No. 08-592

IN THE
SUPREME COURT OF THE UNITED STATES

LAURA SCHUBERT,
Petitioner,
v.
PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, AND PAUL PATTERSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

After a Texas jury unanimously concluded that Respondents had assaulted and falsely imprisoned Petitioner without her consent, a divided Texas Supreme Court overturned the jury's verdict and trial court's judgment, and dismissed Petitioner's claims in their entirety, based solely on the Majority's interpretation of the Free Exercise Clause of the First Amendment.[1]

The Petition in this case presents a single issue for review by this Court: Whether the Texas Supreme Court Majority correctly interpreted and applied the Free Exercise Clause when concluding that provision of the Federal Constitution precludes the imposition of civil liability for the religiously-motivated assault and false imprisonment of Petitioner.

In their Brief in Opposition, Respondents acknowledge the relevance of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), to a proper analysis of the Free Exercise

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[1] Because the Texas Supreme Court dismissed based only on its interpretation of the First Amendment, it did not reach any state law issues raised by the parties. Petitioner is not seeking review in this Court of those issues. *See* Petition at 3 n.5.

Clause issue presented by this case – decisions ignored by the Texas Supreme Court Majority.[2]

At the same time, Respondents do not even mention the four decisions of this Court which the Texas Supreme Court Majority did cite as support for the view that the Free Exercise Clause requires dismissal of Petitioner's claims. Instead, Respondents defend that conclusion by arguing the Texas Supreme Court correctly applied the "Ecclesiastical Autonomy Doctrine" – a doctrine unrecognized by this Court.

Because the Texas Supreme Court's ruling dramatically and dangerously departs from this Court's First Amendment jurisprudence, and conflicts with decisions of other state courts of last resort and federal courts of appeals (Petition at 19-

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[2] Respondents maintain they "simply seek[] the same rights to Free Exercise" recognized by this Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which this Court "protected the religious practice of slaughtering animals to feed their blood to demons during worship services." Brief in Opposition ("Br. Opp.") at 36 n.32. There are material differences between this case and *City of Hialeah* – including that this case involved the physical invasion of a non-consenting *human being*. But most significant for purposes of the Court's consideration of the Petition for Writ of Certiorari is the fact the Texas Supreme Court Majority disregarded *City of Hialeah*, just as it did this Court's other relevant precedents, never even citing the decision, let alone discussing its relevance to a proper Free Exercise Clause analysis in this case.

40), the Petition should be granted.[3] *See* SUP. CT. R. 10(b), (c).

I. RESPONDENTS ERRONEOUSLY CLAIM THE TEXAS SUPREME COURT'S DECISION WAS NOT BASED SOLELY ON ITS INTERPRETATION OF THE FIRST AMENDMENT

Respondents contend the Texas Supreme Court's decision was based not only on the First Amendment, but also the Texas Constitution. *See* Brief in Opposition ("Br. Opp.") at 4 ("The Texas Supreme Court held below that such judicial inquiries were beyond the *jurisdiction* of the Texas courts. Texas courts were constrained by the First Amendment of the United States Constitution, **and** a unique Free Exercise provision in the Texas state constitution.") (italics in original; bold emphasis added); *id.* at 25 ("The Texas Supreme Court held that the Petitioner's complaints would require a judicial inquiry that was beyond the *jurisdiction* of the Texas courts. Texas courts and Texas law had to yield to the First Amendment of the United States Constitution **and** the unique Free Exercise Clause in the Texas State Constitution.") (italics in original; bold emphasis added); *id.* ("The Texas Supreme

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[3] *See* 48a-49a (Chief Justice Jefferson: "This overly broad holding not only conflicts with well-settled legal and constitutional principles, it will also prove to be dangerous in practice.").

Court handed down a decision about Texas law . . . .").

No plausible reading of the Texas Supreme Court's Opinion supports the claim that its decision was predicated on the Texas Constitution. The Majority referred only once, at the outset of the Opinion, to the provision in the Texas Constitution regarding freedom of religion, but otherwise never mentioned or discussed it. *See* 2a (noting TEX. CONST. art. I, § 6, with "see also" signal); *see also* Petition at 9 n.19. Respondents are unable to identify any other references to the Texas Constitution in the Majority's Opinion. *See* Br. Opp. at 25 (citing 2a). Moreover, Respondents contradict their own suggestion that the decision below was based on the Texas Constitution, observing that the application of the "unique Free Exercise Clause under the Texas Constitution" is among the "*unresolved* state law barriers" to Petitioner's claims. Br. Opp. at 1 (emphasis added).

In contrast with its single reference to the Texas Constitution, the Majority referred repeatedly to the Free Exercise Clause and the First Amendment, including when describing the nature of the appeal,[4] and when announcing the Court's holding.[5] That the

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[4] "This appeal concerns the tension between a church's right to protection under the Free Exercise Clause of the First Amendment and a church member's right to judicial redress under a claim for intentional tort." 2a.

[5] "The Free Exercise Clause prohibits courts from deciding

Majority relied exclusively on the First Amendment in dismissing Petitioner's claims is confirmed by the dissenting opinions, which address the First Amendment, but make no mention of the Texas Constitution.

Because the Texas Supreme Court's decision was based entirely on its view of the First Amendment, Respondents' request for "a certain amount of deference to the Texas court's conclusions" is unwarranted, and their invocation of the "interests of federalism" is inapposite.[6] *See* Br. Opp. at 25-26.

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issues of religious doctrine . . . . Accordingly, we reverse the court of appeals' judgment and dismiss the case." 26a-27a.

[6] Respondents recommend against granting *certiorari* because "[t]his Court usually reserves its jurisdiction to decide clearly presented Constitutional questions that will control the final outcome of a case." Br. Opp. at 2. Of course, the only question presented for review concerns the Free Exercise Clause of the First Amendment, and the outcome of this case *was* controlled by the Texas Supreme Court Majority's erroneous interpretation of that provision of the Federal Constitution. In furtherance of their argument, Respondents cite *Richardson v. Ramirez*, 418 U.S. 24 (1974), but do not disclose the passage they quote appears in a dissenting opinion, not the opinion of the Court. Br. Opp. at 2.

II. RESPONDENTS ERRONEOUSLY SUGGEST THE TEXAS SUPREME COURT MAJORITY CONSIDERED AND APPLIED THIS COURT'S DECISION IN *EMPLOYMENT DIVISION V. SMITH*

Respondents do not dispute this case is governed by *Smith*, 494 U.S. 872 – in fact, they seem to concede it on several occasions.

Recognizing the importance of this Court's decision in *Smith* to the argument that the Free Exercise Clause required dismissal of Petitioner's claims, Respondents imply the Texas Supreme Court considered and applied *Smith*. Specifically, referring to Petitioner's assault and false imprisonment claims tried to a jury, Respondents assert the Texas Supreme Court "concluded that pursuing this tort path would not be neutral law, as required by *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)." Br. Opp. at 25; *see also id.* at 31 ("[T]he Texas Supreme Court was correct about the non-neutral nature of Texas personal injury claims for recovery of mental anguish damages."). Respondents, however, offer no citation for this claim – presumably because the Texas Supreme Court never said anything of the kind.

As noted in the Petition, the only time a reference to *Smith* even appears in the Majority's Opinion is in a citation to Justice Green's dissent, in which he specifically discussed inconsistency between the Majority's decision and *Smith*. *See* Petition at 24.

Apparently mindful of the Majority's inattention to *Smith* in the decision below, Respondents spend several pages of their Brief in Opposition arguing that Texas law governing Petitioner's claims is not "neutral." *See* Br. Opp. at 27-31. While Petitioner views these arguments as unpersuasive, what matters for present purposes is that they were not made to, or considered by, the Texas Supreme Court, which effectively ignored *Smith* and this Court's other decisions addressing claims to First Amendment-based exemptions from neutral and generally applicable laws.[7]

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[7] Respondents appear to suggest this Court should deny *certiorari* out of deference to state court judgments about whether state laws comport with the "neutrality" requirement of the Free Exercise Clause. *See* Br. Opp. at 25-26 & n.23. As noted above, the Texas Supreme Court Majority failed to address this issue altogether. Yet even if it had considered the issue, this Court is the ultimate arbiter of the meaning and proper application of the Federal Constitution, and accordingly reviews state and local laws for their conformity with the requirements of the Free Exercise Clause. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (reviewing city ordinance's conformity with Free Exercise Clause requirements); *Smith*, 494 U.S. 872 (reviewing state law's conformity with Free Exercise Clause requirements).

III. RESPONDENTS DO NOT DISPUTE THAT THE TEXAS SUPREME COURT MAJORITY'S INTERPRETATION OF THE FIRST AMENDMENT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND INSTEAD RELY ON AN "ECCLESIASTICAL AUTONOMY DOCTRINE" UNRECOGNIZED BY THIS COURT

The Petition explained that in addition to ignoring *Smith*, the Texas Supreme Court Majority's Opinion scarcely addressed this Court's other First Amendment precedents, citing only four decisions of this Court in support of dismissal of Ms. Schubert's claims – none of which supports the Majority's view of the First Amendment. *See* Petition at 25-33; *see also* SUP. CT. R. 10(c).

Respondents do not defend the Texas Supreme Court Majority's reading of any of these four decisions of this Court. In fact, Respondents fail to mention a single one of them in their Brief in Opposition.[8]

Instead, Respondents invoke a so-called "Ecclesiastical Autonomy Doctrine," declaring it was "correctly applied" by the Texas Supreme Court. *See*

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[8] The four decisions are: *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *United States v. Ballard*, 322 U.S. 78 (1944); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976); and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). *See* Petition at 25-33.

Br. Opp. at 34; *see also id.* at 38 ("The Texas Supreme Court's decision below is consistent with the body of law generally referred to as the Ecclesiastical Autonomy Doctrine.").

Respondents cite a single case, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) – not discussed by the Texas Supreme Court Majority – in support of their claim that "[t]he Doctrine recognizes that it is not only the final imposition of liability, but the civil process *itself*, which impinges on a Church's Free Exercise rights." Br. Opp. at 38 (emphasis in original). Thus, they assert that "granting certiorari would, itself, be a rejection of the Ecclesiastical Autonomy Doctrine," and "entangle" this Court in a "religious dispute." Br. Opp. at 5, 39.[9]

But if Respondents are correct that the Texas Supreme Court applied and rendered its decision based upon the "Ecclesiastical Autonomy Doctrine," that is further reason to grant the Petition.

Petitioner is unaware of any case decided by this Court (including *Catholic Bishop of Chicago*, cited by

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[9] Respondents' extreme view of the First Amendment, which they convinced the Texas Supreme Court Majority to adopt, leads Respondents to conclude that "[t]he very process of the judicial inquiry causes an *entanglement* between church and state," and complain that "[t]he very act of writing this Brief [in Opposition to the Petition for Writ of Certiorari] requires the Church, to some extent, to explain and partly justify its belief to outsiders." Br. Opp. at 39 (emphasis in original).

Respondents),[10] using that phrase, let alone endorsing it as a doctrine for proper construction of the First Amendment. If such a doctrine is to be used by federal and state courts in interpreting and applying the Free Exercise Clause of the First Amendment, it should be done with guidance and approval from this Court in its role as the ultimate arbiter of the meaning of the Federal Constitution. *See, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 (1989) (Kennedy, J.) ("[T]his Court is responsible for assuring 'that state courts will not be the final arbiters of important issues under the federal constitution.'") (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)).[11]

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[10] Far from establishing an "Ecclesiastical Autonomy Doctrine," in *Catholic Bishop of Chicago* this Court concluded only that the National Labor Relations Act did not authorize the NLRB to exercise jurisdiction over teachers in church-operated schools. 440 U.S. at 507.

[11] As explained in the Petition, the Texas Supreme Court Majority's determination that the Free Exercise Clause requires immunity for a tortfeasor even when a victim resists or refuses consent to participate in a religiously-motivated act by the tortfeasor conflicts with the view of the Oklahoma Supreme Court. *See* Petition at 39-40 (discussing *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 776 (Okla. 1989)). Respondents do not dispute the sufficiency of the evidence supporting the jury's finding of lack of consent. *See* Br. Opp. at 3 ("At times, she was physically restrained during the prayers."); *id.* at 14 ("At times church members grabbed her arms and hands and restrained her *against her will.*") (emphasis added); *id.* at 16 ("According to several witnesses, Laura *yelled* something like 'no' or 'get away.'") (emphasis in

IV. RESPONDENTS' DISCUSSIONS OF TEXAS STATE LAW ISSUES ARE IRRELEVANT, AND NOT PRESENTED FOR REVIEW TO THIS COURT

Petitioner asks only that this Court review the Texas Supreme Court's interpretation and application of the First Amendment.[12]

In an effort to dissuade this Court from granting the Petition, Respondents repeatedly suggest review in this case would require deciding questions of Texas law unrelated to the First Amendment issues

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original). Instead, they attempt to explain it away, contending "voluntary participation" is a concept "impossible to apply to an enthusiastic crowd of Pentecostals in the midst of spiritual warfare." *See* Br. Opp. at 35; *see also id.* at 17 (observing, the fact that "numerous youths [held] down her arms and legs" in a "spread eagle" position is unsurprising because "Pentecostals believe that persons afflicted with demons are possessed with remarkable strength"). The Texas Supreme Court Majority erroneously embraced Respondents' view that mere "membership" in a religious organization strips a person of the right to be free from non-consensual assaults and false imprisonment. *See* 24a-26a; *see also* Br. Opp. at 33 ("[T]he true line regarding 'voluntary participation' is membership.").

[12] Respondents concede this Court has jurisdiction to address the Texas Supreme Court's interpretation of the First Amendment, but assert it "lacks jurisdiction to describe the parameters of the right which Petitioner ultimately seeks to vindicate . . . ." Br. Opp. at 1. The Petition makes clear Petitioner is not seeking review of those issues not yet decided by the Texas Supreme Court. *See* Petition at 3 n.5.

presented.[13] These suggestions are misguided. Reviewing the Texas Supreme Court's Opinion would not require this Court to decide questions of state law, any more than in the many cases it has previously decided, in which it reviewed state court decisions involving the application of the Free Exercise Clause to state and local laws. *See* Petition at 19-20.[14]

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[13] For instance, Respondents assert that "[t]o grant *certiorari*, this Court would have to conclude that it is in a superior position to map the contours of Texas personal injury law . . . ." *See* Br. Opp. at 4-5.

[14] Respondents do not dispute any of the facts set forth in the Petition, which contains all of the information relevant to the Question Presented for review. Nevertheless, much of their Brief in Opposition is dedicated to a discussion of "facts" neither presented to the jury, nor discussed in the Texas Supreme Court decision at issue. While these additional facts are irrelevant, it should be noted that Respondents have taken considerable liberties with the recitation of "facts" in their Brief in Opposition. For instance, Respondents represent to this Court that Petitioner's parents "left with the expectation that the church members would exercise parental supervision (*in loco parentis*) over their children." *See* Br. Opp. at 10; *see also id.* at 29 ("[T]he church was left in a *loco parentis* situation. Laura's parents left town knowing that the Church would often be supervising Laura, a minor."). Respondents fail to mention the Texas Court of Appeals determined "the record shows that Laura was primarily responsible for her own care and was not in the custody of anyone in particular while the Schuberts were out of town," and concluded that Respondents "did not stand *in loco parentis* as to Laura." *Pleasant Glade Assembly of God v. Schubert*, 174 S.W.3d 388, 395-96 (Tex. App. 2005).

Respondents also contend Petitioner "waived her complaints ten years ago" by not appealing a 1998 decision of the Texas Court of Appeals. Br. Opp. at 33-34. This claim lacks merit for several reasons – among them is that the decision which supposedly effected a waiver specifically *permitted* Petitioner to proceed with the very causes of action that were tried to the jury. *See In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 88 (Tex. App. 1998) (noting "Pleasant Glade does not argue that the false imprisonment, assault, and battery claims should be protected from objectionable discovery or dismissed based on the [First Amendment] defense."). In fact, Respondents informed the Texas Supreme Court that the Texas Court of Appeals decision in question "exempted from dismissal" Petitioner's "claims for assault and false imprisonment." *See* Reply Appendix at 1ra-4ra. In any event, this argument was not advanced before the Texas Supreme Court, and is improperly raised here for the first time.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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