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 BISHOPACCOUNTABILITY.ORG, THE CARDOZO ADVOCATES FOR KIDS, CHILD PROTECTION PROJECT, THE FOUNDATION TO ABOLISH CHILD SEX ABUSE, JEWISH BOARD OF ADVOCATES FOR CHILDREN, INC., KIDSAFE FOUNDATION, THE NATIONAL BLACK CHURCH INITIATIVE, THE NATIONAL CENTER FOR VICTIMS OF CRIME, SURVIVORS FOR JUSTICE, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

BishopAccountability.org is a 501(c)(3) corporation that maintains a library in Waltham, MA and a large online archive of documents, reports, and newspaper articles about the sexual abuse of children by persons employed by religious institutions, and the mismanagement by religious leaders of abuse allegations. Our collection of newspaper articles covers sexual abuse in all religions and denominations worldwide. Our document and report collections focus on sexual abuse and mismanagement by employees of Roman Catholic dioceses in the United States and Ireland, but the institutional problems revealed by those documents and reports are common to all religious organizations and to corporations and institutions generally. We also maintain a database of Catholic priests, brothers, nuns, deacons, and seminarians who have been accused of abuse. Our holdings and

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *Amici*'s intention to file this brief. On May 3, 2011, Counsel for the Petitioner filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On May 6, 2011, Counsel for the Respondent, Cheryl Perich, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On June 17, 2011, the Solicitor General, on behalf of the EEOC, filed blanket consent, consenting to the filing of *amicus* briefs, in support of either party or of neither party. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

database are often used by law enforcement personnel in their efforts to protect children from future abuse. Our collection offers ample documentation of the barriers that victims of child sexual abuse encounter in coming forward, the beneficial effects of the California window legislation, and the growing awareness in recent years that institutions have covered up the sexual abuse of children by their personnel and thereby created risk for children in the future.

The Cardozo Advocates for Kids ("CAKids") was founded in 2008 at the Benjamin N. Cardozo School of Law in New York City. The student-led organization aims to facilitate social, political and institutional change in order to bring justice for victims of childhood sexual abuse. Through lobbying representatives, hosting academic events, fostering relations between scholars and the community, and initiating grassroots action, the organization hopes to bring about awareness and results. CAKids also maintains a website, sol-reform.com, which provides information and resources about reforming state statutes of limitations for victims of sexual abuse. CAKids has an interest in this case due to the organization's efforts in pursuing justice and concrete policy changes for the benefit of abuse victims, including both children and vulnerable adults.

Child Protection Project ("CPP") is a 501(c)(3) that recognizes that many heinous abuses occur when religious organizations seek and hide behind specific religious exemptions under the law. Child sexual abuse victims often have no recourse to justice because of

arcane statute of limitations laws. We support the removal of the statute of limitations for the crime of child sexual abuse as good public policy. Religions must be good corporate citizens and held to the same standard as secular organizations when dealing with children in their care. These exemptions allow religious organizations to hire people to work with children without performing character background checks routinely required of secular groups and with disastrous results for the children and families in their care. Often religious organizations will provide faith healing only, allowing children and others to suffer or die from preventable illnesses. CPP's interest in this case is to ensure that the door is not opened for the facilitation of sexual abuse in religious organizations.

The Foundation to Abolish Child Sex Abuse ("FACSA") has a mission to influence state and federal governments, courts, the criminal justice system and the media to (1) protect children from sexual abuse; (2) hold those who sexually abuse children accountable; (3) hold institutions which condone and enable the sexual abuse of children accountable; and (4) help child sex abuse victims find justice. Its interests in this case are directly correlated with its mission.

Jewish Board of Advocates for Children, Inc. ("JBAC") is a New York nonprofit corporation whose primary goal is the protection of children from abuse – sexual, physical, emotional – particularly in religious communities, including schools and houses of worship. JBAC advocates before legislatures and courts, seeking new laws and judicial decisions that will

provide religious community children with the highest legal protection possible. JBAC members are primarily drawn from the American Orthodox Jewish community, and include rabbis, attorneys, physicians, mental health therapists, and other community leaders who are greatly anguished at the clergy sex abuse scandal in our Nation. JBAC believes religious institutions should be held legally accountable for their conduct, consistent with core American and Jewish values. The Declaration of Independence declares, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . " The Torah, or Bible, declares at Genesis 1:26-27, that all people are created in the image of God. Granting special status, rights, or immunities to religious institutions, by expansively exempting them from statutory or tort law liability, would be antithetical to these core, shared values.

KidSafe Foundation is a Florida-based 501(c)(3) nonprofit started by two Mental Health Professionals, Educators, Authors and Moms – Sally Berenzweig, MEd, MA, and Cherie Benjoseph, LCSW, who believe that every child deserves the right to be safe. Our mission is to provide prevention education to children, parents, teachers and counselors to decrease child abuse. Over 18,000 children have been through our Prevention Education Programs and thousands of adults have been to our Seminars and Workshops.

As Mental Health Professionals and Educators, we know that 1 in 3 girls and 1 in 6 boys will be

sexually exploited before the age of 18 – those statistics are only the ones who TELL, however MOST children do not. Children don't tell because they feel scared, shame, guilt, embarrassment and many other feelings that only once they become an adult or have received help are they able to report the abuse they suffered. It is a well-known fact that child molesters do not "just" molest one time, it is an ongoing crime that affects the survivors for a lifetime, and as such they deserve to hold these criminals accountable for a lifetime. For that reason and so many more we support the removal of the statute of limitations for the horrific crime of child sexual abuse, and strongly support this *Amicus* Brief on behalf of all the survivors who deserve justice.

The National Black Church Initiative ("NBCI") is a coalition of 34,000 African-American and Latino churches working to eradicate racial disparities in health care, education, housing, and the environment. In addition to our member churches, NBCI is a faith-based health organization dedicated to providing critical wellness information to all of its members. NBCI also runs the Baby Fund in response to the rising tide of abuse, neglect, and death among infants and young children in our society. The Fund will be both a source of assistance and advocacy to meet the needs of children who have little or no voice of their own. The Church's interest is in the moral obligation to protect children. The philosophical and theological underpinnings of the Fund can be understood by all faith communities noting the supreme

value placed upon children in scripture when God said, "Suffer the little children to come unto me, and forbid them not: for such is the Kingdom of God." The NBCI's interest in this case is to further the protection of children.

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center – among other efforts – advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case and this brief because of its commitment to victims of sexual assault and child abuse.

Survivors for Justice ("SFJ"), is a not-for profit organization founded by advocates from within the Strictly Orthodox Jewish community dedicated to providing emotional support and legal assistance to victims of sexual abuse. One of our main goals is to ensure that within our insular community abuse is dealt with in a manner that complies with secular law.

Indeed, while Jewish law (*halacha*) mandates compliance with civil law under the principle that the "law of the land is binding," (*dina demalchusa dina*,) in practice such compliance is discouraged by the

religious leadership within our community. Certain rabbis invoke ancient cultural taboos against "informing" on a fellow Jew to the secular authorities – and other misrepresentations of Jewish doctrine – to ensure that abuse is dealt with "internally," with disastrous consequences for society. Those rare community members who do report can expect to face intimidation, threats and ostracism.

Many of SFJ's clients reported their abuse to rabbis and administrators of religious schools and institutions only to be summoned to religious courts (*bet dins*) ill equipped to conduct a meaningful investigation and often compromised by myriad conflicts of interest and no real power to enforce their "verdicts." These proceedings have invariably resulted in the protection of the abuser and no recourse for the victim.

Government funded Orthodox Jewish organizations such as Agudath Israel of America and Ohel Children's Home and Family Services openly defy civil and criminal statutes with impunity. Recently, Agudath Israel of America sponsored a CLE conference where participants were advised to defy New York State law obligating them to report sexual abuse to the authorities. Instead they were directed to report sexual abuse to their rabbis. These are but a few glaring examples of the danger to society inherent in allowing religious doctrine to trump civil law.

SFJ's interest in this case is that it stands for the belief that only adjudication by the civil justice system, without interference or involvement of religion,

can protect society from the abuse of power that allows predators to thrive and operate freely within our schools and religious institutions.

The Survivors Network of those Abused by Priests ("SNAP") is a not-for-profit agency and is the oldest and largest self-help support group run by and for survivors. The mission of the organization is to heal the wounded and protect the vulnerable. We provide peer counseling in person, on the telephone, by mail. SNAP also hosts conferences and gatherings and provides education and advocacy about clergy sexual abuse. SNAP works to reform secular and church laws and structures to better safeguard children. Founded in 1988, the organization now has groups meeting in 65 cities in the United States with over 10,000 members.

SNAP has an interest in this case as many perpetrators of its members still pose a risk to children and the ruling in this case may impact the ability to expose those perpetrators.

SUMMARY OF ARGUMENT

The Petitioner asks this Court to interpret the First Amendment to mandate immunity for religious organizations from the laws that prohibit discrimination, and retaliation, in the work place. The Respondents rightly respond that Petitioner's broad claim for immunity from the law is misplaced, and no demand for absolute immunity is supported by this Court's precedents. *Amici curiae*, who share a mission to protect

children and vulnerable adults from sexual abuse and assault, are filing this brief for the purpose of making one point: whatever ruling this Court reaches in this case, it should not affect cases involving harm by religious organizations and their employees to third parties.

Any First Amendment questions in this case solely involve a consenting employment relationship between adults, where it is assumed that the ministerial employee voluntarily embraces the religious organization's beliefs and limitations, even if they might be adverse to the religious employee's interests. The Petitioner's implicit theory is that it is, therefore, fair and appropriate to permit the religious employer to engage in otherwise illegal discrimination. Brief for the Petitioner at 14, 18, 32, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, No. 10-553 (U.S. June 2011) [hereinafter "Petr. Br."]. The Petitioner further appears to argue that the First Amendment can and should effectuate religious organizations' internal agreements to avoid and ignore otherwise controlling civil law. Petr. Br. at 2-3, 11, 15, 24, 29, 49, 56-57.

This *amicus* brief is submitted for the purpose of bringing to the Court's attention a doctrinal arena that involves religious institutions and employees, but should not be affected by the decision in this case: sexual misconduct by clergy. Some religious organizations have argued that there ought to be a First Amendment "privilege" that cloaks employment decisions and relationships in cases involving clergy sex

abuse, which would foreclose discovery and litigation in cases brought by child sex abuse victims. Sexual misconduct by clergy and religious employees spans all religious denominations, as the variety of *amici curiae* on this brief attest in their Statements of Interest.

The sexual misconduct cases implicate public interests of the highest order that demand religious organizations be held accountable to tort and criminal law. The protection of children from sexual misconduct is a "government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *see also Brown v. Entm't Merchs. Ass'n*, 564 U.S. ___, ___, 131 S.Ct. 2729, 2736 (2011); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Ginsberg v. New York*, 390 U.S. 629, 641 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

An overly broad interpretation of the so-called "ministerial exception" conceivably could imply that religious organizations' dealings with their clergy are immune from the civil law even beyond cases that involve the employee suing the employer for discrimination. Such an interpretation would put children and vulnerable adults in every religious organization at risk.

ARGUMENT

The First Amendment's Religion Clauses are not a refuge for criminal or tortious behavior that harms

children or vulnerable adults. The criminal and tort laws governing sexual abuse and misconduct are neutral and generally applicable.

Under the Free Exercise Clause, this Court has held religious entities and believers accountable under numerous neutral, generally applicable laws, including those governing drugs and unemployment compensation, *Employment Div. v. Smith*, 494 U.S. 872 (1990); employer Social Security deductions, *United States v. Lee*, 455 U.S. 252 (1982); sales taxes, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990); polygamy, *Reynolds v. United States*, 98 U.S. 145 (1879); prison regulation, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); military conscription, *Gillette v. United States*, 401 U.S. 437 (1971); Sunday closing laws, *Braunfeld v. Brown*, 366 U.S. 599 (1961); social security identification requirements, *Bowen v. Roy*, 476 U.S. 693 (1986), and the federal oversight of federal lands, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). "Neutral principles of law" also can be applied to religious entities without violating the Establishment Clause. *Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Dayton Christian Schs., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932 (6th Cir. 1985), *rev'd*, 477 U.S. 619 (1986).

This Court has developed its Religion Clause doctrine under a horizon of "ordered liberty," which prohibits targeting or persecution of religion and, at the same time, the imposition of anarchy on the United States.

> The First Amendment's guarantee that 'Congress shall make no law . . . prohibiting the free exercise' of religion holds an important place in our scheme of ordered liberty, but the Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional.

Bowen v. Roy, 476 U.S. 693, 701-02 (1986) (citation omitted). *See also Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."). The principle of "ordered liberty" runs through this Court's constitutional doctrine.[2]

The Petitioner is asking this Court to exempt religious organizations from the anti-discrimination laws governing employers on a theory that the Religion

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[2] *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S. Ct. 3020, 3032, 3034, 3034 n.11, 3036, 3042, 3047 (2010); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758, 769 (1985); *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

Clauses demand it. Even the most extreme interpretation of that theory should not affect cases involving any other law, and particularly those laws that apply in circumstances involving sexual misconduct by employees of religious organizations.

I. The First Amendment Is No Defense to Criminal or Civil Liability for Sexual Misconduct by Employees

This Court should reject the notion that the First Amendment forces courts to wear blinders when it comes to the illegal behavior of religious organizations simply because they are religious. The strongest version of the ministerial exception theory treats the issue as "jurisdictional," and forbids courts from even asking whether the discriminatory employment decision is motivated by religious belief. *See, e.g., Petruska v. Gannon University*, 462 F.3d 294, 302-03 (3d Cir. 2006). Such a doctrine violates the Establishment Clause, because it creates a special privilege based on religious status rather than religious belief. It is the equivalent of permitting a religious organization that does not use peyote for religious purposes to use the drug in violation of the law. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (citing approvingly exemptions for religious peyote use); *see Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

In an employment discrimination case, at the very least, the adverse employment decision should

have to be motivated by a sincere religious belief. This principle was enunciated by the late Judge Edward R. Becker in the original *Petruska* decision, which was withdrawn and reversed by a Third Circuit panel because it was not filed before his death. *Petruska v. Gannon University*, 448 F.3d 615 (3d Cir. 2006), *vacated by Petruska v. Gannon University*, 2006 U.S. App. LEXIS 15088 (3d Cir. June 20, 2006). *See also Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840, 858 (N.J. 2002). This distinction alone could distinguish many clergy sexual misconduct cases, because only rarely does a religious organization in the United States sanction or require child sex abuse.

Mainstream religious organizations have not argued that they have a religious belief requiring child sex abuse or the cover up of child sex abuse. But they have argued that their religious status should be a barrier to discovery or civil and criminal liability in child sex abuse cases. These arguments have been unsuccessful with the vast majority of courts applying this Court's precedents.

The highest courts of the states have held that religious organizations can and should be held responsible for sexual misconduct by their clergy, and that the First Amendment is not a barrier to such liability. *See Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp*., 196 F.3d 409, 431-32 (2d Cir. 1999); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir.

1998), *cert. denied, Baucum v. Sanders*, 525 U.S. 868 (1998); *Dausch v. Rykse*, 52 F.3d 1425, 1428 (7th Cir. 1994); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 774 (M.D. Pa. 2007); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194-95 (D. Colo. 2006); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1007 (D. Kan. 2004); *Ehrens v. Lutheran Church-Missouri Synod*, 269 F. Supp. 2d 328, 332-33 (S.D.N.Y. 2003); *Smith v. Raleigh Dist. of the North Carolina Conf. of the United Methodist Church*, 63 F. Supp. 2d 694, 705 (E.D.N.C. 1999); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1065 n.7 (N.D. Iowa 1999); *Smith v. O'Connell*, 986 F. Supp. 73, 77, 81-82 (D.R.I. 1997); *Rashedi v. General Bd. of Church of the Nazarene*, 54 P.3d 349, 354 (Ariz. Ct. App. 2002), *rev. denied*, No. CV-03-0049-PR, 2003 Ariz. LEXIS 100 (Ariz. 2003); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319-21 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *Carnesi v. Ferry Pass United Methodist Church*, 826 So. 2d 954, 955 (Fla. 2002), *cert. denied*, 537 U.S. 1190 (2003); *Malicki v. Doe*, 814 So. 2d 347, 351 n.2, 357-58, 360-62 (Fla. 2002); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. 2005); *Petrell v. Shaw*, 902 N.E.2d 401, 406 (Mass. 2009); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002); *Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1242-43 (Miss. 2005); *McKelvey v. Pierce*, 800 A.2d 840, 850, 857-58 (N.J. 2002); *F.G. v. MacDonell*, 696 A.2d 697, 701 (N.J. 1997); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237 (Ohio 1988); *Turner v. Roman Catholic Diocese of Burlington*, 987 A.2d 960, 972-73 (Vt. 2009); *C.J.C.*

v. Corporation of the Catholic Bishop, 985 P.2d 262, 277 (Wash. 1999). *See also* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 Wm. & Mary Bill Rts. J. 845, 850 (2003).

Only Missouri continues to embrace the theory that the First Amendment immunizes religious organizations from liability in child sex abuse cases. *See, e.g., Perry v. Johnston*, 641 F.3d 953 (8th Cir. 2011) (following *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997)).

This Court's cases support the many state high court decisions rejecting the First Amendment as a defense to enabling child sex abuse, but there is also an independent historical ground to exclude all cases of sexual misconduct in religious organizations from the reach of First Amendment doctrine. The history of religious liberty guarantees in the United States supports a categorical exclusion of acts of licentiousness by clergy. According to historian John Philip Reid, those in the eighteenth century "'had as great a duty to oppose licentiousness as to defend liberty.'" Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 Wm. & Mary Bill Rts. J. 953, 971 (2010); *see also id*. at 956 ("certain actions were never intended to receive protection under religious liberty guarantees. Among the liberties that were never intended to be protected, clearly, were polygamy and sexual abuse. They were consciously excluded from free exercise protection.") (internal citations omitted).

II. The First Amendment Does Not Stand for "Autonomy" from the Law

Some courts have misnamed the theory at issue in this case as a "church autonomy doctrine." *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002). In the same vein, some religious organizations have attempted to avoid liability for sexual abuse, assault, and harassment by their clergy by arguing that their decisions regarding clergy – even when clergy engage in inappropriate sexual behavior – are protected by what they have styled a "church autonomy doctrine."[3] This Court has never employed "autonomy" to describe its Religion Clause doctrine. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. Rev. 1099, 1112-13 (2004).

In fact, "autonomy" is at odds with this Court's longstanding doctrine of "ordered liberty." The lower courts have routinely rejected the so-called autonomy defense in clergy sexual misconduct cases. The United

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[3] *See* Brief *Amicus Curiae* of the Church of Jesus Christ of Latter-Day Saints, *Ramani v. Segelstein*, No. 49341, 14-22 (Nev. Oct. 5, 2009), *available at* http://www.scribd.com/doc/40342262/Amicus-Brief-of-Mormon-Church-in-Ramani-v-Segelstein. The same religious organization is arguing for "church autonomy" here. Brief of the U.S. Conf. of Catholic Bishops et al. as *Amici Curiae* in Support of Petitioner at 6-15, 20, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, No. 10-553 (U.S. June 20, 2011), 2011 WL 2470845.

States Court of Appeals for the Second Circuit explained:

> Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract [or, we would add, their liability arising from the commission of a tort], are equally under the protection of the law, and the actions of their members subject to its restraints.

Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431-32 (2d Cir. 1999). *See also Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 947-48 (9th Cir. 1999); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337-38 (5th Cir. 1998), *cert. denied, Baucum v. Sanders*, 525 U.S. 868 (1998); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 772 (M.D. Pa. 2007); *Doe v. Archdiocese of Denver*, 413 F. Supp. 2d 1187, 1194 (D. Colo. 2006); *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1005 (D. Kan. 2004); *Smith v. Raleigh Dist. of the North Carolina Conf. of the United Methodist Church*, 63 F. Supp. 2d 694, 705-06 (E.D.N.C. 1999); *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1078 (N.D. Iowa 1999); *Smith v. O'Connell*, 986 F. Supp. 73, 77 (D. R.I. 1997); *Rashedi v. General Bd. of Church of the Nazarene*, 54 P.3d 349, 354 (Ariz. Ct. App. 2002); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319-20 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *Carnesi v. Ferry Pass United Methodist Church*, 826 So. 2d 954 (Fla. 2002), *cert. denied*, 537 U.S. 1190 (2003); *Malicki v. Doe*, 814 So. 2d 347, 351 n.2, 360-62 (Fla. 2002); *Fortin v. Roman Catholic Bishop of*

Portland, 871 A.2d 1208, 1232 (Me. 2005); *Petrell v. Shaw*, 902 N.E.2d 401, 406 (Mass. 2009); *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426, 436 (Minn. 2002); *Roman Catholic Diocese v. Morrison*, 905 So. 2d 1213, 1236-38 (Miss. 2005); *F.G. v. MacDonell*, 696 A.2d 697, 701 (N.J. 1997); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237 (Ohio 1988); *Turner v. Roman Catholic Diocese of Burlington*, 987 A.2d 960, 975-76 (Vt. 2009); *C.J.C. v. Corporation of the Catholic Bishop*, 985 P.2d 262, 277 (Wash. 1999).

III. The Claim to Immunity or Autonomy in This Case Is Particularly Extreme

The Petitioner makes an extraordinarily broad claim in this case: "Like many Christian denominations, the Synod has long taught that Christians should resolve disputes within the church rather than sue each other in the civil courts." Petr. Br. at 7. The Petitioner seems to be taking the position that the Church and School intend to exist separate from the civil law. This is not a position taken by "many Christian denominations," which typically stand by the civil law and justice in the courts.

Nor is it a tenable position under this Court's doctrine, which has not recognized a First Amendment right to avoid the obligations of civil law. In fact, this Court's doctrine has reached the opposite conclusion. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990); *Gillette v. United States*, 401 U.S. 437 (1971); *Reynolds v. United States*, 98 U.S. 145

(1879). On the Petitioner's theory, the largest segment of believers in the United States mutually agree to avoid civil law and the judicial system, and the First Amendment should protect their intent to avoid legal obligations. This is dangerous territory for children and the vulnerable generally.

In the context of child sex abuse, a number of religious organizations have taken internal positions that induce clergy and members to keep child sex abuse secret. *See* Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 Md. L. Rev. 115, 119-26 (2009); Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 Wm. & Mary Bill Rts. J. at 964-65. Those positions put children in a wide variety of religious settings at extreme risk as many of the *amici curiae* explain in their Statements of Interest.

No interpretation of the First Amendment in an employer-employee relationship should enable these internal systems to trump child abuse reporting requirements, or criminal or civil liability for clergy sex abuse.[4] *Amici*, therefore, ask this Court to distinguish

[4] Unfortunately, at least one court explicitly has extended the reasoning of the ministerial exception to the child sex abuse context. *See, e.g., Weishuhn v. Catholic Diocese of Lansing*, 756 N.W. 2d 483 (Mich. Ct. App. 2008), *petition for cert. filed*, 79 U.S.L.W. 3370 (Mich. Dec. 6, 2010) (No. 10-760). *Weishuhn* is a case so far removed from reasonable First Amendment

(Continued on following page)

cases involving sexual misconduct by religious employees from a case like this one, which involves solely the question of the employment relationship between a religious employer and an employee that does not involve harm to third parties. This is a position embraced by a broad range of church/state scholars. *See* Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. Rev. 1031, 1040 (2003); Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 29 Cardozo L. Rev. 225, 237-38 (2007); Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 271-72 (2009).

If this Court embraces some version of the ministerial exception, the only laws that should be diminished in any way are those that bar discrimination in the context of an employment relationship. There is no justification to extend the reasoning of any version of the ministerial exception to circumstances involving victims of clergy or religious organizations, or involving any other law, whether that law governs child sex abuse, domestic abuse, divorce, child custody, or property ownership.

The vulnerable require protection from those who harm them whether the cause of the harm is religious

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interpretation that it should be summarily reversed, not held for decision pending a decision in this case.

or not. In every organization, the vulnerable need and deserve to be protected, and like all other organizations, religious organizations need to be made legally accountable when they inflict harm. Civil law is the best route to that end. When religious organizations can and do avoid the law, children especially suffer.[5]

CONCLUSION

Amici curiae BishopAccountability.org, The Cardozo Advocates for Kids, Child Protection Project, The Foundation to Abolish Child Sex Abuse, Jewish Board of Advocates for Children, Inc., KidSafe Foundation, The National Black Church Initiative, The National Center for Victims of Crime, Survivors for Justice, and SNAP respectfully ask this Court to ensure that the First Amendment is not capable of being used as a tool to endanger children in religious organizations

[5] *See* Joseph Berger, *Killing Rattles a Jewish Community's Long-Held Trust of Its Own*, N.Y. Times, July 14, 2011, *available at* http://www.nytimes.com/2011/07/15/nyregion/leiby-kletzkys-killing-rattles-jewish-communitys-trust.html?_r=1 ("In a spate of cases between October 2008 and October 2009 alone, Brooklyn prosecutors arrested 26 ultra-Orthodox men – rabbis, teachers and camp counselors among them – on sexual abuse charges. Many others have come forward to the Jewish news media and to social agencies. [The local Brooklyn assemblyman] said there was no evidence that sexual abuse or other deviance was any more widespread in the Hasidic community than in other ethnic groups, but what is different, they said, is that the Hasidic community has just begun to grapple with these problems and educate its members.").

by distinguishing cases involving clergy sexual misconduct from the employment relationship issues implicated in this case. *Amici* further request that the Court reject the Petitioner's argument for a capacious theory of unaccountability to the law so as to ensure that children are protected under a shared horizon of ordered liberty.

Respectfully submitted,

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