IN THE SUPREME COURT OF THE STATE OF OREGON

HotChalk, Inc., *Plaintiff-Relator*, v. Lutheran Church-Missouri Synod, et al., *Defendants-Adverse Parties*.	Multnomah County Circuit Court Judge Eric. L. Dahlin No. 20CV15620 Supreme Court No. S069765

BRIEF *AMICUS CURIAE* OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS-ADVERSE PARTIES

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MAY 2023

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INTEREST OF AMICUS CURIAE

Amicus Curiae Jewish Coalition for Religious Liberty ("JCRL") is a nondenominational organization of Jewish communal and lay leaders seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square that recognizes the unique societal benefits of religious exercise, religious liberty, and religious diversity.

Every day Jews aim to live their lives in accordance with Jewish law. This requires constant evaluation—both within each individual and within each Jewish community. All of those decisions are aimed at the same end: living beautiful lives, "which transforms faith and love into reality." Norman Lamm, *The Illogic of Logical Conclusions*, in *Derashot Shedarashti: Sermons of Rabbi Norman Lamm* (Feb. 10, 1973), https://perma.cc/J962-C96B.

But the discussions necessary to continue this life will die in speakers' mouths if they fear that what they say may one day be shared outside their religious community and expose the speaker, and potentially the community, to liability. Religious minorities already face concerns with government surveillance and harassment. *See, e.g.*, *Hassan v. City of New York*, 804 F3d 277, 285-86 (3d Cir 2015) (describing police surveillance of Muslims, including collecting license

plates of mosque congregants, video surveillance of mosques, identification of worshipers, and monitoring of sermons). JCRL appears here to explain how the circuit court's order ensures these concerns don't spread to matters of religious decision-making in Oregon, and why this Court should affirm that correct determination.

INTRODUCTION

The circuit court used a straightforward application of Oregon Rule of Civil Procedure 36 C to shield the Lutheran Church–Missouri Synod's (the "Church") internal religious deliberations from discovery. The discretionary nature of that decision takes this case outside the "limited" scope of mandamus review. *Lindell v. Kalugin*, 353 Or 338, 357 (2013); *see also Jack Doe 1 v. Corp. of Presiding Bishop*, 352 Or 77, 86 (2012) (describing discretionary nature of protective orders). Thus—even without reaching the First Amendment issues implicated by HotChalk's discovery request—this mandamus petition should be denied.

But, turning to those First Amendment issues, there is no question that the circuit court got it right and that to rule otherwise would be to walk into a veritable constitutional thicket.

First, it would violate the church autonomy doctrine, including the ministerial exception, to order HotChalk's requested discovery, especially when everyone agrees the discovery implicates the Church's in-

ternal religious deliberations. Civil courts cannot force a religious organization to disclose confidential deliberations regarding internal church governance. This would not only cause Establishment Clause concerns by entangling a secular court in religious governance, doctrine, and discipline; it would violate the Church's free exercise right to organize its internal affairs free from government interference and influence.

Second, ordering HotChalk's requested discovery would also run afoul of United States Supreme Court precedent concerning categorical exemptions for secular conduct but not religious conduct. Oregon's rule permitting broad discovery is subject to categorical exemptions that protect a host of secular deliberations from public disclosure. By barring discovery into the deliberations of medical peer review bodies, legislative counsel communications, and pre-decisional state agency communications (among others), Oregon has made the determination that multiple categories of secular internal deliberations should be shielded from discovery. Why? These exemptions promote frank communication and free internal debate—and avoid the chill imposed by threat of public disclosure. Absent similar protections for their internal religious deliberations, religious groups like the Church risk disclosure of sensitive communications—a risk that certainly carries similar chilling concerns for religious exercise. By creating whole categories of *secular* deliberative communications shielded from discovery,

Oregon and its courts cannot simultaneously enforce a discovery request that would require disclosure of the Lutheran Church's internal *religious* deliberations without a "compelling reason" advanced via means least restrictive of the Church's religious exercise.

Third, ordering discovery into internal church deliberations would violate the Free Exercise Clause in another way: by giving circuit courts broad discretion to craft individualized exemptions from discovery for "good cause." Under multiple United States Supreme Court precedents, this grant of discretionary authority under ORCP 36 C(1) also triggers strict scrutiny if the Church's internal religious deliberations are not exempted, a scrutiny HotChalk does not even attempt to satisfy.

The Church has already produced many communications "relating to HotChalk" and "related to [its] finances." But it sought protection for the narrow category of communications going to the internal religious deliberations of the denomination, including its appointment of a religious leader, the President of Concordia University—Portland (the "University"). As the circuit court confirmed, the withheld communications constitute highly sensitive religious deliberations that are, at best, of questionable relevance to this litigation. Reversing the circuit court's determination would not only hurt the Lutheran Church; it would also create precedent harmful to religious minorities, including the Jewish community. Rabbis are frequently called upon

determine what Jewish law requires. These decisions often entail sensitive internal deliberations about religious doctrine and rabbinic law. This ability to so deliberate, free from government interference, is crucial to the Jewish community.

ARGUMENT

I. The Religion Clauses exclude religious groups' internal decision-making processes from certain forms of discovery.

The Free Exercise and Establishment Clauses of the United States Constitution exclude religious groups' internal decision-making processes from some forms of civil discovery, including the requests at issue in this appeal. That protection manifests in at least three separately sufficient ways relevant here: (1) the church autonomy doctrine; (2) the doctrine of nondiscrimination between comparable nonreligious and religious activities; and (3) the doctrine of equality of exemptions. As we explain below, the United States Supreme Court has elaborated on each of these doctrines in its own line of precedent. And as we further explain, each doctrine forbids the specific forms of discovery HotChalk seeks to obtain using the extraordinary remedy of mandamus.

A. The church autonomy doctrine protects both religious groups' freedom to deliberate over religious questions and the State from becoming entangled in religious affairs.

1. The church autonomy doctrine is rooted in both Religion Clauses.

Over the past 150 years, the United States Supreme Court has expounded what has come to be known as the "church autonomy doctrine," which applies to, among other things, questions of "ecclesiastical government." *Watson v. Jones*, 80 US (13 Wallace) 679, 680 (1872). The United States Constitution guarantees religious bodies "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 US 94, 116 (1952).

The United States Supreme Court has described this sphere of protection for church polity as "the general principle of church autonomy" or "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S Ct 2049, 2061 (2020). These questions of "internal government" include the control of church property, the appointment and authority of bishops, and the hiring and firing of church employees, among other issues. *See Watson*, 80 US (13 Wallace) at 679; *Kedroff*, 344 US 94; *Serbian E. Orthodox Diocese for U.S. & Can. v.*

Milivojevich, 426 US 696 (1976); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 US 171 (2012); *Our Lady*, 140 S Ct at 2066.

The church autonomy doctrine is rooted in both Religion Clauses. *See Our Lady*, 140 S Ct at 2060; *Hosanna-Tabor*, 565 US at 188-89. That is because the Free Exercise Clause protects religious bodies' ability to determine their own beliefs, constitute themselves freely, and carry out their religious missions, *Kedroff*, 344 US at 116, while the Establishment Clause protects the State from becoming entangled in religious affairs, *see Our Lady*, 140 S Ct at 2069; *cf. Carson v. Makin*, 142 S Ct 1987, 2001 (2022) ("scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion").[1]

As explained by the United States Supreme Court, the church autonomy doctrine has a number of components. One "component" of church autonomy is the ministerial exception, which bars employment claims brought by employees who perform important religious duties. *Our Lady*, 140 S Ct at 2060. Because such employees play a key "role in conveying the Church's message and carrying out its mission," the

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[1] This Court's decision in *Newport Church of Nazarene v. Hensley*, which stated that the church autonomy "doctrine has its basis in the Free Exercise Clause, not the Establishment Clause," and accordingly did not address the anti-entanglement interest underlying the doctrine, has therefore been superseded. 335 Or 1, 15 (2002).

ministerial exception bars their claims even when a religious organization offers no "religious reason" for its employment decision. *Hosanna-Tabor*, 565 US at 192, 194.

But as *Our Lady* explained, "the general principle of church autonomy" is not limited to the ministerial exception. 140 S Ct at 2061. It also applies to "matters of internal government," such as discussions of, and decisions about, "matters of faith and doctrine." *Id.* Indeed, under general principles of the church autonomy doctrine, "discuss[ions]" regarding "doctrinal reasons" for a church's decision are simply "not actionable." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F3d 648, 656-58, 658 n 2 (10th Cir 2002) (deciding case under "the church autonomy doctrine generally" rather than the ministerial exception).

2. The church autonomy doctrine applies to the "very process" of litigation, including discovery.

The scope of the church autonomy doctrine (and its ministerial exception component) covers not just the ultimate result of litigation—liability and remedies—but also the "very process of inquiry," which can itself be extremely entangling of Church and State. *NLRB v. Catholic Bishop*, 440 US 490, 502 (1979) (contrasting the "process of inquiry" with "the conclusions that may be reached"); *see also Milivojevich*, 426 US at 718 ("detailed review of the evidence" of church policy was "impermissible"). Indeed, it is well established that courts must

"refrain from trolling through a person's or institution's religious beliefs," regardless of the outcome reached. *Mitchell v. Helms*, 530 US 793, 828 (2000).

As Justice Brennan explained in an influential concurring opinion in *Corporation of Presiding Bishop v. Amos*, opening up religious decision-making to secular courts' second guessing can easily distort religious doctrine:

> [T]his prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive 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. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation.

483 US 327, 343-44 (1987) (Brennan, J., concurring). The church autonomy doctrine's application to the process of litigation is meant to avoid that "chilling" effect on religious organizations, particularly minority or less well-understood religious groups.

This "process of inquiry" that can "impinge on rights guaranteed by the Religion Clauses" includes the process of discovery. *Catholic Bishop*, 440 US at 502 (citing both Free Exercise Clause and Establishment Clause). The principle was recently illustrated in *Whole Woman's Health v. Smith*, 896 F3d 362 (5th Cir 2018), *cert. denied*,

139 S Ct 1170 (2019). There, the Fifth Circuit accepted a collateral order appeal to prevent the Catholic Church from having to turn over internal documents in a civil lawsuit. The Fifth Circuit held that courts should "protect the inner workings" of religious organizations and "maintain their internal organizational autonomy intact from ordinary discovery." *Id.* at 372, 374. It therefore held that a document subpoena could not be enforced.

Litigation related to church autonomy is distinct from ordinary civil litigation in other ways as well. For example, church autonomy defenses are "similar to a government official's defense of qualified immunity" and must be "resolved at the earliest possible stage of litigation" to "avoid excessive entanglement in church matters." *Bryce*, 289 F3d at 654 & n 1. Otherwise, for the litigation to proceed, a court would have to review ecclesiastical judgments made by clergy about questions of religious doctrine. Moreover, "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, [and] the full panoply of legal process designed to probe the mind of the church" about its internal deliberations over religious beliefs and practices. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F2d 1164, 1171 (4th Cir 1985). Indeed, compelling "investigation and review of such matters of church administration and government * * * could only produce by its coercive effect the very opposite of

that separation of church and State contemplated by the First Amendment." *McClure v. Salvation Army*, 460 F2d 553, 560 (5th Cir 1972).

3. The discovery sought here would entangle Church and State and chill religious groups' internal deliberative processes.

Here, HotChalk seeks wide-ranging discovery regarding internal church deliberations over religious questions, including the appointment of a religious leader, the president of the University. The Church produced documents related to HotChalk, to finances and even to certain internal church documents that touch on the University's relationship with HotChalk, thus resulting in the disclosure of many more documents than it would normally have to produce under the First Amendment. But the Church has withheld church governance documents and deliberations that do not mention HotChalk, including discussions about the proper interpretation of religious doctrine and beliefs. Despite this gracious gesture by the Church, HotChalk insists that it should get whatever document it asks for from the Church—the First Amendment notwithstanding.

But the Lutheran Church is not Nike. Unlike garden variety contract disputes between commercial entities, in this lawsuit the First Amendment applies—both to the ultimate outcome and to how the litigation proceeds in the Oregon courts before then. Indeed, the United States Supreme Court has specifically held that state courts are just as bound by the strictures of the church autonomy doctrine as state legislatures. *See Kreshik v. Saint Nicholas Cathedral*, 363 US 190, 191

(1960) ("[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize") (citation and quotation marks omitted).

Given that principle, Oregon courts do not have a free hand in determining the scope of discovery concerning the internal governance and decision-making of a religious body—here, the second-largest Lutheran denomination in the United States. And where the discovery sought would delve into the how the Church decides important issues of faith and doctrine (implicating the "general principle of church autonomy") or how it selects its leaders (implicating the ministerial exception), Oregon courts cannot require it.

In fact, the church-state stakes are even higher in this case because of the effects on other religious groups, including minority religious groups. Allowing discovery requests like HotChalk's would not just harm the Lutheran Church. It would also hinder the ability of a wide variety of religious organizations—including Jewish organizations—to carry out their most basic functions, such as deciding questions of faith and doctrine and selecting clergy. *See infra* Section II. Worse still, it would expose religious organizations to the "significant burden" of having to "predict which of [their] activities a secular court will consider religious." *Amos*, 483 US at 336. That would force religious

groups to alter their practices and beliefs in ways that they hope will lessen their liability or the impact of litigation itself.

Such an approach would be particularly burdensome for Jewish organizations because the risk of unwarranted intrusion into matters of religious law is much greater. As a minority religion, Judaism is more susceptible to misunderstanding and misinterpretation by an Oregon court that might be called upon to parse the requirements of Jewish law.

This is not a hypothetical concern. For example, in *Ben-Levi v. Brown*, both a federal district court and the Fourth Circuit upheld a prison's denial of a Jewish prisoner's request to engage in group study of the Torah. 136 S Ct 930, 931-32 (2016) (Alito, J., dissenting from the denial of certiorari). To support their holdings, the courts relied on the prison's interpretation of Jewish law that 10 men must be present to study the Torah. *Id.* But no such requirement exists under Jewish law. *Cf. id.* at 934 (questioning whether Jewish law imposed the requirement stated by the prison). It is unclear exactly what law the prison mistakenly relied upon to make this rule, but it is possible the prison was confused by the Jewish requirement that 10 Jewish men are

needed to publicly read from a Torah scroll as a part of a prayer service. Joseph Karo, Shulchan Aruch, Orach Chayim 143:1[2]; *see also* Aryeh Citron, Minyan: The Prayer Quorum, Chabad.org (discussing when a minyan (quorum) is required to perform certain prayers and rituals under Jewish law).[3] The prison's and the courts' misunderstanding of Jewish law resulted in a Jewish prisoner being denied the fundamental right to practice his religion. Leaving the interpretation of such complicated religious issues to the Oregon courts (or Oregon juries) would both disfavor Jewish organizations and quickly lead the Oregon judiciary into a constitutional thicket.

B. Because Oregon exempts comparable secular conduct, the First Amendment requires this Court to exempt religious groups' deliberations from certain forms of discovery.

Church autonomy is not the only way that the Religion Clauses come into play in this case. The Free Exercise Clause of the United States Constitution requires that rules burdening religious exercise must be either neutral and generally applicable or satisfy strict scrutiny review. *Employment Div. v. Smith*, 494 US 872, 879 (1990).[4] The

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[2] A partial "community translation" into English is available at https://perma.cc/6VDR-UEVT.

[3] Available at https://perma.cc/D8LA-8EK9.

[4] Amicus notes that many United States Supreme Court Justices have called for *Smith* to be overruled and expresses its view that *Smith* is likely to be replaced with a standard more protective of free exercise rights. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S Ct 1868,

party seeking to enforce a religion-burdening regulation must show that the regulation satisfies strict scrutiny. *Kennedy v. Bremerton Sch. Dist.*, 142 S Ct 2407, 2426 (2022).

Laws that "treat *any* comparable secular conduct more favorably than religious exercise" "are not neutral and generally applicable, and therefore trigger strict scrutiny." *Tandon v. Newsom*, 141 S Ct 1294, 1296 (2021) (per curiam) (emphasis in original). This is because such requirements are "underinclusive," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 543 (1993)—they grant exemptions for secular conduct but regulate religious conduct that implicates the same "government interest that justifies the regulation at issue." *Tandon*, 141 S Ct at 1296.

In *Lukumi*, the United States Supreme Court held that the city ordinances at issue were substantially underinclusive because they "fail[ed] to prohibit nonreligious conduct that endangers [the government's asserted] interests in a similar or greater degree than" the prohibited religious conduct. 508 US at 543. Because the city ordinances were not generally applicable, the Court applied strict scrutiny. *Id.* at 546-47.

1882 (2021) (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 1883 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment). Returning to a pre-*Smith* standard will only further confirm and simplify the analysis by making all such burdens on religious exercise subject to strict constitutional scrutiny.

In the same way, the Supreme Court deemed the public gathering restrictions at issue in *Tandon* underinclusive. 141 S Ct at 1297. These restrictions limited in-home worship gatherings to members from three households. *Tandon v. Newsom*, 922 F3d 916, 918 (9th Cir 2021). But "comparable secular [venues]," including "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants," were permitted to admit more patrons. *Tandon*, 141 S Ct at 1297. Unable to show "that those activities pose a lesser risk" to the government's interest in health and safety, the government's restrictions were subject to (and failed) strict scrutiny. *Id.*

Absent the circuit court's protective order, Oregon's discovery regime would face a similar analysis because it exempts from discovery numerous secular internal deliberations, but fails to exempt comparable religious deliberations.

The baseline rule here is ORCP 36 B(1), which entitles parties to inquire into "any matter, not privileged, that is relevant to the claim or defense of the party seeking discovery." This Court has stated that the rule "permits broad discovery." *Ransom v. Radiology Specialists of Nw.*, 363 Or 552, 558 (2018); *see also Vaughan v. Taylor*, 79 Or App 359, 365 n 7 (1986) ("The scope of discovery has been made very broad[.]" (cleaned up)).

The mere threat of disclosure of internal religious deliberations under this rule burdens religious groups' free exercise. Fear that their communications may be evaluated by those outside their community would prevent religious groups from having full and frank discussions about doctrinal developments or how best to exercise their faith in light of new and unexpected circumstances. And even if they continue to speak, their speech may be altered to better comport with the surrounding culture. *See supra* 9 (Justice Brennan's discussion of chilling effect on religious organizations).

The Oregon legislature and Oregon courts have recognized similar risks in secular contexts. For example, the Oregon legislature exempted medical "peer review bodies" from discovery into their decision-making processes. ORS § 41.675(1). This exemption extends to "all oral communications or written reports, and all notes or records created by or at the direction of a peer review bodies * * * in the course of an investigation." *Id.* § 41.675(2). This Court has recognized that this privilege reflects "the need to encourage frank communication" within medical "peer review bodies" and "to prevent the participants from incurring legal liability for what they say." *Straube v. Larson*, 287 Or 357, 364 (1979).

The existence of one secular comparator is enough to render ORCP 36 B(1) not generally applicable. *Tandon*, 141 S Ct at 1296; *see, e.g.*, *Midrash Sephardi, Inc. v. Surfside*, 366 F3d 1214, 1234-35 (11th Cir

2004); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F3d 359, 365 (3d Cir 1999). And the exemption for medical peer review boards is one such comparator. Protecting from discovery the deliberative process by which medical peer review boards reach their final determinations undermines ORCP 36 B(1)'s interest in board discovery in the same way that protecting the Church's internal deliberations would. In both instances, the baseline rule of broad discovery is checked to protect the free and frank internal discissions of a deliberative body. By exercising its discretion to protect the Church's internal religious deliberations from discovery, the circuit court ensured that religious groups were not treated categorically worse than comparable secular groups like medical peer review boards.

Nor is this the only nonreligious exemption on the books. For example, any matter brought to the Legislative Counsel or to any employee of the Legislative Counsel Committee and marked confidential is protected from discovery. ORS § 173.230; *see also* OEC 514 Commentary (1981) (listing "[i]nformation designated confidential by a person as to a matter before the Legislative Counsel Committed" as a "testimonial privilege recognized in Oregon" (citing ORS § 173.230)). This has protected from disclosure, among other things, communications between the Legislative Counsel and Oregon executive branch agencies concerning potential legislation. *See Chaimov v. State ex rel. Or. Dep't of*

Admin. Servs., 314 Or App 253, 257-61 (2021) (describing use of section 173.230), *affirmed by* 370 Or 382 (2022). This rule therefore has the same purpose and effect as the protective order granted to the Church—blocking discovery so as to permit the free-flowing exchange of ideas (there, between branches of government) without the threat of potential disclosure.

Oregon has recognized the need to protect internal deliberations from the chill associated with public disclosure in other similar contexts too. Like Rule 36 B, under the Public Records Law, "disclosure is the rule." *City of Portland v. Bartlett*, 369 Or 606, 611 (2022). That's unsurprising: Oregon has a "strong and enduring policy that public records and governmental activities be open to the public." *Jordan v. MVD*, 308 Or 433, 438 (1989). Yet the Oregon legislature has deemed some decision-making processes too sensitive to risk chilling frank discussions by the threat of disclosure. For instance, the Public Records Law exempts from public disclosure communications that "are preliminary to any final agency determination of policy or action" whenever there is a sufficiently weighty need to "encourag[e] frank communication between officials and employees of public bodies." ORS § 192.355(1).

The lack of similar religious exemptions creates a First Amendment problem. "A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular

conduct that undermines the government's asserted interests in a similar way.'" *Kennedy*, 142 S Ct at 2422 (quoting *Fulton v. City of Philadelphia*, 141 S Ct 1868, 1877 (2021)). Each of the examples above follows the same pattern: Oregon has a general rule counseling broad disclosure of documents or information, justified by the efficiencies gained from open access to this material. But each also incorporates categorical secular exemptions that undermine that interest and instead protect decision-making processes that might otherwise be put in jeopardy. These categorical secular exemptions from Oregon law require "comparable [protections for] * * * religious exercise." *Tandon*, 141 S Ct at 1297. Without such exemptions, religious groups run the risk of having some of their most sensitive internal deliberations publicized, thus interfering with the *mens ecclesiae*, or "mind of the church." *Rayburn*, 772 F2d at 1171. The circuit court was therefore correct to protect the Church's internal deliberations. Indeed, failure to do so would have violated the First Amendment, as HotChalk hasn't even attempted to satisfy strict scrutiny, meaning an accommodation—as provided by the circuit court's protective order—is required.

C. The broad discretion to restrict discovery granted by the Oregon Rules of Civil Procedure confirms that the circuit court was right to deny HotChalk's request for intrusive discovery into internal church communications.

HotChalk argues that ORCP 36 B(1)'s "liberal relevancy standard" requires the Church to turn over information about its internal religious deliberations. SER-14. But ORCP 36 C(1) simultaneously grants Oregon circuit courts discretion to "make any order that justice requires," including—as relevant here—barring discovery into certain topics. Because ORCP 36 grants circuit courts discretion to limit discovery via protective order, a court cannot deny such protection when a discovery request infringes on First Amendment rights. And, by failing to even *argue* that its discovery requests satisfy strict scrutiny, HotChalk cannot show that the circuit court abused its broad discretion in granting the Church a protective order.[5]

1. *ORCP 36 C(1) grants broad discretion to craft protective orders, triggering strict scrutiny under the First Amendment.*

This rule—that discretion in a law triggers strict scrutiny of the enforcement of that law over a religious objection—has been bedrock First Amendment law for decades. As the Supreme Court explained in *Employment Division v. Smith*, "where the State has in place a system

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[5] The ministerial exception and other components of the church autonomy doctrine are not subject to a strict scrutiny or other affirmative defense. *See Our Lady*, 140 S Ct at 2055; *Hosanna-Tabor*, 565 US at 196 ("the First Amendment has struck the balance for us"). But Free Exercise claims under *Tandon* and *Fulton* are subject to a strict scrutiny analysis, so we address them here.

of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 US at 884; *cf. Foothill Church v. Watanabe*, 3 F4th 1201, 1202 (9th Cir 2021) (Bress, J., dissenting) ("Well before *Fulton*, the law was clear: when, as here, a government official has the discretionary power under a 'good cause' standard to exempt a regulated entity from an otherwise generally applicable regime * * *, we must apply strict scrutiny to the government's determination to enforce its rule over a religious objection.").

Fulton confirms this rule. As the Supreme Court explained, because Philadelphia's foster care contract "incorporates a system of individual exemptions" by which government officials could grant *secular* exemptions, "the City may not refuse to extend that exemption system to cases of religious hardship without compelling reason." *Fulton*, 141 S Ct at 1878 (cleaned up); *see also Kennedy*, 142 S Ct at 2422 ("A government policy will fail the general applicability requirement * * * if it provides a mechanism for individualized exemptions." (cleaned up)).

Like the contract provision in *Fulton*, ORCP 36 is not generally applicable. This rule gives Oregon circuit courts discretion to limit or even completely foreclose discovery "for good cause shown * * * to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." ORCP 36 C(1); *Martin v. DHL Express (U.S.A.), Inc.*, 235 Or App 503, 509-10 (2010) (ORCP 36 C "allows the

trial court to deny discovery altogether"); *I. H. v. Ammi*, 370 Or 406, 412 (2022) (describing ORCP 36 C(1)'s limitations on the scope of discovery). And circuit courts frequently exercise this discretion to make individualized determinations regarding appropriate limitations or conditions on discovery. For example, Oregon courts have relied on this rule to award attorney fees for litigating a protective order, foreclose a deposition based on the health of the deponent, and limit attendance at a medical examination. *See, e.g.*, *Martin*, 235 Or App at 509; *Carton v. Shisler*, 146 Or App 513, 516 (1997); *Kalugin*, 353 Or at 358.

This discretion has also been broadly construed. As *Carton v. Shisler* explained, circuit courts have "the authority to protect that party or person in *any* way that justice requires." 146 Or App at 516; *id*. at 516 n 6 (describing "the broad discretionary powers granted to a court under ORCP 36 C"); *Corporation of Presiding Bishop*, 352 Or at 86 ("The issuance and vacation of protective orders are matters of a trial court's discretion.").

Here, the trial court relied on ORCP 36 C(1) to grant the Church's protective order. ER-11; ER-347; SER-80-83. As the trial court explained, it crafted a protective order to ensure "that [the Church's] First Amendment rights [are] protected," SER-80-81, while simultaneously ensuring that "anything that's relating to HotChalk" or anything "related to the finances" was produced, "even if it's also relating

to First Amendment issues." SER-82. This decision was therefore not only permitted by ORCP 36 C(1) but also required by the First Amendment.

Moreover, HotChalk failed to come forward with any "compelling reason" for intruding into the Church's protected First Amendment rights. *Fulton*, 141 S Ct at 1878. By failing to even allege that its request satisfied strict scrutiny, HotChalk's discovery request was properly denied and the trial court did not err in granting the Church's request for a protective order.

2. Generic 'good cause' and other similar secular criteria for exercising this broad discretion are systems of individualized exemptions triggering strict scrutiny.

HotChalk's amici claim that ORCP 36 C's "good cause" requirement and its list of broad secular justifications (to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense), "limit the scope of discovery neutrally and generally" such that the rule is not subject to strict scrutiny. Br. of Or. Trial Lawyers Assoc., *et al.* at 10-13.

But that gets things exactly backwards. Discretion does not need to be unfettered to trigger strict scrutiny under the First Amendment. Instead, courts have consistently held that it is the ability to engage

in an individualized assessment of whether to grant an accommodation that triggers strict scrutiny—*even if* that discretion is constrained by detailed criteria, or specifically a "good cause" requirement.[6]

The Supreme Court in *Fulton*, for example, explained that "the good cause provision in *Sherbert*," constituted a "system of individual exemptions" and thus was not generally applicable for purposes of Free Exercise Clause analysis. 141 S Ct at 1878. The "good cause provision" at issue in *Sherbert* limited the defendant commission's discretion to award unemployment compensation to cases where "good cause" was shown. *Sherbert v. Verner*, 374 US 398, 401 (1963). A similar "good cause" standard was at issue in *Thomas v. Review Board.* 450 US 707, 712-13 (1981) (limiting unemployment compensation to cases where "[g]ood cause * * * justifies voluntary termination"); *see also Bowen v. Roy*, 476 US 693, 708 (1986) ("The 'good cause' standard [in *Sherbert* and *Thomas*] created a mechanism for individualized exemptions."); *Smith*, 494 US at 884 (use of "good cause" standard in *Sherbert* and *Thomas* was a form of individualized discretion). Thus, far from excus-

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[6] This is similar to other prophylactic and structural protections within First Amendment law, such as the rule against prior restraints. *See, e.g.*, *Houston Cmty. Coll. Sys. v. Wilson*, 142 S Ct 1253, 1259 (2022) (citing *Near v. Minnesota ex rel. Olson*, 283 US 697, 718-20 (1931)) ("government usually may not impose prior restraints on speech").

ing Oregon's discovery regime from *Smith*'s category of systems of individualized exemptions, the "good cause" provision places Oregon's rule squarely within it.

Nor can other similar secular criteria immunize discretionary laws from strict scrutiny review. In both *Sherbert* and *Thomas*, the unemployment agency not only had to find "good cause," but—as here—its discretion was further limited. In *Thomas*, for example, good cause had to be both "job related" and "objective in character." 450 US at 713. And in *Sherbert*, the Commission was "required" to "consider the degree of risk involved to his health, safety and morals" when determining whether "the insured worker has failed 'without good cause' to either apply for available suitable work or to accept suitable work when offered him by the employment office." *Sherbert v. Verner*, 240 SC 286, 299-300 (1962), *rev'd*, 374 US 398 (1963). These constraints didn't change the Court's ultimate conclusion: that the law at issue permitted an individualized assessment of the reasons for granting an accommodation and thus triggered strict scrutiny.

HotChalk's amici also claim that ORCP 36 is neutral and generally applicable because the Church's request was based on the invocation of a privilege, not application of ORCP 36 C(1)'s criteria. Trial Lawyers Br. at 14-15. This is wrong for at least two reasons. First, this Court has held that ORCP 36 C(1) *can* be used to protect privileged information, providing, for example, a "prophylactic remedy in advance of

providing discovery * * * to protect against dissemination of attorney-client privileged materials to third parties." *Johnson v. Premo*, 302 Or App 578, 591 (2020) (relying on this Court's decisions in *Brumwell* and *Longo*); *see also Longo v. Premo*, 355 Or 525, 540 (2014) (ORCP 36 C is "a general provision authorizing courts to issue orders limiting the extent of disclosure of information under appropriate circumstances."). ORCP 36 C(1)'s application to other types of privileged information (like attorney-client privileged communications) confirms it was appropriately invoked here.

Second, amici's argument misunderstands the law. If listing specific *secular* reasons to exercise discretion under ORCP 36 C(1) were enough to foreclose the Church's claim to First Amendment protection, Trial Lawyers Br. at 14, then governments could easily foreclose any religious accommodation simply by narrowing discretion to consideration of only *secular* justifications for an exemption (even if the secular exemptions were otherwise broad and open ended, as they are here). If this were the law, the plaintiff in *Thomas*, for example, should have lost because the unemployment agency's good cause standard limited exemptions to those that are "job related," excluding all requests to accommodate a religious observance. This is obviously not the law.

Instead, any grant of discretion—even if narrowed by secular criteria—triggers strict scrutiny before a religious request for an exemption from the same law can be denied. *Fulton*, 141 S Ct at 1877 ("A law

also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); *Smith*, 494 US at 884 (recognizing that a state may be required to "extend" its "system of individual exemptions" to "cases of religious hardship").

Here, there is no dispute that the circuit court had discretion to grant a broad array of secular exemptions from the general discovery requirement of ORCP 36 B(1). Accordingly, the denial of a religious exemption from that broad discovery rule requires showing of a "compelling reason" that least restricts the Church's religious exercise. *Fulton*, 141 S Ct at 1877. No such reason has even been advanced here.

II. Maintaining confidential religious deliberations is especially important for minority religious groups like Orthodox Jews.

A central aim of Judaism is to live every day in accordance with Jewish law. *Halakha*, the term used to refer to the written and oral Torah, is derived from the Hebrew word *halakh*, meaning "to walk" or "to go." For many Jewish communities, it provides direction, pointing to the way a Jew should behave in almost every aspect of life.

Yet the Jewish people have often found themselves as a tiny minority living in societies that do not understand them, or worse. They must therefore "liv[e] in a country whose religion, culture, and legal system are not [their] own, and yet sustain [their] identity, live [their] faith, and contribute to the common good." Chief Rabbi Jonathan

Sacks, *On Creative Minorities*, First Things (Jan. 2014), https://perma.cc/EL8B-HNAU. Consequently, Jewish communities and schools rely on their rabbis and *roshei yeshiva* to provide guidance on what a *halachic* lifestyle requires and how Jewish law might extend to new situations. Unfortunately, for millennia, secular authorities have mocked or interfered with these internal religious deliberations, often to the point of violence.[7]

In the third century BCE, King Ptolemy II Philadelphus ordered seventy-two Jewish sages, working separately, to translate the Mosaic Bible into Greek. *See* Ammiel Hirsch & Yosef Reinman, *One People, Two Worlds: A Reform Rabbi and an Orthodox Rabbi Explore the Issues That Divide Them* 188 (2002). What might have seemed like a benign order was actually aimed at embarrassing the Jewish community: if the translations were inconsistent, it would undermine both the Torah and its scholars in the minds of the surrounding culture. *See* The Union of Orthodox Jewish Congregations of America, *The Translation of the Seventy*, Orthodox Union (Feb. 13, 2014), https://perma.cc/PT7Y-QD8K. By separating the scholars and interfering with their ability to consense on a single translation, therefore, the

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[7] The United States of America has been one of the best homes for Jews in history, providing an extremely positive environment where Jews enjoy an unprecedented number of rights—including those advocated for here. Yet of course, America is not perfect, nor have the rights it ensures always been fully protected, which is why JCRL's advocacy remains needed.

secular authorities could "disprove" their beliefs and shame the Jewish community. But as the Talmud recounts, this attempt to shame Jews failed when all seventy-two scholars nevertheless produced identical translations. *Id.* The translation coerced by secular authority was seen as such a tragic intrusion on Jewish religious practice that the anniversary of the event is marked as a fast day in Jewish communities. *See* Asher Meir, *Vayigash: Translation of the Torah*, Orthodox Union (Dec. 13, 2007), https://perma.cc/GC9K-NVEB.

Similarly, when Jewish deliberations reached conclusions at odds with the surrounding culture, reactions were volatile. In the Middle Ages, European authorities required Jews to turn over writings concerning contested Biblical and Talmudic passages for study. Judah M. Rosenthal, *The Talmud on Trial: The Disputation at Paris in the Year 1240*, 47 Jewish Q. Rev. 58, 71 (1956). The authorities often deemed these texts blasphemous, leading to the condemnation of the Jewish faith, the burning of Jewish religious texts, and sometimes violence against Jews.

While thankfully these particular injustices are not likely to occur in the United States, that does not mean there is no longer any cause for concern about government intrusion into internal religious decision-making. Jews seeking to carry out the commandments of Jewish law often write to rabbinical authorities with questions about the law's application—a process known as *responsa*. *See* Rabbi Louis Jacobs,

The Jewish Religion: A Companion 202 (1995), reprinted at https://perma.cc/XZW5-5U24. Those making these inquiries often include sensitive information about their family life—such as child rearing, healthcare decisions, and the like. *See* Stephen J. Werber, *Cloning: A Jewish Law Perspective with a Comparative Study of Other Abrahamic Traditions*, 30 Seton Hall L. Rev. 1114, 1126 (2000). The deeply personal and religious nature of these inquiries makes obvious the need to maintain confidentiality of the communications and internal deliberation.

Regardless of the process or subject matter, it is thus imperative for Jews that the government not interfere with or influence internal religious Jewish deliberation and decision-making. Where "the government exerts a[ny] degree of control" it can be "severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 US 709, 720-21 (2005); *see also Universidad Central de Bayamon v. NLRB*, 793 F2d 383, 401-02 (1st Cir 1985) (Breyer, J.) (finding evidence of impermissible entanglement "well illustrated by an excerpt from the record in this case * * * in which counsel questioned church officials * * * about confidential communications among church officials").

As detailed above, this Court has already recognized the chilling effects that the risk of disclosure can have on even secular decision-making processes. *See Straube*, 287 Or at 364 (peer review body exemption furthered "need to encourage frank communication" and "to

prevent the participants from incurring legal liability for what they say"). Those same principles apply twice over to religious minorities like Jews. The religious doctrines and practices of minority faiths are often not familiar to the larger society. *Cf. Hosanna-Tabor*, 565 US at 206 (Alito, J., joined by Kagan, J., concurring) (noting that "popular familiarity with a religious doctrine cannot be the determinative factor" in pretextual firing inquiries). And their practices will often be less integrated into popular culture and understanding, increasing the risk of a conflict or even religiously motivated targeting. S*ee* Asma T. Uddin, *When Islam Is Not a Religion: Inside America's Fight for Religious Freedom* 132 (2019) (describing how "religious practices that conform to this culture w[ill] be protected more often than practices that don't"); Louis Keene & Lauren Markoe, *Police arrest suspect with 'history of animus' toward Jews in shooting of Los Angeles Jewish men*, Forward (Feb. 16, 2023), https://perma.cc/2DV4-WSMA.

This Court should take the opposite approach. By respecting the Lutheran Church's First Amendment rights and shielding its internal religious decision-making from HotChalk's intrusive discovery, this Court would ensure that religious minorities, including Jews, remain free to continue to engage in religious decision-making and cultural engagement without fear.

CONCLUSION

The decision of the circuit court should be affirmed.

May 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation in ORAP 8.15(3) n 5 & 5.05(1)(b)(i)(A), with a word count of 6,777. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated: May 1, 2023

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 1, 2023, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* with the State Court Administrator, Records Division, by using the appellate electronic filing system. I further certify that I served this BRIEF OF *AMICUS CURIAE* on the following parties using the Court's electronic filing system and via email:

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