

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.*,
Respondent.

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

**BRIEF OF *AMICI CURIAE*
RELIGIOUS ORGANIZATIONS AND
INSTITUTIONS IN SUPPORT OF PETITIONER**

JEFFREY A. BERMAN
SEYFARTH SHAW LLP
2029 Century Park East
Suite 3500
Los Angeles, CA 90067-
3021
Phone (310) 201-1541
Fax (310) 282-9686

CARTER G. PHILLIPS
EDWARD R. MCNICHOLAS*
DAVID S. PETRON
GORDON D. TODD
BRYSON L. BACHMAN
ELISA K. JILLSON
ADAM C. DOVERSPIKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcnicholas@sidley.com

Counsel for Amici Curiae

June 20, 2011

* Counsel Of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY	1
ARGUMENT	3
I. FAILURE TO RECOGNIZE THE VARIETY OF MINISTERIAL OFFICES CHILLS RELIGIOUS EXERCISE	3
A. Religious Organizations Have Different Self-Understandings Of Who Holds Ministerial Office	3
B. Religious Exercise Is Hampered By Uncertainty About Whether The Law Will Respect A Religious Organization's Self-Understanding Of Its Ministerial Offices	10
II. COURTS SHOULD GIVE SUBSTANTIAL DEFERENCE TO A RELIGIOUS ORGANIZATION'S SINCERE SELF-UNDERSTANDING OF ITS MINISTERIAL OFFICES..	14
CONCLUSION	23

TABLE OF AUTHORITIES

CASES	Page
<i>Alcazar v. Corp. of the Catholic Archbishop</i> , 598 F.3d 668 (9th Cir. 2010).....	6
<i>Alicea-Hernandez v. Catholic Bishop</i> , 320 F.3d 698 (7th Cir. 2003).....	8
<i>Assemany v. Archdiocese of Detroit</i> , 434 N.W.2d 233 (Mich. Ct. App. 1988).....	8
<i>Bollard v. Cal. Province of Soc. of Jesus</i> , 196 F.3d 940 (9th Cir. 1999).....	14
<i>Bryce v. Episcopal Church in the Diocese of Colo.</i> , 289 F.3d 648 (10th Cir. 2002).....	10
<i>Citizens United v. FEC</i> , 130 S. Ct. 876 (2010).....	12
<i>Clay v. United States</i> , 403 U.S. 698 (1971)	17
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	17
<i>EEOC v. Catholic Univ. of Am.</i> , 83 F.3d 455 (D.C. Cir. 1996)	4
<i>EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.</i> , 597 F. 3d 769 (6th Cir. 2010)	21
<i>EEOC v. Roman Catholic Diocese</i> , 213 F.3d 795 (4th Cir. 2000)	8
<i>Founding Church of Scientology v. United States</i> , 409 F.2d 1146 (D.C. Cir. 1969).....	17
<i>Gillette v. United States</i> , 401 U.S. 437 (1971).....	17
<i>Hankins v. Lyght</i> , 441 F.3d 96 (2d Cir. 2006)	20
<i>Himaka v. Buddhist Churches of Am.</i> , 917 F. Supp. 698 (N.D. Cal. 1995).....	7
<i>Hollins v. Methodist Healthcare, Inc.</i> , 474 F.3d 223 (6th Cir. 2007).....	6
<i>Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.</i> , 344 U.S. 94 (1952).....	10, 14

TABLE OF AUTHORITIES – continued

	Page
<i>Lawson v. Sec’y, Fla. Dep’t of Corrs.</i> , No. 10-10619, 2011 U.S. App. LEXIS 10770 (11th Cir. May 25, 2011).....	17
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000)	9
<i>Petruska v. Gannon Univ.</i> , 462 F.3d 294 (3d Cir. 2006).....	6, 11
<i>Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987).....	11, 12, 13, 20
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	11
<i>Schleicher v. Salvation Army</i> , 518 F.3d 472 (7th Cir. 2008)	6, 7, 10
<i>Serbian E. Orthodox Diocese v. Milivojevic</i> , 426 U.S. 696 (1976)	9, 20
<i>Shaliesabou v. Hebrew Home of Greater Wash, Inc.</i> , 363 F.3d 299 (4th Cir. 2004)...	8
<i>Starkman v. Evans</i> , 198 F.3d 173 (5th Cir. 1999)	8
<i>Stepek v. Doe</i> , 910 N.E.2d 655 (Ill. App Ct. 2009)	16
<i>Temple Emanuel v. Mass. Comm’n Against Discrimination</i> , No. 09-1950, 2009 Mass. Super. LEXIS 137 (Mass. Super. Ct. June 2, 2009)	6
<i>Tomic v. Cath. Diocese</i> , 442 F.3d 1036 (7th Cir. 2006)	7
<i>United States v. Quaintance</i> , 608 F.3d 717 (10th Cir. 2010)	17, 18, 19
<i>Univ. of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002)	13, 14, 19, 20
<i>Universidad Central de Bayamon v. NLRB</i> , 793 F.2d 400 (1st Cir. 1986)	19, 20
<i>Walz v. Tax Comm’n</i> , 397 U.S. 664 (1970) ...	11

TABLE OF AUTHORITIES – continued

	Page
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1871).....	8

OTHER AUTHORITIES

The Catholic Directory, <i>Ministries</i> (2011), available at http://www.thecatholicdirectory.com/ .	5
<i>The Constitution of the Presbyterian Church (U.S.A.)</i> , Pt. II: Book of Order (2009-2011).....	4
<i>The Magna Carta</i>	11
Azuza Pac. Univ., <i>About APU</i> (2011), http://www.apu.edu/about/	19
Congregation of Sisters of St. Agnes, <i>Ministries</i> , available at http://www.csasisters.org/ministries.cfm	5
John Paul II, <i>Centesimus Annus</i> (1991).....	15
Salvation Army, <i>2010 Annual Report</i> (2010), available at http://annualreport.salvationarmyusa.org/_pdf/2010_Annual Report.pdf	6
U.S. Conference of Catholic Bishops, <i>Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons</i> (2006), available at http://uscbb.org/ocyp/charter.pdf	15
U.S. Religious Landscape Survey, <i>Religious Composition of the U.S.</i> (2007), available at http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf	3

INTERESTS OF *AMICI CURIAE*¹

Amici are religious organizations and institutions with hundreds of thousands of religious and lay employees. *Amici* advance their religious missions through both clergy and non-ordained employees charged with religious and ministerial responsibilities or other duties integral to *Amici*'s ministries, as well as through employees who have no ministerial functions.

Amici and their affiliated denominations operate or support, directly or indirectly, thousands of religious institutions such as schools and universities, hospitals and nursing homes, and social service providers. Such facilities both benefit the community at large, as well as *Amici*'s ministries. *Amici* therefore have a direct and substantial interest in the scope and application of the ministerial exception. *Amici*'s ability to structure their internal hierarchies, employment relationships, and the delivery of services are negatively affected by limits on what positions qualify for the ministerial exception.²

INTRODUCTION AND SUMMARY

The ministerial exception plays a crucial role in safeguarding the constitutionally protected autonomy of religious organizations. Without the ministerial exception, religious organizations would be inhibited

¹ Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and no person or entity other than an *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing, and the letters of consent have been filed with the clerk.

² Individual *Amici* are described in the appendix.

in their religious missions. Religious practice in America is diverse, and the variety of religious beliefs about the role of ministers is threatened by mechanistic paradigms that apply the ministerial exception only to employment positions that non-adherents—including courts—interpret as religious in nature. As the decision below illustrates, a religious minister’s position may not have immediate religious significance to a person outside the religion, and it may be declared secular and therefore not protected, regardless of the religious organization’s sincere self-understanding of that ministerial office. Even when judicially-crafted tests reach the correct result, the specter of potential litigation—and the uncertainty of whether the next court will properly understand an organization’s religious practices—looms large, undermining the independence of religious organizations’ decisionmaking and chilling its free exercise of religion.

Religious organizations, including *Amici*, desire to create a fair work environment consistent with their doctrines and practices. A mechanistic approach to the ministerial exception, however, impinges upon religious organizations’ constitutional rights by obstructing their autonomy to decide who serves as a minister of their faiths. These rights are fully protected only where courts give substantial deference to religious organizations’ sincere self-understanding of ministerial duties. This deferential standard does not give religious organizations license to discriminate. Courts are more than capable of identifying insincere and self-serving invocations of ministerial status and, as a consequence, declining to give them any weight. To do so, courts can and should take account of the actual or constructive knowledge of a ministerial employee herself, the

manner in which a religious organization has held itself out to the public, and the institution's non-profit status.

In light of Petitioner's undisputedly sincere self-understanding of the ministerial nature of "called" teachers, the court of appeals should have concluded that the ministerial exception applies in this case. The decision below therefore should be reversed.

ARGUMENT

I. FAILURE TO RECOGNIZE THE VARIETY OF MINISTERIAL OFFICES CHILLS RELIGIOUS EXERCISE.

A. Religious Organizations Have Different Self-Understandings Of Who Holds Ministerial Office.

1. American religious life is inescapably diverse. The Pew Forum on Religion & Public Life identified 143 religions and categories of religions in the United States. See U.S. Religious Landscape Survey, *Religious Composition of the U.S.* (2007), available at <http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf>. Surveying this fertile and varied religious landscape, the Pew Forum's resulting report called the United States "a very competitive religious marketplace." See *id.* According to the report, even the dominant religious category—Protestantism—is characterized by "significant internal diversity and fragmentation, encompassing hundreds of different denominations." *Id.*

The conception of a ministerial role varies greatly across faith traditions. Some positions—such as priests, bishops, pastors, elders, deacons, and the like—are unmistakably ministerial in nature. But different religions may understand other offices to be

similarly ministerial, even if those offices would appear to an outsider to be secular in nature. The fact of religious pluralism may make it difficult for outsiders to recognize the different ministerial offices that individual religious believers may hold within a church or other religious institution—particularly for religious groups that draw primarily from minority or foreign populations and are based on beliefs outside of mainstream American culture.

This issue is not limited to minor denominations. For example, while the Catholic Church has archetypal ministerial officers such as bishops and priests, a Catholic nun—albeit not ordained—particularly one who teaches canon law at a Catholic university, certainly carries on a religious ministry. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). The forms of ministry in the Presbyterian Church (U.S.A.) similarly “may emphasize special tasks and skills and the ordering of the offices of ministry . . . reflect [that] variety,” including ministries that are “primarily educational, administrative, legislative, or judicial.” *The Constitution of the Presbyterian Church (U.S.A.)*, Pt. II: Book of Order G-6.0104, (2009-2011) (“Variety of Forms”). And, in this case, a congregation that is a member of the Lutheran Church–Missouri Synod employed a “called” teacher, an office freighted with that Church’s longstanding theological understanding of the sacred, pastoral role played by persons in that position. See Pet. Br. 4-6.

2. Adding to this complexity is the diversity of functions and activities that different religions assign to their ministers. Some ministers perform obviously religious functions, but some also have roles or responsibilities that may be outside a non-adherent’s understanding of the appropriate roles of a ministry

of the church. Examining a particular function or activity—be it cleaning, nursing, farming, stocking shelves, making furniture, grading papers, writing newsletters—in isolation from the religious organization’s own self-understanding of that role can be misleading.

A purely mechanistic review of an employee’s “secular” and “ministerial” functions cannot yield consistently accurate results, especially when a particular function may be the responsibility of a ministerial employee in one religious organization and a non-ministerial employee in another, depending in part on the theological tenets of each religious group. The centuries of conflict over the theological importance of good works versus faith alone is certainly an indication that these differences in the conception of a particular function can be a defining issue for different denominations.

For example, charitable works like teaching adult literacy classes, performing social work, and nursing can all be “secular” activities, but the nun who takes vows of poverty and obedience and performs these services to live out the gospel in service to others is a “minister” of the church—even though she is not ordained. See, *e.g.*, Congregation of Sisters of St. Agnes, <http://www.csasisters.org/ministries.cfm>; The Catholic Directory (2011), *Ministries, available at* <http://www.thecatholicdirectory.com/> (last visited June 17, 2011) (providing contact information for Catholic hospitals, schools, nursing homes, counselors, literacy program, etc.). Similarly, mopping floors and cleaning sinks may appear to be wholly secular activities, but a Catholic seminarian might perform those duties as part of his vow of poverty and as an act of humility, self-abnegation and

service. See, e.g., *Alcazar v. Corp. of Catholic Archbishop*, 598 F.3d 668, 675 (9th Cir. 2010).

Indeed, ministers routinely engage in apparently “secular” activities that unquestionably serve a religious purpose:

- Secular courts may see teaching a foreign language in an after-school program as a secular activity; yet when a Jewish Temple runs the after-school program for avowedly religious purposes and the only foreign language offered is Hebrew, the teacher engages in ministerial activity. See *Temple Emanuel of Newton v. Massachusetts Comm’n Against Discrimination*, No. 09-1950, 2009 Mass. Super. LEXIS 137, at *15-16 (Mass. Super. Ct. June 2, 2009).
- A resident in a pastoral clinical education program in a religious hospital operated “in accordance with the Social Principles of The United Methodist Church” engages in religious ministry that includes offering comfort, compassion and guidance, much as a secular counselor or therapist might do. See *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 224 (6th Cir. 2007) (internal quotation marks omitted); see also *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (chaplain at a religious university).
- Managing a thrift shop is by no means an overtly religious activity, but an ordained Salvation Army officer who uses sales as an opportunity to witness hope, faith and redemption to patrons is a minister. See *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008); see also *Salvation Army*,

2010 Annual Report 22 (2010), available at http://annualreport.salvationarmyusa.org/_pdf/2010_AnnualReport.pdf (last visited June 17, 2011) (listing 1,375 family stores managed by Salvation Army officers).

- Managerial and educational functions that are often performed by non-ministers may take on religious significance when they are part of a Buddhist minister's oversight of a department of education. See *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698 (N.D. Cal. 1995).
- Growing grapes and selling wine are activities typical of commercial vintners, but these activities may also be performed by monks, quintessentially religious figures, for the benefit of their order. See *Schleicher*, 518 F.3d at 476-77.

Ordained ministers are not the only church employees who serve the mission of the institution through seemingly secular acts; non-clergy employees similarly participate in activities whose religious significance is deep—even if it is not immediately obvious to persons unfamiliar with the teachings of a particular church:

- Playing an instrument or directing a choir can be a quotidian secular activity, but such activities become centrally religious when they involve selecting the music for a religious organization, and an organist or choir director can have such a profound impact on worship that he or she could be a ministerial employee. See *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006) (noting the Church obviously cares “whether

the words of the Gospel are set to Handel’s *Messiah* or to “Three Blind Mice”); see also *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988).

- Meal preparation is an ordinarily secular function, but a lay “mashgiach” responsible for ensuring faithfulness to Jewish dietary law who prepares meals for residents of an Orthodox Jewish eldercare home is a “minister” who fulfills a religious role central to the religious institution’s principles. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301, 303 (4th Cir. 2004).
- A communications director is not manifestly a ministerial employee, but a lay employee can act as the very voice of a church in the community and be responsible for preserving the integrity of the church’s message, thereby filling an essentially ministerial office. See *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003).

Function divorced from doctrine is an inaccurate gauge of whether an employee is “ministerial,” and the separation of function from faith creates an impermissible risk that a secular court will inform a religious institution that its minister is not really a minister. Cf. *Watson v. Jones*, 80 U.S. (13 Wall) 679, 726-32 (1871) (“[I]t . . . would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.”).

But delving into the religious doctrine undergirding different functions is no solution to the challenge presented by the diversity of religious exercise in America: The First Amendment prohibits a secular court's evaluation of religious doctrine. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established . . . that courts should refrain from trolling through a[n] . . . institution's religious beliefs."). Such inquiry into religious employment disputes creates the potential for "substitut[ion]" of a secular court's judgment for a religious institution's and for "judicial rewriting of church law" in a manner inimical to the First Amendment. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09, 719 (1976). Of particular concern, a secular court's evaluation of an employment decision that is deeply enmeshed with religious questions would create the opportunity for secular judges to "sanitize" church doctrine touching on the employment decision wherever that doctrine seems too anachronistic, too progressive, or otherwise unwise or unpleasant or disruptive to dominant social mores.

Even if inquiry by a secular court into how religious doctrine affects employees' actions were constitutionally permissible—which it is not—it would not be feasible without deference to the religion's own understanding of those actions. While a court could perhaps gain a certain degree of expertise in the doctrine and practices of a single religion or a small group of "mainstream" religions, it would be unreasonable to expect any court—much less a secular court of general jurisdiction—to gain the necessary expertise to understand the inner-workings of the myriad religious institutions in this country. And that lack of understanding could result

in situations in which outcomes of religious employment disputes could largely depend on the particular jurists' familiarity with (not to mention affinity for) the religion under judicial scrutiny.

B. Religious Exercise Is Hampered By Uncertainty About Whether The Law Will Respect A Religious Organization's Self-Understanding Of Its Ministerial Offices.

Whether an employee is "ministerial" is not self-evident. Which functions are religious and which persons performing them are ministers are themselves deeply religious questions bound up in religious doctrine. Courts must therefore be careful to respect religious organizations' authentic self-understanding of who qualifies as a minister of the faith, particularly when those religious institutions must make hard employment decisions about those ministers.

The autonomy to consider religious criteria in employment decisions without state interference is the seminal purpose of the "ministerial exception," which is, appropriately, also identified as the "internal affairs" or "church autonomy" doctrine. See, e.g., *Schleicher*, 418 F.3d at 475; *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002). As Petitioner explains, the ministerial exception is firmly grounded in the First Amendment.³ Indeed, the exception is ultimately rooted in the Magna Carta.⁴

³ Pet. Br. 19-37. The Free Exercise Clause protects the right of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116

The very fact of secular review of religious employment decisions—even if infrequent—may profoundly disrupt religious freedom. Judicial determination of which employees qualify as ministers creates a guessing game for religious institutions that cannot know if an employee qualifies as a minister until after a case has been brought, litigation costs have been incurred, and the court has made a ruling. Cf. *Presiding Bishop v. Amos*, 483

(1952). A religious institution’s freedom to arrange its own internal affairs is vital; to allow state involvement—the “active involvement of the sovereign in religious activity”—risks the impermissible establishment of religion. *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

The ministerial exception is also independently required by the Speech Clause. Secular determination of the religious voice is irreconcilable with the First Amendment: if a religious institution is to “communicate its religious message,” it must have the “right to select its voice,” *Petruska*, 462 F.3d at 306—a voice that speaks not only in preaching and praying, but also in comforting, counseling, teaching, guiding, and singing. Indeed, if an organization has the right to select its members, see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), it surely has the right to determine who speaks on its behalf.

⁴ The first provision of the Magna Carta confirms the right of religious organizations to elect their own ministers. *The Magna Carta* § 1 (“FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter *the freedom of the Church’s elections—a right reckoned to be of the greatest necessity and importance to it . . .*”) (emphasis added). Henry VIII would later seize control of the appointment of clergy, resulting in the evils of government appointed clergy elaborated on in the Petitioner’s brief. Pet. Br. 26-28.

U.S. 327, 336 (1987) (“[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.”). Because “[t]he 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,” this “[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission.” *Id.*

Most religious organizations have neither the litigation budget nor the capacity to take on the risk of losing employment suits, and the compliance guessing game would have several deleterious effects. *First*, no longer would religious doctrine and mission alone form the basis for a religious institution’s employment decision; such decisions would be colored by speculation as to the litigiousness of the candidate/employee and of the predilections of the relevant court. This impact could be profound, particularly given that adverse employment actions could include transfer out of a particular parish, suspension from ministry, ecclesiastical discipline, or even merely a change in title.

For example, a dynamic candidate for communications director who could revitalize the church’s role in its community may no longer be a viable choice if that dynamism makes that candidate higher risk (*e.g.*, in terms of potential conflict with church members), and termination would be an untenable solution because of the risk of liability. The church would be constrained in whom it could feasibly consider for a position—and the mission of the church would be altered by that constraint.

As “[p]rolix laws chill speech” in violation of the First Amendment, *Citizens United v. FEC*, 130 S. Ct.

876, 889 (2010), broad and complex anti-discrimination laws and regulations chill religious belief and practice. And these laws are subject to a wide range of potential interpretations ranging from guidance from the EEOC to the welter of state and municipal anti-discrimination agencies, as well as state and municipal courts.

Second, a guessing game would make religious organizations wary of allowing certain employees to perform certain tasks for fear that a court might deem the tasks too secular. If only ordained clergy were to be protected under the ministerial exception, such a policy would create or reinforce a clergy-laity divide and potentially create a host of perverse incentives. Indeed, some religions do not officially ordain or license their ministers, and so any bright-line ordination test would only create other line-drawing problems.

Finally, and most insidiously, as a religious organization begins to “characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well,” the religious organization’s very “process of self-definition would be shaped in part by the prospects of litigation.” *Amos*, 483 U.S. at 336, 343-44. “A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.” *Id.* at 344.

In constantly anticipating what a secular judiciary would deem sufficiently “religious,” a church may begin to narrow its own view of “religious” activity. When “hard-nose proselytizing” provides greater insulation from litigation than ministry-through-service, the service-oriented religion suffers. See

Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1346 (D.C. Cir. 2002). This may itself be “a violation of the most basic command of the Establishment Clause—not to prefer some religions (and . . . some approaches to indoctrinating religion) to others.” *Id.*

II. COURTS SHOULD GIVE SUBSTANTIAL DEFERENCE TO A RELIGIOUS ORGANIZATION’S SINCERE SELF-UNDERSTANDING OF ITS MINISTERIAL OFFICES.

1. Central to religious autonomy is the right of every religious organization to define its own doctrine and practice, including who may act as its ministers and what conduct has significance for the employment status of those ministers. See, e.g., *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (“[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern.”); *Bollard v. Cal. Province of Soc’y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) (“A church’s selection of its own clergy is [a] core matter of ecclesiastical self-governance with which the state may not constitutionally interfere.”). For religious institutions to carry out their religious missions pursuant to their own beliefs and practices (as opposed to those of the judiciary), their constitutional freedoms must extend to internal employment decisions with respect to their ministry.

Although some religious beliefs and practices conflict with the aims of antidiscrimination laws, courts should not lose sight of the fact that the civil rights movement sprang in large part from the teachings of churches, and religious organizations continue to be at the forefront of fighting for various civil rights in the workplace in a manner consistent with their doctrines. Catholic social teaching, to take

another example, emphasizes the moral imperative of “adequate protection for the conditions of employment.” John Paul II, *Centesimus Annus* § 34 (1991). But whether particular religious views are deemed retrograde, radical, disruptive, inspiring or prophetic, it is central to the ability of religions to preach these views through their own chosen speakers.

Religious organizations’ internal employment policies and protections may in fact advance important social interests and norms equally, or indeed more aggressively, than antidiscrimination laws. But without the ministerial exception, those policies, however effective they may be, would be nullified simply because the religious organizations’ approach to discrimination differs from that of a particular legislative or administrative body. In many cases, restrictions on the discretion of religious organizations to remove ministers for acts deemed inconsistent with religious teaching would in fact undermine antidiscrimination and other important social norms. For instance, the United States Conference of Catholic Bishops has promulgated authoritative norms governing the Catholic Church’s response to allegations of sexual abuse of minors, which include “precautionary measures,” such as withdrawing an accused priest from sacred ministry or any ecclesiastical office, based upon a preliminary investigation conducted in accordance with canon law. See U.S. Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* ¶ 6 (2006), available at <http://www.usccb.org/ocyp/charter.pdf>. These precautionary measures can result in swift and harsh employment decisions that may not be consistent

with the human resources procedures of other secular organizations. See, e.g., *Steppek v. Doe*, 910 N.E.2d 655, 657-60 (Ill. App. Ct. 2009) (involving the removal of a priest from all ministry based on “reasonable cause to suspect” alleged sexual abuse of former parishioners, despite priest’s claim that he was falsely accused in retaliation for unrelated disputes with those former parishioners). The Catholic Church has nonetheless deemed it more important to err on the side of protecting its young adherents.

Accordingly, when reviewing the employment decisions of a religious institution, courts should generally give substantial deference to the religious group’s sincere self-understanding of its ministerial offices. Such deference protects the religious organization’s constitutional right to autonomy while eliminating the confusion created by more mechanistic tests. An analysis of a religious organization’s reasons for an employment action taken with respect to a minister is likewise not permissible, as it tramples on the organization’s constitutional rights of association and autonomy—its right to determine for itself what their ministers should believe and how their actions affect their representation of, and stewardship within, the religion.

2. Opponents of the ministerial exception likely will point to instances, whether real or hypothetical, of employment discrimination by religious organizations and argue that deference to religious organizations’ self-definition of ministerial offices will encourage churches to manipulate the exception and will insulate discrimination from judicial review. But a deferential ministerial exception does not give churches license to discriminate as there is no need to extend the protections of the ministerial exception

where a religious organization does not have a sincere belief in the ministerial nature of the employment position in question. Courts have long determined questions of sincerity in similar contexts without engaging in the type of invasive religious assessment that violates the constitution. See, e.g., *Clay v. United States*, 403 U.S. 698, 700 (1971) (per curiam) (conscientious objectors must, among other things, “show that this objection is sincere”); *Gillette v. United States*, 401 U.S. 437, 457 (1971) (“The truth of a belief is not open to question; rather, the question is whether the objector’s beliefs are truly held.”) (internal quotations marks omitted); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (finding it “might be possible to show that a self-proclaimed religion was merely a commercial enterprise”).

Courts are able to assess sincerity in a non-invasive manner even when statutes prohibit considering whether a particular belief is central to a person’s religion. See *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (permitting prison officials to inquire about the sincerity of prisoner’s professed religiosity even though “RLUIPA bars inquiry into whether a particular belief or practice is ‘central’ to a prisoner’s religion”). Because deference should be given only to sincere beliefs about the ministerial office, courts will be able to smoke out those (likely rare) instances where an organization invokes the ministerial exception as a post-hoc justification for otherwise improper discriminatory conduct. See, e.g., *Lawson v. Sec’y, Fla. Dep’t of Corrs.*, No. 10-10619, 2011 U.S. App. LEXIS 10770, at *2-4 (11th Cir. May 25, 2011) (per curiam) (finding prisoner’s asserted Jewish beliefs “not sincere” because he did not attend prayer services, rejected offer for work proscription on

Saturdays, and ate non-Kosher foods); *United States v. Quaintance*, 608 F.3d 717-18, 720-21, 723 n.6 (10th Cir. 2010) (finding asserted religious belief of founding members of the Church of Cognizance, “which teaches that marijuana is a deity and sacrament,” were insincere, in part, because the drug user “began to justify his use in religious terms only after he had been arrested for marijuana possession”).

Courts may properly consider three factors that ensure that the ministerial exception will be applied only to a religious organization’s sincere self-understanding of its ministerial offices. *First*, courts can consider whether employees have actual knowledge that a religious organization believes a particular employment position is ministerial in nature. Such actual knowledge could arise in many ways, including from explicit notice to the employee. But considering that many churches are small and legally unsophisticated entities for whom formal notices would be impractical, implied-in-fact, constructive knowledge based on, for example, the history and tradition of the role should also be sufficient. Whenever a person is held out to the public as a minister, that fact should weigh heavily in the consideration of their status. And when an employee has knowledge of the ministerial nature of a particular office, there will be little doubt about the sincerity of the religious organization’s self-understanding, and little chance that an organization has opportunistically characterized a position as ministerial for litigation purposes.

Second, courts may also consider the manner in which an organization has held itself out to the public. Religious organizations need not take extravagant steps to make clear that they are

religious, nor need they educate prospective employees about specific tenets of their beliefs. But where an organization consistently holds itself out as religious, that view should be accepted as evidence of an organization's sincerity in characterizing an employment position as ministerial. See *Universidad Central de Bayamon v. NLRB*, 793 F.2d 400, 400 (1st Cir. 1986) (en banc) (Breyer, J.) (concluding that a university is a religious organization for purposes of application of federal labor laws where it "holds itself out to students, faculty and community as a Catholic school"); *Great Falls*, 278 F.3d at 1344 ("Where a school, college, or university holds itself out publicly as a religious institution, 'we cannot doubt that [it] sincerely holds this view.'") (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000)). Many bona fide religious organizations (e.g., Azusa Pacific University) are not affiliated with a religious denomination, but are undeniably religious. See, e.g., Azusa Pac. Univ., *About APU* (2011), <http://www.apu.edu/about/>. Although affiliation with a religious denomination rightfully creates a presumption that the organization is religious in nature, it should not be an absolute requirement. To conclude otherwise would result in these unaffiliated organizations being impermissibly penalized.

Third, courts may take into account the non-profit status of a religious organization as a further indication that the organization is religious in nature and sincerely considers certain positions ministerial. See *Quaintance*, 608 F.3d at 722 (finding insincerity, in part, because drug users considered themselves to be in the marijuana "business"). As this Court has noted, non-profit religious organizations have little motive to discriminate for business motives and do not implicate the same concerns as do commercial

institutions.⁵ See *Amos*, 483 U.S. at 337 (dismissing Establishment Clause concerns because the cases “involve a nonprofit activity” rather than the speculative issue of “entering the commercial, profit-making world.”); see also *Great Falls*, 278 F.3d at 1344 (“[I]t is hard to draw a line between the secular and religious activities of a religious organization. However, it is relatively straightforward to distinguish between a non-profit and a for-profit entity.”) (citation omitted).

3. Taken together, these three considerations—knowledge of the employee, the openly religious nature of the employer, and the organization’s non-profit status—all but exhaust an appropriate inquiry into the sincerity of a religious organization’s self-understanding of its ministerial offices. Going any further would invite courts to substitute their own views of which religious practices are “approved” and which are not. See *Serbian E. Orthodox Diocese*, 426 U.S. at 708-09, 719; cf. *Universidad Central de Bayamon*, 793 F.2d at 402-03 (Breyer, J.) (“[W]e cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court . . . ‘entanglement’ as they are administered.”); *Hankins v. Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting) (“Federal court entanglement in matters as fundamental as a religious institution’s selection or dismissal of its spiritual leaders risks an unconstitutional trespass[] on the most spiritually intimate grounds of a religious community’s existence.”) (internal quotation marks omitted).

⁵ Some for-profit organizations might also be religious in nature and sincerely deem as ministerial certain employment positions, but the ministerial exception’s applicability to such for-profit institutions need not be settled to decide this case.

Applying these considerations to the decision below, Petitioner Hosanna-Tabor's sincere self-understanding that Ms. Perich's position as a "called" teacher was ministerial should be given substantial deference. There is no dispute about the sincerity of Hosanna-Tabor's understanding that Perich held a ministerial position. "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began." Pet. App. 52a; see also Pet. Br. 6. Perich knew that Hosanna-Tabor understood a "called" teacher to be a ministerial position, in part because of the requirement that she complete eight college-level theology courses and an oral examination by committee before being deemed eligible to serve as a "called" teacher. Pet. App. 3a, 33a; Perich Dep. 18-19. In fact, after her commissioning, Perich was recognized as a "Minister of Religion, Commissioned," Perich Dep. at 22-11, 22-14; Pet. App. 3a, 33a, and she claimed special tax treatment available for ministerial housing, Pet. App. 4a; Pet. Br. 6. Hosanna-Tabor also held itself out to the community and to Perich as a religious school that "integrate[d] faith into all subjects." Pet. App. 5a, 35a. And there is no dispute that Hosanna-Tabor is not a commercial enterprise.

Deferring to the church's distinction between lay and "called" teachers provides elegant and clear resolution to the issue faced by the court below. Applying a mechanistic test, the court below grappled with the inherent difficulty distinguishing between the similarity of many of the roles of lay and "called" teachers. See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 781 (6th Cir. 2010) ("Given the undisputed evidence that all teachers at Hosanna-Tabor were assigned the same duties, a finding that Perich is a 'ministerial'

employee would compel the conclusion that all teachers at the school—called, contract, Lutheran, and non-Lutheran—are similarly excluded”). By focusing on the sincerity with which Hosanna-Tabor understands, treats, and holds out to the world its “called” teachers, the approach outlined above highlights the difference between lay and “called” teachers that is most important to the religion and most relevant for the ministerial exception—that Perich was a commissioned minister whose role had sincere religious significance to that religious organization. Grounding the ministerial exception in religious organizations’ sincere self-determinations of who acts as ministers thus avoids the entanglement and confusion of the circuit court’s mechanical test.

On this record, a proper application of the ministerial exception requires deferring to Hosanna-Tabor’s sincere self-understanding that Perich occupied a ministerial position for which employment decisions are not subject to judicial review.

CONCLUSION

For these reasons, and those stated by petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

JEFFREY A. BERMAN
SEYFARTH SHAW LLP
2029 Century Park East
Suite 3500
Los Angeles, CA 90067-
3021
Phone (310) 201-1541
Fax (310) 282-9686

CARTER G. PHILLIPS
EDWARD R. MCNICHOLAS*
DAVID S. PETRON
GORDON D. TODD
BRYSON L. BACHMAN
ELISA K. JILLSON
ADAM C. DOVERSPIKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8010
emcnicholas@sidley.com

Counsel for Amici Curiae

June 20, 2011

* Counsel Of Record

APPENDIX

Adventist Health System / West is a not-for-profit religious corporation, which operates healthcare facilities throughout California, Hawaii, Oregon, and Washington. The stated mission of Adventist Health is to share God's love by providing physical, mental and spiritual healing as part of the healthcare heritage of the Seventh-day Adventist Church. The system includes 17 hospitals with more than 2,500 beds, approximately 18,600 employees, numerous clinics and outpatient facilities, the largest system of rural health clinics in California with additional sites in Oregon and Washington, 14 home care agencies and four joint-venture retirement centers. As a faith-based, non-profit organization, Adventist Health is impacted by the scope of the ministerial exception.

The American Islamic Congress ("AIC") is a civil rights organization promoting tolerance and the exchange of ideas among Muslims and between other peoples. AIC combats negative perceptions of Muslims by advocating responsible leadership, dialogue, and interfaith understanding. As Muslim-Americans, thriving amidst America's open multicultural society and civil liberties, AIC promotes these same values for the global Muslim community. AIC advocates unequivocally for women's equality, free expression, and nonviolence—making no apologies for terrorism, which primarily claims Muslim lives. AIC joins this brief in support of the universal principles of freedom of religion and freedom of expression.

Church Communities International is an international communal movement of families and singles who seek to put into action Christ's command to love God and neighbor. Like the first Christians

described in Acts 2 and 4, members are called to a way of life in which all are of one heart and soul, no one possesses anything, and everything is shared in common. Most members live in rural communities of 200-300 people that function as small villages. After a discernment period, members take permanent vows of poverty and as part of the living proclamation of their faith, contribute to the upkeep of the community through daily work. No one is paid for their work as each community shares all property, and working together is an expression of the members' commitment to serve Jesus Christ and one another. For members, prayer is indivisible from work, work indivisible from prayer. Church Communities International joins the brief to express its concern that the ministerial exception should apply to all members of a religious order or church community, such as theirs, where there is no valid distinction between clergy and laity.

The Church State Council is the oldest public policy organization serving a southwest region devoted exclusively to issues of liberty of conscience and religion and the separation of church and state. The Council joins this brief to urge vigorous protection for the rights of religious organizations to determine who is a minister and therefore a representative of the faith.

The General Council on Finance and Administration of The United Methodist Church, Inc. ("GCFA") is an Illinois corporation having its primary place of business in Nashville, Tennessee. GCFA is the financial and administrative arm of The United Methodist Church. GCFA is also charged with protecting the legal interests and rights of The United Methodist Church. The United Methodist Church is a religious denomination with

approximately twelve million members worldwide. Through its various agencies, it performs mission work in over 150 countries. The United Methodist Church is one of the largest religious denominations in the United States. It has approximately 33,000 local churches and nearly eight million members in the United States.

The General Synod of the Reformed Church in America is the highest assembly and judicatory in the Reformed Church in America. The Reformed Church in America traces its history in North America to 1628, and as a result is the oldest protestant denomination in North America with a continuous history. Today, the Reformed Church in America includes approximately 300,000 people of many cultures across the North American continent. There are approximately 950 churches in the United States and Canada. These churches are assembled into 45 regional units (each called a classis), and the 45 classes are assembled into 8 regional units (each called a regional synod). The Book of Church Order of the Reformed Church in America provides that the General Synod exercises “a general superintendence over the interests and concerns of the whole church” and “an appellate supervisory power over the acts, proceedings, and decisions of the lower assemblies.” The ability of the General Synod to bind or speak on behalf of the lower assemblies or judicatories is limited. Nevertheless, the Book of Church Order specifically grants to the General Synod the exclusive authority to determine denominational policy, and also designates the General Synod as the final judicatory for all judicial matters that are filed at the classis or regional synod levels. Between annual meetings of the General Synod the affairs of the Reformed Church in America are administered by the

General Synod's executive committee, called the General Synod Council of the Reformed Church in America ("GSC"). The GSC, as well as the regional synods, classes, and local churches in the Reformed Church in America, employ numerous individuals to carry out their work and witness. Some such employees are ordained to a particular ecclesiastical office; others are not. All, however, play a significant role in promoting the mission and vision of the church, and the work of each individual is often difficult to categorize as religious or secular. Accordingly, the issues addressed in this brief are of great interest and importance to the General Synod.

Loma Linda University is a Seventh-day Adventist educational health-sciences institution with more than 4,000 students located in Southern California. Eight schools comprise the University organization. More than 55 programs are offered by the schools of Allied Health Professions, Dentistry, Medicine, Nursing, Pharmacy, Public Health, Religion and Science and Technology. Curricula offered range from certificates of completion and associate in science degrees to doctor of philosophy and professional doctoral degrees. Loma Linda has an interest in ensuring religious liberty is not hampered by a narrow ministerial exception.

The Mandaean Society of America is a religious organization with more than five thousand members in the United States. The Mandaeans have recently chosen the United States as their new homeland after facing persecution in their original homelands in Iraq and Iran. The Mandaean religion is an ancient monotheistic belief system. The ethics of Mandaeans apply to all—man or woman, priest or layman—and reinforce the ideas of monogamy, family, pacifism, dietary laws, and alms-giving. Their rituals are

conducted in the Mandaean language; they have no symbols, idols, or images to which they pray. The Mandaeans have endured severe discrimination throughout their history and desire to see a robust protection for the freedom of religion, and particularly for the freedoms of religious minorities whose ethics and practices may not be well understood.

The Moravian Church in America consists of a Northern and Southern Province, two of the eighteen self-governing, semi-autonomous provinces which make up the world-wide Moravian *Unitas Fratrum*. The church's northern European origins actually predate the Protestant Reformation. The Moravian Church is broadly evangelical, ecumenical, liturgical, and "confederal" in form of government. Although not a true confessional church, the Moravian Church accepts the traditional creeds of the Christian Church and, in its practice, adheres to its motto: "In essentials, unity; in nonessentials, liberty; and in all things, love." Ecumenism is a particular emphasis of the church. In addition to membership in the World and National Councils of Churches and numerous other ecumenical organizations, both Provinces enjoy a relationship of full communion with the Episcopal Church and the Evangelical Lutheran Church in America. The promotion of social justice is another hallmark of the Church and Moravians cooperate with other churches and faith-based organizations in the support of mission, public charities and other Christian enterprises. The Moravian Church, Northern Province and the Moravian Church, Southern Province join in this amicus brief to help ensure that all religions enjoy the legal freedom to choose those who minister in the name of that faith.