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

AMICUS CURIAE BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") FILED ON BEHALF OF THE ORTHODOX JEWISH ORGANIZATIONS AND RABBINICAL COURTS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI[1]

[1] Pursuant to Supreme Court Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amici* or their counsel has made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this amicus brief.

The *amici* are organizations that represent the Orthodox Jewish community of the United States, its educational institutions, and its rabbinical courts. They strongly believe that controversies between religious institutions and their present or former employees should be considered and determined by religious authorities applying the principles that govern the faith. The "ministerial exception" that is being defined in this case should, in the view of these *amici*, be applied broadly to withdraw from the jurisdiction of secular courts litigation that could and should be decided in accordance with religious guidelines by religious authorities. This principle extends beyond employment controversies with employees whose "primary duties" are religious. It includes all claims made by or against any employee whose duties relate in any manner to the religious doctrine or teaching of his or her employer, particularly if, as is true of Jewish institutions, a meaningful internal religious remedy is available to the plaintiff.

This *amicus* brief describes for the Court some relevant propositions of Jewish Law that affect the resolution of employment-related controversies involving Jewish religious institutions. Jewish Law directs Jewish institutions to resolve controversies with Jewish employees in rabbinical courts applying the rules of Jewish Law. Jewish employees who are committed to traditional observance of Jewish Law should also, with rare exceptions, bring their claims against Jewish religious institutions to a rabbinical court.

There are many standing rabbinical courts ("*Batei Din*") in the United States that are available to hear and determine civil disputes, including controversies between employees of Jewish institutions and their employers. Some of the leading rabbinical tribunals in the United States have joined this *amicus curiae* brief. In all States, the jurisdiction of Jewish religious tribunals is limited to cases in which both parties voluntarily submit their controversies to rabbinical arbitrators. Decisions of such rabbinical tribunals, if voluntarily chosen by both parties, have generally been respected and enforced under federal and state arbitration laws.

The "ministerial exception" as universally recognized by American courts bars litigation in secular courts of disputes between synagogues and their rabbis. As a result, parties to such controversies – at the core of the "ministerial exception" – must resort to the alternative avenue of dispute resolution that Jewish Law commands – the rabbinical courts. Controversies between other employees of Jewish religious institutions and their employers remain, however, in an uncertain state and whether they may proceed in secular courts depends on how broadly the "ministerial exception" is applied or on how committed both parties are to a resolution based on principles of Jewish Law.

Jewish communal institutions are much more likely to abide by the doctrines of Jewish Law than are individuals, whose choice of forum may be determined by their appraisal of the probability of a favorable outcome from a particular tribunal. As a practical matter, Jewish religious institutions

ordinarily have no real choice. They must invoke the authority of a rabbinical court and request the application of Jewish Law if they seek resolution of a controversy with a Jewish employee.

The application of the "ministerial exception" urged in this case by the petitioner will govern more cases than the "primary duties" test invoked by the court below. It will, therefore, accord greater reciprocity, fairness, and mutuality of obligation to parties in disputes between Jewish religious institutions and their employees. In such controversies the Jewish institutional party is, in nearly all circumstances, obliged by the rules of its faith to seek relief only in a religious tribunal. A private disputant should not be able to select a secular court or to prevent recourse to an available religious court by withholding consent to arbitration.

The *amici* also believe that petitioner's stance on the "ministerial exception" follows from the Establishment Clause's doctrine of non-interference with the internal affairs of religious institutions. Whether an employee's conduct has violated the religious institution's doctrines so that his or her continued employment or promotion is damaging should not be determined by a secular judge or by a jury. This is true regardless of the centrality of the employee's position in the institution's hierarchy. Courts should not be permitted to substitute their superficial understanding of religious doctrine for more learned evaluations by scholars committed to observance of religious precepts.

DESCRIPTION OF THE *AMICI*

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in the Supreme Court of the United States in 28 cases since 1968.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States.

National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community. For many decades it has maintained a standing religious court which adjudicates disputes brought to it by members of the Orthodox Jewish faith.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social, and educational areas affecting Orthodox Jews. For several decades it has maintained a religious court for the adjudication and resolution of disputes brought to it by members of the Orthodox Jewish faith.

Torah Umesorah is the coordinating body for more than 600 Jewish Elementary and Secondary Day Schools across the United States and Canada.

Baltimore Bais Din is a religious court for settlement and resolution of disputes through arbitration according to Jewish law, including financial, domestic and other claims.

Beth Din of the Rabbinical Council of California (RCC) is the largest body of Orthodox Rabbis in the Western United States. Its members serve as pulpit Rabbis and heads of educational institutions. The RCC Beth Din provides Alternative Dispute Resolution in accordance with Torah law.

Boston Rabbinical Court of Justice serves the entire New England area in adjudicating religious laws and controversies and has done so since its inception in 1930.

Kehilla Bais Din of Los Angeles handles ecclesiastic matters such as marriage and divorce, personal status certification, and conversion. Financial disputes are addressed through mediation and formal Beth Din procedures.

Maysharim Bais Din of Lakewood serves the Jewish communities of New Jersey, arbitrates dispute resolution in business matters, torts and damages, and family law.

Bais Din Tzedek U'Mishpat of New York was established in 2005 and serves the Jewish communities of New York. Its rabbinical judges hear cases in business, family and interpersonal dispute resolution.

ARGUMENT

I.

JEWISH LAW PROVIDES A RELIGIOUS FORUM THAT JEWISH LITIGANTS SHOULD INVOKE FOR THE RESOLUTION OF EMPLOYMENT-RELATED CONTROVERSIES

A fundamental principle of the Jewish religious tradition is that any society – including a gentile community – must establish a judicial system to hear and decide civil controversies. Establishment of courts is deemed one of the basic seven commands that bind all Noahides – *i.e.*, non-Jews. Maimonides, Mishneh Torah, *Melachim UMilchamotehem* 9:1, 14. As for Jews subject to Jewish religious law, the Torah's command in Exodus (21:1) that "these are the ordinances that you shall place *before them*," has been rabbinically interpreted as directing that civil controversies between Jews be brought before Jewish courts applying Jewish Law. Babylonian Talmud, *Gittin* 88b; Maimonides, Mishneh Torah, *Sanhedrin* 26:7; Shulchan Aruch, *Choshen Mishpat*

26. *See* Quint, A Restatement of Rabbinic Civil Law, Vol. 1, pp. 174-182 (1990).

The institution known as "*Beth Din*" or rabbinic court dates back to the time of Moses, whose father-in-law Jethro advised him to appoint judges over thousands, hundreds, fifties, and tens, who would "judge the people at all times." Exodus 18:21-22. The *Beth Din* has been a fixture of Jewish communities throughout history for the past three millennia.

In the United States *Batei Din* (the plural of *Beth Din*) are currently available in many metropolitan centers to adjudicate civil disputes between Jewish litigants. Some have permanent rabbinically ordained judges who hear civil claims and either issue decisions or seek compromise and settlement of disputes. Others call on knowledgeable members of the Jewish community to serve in a judicial capacity. Jewish Law also authorizes the parties to a dispute to form their own panel of judges by a *zabla* process under which each party selects one judge and the two chosen judges agree on a third member of the panel.

There is, therefore, no barrier whatever in the United States to a rabbinic court's consideration and decision of an employment-related dispute between a Jewish religious institution and a Jewish employee. The *Beth Din* is an available forum that can hear and decide the controversy according to Jewish Law. It is also an accepted principle of Jewish Law that *dina de-malchuta dina* – that the secular law of the venue of the litigation may be taken into account by the Jewish religious court and will, in certain

circumstances, be deemed binding. *See* 5 Encyclopedia Judaica 663-669 (2d ed. 2007), and authorities there cited.

This is the proper and preferred means that Jewish tradition prescribes for the resolution of disputes between employees of Jewish institutions and their employers. Whether the litigation is initiated by the individual or by the institution, a *Beth Din* should be empowered to resolve it.

II.

COURTS IN THE UNITED STATES HAVE CONSISTENTLY ENFORCED DECISIONS OF *BATEI DIN* THAT SATISFY PROCEDURAL STANDARDS REGARDLESS OF WHICH SIDE PREVAILS

American courts have treated *Beth Din* decisions as rulings of arbitration panels and enforced them if they satisfied the procedural criteria governing arbitral determinations. *See, e.g., Lang v. Levi*, 16 A.3d 980, 985-991 (Md. Spec. App. 2011); *Glatzer v. Glatzer*, 905 N.Y.S.2d 607 (App. Div. 2d Dep't 2010); *Dial 800 v. Fesbinder*, 12 Cal. Rptr.3d 711, 721 (Cal. App. 2004); *Ghertner v. Solaimani*, 563 S.E.2d 878, 823-824 (Ga. App. 2002); *Elmora Hebrew Center, Inc. v. Fishman*, 570 A.2d 1297 (N.J. Sup. Ct. App. Div. 1990).

An employee of a Jewish religious institution would, under these precedents, be able to secure a judicially enforceable judgment against the religious institution by initiating and pursuing a *Beth Din*

proceeding. See *Brisman v. Hebrew Academy of Five Towns & Rockaway*, 895 N.Y.S.2d 482 (App. Div. 2d Dep't 2010); *Kingsbridge Center of Israel v. Turk*, 469 N.Y.S.2d 732 (App. Div. 1st Dep't 1983). In the *Brisman* case the Beth Din's award to the employee substantially exceeded any judgment the employee could have obtained in a New York State court. Nonetheless, the Appellate Division held that it lacked authority to revise the Beth Din's judgment. Applying the "ministerial exception" to foreclose jurisdiction over lawsuits brought by teachers or other personnel in religious schools would not deny relief to employees who have valid claims that they are prepared to assert in a forum that applies the religious doctrines of their employers.

III.

BOTH SIDES IN JEWISH EMPLOYMENT-RELATED DISPUTES SHOULD BE EQUALLY MOTIVATED TO PRESENT THEIR CLAIMS TO *BATEI DIN*

Because of the constraints of Jewish Law, religious institutions ordinarily have no real choice of forum if they wish to initiate a legal proceeding against a Jewish employee. They are required by the doctrines previously discussed to seek relief only in a religious tribunal. Their religious constituencies will not permit them to bypass this traditional Jewish avenue of dispute resolution.

This result follows irrespective of whether the employee's "primary duties" are religious in nature. If a Jewish religious school determines to discharge

a Jewish teacher of secular subjects because his or her teaching, conduct, or dress violates the school's standards, it must initiate a *Beth Din* proceeding to obtain legal validation for the discharge. The individual employee is not similarly constrained in his personal choice, and he or she may deny jurisdiction to a *Beth Din* by simply refusing to consent to arbitration.

Petitioner's understanding of the "ministerial exception" extends beyond the limited class of employees whose "primary duties" consist of religious instruction. By bringing a larger category of employees within the exception, this interpretation would balance the scales between both sides in Jewish institutions' employment-related disputes. If an individual employee of a Jewish religious institution whose duties relate in any manner – not just in "primary" fashion – to the institution's religious doctrine or teaching cannot secure relief from a court, both employer and employee would equally be obliged to submit their controversy to the internal dispute-resolution mechanism provided by Jewish Law and Jewish tradition. As a result substantially more disputes of this nature would be submitted to, and decided by, Jewish religious tribunals, thereby reducing the burden on the courts and the judicial process.

IV.

CONSTITUTIONAL CONSIDERATIONS PROHIBIT AN INQUIRY INTO "PRIMARY DUTIES"

The Solicitor General acknowledges that the "ministerial exception" is "constitutionally rooted." Brief for the Federal Respondent in Opposition, p. 11. The exception implements the Establishment Clause's instruction that American courts may not interfere in the internal affairs of religious institutions. Former Chief Judge Posner of the Seventh Circuit described the purpose of the exception – "to avoid judicial involvement in religious matters" – and has said that it "is better termed the 'internal affairs' doctrine." *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).

If the "ministerial exception" applied only to those employees whose "primary duties" are religious, courts would be free to inquire deeply into the scope and importance of religious doctrine. That inquiry is prohibited by the constitutional bar against religious entanglement, evaluation, and oversight by the judiciary. The many reported judicial decisions involving the "ministerial exception" – canvassed in substantial detail in the pleadings filed by the parties and by *amici* at the petition for certiorari stage of this case – demonstrate how intrusive and judgmental of religious beliefs and religious practice courts can be if the exception is narrowly applied.

The Fourth Circuit's opinion in *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d

299 (4th Cir. 2004), which applied a "primary duties" test to an employee of a Jewish institution, illustrates this point. The Fourth Circuit correctly concluded that the particular plaintiff in that case – who was a *mashgiach* or inspector of his employer's adherence to Jewish dietary rules – came within the "ministerial exception." But in arriving at that conclusion, the court determined that "kosher food is an integral part of Judaism" (363 F.3d at 308), that the plaintiff "occupied a position that is central to the spiritual and pastoral mission of Judaism" (363 F.3d at 309), and that "in the Jewish faith, non-compliance with dietary laws is a sin" (*id.*). The court concluded that "Jews view their dietary laws as divine commandments, and compliance therewith is as important to the spiritual well-being of its adherents as music and song are to the mission of the Catholic church." 363 F.3d at 309.

Although we do not disagree with the court's observations in the *Shaliehsabou* case, we believe that the Constitution forbids courts from engaging in this kind of analysis and comparison of religious convictions. The constitutional principle that preserves the independence of religious faiths and institutions shields judgments based on religious convictions from review and oversight by secular courts.

A different court faced with the same record regarding his "primary duties" might have reached the opposite conclusion. Hence the *Shaliehsabou* case illustrates to these Jewish *amici* the dangers of permitting courts to decide whether a plaintiff's "primary duties" are religious. The "ministerial

exception" should apply whenever a plaintiff in such a case has any duties that relate in any manner to the religious doctrine or teaching of the employer's faith, particularly if the faith affords an internal process for evaluating the plaintiff's claim and providing a meaningful remedy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be reversed.

June 20, 2011

Respectfully submitted,

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