No. 16-450

In The Supreme Court of the United States

MING TUNG, et al.,

Petitioners,

v.

CHINA BUDDHIST ASSOCIATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Freedom From Religion Foundation, Inc. ("FFRF")[1] is a national nonprofit organization based in Madison, Wisconsin, and is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason, rather than faith, tradition or authority. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico, including 1,200 members in New York. The Foundation's two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church. FFRF works to achieve these purposes by advocating for and representing the views of its membership in Establishment Clause cases.

FFRF's interest in this case arises from its second purpose, to defend the separation of church and state. The Establishment Clause of the First Amendment to the United States Constitution prohibits the government from giving preference to religion over nonreligion.

The Foundation and its members not only view preferential treatment as impermissible under the Establishment Clause, but also as divisive. Giving

[1] Counsel for either party has not authored this brief, in whole or in part. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. Consent to this brief has been given by all parties. All parties received timely notice of *amicus curiae*'s intention to file this brief.

benefits to religious organizations – that are not available to secular organizations – alienates and excludes the Foundation's members, other nonbelievers, and all nonreligious organizations.

SUMMARY OF THE ARGUMENT

As the number of religious "nones" – those who select none of the above on religious identity surveys – continues to rapidly rise, congregations will shrink. As they dwindle, more and more congregations will need to dispose of religious property. As these congregations dispose of religious property the most efficient and predictable way to resolve religious property disputes is to simply apply ordinary, secular law.

Following this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979), lower courts have inconsistently applied "neutral principles of law" to resolve religious property disputes. Without additional guidance from this Court, religious organizations will continue to be able to avoid secular laws and secular courts to handle secular issues, such as property title.

The Constitution prohibits the government from preferring adherents to one religion over adherents to other religions, or the religious over those who follow no religion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When courts let religious organizations avoid secular laws during religious property disputes, typically by hiding behind the veil of conducting sacred matters, the courts are conferring a benefit on religious

organizations that is wholly unavailable to nonreligious organizations, thus violating basic constitutional principles.

The constitutional rules here are black and white: the government may benefit secular and religious organizations alike without running afoul of the First Amendment; or the government can burden all organizations, secular and religious alike, with administrative and financial burdens that are unrelated to sacred functions or theological questions. But the government cannot constitutionally exempt *only* religious organizations from wholly secular financial and administrative burdens.

This Court has only upheld exclusive government benefits to religion in two circumstances: (1) when the benefit is necessary to avoid excessive government entanglement with sacred matters, or (2) when the benefit is necessary to avoid a substantial government imposed burden on free exercise.

Neither rationale can exempt religious organizations from following generally applicable property laws during religious property disputes. Ignoring generally applicable property laws is not necessary to avoid excessive entanglement because they are entirely administrative in nature; i.e., they do not touch upon sacred matters. It is also not necessary to ignore ordinary laws to alleviate a substantial burden on free exercise for the same reason – this Court has consistently held that financial and administrative burdens do not impermissibly interfere with religious exercise.

Given the inconsistent way that courts across this country are applying neutral principles of law to religious property disputes and the potential for the number of these cases to increase in frequency as the country becomes less religious, this Court must provide guidance to ensure that religious organizations are not being granted an unconstitutional benefit that is unavailable to nonreligious organizations. This Court should accept *certiorari* in this case.

ARGUMENT

I. Without guidance from this Court, lower courts will continue to inconsistently resolve religious property disputes following religious schisms and continue to allow an unconstitutional preference for religion.

A. The demographic shift away from religion will also bring a rise in the number of cases litigating the disposal of religious property.

America is rapidly losing its religion. Overall, 23% of adult Americans are religiously unaffiliated – a group commonly referred to as the "nones." *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015), http://pewrsr.ch/2czcSe6. This represents an 8-point increase in the unaffiliated since 2007 and a 15-point jump since 1990, making the "nones" the fastest growing identification in America. *Nones on*

the Rise: One-in-Five Adults Have No Religious Affiliation, The Pew Forum on Religion and Public Life (October 9, 2012), http://pewrsr.ch/2cT94SH; Barry Kosmin, *National Religious Identification Survey* (1989-1990), http://bit.ly/2dhF8PI.

It is not just the unaffiliated "nones" that are growing as a percentage of the population: 7% of Americans, more than 20 million people, are avowed atheists or agnostics. That is a larger group than Jews, Hindus, Muslims, Jehovah's Witnesses, and Buddhists combined, groups that courts have long recognized may not be excluded or discriminated against by government. *E.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (recognizing the right of the children of Jehovah's Witnesses to refuse to salute the national flag); *America's Changing Religious Landscape*, *supra.* That 7% is more than triple the number of Mormons in this country. *Id.* Among Millennials, those born between 1981-1996, the youngest group surveyed in the 2015 Pew survey, this pattern is even more pronounced. Approximately 35% of Millennials are not religiously affiliated, and 12% are atheistic or agnostic. *Id.*

As the number of nonreligious persons grows, shrinking congregations will need to dispose of religious property. In other words, the issues presented in this case are going to become more frequently litigated. Applying ordinary, secular, state law to determine property ownership will prevent courts from becoming excessively entangled in sectarian disputes.

B. Lower courts inconsistently apply "neutral principles of law" when resolving religious property disputes.

In *Jones v. Wolf*, this Court stated a preference for resolving religious property disputes following religious schisms using ordinary state property laws. 443 U.S. at 595-596. However, since that decision a widespread split among lower courts has developed over how to properly resolve these property disputes. At the heart of this split is how courts are applying "neutral principles of law" to resolve religious property disputes. *See id.* Many lower courts resolved religious property disputes by relying on ordinary state law instead of relying on the internal workings of the religious organizations. *See Roman Catholic Archbishop of Boston v. Rogers*, 88 Mass. App. Ct. 519 (2015); *Aldrich ex rel. Bethel Lutheran Church v. Nelson on behalf of Bethel Lutheran Church*, 859 N.W.2d 537 (2015); *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 374 Mont. 229 (2014); *Masterson v. Diocese of Northwest Texas*, 422 S.W.3d 594 (Tex. 2014); *Carrollton Presbyterian Church v. Presbytery of South Louisiana of the Presbyterian Church*, 77 So. 3d 975 (La. Ct. App. 2011); *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, 385 S.C. 428 (2009); *Arkansas Annual Conference of AME Church, Inc. v. New Direction Praise and Worship Center, Inc.*, 375 Ark. 428 (2009). However, many other courts, including the New York Appellate Division, First Department, have given deference to religious leadership and structure over ordinary state

laws. *See Falls Church v. Protestant Episcopal Church in U.S.*, 285 Va. 651 (2013); *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099 (Ind. 2012); *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.*, 290 Ga. 95 (2011); *Episcopal Church in the Diocese of Connecticut v. Gauss*, 302 Conn. 408 (2011); *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814 (Miss. 2009); *Huber v. Jackson*, 175 Cal.App.4th 663 (2009); *Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340 (2008).

As courts have inconsistently applied "neutral principles of law," guidance by this Court can bring clarity.

II. Courts cannot advance religion by giving an exclusive benefit to religious organizations that is unavailable to similarly situated nonreligious organizations.

It is a fundamental principle of Establishment Clause jurisprudence that the government is prohibited from advancing religion. *McDaniel v. Paty*, 435 U.S. 618, 636, n.9 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment) ("under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion"); *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (to pass Establishment Clause scrutiny, a law "must have a principal or primary effect that neither advances nor inhibits religion"); *Meek v. Pittenger*, 421 U.S. 349, 358 (1975)

(same); *Hunt v. McNair*, 413 U.S. 734, 744 (1973) ("we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion"); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) ("we consider . . . [whether] the primary effect of the Act [is] to advance or inhibit religion"); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that one of the Establishment Clause tests is that "a law's principal or primary effect must be one that neither advances nor inhibits religion"); *Epperson v. Arkansas*, 393 U.S. at 107 ("If either [the purpose or the primary effect of an enactment] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution"); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) ("to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion"); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (same).

Religion can be "advanced" in many ways, but only one merits discussion in this case: this Court has long held that religion is advanced when the government offers religion a benefit that isn't available to other similarly situated secular organizations.

A. Government imposed burdens and benefits must be the same for religious and nonreligious organizations.

Where a benefit is shared among the secular and religious alike,[2] this Court has employed the test established in *Lemon v. Kurtzman* to determine whether a statute has a secular legislative purpose; whether its principal or primary effect is one that neither advances nor inhibits religion; and finally, whether the statute fosters "excessive government entanglement with religion." 403 U.S. at 612. Generally speaking, the Supreme Court has upheld *shared* benefits so long as they do not discriminate on the basis of religious affiliation. *See, e.g.*, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (equal access to speech forum at high school); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation program to study at college of choice); *Mueller v. Allen*, 463 U.S. 388 (1983) (state income tuition tax deduction for parents of school-aged children); *Larson v. Valente*, 456 U.S. 228 (1982) (charitable solicitation law struck down, *inter alia*, because of evidence that legislature motivated by animus toward new religious movements).

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[2] Such benefits have taken the form of direct cash grants, reduced postal rates, vouchers, tax credits, and in-kind transfers such as textbooks, surplus food or the use of public facilities.

B. Avoiding secular laws by claiming to conduct sacred matters is a benefit not available to nonreligious organizations.

When courts allow religious organizations to ignore secular, generally applicable laws by hiding behind the veil of conducting sacred matters, they are conferring a benefit to those organizations that is unavailable to similarly situated nonreligious organizations. Religious organizations are able to avail themselves of the benefits of secular laws, such as New York's Religious Incorporation Law, and then ignore the burdens they do not wish to follow by claiming to conduct sacred matters, knowing that many courts will refuse to force them to do so. Nonreligious organizations, unlike religious organizations, cannot evade laws by evoking the specter of the sacred or divine.

C. Benefits only available to religious organizations are subject to this Court's exclusive benefits test.

Where benefits are given exclusively to religious organizations, this Court's analysis focuses on whether the benefit is necessary to either avoid excessive entanglement or avoid prohibiting free exercise. *See, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15-18 (1989) (finding statute unconstitutional because, *inter alia*, it did not remove "a significant state-imposed deterrent to the free exercise of religion").

Exclusive benefits have been upheld in two instances: when those exemptions avoided (1) excessive

entanglement or (2) prohibiting free exercise. *See, e.g.*, *NLRB v. Catholic Bishop*, 440 U.S. 490, 496 (1979) (upholding a unique exemption from the National Labor Relations Act (NLRA) for certain parochial school teachers, finding that without it, the NLRA would "interfere . . . with the religious mission of the schools" and create an "impermissible risk of excessive governmental entanglement"); *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (exempting parochial schools from the Civil Rights Act of 1964's prohibition against religious discrimination because the exemption "alleviate[d] [a] significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (finding RLUIPA constitutional because "foremost . . . it alleviate[d] exceptional government created . . . burdens on private religious exercise").

Exclusive benefits that avoided neither have all been found to violate the Establishment Clause. *See, e.g.*, *Texas Monthly*, 489 U.S. 1; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (finding a state statute giving churches the unique power to veto liquor license applications unconstitutional because the statute encouraged, rather than avoided excessive entanglement); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (finding a state law creating a distinct religious school district unconstitutional because the law "neither presuppose[d] nor require[d] governmental impartiality toward religion. . . ."); *Troy and Susan Alamo Found. v. Secretary of Labor*, 471

U.S. 290, 305 (1985) (upholding the application of the Fair Labor Standards Act to certain religious nonprofit organizations because it did not "pose an intolerable risk of government entanglement with religion"); *see also, e.g.*, *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000) (finding certain federal employment tax provisions constitutional because they did not encourage excessive entanglement and did not impinge on free exercise).

Murky as the Establishment Clause waters may be, one thing is clear: the government may not give an exclusive benefit to religion where there is no risk of government entanglement with religious matters and where the government is not prohibiting the free exercise of religion. Doing so impermissibly advances religion.

Avoiding secular courts and ordinary laws is a benefit, offered exclusively to religious organizations and is therefore presumptively an unconstitutional advancement of religion.

1. New York's Religious Incorporation Law does not cause unconstitutional excessive entanglement.

The excessive entanglement prohibition does not preclude the government from regulating *any* aspects of a religious organization. The mere presence of an interaction between church and state alone is not enough. *See Lemon*, 403 U.S. at 612. Entanglement

"must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

This Court first articulated the "excessive entanglement" prong in *Lemon v. Kurtzman* and held that it is the government's interaction, or interference, with religious matters that creates an entanglement danger, not the mere presence of any relationship at all. *See Lemon*, 403 U.S. 602. The statute at issue in *Lemon* required, *inter alia*, the examination of "[a] school's records in order to determine how much of the total expenditures [were] attributable to secular education and how much to religious activity." *Id.* at 620. In finding the statute unconstitutional, the Court pointed to the fact that "the inspection and evaluation of the *religious content*" was "fraught with the sort of entanglement that the Constitution forbids." *Id.* (emphasis added). It was not record inspection that entangled church with state, but rather the government deciding what was religious enough to constitute "religious activity" that excessively entangled church and state. *See id.*

Excessive entanglement analysis focuses on the extent of governmental oversight of *religious matters*, not the administrative or financial aspects of a religious organization. For instance, in *Bowen v. Kendrick*, the Court considered whether the Adolescent Family Life Act (AFLA) violated the Establishment Clause by mandating government oversight of religious organizations accepting federal grants for research into premarital sex. 487 U.S. 589, 615-17 (1988). AFLA forbade

qualifying religious organizations from using federal funds for family planning services or promoting abortion. *Id.* To this end, AFLA required governmental review of the materials used by grantees and monitoring of the programs with periodic visits. *Id.* There was no requirement that religious grantees follow any federal guidelines concerning the content of the advice given to teenagers, to not discriminate as to the clientele they served, or otherwise to modify their values or program. *See id.* Accordingly, the Court found that AFLA did "not create . . . excessive entanglement" because there was "no reason to fear that the . . . monitoring involved . . . [would] cause the Government to intrude *unduly* in the . . . operations of the religiously affiliated grantees." *Id.* (emphasis added). This Court has found that mere "administrative cooperation," between church and state, is "insufficient to create . . . 'excessive entanglement'. . . ." *Agostini*, 521 U.S. at 206. The prohibition on excessive entanglement is rooted, *inter alia*, in the duty to safeguard religious organizations from "being limited by . . . governmental intrusion into *sacred matters*." *See Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (emphasis added).

The "sacred matters" contemplated by the Supreme Court simply do not encompass administrative obligations or other mundane, fact-based, non-sacred regulatory inquiries, like those in New York's Religious Incorporation Law. Government regulation of the purely non-religious aspects of a religious organization has *never* been held to violate the excessive entanglement prong of the *Lemon* test. For instance, in *Troy and*

Susan Alamo Found. v. Sec'y of Labor, the Court considered whether the Fair Labor Standards Act (FLSA) – which required religious organizations to keep and disclose records "of . . . persons employed . . . [along with] their wages, [and] hours" – constituted excessive entanglement. 471 U.S. at 305. Such requirements, the Court found, "do not pose an intolerable risk of government entanglement with religion." *Id.* The Establishment Clause, they continued, "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations . . . and the recordkeeping requirements of the [FLSA], while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." *Id.*

Again in *NLRB v. Catholic Bishop of the City of Chicago*, the Court considered the National Labor Relations Act's (NLRA) application to parochial schools. *See* 440 U.S. at 497. The NLRA required the government to determine whether the positions asserted by clergy were in line with the schools' "religious mission" – and the Court held that such a determination would impermissibly require the government to delve into sacred doctrine. *See id.*

New York's Religious Incorporation Law only requires "the sorts of generally applicable administrative and record keeping requirements" traditionally "imposed on religious organizations without violating the Establishment Clause." *Indianapolis Baptist Temple*, 224 F.3d at 631; *see also Jimmy Swaggart Ministries v. Bd. of Equalization of Ca.*, 493 U.S. 378, 394-97 (1990)

(state sales and use tax); *Hernandez v. C.I.R.*, 490 U.S. 680, 695-98 (1989) (federal income tax); *South Ridge Baptist Church v. Indus. Com'n of Ohio*, 911 F.2d 1203, 1210 (6th Cir. 1990) (workers' compensation program); *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1340-41 (3d Cir. 1987) (social security tax).

Simply put, even "substantial administrative burdens . . . do not rise to a constitutionally significant level. *See, e.g.*, *Jimmy Swaggart Ministries*, 493 U.S. at 392-97 (no excessive entanglement where State imposes sales and use tax liability on religious organizations); *see also Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 764-65 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion). New York's Religious Incorporation Law's requirements are precisely the type of routine, factual and non-doctrinal inquiries this Court has held to be constitutional as applied to religious organizations.

2. The Free Exercise Clause of the First Amendment is also not violated by applying New York's law.

Complying with New York's Religious Incorporation Law does not implicate the Free Exercise Clause of the First Amendment because financial and regulatory burdens have never been held to violate free exercise.

This Court has held that the government may give religion an exclusive benefit if doing so lifts a substantial government-imposed burden on the practice of

religion. An interference with an institution's free exercise, however, only occurs when the government prevents the institution from carrying out its *religious function*. *See Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 876 (1990) (holding that Oregon State could, consistent with the Free Exercise Clause, deny claimants unemployment compensation for work-related misconduct based on the religious use of peyote). The First Amendment precludes "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). However, limited governmental regulation of purely secular aspects of a religious organization does not violate the Free Exercise Clause.

As a matter of law, this Court has not held that financial obligations or administrative requirements, like those required by New York's Religious Incorporation Law, violate religious free exercise. *See, e.g., Troy and Susan Alamo Found.*, 471 U.S. at 305 (the application of federal wage and hour law to the foundation's commercial businesses did not implicate the Free Exercise Clause because the required payments in cash to the workers, which they could voluntarily return to the foundation, did not in any way interfere with their religious beliefs). The application of general laws to the activities of religious organizations only raises a free exercise concern if that application significantly interfered with the ability of the religious organization to carry out its religious function. Under this Court's free exercise doctrine, that showing would be very difficult to make, especially in this case, as this Court has, for

the most part, rejected the notion of a "free-exercise required exemption" from generally applicable laws. *See, e.g., Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (employer not required to accommodate a Sabbatarian's effort to avoid Saturday work where this would require the employer to disregard the seniority system established by a collective bargaining agreement); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-10 (1985) (finding unconstitutional a state law allowing employees to take off work on the day that they observed as their Sabbath on the grounds that it could impose substantial costs on other employees who would have to work on weekends in their stead).

Factually, applying ordinary property laws and New York's Religious Incorporation Law to religious organizations is consistent with the rule of law. Religious organizations have always been subject to government-imposed administrative and financial burdens – especially when the religious organization voluntarily chooses to enter secular arenas. Religious organizations have the freedom to choose whether or not to enter a particular market place, but once they do, they cannot constitutionally be allowed to duck the rules simply because they are administratively or financially inconvenient. That inconvenience must rise to the level of excessive entanglement or must infringe substantially upon the practice of religious belief in order to warrant constitutional protection. Following New York's Religious Incorporation Law and ordinary property laws simply does not meet that standard.

CONCLUSION

Courts across this country have been inconsistently applying neutral principles law to religious property disputes. Consequently, a widespread split has developed among lower courts. When courts allow religious organizations to avoid secular laws during these property disputes by hiding behind the specter of conducting sacred matters, they are impermissibly conferring a benefit to those religious organizations that is unavailable to nonreligious organizations. As demographics rapidly shift towards an increasingly nonreligious population, these cases will increase in frequency as shrinking congregations dispose of their religious property. A rise in the frequency of these cases will only exacerbate the inconsistencies of lower court decisions. This Court must weigh in and provide guidance to lower courts that religious organizations must follow secular laws. This Court should accept *certiorari* in this case.

Respectfully submitted,

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