No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR LAW AND RELIGION STUDIES AT BRIGHAM YOUNG UNIVERSITY IN SUPPORT OF PETITIONER

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TABLE OF ABBREVIATIONS

A.C.	Appeals Cases (United Kingdom)
AGG	Allgemeines Gleichstellungsgesetz (German General Equal Treatment Act)
BGHZ	Bundesgerichtshof Zivilsachen (German Federal Court of Justice in Civil Matters)
BVerfGE	Bundesverfassungsgericht (German Federal Constitutional Court)
CETS	Council of Europe Treaty Series
ECHR	European Convention on Human Rights (formally Convention for the Protection of Human Rights and Fundamental Freedoms)
EComHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
GBG	Gleichberechtigungsgesetz (Austrian Equal Treatment Act)
H.L.	House of Lords (United Kingdom)
ICCPR	International Covenant on Civil and Political Rights
ICLRS	International Center for Law and Religion Studies

I.C.R.	Industrial Cases Reports (United Kingdom)
IRLR	Industrial Relations Law Reports (United Kingdom)
O.N.S.C.	Ontario Superior Court of Justice (Canada)
OSCE	Organization for Security and Cooperation in Europe
ResDH	Citation system label for Council of Europe Committee of Ministers resolutions
UDHR	Universal Declaration of Human Rights
UN GAOR	United Nations General Assembly Official Records

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INTEREST OF *AMICUS CURIAE*

This Brief *Amicus Curiae* in support of the petitioner is respectfully submitted pursuant to Supreme Court Rule 37.[1] The *Amicus*, the International Center for Law and Religion Studies ("ICLRS"), is an

[1] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *Amicus* affirms that no counsel for a party authored the brief in whole or in part and no person other than the *Amicus* or its counsel made a monetary contribution to this brief.

academic center located at Brigham Young University. ICLRS and the university where it is housed are both institutions with profound concerns about the scope of the ministerial exception and its implications for their religious freedom in structuring their personnel practices. Because of its international engagement with religious freedom issues and with experts on these issues from around the world, ICLRS brings a unique comparative perspective to the question of the appropriate scope of the ministerial exception.

INTRODUCTION AND SUMMARY OF ARGUMENT

The American constitutional tradition has recognized from its inception that ministerial personnel play a vital and indeed constitutive role in the life of religious communities. Protecting this role becomes even more important as one examines the experience of other legal systems. From this vantage point, we draw on the resources of comparative law not only to confirm the widespread global recognition of the principles of religious autonomy that apply in this case, but perhaps even more importantly to underscore the distinctive strengths of the American approach and to highlight the hazards of narrowing religious autonomy in this critical domain.

Church-state law in the United States varies significantly from that of many countries around the world, in large part because of the Establishment Clause. In contrast to the United States, for example, many European countries retain strong ties with religious organizations, and a few continue to have established churches. What is striking, however, is that, despite these differences, European and other democratic societies broadly recognize the importance of the principles underlying the ministerial exception.

These principles, typically referred to under the rubric of "religious autonomy," include the freedom of religious groups to define their own beliefs and ecclesiastical polities, to carry out their religious missions as they understand them, and to do so through religious personnel of their own choosing. Countries throughout the world recognize that without the ability to define their own doctrines, mission, leadership, membership, organizational structure, and the like, religious organizations lack the authenticity and expressive integrity that religious freedom is designed to protect.

Religious autonomy is grounded in religious freedom, both the institutional freedom of religious organizations and the individual freedom of the believers to be able to exercise their religion together as they choose. It also finds support in the value of preventing state interference in religious affairs. In the United States, this principle is enshrined not only in rights to free exercise of religion but also importantly in the anti-entanglement principle of the Establishment Clause. However, even foreign states not bound by non-establishment principles recognize the importance of preserving the autonomy and independence of religious communities. Many countries also ground protections for religious autonomy in doctrines of freedom of expressive association, and protect, for example, political parties or trade unions, which often enjoy broad discretion with respect to employees who contradict opinions that their employers support.

Foreign jurisdictions provide broad protection for religious autonomy in cases equivalent to the ministerial exception in the United States courts. While there is variation in the exact scope of protection,

there is a consistent focus on the importance of the person's position to the religious mission or the organization. In the more than forty jurisdictions we reviewed, we found no case or statute in which ministerial status was determined by a test assessing the proportionality of time spent on religious duties.

Foreign equivalents to the ministerial exception have protected religious autonomy with respect to school teachers, teachers of religious doctrine, a public affairs spokesperson, and a nurse and a doctor working in a religious hospital.

While much foreign experience supports the principles and values of the ministerial exception in U.S. law, some foreign experience also provides cautions. The concerns about excessive entanglement of state and church that prompted the Establishment Clause in the first place remain vital. Governments in countries with narrower traditions of freedom have occasionally run roughshod over core notions of autonomy by intervening in contested appointments of religious personnel charged with ministerial functions. More repressive states elsewhere have barred religious organizations from determining their own hierarchical structure, selecting their own leaders, or otherwise managing their own ministerial personnel.

The American constitutional tradition that protects religious autonomy was designed to avoid just such interference with religious claims. Preservation of a broad ministerial exception in U.S. law ensures that this tradition will endure.

ARGUMENT

I. DEMOCRATIC SOCIETIES SHARE THE UNITED STATES' CONSTITUTIONAL COMMITMENT TO THE AUTONOMY OF RELIGIOUS INSTITUTIONS.

A. Religious Autonomy Enjoys Broad Foreign Protection.

Church-state relations in the United States differ in many ways from those in much of the world.[2] Many European countries, for example, still retain established churches and strong systems of cooperation with and funding of religious organizations.[3] In Germany and Austria, for instance, the state collects a "church tax" from members for the benefit of their respective churches as an aspect of church-state cooperation.[4] It is, therefore, striking to note the degree to which other countries, representing a wide range of church-state systems, have nonetheless recognized the need for an equivalent to the United States' ministerial exception, which protects religious organizations' ability to select, supervise, discipline, and remove leaders, teachers, and others who have ministerial functions.[5] Just as the United States

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[2] W. Cole Durham, Jr. & Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* 114-122 (Aspen Publishers 2010).

[3] Gerhard Robbers ed., *State and Church in the European Union* (Nomos Publishers 2d ed. 2005) (hereinafter "Robbers, *State and Church*"); Silvio Ferrari & W. Cole Durham, Jr. eds., *Law and Religion in Post-Communist Europe* (Peeters 2003).

[4] *See* Gerhard Robbers, *State and Church in Germany*, and Richard Potz, *State and Church in Austria*, *in* Robbers, *State and Church*, 77, 89-90 and 391, 411-413.

[5] *Cases: See, e.g.*, Siebenhaar v. Germany, App. No. 18136/02 (ECtHR, Feb. 3, 2011); Obst v. Germany, App. No. 425/03

(ECtHR, Sept. 23, 2010); Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria, App. Nos. 412/03 and 35677/04 (ECtHR, Jan. 22, 2009); Supreme Holy Council of the Muslim Community v. Bulgaria, App. No. 39023/97 (ECtHR, Dec. 16, 2004); Hasan and Chaush v. Bulgaria, App. No. 30985/96 (ECtHR, Oct. 26, 2000); Serif v. Greece, App. No. 38178/97 (ECtHR, Dec. 14, 1999); Delgado Páez v. Colombia, U.N. Human Rights Committee, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/ 195/1985 (1990); Germany Federal Court of Justice in Civil Matters, Mar. 28, 2003, BGHZ 154, 306, 315 ("The question of whether a minister has been lawfully dismissed from his service is an absolute autonomous decision of the church or religious denomination.").

Law and International Instruments: See, e.g., Czech Republic Const., arts. 15(1), 16(2); Danish Const. (1953), art. 67; German Basic Law, art. 140, incorporating Weimar Const. Art. 137 (affirming self-determination rights of religious bodies); Italy Const., arts. 7 & 8; Poland Const., art. 25(3); Portugal Law on Religious Freedom 16/2001, art. 15 § 1; Spain Const., art. 16, Dec. 29, 1978, and 1980 Organic Law on Religious Freedom, art. 6.1; OSCE Office for Democratic Institutions and Human Rights, *Concluding Document of the Vienna Meeting, 1989,* Principle 16.4*, in OSCE Human Dimension Commitments, Volume 2: Chronological Compilation*, 42-43, 3d ed. 2011 (hereinafter "Vienna Concluding Document"), *available at* http://www.osce.org/files/documents/b/0/76895.pdf. *See also* European Union Directive: 2000/78/EC, Nov. 27, 2000, art. 4 (covering broader range of employees, but still protecting religious autonomy with respect to ministerial personnel).

Authorities: See, e.g., Gerhard Robbers, *Document submitted by the Government of the Federal Republic of Germany to the European Court of Human Rights in the Case of Obst v. Germany* (App. No. 425/03) (English translation, document available upon request) (discussing multiple jurisdictions); Richard Puza, *Report of Austria*, *in Legal Position of Churches and Church Autonomy* 57 (*Scripta Canonica* 3) (Hildegard Warnink ed., Peeters 2001) (hereinafter "Warnink, *Legal Position of Churches*"); Brigitte Schinkele, *Church Autonomy in Austria*, *in* Robbers, *Church Autonomy* 561 (Austria); Jan Velaers & Marie-Claire Foblets, *Religion and the Secular State in Belgium*,

in Religion and the Secular State: Interim Reports (hereinafter "*Interim Reports*") 103, 117 (Javier Martinez-Torrón & W. Cole Durham, Jr. eds., International Center for Law and Religion Studies 2010), *available at* http://www.iclrs.org/index.php?blurb_id=975) (Belgium); Jiří Rajmund Tretera, *Church Autonomy in the Czech Republic*, *in* Robbers, *Church Autonomy* 633, 640-641 ("Finding of the Constitutional Court . . . rejects the jurisdiction of secular courts in disputes dealing with the termination of service relationship involving members of clergy in accordance with article 16/2 of the Bill of Basic Rights and Freedoms."); Záboj Horák, *Czech Republic*, *in Interim Reports* 251, 258 (Czech Republic); Lisbet Christoffersen, correspondence with International Center for Law and Religion Studies (hereinafter "ICLRS") (June 2011, document available upon request) ("According to both theory and practice this free right to worship includes a right to self-determination and autonomy in matters of doctrine and ecclesiastical structures.") (Denmark); Merilin Kiviorg, *Religion and the Secular State in Estonia*, *in Interim Reports* 261, 265 (Estonia); Matti Kotiranta, *Religion and the Secular State in Finland*, *in Interim Reports* 273, 287 and communication with ICLRS (June 2011, document available upon request) ("[T]he Finnish State is neutral in matters of religion, and the Church is legally and administratively very independent in relation to the State.") (Finland); Brigitte Basdevant-Gaudemet, *State and Church in France*, *in* Robbers, *State and Church* 157, 174-176 ("[T]he civil courts regard themselves as incompetent to review the decisions of a bishop in suspending a priest or religious from his ecclesiastical functions, a step which could ultimately lead to his removal.") (France); Gerhard Robbers, *Church Autonomy in Germany*, *in* Warnink, *Legal Position of Churches* 121, 122 (German constitution "guarantees autonomy of all religious and ideological communities regardless of their religious creed.) (Germany); Balázs Schanda, *State and Church in Hungary, in State and Church* 323, 336-337; Balázs Schanda, *Church*

Autonomy and Religious Liberty: National Report on Hungary, *in Church Autonomy: A Comparative Survey* 541, 548-549 (Gerhard Robbers ed., Peter Lang 2001) (hereinafter "Robbers, *Church Autonomy*") (Hungary); James Casey, *Ireland: Preliminary Report*, *in* Robbers, *Church Autonomy* 87, 89; Carmen Garcimartín, *Religion and the Secular State in Ireland*, *in Interim Reports* 403, 412 ("Matters such as a church's teachings, their religious internal organization, or the number of ministers required for a certain task, do not fall within the powers of the State. . . . Religious autonomy means that each denomination is entitled to create its own system: a church tribunal, with jurisdiction exclusively on internal affairs like disciplinary matters.") (Ireland); Gianni Long, *Church Autonomy in Italy, in* Robbers, *Church Autonomy* 319 (Italy); Ringolds Balodis, *State and Church in Latvia, in* Robbers, *State and Church* 253, 270-271 (Latvia); Jolanta Kuznecoviene, *State and Church in Lithuania, in* Robbers, *State and Church,* 283, 292-293, 296-297 (Lithuania); Alexis Pauly, *State and Church in Luxembourg*, *in* Robbers, *State and Church* 305, 315-318 (Luxembourg); Sophie van Bijsterveld, *Religion and the Secular State in the Netherlands*, *in Interim Reports* 524, 530-531 (Netherlands); Ingvill Thorson Plesner, *State Church and Church Autonomy in Norway*, *in* Robbers, *Church Autonomy* 467 (Norway); Peter Roudik, *Church Autonomy in the Russian Federation*, *in* Robbers, *Church Autonomy* 505; Lev Simkin, *Church and State in Russia*, *in Law and Religion* 261, 275 (Russia); Dusan Rakitic, communication with ICLRS (June 2011, document available upon request) ("[Serbia Const., art. 8, para. 1] expressly provides that ministers and religious officials are elected and appointed by churches and religious communities in accordance with their own autonomous regulations.") (Serbia); *Francis* Lyall, *Religion and the Secular State in Scotland*, *in Interim Reports* 593, 594 (Scotland); Michaela Moravčíková, *State and Church in the Slovak Republic*, *in* Robbers, *State and Church* 491, 508-509 (Slovakia); Lars Friedner, *State and Church in Sweden, in* Robbers, *State and Church* 537, 547; Emma Svensson, correspondence with ICLRS (June 2011, document available upon request) (detailing three ways in which religious organizations in Sweden can impose religious requirements on employees) (Sweden); Anthony Bradney, *Religion and the Secular State in the United Kingdom,*

has consistently striven to "chart a course that preserve[s] the autonomy and freedom of religious bodies,"[6] so too foreign jurisdictions have repeatedly recognized how essential autonomy is to religious freedom.[7] For example, the European Court of Human Rights has described the autonomy of religious organizations as "indispensable for pluralism in a democratic society and . . . an issue at the very heart of the protection [of religious freedom]."[8]

A religious group's ability to select, supervise, discipline, and remove employees who carry out their religious mission, as well as to determine the group's beliefs and membership, is often described as the right to religious autonomy.[9] It is also described

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in Interim Reports 737, 741; Mark Hill, *Church Autonomy in the United Kingdom, in* Robbers, *Church Autonomy* 267, 277-280; David McClean, *State and Church in the United Kingdom*, *in* Robbers, *State and Church* 553, 568-570 (United Kingdom).

[6] Walz v. Tax Comm'n of New York City, 397 U.S. 664, 672, 90 S.Ct. 1409, 1413, 25 L.Ed.2d 697 (1970). *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 341-42 (1987) ("Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'") (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981) (Brennan, J. concurring)).

[7] *See infra* notes 14-16.

[8] Hasan and Chaush v. Bulgaria, App. No. 30985/96 (ECtHR) para. 62.

[9] *See generally* Warnink, *Legal Position of Churches*, and Robbers, *Church Autonomy*.

as "sphere sovereignty,"[10] "self-determination of churches,"[11] or "non-intervention of the state in religious affairs."[12] While the precise contours of the right vary from country to country, the right of religious organizations to choose or dismiss ministerial personnel is broadly held to be an essential element of religious autonomy.[13]

B. The Commitment to Religious Autonomy in Other Legal Systems Is Grounded on Principles Parallel to Those that Undergird the U.S. Ministerial Exception.

Protections for religious autonomy in other legal systems are based in some cases on explicit constitutional provisions[14] or international norms,[15] but they

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[10] *See, e.g.,* Johan D. van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations*, *in* Robbers, *Church Autonomy* 645, 650.

[11] *See, e.g.,* Sophie C. van Bijsterveld, *State and Church in the Netherlands, in* Robbers, *State and Church* 367, 376.

[12] *See* Jan Velaers & Marie-Claire Foblets, *Religion and the Secular State in Belgium*, *in Interim Reports* 103, 117 ("According to the Constitution, interference in religious affairs is prohibited.") (translation from the French).

[13] *See supra* note 5.

[14] Albania Const., Nov. 28, 1998, art. 10(4) ("The state and the religious communities mutually respect the independence of one another and work together for the good of each and all (5) Relations between the state and religious communities are regulated on the basis of agreements entered into between their representatives and the Council of Ministers."); Belgium Const. (1994 as amended 2008, new English translation 2009), art. 21 ("The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever."); Charter of Fundamental Rights and Freedoms, Resolution of the Presidium of the Czech National Council, Dec. 16, 1992, art. 16(2) ("Churches and religious societies govern

are for the most part grounded in general constitutional and international protections for freedom of religion.[16] Unless religious communities can

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their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independent of state authorities."); Germany Basic Law, art. 140, incorporating art. 137 of the Weimar Const. ("(3) Every religious society shall regulate and administers its affairs independently within the limits of the law that applies to all. It shall confer its offices without the participation of the state or the civil community."); Hong Kong Const., art. 141 § 1 ("The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organizations or restrict religious activities which do not contravene the laws of the Region."); Poland Const., art. 25(2)-(5) ("The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good."); Romania Const., art. 29(5) ("The religious denominations are autonomous in relation to the state and enjoy its support.).

[15] Vienna Concluding Document, Principle 16.4.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), CETS No. 005 (entry into force Sept. 3, 1950), art. 9; Treaty of Lisbon in art. 17 of the draft Treaty on the Functioning of the European Union (9.5.2008 EN Official Journal of the European Union C 115/55). Albania Const., Nov. 28, 1998, art. 10(6); Bulgaria Const., July 12, 1991, art. 37(1); Georgia Const., Aug. 24, 1995, art. 9(1); India Const., art. 26 ("Subject to public order, morality and health, every religious denomination or any section thereof shall have the right . . . (b) to manage its own affairs in matters of religion); Italy Const., arts. 7, 8, 20; Jamaica Const. 1962, chap. 3, art. 21(3); Japan Const. arts. 20, 89; Liechtenstein Const., arts. 38, 43; Lithuania Const., art. 43; Luxembourg Const., art. 22); Portugal Const., art. 41(4); Russia Const., art. 28); Serbia Const., arts. 11, 44, 81; Slovakia Const. art. 1; Slovenia Const., art. 7 ("The state and religious communities

broadly define their own doctrines, beliefs, mission, leadership, membership, organizational structure, operational activities, and the like, they lack the authenticity and expressive integrity that religious freedom is designed to protect. The structure and organization of a religious organization are themselves religious questions.[17] The selection of religious leaders, spokespersons, and teachers are key expressions of the freedom of religious communities to structure their own affairs.

Accordingly, principles of religious autonomy have been understood internationally to flow not only from institutional rights, but also from the collective exercise of individual religious freedom, or freedom to manifest one's beliefs "in community with others."[18]

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shall be separate. Religious communities shall enjoy equal rights; they shall pursue their activities freely."); Switzerland Const., art.72; Ukraine Const., art. 35.

[17] *See, e.g.*, discussion in W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion,* in *Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* 3-84 (James A. Serritella et al. eds., Carolina Academic Press 2005).

[18] The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both recognize in nearly identical language that "[e]veryone shall have the right to freedom of thought, conscience and religion" and that "[t]his right shall include . . . freedom, either individually, or in community with others, and in public or private, to manifest his religion . . . ." (UDHR, art. 18, GA res. 217A (III), UN Doc A/810 at 71 (1948); ICCPR, art. 18, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966)). The idea of manifesting or exercising one's religion in public and in community with others is a consistent source of international recognition of the institutional and collective right of autonomy belonging to religious organizations. (*See* UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of

One of the major commitments made by states belonging to the Organization for Security and Cooperation in Europe, for example, is that, "[i]n order to ensure the freedom of the individual to profess and practice religion or belief the participating States will, *inter alia*, . . . respect the right of religious communities to . . . organize themselves according to their own hierarchical and institutional structure, [and] . . . select, appoint and replace their personnel in accordance with their respective requirements and standards."[19] The European Court of Human Rights has also underscored the individual and collective nature of religious autonomy:

> [T]he right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.[20]

In addition, religious autonomy has been grounded internationally in the importance of preventing interference by the state in internal church affairs[21]—a

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Discrimination Based on Religion or Belief, art. 6 ("the right to freedom of thought, conscience, religion or belief shall include . . . the following freedoms: (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief"), 25 November 1981, A/RES/36/55).

[19] Vienna Concluding Document, Principle 16.4.

[20] *Metropolitan Orthodox Church of Bessarabia,* App. No. 45701/99 (ECtHR) para. 118.

[21] *Serif,* App. No. 38178/97 (ECtHR); *Hasan and Chaush*, App. No. 30985/96 (ECtHR) (where the organization of the religious community is at issue, Article 9 (freedom of religion) of

concern that is enshrined in the anti-entanglement principle in the U.S. Establishment Clause.[22] Support for this principle takes different forms. Sometimes it is a direct inference from general freedom of religion provisions.[23] Sometimes it derives from specific provisions affirming the autonomy of religious communities.[24] Sometimes it follows from broad commitments to state neutrality.[25] Many countries have no corollary to the U.S. Establishment Clause. Significantly, even states that allow greater blurring of the separation of church and state consistently respect the right of religious communities to autonomy in decisions relating to religious personnel that carry out ministerial functions. *See supra* note 5. They understand that such decisions are vital to religious freedom, and should not be subjected to second-guessing by state officials and state courts.

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the Convention must be interpreted in the light of Article 11 (freedom of association), which safeguards associative life against unjustified State interference); *Obst*, App. No. 425/03 (ECtHR) (balancing religious autonomy and Article 8 (privacy)); *Siebenhaar*, App. No. 18136/02 (ECtHR) (reading Article 9 together with Article 11, to safeguard associative life against unjustified interference by the State). *See also* Robbers, *Germany*, *in* Warnink, *Legal Position of Churches* 121; *Metropolitan Orthodox Church of Bessarabia*, App. No. 45701/99 (ECtHR); Hong Kong Const., art. 141 §1.

[22] Agostini v. Felton, 521 U.S. 203, 232-33 (1997).

[23] *See supra* note 21.

[24] German Basic Law, art. 140, incorporating art. 137 of the Weimar Constitution; Serbia Const. art. 8; *see also* Dusan Rakitic, correspondence with ICLRS (June 2011, document available upon request).

[25] *See* Gerhard Robbers, *Church Autonomy in Germany Including an Attachment on Relevant European Union Law, in* Warnink, *Legal Position of Churches* 121.

In many cases, religious autonomy also has been identified with the freedom of expressive association. (See Pet. Br. at 33-35.) In Austria, Germany, France, and Italy, for example, the broad scope of religious organizations enjoying autonomy (such as church-related hospitals, homes, schools and kindergartens) has been compared to "tendency" or "ideological" organizations, such as political parties or trade unions, which also enjoy a broad right to dismiss representatives who contradict opinions supported by their employer.[26] In Spain, the Constitutional Court has held that employees of ideological institutions have a duty of good faith and loyalty to their employer's creed; all employees, even those not directly involved in spreading an employer's beliefs, may not act in a way that would cause friction with those beliefs, even when such actions happen outside the workplace.[27]

These principles are even more pertinent to religious organizations because of the special protections afforded by religious freedom norms.[28] Religious

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[26] *Id.*; Austrian Equal Treatment Act 2004 (GBG) § 20 ¶ 2 (*available at* http://www.bka.gv.at/site/6814/default.aspx); German General Equal Treatment Act 2006 (AGG) § 6; Hildegard Warnink, *The Autonomy of Religious Confessions in France*, *in* Warnink, *Legal Position of Churches* 111, 118; Silvio Ferrari, *State and Church in Italy*, *in* Robbers, *State and Church* 209, 220-221 (comparing religious organizations with special tendency organizations such as political parties, trade unions, and the like, whose employees are expected to respect the purposes of the organization).

[27] Constitutional Court of Spain Judgment 5/1981, Feb. 13, 1981 (legal basis 11th); *see also* Judgment 38/2007, Feb. 15, 2007.

[28] *See, e.g.,* Gerhard Robbers, *State and Church in Germany*, *in* Robbers, *State and Church* 77, 87-88 (Church employees "owe

groups need the right to discipline or remove disloyal employees or those who would impair their ability to communicate their message, as determined by the organization using its own criteria. Second-guessing either the decision or the criteria on which a religious group bases its decision regarding employment of ministers is by nature normative and would place the state above the group's leadership in the religious hierarchy.

In sum, religious autonomy enjoys broad protections in legal systems around the world which corroborate the fundamental importance of the ministerial exception in U.S. law. The European Court of Human Rights, in interpreting the protection of religious freedom in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has explained that protections of religious autonomy are key to protecting pluralism in a democratic society:

> The right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community

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a particular obligation of loyalty to their Church employer") and Richard Potz (Austria), correspondence with ICLRS (June 2011, document available upon request) ("A special relationship with the church or religious community as employer results from direct participation in the pursuit of denominational aims. This expresses itself in a special sort of allegiance: acceptance of the teaching of the church or religious community and an appropriate way of life, as well as in a special duty of care by the church employer. This allegiance may vary with the importance of a person's work to the church's spiritual mission.").

> or seeking to compel the community or part of it to place itself, against its will, under [particular] leadership, would also constitute an infringement of the freedom of religion. … [T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.[29]

II. RELIGIOUS AUTONOMY PROTECTS SELECTION, SUPERVISION, DISCIPLINE, AND REMOVAL OF THOSE IN MINISTERIAL CAPACITIES.

A. Religious Autonomy Protections Extend to a Religious Organization's Choice of Those with Ministerial Responsibilities.

As demonstrated in the prior section, foreign and U.S. laws have generally recognized that religious communities enjoy the right of self-determination in matters of doctrine and ecclesiastical structure.[30] In nearly every consolidated democracy, the state simply cannot and will not dictate what a church should believe or how it should conduct its internal affairs.[31] Similarly, states recognize, through protections such as the ministerial exception, the ability of

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[29] *Metropolitan Orthodox Church of Bessarabia,* App. No. 45701/99 (ECtHR) paras. 117-118.

[30] Watson v. Jones, 80 U.S. 679 (1872); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *Hasan and Chaush*, App. No. 30985/96 (ECtHR); *Schüth*, App. No. 1620/03 (ECtHR); Lombardi Vallauri v. Italy, App. No. 39128/05 (ECtHR, Oct. 20, 2009).

[31] *See, e.g.*, *supra* notes 14-15.

religious organizations to select, supervise, discipline, and remove those whose activities are important to the mission of the organization.[32]

The German Federal Constitutional Court, for example, in a case upholding the right of a Catholic hospital to terminate a doctor who publicly opposed its anti-abortion stance and upholding the right of a Catholic hostel to terminate a bookkeeper who had resigned his membership from the Catholic Church, has explained that exactly these sorts of protections are part of a religious organization's "freedom to organize and administer its own affairs."[33] The Constitutional Court explained that the church's "right of self-administration and self-determination comprises all measures that are to be taken in pursuit of the charitable and social ministry tasks arising from the church's fundamental mandate, for example, . . . the selection of staff."[34] Autonomy in staffing decisions allows churches to ensure the "religious dimension" of its activities according to the church's understanding of itself."[35] The Constitutional Court stressed the significance of these ministerial exception-type protections: in them "[t]he guarantee of freedom to organize and administer [a church's] own affairs is . . . shown to be a necessary, legally independent guarantee which adds to the freedom of religious life and [a church's] freedom of determination with regard to organization,

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[32] *See supra* note 5.

[33] BVerfGE 70, 138 (1985), 2 BvR 1703, 718/83 and 856/84, as translated in W. Cole Durham, Jr. & Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives* 409 (Aspen Publishers 2010).

[34] *Id.*

[35] *Id.*

legislation and administration that is indispensable for the church to carry out its tasks."[36]

These sorts of ministerial exception-type protections recognize that religious organizations must be able to exercise autonomy in selecting leaders, teachers, and others who have a significant impact on the ability of the organization to carry out its mission. These positions are highly sensitive for the religious mission of the organizations involved. Leaders shape and articulate doctrine, and religious teachers and those with influence on believers and the public at large play a formative role in others' beliefs and preserve the credibility and authenticity of the organization's tenets.

Ministerial exception-type protections thus preserve institutional integrity and authenticity and also serve to support the ability of religious organizations to maintain doctrinal integrity and promulgate their own beliefs.[37] Countries throughout the world provide such protections in situations involving selection, supervision, discipline, and removal of those in ministerial-type capacities. [38]

B. Religious Autonomy Protections Extend to Those with Roles Important to the Mission of Religious Organizations.

The principles underlying the ministerial exception are grounded in providing religious organizations with both maximum autonomy from the state and self-determination in the organization's mission. In

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[36] *Id.*

[37] *See* Grégor Puppinck, correspondence with ICLRS (June 2011, document available upon request).

[38] *See supra* note 5.

contrast to the approach taken by the Sixth Circuit in *Hosanna-Tabor*, we have not found any support for the notion that determination of eligibility to invoke the ministerial exception should turn on the percentage of an employee's time devoted to religious tasks. To the contrary, protection for religious autonomy in these contexts is more likely to take into account the importance of the activities to the religious mission of the organization. This substantive approach to the ministerial exception is widely recognized internationally.

The countries that have addressed this issue agree that the application of the ministerial exception is based on the importance to the religious organization of the activities conducted by employees.[39] For example, French courts have held that employees hired "for a task that implies that the employee be in communion of thought and faith with her employer"[40] are subject to ministerial exception-type autonomy protections for their employer.[41] These "committed" employees are identified by the functions they

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[39] *See* Austrian Labor Relations Act, ArbVG § 36 ¶ 2-6, Definition of an Employee; Austrian Equal Treatment Act (GBG) § 20 ¶ 2; *also* Richard Potz & Brigitte Schinkele, correspondence with ICLRS (June 2011, document available upon request) ("The crucial issue [in Austria] is the concept of grading loyalties according to the intensity the employee is involved in the genuine Church mission and mandate."); *also* Balázs Schanda, *State and Church in Hungary, in* Robbers, *State and Church* 323, 336-337.

[40] Cass. Soc., 20 Nov. 1986, Delle Fischer c/ Unacerf: JPCG, 1987, II, 110798, note Revet, T.; *see generally* Francis Messner, *The Autonomy of Religious Confessions in France*, *in* Warnink, *Legal Position of Churches* 111, 119.

[41] Messner, *The Autonomy of Religious Confessions in France* 111, 119 (quoting *Delle Fischer c/ UNACERF*).

perform and whether they have direct contact with the followers of a religion and thus can influence them.[42]

German courts consider "the credibility of the church and of its proclamation of [what] the Gospel requires," what are "specifically church tasks," and what the employee's "proximity" to them is, but allows the churches to decide these points and thus "to make binding provisions" on these determinations.[43]

Courts in the United Kingdom have resisted creating a set of factors for determining whether a church worker is a protected non-employee "servant of God."[44] They have, however, looked at considerations such as (1) the offer and acceptance of a church post; (2) the finite and specified duration of a church post; (3) the existence of specified ministerial duties; (4) payment to the minister, including travelling expenses, holiday pay, and living allowance; (5) spiritual ordination to the ministerial position; (6) the amount of control exercised by the church over the minister in the execution of his/her duties; and (7) whether ruling that an individual is not a minister would be contrary to the church's doctrine.[45] Of par-

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[42] *Id.*

[43] BVerfGE 70, 138 (1985), 2 BvR 1703, 718/83 and 856/84.

[44] President of The Methodist Conference v. Parfitt [1984] I.C.R. 176, 183.

[45] *See* Percy v. Board of National Mission of the Church of Scotland [2006] 2 A.C. 28 (H.L.) 40 ("In the United Kingdom the issue that prevails in ministerial exception cases is whether or not a minister is an employee of his/her church."); *President of The Methodist Conference* at 182; Barthorpe v. Exeter Diocesan Bd. of Finance [1979] I.C.R. 900, 905; New Testament Church of God v. Stewart [2008] I.C.R. 282 (C.A.) 296.

ticular note is that we have been unable to identify ***any*** foreign jurisdictions that calculate percentage of time spent on religious as opposed to secular duties of an employee in determining whether religious autonomy protections should apply.

Some common types of "ministerial" positions that fall within the protection of religious autonomy in other legal jurisdictions include teachers, leaders and spokespersons, and other important roles, both those clearly religious and those otherwise significant to the mission of a religious organization. The teaching of religious doctrine is critically important to the mission and vitality of a church. For most religions, doctrinal teachings are the heart and substance of what they offer to the world. Because no aspect of a religion is as uniquely important as its message, equivalents to the ministerial exception have been regularly held to apply to those employed by the church in whole or in part to teach its religious message. *See, e.g., Delle Fischer c/ Unacerf* (upholding the dismissal of a lecturer who failed to remain in communion with her protestant employer) (France); *Caldwell et al. v. Stuart et al.* (1984), 2 S.C.R. 603 (upholding the dismissal of a Roman Catholic teacher at a private Catholic school who had married a divorced man in a civil ceremony contrary to church dogma, and who did not give formal religious instruction, but led daily prayers in her classroom) (Canada); *Delgado Páez*, U.N. Human Rights Committee (the termination of a Catholic school teacher for advocating a liberation theology approach did not constitute a violation) (Colombia); Constitutional Court of Spain (38/2007), Feb. 15, 2007 (deciding against a religious teacher who was fired by the Catholic Church for not meeting the moral requirements of the church) (Spain).

The influence that teachers can have on impressionable youth being raised in a religious tradition has also led some foreign courts to uphold the dismissal of teachers by religious organizations even when the instructors do not directly teach religious doctrine. For example, the European Court of Human Rights upheld the dismissal of a kindergarten teacher because she participated in a church other than the national Protestant association that had hired her.[46] It is instructive that the European Court upheld the German court decisions, even though there was no evidence that her duties involved teaching religious doctrine or that her membership in another church would affect her teaching responsibilities.[47] Instead, it was enough that the Protestant church that hired her would have an interest in remaining credible in the eyes of the public and parents of the children attending the school and that the church sought to avoid any risk of unwanted influence on the children.[48]

Ministerial exception-type protections clearly also extend to religious leaders. Religious organizations could not function without personnel who govern or administer their various operations. Since religious organizations act through their human agents, they are dependent upon their personnel, especially those in leadership positions. The self-determination needed for the survival of all religious organizations requires the unfettered ability to choose governing spiritual and administrative leaders. The European Court of Human Rights has emphasized the impor-

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[46] *Siebenhaar*, App. No. 18136/02 (ECtHR).

[47] *Siebenhaar* at paras. 44-46.

[48] *Id.*

tance of autonomy in this area in cases rejecting attempts of states to interfere with religious leadership appointments.[49] It has also upheld national decisions applying ministerial exception-type protections allowing the termination of clergy.[50]

Foreign courts have extended ministerial-type protections in cases involving a broad array of other positions that have been important for the religious mission or ethos of the religious organization, including a public affairs spokesperson, a nurse, and a doctor. *See Obst v. Germany*, App. No. 425/03 (ECtHR, Feb. 3, 2010) (upholding the dismissal of a church public affairs director even though he did not hold the title of minister and his employment was not related to ministering to a specific congregation); *Neary v. The Dean of Westminster* (1999) IRLR 288 (upholding summary dismissal of an organist and concert secretary whose conduct undermined trust and confidence); Constitutional Court of Spain ruling 5/1981, February 13 (upholding a nurse's dismissal from a Catholic hospital because she criticized the religious order); *Rommelfanger v. Federal Republic of Germany*, App. No. 12242/86 (EComHR, Sept. 6, 1989) (ruling that it was constitutional to give notice of termination to a Catholic hospital physician who

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[49] *Serif,* App. No. 38178/97 (ECtHR) paras. 49-54 (State interference in the appointment of a mufti violates Article 9) and *Hasan and Chaush*, App. No. 30985/96 (ECtHR) para. 104 (Article 9 protects the right to organizational autonomy).

[50] Dudová and Duda v. Czech Republic, App. No. 40224/98 (ECtHR, Jan. 30, 2001) (rejecting the jurisdiction of secular courts in employment termination disputes involving members of the clergy).

publicly took a stance against the Church concerning the right of women to have an abortion).[51]

III. COMPARATIVE ANALYSIS OF RELIGIOUS AUTONOMY PROTECTIONS IDENTIFIES HAZARDS THAT FLOW FROM FAILURE TO AFFORD BROAD PROTECTION TO THE MINISTERIAL EXCEPTION.

While foreign experience supports the principles and values of the ministerial exception, it also provides important cautions in interpreting United States law. From the colonial era on, Americans have been consistently careful in rejecting the vestiges of British- and European-style establishment of religion.[52] While degrees of establishment existed in various forms in some of the colonies, and even after independence in a few states, laws "respecting an establishment of religion" were proscribed at the federal level with the adoption of the First Amendment;

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[51] Courts have questioned extending ministerial exception-type protections in a few cases where the positions were perceived as more peripheral to the organization's pastoral and teaching functions. Ontario Human Rights Commission v. Christian Horizons (2010) O.N.S.C. 2105 (CanLII), May 14, 2010 (ruling for a support worker at an organization ministering to individuals with developmental disabilities); Belgian Court of Cassation, Jan. 13, 1992, Triv. Trav. 1992, S. 225 (ministerial exception equivalent does not apply to teachers of secular subjects). *See also Schüth* (European Court found that Germany had not adequately balanced the privacy, family, and professional interests of an organist and choirmaster against religious autonomy rights).

[52] *See* John Witte, Jr. & Joel A. Nichols, *Religion and the American Constitutional Experiment* 1-3, 13-17, 21-37 (Westview Press 3d ed., 2011); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409.

and the insistence on institutional separation of church and state (and the concomitant protection of religious autonomy) had become axiomatic by the time of the adoption of the Fourteenth Amendment. The Great Awakening, the unprecedented religious diversity of the American populace,[53] the distance and spread of settlement and ready ability of Americans to move to new communities, the weakness and distance of formal ecclesiastical authority,[54] the influence of the Enlightenment on late-colonial elites,[55] and not least the War of Independence itself all engendered an irreversible break with British- and European-style establishment.[56] The First Amendment and the eventual disestablishment of religion in the various states were designed to bring the prior regime of established religion to an end, preventing both coerced support for religion and state control over the clergy and the church.

From the beginning, this Court's church autonomy cases have distanced themselves from European patterns that allowed judicial intervention in internal

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[53] Most Americans at the time of the Revolution were religiously fervent but not church-goers; adherents to diverse minority faiths, whose numbers were fueled by immigration and revival, outnumbered members of traditional established churches. Steven Waldman, *Founding Faith: How Our Founding Fathers Forged a Radical New Approach to Religious Liberty* 43-44 (Random House 2008).

[54] Perez Zagorin, *How the Idea of Religious Toleration Came to the West* 203 (Princeton Univ. Press 2003).

[55] *Id.*; McConnell, *supra* note 52, at 1430-1434.

[56] McConnell, *supra* note 52, at 1436; Philip Hamburger, *Separation of Church and State* (Harvard Univ. Press 2002) 89-92.

religious affairs. In *Watson v. Jones*,[57] the Court was faced with a question of first impression on an intra-church property dispute. British common law precedent used the "implied trust" doctrine, which held that in the absence of evidence of an express trust provision, property given to a church was held in implied trust for the benefit of individuals or groups that adhered to the same beliefs as the donors.[58] The Court reasoned that while the resulting "departure from doctrine" test may have been acceptable in the established church setting of Great Britain, it was not consistent with the spirit of religious freedom that prevailed in the United States. The Court emphasized that in the United States,

> [t]he 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, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.[59]

Accordingly, the Court determined that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest . . . church judicatories to which the matter has been carried, the legal tribunals must accept such

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[57] 80 U.S. (13 Wall.) 679 (1871).

[58] Craigdallie v. Aikman, 4 Eng. Rep. 435 (1820); *see generally* H. Reese Hansen, *Religious Organizations and the Law of Trusts*, *in Religious Organizations in the United States: A Study of Identity, Liberty, and the Law* 279, 286 (James A. Serritella et al. eds., Carolina Academic Press 2005).

[59] *Watson,* 80 U.S. at 728-29.

decisions as final and as binding on them . . . ."[60] In subsequent cases, the Supreme Court has made it clear that

> First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice . . . . [T]he [First] Amendment . . . commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.[61]

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[60] *Id.* at 727.

[61] *Mary Elizabeth Blue Hull*, 393 U.S. 440, 449. The continuing validity of the church autonomy cases was recognized in Employment Division v. Smith, 494 U.S. 872, 877, 887 (1990). It is important to understand why this is the case. The *Smith* case addressed the validity of general and neutral laws passed in the exercise of constitutionally authorized legislative powers. Such powers are broad, but they are not unlimited. As argued more specifically in the Brief for Petitioners, the confluence of free exercise, non-establishment, and expressive association principles in the federal Constitution respect a sphere of autonomy available to all religious communities. Significantly, the contours of this sphere are not dependent on the distinctive religious beliefs of any particular group. *See* Perry Dane, *The Varieties of Religious Autonomy, in* Robbers, *Church Autonomy*, 121-122. The Establishment Clause in particular poses a structural bar to government intrusion into internal religious affairs. *See* Carl Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J. Law & Politics 445 (2002); Carl Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998). Protection of this sphere places the internal affairs of religious communities beyond the reach of normal state regulatory powers. This is a sphere necessarily required if the state is to remain neutral in its dealings with all religious communities.

As detailed in Parts I and II, most foreign understandings of autonomy have come to more closely mirror United States protections. Nevertheless, there still remain a number of precedents in countries with limited traditions of freedom that illustrate the sorts of problems autonomy protections in the West have prevented. For example, national courts in Bulgaria and Greece have rejected the autonomy principles the United States articulated in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) by intervening in the appointment process for religious leaders.[62] In contrast, this Court has shown deference both over the dispute itself and over the procedures used by churches.[63] The European Court of Human Rights, in cases overturning the Bulgarian and Greek national courts has likewise emphasized religious autonomy is inconsistent with obligations of state neutrality.[64]

Strong protections for religious autonomy have served to protect United States courts from subtle pressures faced by governments and courts in other parts of the world to alter core structures, doctrines, and practices. In *Kedroff v. St. Nicholas Cathedral,*

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[62] *See* discussion of national court decisions in *Serif*, App. No. 38178/97 (ECtHR), and *Hasan and Chaush*, App. No. 30985/96 (ECtHR).

[63] *Serbian Eastern Orthodox Diocese*, 426 U.S. 696.

[64] *See Serif*, App. No. 38178/97 (ECtHR), and *Hasan and Chaush*, App. No. 30985/96 (ECtHR). Subsequent to the European Court's judgment in *Serif*, the applicant requested a reopening of his case in Greece, and on April 24, 2002 the Thessaloniki Appeal Court Council quashed the applicant's original conviction (Committee of Ministers Resolution ResDH(2005)88 of 26 October 2005, *available at* http://www.strasbourgconsortium.org/document.php?DocumentID=5524).

344 U.S. 94 (1952), despite Cold War pressures, the Court rejected a statute which could have transferred control of the Russian Orthodox Churches in New York from the Moscow hierarchy to that of the Russian Orthodox Church in America, holding that civil courts must defer to religious conceptions of their own organizational structures.

Other countries have found it much more difficult to resist political pressures. For example, as chronicled in *Metropolitan Church of Bessarabia v. Moldova,* App. No. 45701/99 (ECtHR, Dec. 13, 2001), Moldovan officials spent years refusing to give legal entity status to a breakoff Orthodox church that claimed allegiance to the Romanian hierarchy instead of the state-favored Russian one.[65] Similarly, in *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 (ECtHR, June 14, 2007), Ukrainian officials refused to permit a local parish to change its affiliation from the more favored Moscow hierarchy to the breakoff Ukrainian one. Religious autonomy protections also work to protect government officials from undue pressure to support a given religious organization's legal positioning. In 1992, the President of Ukraine dismissed the official in charge of religious affairs because he refused to legitimize a legally questionable merger between two branches of the Orthodox Church and opposed the creation of a third branch.[66]

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[65] *See* Grégor Puppinck, correspondence with ICLRS (June 2011, document available upon request) (comparing Moldovan law to U.S. anti-discrimination law).

[66] *See* Gennadiy Druzenko, *Religion and the Secular State in Ukraine, in Interim Reports* 728.

At its extreme, lack of autonomy in the selection of religious leaders, teachers, and others performing ministerial functions becomes a facet of repressive state control of religious organizations. China bars foreign leadership of religious organizations;[67] it routinely interferes with or contests clerical appointments. The Vatican recently succeeded in the open appointment of a cardinal in Hong Kong because of limitations on Chinese governmental authority over religious practices in Hong Kong.[68] Roman Catholic leaders in the rest of the People's Republic of China are appointed by Chinese officials.[69] Many Middle Eastern countries control the appointment of the Muslim leadership in their countries.[70] In Turkey, all imams are employees of the state,[71] which in turn dictates the terms of their employment and the content of their sermons.

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[67] *See* U.S. State Department International Religious Freedom Report 2007: China, *available at* http://www.state.gov/g/drl/rls/irf /2007/90133.htm.

[68] *Id.* However, the PRC government subsequently warned the cardinal to avoid discussing political matters. *Id.*

[69] *Id.* There are some indications that the appointments are made after quiet consultation with the Vatican, but this modus vivendi remains shaky.

[70] Jakob Skovgaard-Petersen, *A Typology of State Muftis*, *in Islamic Law and the Challenges of Modernity* 81, 85-95 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., AltaMira Press 2004). *See also* Steven J. Coffey, *Religious Freedom is a Growing Priority*, *in The Middle East Quarterly*, September 1997, 77-80.

[71] *See* Talip Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere,* 2003 B.Y.U. L. Rev. 475, 502.

Algeria requires that all ministers register with and be approved by the government.[72]

United States constitutional principles, of course, represent a reaction against precisely these sorts of repressive controls of religious life. Robust protections of religious autonomy in countries with traditions of freedom have proved to be vital bulwarks against erosion of religious freedom around the world. The ministerial exception and its equivalents in foreign law have played a key role in ensuring the self-determination and authenticity of religious organizations and thus the pluralism of democratic societies. The European Court has emphasized the significance of religious autonomy for pluralism and how it lies at the center of religious freedom protections: "[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which [religious freedom] affords."[73] The ministerial exception and similar foreign protections ensure religious autonomy and pluralism by preventing governmental interference in an essential aspect of autonomy and religious self-determination—the selection, supervision, discipline and removal of those in important roles in carrying out a religious organization's mission.

CONCLUSION

Foreign law reaffirms the principles underlying the ministerial exception as a vital aspect of religious

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[72] Association Tunisienne de Droit Constitutionnel, *Droit, Pouvoir & Religion* (2010) 352, 353.

[73] *Metropolitan Church of Bessarabia*, App. No. 45701/99 (ECtHR) para. 118.

autonomy. To support religious freedom protections of self-determination and autonomy, the scope of the exception should apply to those who represent a religious organization in a variety of important duties including those who teach, govern, minister or have a meaningful role in carrying out the religious organization's mission. Finally, it is the importance of the duties performed, rather than the preponderance of time spent performing various employment duties that should determine the application of the ministerial exception.

Amicus respectfully submits that the Sixth Circuit erred in grounding its decision on the proportionate amount of time Respondent spent teaching spiritual and secular subjects. In doing so, the court's decision eviscerated the principles of autonomy and self-determination that are at the heart of the ministerial exception as understood and applied in both the United States and most leading countries throughout the world.

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APPENDIX

APPENDIX

The International Center for Law and Religion Studies is part of the J. Reuben Clark Law School at Brigham Young University. The Center focuses on questions of religion-state law and freedom of religion or belief around the globe. Center personnel co-organize or participate in 20 to 30 conferences in the United States and abroad each year, have published widely on religion-state issues, and have been called upon to consult on legislative proposals in nearly 50 countries. The Center hosts two websites that address religion-state matters: www.religlaw.org and www.strasbourgconsortium.org. The Center helps develop local expertise among scholars and government officials abroad through training and by facilitating professional relationships among these thought leaders. The Center's approach is comparative; it rallies expertise drawn from a worldwide network of collaborating scholars from many legal systems and religious traditions. The Center seeks to assist thought leaders and government officials working on religion-state issues to find enhanced, country-specific solutions that draw on international experience and comparative research.