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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS BRIEF OF ANTITRUST PROFESSORS AND SCHOLARS IN SUPPORT OF RESPONDENTS

PROFESSOR BARAK D. RICHMAN
DUKE UNIVERSITY SCHOOL OF LAW
Science Drive & Towerview Road
Durham, NC 27708-0360
(919) 613-7244

PROFESSOR HARRY FIRST
Counsel of Record
NEW YORK UNIVERSITY SCHOOL OF LAW
40 Washington Square South
New York, NY 10012
(212) 998-6211
harry.first@nyu.edu

237359

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

I. STATEMENT OF INTEREST

The undersigned (collectively, the "*Amici*") are scholars who study, teach, write, or research antitrust law and policy. *Amici* have an interest in ensuring the proper application of the antitrust laws and in the maintenance of labor markets in accordance with the Sherman Act.

Amici have a particular interest in this matter because a broadly and loosely defined "ministerial exception" has the potential of allowing clergy to form horizontal agreements that would normally be condemned by the Sherman Act. A carefully crafted ministerial exception that does not encroach on the boundaries of the Sherman Act will not increase religious organizations' liability to employment-related suits from their employees, and *Amici* have no direct interest in the specific outcome of this case. However, certain professional associations of clergy organize their labor markets through restraints that, absent First Amendment protections, violate the Sherman Act. *Amici* argue that the ministerial exception was never designed to immunize cartel-like arrangements such as these. In fact, *Amici* further submit that a ministerial exception that conforms to the Sherman Act will protect the hiring interests of religious organizations and will therefore advance their constitutional freedom to hire the clergy of their choice.[1]

---

1. *Amici* are identified in Appendix A. None of the *Amici* has received any compensation related to this matter. The parties to this case have filed blanket letters consenting to the filing of this brief. The letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *Amici*, has contributed monetarily to the preparation or submission of this brief. *Amici's*

II. SUMMARY OF ARGUMENT

Some professional associations of clergy[2] have invoked the ministerial exception to claim immunity from the antitrust laws. In claiming immunity, these clergy feel entitled to construct cartel-like arrangements that, absent such immunity, would violate section 1 of the Sherman Act, 15 U.S.C. § 1 (2006).

The question presented in this case characterizes the ministerial exception as a bar to most "employment-related lawsuits brought against religious organizations by employees performing religious functions." Pet. Br. at *ii. Such a characterization leaves open the possibility that "religious organizations" could include

---

professional and academic associations are indicated only for purposes of identification and do not imply their representation of any views other than their own.

2. *Amici* use the term "professional associations of clergy" to describe unincorporated associations comprised of individual clergy members who are not employed by the association. This is consistent with the common definition of professional association, "A group of professionals organized for education, social activity, or lobbying, such as a bar association." BLACK'S LAW DICTIONARY 141 (9th ed. 2009) (alternate definition omitted). Two organizations that can be characterized as professional associations of clergy, for example, are the Rabbinical Assembly and the Ministers Council. The Rabbinical Assembly describes itself as "the international association of Conservative rabbis" that, inter alia, "serves the professional and personal needs of its membership." http://www.rabbinicalassembly.org/about-us. The Ministers Council describes itself as "an autonomous, professional, multi-cultural organization of ordained, commissioned and lay Christian leaders within the American Baptist Churches in the U.S.A." http://www.ministerscouncil.com/WhoWeAre/MissionStatement.aspx.

professional associations of clergy, in addition to churches, religious schools, or other employers of clergy, and that "employment-related lawsuits" could include Sherman Act challenges to cartel-like restraints imposed by professional associations of clergy that control an employment market, in addition to disputes between an employer and its employee. Accordingly, the doctrine's parameters would benefit from a limitation and clarification.

The ministerial exception arose from cases that protected hierarchical religious organizations (i.e. organizations with an "ecclesiastical head") from government intrusion into matters regarding their employment of clergy. This Court has never applied the ministerial exception to all matters of employment, such as employment rules established by professional associations and imposed upon independent congregations. The proper scope of the ministerial exception should extend only to hierarchical organizations, including employers of clergy, and not to professional associations of clergy. The doctrine is designed to insulate certain employer-employee clergy relationships from generally applicable laws. It is not designed to provide general antitrust (or other immunity) to a class of individuals and groups in all employment-related matters.

Limiting the ministerial exception to employers and hierarchies does not injure the Petitioner's case nor does it tilt the Court's calculus of the facts in the matter at hand, but it greatly influences the ability of independent houses of worship in congregational denominations to seek and hire the clergy of their choice. Because a congregation's selection of its religious leaders is so central to its religious mission, an overbroad ministerial exception would limit the

religious freedoms of independent institutions that seek to hire clergy, thereby undermining the very objective the doctrine is designed to advance and expanding the ministerial exception beyond its judicial intent and constitutional logic.

III. THE MINISTERIAL EXCEPTION DOES NOT PROTECT PROFESSIONAL ASSOCIATIONS

As Petitioner highlights, this Court has given constitutional protection against state interference with the "[f]reedom to select the clergy." Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952). Protecting this freedom, however, is not straightforward when the interests of an independent house of worship are in tension with a professional association of clergy. A broadly construed ministerial exception that prohibits "employment-related lawsuits brought against religious organizations by employees performing religious functions," Pet. Br. at *ii, would inadvertently block a legal challenge to a clergy-organized employment cartel. Such a grant of immunity would in fact undermine the freedom of some religious organizations to hire whom they want.

This conflict of religious freedoms arises in congregational denominations, which this Court has distinguished from hierarchical denominations. In some congregational denominations, professional associations of clergy have organized restraints on employment and have invoked the ministerial exception to assert immunity from the Sherman Act. But this Court has never extended the protections articulated in *Kedroff* to professional associations.

A. The Ministerial Exception Arose to Insulate Hierarchical Polities from Government Intrusion

When this Court ruled in *Kedroff* that the Constitution prohibits "[l]egislation that regulates … the appointment of clergy," *Kedroff* at 107-08, it emphasized the hierarchical nature of the defendant church. As a matter of church protocol, there was no doubt as to who in the Russian Orthodox Church appointed clergy and where authority for such hiring (and other) decisions lay. *Id.* at 115 ("This controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America."); *see also* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976) (ruling, in a dispute over the defrocking of a priest, that "the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of *hierarchical* polity") (emphasis supplied).

Because the hierarchical nature of the Russian Orthodox Church was instrumental in reaching the result in *Kedroff* (and because the hierarchical nature of the Serbian Orthodox Church was instrumental in reaching the result in *Milivojevich*), this Court was careful in *Kedroff* to rest its decisions on the century-old definition of "hierarchical churches" and to distinguish them from alternative religious structures. Invoking *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722-23 (1871), the *Kedroff* Court stated that "[h]ierarchical churches may be defined as those organized as a body with other churches having similar faith and doctrine with a

common ruling convocation or ecclesiastical head." *Id.* at 110. Hierarchical churches can be distinguished from a congregational polity, in which "a religious congregation … by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." Watson, 80 U.S. at 722; *see also* Milivojevich, 426 U.S. at 708-09; *M*aryland & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369 (1970) (Brennan, J., concurring). For congregational churches, decisions are made "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government," Watson, 80 U.S. at 724; *see also* Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872) (affirming the reinstatement of certain church trustees because, recognizing the congregational polity of the Baptist church, "the majority [of church members], if they adhere to the organization and to the doctrines, represent the church.").

The critical distinction between hierarchical and congregational churches is highlighted during the hiring of clergy. In hierarchical churches, hiring authority lies in an "ecclesiastical head," whereas in congregational churches, hiring authority lies in the majority of church members or their elected representatives.

B. The Ministerial Exception Protects Employers and Hierarchical Polities, Not Professional Associations

All of the cases in which this Court articulated the ministerial exception, and all the cases cited by Petitioner to articulate that doctrine, involved prohibiting government

interference in a hierarchical polity. *See* Milivojevich, 426 U.S. 696 (Serbian Orthodox Church); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960) (Russian Orthodox Church); Kedroff, 344 U.S. 94 (Russian Orthodox Church); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (Roman Catholic Church). They produced rulings in which this Court refused to interfere with or issue directives to an authority that makes hiring and employment decisions for clergy. These cases involved paradigmatic instances in which an "ecclesiastical head" possessed authority to make hiring decisions, but they would readily apply to officers in religious organizations—such as a principal of a religious school or a church president—that make equivalent employment decisions concerning clergy. These cases therefore protect other religious organizations that directly hire and employ clergy, such as religiously affiliated hospitals, universities, schools, and assorted houses of worship.[3]

Professional associations of clergy, however, do not resemble these hierarchical organizations and therefore do not fall under this Court's characterization of the ministerial exception. Individual members of these professional associations are employed by other organizations (usually houses of worship), and members affiliate with these associations by, among other things, paying dues and subscribing to a professional code of conduct. Their membership is comprised only of their individual clergy members and does not include houses

3. Petitioner, as an employer of ministers and teachers, readily falls into this category of organizations that fit into the case law. Therefore, applying the ministerial exception only to ecclesiastical heads and employing organizations does not affect Petitioner's treatment under the doctrine.

of worship or other employers of the clergy. While these professional associations often create self-governing rules that concern employment, they are not parties to the employer-employee relationship that the ministerial exception is designed to insulate from legislation.

IV. THIS COURT SHOULD NOT EXPAND THE MINISTERIAL EXCEPTION TO PROTECT PROFESSIONAL ASSOCIATIONS

This Court is well aware that professional associations have a history of violating the Sherman Act, defining codes of conduct—often under the guise of professional ethics—that this Court found to be anticompetitive and harmful to consumer welfare. *See, e.g.,* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (finding a pledge to withhold x-rays from insurers, organized by an association of dentists, to violate the Sherman Act); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) (finding a non-profit foundation of doctors to have orchestrated illegal price fixing agreements); Nat'l Soc'y of Prof. Engineers v. United States, 435 U.S. 679 (1978) (finding illegal a code of ethics among engineers that limited price competition); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (ruling that price schedules disseminated and enforced by a local bar association violated the Sherman Act).

Professional associations of clergy present some of the same dangers. Several have established rules governing the process in which their members seek and obtain employment that severely restrict the freedom of independent congregations to hire whom they desire. Specifically, certain associations have instituted policies that (1) require their members to seek employment only

through the association's placement office, (2) require congregations seeking to hire clergy to search for candidates only through that same office, prohibiting searches through the placement offices of alternative associations of clergy, (3) limit whom a congregation may interview, deeming some candidates to be inappropriate for certain positions in spite of a congregation's preference to the contrary, and (4) penalize congregations and clergy that transgress the rules, including threatening to expel offending clergy members and preventing their contact with hiring congregations. *See, e.g.,* Eliot Salo Schoenberg, *Aliyah*, The Rabbinical Assembly, Commission on Placement (2001) at Appendix A.

These restrictive policies resemble restraints that this Court has previously condemned.[4] The rules that bind fellow clergy members to a restrictive placement process (while punishing those who do not comply) and exclude rival organizations constitute horizontal collusion that denies consumer choice, limits output, and restricts price. The restrictive arrangements with independent congregations are vertical restraints that cement the association's

4. The First Amendment does not inoculate political, religious, or expressive organizations from Sherman Act scrutiny, and this Court has long permitted the Sherman Act to regulate conduct that is primarily commercial in nature, as distinct from spiritual or expressive conduct that enjoys First Amendment protection. See FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 426-28 (1990); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508-09 (1988); NAACP v. Claiborne Hardware, 458 U.S. 886, 914-15 (1982); Associated Press v. United States, 326 U.S. 1, 19-20 (1944). Lower courts have explicitly deployed this distinction in the religious liberty context. See, e.g.,Costello Pub. Co. v. Rotelle, 670 F.2d 1035, 1048-50 (D.C. Cir. 1981).

incumbent status. Together, the rules limit both the ability of clergy members to freely seek employment and the freedom of participating congregations (who hire those members as clergy) to search and pursue the clergy member whom congregational leaders believe best suits their spiritual needs. Congregations are unable to implement their own placement search or assert individual views on the appropriateness of candidates. Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808005.

At least one of these associations has rhetorically invoked the ministerial exception and related doctrines to claim immunity from Sherman Act scrutiny of its placement procedures, claiming that any violation of the Sherman Act is constitutionally insulated because the restraints involve the hiring of clergy. *See* Gilah Dror & Julie Schonfeld, *Statement About the Placement System*, RA News Alert (October 2010). This claim currently serves as a purported legal justification to continue conduct that harms both the economic welfare and the religious interests of individual congregations. The *Amici* request that this Court clarify the ministerial exception such that it is well understood to be limited to hierarchical organizations and equally well understood that cartel-like arrangements by professional associations of clergy are not constitutionally protected.

A. Exempting Professional Associations of Clergy from Antitrust Scrutiny Would Cause Economic Harm that the Sherman Act is Designed to Prevent

Like any anticompetitive horizontal restraint among competitors in a common labor market, restraints by clergy inflict precisely the harmful economic consequences that Congress intended to prevent when it enacted the Sherman Act.[5]

First, restraints on the placement process for clergy limit the consumer freedoms of hiring congregations. The exercise of consumer preferences in the marketplace, and the economic forces that those consumer freedoms exert, are paramount to sustaining a competitive market and thus are at the core of antitrust law. This Court has warned that "[a] restraint that has the effect of reducing the importance of consumer preference … is not consistent with this fundamental goal of antitrust law," *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984), and that "[a]bsent some countervailing procompetitive virtue … an agreement limiting consumer choice by impeding the

5. This Court has recognized that, like any other horizontal collaboration, agreements among professional organizations have the potential for both pro- and anticompetitive consequences. Thus, even while refusing to "fashion[] a broad exemption under the Rule of Reason for learned professions profession's code of ethics," this Court recognized that "[e]thical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason." Nat'l Soc'y of Prof. Engineers, 435 U.S. at 696. Many ethical and religious standards established by professional associations of clergy would likely survive scrutiny under the Rule of Reason, but the restraints on the employment market described herein are much more readily condemned under an abbreviated analysis.

'ordinary give and take of the market place,' cannot be sustained." *Indiana Fed'n of Dentists,* 476 U.S. at 459 (*quoting* Nat'l Soc'y of Prof. Engineers, 435 U.S. at 692). In short, the horizontal restrictions by these professional organizations of clergy "cripple the freedom" of independent congregations as market actors and "thereby restrain their ability to [transact] in accordance with their own judgment." Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959). Independent congregations deserve the Sherman Act's protection of their consumer freedoms and interests in hiring the clergy of their choosing—in fact, such consumer freedoms are precisely the interests the Sherman Act was designed to protect—and restrictions on these freedoms constitute textbook violations of the Sherman Act.

Second, restraints that limit competition in the labor market for clergy have precisely the economic results predicted by accepted economic theory. Output, as measured by the number of job applicants an independent congregation can interview and consider for its pulpit, is severely restricted, and such a restriction on competition would be expected to elevate the wages secured by those who obtain pulpits. Indeed, recent journalistic accounts indicate that members of associations that create these restraints are remunerated more handsomely than clergy in denominations without those restraints. Josh Nathan-Kazis, *On the Pulpit, Rabbis Earn More Than Christian Clergy*, The Jewish Forward (Sept. 24, 2010) (finding that rabbis receive significantly higher wages—often double or triple—than Catholic priests and Protestant ministers). By limiting output and competition among members and by restricting the ability of participating

congregations to search widely for ideal candidates, professional associations of clergy can inflate the wages of their own members.

B. Exempting Professional Associations of Clergy from Antitrust Scrutiny Would Restrict Religious Expression

Nothing is more central to a congregation's mission than finding the religious leader that best suits its spiritual needs. Petitioner put it best when, citing *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), it argued that "[t]he relationship between an organized church and its ministers is its lifeblood." Pet. for Cert. at 9. But an expansive ministerial exception that permits professional associations of clergy to implement otherwise-illegally restrictive placement policies is at cross purposes with this value. Petitioner continued that "allowing the state to interfere in that relationship—effectively allowing judges and juries to pick ministers—would produce 'the very opposite of that separation of church and State contemplated by the First Amendment.'" *Id.* (citing McClure, 460 F.2d at 560). Yet if a court is precluded from enforcing the antitrust laws, then it sanctions coercive arrangements that interfere with a congregation's ability to pursue its religious expression. This also is the very opposite of what is contemplated by the First Amendment.

Indeed, *McClure* and its antecedents, including the 1871 ruling in *Watson v. Jones*, have been held to enshrine "a spirit of freedom for religious organizations," 460 F.2d at 560, and this Court in *Kedroff* explicitly added to this general guarantee the "[f]reedom to select the

clergy." 344 U.S. at 116.[6] If the ministerial exception has been crafted, as these cases suggest, to ensure that religious organizations have unfettered freedom to select their own clergy, then a broadly crafted exception would, given the reality of cartel-like restraints within the professional clergy, undermine its own purpose if it protected professional associations. More generally, if the ministerial exception is intended to safeguard religious freedom for religious communities, then it should not enable arrangements that assert both economic and religious power over independent congregations.

Alternatively, limiting the ministerial exception to hierarchical polities with ecclesiastical heads and to employers with unambiguous hiring authority, and limiting the ministerial exception to employment matters that only concern those parties' employees, would fulfill the doctrine's purpose along all dimensions. It would protect the internal integrity of religious organizations yet would also ensure that the pursuits of one religious organization do not encroach upon the freedom of others.

---

6. These ideals predate *Watson* and lie at the core of the Framers' conceptions of religious freedom. In an oft-cited letter to the Reverend Samuel Miller, Thomas Jefferson wrote:

> Every religious society has a right to determine for itself the times for [its] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.

Letter to Rev. Samuel Miller (1808), in 10 THE WRITINGS OF THOMAS JEFFERSON 174-75 (Paul Leceister Ford ed. 1899).

In sum, the ministerial exception is designed to secure the integrity of employment relations in hierarchical religious organizations. But if it extends to professional associations, the doctrine instead would infringe upon the integrity of employing clergy. *Cf.* McClure, 460 F.2d at 558 ("The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.")

CONCLUSION

For the forgoing reasons, the *Amici* urge the Court to limit the parameters of the ministerial exception such that it does not immunize cartel-like behavior by professional associations that otherwise would violate the Sherman Act. Such a limitation would be consistent with this Court's precedents and would advance the doctrine's underlying purpose of protecting the integrity of religious expression. An expansive ministerial exception would undermine that purpose and would regrettably restrict the freedom of independent congregations to seek out and hire the clergy that best suit their religious needs.

Respectfully submitted,

Professor Barak D. Richman
Duke University School of Law
Science Drive &
Towerview Road
Durham, NC 27708-0360
(919) 613-7244

Professor Harry First
Counsel of Record
New York University
School of Law
40 Washington Square South
New York, NY 10012
(212) 998-6211
harry.first@nyu.edu

APPENDIX — LIST OF AMICI

Joseph P. Bauer
Professor of Law
Notre Dame Law School

Peter Carstensen
George H. Young-Bascom Professor of Law
University of Wisconsin Law School

Andrew Chin
Associate Professor of Law
University of North Carolina School of Law

Harry First
Charles L. Denison Professor of Law
New York University Law School

Eleanor M. Fox
Walter J. Derenberg Professor of Trade Regulation
New York University School of Law

Clark C. Havighurst
William Neal Reynolds Professor Emeritus of Law
Duke University School of Law

Jeffrey L Harrison
Stephen C. O'Connell Chair
University of Florida Frederic G. Levin College of Law

Herbert Hovenkamp
Ben V. & Dorothy Willie Professor
The University of Iowa College of Law

Robert H. Lande
Venable Professor of Law
University of Baltimore School of Law

Robert Litan
Vice President of Research and Policy
Ewing Marion Kauffman Foundation

Appendix

Alan J. Meese
Ball Professor of Law
and Cabell Research
Professor of Law
William and Mary
Law School

Roger G. Noll
Professor of Economics,
Emeritus
Stanford University

Barak Y. Orbach
Professor of Law
University of Arizona,
James E. Rogers College
of Law

Barak Richman
Professor of Law and
Business Administration
Duke University School
of Law

Christopher L. Sagers
Professor of Law
Cleveland State
University, Cleveland-
Marshall College of Law

D. Daniel Sokol
Associate Professor
of Law
University of Florida
Frederic G. Levin College
of Law

Abraham Wickelgren
Bernard J. Ward
Professor in Law
University of Texas at
Austin School of Law