</sup> Thus, Colombia recognizes that religious institutions play an important role in society as they contribute to the common good, and that government cooperation with these religious institutions is especially important as society becomes more diverse. The “unifying factor is in the common purpose of serving the individual and the common good,” which is best achieved when the government respects the freedoms and autonomy of religious institutions.<sup>107</sup>
87. Article 6 of the Statutory Law of Religious Liberty acknowledges the right to teach and be taught in accordance with one’s religion, recognizing that these

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<sup>103</sup> Political Constitution of the Republic of Colombia 1991 [C.P.], art. 19, <https://perma.cc/SV65-8DZX>.

<sup>104</sup> L. 20 art. 10, 18 Dec. 1974, Diario Oficial [D.O.] (Colom.), <https://perma.cc/WK6B-FNML>.

<sup>105</sup> *Id.*

<sup>106</sup> L. 133 art. 2, 23 May 1994, Diario Oficial [D.O.] (Colom.), <https://perma.cc/7YTG-3ERP>.

<sup>107</sup> Vicente Prieto, *Law and Religion in Colombia: Legal Recognition of Religious Entities*, 2011 BYU L. Rev. 691, 707 (2011), <https://perma.cc/629A-RJYT>.

subjects merit “legal autonomy and immunity from coercion.”<sup>108</sup> This law protects the right to “receive and impart religious education and information . . . to whoever wishes to receive it.”<sup>109</sup> The law extends not only to teachers, but also to students and parents, protecting their right “to choose for themselves . . . inside and outside the school environment, religious and moral education according to their own convictions.”<sup>110</sup>

88. Most relevant here, this law “require[s]” the “certification of suitability issued by the Church or confession of the religion that he attends or teaches,” and this requirement extends to “admission, promotion or permanence in chaplaincies or in teaching religious and moral education.”<sup>111</sup> Thus, Colombian law protects religious freedom in the specific area of education, and it safeguards the Church’s autonomy in certifying qualified teachers. As in Chile, churches in Colombia issue certificates of suitability to teachers that it deems qualified to accurately convey the faith through a lifestyle consistent with Church teaching. And when it comes to religious education more broadly, churches and religious organization hold the authority to decide who is qualified to teach in accordance with the Church’s beliefs.

**D. Non-OAS jurisdictions also guarantee the autonomy of religious communities in matters involving religious teachers.**

89. Across European and other jurisdictions, while there is variation as to the precise scope of religious autonomy, there is strong convergence when it comes to protecting the autonomy of religious communities to manage interactions with their clergy and those who serve in leadership or religious teaching capacities.<sup>112</sup> 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.<sup>113</sup>

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<sup>108</sup> L. 133 art. 6, 23 May 1994, Diario Oficial [D.O.] (Colom.), <https://perma.cc/7YTG-3ERP>.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See, e.g.*, European Court of Human Rights, *Obst* (leadership); *Siebenhaar* (teaching).

<sup>113</sup> *See, e.g.*, Decision of the German Federal Labor Court of 25 May 1988, 7 AZR 506/87, [https://www.prinz.law/urteile/BAG\\_7\\_AZR\\_506-87](https://www.prinz.law/urteile/BAG_7_AZR_506-87); Decision of Italian Supreme Court of Cassation, 24 February 2003, n. 2803, <https://perma.cc/LD6M-Q46D> (teaching authorization 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, <https://perma.cc/72HE-8RTR> (private educational institutions run

90. Several countries have 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. Consistent with Catholic canon law provisions establishing diocesan authority over Catholic religious teaching, numerous countries have Concordats with the Holy See that recognize the authority and autonomy of church authorities with respect to the appointment and dismissal of teachers of Catholic religion in public schools.<sup>114</sup>

### Germany, Italy, and Belgium

91. According to the European Court of Human Rights, “a significant majority of the Council of Europe Member States provide religious education, both denominational and non-denominational, in State schools. In a large number of States making up this majority, the religious authorities concerned have either a co-decision role or an exclusive role in the appointment and dismissal of religious education teachers.”<sup>115</sup> This typically includes “the authorization of the religious community in question.”<sup>116</sup>
92. As examples of this dominant approach, Italy and Germany have agreements with religious communities to ensure that the religious community has authority over teaching its faith in public schools. Additional Protocol to the Accordi di Villa Madama, n.5 (1984) (teachers will be “recognised by the ecclesiastical authority as being qualified thereto”) (Italy); Constitution (*Grundgesetz*) Article 7 (“Without prejudice to the state’s right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned.”) (Germany).
93. In Belgium, the relationship between church and state varies regionally, but the Belgian Conseil d’État permanently confirmed the primacy of religious autonomy over other individual rights of religion teachers. The Conseil d’État

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by religious organizations may require loyalty to institution’s religious and moral values in relation to employment).

<sup>114</sup> See, e.g., Concordats of the Holy See with: Austria, art. 1, 3(2) (1962), <https://perma.cc/2WSF-WM5D>; Bosnia and Herzegovina, art. 16 (2006), <https://perma.cc/2QKK-666Y>; Croatia, art. 3, 2 (1996), <https://perma.cc/H8ZG-7TU8>; Malta, art. 2 (1989), <https://perma.cc/BA4B-HSD4>; Poland, art. 12, 3 (1993), <https://perma.cc/R8YN-QMDX>; Portugal, art. 19, 3-4 (2004), <https://perma.cc/W7ER-XU4D>; Spain, art. 3 (1979), <https://perma.cc/XB35-P47E> (“[Catholic] religious instruction shall be imparted by the academic authority from among those proposed by the diocesan [bishop] . . . [who] shall make known the names of those teachers and persons considered competent for said teaching”).

<sup>115</sup> European Court of Human Rights, *Fernández Martínez v. Spain*, App. No. 56030/07 (ECtHR, 12 June 2014), § 67, <https://perma.cc/R4RW-GJE5>.

<sup>116</sup> *Id.*

held on 6 March 1998 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.<sup>117</sup> On 29 November 2007, the Conseil d'État confirmed church autonomy rights as against the privacy rights of a religion teachers whose remarriage violated Catholic doctrine.<sup>118</sup>

94. Most European countries have also adopted religious exceptions to anti-discrimination legislation in compliance with the European Union's Employment Equality Directive 2000/78. These exceptions allow the relevant religious community to impose occupational requirements when hiring leaders and teachers, such as requiring the teacher to believe and follow church doctrine.<sup>119</sup>
95. 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 they may not control teaching roles.
96. There is thus broad European consensus respecting religion teachers: churches have latitude to order their relations with their clergy and to decide who teaches their faiths. European case law typically protects religious autonomy not only with respect to the members of the clergy, but also with respect to schoolteachers, teachers of religious doctrine, and others holding high leadership or representational positions.

## New Zealand

97. In New Zealand, the Human Rights Review Tribunal considered a challenge of discrimination by a student seeking ministry training and ordination in the Anglican Church, who was denied because he was in a same-sex relationship contrary to Anglican doctrine.<sup>120</sup> The tribunal rejected the challenge, in part because if the Anglican church was required by the state to hire priests in relationships forbidden by church doctrine, "[m]inisters would not be exemplars,

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<sup>117</sup> Belgian Conseil d'État, *app. Bouillon*, A.76.629/VIII-656 (6 March 1998), <https://perma.cc/S45Q-PSLG>.

<sup>118</sup> Belgian Conseil d'État, *app. Claes*, A.116/828/XII-3457 (29 November 2007), <https://perma.cc/TYW4-S82A>.

<sup>119</sup> *See, e.g.*, Belgian Anti-Discrimination Law of 10 May 2007, art. 13, <https://perma.cc/C4QJ-UBUK>; Norwegian Labour Environment Act § 13-3(1), (2005/06-17 nr. 62), <https://perma.cc/B5KY-7UYZ> ("Discrimination that has a just cause, that does not involve disproportionate intervention in relation to the person or persons so treated and that is necessary for the performance of work or profession, shall not be regarded as discrimination pursuant to this Act.").

<sup>120</sup> New Zealand Human Rights Review Tribunal, *Gay and Lesbian Clergy Anti-Discrimination Society Inc. v. Bishop of Auckland*, [2013] NZHRRT 36, <https://perma.cc/8DAG-6DBF>.

nor would they be bound by submission to the Constitution of the Church.”<sup>121</sup> The tribunal went on to hold that a contrary ruling would “undermine in the most fundamental way the religious autonomy of the Church, its right to be selective about those who will serve as the very embodiment of its message and its voice to the faithful.”<sup>122</sup>

## **Australia**

98. Australia also recognizes the autonomy of religious communities in the context of ministers and religious educators. Australia’s Sex Discrimination Act of 1984 contains an exemption, “in order to avoid injury to the religious susceptibilities of adherents,” for an “educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed,” allowing churches and educational institutions to “discriminate against another person on the ground of the other person’s sex, sexual orientation, gender identity, marital or relationship status or pregnancy.”<sup>123</sup>

### **E. Governments that exercise control over religious education, especially the selection of religious teachers and leaders, also tend to abuse other human rights.**

99. Unlike the States described above, which have recognized the importance of religious freedom and upheld the right of religious communities to select their leaders and teachers, States which infringe this right by interfering in the selection of religious teachers tend to violate other human rights as well, including the rights of LGBTQ people. Every year, the United States Commission on International Religious Freedom (USCIRF) designates the most egregious violators of religious freedom as “countries of particular concern,” a category which garners international notoriety and often leads to sanctions and other diplomatic efforts to hold these nations accountable.<sup>124</sup>
100. In 2020, USCIRF designated the following countries as of particular concern, many of which have been on the list for years: Burma, China, Eritrea, India, Iran, Nigeria, North Korea, Pakistan, Russia, Saudi Arabia, Syria, Tajikistan, Turkmenistan, and Vietnam.<sup>125</sup> Along with other more severe violations of

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<sup>121</sup> *Id.* at 92.

<sup>122</sup> *Id.*

<sup>123</sup> Sex Discrimination Act 1984, § 37-38, <https://perma.cc/TDM5-SUA5>.

<sup>124</sup> U.S. Commission on International Religious Freedom, 2020 Annual Report at 11, <https://perma.cc/U9V9-DUJS>.

<sup>125</sup> *Id.*

human rights, these countries tend to exercise control over the selection of religious leaders and teachers.

## China

101. As one of the world's foremost violators of human rights, China exercises a unique level of state control over the selection, teaching, and lives of religious leaders. USCIRF has long designated China a Tier 1 "country of particular concern" under the United States' International Religious Freedom Act for its ongoing repression of religious freedom.<sup>126</sup>
102. In 1949, the Chinese Communist Party coopted a Protestant religious movement known as the Three-Self Movement, turning it into a state-run program that imposes restrictions on teachers and churches outside the movement.<sup>127</sup> Even within state-approved churches, intense government oversight is prevalent.<sup>128</sup> Three-Self pastors can only preach where assigned, their sermon content is closely monitored by Communist Party spies, they can be "severely punished" if preaching strays from party requirements,<sup>129</sup> and only one officially approved publisher is allowed to print a limited number of Bibles each year.<sup>130</sup> Three-Self pastors and members cannot evangelize outside church, and they are pressured to sing Communist Party songs during worship.<sup>131</sup> Their activities and preaching must align with Chinese political values,<sup>132</sup> and may not discuss certain topics or critique the content of government actions, but in the words of President Xi, must "uphold the leadership of the Chinese Communist Party."<sup>133</sup>
103. Registration to become state-approved is an arduous process that involves turning over lists of participants to government officials, and giving up the

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<sup>126</sup> *Id.*

<sup>127</sup> H.R. Rep, Congressional-Executive Commission on China, 114th Cong., 2d Sess. (Oct. 6, 2016), <https://perma.cc/WMH2-3YRV>.

<sup>128</sup> U.S. Department of State, China 2019 International Religious Freedom Report, at 35, <https://perma.cc/5HWP-MSD8>.

<sup>129</sup> *Id.*

<sup>130</sup> H.R. Rep, Congressional-Executive Commission on China, 118th Cong., 2d Sess. (Nov. 18, 2004), <https://perma.cc/2SV8-4R8T>.

<sup>131</sup> *Congressional-Executive Commission on China 2020 Annual Report*, at 116, <https://perma.cc/KZ5K-U4GP>.

<sup>132</sup> H.R. Rep, Congressional-Executive Commission on China, 118th Cong., 2d Sess. (Nov. 18, 2004).

<sup>133</sup> Kuei-min Chang, *New Wine in Old Bottles: Sinicisation and State Regulation of Religion in China*, China Perspectives, 2018/1-2 at 37-44, <https://perma.cc/FWQ6-4YZR>.

right to make decisions about leaders, doctrine, and sacramental practices.<sup>134</sup> To avoid this intense government control of leaders and doctrines, an estimated 60-80 million Chinese Christians gather secretly in underground “house churches.”<sup>135</sup> Yet choosing not to register with the government results in debilitating fines and confiscated assets, and when their secret gatherings are raided by government officials, these believers face detention, imprisonment, and death in many cases.<sup>136</sup>

104. China has also violated international norms by restricting employment rights and banning unauthorized religious teaching in its 2018 Revised Regulations on Religious Affairs.<sup>137</sup> Article 36 specifies that in order to “engage in professional religious activities,” religious professionals must report “to the religious affairs department of a people’s government at the county level or above to be filed for the record;” only after reporting are these professionals “protected by law” under Article 38.<sup>138</sup> Thus, leaders of official religious groups who have not been vetted by government officials lack legal protection.<sup>139</sup>
105. China’s stringent control over religious leaders harms adherents of multiple faiths. For example, Tibetan Buddhists were harmed when the Chinese government attempted to control the next reincarnation of His Holiness the Dalai Lama, and when it forced the disappearance of the Panchen Lama for over 25 years.<sup>140</sup> Thus, by extending government oversight over the process of choosing religious leaders, China’s regulations violate international principles of religious freedom.<sup>141</sup>

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<sup>134</sup> 2018 Revised Regulations on Religious Affairs, <https://perma.cc/T6MT-FWLQ>. (English trans. available here: <https://perma.cc/K98S-88BW>).

<sup>135</sup> Wael Taji, *Inside the House Church Movement in China*, Palladium Magazine (Aug. 19, 2019), <https://perma.cc/N65K-VNCQ> (reporting that about two-thirds of China’s estimated 100 million Christians worship in house churches).

<sup>136</sup> U.S. Department of State, China 2019 International Religious Freedom Report, at 8, 12, <https://perma.cc/7CTJ-PNPG>.

<sup>137</sup> USCIRF 2020 Annual Report, <https://perma.cc/5U7V-WBTF>; 2018 Revised Regulations on Religious Affairs, <https://perma.cc/K98S-88BW>.

<sup>138</sup> 2018 Revised Regulations on Religious Affairs, <https://perma.cc/K98S-88BW>.

<sup>139</sup> *Id.*

<sup>140</sup> USCIRF 2020 Annual Report, <https://perma.cc/5U7V-WBTF>; see also Hannah Beech, *China Says It Will Decide Who the Dalai Lama Will Be Reincarnated As* (Mar. 13, 2015), <https://perma.cc/WG3Q-M69H>.

<sup>141</sup> See, e.g., Yeshe Choesang, *Despite Wide Criticism, Hundreds More Expelled from Larung Gar, Tibet*, Tibet Post International (Jan. 4, 2017), <https://perma.cc/Y7ZM-DPGQ> (U.N. Human Rights Committee leaders holding China accountable for its violations of human rights).



106. China is notorious for other human rights abuses as well, which have garnered international condemnation.<sup>142</sup> Notably, as China's restrictions on religion have grown more stringent over the last several decades, support for LGBTQ rights has also declined.<sup>143</sup>

### **Eritrea**

107. Eritrea is a highly repressive state whose ruling party brutally represses any group viewed as a potential threat, especially religious groups.<sup>144</sup> Under the dictatorial rule of President Isaias Afwerki since 1993, the government has consistently tried to scrub Eritrea of religious influence as a perceived threat to national unity.<sup>145</sup>
108. The Eritrean government recognizes only four religious groups: Sunni Islam, the Roman Catholic Church, Eritrean Orthodox Church, and the Lutheran Church of Eritrea.<sup>146</sup> "Authorities closely monitor the activities of the officially recognized groups, and also appoint leaders to key religious positions."<sup>147</sup> This extensive control has harmed religious schools in particular. In 2019, the Eritrean government "forcibly took over and closed multiple faith-based schools as well as 22 additional Catholic Church-run health centers."<sup>148</sup>
109. Eritrea's control extends directly to religious leaders. For example, the Eritrean government has imprisoned the Patriarch of the Eritrean Orthodox Church, Abune Antonios, since 2006.<sup>149</sup> In 2019, the government coerced the

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in Tibet because they are inconsistent with the Universal Declaration and its own Constitution).

<sup>142</sup> U.S. Department of State, China 2020 Human Rights Report, <https://perma.cc/LSV2-8BRJ>.

<sup>143</sup> Brian Grim, Religious Freedom & Business Foundation, *Religious Freedom and LGBT rights: Do they have common ground?* (2019), <https://perma.cc/U53A-HCZ3>.

<sup>144</sup> U.S. State Department, Eritrea 2017 Human Rights Report, at 1, <https://perma.cc/2C5Z-F2S4>.

<sup>145</sup> *Id.*

<sup>146</sup> *Eritrea: Tier 1 USCIRF-Recommended Countries of Particular Concern*, USCIRF (2018), at 1.

<sup>147</sup> USCIRF 2020 Annual Report at 19.

<sup>148</sup> *Id.* at 18.

<sup>149</sup> USCIRF, *Current Religious Prisoners of Conscience, Patriarch Abune Antonios*, <https://perma.cc/KC2K-6KFG>.

Holy Synod into excommunicating him on the grounds of heresy.<sup>150</sup> Yet Patriarch Antonios was actually imprisoned because he resisted a government mandate to excommunicate 3,000 of his own church members—and many Orthodox Eritrean monks who still view him as the lawful leader of the church have also been imprisoned.<sup>151</sup>

110. All unrecognized religious groups and activities are illegal, and the Eritrean government has not recognized any new groups since 2002, although many have applied for formal recognition.<sup>152</sup> This refusal to register groups such as Jehovah’s Witnesses and Pentecostals “means unregistered religious communities lack a legal basis on which to practice their faiths, including holding public and private services or other religious ceremonies,” and “leaders and members of unregistered communities who continue to practice their faith are punished with imprisonment and fines.”<sup>153</sup>
111. The Eritrean government discriminates against LGBTQ individuals as well. Consensual homosexual activity is currently criminalized, punishable by imprisonment.<sup>154</sup> Same-sex marriage is not legal, and there are no protections against discrimination in housing, employment, or any other area.<sup>155</sup> LGBTQ people are not allowed to donate blood or serve in the military.<sup>156</sup>

## **Russia**

112. Russia recognizes only four “traditional” religions and broadly bans “extremism” and “religious discord,” which it has used as justification to target and harass minority groups, especially Jehovah’s Witnesses and certain Muslims.<sup>157</sup> Styled as an anti-terrorism effort, Russia’s anti-extremism laws give police broad powers to disrupt worship services, detain congregants and leaders, and ban preaching without prior approval.<sup>158</sup> In 2016, president Vladimir

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<sup>150</sup> USCIRF, *Current Religious Prisoners of Conscience, Patriarch Abune Antonios*, <https://perma.cc/KC2K-6KFG>.

<sup>151</sup> *Id.*; USCIRF 2020 Annual Report at 19.

<sup>152</sup> USCIRF 2020 Annual Report at 19.

<sup>153</sup> *Eritrea: Tier 1 USCIRF-Recommended Countries of Particular Concern*, USCIRF (2018).

<sup>154</sup> Human Dignity Trust, *Eritrea*, <https://perma.cc/4ZTM-9KDZ>.

<sup>155</sup> Equaldex, *LGBT Rights in Eritrea*, <https://perma.cc/NB2V-WEFB>.

<sup>156</sup> *Id.*

<sup>157</sup> U.S. Department of State, *Russia 2016 International Religious Freedom Report*, <https://perma.cc/NL57-UEBK>, at 4.

<sup>158</sup> *Id.*

Putin signed anti-missionary laws that restrict worship and evangelism to officially registered buildings and outlaw “unauthorized missionary activity.”<sup>159</sup>

113. Russia’s registration system involves intense government oversight; churches must provide lists of their leaders including addresses and passport information, a description of their doctrines and attitudes toward marriage and education, and disclosure of their funding sources and all of their activities.<sup>160</sup> The Russian Orthodox Church in particular is closely monitored by the Russian government. Because officially-registered churches face such intense scrutiny, many groups including Baptists and Pentecostals choose not to register but face additional harassment as a result, as well as fines and convictions for evangelizing without government approval.<sup>161</sup> In 2019, 159 religious individuals and groups were prosecuted for sharing their faith as a violation of Russia’s anti-missionary laws.<sup>162</sup>
114. The Russian government has also committed or turned a blind eye to abuses of LGBTQ individuals. Since 2013, Russia has banned “propaganda of nontraditional sexual relations.”<sup>163</sup> This has fueled anti-LGBTQ violence including murders and other hate crimes by vigilante groups who the police have not opposed.<sup>164</sup> In April 2021, after a voter-backed referendum, Russian President Vladimir Putin formally banned same-sex marriages through a series of constitutional amendments.<sup>165</sup>

### **Saudi Arabia**

115. Secular governments are not the only violators of religious freedom and autonomy. Theocracies, or governments that claim direct religious authority for their actions, often extend even more control over religious activities and suppress dissent from minority groups.

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<sup>159</sup> U.S. Department of State, Russia 2019 International Religious Freedom Report, <https://perma.cc/2K2A-9V7T>, at 1.

<sup>160</sup> U.S. Department of State, Russia 2019 International Religious Freedom Report, <https://perma.cc/2K2A-9V7T>, at 5.

<sup>161</sup> *Id.* at 18.

<sup>162</sup> Kate Shellnutt, *Russian Evangelicals Penalized Most Under Anti-Evangelism Law*, Christianity Today (May 7, 2019), <https://perma.cc/QJ23-Z9XC>.

<sup>163</sup> Equaldex, *LGBT Rights in Russia*, <https://perma.cc/5QZE-GU3S>.

<sup>164</sup> Daria Litvinova, *Masked men and murder: vigilantes terrorise LGBT+ Russians*, Reuters (Sept. 24, 2019), <https://perma.cc/DT7F-VNTT>.

<sup>165</sup> Vladimir Isachenkov, *Putin signs law allowing him 2 more terms as Russia’s leader*, Associated Press (Apr. 5, 2021), <https://perma.cc/YF49-7CGG>.

116. For example, Saudi Arabia is officially an Islamic state, meaning that no dissent or other religions are allowed.<sup>166</sup> Because the judicial system is “governed by a Saudi interpretation of Shari’a” law, peaceful dissent, LGBTQ identity, and blasphemy against Islam are all punishable by death.<sup>167</sup>
117. The government exercises extensive control over education in particular. Official Saudi textbooks in schools have drawn international criticism from their “language inciting hatred and violence toward non-Muslims.”<sup>168</sup> As of 2020, textbooks call Christians and Jews “the enemy of Islam and its people,” and that LGBTQ individuals will “be struck [killed] in the same manner as those in Sodom.”<sup>169</sup>
118. As an example of state interference with religious leaders, Sheikh Mohammed Habib was arrested in 2016 and sentenced to 12 years in prison “after delivering sermons critical of the government and in support of his close associate . . . whom Saudi Arabia executed in 2016.”<sup>170</sup>

### Iran

119. The Islamic Republic of Iran is also an Islamic theocracy, and the government uses its official religious authority to wield extensive control over Muslim leaders and ban any other forms of religion.<sup>171</sup> This control extends even to state-recognized Muslim religious leaders. For example, the Iranian government “interfered in the selection of a successor to the leader of the Nematollahi Gonbadi Sufi community,” a group that has faced consistent harassment from government officials because they believe in separation of church and state.<sup>172</sup> That leader died in 2019 “following medical mistreatment and months under house arrest.”<sup>173</sup> Christian pastors also face intense persecution, especially if they converted from Islam.<sup>174</sup>

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<sup>166</sup> USCIRF 2020 Annual Report, at 37.

<sup>167</sup> *Id.* at 37.

<sup>168</sup> USCIRF 2020 Annual Report, at 37.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 25.

<sup>172</sup> *Id.* at 24; Golnaz Esfandiari, *Clashes Highlight Tensions between Dervishes and Iran’s Establishment*, RadioFreeEurope (Feb. 20, 2018), <https://perma.cc/7F28-A4BH>.

<sup>173</sup> USCIRF 2020 Annual Report at 24.

<sup>174</sup> *Id.* (recounting that Iran “twice delayed a sentencing hearing for Assyrian pastor Victor Bet Tamraz, his wife Shamiram Isavi, and three Christian converts from Islam. Pastor Bet

120. Iran is also notorious for abusing the human rights of women and LGBTQ individuals, and anyone who defends their rights. Homosexuality is illegal, punishable by death for men and life in prison for women; Iran's Foreign Minister claimed this was according to "moral principles."<sup>175</sup>
121. By extending government control over religious leadership selection and by quashing dissent, these countries are flagrant violators of religious freedom who have drawn international criticism with diplomatic and economic consequences. These countries stand in stark contrast to OAS States and European States who have recognized and protected religious autonomy for churches and organizations. Thus, this Court has a unique opportunity to set precedent that values religious freedom, specifically religious autonomy, instead of aligning with autocratic regimes that control religious leadership and violate other human rights as well. Because of this Court's global influence, its decision will have implications for countries that currently exercise control over religious leaders and teachers, and by affirming the right of religious autonomy, this Court has the opportunity to extend a positive influence over those countries.

### III. Analysis

122. In contrast to the pragmatic and sensitive approach of leading international tribunals and national courts outlined above, the Commission would instead have the Court sit in judgment over ecclesiastical decisions, thereby drawing the Court into a human rights quagmire. But there is no need for this Court to go it alone. The existing broad international consensus offers an alternative perspective that indicates why the better approach is to leave questions of religion entirely to religious bodies. This Court's deference to international law and established human rights requires a similar approach in this case.
- A. The problem of government interference with decisions about who may teach religious beliefs is common to all pluralistic democratic societies.**
123. Disputes over internal church governance occur on both sides of the Atlantic and around the globe. These cases illustrate that this conflict is not unique to any particular legal system, but is universal to all pluralistic democratic societies. As courts have encountered those conflicts at the national level and at the international human rights level, they confront the same fundamental

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Tamraz was charged in 2015 with 'conducting evangelism' and 'illegal house church activities.'")

<sup>175</sup> Equaldex, *LGBT Rights in Iran*, <https://perma.cc/ARR9-QMHS>; USCIRF 2020 Annual Report at 24.

question: Who decides who will teach the faith? Either it will be the church, or it will be the state.

124. As jurisdictions worldwide attempt to answer that question, LGBTQ rights have become a part of the analysis more often in recent years. But as governments balance the interests behind discrimination laws and religious liberty, this analysis shows that they have often attempted to find ways to respect both. Indeed, research has shown that countries with greater religious freedom also have higher respect for LGBTQ rights.<sup>176</sup> As Europe, the United States, Canada, and other jurisdictions grapple with those questions, they have all recognized that the internal affairs of religious communities should not be the province of the state, no matter the polity of the relationship between church and state in the specific context.
  125. The European Court of Human Rights has respected church autonomy in key cases including *Obst*, *Siebenhaar*, *Sindicatul*, and *Fernández Martínez*, discussed above, *supra* at ¶¶ 45-48. The European Court has recognized that it would be unreasonable to force a religious community to select and maintain its teachers based on the criteria and values of the state rather than those of the church. EU Council Directive 2000/78/EC makes clear that religious organizations can expect their employees to act with loyalty to the organization's ethos, which includes religious beliefs. According to this directive, actions like those of the Archdiocese in this case would not constitute discrimination, because as a teacher of the Catholic faith, the Petitioner's beliefs and conduct were at odds with Catholic doctrine and ethos.
  126. Of course, some states are involved in clergy selection through a formally established church, and such establishments are not prohibited by human rights instruments. But to subject a nominally autonomous church to government 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.
- B. The conflict between government regulation and internal church governance can only be solved by leaving ecclesiastical matters entirely to religious bodies.**
127. In contrast to the Petitioner's suggested approach, the consensus solution to the question of clergy selection is simple and elegant. As the European Convention on Human Rights makes clear, confessional teaching of religion in public schools is not only understood as legally required state cooperation with

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<sup>176</sup> Brian Grim, Religious Freedom & Business Foundation, *Religious Freedom and LGBT Rights: Do they have common ground?* (2019), <https://perma.cc/U53A-HCZ3>.

churches; it reflects legal requirements that the state respect and facilitate the religious choices of parents and children. Parents who choose Catholic education rely on Catholic authorities to provide teachers that are qualified to teach Catholic religion to their children. Giving priority to the Petitioner's rights here would mean ignoring the choices of parents who want their children to receive traditional Catholic instruction that aligns with the doctrines of the church.

128. In the United States, the Supreme Court has rejected the premise that courts must engage in the process 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 *Our Lady of Guadalupe* and *Hosanna-Tabor* leaves what it conceives as a private 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 organizes itself to carry out its religious mission than there is for courts to decide which political or social beliefs a nongovernmental organization should espouse.
129. This hands-off approach also allows judges to be truly neutral in a pluralistic society that has increasing religious diversity and an increasing number of legal disputes. A judge cannot hope to determine the qualifications to teach every religion. That is one of the primary lessons of *Our Lady of Guadalupe*, and may be of some use to this Court as it confronts increasing religious diversity in the Americas.
130. Here, the stakes are much lower for the Petitioner than the discharged teachers in *Our Lady of Guadalupe*, because the Petitioner did not lose her job but was actually *promoted* to a different, higher-paid role where she would not teach Catholicism. Because her only role was teaching religion, she is even more clearly a “minister” than the employees in *Our Lady of Guadalupe*, who taught multiple subjects. Thus, were her case to be decided under the United States Constitution, her situation would certainly fall under the ministerial exception or the broader principle of religious autonomy, since both doctrines extend to situations where employment decisions are based on the religious beliefs of the church. This recent precedent from the United States Supreme Court shows the importance of autonomy for religious institutions in their employment decisions. The principle of autonomy applies no less to religious instruction in state-sponsored schools.
131. 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 moral 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.

132. Here, the Chilean court did balance the key human rights considerations at stake, and any interference with the church's decision regarding the Petitioner would hamper the church's ability to decide who can carry out the central role of teaching its own doctrine. The Petitioner here was fully aware that her behavior was not consistent with the beliefs of the Catholic Church and that her employment was conditioned upon the Church's approval. She was aware that the Church requires its teachers to model and practice the faith so as to teach its students a consistent religious ethic. The Church's withdrawal of her authorization to teach was thus based on reasonable and foreseeable religious considerations.
133. As the Supreme Court of Canada has also recognized in *Wall* and *Loyola*, even where courts need to balance multiple human rights considerations, this need not come at the expense of religious autonomy. The Petitioner's lawsuit relies on rights to respect for private life, protection against arbitrary intervention, and freedom to work. These principles are similar to the "general fairness" principles that Mr. Wall invoked, but they do not constitute a legal dispute. Thus, like the Supreme Court of Canada in *Wall*, the San Miguel Court of Appeals and the Supreme Court of Chile correctly respected the internal decision of a religious community about whether the Petitioner was qualified to teach their particular faith. And just as Loyola's doctrinal decision about how it would teach Catholicism to its students was an internal decision free from government interference, the Archdiocese's decision that the Petitioner should be transferred to teach courses other than religion was an internal theological decision based on Catholic doctrine.
134. To allow the government to dictate who teaches the faith, and how they teach it, in spheres that are explicitly governed by church leaders, would violate the internationally recognized principle of religious autonomy. As the examples from Chile and Colombia demonstrate, *see supra* at ¶¶ 79-88, OAS States have constitutions and other laws that specifically protect the freedom and autonomy of religious communities. By providing clear guidance in this case and protecting the Archdiocese's ability to govern who teaches church doctrine to the next generation, this Court can provide clarity and guidance to other OAS States as they seek to apply the religious freedom provisions in their own laws and constitutions.

**C. Here, the local bishop must have control over who teaches Catholicism devotionally.**

135. The guarantee of the right to institutional autonomy as it relates to the relationship between a religious community and its clergy and teachers is a vital



aspect of freedom of religion set out in the Convention and the American Declaration of the Rights and Duties of Man. Religious communities constitute and renew themselves through their clergy and teachers by passing their faith, values, and moral precepts on to the next generation. These communities must be able to rely on the loyalty and example of those serving in these capacities, because compliance with church discipline goes directly to the religious community's credibility.

136. Religious communities are not free to be themselves and follow their own beliefs and practices if the State interferes in these sensitive relationships. In many, if not all religious traditions, who has the 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.
137. In recent years, there appears to be a remarkable convergence of American and European jurisprudence in the area of collective religious freedom. European and American law have 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, though using different terms.<sup>177</sup> 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 process by which those beliefs are formed and articulated.
138. In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the U.S. Supreme Court recognized what amounts to a *forum internum* for churches: “internal church decision[s] that affect[] the faith and mission of the church itself.”<sup>178</sup> This is a helpful demarcation of the boundaries of a religious group's sphere of autonomy. Just as an individual must be absolutely free to choose her 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, labor laws, or other means. This striking convergence between American and European law is an indication of the universality of a solution to the universal conflict

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<sup>177</sup> See, e.g., European Court of Human Rights, *Işık v. Turkey*, App. No. 21924/05 (ECtHR, 2 February 2010), <https://perma.cc/5XKX-E6R9> (“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.”); United States Supreme Court, *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (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.”).

<sup>178</sup> United States Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. at 190; *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. at 2060-62.

through autonomy for religious groups in their internal decisions about belief and teaching.

#### IV. Conclusion

139. For the reasons stated above, the Court should find no violation of the American Convention in this case. It should instead adopt principles regarding religious autonomy similar to the principles repeatedly articulated by the European Court of Human Rights regarding the European Convention on Human Rights. Specifically, the Court should hold that under the American Convention:

- “Religious communities traditionally and universally exist in the form of organised structures.” The Convention thus “safeguards associative life against unjustified State interference.”
- “[T]he right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State intervention.”
- “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 . . . the Convention affords. . . . Were the organisational life of the community not protected by . . . the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.”
- “Concerning more specifically the internal autonomy of religious groups, . . . the Convention does not enshrine a right of dissent within a religious community; in the event of any doctrinal or organisational disagreement between a religious community and one of its members, the individual’s freedom of religion is exercised by the option of freely leaving the community.”
- “Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them.”
- “[T]he principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty.”
- “[W]here questions concerning the relationship between State and religions, on which opinion in a democratic society may reasonably differ

widely, are at stake, the role of the national decision-making body must be given special importance.”

- “[A]s a consequence of their autonomy religious communities can demand a certain degree of loyalty from those working for them or representing them. . . . [T]he specific mission assigned to the person concerned in a religious organisation is a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty.”
- However, “a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient.” Instead, “[t]he national courts must . . . conduct[] an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake.”

*Fernández Martínez v. Spain*, App. No. 56030/07 (ECtHR, 12 June 2014), ¶¶ 126-131; *see also Sindicatul “Păstorul cel Bun” v. Romania*, App. No. 2330/09 (ECtHR, 9 July 2013), ¶¶ 136-138, 159-168 (similar holdings).

140. Applying those longstanding principles to the facts here results in a conclusion that no violation of the Convention has occurred.

Respectfully submitted,



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