

No. 10-553

IN THE
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondent.

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

**MOTION FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE* AND
BRIEF OF RELIGIOUS ORGANIZATIONS
AND INSTITUTIONS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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November 26, 2010

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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Pursuant to Supreme Court Rule 37.2(b), Loma Linda University, the General Council on Finance and Administration of The United Methodist Church, the Association of Christian Schools International, the Church State Council of the Pacific Union Conference of Seventh-day Adventists, Church Communities International, and Adventist Health (collectively, “*Amici*”) hereby request leave to file the accompanying *amici curiae* brief. This brief is submitted in support of granting the petition for a writ of certiorari.

Counsel for Petitioners has consented to the filing of this brief. The Office of the Solicitor General has consented for Respondent EEOC. Counsel for Respondent Perich, however, has declined to consent, while indicating that she will not oppose the motion.

As set forth in the accompanying brief, *Amici* are religious institutions that are directly impacted by the scope of the ministerial exception or which advise their denominations on these issues. *Amici* and their affiliated denominations have hundreds of thousands of ordained and lay employees, and operate or support, directly or indirectly, institutions including houses of worship, schools, hospitals, nursing homes, and social service facilities. *Amici* have specific interests in the ministerial exception, which governs the extent to which courts will intervene in *Amici*'s ability to determine who will carry out religious duties central to *Amici*'s religious and pastoral missions.

Church Communities International, for instance, is an international Christian communal movement in which everything is shared in common and most members live together in rural communities. As part of the living proclamation of their faith, members participate in the community through daily work. Work is integral to members' religious vocation, making the distinction between secular and sacred exceptionally difficult to parse.

Loma Linda University and the Association of Christian Schools International have substantial interests in the application of these standards in the context of educational ministries that could be deemed secular activities under some readings of the ministerial exception.

The General Council on Finance and Administration of The United Methodist Church and Church State Council of the Pacific Union Conference of Seventh-day Adventists, safeguard their respective denominations' legal interests and rights, and could

face a surge in litigation if certain ministries are deemed to be secular.

Adventist Health is a faith-based medical institution whose goal is to share God's love by providing physical, mental and spiritual healing, in a manner that expresses and embodies the distinctive religious importance of care of the whole person within Adventist theology, but some of whose ministries would lose some legal protection under the test applied below.

The instant case presents a question fundamental to the protection of religious liberty for all, but particularly for these *Amici*. The decision below alters the ministerial exception so as to oblige courts to delve into religious doctrine in order to deem whether an employee performs religious or secular activities, thereby injecting the State into the internal affairs of religious institutions.

Amici believe that the decision below, if affirmed, would both entangle the State with religion, and would chill the free exercise of religious liberty among religious organizations across America. This issue arises here in the context of Petitioner's claim, involving a school and a specifically designated minister. The issues presented, however, apply to situations more broadly than those addressed in the petition. *Amici* are uniquely situated to speak to those broader implications, and do so in the attached brief.

Amici therefore respectfully request leave to file the accompanying brief containing discussion of the wider implications of narrowing the ministerial exception on religious liberty.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*¹

Amici are religious organizations and institutions with hundreds of thousands of religious and lay employees. *Amici* further their religious missions through both clergy and non-ordained employees charged with religious responsibilities or other duties integral to *Amici*'s ministries.

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

INTRODUCTION

Courts risk both establishing certain religions and prohibiting the free exercise of others when they undertake to define the ways in which the law will recognize religious expression. Courts are ill-suited to declare what is religiously orthodox and who may convey the orthodox faith and teachings for any

¹ No person or entity other than *Amici* made a monetary contribution to this brief's preparation or submission. No counsel for a party authored this brief in whole or in part or made a monetary contribution to its preparation or submission. Counsel for all parties received timely notice of the filing of this brief and all parties except Respondent Perich have consented to the filing. The letters of consent have been filed.

² Individual *Amici* are described in the appendix.

religious organization. The “ministerial exception” avoids this conflict by declining to adjudicate the employment rights of “ministerial” employees—those ordained or lay employees of a religious organization whose duties are central to its pastoral mission.

The lower courts, however, are conflicted as to the scope of this exception. Some remain focused on the concerns that animate the exception—avoiding entangling courts in matters of church doctrine and leadership. Others, such as the court below, have ossified the exception into a mechanistic inquiry divorced from its purposes. This second group of courts, applying a “primary duties” test, endeavor to determine whether an employee is “ministerial” by assessing whether the employee’s duties are religious. In doing so, they wade into the very conflict the exception was intended to avoid.

The division among the circuits results in substantively different outcomes in factually indistinguishable cases. In light of the number of religious organizations and institutions across the country, the division among the lower courts well merits this Court’s attention. *Amici* rely heavily on the ministerial exception as a bulwark against the prospect of courts probing into their internal affairs, particularly given that the religious practices of faiths with fewer adherents can be poorly understood by those outside of their faiths. The prospect that courts may later question – hour by hour – the activities that a faith deems relevant for spiritual formation of its ministers can easily erode that faith’s independence in determining what it believes to be the best course for its ministers – however it defines them. The need for clarity is especially important given that many affected religious organizations lack the resources to engage in protracted employment

litigation, and the credible threat of such litigation, even when meritless, can significantly diminish the resources they can devote to their ministries.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS A DEEP AND MATURE SPLIT AMONG THE LOWER COURTS THAT RESULTS IN THE DISPARATE ADJUDICATION OF CORE CONSTITUTIONAL FREEDOMS

It is long settled that courts do not adjudicate the internal affairs of religious organizations. See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 446-47 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114-16 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Watson v. Jones*, 80 U.S. 679, 726-32 (1871). In order to avoid entanglement with religion or trenching upon free exercise the lower courts have, since *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), unanimously exempted “ministerial” employees from certain employment laws.³ This

³ See, e.g., *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577-78 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 (3d Cir. 2006); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *1 (4th Cir. Dec. 29, 1998) (unpublished); *McClure*, 460 F.2d at 560; *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 670, reh'g granted, 617 F.3d 401 (9th Cir. 2010); *Bryce v.*

exception extends to persons beyond those who are ordained ministers.⁴

But the consensus ends there; the more frequently courts have addressed its scope, the more divergent the “ministerial exception” has become. As the petition ably explains, twelve federal circuits are sharply divided: four apply a “primary duties” test, four reject that test in favor of a more holistic analysis, and four resolve the issue on a case-by-case basis. State courts have similarly divergent views. These competing approaches result in inconsistent outcomes in factually indistinguishable cases.

A. The federal courts of appeals are conflicted as to the proper application of the ministerial exception.

1. *The Primary Duties Test*: The Third, Fourth, Sixth, and D.C. Circuits embrace a “primary duties” test, which, in general terms, applies the exception where an “employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.” *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772

Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656-58 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460-61 (D.C. Cir. 1996). The Federal Circuit does not have jurisdiction over cases that would present the issue in the normal course.

⁴ See, e.g., *Rweyemamu*, 520 F.3d at 206-07; *Petruska*, 462 F.3d at 307; *Clapper*, 166 F.3d 1208, 1998 WL 904528 at *7-8; *Hollins*, 474 F.3d at 226-27; *Starkman v. Evans*, 198 F.3d 173, 177 (5th Cir. 1999); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042-43 (7th Cir. 2006); *Scharon*, 929 F.2d 362-63; *Alcazar*, 498 F.3d at 676-77; *Bryce*, 289 F.3d at 659; *Catholic Univ. of Am.*, 83 F.3d at 460-61.

F.2d 1164, 1169 (4th Cir. 1985). In assessing particular roles, these courts inquire whether these duties are “important to the spiritual and pastoral mission of the church.” *Id.*

The circuits that employ this test, however, disagree as to its application. The decision below reflects a quantitative approach. The Sixth Circuit grounded its decision in the fact that plaintiff spent only “forty-five minutes of the seven hour school day” engaged in what *it* deemed to be explicitly religious activity. Pet. App. 19a-20a. See also *Redhead v. Conf. of Seventh-day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (ministerial exception did not apply because “[plaintiff’s] religious [duties] were limited to only one hour of Bible instruction per day”); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) (ministerial exception did not apply because “the vast majority of [plaintiff’s] duties involved her teaching secular courses”).

The other “primary duties” circuits take a more qualitative approach, focusing less on the proportion of time spent on various activities, and more on the “function of [an employee’s] position” within the religious organization. *Rayburn*, 772 F.2d at 1168; See also *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996); *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006). These circuits have recognized that the duration of an activity is not always the best metric of its significance. See, e.g., *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998).

2. *Avoidance of Entanglement*: Other circuits eschew focusing on specific duties, or the amount of time spent performing them, in favor of a more

holistic analysis directed at “avoid[ing] judicial involvement in religious matters.” *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

Two circuits have expressly rejected the “primary duties” test as “too rigid,” *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008), or as “suspect,” “arbitrary” and “problematic,” *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 675-76, reh’g granted, 617 F.3d 668 (9th Cir. 2010). Thus, in *Alcazar*, the Ninth Circuit concluded that Catholic seminarians were “ministerial” employees for purposes of the exception, regardless of the fact that their duties consisted primarily of maintenance work. *Id.* at 675. The court rejected the “arbitrary 51% requirement implicit in the ‘primary duties’ test,” in favor of a “functional approach” that considers whether the plaintiff was selected “largely on religious criteria” and “performs some religious duties and responsibilities.” *Id.* at 675-76. It did so in an “acknowledg[ement] that secular duties are often important to a ministry,” and secular courts should not be in the business of determining when a “secular” duty has religious significance. *Id.* at 676.

In *Rweyemamu*, the Second Circuit stressed the importance of examining not only an employee’s particular duties but also the nature of the dispute, to confirm that the court would not become entangled in competing religious viewpoints. 520 F.3d at 207-09.

The Fifth and Seventh Circuits have similarly rejected the primary duties approach by adopting different tests. In *Starkman v. Evans*, the Fifth Circuit examined: (1) whether the employee was hired “largely on religious criteria;” (2) whether the employee was “qualified and authorized to perform the ceremonies of the church;” and (3) whether the employee “engaged in activities traditionally

considered ecclesiastical or religious.” 198 F.3d 173, 175-77 (5th Cir. 1999) (quotations omitted). Applying this test, it concluded that a music director’s involvement in the church’s pastoral mission was ministerial for purposes of the exception. See also *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (noting the Church obviously cares “whether the words of the Gospel are set to Handel’s *Messiah* or to “Three Blind Mice”).

Rather than attempt to categorize particular activities as “secular” or “religious,” these circuits focus on whether the employee had substantial duties that were considered religious from the standpoint of the particular religious organization in question. For example, the Seventh Circuit concluded in *Schleicher* that employees of the Salvation Army who administered an adult rehabilitation center were ministerial, because the Salvation Army viewed operation of the facilities as part of its spiritual mission. 518 F.3d at 477. The court thus adopted a rebuttable presumption that clerical personnel—as designated by the institution—are not covered by the relevant employment statute. *Id.* at 477-78.

The four remaining circuits have addressed the ministerial exception without embracing a particular standard or commenting on the “primary duties test.” See, e.g., *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576-77 (1st Cir. 1989) (applying exception to pastor’s suit against church where alleged property dispute “would require judicial intrusion into rules, policies, and decisions which are unmistakably of ecclesiastical cognizance.”); *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991) (applying ministerial exception to hospital chaplain’s ADEA and Title VII claims where the chaplain had expressly religious

duties in a church-affiliated hospital); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) (applying exception to Catholic Director of Department of Religious Formation where she was “important to the spiritual and pastoral mission of the [Diocese]” and adjudicating the claim would “involve gross substantive and procedural entanglement with the Church’s core functions, its polity, and its autonomy”) (quotations omitted); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000) (applying exception to church minister, observing that “the exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration”).

B. The state courts are similarly in conflict.

State courts similarly disagree as to the scope and nature of the ministerial exception.⁵ Several apply some variant of the primary duties test. See, e.g., *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513, 516-17 (Mich. Ct. App. 2010) (finding Catholic school math teacher was ministerial under a four-part version of the qualitative primary duties test); *Archdiocese of Washington v. Moersen*, 925 A.2d 659, 669 (Md. 2007) (applying quantitative primary duties test to conclude that a church organist was not a ministerial employee because his sole role was to play the organ); *Pardue v. Ctr. City Consortium Sch. of the*

⁵ Indeed, the Court currently has before it the petition in *Cooke v. Tubra*, No. 10-559 (Oct. 22, 2010), which seeks review of an Oregon decision, *Tubra v. Cooke*, 225 P.3d 862 (Or. Ct. App. 2010), considering the application of the ministerial exception to a defamation dispute between a pastor and his former church.

Archdiocese of Washington, Inc., 875 A.2d 669, 677 (D.C. 2005) (embracing the qualitative primary duties test, because “merely enumerating the duties” of a principal at a Catholic school failed to grasp the religious significance of her work). The Wisconsin Supreme Court applies a “functional” version of the primary duties test, rejecting the quantitative approach as “narrow” and “intrusive[]” because, “as a practical matter,” it means that “the state can interfere with the hiring and firing of the leaders of religious organizations...so long as the leaders are spending (presumably) 49 percent or less of their time or tasks on whatever the court determines to be ‘religious’ activities.” *Coulee Catholic Schs. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 882 (Wis. 2009) (holding that an elementary school teacher at a Catholic school was a ministerial employee).

The New Jersey Supreme Court agrees with the Second Circuit’s view in *Rweyemamu*, that courts applying the ministerial exception should consider “the nature of the dispute.” 520 F.3d at 208. It held that the “critical factor” is whether the “resolution of the claim requires an impermissible inquiry into the propriety of a *decision* of core ecclesiastical concern.” *McKelvey v. Pierce*, 800 A.2d 840, 857-58 (N.J. 2002) (emphasis in original). The Supreme Judicial Court of Massachusetts, on the other hand, has refused to consider the nature of a plaintiff’s claims because it is “hard to conceive...how a court could inquire into the reasons for the defendants’ decisions...without intruding into matters of the internal management of the Diocese.” *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820, 825-26 (Mass. 2002).

Finally, several state courts have applied the ministerial exception without articulating any test. See, e.g., *Cha v. Korean Presbyterian Church of*

Washington, 553 S.E.2d 511, 514-515 (Va. 2001) (educational pastor could not proceed against church deacons); *Williams*, 766 N.E.2d 820 (Episcopal priest's discrimination claims barred).

C. Disparate Applications of the Ministerial Exception Result in Markedly Inconsistent Outcomes.

Despite nearly 40 years to frame the issue, the lower courts have failed to coalesce around any unified, or even majority, approach to applying the ministerial exception. Quite the contrary, the varied approaches result in tangibly different outcomes depending on where a case arises. This impact is well-illustrated by applying the test adopted below to ministerial exception cases resolved under different standards in other circuits. Contrary to the decisions in those courts, under the Sixth Circuit's test:

- Catholic seminarians performing maintenance work in a church would not be ministerial— notwithstanding the religious basis for their self-abnegation and service to the church community—because the number of hours spent cleaning far exceeded the number spent on activities the court deemed religious. As the Ninth Circuit recognized in declining to apply the primary duties test: “If taken literally, the primary duties test would require the district court to examine the number of hours [the plaintiff] spent on maintenance and the number of hours he performed religious duties.” *Alcazar*, 598 F.3d at 675.
- Ordained Salvation Army ministers directing a rehabilitation center and thrift shops would not be ministerial employees, even though, as the Seventh Circuit explained, the Salvation Army's

operation of such facilities “has a spiritual dimension.” *Schleicher*, 518 F.3d at 477. Even though the Salvation Army viewed its sales activities as a central means of witnessing, the hours spent managing would outweigh the moments of spiritual witness.

- Music directors or choirmasters, like the plaintiffs in *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000); *Tomic*, 442 F.3d 1036 and *Starkman*, 198 F.3d 173, would not be ministerial employees, because selecting or playing music was deemed a secular function—notwithstanding the fact that, as the Fourth Circuit described it, directing a church choir is “bound up in the selection, presentation and teaching of music, which is an integral part of...worship and belief.” *Raleigh*, 213 F.3d at 802. The quantitative primary duties test does not make room for consideration of whether a “secular” activity like teaching music has “spiritual moorings.” *Id.*
- The communications manager of a church responsible for conveying its religious messages would not be a ministerial employee—even if she “served as a liaison between the Church and the community to whom it directed its message,” *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003)—because of the number of hours spent communicating “secular” messages. For this reason, the Seventh Circuit in *Alicea-Hernandez* rejected the hours-counting approach as insensitive to the significance of the communication manager’s role as the voice of the church. *Id.* (“[D]etermination of whose voice speaks for the church is *per se* a religious matter.”) (quoting

Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1356 (D.C. Cir. 1990)).

- A chaplain at a religious university, such as the plaintiff in *Petruska*, 462 F.3d at 305, would not necessarily be a ministerial employee under the hours-counting primary duties test, because a university chaplain counsels students much like a secular guidance counselor. The frequency of providing guidance, compassion and comfort could very well far exceed the time the chaplain spent praying or performing religious rituals.
- Finally, under the primary duties test, even a quintessentially religious person, a monk, may not be a ministerial employee, even if he serves solely to maintain the physical buildings of a monastery. In a telling hypothetical, Judge Posner noted that monks' sale of wine made at their monastery could be construed as either religious or secular. *Schleicher*, 518 F.3d at 476-77. For a court to characterize the degree of religiousness in such activity "would plunge a court deep into religious controversy and church management" that touches on the heart of the Free Exercise clause. *Id.* at 477.

This case, too, would have turned out differently had it arisen in a different jurisdiction. The Seventh Circuit would have applied its presumption that a "commissioned minister" comes within the exception. Pet. App. 3a-4a, 33a-34a. Absent (very surprising) evidence that the Lutheran Church—Missouri Synod was engaged in some sort of sham, the Church would have prevailed. *Schleicher*, 518 F.3d at 477-78. The Fifth and Ninth Circuits would have credited the fact that Perich undertook university level theological training in order to be a "called" teacher, and agreed

to be subject to the same internal dispute resolution process as the Church pastor. Pet. App. 51a. Despite teaching subjects deemed principally “secular,” Perich accepted her calling to serve as a “Christian role model” and to “integrate faith into all subjects.” Pet. 4, 5a, 35a. Because she was hired based on expressly religious criteria, and performed some expressly religious duties, the exception would have applied. See *Alcazar*, 598 F.3d at 675-76; *Starkman*, 198 F.3d at 175-77.

Indeed, this case may have come out differently even if decided by one of the other “primary duty” jurisdictions. For example, in *Clapper*, 1998 WL 904528, the Fourth Circuit repudiated a purely quantitative application of the primary duties test and applied the ministerial exception to a religious elementary school teacher. The court recognized the teacher’s assertion that he spent “only 10.6% of his work week” on overtly religious activities, but also credited the fact that the school’s education code “ma[de] abundantly clear...that the primary purpose of Seventh-day Adventist elementary education is the redemption of each student’s soul.” *Id.* at *4, *7. In concluding that the teacher was a ministerial employee, the court was not dissuaded by the fact that only one of thirteen identified responsibilities for teachers was explicitly religious, because, as the court explained, “nothing...suggests that the differing general responsibilities are considered of equal importance.” *Ibid.* On facts indistinguishable from this case, the outcome was precisely the opposite.

As these examples demonstrate, the divergence among the lower courts results in substantively different outcomes, appropriate for this Court’s review.

II. THE PETITION RAISES AN ISSUE OF NATIONAL IMPORTANCE AS THE INCONSISTENT STANDARDS IN THE LOWER COURTS HINDER THE ABILITY OF HUNDREDS OF CHURCHES AND OTHER RELIGIOUS ORGANIZATIONS TO STRUCTURE THEIR MINISTRIES.

The split described above has a broad, national impact. Across the United States a wealth of different religions practice widely-varied means of spiritual expression. Some center on houses of worship. Others also maintain hospital, school, day-care, youth, old-age, store, recreation, meditation, media and other facilities – all as an overt part of their ministries. Thousands of institutions—from major faiths to unique store-front churches—employ hundreds of thousands of employees. Faced with inconsistent application of the ministerial exception, some employers must guess as to what duties courts will consider secular or religious, chilling their First Amendment rights.

A. The primary duties test hinders religious organizations' ability to direct their own ministries, and risks entangling courts in questions of religious doctrine.

The lower courts vary in their willingness to evaluate whether a particular activity is religious or secular, and thereby question a church's *bona fide* assertion that a particular function is central to its pastoral mission. Doing so necessarily draws courts into ecclesiastical disputes and poses substantial challenges for religious employers.

1. Assuming *arguendo* that an employee's duties can be classified objectively, the Sixth Circuit's

quantitative approach obliges an employer to ensure that any employee the church considers to be ministerial spends the appropriate percentage of his or her time performing court-approved religious activities. What percentage that may be—whether 51 percent or some other number—is not clear. *Cf. Alcazar*, 598 F.3d at 675-76 (rejecting arbitrary 51 percent requirement); *Coulee Catholic Schs.*, 768 N.W.2d at 882 (same).

This quantitative approach thus discriminates against faiths that favor ministry-through-service over more overt and recognizable “hard-nose proselytizing.” See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002). The Salvation Army, for example, uses ordained members in many activities that could be deemed secular. See *Schleicher*, 518 F.3d 472 (administrator of Adult Rehabilitation Center operating five thrift shops and overseeing 20 to 40 employees); *McClure*, 460 F.2d 553 (secretary in the Territorial Headquarters’ Public Relations Office). Embracing the approach below would require such organizations fundamentally to reassess how their ordained employees spend their time.

Organizations emphasizing service may have to amend their operations to accommodate this test. For example, a religious hospital may have to ensure that counselors spend the appropriate fraction of their time praying or engaged in other overtly sectarian activity rather than counseling patients and loved ones. See *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007). Or perhaps a nun ministering as a nurse must raise her eyes to heaven and murmur a prayer before engaging in the physical care of patients in order to meet the necessary time

requirement, even if she considers her caregiving to be spiritual expression in itself.

Teaching ministries are particularly vulnerable to hours-counting precisely because they involve facially secular activities. Parochial schools minister to students not only through religious instruction, but by teaching secular subjects in a religious setting, sometimes by religious faculty. Limiting the exception to those who spend a majority of their time engaged in overtly religious activity will hinder religious schools' ability to do so.

2. This whole discussion begs the question whether employees' duties are even susceptible to objective classification as secular or religious in the first instance. Whether applied quantitatively or qualitatively, the primary duties approach assumes that courts can and should make such an assessment. But that inquiry risks the encroachment on religious freedoms that has animated courts to avoid doctrinal disputes generally. Indeed, a similar refusal to categorize activities as "religious" or "secular" was the basis for the Court's decision in *Presiding Bishop v. Amos*, 483 U.S. 327 (1987). There, the district court held that a gymnasium run by the Mormon Church could not fire a building engineer because "there [was] no clear connection between the primary function which the Gymnasium performs and the religious beliefs and tenets of the Mormon Church." *Id.* at 332. The Court reversed, rejecting any attempt to categorize activities as "religious" or "secular." *Id.* at 336.

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might

understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Ibid.

Likewise, in *University of Great Falls*, the D.C. Circuit chastised the NLRB for determining whether a professedly religious college or university was entitled to a religious exemption by “trolling through the beliefs of the University, making determinations about its religious mission.” 278 F.3d at 1342. Indeed, “[j]udging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’” *Id.* at 1343 (citing *Smith*, 494 U.S. at 87).

So, too, is it improper for a court to inquire qualitatively whether particular duties are religious or secular for purposes of tallying up an employee’s hours. The “potential for chilling religious activity” posed by a secular court imposing a secular-religious dichotomy is significant. *Amos*, 483 U.S. at 346 (Brennan, J., concurring in the judgment).

The decision below crossed this line. In parsing religious duties from secular, the court necessarily concluded—implicitly, if not explicitly—that in teaching anything other than religion, a “called” teacher acts as a purely secular agent. In so doing, the court gave minimal credit to the fact that Perich was engaged specifically as a commissioned minister, and was charged by the Church to “integrate faith into all subjects.” Pet. 4, 3a-5a, 35a.

3. The potential for entanglement or impingement on free exercise are widespread, imposing a burden

on employers to guess how courts will classify particular duties.

Churches rely on a range of ordained and non-ordained employees to promote their religious mission. Courts have disagreed whether music directors are ministerial. Compare *Moersen*, 925 A.2d at 669 (organist not a minister), with *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (organist is a minister). Non-ordained employees may be essential to a church's pastoral message. See *Alicea-Hernandez*, 320 F.3d at 700 (non-ordained Hispanic Communications Manager is the "voice" of the church); *Skrzypczak*, 611 F.3d at 1240 (administrator heading the Department of Religious Formation).

Other important religious duties may similarly be carried out by lay employees. See *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 303, 309 (4th Cir. 2004) (non-minister in charge of "guard[ing] against any violations of Jewish dietary law" claimed to serve a purely secular food-safety function); *Weissman v. Congregation Shaare Emeth*, 839 F. Supp. 680, 681 (E.D. Mo. 1993) (Jewish Temple administrator responsible for public relations and business management).

Less traditional religious organizations pose special difficulties. Quakers, for example, eschew hierarchy and leadership classifications. A federal district court thus found the Quaker representative to the United Nations to be secular, notwithstanding the assertion that the envoy's purpose was to give voice to Quaker values. See *Leaphart v. Am. Friends Serv. Comm.*, No. 07-4919, 2008 WL 4682626, at *2 (E.D. Pa. Oct. 22, 2008).

Judicial willingness to second-guess a religious institution's view of a position as religious poses tremendous difficulties for religious employers. Where a church must guess how a secular court will perceive a particular function that is integral to its pastoral ministry, but which has strong secular parallels, the church is chilled in its ability to arrange its affairs as it would for purely religious reasons. This is particularly the case for religions that are less widely understood. And, the mere threat of lawsuits over such issues may have the effect of coercing religious organizations to allow particular individuals to exercise religious responsibilities against the organization's will.

This difficulty is especially pronounced with regard to teaching, healing, and service ministries. Unsurprisingly, the question whether teaching is religious or secular has arisen repeatedly. See, e.g., *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 863, 867-69 (E.D. Wisc. 2004) (concluding that because "Indian culture" and "Indian religion" are inseparable, plaintiff was hired in a ministerial role); *Guinan*, 42 F. Supp. 2d at 852 (deciding "majority of the classes she taught regarded secular subjects"); *Redhead*, 440 F. Supp. 2d at 214 (comparing Bible study to "secular" subjects); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (applying exception to director of the Department of Buddhist Education because "[d]etermining whether the decision to eliminate funding...was 'legitimate' seems likely to draw this Court into judgments on matters of faith and doctrine, as well as matters of general church governance").

Faith-based organizations often serve communities in arguably secular ways. For example, a Jewish

non-profit whose mission is to serve elderly Jews “in accordance with the precepts of Jewish law and customs, including the observance of dietary laws” provides meals prepared by a “mashgiach,” who is responsible for abiding by Jewish dietary law. *Shaliehsabou*, 363 F.3d at 301, 303 (quoting Hebrew Home’s By-laws). Perhaps to non-believers, this is merely cooking, but the Fourth Circuit held otherwise, because a contrary ruling “would denigrate the importance of keeping kosher to Orthodox Judaism.” *Id.* at 309.

Finally, religious humanitarian relief efforts require administrative duties similar to any aid organization. Those activities could be described as secular despite the fact that the “efforts flow from a profound sense of religious mission.” *Spencer v. World Vision*, 619 F.3d 1109, 1126 (9th Cir. 2010) (finding World Vision is a religious organization under Title VII).

Charging courts to distinguish religious from secular forces employers to guess at the appropriate mix of duties or to artificially separate religious from secular duties, without regard to the nature of the church’s ministry. It may also result in a chilling of religious organizations’ ability to carry out their mission through their theologically-preferred manner or minister. Courts must not trench on religions’ determination of who should be a minister, and how they shall minister. Nor should courts curtail religious organizations’ ability to pursue sacred aims through seemingly secular means.

B. The ministerial exception potentially impacts tens of thousands of places of worship, faith-based institutions and employees.

The widespread significance of this issue is difficult to understate. Across the United States, scores of religious traditions express myriad religious practices and employ a wide range of religious and lay personnel.

At least ten religious traditions maintain one million or more self-reported adherents.⁶ Christians alone comprise 227 national church bodies. National Council of the Churches of Christ in the U.S., 2010 Yearbook of American and Canadian Churches (Eileen W. Lindner ed., 2010). Some 335,000 religious congregations, served by more than 600,000 clergy dot the American landscape, including 12,000 non-Christian congregations.⁷ The Catholic Church alone operates 17,958 parishes, and fields 39,993 priests, 57,544 nuns, 4,690 monks, and 16,649 permanent deacons.⁸ The Presbyterian Church (USA) reports 10,657 congregations comprising

⁶ Protestant, Catholic, Mormon, Jehovah's Witness, Orthodox Christian, Jewish, Buddhist, Muslim, and Hindu. See Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey, *available at* <http://religions.pewforum.org/pdf/affiliations-all-traditions.pdf> (last visited Nov. 8, 2010) (listing all religions with greater than 0.4% of the American population as self-reporting adherents).

⁷ Hartford Institute For Religion Research, Fast Facts, *available at* http://hrr.hartsem.edu/research/fastfacts/fast_facts.html (last visited Nov. 8, 2010).

⁸ Center for Applied Research in the Apostolate, Frequently Requested Church Statistics, *available at* <http://cara.georgetown.edu/CARAServices/requestedchurchstats.html> (last visited Nov. 8, 2010).

2,077,138 reported members.⁹ And the Seventh-day Adventist Church employs 74,532 individuals in its North American Division, including 2,753 ordained pastoral employees, 572 licensed pastoral employees, 1,957 non-ordained administrative employees, and 96 literature evangelists.¹⁰

In 2007-2008, some 22,910 religious schools educated over four million students and employed 329,941 full-time equivalent teachers in the United States.¹¹ The Catholic Church alone operates 5,889 elementary schools and 1,205 secondary schools serving over 2.1 million students.¹² These employ 154,316 professional staff, of whom the vast majority, more than 96 percent, are now lay.¹³

⁹ See Comparative Statistics 2009, Table 1, *available at* http://www.pcusa.org/media/uploads/research/pdfs/2009_table_1.pdf (last visited Nov. 16, 2010).

¹⁰ See Conference of Seventh-day Adventists, 146th Annual Statistical Report at 6 (2008), *available at* <http://www.adventistarchives.org/docs/ASR/ASR2008.pdf> (last visited Nov. 15, 2010).

¹¹ See United States Dep't of Ed., Nat'l Cent. for Educ. Stats., Private School Universe Survey (PSS), Table 2 (2007-2008) *available at* http://nces.ed.gov/surveys/pss/tables/table_2008_02.asp (last visited Nov. 8, 2010).

¹² Center for Applied Research in the Apostolate, Frequently Requested Church Statistics, *available at* <http://cara.georgetown.edu/CARAServices/requestedchurchstats.html> (last visited Nov. 8, 2010) (citing statistics from the National Catholic Educational Association).

¹³ See United States Catholic Elementary and Secondary Schools 2009-2010, Annual Statistical Report on Schools, Enrollment, and Staffing, *available at* <http://www.ncea.org/news/AnnualDataReport.asp> (last visited Nov. 8, 2010).

During 2005-2006, some 14,445 non-Catholic religious schools educated 1,884,616 students.¹⁴ These included *inter alia* 4,338 non-denominational Christian schools, 2,511 Baptist schools, 1,632 Lutheran schools, 883 Seventh-day Adventist schools, 853 Jewish schools, and 202 Islamic schools.¹⁵

Many faiths minister to the sick by operating hospitals. For example, the Seventh-day Adventist Church operates nearly 60 hospitals in North America, employing 7,879 Seventh-day Adventist employees alongside 46,025 other employees.¹⁶ During 2009, 562 Catholic hospitals treated over 85 million patients.¹⁷

Many faiths also minister through social services. The Salvation Army, Catholic Charities, Hillel, and Islamic Relief USA regularly provide spiritual and charitable support. To pick just one, the Salvation Army runs 1,375 family stores, 340 community centers, 120 child day care centers, 266 senior citizen

¹⁴ See United States Dep't of Ed., Nat'l Cent. for Educ. Stats., Private School Universe Survey (PSS) (2005-2006) *available at* http://nces.ed.gov/surveys/pss/tables/table_whs_02.asp (last visited Nov. 15, 2010).

¹⁵ See *id.*, *available at* http://nces.ed.gov/surveys/pss/tables/table_whs_03.asp.

¹⁶ See General Conference of Seventh-day Adventists, 146th Annual Statistical Report at 65-66 (2008), *available at* <http://www.adventistarchives.org/docs/ASR/ASR2008.pdf> (last visited Nov. 15, 2010). The Seventh-day Adventist Church separately operates 41 nursing homes and retirement centers in North America, employing 4,242 individuals. *Id.* at 68.

¹⁷ See United States Conference of Catholic Bishops, The Catholic Church in the United States At A Glance, *available at* <http://www.usccb.org/comm/catholic-church-statistics.shtml> (citing The Official Catholic Directory 2009, P.J. Kennedy & Sons, New Providence, NJ. 2006).

centers, 568 group homes, 45 camps, and 4 training colleges.¹⁸ These employ 3,557 officers, 283 cadets, 107,393 soldiers, 400,055 members, 60,117 employees, and over 3.4 million volunteers. *Id.*

These statistics clearly illustrate the widespread importance of the question presented, as religious employers of all faiths must face the inconsistent application of the various standards currently in use across the circuits and states. Because the petition presents a clear dispute deserving of this Court's resolution on an issue of widespread national importance, the petition ought to be granted.

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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¹⁸ See Salvation Army, 2010 Annual Report, at 22 (2010), available at http://annualreport.salvationarmyusa.org/_pdf/2010_AnnualReport.pdf (last visited Nov. 15, 2010).

APPENDIX

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

The General Council on Finance and Administration of The United Methodist Church, Inc., (“GCFA”) is an Illinois corporation having its primary place of business in Nashville, Tennessee. GCFA is the financial and administrative arm of The United Methodist Church. GCFA is also charged with protecting the legal interests and rights of The United Methodist Church. The United Methodist Church is a religious denomination with approximately thirteen million members worldwide. Through its various agencies, it performs mission work in over 150 countries. The United Methodist Church is one of the largest religious denominations in the United States. It has approximately 33,000 local churches and nearly eight million members in the United States.

The **Church State Council** is a religious liberty ministry of the Pacific Union Conference of Seventh-day Adventists, and is the oldest public policy organization in the southwestern United States

devoted exclusively to issues of liberty of conscience and religion and the separation of church and state. The Church State Council stands in the Protestant and Enlightenment traditions of protesting the combination of church and state to define or promote theological “truth,” or to punish “error.” The Church State Council asks nothing of the state except that it protects religious freedom for all peaceful people of faith. The Church State Council is dedicated to encouraging persons of all faiths or no faith to be diligent to protect the freedom to think and believe according to the dictates of individual conscience, and the institutional separation of church and state that is essential for preserving religious freedom.

Church Communities International is an international communal movement of families and singles who seek to put into action Christ’s command to love God and neighbor. Like the first Christians described in Acts 2 and 4, members are called to a way of life in which all are of one heart and soul, no one possesses anything, and everything is shared in common. Most members live in rural communities of 200-300 people that function as small villages. As part of the living proclamation of their faith, members contribute to the upkeep of the community through daily work. No one is paid for their work as each community shares all property, and working together is an expression of the members’ commitment to serve Jesus Christ and one another.

The **Association of Christian Schools International** (“ACSI”) is a nonprofit, non-denominational, religious association providing support services to more than 4,100 Christian preschools, and elementary and secondary schools in the United States. Services are also provided to more than 160 colleges and universities. ACSI has eleven

offices in the United States. ACSI's headquarters and international office is located in Colorado Springs, Colorado.

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