No. 10-553

In The
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* MUSLIM-AMERICAN PUBLIC AFFAIRS COUNCIL, UNITED SIKHS, CHURCH OF THE LUKUMI BABALU AYE, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, O CENTRO BENEFICENTE UNIAO DO VEGETAL, AND TEMPLO YORUBA OMO ORISHA IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONS AND STATUTES

INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations or representatives of religious organizations that have minority status in the United States. O Centro Beneficente Uniao do Vegetal is a Christian Spiritist religion with origins in Brazil. The Church of the Lukumi Babalu Aye follows the Lukumi religion known as Cuban Santeria. International Society for Krishna Consciousness is a monotheistic faith within the Hindu tradition. Templo Yoruba Omo Orisha draws its roots from the Yoruba religion brought to the Caribbean and the Americas by slaves from West Africa. UNITED SIKHS is an UN-affiliated NGO whose mission is to protect disadvantaged communities through international civil and human rights advocacy, humanitarian aid, and health and education initiatives geared towards the Sikh community. And the Muslim-American Public Affairs Council is a public service organization representing the civil rights of American Muslims. These organizations represent a wide array of religious beliefs, practices, and organizational structures. Each believes that a robust ministerial exception is essential to preserving the autonomy of all religious organizations – including their own and those they represent – to designate who will carry out

[1] No counsel for a party authored this brief in whole or in part. No person other than the *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to its filing. The letters of consent are on file with the Clerk.

their religious missions, to organize their own affairs, and to define the scope of their beliefs. They emphasize the heightened risk that they and other minority religions face under the ministerial exception as construed by the Sixth Circuit Court of Appeals and urge this Court to adopt instead a deferential standard consistent with the Court's long-standing precedents that protect the autonomy of all religious organizations.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals' application of the "ministerial exception" in this matter encroaches significantly on the First Amendment's guarantees of religious freedom for religious organizations. It impairs their exclusive prerogative under the Free Exercise Clause to designate who will carry out their religious functions. And it breaches the barrier created by the Establishment Clause against excessive entanglement by the state in their affairs. These harms are amplified for minority religious organizations, like *amici* here, whose religious practices are often deemed atypical and frequently misunderstood. Judicial efforts to weigh religious organizations' specific activities on the scale from secular to sacred are questionable in any instance, but leave minority religious organizations particularly susceptible to infringement of their rights. A robust ministerial exception that gives meaningful deference to the good-faith identification by religious organizations of their

sacred functions – and by extension the employment positions responsible for carrying them out – is necessary to protect the First Amendment rights of all religious organizations, and minority religious organizations in particular. Such protection extends naturally from this Court's long-standing precedents giving religious organizations broad autonomy to govern their own affairs. The Sixth Circuit's departure from these precedents should accordingly be reversed.

ARGUMENT

I. This Court's precedents invoke a "spirit of freedom" for religious organizations in how and through whom they promote their doctrines.

This Court has long recognized the "full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871). The Court in *Watson* emphasized that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id*. Instead, the right of all persons "to organize voluntary religious associations" that disseminate doctrine, resolve "controverted questions of faith," and establish "ecclesiastical government" over their "members, congregations, and

officers" is "unquestioned." *Id*. at 728-29. Giving substance to these principles, the Court in *Watson* held that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law" have been resolved by a religious organization's internal system of governance, "the legal tribunals must accept such decisions as final, and as binding on them." *Id*. at 727. Individual members aggrieved by the organization's decisions have available to them only "such appeals as the organism itself provides for." *Id*. at 729. In other words, "[a]ll who unite themselves to such a body do so with an implied consent to this government." *Id*.

This deference to the institutional governance of religious organizations was based, at least in part, on recognition of the civil courts' own limitations. "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law ***and religious faith***" of religious organizations as "the ablest men in each are in reference to their own." *Id*. (emphasis added). Indeed, the Court warned that "civil courts" supervising matters of "faith, discipline, and doctrine" would "only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals." *Id*. at 732.

The Court has consistently reasserted these principles in a variety of contexts, including in disputes concerning the appointment of clergy. In *Gonzalez v. Roman Catholic Archbishop of Manila*, the Court rejected the petitioner's claim that he was "legally

entitled to be appointed the chaplain." 280 U.S. 1, 10 (1929). The Court reasoned that "appointment is a canonical act." *Id*. at 16. Thus, "it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id*. Such decisions are binding, despite potentially "affecting civil rights." *Id*.

In *Kedroff v. St. Nicholas Cathedral*, the Court struck down a law transferring "control of the New York churches . . . from the central governing hierarchy of the Russian Orthodox Church [in Moscow] to the governing authorities of the Russian Church in America." 344 U.S. 94, 107 (1952). The Court deemed the dispute "a matter of ecclesiastical government" and upheld the power of the mother church in Russia "to appoint the ruling hierarch of the archdiocese of North America." *Id*. at 115. In making this ruling, the Court cited *Watson* at length, expressly rooting it in the First Amendment's Free Exercise clause:

> [*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.

Id. at 116.

Nearly twenty-five years later, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court reconfirmed this deference to religious organizations in selecting their leaders. The Supreme Court of Illinois had reinstated a diocesan bishop defrocked by the highest authorities of the Serbian Orthodox church. The bishop prevailed on the ground that the church had acted arbitrarily by "not follow[ing] its own laws and procedures" in removing him. 426 U.S. 696, 712-13 (1976). This Court rejected the Illinois court's analysis to hold that there is "no 'arbitrariness' exception" in determining whether "the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations." *Id*. at 713. The civil courts are barred from questioning the ecclesiastical jurisdiction of religious organizations in governing their affairs. *Id*. at 714. If civil courts were "to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care." *Id*. Such "detailed review" is "impermissible" under the First Amendment. *See id*. at 718.

The Court reaffirmed this line of cases in its landmark decision in *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (government cannot "lend its power to one or the other side in controversies over religious . . . dogma"). They reflect this Court's

longstanding optimism drawn from the core of the First Amendment that deference to religious organizations in arranging their own affairs ultimately promotes rather than hinders the values that sustain a sound and stable society.

II. The Sixth Circuit's ruling hinders religious organizations' right to select who will promote their faith by empowering courts to decide when some means of promotion are too secular.

The Sixth Circuit's ruling defies the autonomy that this Court's precedents have long extended to religious organizations. Specifically, it rejects the right of religious organizations to select their own leaders, spokespersons, or other faith promoters unless those individuals spend more than fifty percent of their time engaged in activities that ***the court*** agrees are "religious." Here, for example, respondent Cheryl Perich undisputedly performed religious functions for petitioner Hosanna-Tabor Lutheran Evangelical Church and School. Perich was formally "called" into religious service at the church school and given the title of "commissioned minister." Pet. App. 3a-4a. She initiated religious devotionals by her students each morning, taught them religion for thirty minutes four times a week, led them in prayer three times a day, and accompanied them weekly to chapel. Pet. App. 4a. The Church plainly attributed religious significance to these functions. It promoted the school as providing "a 'Christ-centered education'

that helps parents by 'reinforcing bible principals [sic] and standards'" and described its teachers as "fine Christian role models who integrate faith into all subjects." Pet. App. 4a-5a. It was never disputed that these characterizations of its religious mission were sincere.

The Sixth Circuit, however, rejected the Church's genuine attachment of religious significance to Perich's employment, because – in counting her hours – it noted that she spent only forty-five minutes a day engaged in what it deemed religious conduct, while spending the remaining six hours and fifteen minutes teaching ostensibly secular subjects. Pet. App. 4a, 20a. On this mathematical foundation, the Sixth Circuit concluded that the Church lacked autonomy to dismiss Perich free from government scrutiny. "The fact that Perich participated in and led some religious activities through the day does not make her ***primary*** function religious." Pet. App. 20a. (emphasis added). Thus, the Church's Free Exercise right to "select [its] clergy," *Kedroff*, 344 U.S. at 116, was restricted where the Church failed to utilize that clergy in a role that ***the court*** deemed sufficiently religious. The Church's own assessment that it could best convey the faith to the next generation through ministers called to teach in its church school was given no deference, even though this Court has acknowledged the purely religious nature of such a calling. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (recognizing the "critical and unique role of the teacher in fulfilling the mission of a

church-operated school"); *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring) (noting "the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith").

In parsing by the hour the religious nature of Perich's labors, the Sixth Circuit also violated the Establishment Clause. It adopted Perich's definition of what functions carried out by the Church could be considered "religious," despite the Church's competing view. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996) (noting that "courts have found an unconstitutional entanglement . . . where the Government is placed in a position of choosing among 'competing religious visions'") (citations omitted). In the process, it implicitly condoned subjecting the Church to litigation discovery, a costly and time consuming process "designed to probe the mind of the church in the selection of its ministers." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985); *see also NLRB*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."). Thus, in every respect, the Sixth Circuit's ruling contravenes this Court's precedents affording deference and autonomy to religious organizations in selecting who will carry out their religious aims.

III. The religious freedoms of minority religious organizations are particularly susceptible to encroachment under the Sixth Circuit's approach.

The complications inherent in civil courts' efforts to distinguish between the sacred and secular activities of religious organizations are enhanced with respect to minority religions whose beliefs and rituals are poorly understood. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 732 n.8 (9th Cir. 2011) (O'Scannlain, J., concurring) (noting that questions about what constitutes religious activity "might prove more difficult when dealing with religions whose practices do not fit nicely into traditional categories"). The case law reveals this negative potential. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, for example, the Fourth Circuit Court of Appeals considered whether a Jewish mashgiach – "an inspector appointed by a board of Orthodox rabbis to guard against any violation of the Jewish dietary laws" – qualified for the ministerial exception. 363 F.3d 299, 301 (4th Cir. 2004). The mashgiach had sued his employer, a Jewish assisted-living facility, for violating the Fair Labor Standards Act. He contended that his primary duties involved nothing more than "inspecting incoming food deliveries and ensuring the kosher preparation of food," duties he characterized as essentially secular. *Id*. at 308. In addition, he argued that, "apart from being an Orthodox Jew, no special training [was] required to serve as a mashgiach." *Id*.

The trial and appellate courts ultimately rejected the mashgiach's arguments, adopting instead the assisted-living facility's view that "the position of mashgiach is intrinsically religious, because maintaining a kosher diet is an integral part of Judaism and reflects a divine commandment from God." *Id*. at 308, 309. The courts reached this conclusion, however, only at the summary judgment stage after discovery had been completed. *See id*. at 304. Thus, the organization's right to be free from entangling inquiry through litigation had already been violated. *See NLRB*, 440 U.S. at 502; *see also Rayburn*, 772 F.2d at 1171 (noting that "entanglement might also result from a protracted legal process pitting church and state as adversaries"). Moreover, the organization's right to direct its internal affairs without state interference was affirmed only after ***the court*** determined that the functions performed by the mashgiach were "important to the spiritual mission of Judaism." *Shaliehsabou*, 363 F.3d at 309. Yet under this Court's *Watson* line of cases, the significance of a mashgiach to the spiritual mission of Judaism should not be subject to review by a court. Although the Fourth Circuit ultimately reached the right conclusion, the litigation process as conducted – exposing, as it did, the religious organization to the threat of having a core religious belief disregarded – was itself a violation of core First Amendment freedoms.

The difficulties courts face in properly characterizing religious activity as sacred, if allowed to do so, is further well-illustrated in *Stately v. Indian Community School of Milwaukee, Inc*., 351 F. Supp. 2d

858, 862 (E.D. Wis. 2004). There, the court considered application of the ministerial exception to a teacher fired by a religious school that was "based on traditional Indian spiritual and cultural principles." *Id*. The court emphasized the "conceptual difficulties" posed by Native American religious beliefs to "conventional western-religious thought." *Id*. at 869. "The line between sacred and profane does not exist in Native American cultures." *Id*. at 867. Culture and religion are viewed as inseparable. *Id*. at 867-68. And "Native American religions do not consider it contradictory to fully practice more than one religion." *Id*. at 869. The court further noted that allowing the plaintiff's wrongful termination action to proceed would open questions, then and in the future, of whether "plaintiffs were *religious enough*" or "faithfully carried out their religious obligations in the classroom." *Id*. at 870. The court further observed that "a long, legal battle draining [the school's] resources" might also result in excessive entanglement, "***if it has not already***." *Id*. (emphasis added). The court, in essence, would have been forced in the course of reaching a judgment to identify and appraise the beliefs and practices of Indian religions that are only vaguely defined by the religions themselves – a certain recipe for misconstruing core religious beliefs.

In this regard, many seemingly secular activities take on deep religious significance within specific faith traditions. For Sikhs, for example, operating a community kitchen and providing meals (*langar*) to the needy and vulnerable is an indispensible element

of religious worship. For some temple-centric religions, the actual process of constructing a temple carries deep religious significance. Hindu temple architects and artisans follow ancient religious traditions in their work. For others, temple overseers may be tasked specifically to ensure that construction workers follow religion-based standards and refrain from profane acts that might desecrate the temple. For other religious organizations, meditation is a form of worship, distributing aid through prescribed means is an essential sacred ritual, and counseling and healing are acts inspired by deity. But because such religious functions – at least from the external view – may be indistinguishable from the same activities carried out for secular purposes, courts trying to parse the sacred from the profane jeopardize the ability of religious organizations to define and carry out their own sacred missions.

Nor is this risk limited to minority religions. Indeed, it is likely manifest across all religions in a variety of forms.

> When the Pope washes feet on the Thursday before Easter, that is not secular hygiene, and the Pope is not a pedicurist. Confession to a priest and confession to a psychiatrist may have the same content, but that does not make confessing to a priest secular. Fitness clubs and Falun Gong both perform calisthenics. Religious missionaries and Peace Corps volunteers both perform humanitarian work, but only the latter is secular. Humanitarian work may be a secular or a religious

> activity, depending on the motivation and meaning among those who perform it.

Spencer v. World Vision, Inc., 633 F.3d 723, 745 (9th Cir. 2011) (Kleinfeld, J., concurring). But minority religions whose faith traditions are often foreign to judges and jurors and who lack political and financial clout to defend against misconceptions are particularly susceptible to having their religious freedoms infringed.

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Corp. of Presiding Bishop, 483 U.S. 327, 336 (1987). Thus, protecting the First Amendment freedoms of all religious organizations requires a robust ministerial exception that gives at least some deference to religious organizations' own definition of what is sacred to their faith.

CONCLUSION

Religious organizations should be "free to 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'"

Amos, 483 U.S. at 342 (quoting Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)). This principle is firmly established in the Court's *Watson* line of cases, *see id*. (citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) and *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952)), which are animated by a "spirit of freedom" derived from the First Amendment's Free Exercise and Establishment clauses, *see Kedroff*, 344 U.S. at 116. The Sixth Circuit's approach, in contrast, focuses on trying to restrict the ministerial exception to precise boundaries dividing the sacred and secular. This attempt, however, is intrinsically antithetical to the First Amendment. Religious worship and rituals are frequently identical in their physical manifestation to secular behavior and may be distinguished only by the underlying doctrines and internal beliefs that motivate them. Thus, the parsing and weighing that would be necessary for courts to separate the seemingly secular from the obviously sacred would inherently invade the prerogative of religious organizations to determine on their own how to define their faith and carry out their religious missions. *See Amos*, 483 U.S. at 343 ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs."). The autonomy for religious organizations "enshrined in the First Amendment plainly rank[s] high 'in the scale of our national values.'" *NLRB v.*

Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). Its protection requires a clear standard giving reasonable deference to qualified religious organizations in selecting those who will carry out their missions. Such a standard, at minimum, must include persons like Perich who are employed by a religious organization, based at least in part on their religious qualifications, and who perform some religious functions. *See Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (adopting similar test); *Alcazar v. Corp. of the Catholic Archbishop*, 598 F.3d 668, 676 (9th Cir. 2010) (same), *aff'd en banc without adopting test*, 627 F.3d 1288 (2010). For all these reasons, the Sixth Circuit's judgment should be reversed, and the district court's judgment reinstated.

Respectfully submitted,

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June 20, 2011