No. 08-592

IN THE

Supreme Court of the United States

LAURA SCHUBERT,

Petitioner,

v.

PLEASANT GLADE ASSEMBLY OF GOD,

Respondent.

On Petition For Certiorari To The Supreme Court of Texas

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. To that end, it has taken a special interest in litigation arising under the Religion Clauses of the First Amendment.

A central unifying idea behind both clauses is that religious activity should be voluntary, neither impeded, subsidized, nor encouraged by government. Though that idea is simply put, it is often not simple to implement in practice, as this Court's cases demonstrate, particularly as government plays a larger role in society than it did at the time of the Founding. Nevertheless, this case should have presented a relatively straight-forward application of that principle—one which the court below obscured by recourse to other Religion Clause doctrines irrelevant here.

The brief is filed with the consent of the parties.

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[1] Pursuant to S.Ct.R. 37, we certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or counsel, made a monetary contribution to its preparation or submission.

ARGUMENT

I. THE JUDGMENT BELOW UNDERMINES VOLUNTARINESS AS THE UNDERPINING OF ALL RELIGION CLAUSE LAW

If this case involved the Boy or Girl Scouts restraining an adolescent participant against his or her expressed will pursuant to some secular ideology, no constitutional issue would be presented. Although the Texas Supreme Court thought otherwise, this case, involving religiously motivated restraints, would likewise present only a straightforward tort claim.

This Court should grant review of the troubling judgment below, so that tort actions against religious institutions do not encounter unfounded federal constitutional impediments.

The keystone of the American religion-state settlement in both practice and as it emerges from this Court's cases is that religious activity must be wholly voluntary. With all else that is in dispute about the Religion Clauses, the centrality of voluntariness is not.

Absent generally applicable, facially neutral legislation incidentally banning a form of religious worship or observance, or a compelling reason for a targeted ban, *Employment Division v. Smith*, 494 U.S. 872 (1990), Americans may participate, or refrain from participating, in whatever form of worship they voluntarily choose.

Petitioner explains why *Smith* applies to common law torts as well as to statutes. We add only that the point missed by the court below is more fundamental than the misapplication of one of this Court's cases.

Neither a public nor church official may enlist government's power to coerce an individual's participation in (or abstention from) otherwise legal religious activity. This is a principle which animates the pulsing vitality of American religious life. Religious leaders around the world have not been slow to make the connection between the principle of voluntariness and the vitality of American religion. See, *e.g.*, J. Ratzinger (now Pope Benedict XVI) and M. Pera, Without Roots (2006) at pp. 110-11.

Neither a public official nor a church leader has the legal authority to compel participation in a religious activity. If a religious leader or institution coerces religious practice with the assistance of government, the religious leader or institution as well as government are in violation of one or the other (or both) of the Religion Clauses. That is the teaching of the school prayer cases, *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist., Abington Twshp. v. Schempp*, 374 U.S. 203 (1963); as well as other cases, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (belief in God invalid requirement for service as notary public); *cf. Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996) (mandatory Alcoholics Anonymous attendance).

For this very reason, some courts of appeal have refused to apply the deferential standard of *Estate of O'Lone v. Shabazz*, 482 U.S. 342 (1987) for passing on constitutional claims by prison inmates to challenges to compulsory religious practices, see, *e.g.*, *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005); *Murphy v. Mo. Dept. of Corrections*, 372 F.3d 979 (8th Cir. 2004).

The relative paucity of recent citations directly invalidating official religious coercion is not due to doubt about the principle; rather the clarity and universal acceptance of the principle makes it rare that public officials transgress it.

At the margins, it is not always certain what is voluntary and what is coerced conduct as the contesting opinions in *Lee v. Weisman*, 505 U.S. 577 (1992), illustrate. The bottom line remains undisputed—government may not coerce religious activity or aid others in doing so.

Where participation in religious activity is coerced by purely private authority, the law of torts, so much of which turns on consent, serves as the guarantor of voluntariness.

Consent need not be explicit. In the cases of participation in a religious activity, consent to must often be presumed by courts and other governmental bodies. Someone who chooses to participate in a religious activity voluntarily must be taken to have acquiesced otherwise tortious conduct inherent and

usual in that activity, even without a lawyer-drafted, formally signed and notarized consent. For a court to find otherwise—and retroactively at that—would again be to denigrate the voluntariness principle.

Allowing or repudiation of consent—on an 'if I knew then what I know now' theory—would work great harm to religious liberty, as no religious institution, officer or worshipper, could ever be sure that they could rely on an apparently voluntary consent. Similarly, where parents validly consent to a child's participation in religious activity, the child cannot validly later sue persons relying on that that consent. Cf. *In Re Marriage of Boldt*, 344 Or. 1, 176 P.3d 388 (2008) (rejecting claim that parent cannot consent to child's circumcision).

The simplest definition of 'assault'[2] is an un-consented touching. *LaBella v. Charlie Thomas, Inc.* 942 S.W.2d 127 (Tex. App. Amarillo, 1997). In a church where the laying on of hands is an integral, expected and ordinary part of worship, worshippers must be assumed to have consented to having others touch them in this way. They cannot later sue, alleging assault, unless and until they explicitly and openly withdraw the presumed consent, and convey that withdrawal to the relevant persons.

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[2] The opinion of the Texas Supreme Court variously refers to the relevant tort as assault, battery or assault and battery. There is no relevant difference between these formulations at this stage of the proceedings.

If consent is given but withdrawn, religious officials are not liable for actions taken under authority of the previously given consent. However, they have no immunity from tort liability as to activity taking place after a withdrawal of consent. Conduct which was permissible then becomes tortious. This is so even if the tort-feasors insist that they are religiously obligated to continue what they began with consent.

When Petitioner Schubert participated with her parents' knowledge and approval[3] in activities at Pleasant Glade Assembly of God Church, she must be presumed to have consented the "laying on of hands." until she communicated her withdrawal of consent. Thus, the very first "laying on of hands" on Schubert was not tortious.

However, when Schubert unmistakably communicated her withdrawal of consent to fellow worshippers and demanded to be released, conduct that was previously legally innocuous became tortious. At that point, the laying on of hands had to stop. After her withdrawal of consent, the leaders of the church could no more "lay hands" on a protesting Schubert, though a member of their church, than

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[3] This Petition presents no occasion to consider the problematic case where an adolescent and a parent disagree about the child's religious life. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 243-46 (1971) (Douglas, J. dissenting in part); *id.*, at 230-31 (majority opinion).

they could go out on the street, seize the nearest Jew or Catholic and "lay hands" on them to drive out demons possessing them.

That Schubert was of the same faith as the Respondent, that she initially participated voluntarily, that she initially shared the religious assumptions of church—indeed, that her father was a pastor in the same denomination—all justify presuming consent, but all are irrelevant after she explicitly and unambiguously manifested her objection to being restrained, as the jury found she did. Church members were not entitled to restrain Schubert to enforce on her their religious beliefs.

Respondents remained free to continue their own religious practices uninhibited by Schubert's withdrawal. They could pray out loud for the demons to leave her. They could warn her that she risked eternal damnation by asking them to release their physical hold. Tort liability for Schubert's subjective reaction to Respondent's pure expression of their beliefs would be a different matter entirely, and, though not now before this Court, would in fact raise substantial constitutional questions.

Beliefs, including expression of beliefs are entitled to absolute constitutional protection, *Employment Division v. Smith*, *supra*. Labeling one's objection to another's expression of belief a tort

cannot overcome the constitutional barrier to liability. But, this is simply not such a case.[4]

The jury in this case was apparently not instructed to distinguish between damages (if any) stemming from the original laying on of hands under presumed consent and those which accrued after the withdrawal of consent. As far as the record shows Respondent did not seek an instruction on this point.

Had Respondent requested that the jury be instructed to distinguish between actions taken under presumed consent and those taken after consent was explicitly withdrawn, and been refused, a jury verdict based on that faulty charge could not stand. This is not that case.

Unless, as the Texas Supreme Court held, any jury inquiry here would require a jury to determine religious truths, the reversal of the verdict on constitutional grounds was improper. No such inquiry was in fact indispensable to reaching a verdict for Petitioner.

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[4] This is also not a case where consent cannot be withdrawn without interfering with or interrupting other worshippers—say a rule that no one may leave a sanctuary when the minister is speaking or locking the door during certain parts of worship.

II. NO RELIGIOUS INQUIRY WAS NECESSARY HERE

To escape these first principles, the Texas Supreme Court invoked a line of cases prohibiting courts from deciding religions questions. Its reliance on those cases was misplaced.

American courts are not arbiters of religious truth. *Thomas v. Review Bd.*, 450 U.S. 707 (1981). As a matter of federal constitutional law, no official, high or petty, can decide what is orthodox in matters of, *inter alia*, religion, *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

A common application of this principle is that American courts cannot resolve so-called church property disputes by reference to "departure from doctrine" rule accepted in England. *Watson v. Jones*, 80 U.S. 679 (1871); *PCUS v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

Where ownership of church property is in dispute as a result of internal doctrinal division, those disputes may be decided by the courts only if they can do so by reference to deference to hierarchical authority or to neutral doctrines of law and, in each case, without deciding any religious questions. *Jones v. Wolf*, 443 U.S. 593 (1979).

The proscription against deciding religious questions applies even where the rule to be enforced is otherwise a generally applicable neutral rule.

Thus, for example, a fraud statute could not be applied where a determination of guilt requires passing on the truth of religious claims. *U.S. v. Ballard*, 322 U.S. 78 (1944) (prosecution under mail fraud statute for "falsely" claiming heavenly revelation barred by Constitution) *cf.*, *Commack Self Service Kosher v. Weiss*, 294 F.3d 415 (2nd Cir. 2002) (state may not enforce kosher fraud laws if those laws require it to decide ritual matters).

These principles would be relevant and controlling here had the jury been told that it could assess damages only if it found that laying on of hands was not a religious practice. *Thomas v. Review Bd.*, *supra*. The trial judge carefully avoided this pitfall. His charge, coupled with pre-trial rulings on evidence, steered the jury away from passing judgment on religious questions.

This ban on inquiries into religious truth does not stand for the proposition, as the Texas Supreme Court seems to have thought, that any case in which religion is in the background runs an impermissible risk of requiring a judgment on religious matters.

An examination of church books to assess sales taxes does not violate the ban on assessing religious doctrine. *Jimmy Swaggert Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990). Neither does enforcement of the Fair Labor Standards Act, even against a claim that the "workers" in question were religiously motivated

volunteers. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). And, most closely, neither does judicious invocation of the neutral principles of law rule to resolve church property disputes run impermissibly high risks of passing on religious issues.

All of this is far afield from this case. The jury was not invited to decide a religious question, nor set a negligence standard for behavior by clergy (*e.g.*, so-called clergy malpractice). Compare, *e.g.*, *Mermelstein v. Kehilat New Hempstead*, 11 N.Y.3d 26, 892 N.E.3d 375 (2008) with *F.G. v. MacDonnell*, 150 N.J. 550, 696 A.2d 697 (1997).

Schubert's jury had no need to pass on any religious proposition to determine whether she had withdrawn her consent to the "laying on of hands" and being restrained of her liberty. It was not invited to inject its own religious prejudices into its fact-finding. Its verdict against Respondent should have stood.

CONCLUSION

In the end, the judgment of the Texas Supreme Court upends fundamental principles of American church-state law. No doubt motivated by a commendable desire to protect the integrity of religious practice, its judgment paradoxically undermined the religious autonomy of individuals and that of religious institutions.

Worse yet, allowing that decision to stand unreviewed would cast doubt on the viability of tort lawsuits which in recent years have done so much to address the problem of sexual abuse in houses of worship. See Tim L. Lyton, Holding Bishops Accountable: How Lawsuits Helped Confront Clergy Sexual Abuse (2008).

For all these reasons, the prayed for writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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