No. 23-55088

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

YAAKOV MARKEL,
Appellant,

v.

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Central District of California, Case No. 2:19-cv-10704
Hon. John W. Holcomb

BRIEF OF *AMICUS CURIAE* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS SUPPORTING APPELLEES

NICHOLAS R. REAVES
YALE LAW SCHOOL
FREE EXERCISE CLINIC
1919 Penn. Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 349-7212

GORDON D. TODD
DANIEL J. FEITH
ALARIC R. SMITH
AARON P. HAVILAND
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and the Rules of this Court, the International Society of Krishna Consciousness states that it has no parent corporation and that no publicly held corporation owns any part of it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The International Society for Krishna Consciousness ("ISKCON") is a monotheistic tradition within the umbrella of Hindu culture and faith. Founded in New York City in 1966, ISKCON—also known as the Hare Krishna movement—is led by a 36-member Governing Body Commission. It hosts 15 million members and worshipers each year at its 700 temples worldwide, including 50 in the United States. Approximately 100,000 members of ISKCON have accepted religious vows.

ISKCON has a strong interest in ensuring that religious organizations remain free to select those who serve as ministers. The right of religious groups to govern themselves in such matters is essential to their ability to carry out their missions. This right is particularly important for minority religions like ISKCON, as courts and government

[1] No party's counsel authored this brief in whole or in part, and no party, its counsel, or any other person—other than *amicus curiae* or its counsel—contributed money intended to fund preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellees consented to this filing. Counsel for *amicus curiae* contacted counsel for Appellant on October 13, 2023, again on October 17, 2023, and once more on October 19, 2023, but never received a response. Accordingly, *amicus curiae* has filed a motion contemporaneously with this brief seeking leave of the Court. *See id.* Rule 29(a)(2).

officials are typically unfamiliar with the doctrines and beliefs that govern the relationship between religious organizations and their ministers.

INTRODUCTION

The ministerial exception plays a vital and necessary role in protecting the constitutionally guaranteed autonomy of religious organizations. It preserves "the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (internal quotation marks omitted). Government interference in such decisions would violate both the Free Exercise Clause, "which protects a religious group's right to shape its own faith and mission through its appointments," and the Establishment Clause, "which prohibits government involvement in ecclesiastical decisions." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

Because of the diversity of religious belief and practice in the United States, the ministerial exception applies broadly. It applies not only to ordained priests and other clergy who fit the paradigm of a religious minister, but also to roles whose religious significance might not be immediately apparent to a person outside the religion. The ministerial

exception also protects *all* faiths, not just major denominations or those that align with popular understandings of how a religious organization should look or behave.

This appeal involves a simple and straightforward application of the ministerial exception. Appellant Yaakov Markel worked as a *mashgiach*—a kosher-food supervisor—for Appellee Union of Orthodox Jewish Congregations of America. Alleging unpaid wages, Markel brought several state-law claims against the Orthodox Union and its senior leaders, including violation of the California Labor Code, fraud, and negligent misrepresentation. On a motion for summary judgment, the district court ruled in favor of the Orthodox Union, concluding that under well-settled precedent Markel's claims were barred by the ministerial exception. The district court's opinion should be affirmed.

ISKCON submits this brief to address two issues presented in this appeal of particular importance to ISKCON and other minority faiths. First, contrary to the highly formalistic test advanced by Markel, the ministerial exception requires a functional approach to determining both whether an individual is a "minister" for purposes of the exception, and whether an entity is a "religious organization." Such an approach is

essential to safeguarding religious liberty, especially for minority faiths such as ISKCON, whose religious practices and organizational structures often diverge from those of majority religions. The application of a "rigid formula" like that Markel advances risks denying those religious minorities the same protections afforded mainstream faiths. *See Our Lady of Guadalupe*, 140 S. Ct. at 2055.

Second, as the district court correctly recognized, the ministerial exception protects the autonomy of religious organizations in *all* "matters of church government," *id.* (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)), not just those relating to the hiring and firing of ministers. This ensures that the exception prevents judicial intrusion into the religious doctrines of unfamiliar faiths, like ISKCON, that often govern all aspects of a minister's relationship with his church.

ARGUMENT

I. The Ministerial Exception Does Not Employ a One-Size-Fits-All Approach to Identifying Ministers and Religious Organizations.

A functional approach to the ministerial exception is essential to protecting the wide variety of faith-based groups in this country, many of which have diverse practices and customs that bear little resemblance to

each other. The Pew Forum on Religion and Public Life has identified 144 religions and categories of religions in the United States. *See* Pew Rsch. Ctr., *America's Changing Religious Landscape* 21 (May 12, 2015), https://pewrsr.ch/46n0si0. According to that same study, the percentage of U.S. adults identifying with a major religious denomination has dropped precipitously in recent years, while the share that belong to minority faiths has grown steadily. *See id.* Now more than ever, a rigid approach to the First Amendment that safeguards only traditional (and predominantly Christian) understandings of both ministers and religious organizations is ill-suited to the diverse composition of American religious life.

A. Ministers for Minority Faith Groups Often Engage in Religious Functions That Do Not Comport with the Norms of Majority Faiths.

When applying the ministerial exception, courts must not hew to "a rigid formula for deciding when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 190; *accord Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010) (en banc) ("[T]he ministerial exception encompasses more than a church's ordained ministers."). To be sure, the Supreme Court has identified several factors

that aid in determining whether an individual working for a religious organization qualifies as a minister, including whether the "religious organization holds the employee out as a minister by bestowing a formal religious title"; whether the title reflects "a significant degree of religious training followed by a formal process of commissioning"; whether the employee's "job duties reflect a role in conveying the Church's message and carrying out its mission"; and whether the "employee . . . holds herself out as a religious leader." *Puri v. Khalsa*, 844 F.3d 1152, 1160 (9th Cir. 2017) (cleaned up) (quoting *Hosanna-Tabor*, 565 U.S. at 190–92).

But the Court has also cautioned that these factors are not to be treated as a "checklist [of] items to be assessed and weighed against each other in every case." *Our Lady of Guadalupe*, 140 S. Ct. at 2067; *see also id.* at 2063 ("[O]ur recognition of the significance of those factors in [*Hosanna-Tabor*] did not mean that they must be met—or even that they are necessarily important—in all other cases."). Instead, courts must "take all relevant circumstances into account" and determine whether a "particular position implicate[s] the fundamental purpose of the [ministerial] exception," *id.*, which is to "ensure[] that the authority to

select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone," *Hosanna-Tabor*, 565 U.S. at 194–95 (cleaned up).

Following this guidance, courts have identified numerous positions within religious organizations that might not fall within the stereotypical understanding of a "minister" but nevertheless qualify for the ministerial exception. For example, in *Alicea-Hernandez v. Catholic Bishop of Chicago*, the Seventh Circuit held that the press secretary for a Catholic Bishop "served a ministerial function" because "[t]he role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance." 320 F.3d 698, 704 (7th Cir. 2003). In *Markowski v. Brigham Young University*, a district court ruled that an instructor who "trained full-time missionaries in how to respond to online inquiries about the Church and how to use their social media to have discussions with people interested in learning more about the Church" qualified as a minister. 575 F. Supp. 3d 1377, 1379, 1379 (D. Utah 2022). And in *Behrend v. San Francisco Zen Center, Inc.*, a district court ruled that a "Work Practice Apprentice" at a Soto Zen Buddhist church, whose duties included checking in and serving guests, cooking and cleaning in

the kitchen, and performing maintenance, was covered by the ministerial exception. No. 21-cv-01905-JSC, 2023 WL 1997919, at *3, *5 (N.D. Cal. Feb. 14, 2023), *appeal filed*, No. 23-15399 (9th Cir. Mar. 17, 2023).

This flexible, functional approach is critical to protecting majority and minority faiths alike. ISKCON's temple priests, for example, have duties that defy what many would typically think of as ministerial. As part of their religious tradition, temple priests practice *sankirtan*—i.e., the ritual of venturing into public places to share information about, seek donations for, and distribute literature on the Krishna faith. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 432–34 (2d Cir. 1981). To some, these acts may appear no different than a secular exercise of public relations and fundraising, but they are undoubtedly "an essential part of the Krishna faith." *Id.* at 433.

Temple priests also have duties to set up bovine shelters called *goshalas* and to campaign for cow protection, which stem from the Krishna faith's belief that all living beings are sacrosanct. Anna S. King, *Krishna's Cows: ISKCON's Animal Theology and Practice*, 2 J. Animal Ethics 179, 180–81 (2012). These same ministers devote their lives to taking care of animals on self-sufficient farms, *id.* at 180, and help run

the world's largest vegetarian food-distribution program, which provides millions of meals daily to the poor, ISKCON, *Food Relief Program*, https://bit.ly/3RSthOy (last visited Oct. 16, 2023). Again, although these duties may not resemble those of traditional ministers, they are "ministerial" nonetheless.

In this case, applying the Supreme Court's functional approach to determine whether a *mashgiach* qualifies as a minister is not a difficult task; indeed, another court has already answered the question. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, the Fourth Circuit held that the position of a kosher-food supervisor at a Jewish nursing home was a minister for the purpose of the ministerial exception. 363 F.3d 299, 309 (4th Cir. 2004). The *mashgiach*'s duties in that case included "starting and kosherizing the ovens and cleansing kitchen utensils in accordance with the rules of kashruth," or the "Jewish dietary laws." *Id.* at 301, 309. They also included "overs[eeing] the preparation of kosher food, a key aspect of Jewish halakha," which "is the overall term for Jewish law." *Id.* at 301, 309. The court explained that, in Judaism, dietary laws are considered "divine commandments," and non-compliance with those laws "is a sin." *Id.* at 309. Accordingly, when a

mashgiach carries out his daily tasks, he is "perform[ing] sacerdotal duties" that are essential for the "spiritual well-being" of the Jewish people he is serving. *Id.* Because the position of *mashgiach* "is important to the spiritual mission of Judaism," the court recognized that "failure to apply the ministerial exception . . . would denigrate the importance of keeping kosher to Orthodox Judaism." *Id.*

B. Participating in Commercial Transactions Does Not Strip an Organization of Its Religious Character.

A test sensitive to minority faith practices is equally important for determining what types of entities qualify as religious organizations for purposes of the ministerial exception. Contrary to Markel's assertions, a religious organization need not resemble a synagogue or church in order to be covered by the ministerial exception. *See* Appellant's Br. 35–36. "[W]hether an organization is 'religious' for purposes of the [ministerial] exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do." *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–27 (3d Cir. 2007).

Any entity whose "mission is marked by clear or obvious religious characteristics" qualifies as a religious organization for the purpose of the ministerial exception. *Shalehsabou*, 363 F.3d at 310; *see also Conlon*

v. InterVarsity Christian Fellowship, 777 F.3d 829, 834 (6th Cir. 2015) (same); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring) (non-profit entity qualifies as a religious organization when "it 1) is organized for a self-identified religious purpose . . . , 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious"). This is true regardless of whether the entity engages in some activities that are commercial in nature. *Contra* Appellant's Br. at 55–65. Such activities do not necessarily negate an organization's religious character.

Indeed, in many cases, commercial activities are the lifeblood of minority faiths lacking the large memberships that sustain more established religions. ISKCON provides a case in point. Since its founding, ISKCON has repeatedly turned to what appear to be commercial activities to sustain its religious tenets. During the Hare Krishna movement's infancy, its followers engaged in numerous such activities to fund their faith. Nicole Karapanagiotis, *Branding Bhakti: Krishna Consciousness and the Makeover of a Movement* 43 (2021) [hereinafter "*Branding Bhakti*"]. Followers gave away books, flowers,

and homemade trinkets in exchange for donations; hosted public events and concerts; and danced and sang in the streets, often accepting contributions from those who passed by. *Id.* at 37. In turn, ISKCON's members used those funds to open temples across the United States that "would be the basis for both the participation in, and the further spreading of, the ISKCON movement." *Id.*

Even today, ISKCON's various income generating activities support its religious mission. ISKCON includes hundreds of major religious centers, nearly one hundred affiliated vegetarian restaurants, and thousands of local meeting groups that lead community projects. ISKCON, *About Us*, https://bit.ly/3rBM5XK (last visited Oct. 16, 2023). Moreover, ISKCON manages sixty-five farms and eco-villages, and hosts regular programming at universities, parks, and other public spaces. *Branding Bhakti* at 30. These activities, which advance and sustain ISKCON's religious mission, should not deprive faiths like ISKCON of the protections afforded by the First Amendment.

Courts agree. Employing a broad understanding of "religious organization," numerous cases have held that revenue-generating religious corporations, schools, and hospitals qualify for the ministerial

exception. *See Shaliehsabou*, 363 F.3d at 310 (nursing home that observed Jewish law); *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996) (church-affiliated university); *Geary v. Visitation of the Blessed Virgin Mary Par. Sch.*, 7 F.3d 324 (3d Cir. 1993) (church-operated school); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (church-operated school); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (church-affiliated hospital); *Natal v. Christian & Missionary All.*, 878 F.2d 1575 (1st Cir. 1989) (non-profit religious corporation).

This Court should hold the same. Markel argues that the Orthodox Union cannot be a religious organization because it generates revenue through its kosher certifications and competes against for-profit, non-religious entities. *See* Appellant's Br. 18–19. But it makes no difference whether the religious organization "competes with commercial enterprises." *Schleicher v. Salvation Army*, 518 F.3d 472, 476 (7th Cir. 2008). As discussed above, a religious organization does not lose the protection of the ministerial exception simply because it raises funds or otherwise participates in commercial transactions. Rather, these functions often allow religion to flourish. Accordingly, the commercial

nature of an entity has no independent bearing on whether or not it is a "religious organization" for purposes of the ministerial exception.

II. The Ministerial Exception Applies Broadly to All Legal Claims Stemming from the Relationship Between a Religious Organization and Its Minister.

"The ministerial exception does not apply solely to the hiring and firing of ministers, but also relates to the broader relationship between an organized religious institution and its clergy[.]" *Werft v. Desert Sw. Ann. Conf. of United Methodist Church*, 377 F.3d 1099, 1103 (9th Cir. 2004) (per curiam). It covers any "cause of action that would otherwise impinge on the church's prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers." *Puri*, 844 F.3d at 1158 (quoting *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999)). Accordingly, not only does the ministerial exception foreclose "any claim with an associated remedy that would require the church to employ a minister," it "also bars relief for consequences of protected employment decisions, such as damages for lost or reduced pay." *Id.* (cleaned up).

It is well-settled by this Court that the ministerial exception applies to wage-related claims such as those brought by Markel. In *Alcazar v.*

Corporation of the Catholic Archbishop of Seattle, a seminarian brought a claim against the Catholic Church for unpaid overtime wages under Washington's Minimum Wage Act. 627 F.3d at 1290. Sitting en banc, this Court held unanimously that the ministerial exception applied to the seminarian's claim for additional wages. *Id.* at 1290 & n.1.

Markel argues that *Alcazar* does not control the outcome of this case because, unlike the plaintiff in *Alcazar*, Markel "was never part of an [Orthodox Union] seminary or training program." Appellant's Br. 52. But that argument pertains to whether Markel is a minister, not to whether the ministerial exception applies to wage-related claims. The two questions are distinct in the ministerial exception analysis. Put another way, whether *mashgichim* are ministers does not alter the fact that, under this Court's precedent, the ministerial exception bars wage-related claims by a minister against a religious organization. *See Alcazar*, 627 F.3d at 1290 & n.1; *see also Puri*, 844 F.3d at 1158 (ministerial exception bars claims demanding "damages for lost or reduced pay") (cleaned up).

Markel similarly argues that the ministerial exception applies only to claims impacting a religious organization's "ability to select hire, fire,

or discipline its ministers." Appellant's Br. 29. Again, *Alcaraz* forecloses this argument. Any claim touching on the relationship between a minister and a religious organization—not just claims challenging hiring and firing decisions—risks infringing on the religious organization's independent authority over its ministers, and therefore implicates the ministerial exception. *See Werft*, 377 F.3d at 1103.

For similar reasons, courts have extended the ministerial exception to state law claims, such as breach of contract and tortious interference, that implicate the relationship between a minister and a religious organization. *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 944 (7th Cir. 2022) ("[T]he ministerial exception applies to state law claims . . . that implicate ecclesiastical matters."); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 (3d Cir. 2018).

Wage-and-hour claims prove no different. Just like the decision to hire or fire, a religious organization's compensation of its ministers goes to the core of the "employment relationship between a religious institution and its ministers." *Hosanna-Tabor*, 565 U.S. at 188; *cf. Daggitt v. United Food & Com. Workers Int'l*, 245 F.3d 981, 987 (8th Cir.

2001) ("Compensation is an essential condition to the existence of an employer-employee relationship." (internal quotation marks omitted)). Thus, any intrusion by the courts into those decisions risks unnecessarily "interfer[ing] with the internal governance" of the religious organization. *Hosanna-Tabor*, 565 U.S. at 188.

Markel also argues that the ministerial exception applies only when the religious organization's employment decision has a "basis in religion," Appellant's Br. 30, and when judicial review of that decision would require a court "to wade into religious doctrine," *id.* at 35. But both the Supreme Court and this Court have explicitly rejected that narrow construction of the ministerial exception as inconsistent with the exception's purpose.

In *Hosanna-Tabor*, the Supreme Court explained: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone." 565 U.S. at 194–95. This Court has also held that "it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel

decisions." *Bollard*, 196 F.3d at 946; *see also Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 980 (7th Cir. 2021) (en banc) ("Just as a religious organization need not proffer a religious justification for termination claims, a religious organization need not do so for hostile work environment claims."). Because wage and hour claims implicate "internal church decision[s]" about compensation "that affect[] the faith and mission of the church itself," *Hosanna-Tabor*, 565 U.S. at 190, requiring that the organization proffer a reason for its action impermissibly intrudes on those decisions.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Date: October 19, 2023

Respectfully submitted,

/s/ Daniel J. Feith

NICHOLAS R. REAVES
YALE LAW SCHOOL
FREE EXERCISE CLINIC
1919 Penn. Ave. NW
Suite 400
Washington, DC 20006
Telephone: (202) 349-7212

GORDON D. TODD
DANIEL J. FEITH
ALARIC R. SMITH
AARON P. HAVILAND
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Brief:

(i) complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-1 because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 3,456 words; and

(ii) complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook.

Date: October 19, 2023

Respectfully submitted,

/s/ Daniel J. Feith

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2023, a true and correct copy of the foregoing was timely filed with the Clerk of the Court using the appellate CM/ECF system, which will send notifications to all counsel registered to receive electronic notices.

/s/ Daniel J. Feith
DANIEL J. FEITH