No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

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

BRIEF OF RELIGIOUS TRIBUNAL EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

This case presents important questions about the coexistence of religious organizations' recognized interest in the establishment and management of their internal affairs and the employment rights and remedies that federal and state legislatures have enacted over the past several decades. Participating as *amici curiae* are current and former members of religious courts and other individuals expert in the work of such courts ("Religious Tribunal Experts"). Religious Tribunal Experts collectively have decades of experience with religious courts in The United Methodist Church, the Presbyterian Church (U.S.A.), the Roman Catholic Church, and the Jewish faith. A list of the Religious Tribunal Experts and their qualifications is set forth in the appendix hereto.

Amici Curiae Religious Tribunal Experts have several distinct and substantial interests in this case. *First*, as active participants in their respective faith traditions, *amici curiae* have observed first-hand how religious institutions rely on religious courts, tribunals, and other forms of dispute resolution as integral parts of their faith missions. Religious Tribunal Experts recognize that members of the Court, like many members of the public at large, may not be familiar with these diverse tribunals, and therefore respectfully seek to inform the

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* and their counsel drafted this brief. No party or counsel for a party authored this brief in whole or in part. No person other than the *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.

Court about the vital function that religious courts and tribunals serve.

Second, Religious Tribunal Experts, several of whom serve or have served on religious courts, recognize that this case may significantly alter the development of ecclesiastical law. Since the enactment of the various federal employment anti-discrimination laws beginning in the middle of the 20th century, the "ministerial exception" recognized by the lower courts has allowed religious courts to continue their work of deciding religious disputes—including certain employment disputes—without undue interference from civil courts. The case before the Court may impact whether and how religious courts will be able to carry out their important role in the faiths they represent.

Finally, Religious Tribunal Experts believe the case before the Court implicates fundamental First Amendment principles that may more broadly shape the interaction of government and religious organizations well into the future. They thus respectfully offer this brief in an attempt to make the function, procedures, and inner workings of religious tribunals more understandable to the Court, so that as it considers the issues raised by the parties, the Court can fully appreciate this case's implications.[2]

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2. *Amici Curiae* Religious Tribunal Experts each present their views based solely on their own personal knowledge and experience with their respective faith and not on behalf of the faith itself or any organization.

SUMMARY OF THE ARGUMENT

This Court has long recognized the vital role that ecclesiastical systems of government can play in the life of religious organizations. Over one hundred years ago, the Court stated that where a religious organization has established an ecclesiastical system of government, civil courts must respect and defer to decisions of the highest "church judicatories" that pass on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" "as final, and as binding." *Watson v. Jones*, 80 U.S. 679, 727 (13 Wall. 1871).

The issue in this case—the scope of the First Amendment's "ministerial exception"—implicates a specific component of many religious organizations' ecclesiastical systems of government: the religious court. The purpose of this brief is to assist the Court in understanding the work of these religious courts and the vital role they play in religious organizations in this country and around the world, so it can place the ministerial exception in its proper context as a critical safeguard for religious organizations' freedom and vitality.

Section I of this brief describes the religious court systems of several different religious organizations—The United Methodist Church, the Presbyterian Church (U.S.A.), the Roman Catholic Church, Judaism, and the Episcopal Church. As part of a long historical tradition, these and other religious organizations have committed ministerial employment decisions to the jurisdiction of a religious court, ecclesiastical tribunal, or other decisional body. These religious organizations have endowed their courts with authority to hear and resolve ministerial

employment disputes based on governing procedures, rules and principles, which are often quite formal and well-developed. Whether characterized by formal or informal processes, however, the work of these tribunals is imbued with the unique values and judgments of the belief systems they support and enforce.

Section II of this brief explains how the Court's decision on the ministerial exception will affect the First Amendment rights of the religious organizations that have established religious courts. The ministerial exception, generally speaking, bars civil lawsuits that interfere with or would superintend over the relationship between a religious organization and its employees who perform religious functions. The exception is a considered response to the sometimes uncomfortable relationship between internal religious administration and decisionmaking, on the one hand, and enforcement of various antidiscrimination laws on the other. Regardless of its precise doctrinal underpinnings, the exception was borne of several core considerations: concern about excessive judicial entanglement in internal church doctrine and religious questions, respect for the inherent authority of religious organizations to determine who carries out their mission, and the need for our civil legal system to provide breathing room for religious organizations to order themselves as they see fit.

A robust ministerial exception protects religious organizations' core First Amendment rights by preventing civil courts from second-guessing the true motivations of a religious organization's hiring, assignment, discipline and termination decisions, which are often made by religious tribunals. As the Fifth Circuit said in the seminal

case establishing the ministerial exception, the First Amendment recognizes that the "relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972).

As it evaluates the applicability of the ministerial exception in this case, the Court will provide guidance about how First Amendment principles interact with the federal and state interests embodied in the varied laws that otherwise would regulate the internal decisions of religious organizations. Any resolution of the scope of the ministerial exception must take account of and respect the vital role that religious courts play in resolving ministerial employment disputes for certain religious organizations. The tribunals described herein are, to the religious organizations they serve, a critical means of maintaining, protecting, and developing their core values by resolving questions about who serves as leaders, teachers, and representatives, and under what conditions. Through established procedures, legitimate authority, and the confidence of their faithful, these tribunals ensure fidelity to the organization's core values and doctrine.

ARGUMENT

I. Many Religious Organizations Have Sophisticated Religious Court Systems for Resolving Employment Questions

Many religious organizations maintain religious court systems to hear disputes affecting the management of the organization and the answer of doctrinal questions.

Although these court systems may be called upon to address any number of issues within their respective religious organizations, one major purpose of these tribunals is to hear and resolve matters concerning employees, such as priests, rabbis, and laity performing religious or internal functions. A typical use of such a court would be to resolve questions over whether a particular employee's actions are consistent with the beliefs of the religious organization. Conflicts between civil legal systems and the jurisdiction of ecclesiastical tribunals can arise when an employee subject to a disciplinary or personnel decision of a religious tribunal asserts that the tribunal's decision is pretextual or is invalid under civil laws or standards. Indeed, it is not hard to hypothesize all manner of disagreements related to religious personnel's selection, hiring, training, assignments, and discipline that could be alleged to implicate various federal and state employment rights, but which would necessarily involve civil courts' superintendence over internal and doctrinal matters.

Religious court systems can be quite varied. This brief describes a few of these systems to give the Court a deeper understanding of their operations and of their importance to their respective faiths. These systems generally share certain primary characteristics, including discernable substantive standards and procedural rights, which are grounded in the religious organization's core values and doctrine. Whether termed "fair process" in The United Methodist Church's tradition, or "due process" in the Presbyterian Church (U.S.A.)'s tradition, many religious organizations share a stated commitment to evenhandedness and strive to ensure that the religious organization is not unfairly favored in the crafting and

execution of the process. Whatever their particular attributes, these tribunals form an integral part of the organization's structure and operations; they embody the unique values of the faiths they represent and offer procedures consonant with those values, about which the organization's community have knowledge and on which, in many cases, the laity have substantial input.

A. The United Methodist Church

The United Methodist Church ("UMC"), which traces its roots to church bodies in the 18th century, has fashioned an extensive system of internal governance founded on its belief that "[t]he church is a community of all true believers under the Lordship of Christ" which "seeks to provide for the maintenance of worship, the edification of believers, and the redemption of the world."[3] In addition to five jurisdictional conferences within the United States, the UMC performs mission work in over 150 countries, with seven central conferences in Africa, Central and Southern Europe, Congo, Germany, Northern Europe, the Philippines, and West Africa.[4] The UMC has a formal judicial system,[5] which has authority to investigate and resolve complaints against ministers

3. The United Methodist Church, *The Book of Discipline of The United Methodist Church* (The United Methodist Publishing House 2008) ("Book of Discipline"), Part I, The Constitution, Preamble, *available at* http://www.nyac.com/pages/detail/1755.

4. *See* The United Methodist Church, Structure and Organization: Organization, *available at* http://www.umc.org/site/c.lwL4KnN1LtH/b.1720697/k.734E/Structure__Organization_Organization.htm.

5. Book of Discipline, Part I, The Constitution, ¶ 58.

that involve one or more of a list of serious "chargeable" offenses.[6] The Judicial Council, which is the church's ultimate appellate body,[7] has issued over 1,100 decisions addressing diverse ecclesiastical issues within the UMC,[8] including ministerial employment matters.[9]

The UMC views ordination as a "sacred trust," and therefore a minister accused of violating this trust is subject to review and, potentially, administrative or judicial

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6. *Id.*, Part V, Ch. 7, ¶ 2702 (chargeable offenses include "disobedience to the order and discipline of [the UMC]" and "dissemination of doctrines contrary to the established standards of doctrine of [the UMC]").

7. *Id.*, Part I, The Constitution, ¶ 55 ("There shall be a Judicial Council."); *id.*, ¶ 56 (Judicial Council's authority).

8. *See* http://archives.umc.org/interior_judicial.asp?mid =263 (links to 1,189 published decisions by the Judicial Council).

9. *See, e.g.*, *In re: Appeal of Wesley Kendall*, Decision 1094 (UMC Judicial Council, Apr. 29, 2008) (affirming revocation of minister's ordination credentials after conviction on charges of sexual misconduct and disobedience to the Order and Discipline of the UMC), *available at* http://archives.umc.org/interior_judicial.asp?mid=263&JDID=1176&JDMOD=VWD&SN=1001&EN=1099; *In re: Request from the California-Pacific Annual Conference for a Declaratory Decision on the Constitutionality, Meaning, Application, and Effect of ¶ 359.3c(2) of the 2000 Discipline Concerning Administrative Location*, Decision No. 1010 (UMC Judicial Council, Apr. 29, 2005) (holding fair process was violated, reversing administrative location of clergy member, and ordering clergy's reinstatement to prior position along with retroactive benefits and compensation), *available at* http://archives.umc.org/interior_judicial.asp?mid=263&JDID=1087&JDMOD=VWD&SN=1001&EN=1099.

action.[10] The church's process of addressing ministerial employment issues begins with an informal process that has the goal of a "just resolution."[11] If a complaint is based on allegations of "incompetence, ineffectiveness, or unwillingness or inability to perform ministerial duties," the matter is referred as an administrative complaint to the Board of Ordained Ministry for remedial or other action.[12] If, however, a complaint is based on a chargeable offense, then it is converted into a judicial complaint subject to the UMC's judicial system.[13]

Under the UMC's judicial system, clergy may be tried in a formal process when charged with one or more of a list of offenses. Counsel for the UMC initiates such a proceeding by preparing a judicial complaint and referring it to a committee on investigation, which may issue a "bill of charges and specifications" identifying one or more offenses for trial.[14] Church trials, which the UMC considers "an expedient of last resort," are held before a thirteen-member "trial court" selected from a pool of thirty-five clergy "representative of racial, age, ethnic,

10. Book of Discipline, Part II, Ch. 2, ¶ 361.

11. *Id.*, Part II, Ch. 2, ¶ 361. The complexity of the UMC's administrative and judicial system is underscored by the 230-page guide to the denomination's procedures. *See* General Council on Finance and Administration of The United Methodist Church, *Administrative and Judicial Procedures Handbook* (2011), *available at* http://www.gcfa.org/sites/default/files/u3/A%26JP%20Handbook.pdf.

12. Book of Discipline, Part II, Ch. 2, ¶ 362.

13. *Id.*

14. *Id.*, Part V, Ch. 7, ¶ 2706.

and gender diversity."[15] During a trial, the clergy member has the right to present a defense, which may include allegations of pretext.[16] A conviction must be based on clear and convincing evidence and requires the vote of at least nine members of the trial court.[17] Upon conviction, the trial court may hear further testimony on the proper penalty, which may include removal or suspension from office.[18]

An adverse decision of the trial court may be appealed to a committee on appeals, but only by the clergy member.[19] Ultimate review belongs to the Judicial Council.[20] The Judicial Council, the UMC's highest judicial body, is composed of nine members, including both lay and clergy members.[21] The UMC's goal is that the composition of the Judicial Council "should reflect the diversity of [the UMC], including racial, age, ethnic, [and] gender" diversity.[22]

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15. *Id.*, Part V, Ch. 7, ¶¶ 2707, 2709, 2712.3, 2713.3.

16. *Id.*, Part V, Ch. 7, ¶¶ 2710, 2701.2.

17. *Id.*, Part V, Ch. 7 ¶ 2711.

18. *Id.*, Part V, Ch. 7, ¶ 2711.

19. *Id.*, Part V, Ch. 7, ¶ 2715.10 (prohibiting appeal of trial court decision by the church).

20. *Id.*, Part V, Ch. 7, ¶¶ 2715–18.

21. *Id.*, Part V, Ch. 7, ¶ 2601–02; *see also* The United Methodist Church, *Rules of Practice and Procedure: The Judicial Council of The United Methodist Church* (Revised Apr. 2010), *available at* http://www.umc.org/atf/cf/%7Bdb6a45e4-c446-4248-82c8-e131b6424741%7D/RULES_ADOPTED_FINAL_APRIL_2010_A.PDF (Judicial Council's procedural rules).

22. Book of Discipline, Part V, Ch. 7, ¶ 2602.

B. The Presbyterian Church (U.S.A.)

The Presbyterian Church (U.S.A.) ("PC(USA)") and its predecessors have been in existence since the 1700s and have a longstanding system of internal governance, which was first recognized by this Court in 1871. *See Watson*, 80 U.S. (13 Wall.) at 727 ("There are in the Presbyterian system of ecclesiastical government in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all.").[23] PC(USA) has a structured system in which the sessions (individual congregations) are subject to a presbytery, which is subject to a synod, which is subject to the General Assembly. The presbyteries, synods, and General Assembly each have a permanent judicial commission.[24] Each presbytery's permanent judicial commission has authority to hear remedial and disciplinary cases concerning ministers, while the permanent judicial commissions of the synods and the General Assembly have jurisdiction over appeals.[25]

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23. The Court in *Watson* referred to one of the PC(USA)'s predecessor organizations, the Presbyterian Church in the United States. The present PC(USA) resulted from the union between the Presbyterian Church in the United States and the United Presbyterian Church in the United States of America in 1983. *See* Presbyterian Historical Society, A Brief History of the Presbyterian Church in this Country, *available at* http://www.history.pcusa.org/history/history.cfm (last visited June 17, 2011).

24. The PC(USA) maintains a database of decisions rendered by the permanent judicial commission of the General Assembly, the church's highest authority. The decisions are available at PC(USA) Office of the General Assembly, Permanent Judicial Commission Decisions, http://oga.pcusa.org/gapjc/decisions/decisions.htm.

25. The Constitution of the Presbyterian Church (U.S.A.), Part II, Book of Order 2009-2011 (The Office of the General

The PC(USA) believes that "[t]he church's disciplinary process exists not as a substitute for the secular judicial system, but to do what the secular judicial system cannot do."[26] The PC(USA)'s judicial process "is the means by which church discipline is implemented within the context of pastoral care and oversight" and represents "the exercise of authority by the governing bodies of the church for," among other things, "the prevention and corruption of offenses by persons."[27]

Recognizing that "all participants are to be accorded procedural safeguards and due process,"[28] the PC(USA)'s *Rules of Discipline* provide detailed procedures for conducting "disciplinary cases," in which "church officers" may be censured for an offense.[29] Likewise, the PC(USA)'s

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Assembly of the Presbyterian Church (U.S.A.) 2009) ("PC(USA) Rules of Discipline"), § D-5.0101, *available at* http://oga.pcusa.org/publications/2009-2011-boo.pdf; *id.* § D-3.0101(c). A remedial case involves "an irregularity or a delinquency of a lower governing body" (such as a congregation or presbytery). *Id.* § D-2.0202. Irregularities are erroneous decisions or actions by a pastor or higher body, and delinquencies are omissions or failures to act. *Id.* Remedial cases often involve disputes over interpretation of Scripture or doctrine. Disciplinary cases involve instances where a church officer performed an act or omission contrary to the Scriptures or Constitution of the PC(USA), and for which that officer may be subject to censure. *Id.* § D-2.0203.

26. PC(USA) Rules of Discipline, § D-1.0101, Preamble (describing purpose of discipline in the PC(USA)).

27. *Id.* § D-2.0101.

28. *Id.* § D-1.0101.

29. *Id.* § D-2.0103 (church officers are "ministers of the Word and Sacrament, elders, and deacons").

Association of Stated Clerks, an organization that serves to aid church clerks in their duties, provides a non-binding and advisory *Handbook For Judicial Process* to aid the permanent judicial commissions in following the proper procedures specified in the *Rules of Discipline* during investigations, trials, and appeals.[30]

A disciplinary case is initiated by the submission of a written statement of an alleged offense, and the *Rules of Discipline* delineate clear procedures to be followed when such accusations are leveled.[31] When an accusation is made, the presbytery's clerk informs the governing body that an offense has been alleged, and the governing body forms an investigative committee to determine whether charges should be filed.[32] The committee provides a copy of the accusation to the accused, informs the accused of the procedures to be followed, and conducts a thorough investigation.[33] The committee also can recommend alternative dispute resolution or mediation to resolve the charges leveled against the accused.[34] During all investigatory or trial proceedings, the accused has the right to an advocate.[35]

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30. The Association of Stated Clerks, *The Handbook For Judicial Process* (The Association of Stated Clerks, Presbyterian Church (U.S.A.) 4th ed. Oct. 2005), *available at* http://www.statedclerks.org/handbook_files.html.

31. PC(USA) Rules of Discipline, § D-10.0100 *et seq.*

32. *Id.* § D-10.0201-02(a).

33. *Id.* § D-10.0202.

34. *Id.* § D-10.0202(h).

35. *Id.* § D-10.0203(c); *id.* § D-11.0301.

If the committee determines by a two-thirds vote that charges should be filed, the accused is promptly informed, and the governing body designates a prosecuting committee in the name of the PC(USA).[36] Pre-trial conferences are held, witness and evidentiary lists are exchanged, and the time and location of the impending trial are set.[37] During trial, the accused has the right to be represented by an advocate who is a member of the PC(USA).[38] Trial procedures are carefully delineated and authority over the trial is vested in the session or permanent judicial commission before which the proceeding is heard.[39] Rules of evidence govern its admissibility at trial.[40]

To convict, two-thirds of the permanent judicial commission must "find that the pertinent facts within that charge have been proven beyond a reasonable doubt."[41] Upon a guilty verdict, the session or general assembly hears further evidence to determine the censure to be imposed.[42] "The degrees of church censure are rebuke, rebuke with supervised rehabilitation, temporary exclusion from exercise of ordained office or membership, and removal from ordained office or membership."[43]

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36. PC(USA) Rules of Discipline, § D-10.0402.

37. *Id*. § D-10.0405-406.

38. *Id*. § D-11.0301.

39. *Id*. § D-11.0300 *et seq.*; *id*. § D-11.0400 *et seq.*

40. *Id*. § D-14.000 *et seq.*

41. *Id.* § D-11.403(a).

42. *Id*. § D-11.0403(e).

43. *Id*. § D-12.0101.

The convicted has the right to appeal to the next higher governing body to obtain review of the decision.[44] Grounds for an appeal include irregularities in the proceedings, refusing a party a reasonable opportunity to be heard, allowing improper evidence to be heard at trial, refusing admission of proper evidence, rushing to conclude a trial before all evidence has been weighed, and any manifestation of prejudice during the proceeding.[45]

C. Roman Catholicism

The legal system of the Catholic Church is known as *ius canonicum* ("canon law"). Although it derives its guiding values from the teachings of Jesus Christ as preserved and proclaimed by the Catholic Church, canon law is primarily organized around juridic principles adopted from the Imperial Roman or "civil" legal system now practiced in continental Europe and throughout Latin America. *See* John Merryman, *The Civil Law Tradition* 10 (2d ed. 1985). Developed over many centuries and codified since the early 20th century,[46] canon law addresses virtually every aspect of

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44. *Id.* § D-13.0101.

45. *Id.* § D-13.0106(a)-(b).

46. Canon law was first codified early in the twentieth century by Pope Benedict XV. *See Codex Iuris Canonici, Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, Acta Apostolicae Sedis* 9/2, at 3-521 (1917). This first comprehensive code, commonly known as the 1917 Code of Canon Law, was the primary legislative document of the Roman Catholic Church until it was replaced by the current canon law governing the Roman or Western Catholic Church, commonly known as the 1983 Code of Canon Law. *See Codex Iuris Canonici auctoritate*

ecclesiastical life for the Catholic Church's congregations in almost every corner of the world, including disciplinary matters regarding ministerial employees or officers, such as clergy or members of religious institutions. Such employment decisions are informed by both canon law and its accompanying commentary.

A useful illustration of canon law's ability (indeed, duty) to regulate a religious employment dispute in the Catholic Church would be to trace the stages of a hypothetically contested removal of a priest from his post as pastor of a parish. Where a priest declines an initial suggestion by the presiding bishop to resign, a bishop may, in accord with a series of steps outlined in Canons 1740–1747 of the 1983 Code of Canon Law, remove the priest from office. In the implementation of these sequentially mandated steps, the bishop would be guided by canonical counsel, who in turn would draw upon canonical commentary and, where necessary, other forms of ecclesiastical jurisprudence.

Should the priest challenge the sufficiency of the bishop's removal action, however, the priest has the right to take "recourse" (a form of appeal under administrative canon law) to the Congregation for the Clergy (a "dicastery" of the Holy See in Rome), which has jurisdiction to hear complaints against removal.[47] The Congregation of the Clergy has authority to confirm the bishop's decision, or to reinstate the pastor, or to return the matter for

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Ioannis Pauli PP. II promulgatus, Acta Apostolicae Sedis 75/2, at 1-320 (1983); English transl., Canon Law Society of America, Code of Canon Law, Latin-English Edition, New English Translation (Canon Law Society of America, 1999) ("1983 Code").

47. *See Pastor Bonus* art. 93 (1988) (apostolic constitution).

rehearing at the diocesan level. In reaching its decision, the Congregation of the Clergy would be guided by general principles of canon law (including those portions of the 1983 Code dealing with, for example, administrative acts, the rights and duties of priests, the rights and duties of pastors, the general norms on administrative recourse, and the special norms on removal of pastors)[48] and by the particular law of the Roman Curia.[49] In all respects, the Congregation for the Clergy is assisted by trained canonical counsel who in turn draw upon a sophisticated collection of scholarly commentaries which enjoy a respect in canonical circles akin to judicial precedent.[50]

Finally, a priest would have the right of recourse from the Congregation for the Clergy's decision to the dicastery known as the Supreme Tribunal of the Apostolic Signatura. This tribunal (whose jurisprudence dates back to the 13th century) functions as the court of last resort in the Catholic Church and is governed by the general principles of canon law[51] and by the apostolic letter *"Motu Proprio data" Antiqua ordinatione* (June 21, 2008). The Signatura has authority to, among other things, confirm

48. *See, e.g.*, 1983 Code, c.35–58, c.273–89, c.515–52, c.1732–39, and c.1740–47.

49. This chiefly would be the apostolic constitution *Pastor Bonus* (1988) and the *Regolamento Generale della Roman Curia* (1999).

50. *See* 1983 Code, c.16–19; *see also* Edward Peters, "Lest amateurs argue canon law: a reply to Patrick Gordon's brief against Bp. Daily," 83 *Angelicum* 121, 121–42 (2006).

51. *See, e.g.*, 1983 Code c.1445; *Pastor Bonus* art. 121–25 (1988).

the bishop's decision, reinstate the priest, or return the matter for rehearing at the diocesan or dicasterial level. As before, in all respects the Signatura is assisted by canonical counsel who in turn draw upon a sophisticated collection of scholarly commentaries.

D. Judaism

The Jewish tradition has a decentralized, well-established and robust judicial system that resembles arbitration and has developed internationally through individual decisions and applications in ways similar to the common law familiar to the U.S. legal system. Jewish courts, known as *battei din* (*beth din* in the singular), resolve all manner of disputes, including those involving the duties, rights and employment of rabbis, other religious leaders, and employees of Jewish religious organizations such as temples and schools.[52]

Beth din tribunals have reflected and applied substantive Jewish law and civil procedure to disputes for thousands of years. A *beth din* typically is composed of a panel of three *dayanim*, or judges, or a single *dayan*, who will conduct a *din torah*, an arbitral proceeding designed to resolve the dispute in reliance on *halacha*, Jewish law. A

52. *Beth din* arbitration activities related to disputes generally, and the enforceability in civil courts of those resolutions, have been the subject of extensive judicial and academic commentary. *See, e.g.*, Ginnine Fried, Comment, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urb. L.J. 633, 653–54 (2004). Issues surrounding the enforceability of arbitral decisions by religious tribunals are not impacted by the ministerial exception at issue here.

beth din may look to Jewish legal experts' written answers to questions posed by an individual, a group of individuals, or a specific community, called *responsa*, of which there are hundreds of thousands that inform *dayanim* decision-making; a *beth din* also may scrutinize Jewish legal commentaries and restatements that give substantive content to their decisionmaking process.

Beth Din of America is a modern example of a *beth din* court.[53] Founded in 1960, Beth Din of America "provide[s] a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (halacha)."[54] *Battei din*, including Beth Din of America, are regularly called upon to evaluate and adjudicate disputes over, for example, teacher termination, severance pay, and rabbinical tenure. They can also make decisions about the selection of particular communities' religious leaders.[55]

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53. *See* Beth Din of America, Organization and Affiliations, http://www.bethdin.org/organization-affiliations.asp.

54. Beth Din of America, Rules and Procedures of the Beth Din of America, Preamble § (a), *available at* http://www. bethdin. org/docs/PDF2-Rules_and_Procedures.pdf ("Beth Din Rules and Procedures").

55. *See, e.g.*, Michael Broyde, *Severance Pay for Yeshiva Day School Employees*, at 1, *available at* http://www.jlaw.com/Articles/SEVERANCarticle.pdf ("[O]ne matter that is frequently litigated in dinai torah is claims for severance pay under Jewish law for employees of Jewish school[s]. . . . As is widely known, there is a common practice in Jewish education institutions that when a Judaic studies faculty member or administrator is either terminated from employment or denied a regularly expected renewal, without due cause, severance pay must be provided."); *see also, e.g., Brisman v. Hebrew Academy of Five Towns &*

To facilitate the performance of these functions, Beth Din of America has adopted Rules and Procedures "designed to provide a process of dispute resolution in a Beth Din [and] which are in consonance with the demands of Jewish law that one diligently pursue justice, while also recognizing the values of peace and compromise."[56] The Rules and Procedures explain that Jewish law "provide[s] the rules of decision and rules of procedure that govern the functioning of the Beth Din," except where the parties have agreed to a choice of law provision or where the parties accept "the common commercial practices of any particular trade, profession, or community."[57] The Rules and Procedures also require that the parties have entered into an agreement to arbitrate before Beth Din of America.[58] Finally, parties appearing before Beth Din of America have the right to petition for modification of a *beth din*'s decision, and the Av Beth Din, a supervising rabbi of Beth Din of America, may overturn the *beth din* decision to the extent it is contrary to Jewish law.[59]

Rockaway, 895 N.Y.S.2d 482, 483 (N.Y. App. Div. 2010) (*beth din* affiliated with Beth Din of America found that tenured teacher at Jewish school was wrongfully terminated without just cause and ordered reinstatement of teacher, along with back pay and benefits); *Blitz v. Beth Isaac Adas Israel Congregation*, 720 A.2d 912, 913 (Md. 1998) (*beth din* ordered synagogue to pay rabbi to resolve employment dispute).

56. Beth Din Rules and Procedures, Preamble § (b).

57. *Id.* § 3(c)–(e).

58. *Id.* § 2.

59. *Id.* § 31(a).

Although Beth Din of America has published formal procedures, all *battei din* in the United States and around the world are governed by a form of Jewish civil procedure and Jewish law, and interpret and apply that law in individual cases. This law is not codified like canon law, but is left to individual *dayan* and rabbis to interpret, and this law provides the guidelines and substance for *dayanim* confronting disputes over employment and doctrine and is relied on internationally by *battei din* from New York to Israel. This development of the law provides a medium for the maintenance and development of the Jewish faith, beginning thousands of years ago and continuing to this day.

E. The Episcopal Church

Many other religious traditions besides those discussed in this brief and represented by *amici* have established religious tribunals. To give just one example of another ecclesiastical system, the Episcopal Church has a formal disciplinary process that applies to allegations of misconduct by any member of the clergy. These proceedings are "neither civil nor criminal but ecclesiastical in nature" and "represent the responsibility of the Church to determine who shall serve as Members of the Clergy of the Church."[60] The disciplinary process is premised on the principle that "Members of the Clergy have voluntarily sought and accepted positions in the

60. The General Convention of the Episcopal Church, *Constitution and Canons of the Episcopal Church*, § IV.19.1 (2009), *available at* http://extranet.generalconvention.org/staff/files/download/648 ("Episcopal Constitution").

Church and have thereby given their consent to subject themselves to the Discipline of the Church."[61]

The Episcopal Church's disciplinary process is currently in transition, with new procedures to take effect July 1, 2011. Previously, trial proceedings were formalized and evidence was admissible only in accordance with the Federal Rules of Evidence.[62] The Episcopal Church recently instituted reforms to reflect to a greater degree its theological beliefs and convictions, such as incorporating wherever possible a spirit of reconciliation and healing.[63]

Under the revised procedures, any allegation of misconduct is subject to multiple layers of review.[64] Persons who have information about an offense subject to disciplinary action are directed to forward the information

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61. *Id.*

62. *See* The General Convention of the Episcopal Church, *Constitution and Canons of the Episcopal Church*, § IV.4.10 (2006), *available at* http://extranet.generalconvention.org/staff/files/download/378.

63. *See* The General Convention of the Episcopal Church, *Report to the 76th General Convention* at 768, *available at* http://extranet.generalconvention.org/staff/files/download/364. At many stages of the proceeding, a process called "Conciliation" is available. Conciliation is a form of negotiated settlement designed to "seek a resolution which promotes healing, repentance, forgiveness, restitution, justice, amendment of life and reconciliation among the Complainant, Respondent, affected Community, other persons and the Church." Episcopal Constitution, § IV.10.1.

64. Episcopal Constitution, § IV.5 (2009).

to an Intake Officer,[65] who conducts a preliminary investigation and prepares a written report to determine whether or not allegations should be considered by the Reference Panel.[66] The Reference Panel then decides upon an appropriate response to the allegations, with the assistance of an appointed Investigator.[67] These responses include informal pastoral care, disciplinary action negotiated with the local bishop, continued factual investigation, or no action at all.

If a formal prosecution is deemed necessary, the matter is referred to the Conference Panel, which hears evidence and engages in a confidential, informal, and conversational proceeding with the respondent present.[68] The Conference Panel may take various actions, including referral to the Hearing Panel.[69] The Hearing Panel engages in public proceedings modeled after an adversarial hearing in which evidence and testimony may be presented,[70] witnesses cross-examined, and rebuttal evidence presented by the respondent.[71] The Hearing Panel may then issue a ruling restricting "the involvement, attendance or participation of the respondent in the Community" or issue other appropriate disciplinary

65. *Id.* § IV.6.3 (2009).

66. *Id.* § IV.6.4 (2009).

67. *Id.* § IV.6.8; *id.* § IV.11.2 (2009).

68. *Id.* § IV.12.7 (2009).

69. *Id.* § IV.12.9 (2009).

70. *Id.* § IV.13.6 (2009).

71. *Id.*

measures.[72] Finally, a Provincial Court of Review may review the determinations of the Hearing Panel.[73]

In total, the section of the Episcopal Constitution and Canons concerning ecclesiastical discipline contains over forty pages of definitions, rules, and procedures designed to ensure that members of the clergy receive a fair resolution of all disciplinary matters in a manner consistent with the Episcopal faith.[74]

II. The First Amendment Necessitates Respect for the Role of Religious Tribunals

The case before the Court directly impacts the religious courts discussed above because they hear and resolve disputes involving ministerial and other religious employees, from bishops, nuns, and rabbis to school officials and church functionaries. These tribunals represent the efforts of certain religious organizations to enforce doctrinal standards and to regulate their membership and leadership. They are thus critical to the mission and identity of these individual organizations.

In prior decisions, this Court has observed that religious organizations have First Amendment rights to self-govern. Furthermore, the Court has recognized that religious tribunals are essential extensions of their respective religious organizations and therefore are entitled to deference by civil courts under the First

72. Episcopal Constitution, § IV.14.1 (2009).

73. *Id.* § IV.15 (2009).

74. *Id.* § IV (2009).

Amendment. Today, a number of religious organizations continue to look to religious tribunals to resolve questions of faith and practice for their adherents. In determining the scope of the ministerial exception in this case, therefore, the Court should reaffirm the core First Amendment interests of religious organizations to resolve disputes about their personnel, doctrines, and values internally through religious, rather than civil, courts.

Unlike the decisions of many other courts that have applied the ministerial exception, the Sixth Circuit's decision in this case grants civil courts permission to impermissibly intrude upon core First Amendment territory by second-guessing the true motivations of a religious organization's ministerial employment decision. And it further erodes religious organizations' ability to manage their internal affairs by taking a crabbed and grudging view of what personnel constitute "ministerial" employees. The Sixth Circuit's decision thus allows civil law to interfere with, collaterally attack, and override determinations about religious leadership and doctrine made by those entrusted by their religious communities with the critical mission of ensuring fidelity to their faith. The Court should not countenance this erosion of a vital element of religious expression and worship and should reject the Sixth Circuit's approach.

A. This Court Should Reaffirm the Core First Amendment Right of Religious Organizations to Self-Govern, Including through Religious Tribunals

The Court previously has acknowledged that religious organizations have a fundamental First Amendment

right to self-govern. This right extends to a religious organization's decision to resolve internal disputes through religious tribunals. In evaluating the scope of the ministerial exception, the Court should reaffirm the First Amendment rights of these organizations.

In *Watson*, which involved an internal dispute of a predecessor to the PC(USA), the Court first recognized that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of church judicatories to which the matter has been carried," civil courts must accept the decision as final and binding. *Watson*, 80 U.S. (13 Wall.) at 727. In so holding, the Court acknowledged that the local congregation where the property dispute arose was "itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments." *Id.* at 726–27.

Watson did not articulate a constitutional rule, but the Court rooted its reasoning in religious freedom, anti-establishment, and associational principles:

> The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned.

Id. at 728–29. Under *Watson*, respect for the decisions of religious courts was "founded in a broad and sound view of the relations of church and state." *Id.* at 727. The Court

also acknowledged that granting civil courts jurisdiction to review the decisions of religious courts could fatally undermine the system of internal government on which such religious organizations were based:

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Id. at 729.

In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), the Court confirmed that the principles in *Watson* extended beyond church property disputes to church governance matters generally, holding that a state supreme court's inquiry into the defrocking of a bishop violated the First Amendment. *Id.* at 697–98; *see also id.* at 710 ("This principle applies with equal force to church disputes over church polity and church administration."). The "fallacy fatal" in the state court's decision was that it "rest[ed] upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute" and "impermissibly substitute[d] its own inquiry into church polity." *Id.* at 708–12.

The First Amendment principles that animated *Watson* and *Serbian* unquestionably reach and protect the decisions of religious courts on matters of religious discipline and employment. *See Serbian*, 426 U.S. at 709

("Resolution of the religious dispute over Dionisije's defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals."). The Court's precedents firmly establish the First Amendment right of every religious organization to determine its own path free from outside government interference. By extension, civil courts generally must defer to the decisions of a religious tribunal, including those involving ministerial employees. Many religious organizations, including those discussed above, have established religious tribunals and granted them authority to resolve religious employment disputes. Each of these tribunals represents the genuine effort of a religious organization to provide a forum for equitably resolving such disputes, in a manner consistent with the values of the faith. And each of these tribunals relies, to some extent, on the resolution of such disputes to further refine and develop its faith tradition.

Encouraging questions of religious doctrine and discipline to be litigated in the first instance before civil courts, or sanctioning collateral attacks on religious tribunal decisions, will harm these organizations. Ecclesiastical court decisionmaking is critical to the enforcement and development of these faiths' religious doctrine. Thus, in addition to interfering and intruding into their internal affairs, a regime that countenances such litigation and review risks depriving these organizations of the opportunity to continue developing their substantive law and doctrine through case by case adjudication and refinement. Moreover, opening the door to civil court review would render those religious tribunal decisions

advisory, thereby undercutting their intended purpose of resolving ecclesiastical disputes with finality. *Watson*'s caution about the inhibiting effect that civil review of religious questions would have on the voluntary nature of these organizations still rings true today. *See* 80 U.S. (13 Wall.) at 728–29 ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.").

As the Court considers the contours of the ministerial exception, it should reaffirm the deference due to religious tribunals on matters of personnel management, discipline, and employment.

B. The Sixth Circuit's Decision Fails to Give Proper Weight to the First Amendment Rights of Religious Organizations

The Sixth Circuit's decision fails to respect the First Amendment rights of a religious organization that entrusts its internal ministerial employment disputes to a religious court. The panel opined broadly that "this Court would not be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 782 (6th Cir. 2010) (Pet. App. at 24a). This suggestion flies in the face of the core First Amendment principles recognized in *Watson* and *Serbian*, which require civil courts to *accept* the decision of a religious court on a matter of internal governance, not to second guess it as pretextual. In *Serbian*, the Court

underscored this deferential approach to civil court review of the decisions of religious tribunals when it rejected an "arbitrariness" standard that would have permitted civil courts to inquire into whether the religious tribunal had complied with its own church laws and regulations. 426 U.S. at 713. "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Id*. at 714–15. As the Court acknowledged in *Serbian*, civil court review of religious tribunal decisions is antithetical to the fundamental tenets of faith on which a religious organization is built.

Contrary to the Sixth Circuit's approach, other lower courts have applied the ministerial exception to accept the decisions of religious courts on matters of ministerial employment and discipline as binding. For example, in *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008), the Second Circuit held that the ministerial exception precluded a former Catholic priest from bringing a Title VII claim against his bishop and diocese for his removal from office. *Id*. at 209–10. Noting that the priest had appealed his dismissal to the Catholic Church's Congregation of the Clergy, which had affirmed his removal, the court asked rhetorically, "[H]ow are we, as Article III judges, to gainsay the Congregatio Pro Clericis' conclusion that Father Justinian is insufficiently devoted to ministry? How are we to assess the quality of his homilies?" *Id*. at 200, 209 (priest's Title VII claim that Congregation of the Clergy's decision was pretextual "cannot be heard by [the court] without impermissible entanglement with religious doctrine"); *see also Serbian*, 426 U.S. at 714 n.8 ("Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs

ecclesiastical disputes, as *Watson* cogently remarked . . . ." (citation omitted)).

Similarly, a prior decision from the Sixth Circuit, *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992), illustrates the errors of the panel decision currently before the Court. In *Lewis*, the Sixth Circuit affirmed the district court's dismissal of the claims of a minister and his wife against a conference of the Seventh Day Adventist Church for breach of contract, promissory estoppel, intentional infliction of emotional distress, and loss of consortium. *See id.* at 941–43. In so holding, the *Lewis* court rejected as contrary to the First Amendment the plaintiffs' argument that "civil courts sometimes may intervene in employment disputes between churches and clergy" in instances where "the plaintiff alleges that the religious tribunal's decision was based on a misapplication of its own procedures and laws." *Id.* at 942–43; *see also Crowder v. Southern Baptist Convention*, 828 F.2d 718, 726–27 (11th Cir. 1987) (deferring to the Southern Baptist Convention as an ecclesiastical tribunal); *Kral v. Sisters of the Third Order Regular of St. Francis of the Congregation of Our Lady of Lourdes*, 746 F.2d 450, 451 (8th Cir. 1984) (per curiam) (affirming dismissal of complaint by nun expelled from membership based on the decision of Catholic Church's judicial authorities).

While professing faithful adherence to *Serbian* and *Lewis*, the Sixth Circuit's decision fails to properly account for the breadth of the First Amendment principles at stake, casting uncertainty on the ability of religious organizations to rely on their religious courts to resolve ministerial employment disputes. *See Hosanna-Tabor*, 597 F.3d at 777 (Pet. App. at 15a) (generally citing *Serbian*

and *Lewis*). As the Court grapples with the scope of the ministerial exception in this case, it should acknowledge the role of religious courts in deciding internal employment disputes and give due regard to the First Amendment rights of the religious organizations that rely on them.

CONCLUSION

The Court has before it a case that touches a core prerogative of every religious organization: the right to choose its religious leaders and the corollary right to discipline or dismiss them. Many religious faiths have chosen to exercise this right in part through religious courts. The First Amendment requires civil courts to show due regard for the decisions of these religious courts as unique expressions of the beliefs and values of the faiths they represent. Because the opinion below fails to protect these First Amendment interests, the Court should reverse the Sixth Circuit's decision and vindicate First Amendment freedoms by endorsing a robust ministerial exception.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF DISTINGUISHED EXPERTS ON RELIGIOUS TRIBUNALS

William Edwin Chapman

Dr. Chapman's fifty-three year career as a minister in the Presbyterian Church (U.S.A.) included numerous roles as pastor, teacher, and administrator at local, area, regional, and national church bodies. He holds degrees from the College of Wooster (B.A.) and Princeton Theological Seminary (B.D., M.R.E., Ph.D.) and has authored four books on church life, including a widely used text regarding Presbyterian polity (governance), a topic he also taught for a decade in two seminaries. Dr. Chapman served six years on a regional church court and has testified as an expert witness in civil cases around the country regarding church governance issues. In 2010, the Presbyterian Church (U.S.A.)'s Association of Stated Clerks conferred on him their national award for distinguished service in the church's polity.

Edward N. Peters

Dr. Peters holds the Edmund Cdl. Szoka Chair at Sacred Heart Major Seminary in Detroit, Michigan. He is a graduate of Saint Louis University (B.A.), the University of Missouri at Columbia School of Law (J.D.), and The Catholic University of America School of Canon Law (J.C.L., J.C.D.). Dr. Peters practiced canon law for more than ten years, holding prominent canonical offices such as Collegial Judge at the trial and appellate levels, Diocesan Chancellor, Promoter of Justice, Defender of the Bond, and Director of the Office of Canonical Affairs. He has taught canon law for ten years and published dozens of articles

and reviews in peer-reviewed canonical and secular law reviews. In 2010, Pope Benedict XVI appointed Dr. Peters to a five-year term as a "Referendary" (consultant) to the Supreme Tribunal of the Apostolic Signatura, the Catholic Church's highest administrative court. Dr. Peters is the first layperson to be a Referendary since the Signatura was reconstituted in 1908.

Richard J. Rettberg

Mr. Rettberg earned a B.A. from the University of Illinois at Urbana-Champaign and a J.D. from the Illinois Institute of Technology/Chicago-Kent College of Law. He currently is General Counsel for the General Council on Finance and Administration of The United Methodist Church, a position he has held for four years. Prior to that, he was a partner with a Chicago litigation firm for twenty-nine years. As a part of his regular duties, Mr. Rettberg is expected to be knowledgeable about The United Methodist Church's *Book of Discipline*, including the provisions relating to clergy discipline matters and judicial proceedings, and he frequently is consulted by various parties within The United Methodist Church on those issues. Mr. Rettberg has traveled to Europe, Africa, and the Philippines to consult with church leaders on church law issues, including clergy discipline matters and judicial proceedings.

Appendix

Ronald Warburg

Rabbi Dr. Ronald Warburg is an internationally recognized scholar of Jewish law and a sitting *dayan* (judge) at the Beth Din of America in New York City. He also serves as research fellow at the Institute of Jewish Law at Boston University School of Law. He serves on the editorial boards of The Jewish Law Annual and Tradition and served as Chairman of the Jewish Law committee for the International Association of Jewish Lawyers and Jurists. Rabbi Warburg has published numerous articles in refereed journals in the areas of family law, bioethics, contracts and securities law addressing the interface of Jewish law and American law. A series of *beth din* decisions in commercial and family matters authored by Rabbi Warburg will appear in his forthcoming book entitled *Rabbinic Authority: The Vision & the Reality*. Rabbi Warburg earned his rabbinic ordination at Yeshiva University, an S.J.D. at the Hebrew University Faculty of Law, and an M.A. at New York University.