No. 08-35532

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA SPENCER, VICKI HULSE, and TED YOUNGBERG

Plaintiffs-Appellants,

v.

WORLD VISION, INC.,

Defendant-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
The Honorable Ricardo S. Martinez

AMICUS BRIEF FOR CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF GOSPEL RESCUE MISSIONS, CENTER FOR PUBLIC JUSTICE, NATIONAL ASSOCIATION OF EVANGELICALS, SAMARITAN'S PURSE, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

In Support of Affirmance.

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INTERESTS OF AMICI

The **Association of Gospel Rescue Missions** (AGRM) represents 250 autonomous Christian ministries that serve the poor, homeless, abused, and addicted. Member missions serve men, women and families, offering emergency food and shelter, rehabilitation, education, vocational training, transitional housing, and youth and family services. In 2007, AGRM members served 36 million meals, provided 13 million nights of lodging, graduated 14,000 individuals from rehabilitation programs, and assisted 13,000 individuals in the pursuit of GEDs and other educational program diplomas. Opportunities for Christian evangelism and discipleship occur throughout member ministries' programs. Many members identify evangelism and discipleship as their primary purpose.

AGRM members typically draw their staff from among those who are professing and practicing Christians involved in a local church and who are exhibiting behavior that is consistent with the traditional values and morals of Christian faith. Many members require a person to either sign or give verbal assent to the statement of faith to which the ministry ascribes. AGRM knows that having a staff that shares the ministry's Christian commitments is essential to the Christian evangelism and discipleship that is central to all programming in AGRM members.

It is inconceivable that those who do not identity themselves as Christian could fulfill a ministry's central purpose of Christian evangelism and discipleship.

The overwhelming majority of AGRM members are organized as 501(c)(3) organizations. The overwhelming majority are not legally connected to a church or denomination. However, they work closely with churches, who often provide financial support and volunteers. Members perform services that churches are not organized to do.

The AGRM and its members have a great interest in this case. There are eighty-two AGRM ministries in the Ninth Circuit. Each member has a uniquely Christian character. To maintain that identity, these ministries have employment policies that ensure that all employees adhere to the beliefs and practices of the Christian faith. Not being able to use such qualifications for employment would undermine the organizations' core identity and purpose.

The **Center for Public Justice** is a national public policy and civic-education organization that advocates the equal treatment of institutions of all faiths in the public square. For 30 years the Center has been advancing the case for the free exercise and non-establishment of religion in public life.

The **Christian Legal Society** ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with

chapters in nearly every state and members at over 140 accredited law schools. CLS' legal advocacy and information division, the Center for Law & Religious Freedom (the "Center"), works for the protection of religious belief and practice, as well as for the autonomy of religion and religious organizations from the government. The Center strives to preserve religious freedom in order that men and women might be free to follow their conscience, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and ministries in the United States. It serves 60 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and ministries. NAE believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

Samaritan's Purse is a nondenominational evangelical Christian organization providing spiritual and physical aid to victims of war, poverty, natural disasters, disease, and famine around the world. Samaritan's Purse and World Vision are, for

example, two of five charities selected to deliver food and monitor food distributions in North Korea. Samaritan's Purse's purpose is to share God's love through His Son, Jesus Christ and to promote the Gospel of the Lord Jesus Christ. It chief executive officer is Rev.Franklin Graham, son of Dr. Billy Graham. Few have preached the Gospel in more countries. Samaritan's Purse joins this amicus brief because the potential loss of the freedom to hire like-minded people of faith is one of the most critical issues threatening it and other faith-based charities. An effective way to earn a right to be heard and to live out the love of the Gospel is to provide crisis relief, development programs, medical assistance and other Christian outreach programs. If Samaritan's Purse is forced to hire employees not motivated by this purpose and mission, or hire those who are hostile to its mission, Samaritan's Purse will lose the unique call of faith to serve and witness to others.

The **Union of Orthodox Jewish Congregations of America** (the "U.O.J.C.A.") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community.

The U.O.J.C.A. is supporting the appellee in this case because it believes that this Court must protect the First Amendment rights of those private associations which form the fabric of our civil society. U.O.J.C.A. congregations, as well as the Orthodox Jewish community's schools, social-welfare charities and other institutions thrive in the United States because of the scope of religious freedom Jews have enjoyed in America, which is unprecedented in Jewish history. The right for our communal entities to form their character is an essential aspect of this freedom and must be legally protected.

I.
INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a question regarding the scope of Title VII's exemption permitting religious organizations to staff themselves with employees of the same faith. The Court of Appeals should resolve this question by interpreting the § 702 exemption consistent with its wording and legislative history. In accordance with the canon of avoiding constitutional questions, the court should reject any construction of § 702 inconsistent with the First Amendment values related to the Freedom of the Church, right of expressive association, prohibition on discrimination among religious organizations, and avoidance of entanglement.

Amici, including national bodies representing Jews and Evangelical Christians, suggest a methodological approach to this exemption that is faithful to the statutory text, Congressional intent, and constitutional values. Under this methodology, this court should determine: Is the employer a nonprofit entity? Does it hold itself out as religious? Is it either affiliated with a recognized religious organization or served or supported by persons or entities determined, at least in part, with reference to their religion or religious beliefs? The defendant here, World Vision, easily qualifies. Amici derive this methodological approach from a consideration of the distinctiveness of religious organizations and from the text,

legislative history, and constitutional purpose of the § 702 exemption--subjects to which amici now turn.

II.
THE DISTINCTIVENESS OF RELIGIOUS ORGANIZATIONS

Title VII exempts an employer from its prohibition of religious discrimination when the employer is a "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1 ("§ 702"). Before examining the text, history, and constitutional values relevant to this exemption, the Court should consider what it is about a religious organization that warrants such protection.

A. **Religious Organizations Are Epistemologically Unique.** What is the difference between a church and a car dealership, or, for that matter, between World Vision and the International Red Cross? Each has employees and goals. Red Cross, like World Vision, is humanitarian and seeks to help those with need. The primary difference is epistemological. Only a religious organization believes that it is called by God to undertake a task. It responds not only to the rational and experiential knowledge of the businessperson or government official, it responds to revelation. Revelation is knowledge that, while not necessarily inconsistent with rational or experiential knowledge, is acquired through sacred texts and religious traditions.

The testimony of World Vision's Senior Vice President is illustrative. She explains, by quoting World Vision documents, that World Vision, seeks "to honor God in all we do," SER8 (Regnier affidavit ¶ 7); and that it is "[m]otivated by our faith in Jesus [and] serve[s] the poor as a demonstration of God's unconditional love for all people." World Vision, a Christian organization, not only subscribes to the doctrine of the Trinity but seeks to imitate the "over-flowing" love between the Persons within the Trinity and also the love of Christ. Its Core Values states:

> **We are Christian.** We acknowledge one God; Father, Son and Holy Spirit. In Jesus Christ the love, mercy and grace of God are made known to us and all people. From this over-flowing abundance of God's love we find our call to ministry . . . . We seek to follow Him--in His identification with the poor, the afflicted, the oppressed, the marginalized . . . ."

SER11 (Id., ¶ 12).

It is precisely because religious organizations try to conform themselves to a divine calling that the Supreme Court recognized that judicial competence does not extend to evaluating matters of faith.

> "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

B. **Religious Organizations Are Necessary Communal Expressions of Religious Individuals.** Most people of like faith come together to profess their beliefs, study sacred texts and religious tradition, worship, inculcate a common ethic, and serve.[1] In his discussion of the § 702 exemption, Justice Brennan observed:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring); EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610, 620 n.15 (9th Cir. 1988) (religion includes communal elements).

Justice Brennan also saw that, because of its communal character, a religious organization must decide for itself whether it can better advance its religious mission through fellow believers or strangers to the faith.

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself . . .

483 U.S. at 342-43.

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[1] *See* Bruce R. Hopkins, The Law of Tax-Exempt Organizations (8th ed. 2003) (noting that religion may include doctrinal, mythic, ethical, ritual, experiential, or social dimensions).

He also determined that when individual religious freedom and institutional religious freedom are in tension, the former must give way.

> The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights [of employees], since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that . . . a religious organization should be able to require that only members of its community perform those activities.

Id.

C. **Religious Organizations Require Freedom.** A religious organization cannot answer a divine calling without freedom to define itself and its doctrine, polity, and personnel. John Courtney Murray writes:

> . . . that the primary and indispensable care which government owes to religion is a care for the freedom of the Church. Religion, even as a social value, is not created by government but by the Church. The role of government is to see to it, by appropriate measures both positive and negative, that the Church is free to go about her creative mission . . . .

John Courtney Murray, Religious Liberty, 217 (J. Leon Hooper, ed., 1983). Murray notes that government's function in protecting this freedom is secular. It is "secular because freedom in society, for all that it is most precious to religion and the Church, remains a secular value--the sort of value that government can protect and foster by instrument of law." John Courtney Murray, Bridging the Sacred and the Secular, 205-06 (J. Leon Hooper, ed., 1994).

American courts have long performed their secular function of protecting the Freedom of the Church by hewing to the Supreme Court teaching that:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson, 80 U.S. at 728-29.

The appellants, aggrieved by World Vision's termination decision, contend that permitting a religious organization to define its own religious values is dangerous. Appellants Brief at 39. Justice Brennan and this Circuit disagree:

> [R]eligious 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. Religion includes important communal elements for most believers. They exercise their religion through religious organizations. . . .

Amos, 483 U.S. at 341-42 (Brennan, J., concurring) (*quoting* Professor Laycock); Townley, 859 F.2d at 620 n.15 (9th Cir. 1988) (same). Indeed, James Madison taught that the fruits of disestablishment are a religiously diverse nation and a competition among religious ideas that itself is the best antidote to the dangers of an

established religion. The Federalist No. 51 (James Madison). In other words, there is greater peril in having government decide whether World Vision's beliefs and practices are worthy of the protection than in permitting World Vision to decide for itself whether its employees should have the same faith.

Government deference to a religious organization's definition of itself is, therefore, necessary for the Freedom of the Church. "Solicitude for a church's ability to [staff itself with fellow believers] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom . . ." Amos, 483 U.S. at 342 (Brennan, J., concurring).

Appellants, instead, suggest that respecting World Vision's religious freedom diminishes their own. Appellants Brief at 16-17. They are twice wrong. First, when World Vision chooses to exclude from its employment those who deny the deity of Christ, there is no state action involved. Constitutionally cognizable denial of individual religious freedom requires state action. Second, the burden on appellants' freedom to work is minimal compared to the institutional harm suffered when a religious organization loses the freedom to select those persons best able to carry out its mission. The loss of institutional religious freedom, as Justice Brennan observed above, also diminishes individual religious freedom. Individual religious freedom means little if the religious communities individuals form have no freedom.

D. **Religious Organizations Are Diverse.** Professor Esbeck notes that:

> . . . religion is rarely just an individual affair. It comes in many assorted groupings: clusters of people bound together by collective worship and ritual, sacred literature and creed, clerical leaders and governing polity, shared history and beloved buildings, overseas mission fields and neighborhood social projects. We call theses various clusters of communal activities churches, synagogues, mosques, mission societies, hospitals, faith-based charities, parochial schools, and church-related colleges. These (and others) are all embraced, if inadequately, by the term "religious organization."

Carl H. Esbeck, "Dissent and Disestablishment: The Church-State Settlement in the Early American Republic," 2004 B.Y.U. Univ. L. Rev. 1385, 1386 (2004).

The Encyclopedia of American Religion catalogs over 2,600 religious groups or denominations in the United States. J. Gordon Melton, Encyclopedia of American Religion (7th ed. 2003). Many of these groups are not affiliated with any denomination. Protestants, for example, account for "51.3% of the adult population and nearly two-in-three (65%) Christians in the United States." Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 13 (2008). One-third of the Protestant adults are not associated with any denomination. Id. at 14. Indeed, "5% of the adult population consists of Protestants who attend . . . churches that are not affiliated with any specific denomination[, and] 13% of all members of evangelical churches belong to nondenominational congregations." Id. at 15. Large numbers of non-denominational faith communities are also present in other religious

traditions, including Judaism, Islam, and many Eastern religions. *See* Encyclopedia of American Religion, *supra*, 182-83 (identifying "branches" of Judaism), 189 (discussing Islam in the United States), 961-62 (listing interfaith Muslim groups), 1063-1130 (discussing Buddhism, Shintoism, Hinduism, Zen, and other Eastern religions.)

Alongside these groups are thousands of ministries, including colleges, monasteries, parachurches, associations, publishers, and others. For many, these ministries constitute an important--and sometimes primary--means by which they exercise their religion. Christians, Jews, Muslims, and others, because of their faith callings, have founded a broad array of organizations. There are men's ministries and women's ministries; ministries that promote adoption; ministries supporting foster families; medical ministries; missionary societies; religious schools, colleges, and seminaries; ministries to victims of AIDS, cancer, addictions, and divorce; ministries that promote good worship; music ministries; ministries to families unable to manage their finances; campus ministries; prison ministries; and many more. Some of these ministries are founded and controlled by congregations or denominations. Many are not.

The sources of funding for these ministries are also diverse. Some are supported by a single congregation; others by conventions of churches within a

geographic region; and others by a denomination. Some are ecumenical and receive support from many different congregations or denominations. Some are supported exclusively by local congregants. Many receive support from a variety of sources including donations, tuition, fees, and even government contracts.

A jurisprudence respectful of the freedom and diversity of religious organizations must accommodate different faith traditions, polities, and missions. The religious entity and not Caesar must define these differences.

III.
THE TEXT, LEGISLATIVE HISTORY, AND CONSTITUTIONAL PURPOSE OF THE SECTION 702 EXEMPTION

A. **Judicial Interpretation of a Statute Involves Examination of the Statutory Text and, If Necessary, the Legislative History--All While Avoiding Any Construction Contrary to the Constitution.** The *sine qua non* of statutory interpretation is a close reading of the statutory text, and, if the plain language is ambiguous, the legislative history. Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S., 482 F.3d 1157, 1168 (9th Cir. 2007). The Court should perform this task consistent with the canon of avoiding constitutional issues. Sherman v. U.S. Parole Comm'n, 502 F.3d 869, 882 (9th Cir. 2007).

B. **The Text of the Section 702 Exemption.**

1. The 1964 Act. When first enacted in 1964, § 702 read:

> [Title VII] "shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

42 U.S.C. § 2000e-1 (1970).

Congress could have limited this exemption to every "church, synagogue, mosque, and similar organization." It could have required the exempt employer "to be established or supported in whole or in part by a church, synagogue, mosque, denomination, or similar organization." It did neither. Instead, it broadly described the employer eligible for exemption as a "religious corporation, association, or society." The textual requirement for the exemption is that the employer must be an *entity that is religious*.

There is a second requirement in the 1964 text. Religious employers could discriminate on the basis of religion only when the affected employee "perform[ed] work connected with carrying on [the entity's] religious activities." Id. This second requirement did not last.

2. The 1972 Amendments. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972) modified § 702 as follows:

> Title VII "shall not apply . . . to a religious corporation, association, **educational institution,** or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, **educational institution,** or society of its **religious** activities ~~or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution~~."

42 U.S.C. § 2000e-1 (1982) ((**bold** words are additions; ~~strike outs~~ are deletions).

The 1972 Act deleted the general exemption for educational institutions, and then added "educational institution" to the previous list of entities that had to be "religious" to qualify for the exemption. This suggests two concerns. First, even though religious educational institutions would almost certainly have been subsumed in the 1964 list ("religious corporation, association, or society"), Congress must have been concerned that the deletion of "educational institution" from the 1964 general exemption created the risk that a court might construe the amendment as eliminating similar institutions from the subset of religious entities.

More important, the inclusion of "educational institution" to the list of other religious entities provides additional evidence that the § 702 exemption was never limited to churches, synagogues, and mosques or the so-called formally religious entities.

In 1972, Congress also deleted the adjective, "religious," that had preceded "activities" and thereby "broadened [the § 702 exemption] to cover non-religious

activities of" religious employers. Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991). The purpose as inferred from the text is that Congress gave religious employers a broader exemption to relieve courts from distinguishing between employees' religious and secular activities and, hence, the entanglement associated with doing so.

Finally, the 1972 Act added a definition for "religion" in § 701(j):

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardships on the conduct of the employer's business."

Pub. L. No. 92-261, § 2(7), 86 Stat. 103.

"Section 701(j) . . . defines religion broadly." Little, 929 F.2d at 950. While this definition formally applies to the use of the term, "religion," in the bona fide occupational qualification exception at 42 U.S.C. § 2000e-2(e)(1) and the exception for some educational institutions at 42 U.S.C. § 2000e-2(e)(2), it also provides meaning to its adjecti

religious group can use the definition as a guide . . . as long as the activity can be construed as involving any aspect of the group's religious observances, practices, or beliefs, the group should be within the exemption").

C. **The Legislative History of the Section 702 Exemption.**

1. The 1963 Legislative History Provides Little Help. Three circuits have discussed the 1963 legislative history of the § 702 exemption. All found it provided little help. Townley, 859 F.2d at 617 (9th Cir. 1988) ("this debate is far from comprehensive);" Little v. Wuerl, 929 F.2d at 950 (3d Cir. 1991) ("legislative history never directly addresses the question"); LeBoon v. Lancaster Jewish Community Center, 503 F.3d 217, 231 (3d Cir. 2007) ("we do not find the legislative history helpful"). Even those involved in the debate noted "if there ever was a legislative history which became confused in less than an hour, this is it . . ." LeBoon, 503. F.3d at 231 (*citing* EEOC Legislative History of Titles VII and XII of the Civil Rights Act of 1964, 3204 (1968)). This Circuit has observed that the "test the court adopted in Townley does not depend on the analysis of legislative history." EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 460 n.5 (9th Cir. 1993).

2. The Debate Regarding Representative Purcell's Amendment Provides No Insight Regarding the Requirements for § 702 Exemption. This Court

should reconsider Townley's interpretation of the legislative history in light of the textual analysis above, the 1972 legislative history, the relevant First Amendment principles, and the Third Circuit's analysis Townley reviewed the House Judiciary Committee debate of the Purcell Amendment and then, without citation, concluded that "[a]ll assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm." Townley, 859 F.2d at 618.

Appellants now seek to make this paradigm, the exclusive category of religious institutions. After quoting the "paradigm" reference, appellants write: "In Kamehameha, the Ninth Circuit reaffirmed Townley's holding that only entities with 'extremely close ties to organized religion' such as 'churches and like organizations' qualify for the religious organization exemption . . . " Appellants Brief at 15.

This is not Townley's "holding." Its holding is that a **for profit** mining corporation owned by a Christian couple with religious goals and religious practices for their company is not a Title VII religious organization. While acknowledging that a church may be the paradigm, Townley itself noted that "[t]he Supreme Court has not discussed the scope of the term "religious organization," but "**it clearly includes organizations less pervasively religious than churches**." Townley, 859

F.2d at 520 n. 15 (emphasis added). Appellants' statement also does not describe the Ninth Circuit's methodology. In both Townley and Kamehameha, the approach involved weighing all the religious characteristics of the entities against their secular characteristics. Kamehameha, 990 F.2d at 460; Townley, 859 F.2d at 681. The Townley test inquires whether the entity is "primarily religious." 859 F.2d at 619.

Making a church the paradigm Title VII religious does not foreclose religious organization status for World Vision and similar ministries. A paradigm is an ideal exemplar. It is the epitome of a type, but is not the sole example of a type. As explained elsewhere in this brief, neither the text, legislative history, nor constitutional values permit limiting the religious exemption to "churches and like organizations," and the Ninth Circuit has not so held.

The Third Circuit's reading of Townley's discussion of the thin 1963 legislative history is helpful. *See* LeBoon, 503 F.3d at 231. When Rep. Purcell offered his amendment, the § 702 exemption was already part of the bill. The § 703(e)(2) exemption was not. The § 702 exception is limited to ***religious*** entities. Rep. Purcell's proposed § 703(e)(2) exemption would benefit ***secular*** educational entities that had a substantial affiliation with a religious entity. When Townley stated that the "consensus [in the debate over the Purcell amendment"] was that they were not protected if they were merely affiliated with a religious corporation," the

antecedent to "they" is the *secular* entities not helped by § 702. This statement that there was a consensus that *secular* entities were not helped by the *religious* entity exemption is simply a truism. This truism provides no insight into what is required for § 702 *religious* entity status, and it does not support Townley's suggestion that § 702 *religious* entities are not protected if they have only an "affiliation" with a religious corporation. A § 702 *religious* entity must itself be a religious entity, but not necessarily a church. Neither the § 702 text, its legislative history, nor the relevant First Amendment principles, require, commend, or permit limiting the exemption to "churches and like organizations." *See* LeBoon, 503 F.2d at 230-31.

At least one of the senators considering § 702 understood that "church" and "religious organization" had different meanings. In a 1970 debate regarding § 702, Sen. Sam Ervin (D-N.C.) said, "I think people who establish a *religious institution* and people who establish a *church* should be allowed to select a janitor or a secretary who is a member of the church in preference to some infidel or nonmember." 116 Cong. Rec. 34,565 (1970). When he debated the 1972 amendment that was adopted into law, he intended, just as he had in 1970, that § 702 would provide a freedom of broad scope for all types of religious entities to hire workers of like-minded faith. Sen Ervin said:

> . . . the amendment would exempt religious corporations, associations, and societies from the application of this act insofar as the right to

> employ people of any religion they see fit is concerned. That is the only effect of this amendment. In other words, this amendment is to take the political hands of Caesar off the institutions of God, where they have no place to be.

118 Cong. Rec. 4503 (1972). *See* Little, 929 F.2d at 950.

3. The Legislative History Related to the 1972 Amendments Shows that Congress Did Not Want Courts to Adjudicate Which Religious Organization Activities Were Religious and Which Were Secular. The 1972 legislative history shows that Congress did not want the courts in the business of determining which religious organization activities were religious and which were secular. At that time, Congress "expand[ed] the existing exemption for religious organizations" by removing the term "religious" before "activities." Feldstein v. Christian Science Monitor, 555 F.Supp. 974, 976 (D. Mass. 1983). Senator Ervin was concerned that "unless the amendment passed, an unconstitutional encroachment on the operations of religious organizations by the government would result." Id.

> It is impossible to separate the religious and non-religious activities of a religious corporation or religious association or religious educational institution or religious society from its other activities . . . Congress does not keep the states--that is, the Government's--hands out of religion by enacting a bill which says that the Government can regulate and control the employment practices of all the religious groups in this country . . . in respect to all of their employees who are not strictly engaged in carrying out the religious affairs of those institutions.

Id. (*quoting* Legislative History of the Equal Employment Opportunity Act of 1972, 1212, 1223 (1972).

The Supreme Court concurs that "Congress' purpose [in adopting the 1972 amendments] was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" Amos, 483 U.S. at 336.

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. The High Court's statement is important because it notes that judicial determination of the presumed religious-secular divide is fraught with entanglement, including the risk that a judge might not understand the religious organization's own definition of its doctrine and mission and that an organization might re-draw its polity to induce a judge to treat it as religious.

D. **The Court Should Construe § 702 Consistent with Constitutional Norms Related to the Freedom of the Church, the Right of Expressive Association, the Prohibition on Discriminating Among Religious Organizations, and the Avoidance of Entanglement.** Chief Justice John Marshall admonished long ago: "an Act of Congress ought not be construed to violate the Constitution if

any other possible construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (citing Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804)).

1. The First Amendment Freedom of the Church. Professor Esbeck concludes his review of church-state relations in Western history with:

> [S]ince the fourth century, the [relationship between nation-state and organized religion] presumes a dual-authority pattern, one of coexisting governmental and religious institutions, the former with authority over the civil and the latter having its province over the spiritual. For seventeen centuries now these two centers of authority have at times competed and at times cooperated. While the exact boundaries between the two remain conflicted, it is understood that . . . there are subject matters over which the state has sovereign power and subject matters over which the church has exclusive authority. The First Amendment, with its doctrine of church autonomy, is a recognition of the latter . . .

Esbeck, *supra*, at 1589.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871) is the fountainhead of the First Amendment Doctrine of Church Autonomy (also called, the Freedom of the Church). It held that, when there is a schism within a hierarchical church and a resulting dispute over the identity of ecclesiastical leaders and the ownership of church property, civil courts must resolve such disputes by deferring to the hierarchical authorities. While decided as federal common law, the Supreme Court later recognized Watson's moorings in First Amendment doctrine:

> The opinion radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

This First Amendment doctrine has been applied in many circumstances, including the varied contexts by which a religious organization selects or removes individuals who advance its mission. It absolutely protects the religious organization's choice (or removal) of ecclesiastical officials, Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); ordained ministers, Werft v. Desert Southwest Annual Conf. of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); non-ordained employees, Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002); and even members, O'Connor v. Diocese of Honolulu, 885 P.2d 361, 370 (Hawaii 1994). Townley acknowledged this law, stating: "[o]f course, even without section 702, the First Amendment would limit Title VII's ability to regulate the employment relationships within church and similar organizations. Townley, 859 F.2d at 618 n.13 (citing Kedroff). The Freedom of the Church, of course, is not limited to houses of worship and

"formally religious entities." *See., e.g.*, Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006) (religious university).

The Supreme Court acknowledges that the Doctrine of Church Autonomy animated the § 702 exemption. "[R]eligious organizations have an interest in autonomy in ordering their internal affairs [and] select[ing] their own leaders, . . . and run[ning] their own institutions." Amos, 483 U.S. at 341-42 (Brennan, J., concurring). History teaches that those societies that are serious about the freedom of religious organizations know that a critical component of such freedom is the right to staff with persons of the same faith. *See* Kedroff, 344 U.S. at 101-03 (discussion regarding the U.S.S.R.'s interference with the Russian Orthodox Church's selection of its leaders). In his study of the process by which historically religious colleges lost their religious character, James Burtchaell argues that secularization occurred, in part, because those colleges did not insist upon religious faith and practices from its employees:

> Because stridency is usually no help to a career, the growing indifference of the professors to the religious identity of the colleges was usually expressed by silence and absence. At first they took the religious character of the college for granted, or even as a saving grace; but it became an aspect, like the food service, which did not require their management. In that mode they might attend chapel, but no longer be called upon to lead the prayers. Later the religious aspect would take on the weight of a burden; and they would find reasons not to go to chapel. Later still, they needed no reasons. And if in early years they would be chided for it, the chiding rarefied, then ceased.

> Then it became a matter of indifference in the evaluation of prospective colleagues, though for some years the subject of religion might continue to be raised in the interview with the president or, later, the dean. . . . As the process worked its way closer toward its term, those conversations brought forth affirmations in tones that shifted from assurance to nonchalance, to impatience, and then to affront. By that time the requisite faculty solidarity with the character of the college would have been significantly reduced as to both noun and verb. The identity would then slide from Methodist to evangelical, to Christian, to religious, to wholesome, to "the goals of the college" which by then were stated in intangible terms.

James T. Burtchaell, The Dying of the Light, 829-30 (1998). When a church or ministry like World Vision insists that those who advance its mission must be of like mind and heart, in order to avoid such secularizing tendencies, § 702 protects its freedom do so. Amos, 483 at 339 ("§ 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

2. The First Amendment Right of Expressive Association. Rooted in the Free Speech Clause, the Right of Expressive Association has parallels to the Church Autonomy Doctrine. The Supreme Court explained this right in Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984):

> [I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. [It] is especially important in

> preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.

Expressive association is a freedom held by values inculcating organizations that engage in expression, even though their primary purpose may not be "disseminating a certain message." Boy Scouts of America v. Dale, 530 U.S. 640, 649, 655 (2000). Almost every religious institution is involved in inculcating values. Courts recognize that values can be taught either "expressly [or] by example." Id. at 650. When applying this right, "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." Id. at 651.

If expressive association permits the Boy Scouts to terminate a volunteer Scout leader, Dale, *supra*, and a parade organizer to exclude a group on the basis that the organizer disagrees with the excluded group's message, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), then the same right permits a religious organization like World Vision to remove employees of differing faith.

3. The First and Fourteenth Amendment Prohibition on Discriminating Among Religious Organizations. Appellants urge this Court to favor church over non-church religious entities and denominationally-affiliated over non-denominational religions. Neither the Establishment, Free Exercise, or Equal

Protection Clauses permit government discrimination between two classes of religious organization. Colorado Christian University v. Weaver, 534 F.3d 1245, 1257-58 (10th Cir. 2008) (striking down scholarship scheme that favored students attending non-pervasively sectarian colleges over those that attended pervasively sectarian colleges). "The clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982) (striking down statute that preferred denominations raising money internally over new religious movements raising money from outsiders). The constitutional prohibition of discriminating among different types of religious organizations forbids denying the § 702 exemption to religious organizations with no denominational affiliation.

4. The Establishment Clause's Mandate that Courts Avoid Entanglement with Religious Questions. When it amended Title VII in 1972, Congress recognized that it was a constitutionally dubious undertaking for government to distinguish between an employer's religious and sectarian activities. Courts have repeatedly recognized that the Establishment Clause forbids entangling religious inquiries, Colorado Christian University, 534 F.3d at 1261, and that they "should refrain from trolling through a person's or institution's religious beliefs." Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion). "It is not only the

conclusions that may be reached by the [government] which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." Chicago Bishop, 440 U.S. at 502. This concern about entanglement is why the Amos court noted that § 702 "effectuates a more complete separation of [church and state] and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case." Amos, 483 U.S. at 339.

Based upon entanglement concerns, the Tenth Circuit recently struck down a statutory list of factors that applied to determine whether a university was pervasively sectarian. Colorado Christian University, 534 F.3d at 1261-67. In its analysis, the circuit found that a state educational agency could not analyze the following factors without becoming impermissibly entangled with religion: (1) whether required theology courses tended to indoctrinate or proselytize, id. at 1261; (2) whether a governing board limited its members to persons of a particular religion, id. at 1263; and (3) whether students, faculty, trustees, or funding sources are "'exclusively,' 'primarily,' or 'predominantly,' of 'one religious persuasion' or of a 'particular religion.'" Id. at 1264.

Several of the factors identified by the Third Circuit created similar entanglement because, if strictly applied, they require a court to assess whether the

employer's product is religious or secular (factor 2); whether the employer is "formally religious," (factor 4); whether a "formally religious" entity participates in management (factor 5); whether the entity holds itself out as secular or sectarian (factor 6); and whether "its membership is made up of coreligionists" (factor 9). LeBoon, 503 F.3d at 226. *See also* University of Great Falls v. NLRB, 278 F.3d 1335, 1342-43 (D.C. Cir. 2002) (rejecting a "centrality of religious beliefs" test). With the dual problems of entanglement and of creating a regulatory scheme that discriminates between differing types of religion, this Court should assess whether an employer is eligible for the § 702 exemption by following the methodology set forth in the next part.

IV.
A METHODOLOGY FOR DETERMINING WHETHER AN EMPLOYER QUALIFIES FOR THE SECTION 702 EXEMPTION

Based upon the distinctive characteristics of religious organizations, the text of the § 702 exemption, its legislative history, and the canon of avoiding constitutional question, amici respectfully suggest a methodology for determining when an employer qualifies for the § 702 exemption. A court assessing whether an employer qualifies for the exemption should inquire: **Is the employer a nonprofit entity? Does it hold itself out as religious? Is it either affiliated with a recognized religious organization or served or supported by persons or entities**

determined, at least in part, with reference to their religion or religious beliefs? *See* University of Great Falls, 278 3d. at 1341-43 (explaining constitutional problems with "substantial religious character" test and offering a similar methodology for determining exemption from the National Labor Relations Act). A court should undertake this inquiry consistent with the Ninth Circuit's recognition that "each case must turn on its own facts." *See* Townley, 859 F.2d at 681.

A. **Is the Employer a Nonprofit Entity?** Townley establishes the importance of nonprofit status. *See also* University of Great Falls, 278 F.3d at 1344 (noting Amos' emphasis in concurring opinions that the employer "be organized as a non-profit entity"). The non-profit requirement is also consistent with the statutory list of entities that includes unincorporated *non-profit* associations and *omits for-profit* sole proprietorships and partnerships. It is also consistent with the classic inclusion of religion among those activities that constitute a charitable purpose under charitable trust law. Restatement (Third) of Trusts § 28 (2003) (reflecting the requirements from the Statute of Charitable Uses, 43 Eliz. I, c. 4 (1601)).

An employer satisfies the entity requirement if it is either a corporation, an association, an educational institution, or a society." *See* 42 U.S.C. § 2000e-1.

B. **Does the Employer Hold Itself Out as Religious?** A court should deferentially assess whether the employer holds itself out as a religious organization. Because Congress has defined "religion" broadly, 42 U.S.C. § 2000e(j) (religion includes "all aspects of religious observance and practice"); because courts have no competence to evaluate issues of faith; because the freedom of religious organizations includes the freedom to self-define; and because the court must avoid entangling inquiries and discrimination, a court must deferentially assess whether the employer holds itself out as being religious. University of Great Falls, 278 F.3d at 1343. The court may inquire how an employer describes itself to its members, its employees, its board, and those it serves. A finding of activities consistent with the employer's stated religious purpose should be sufficient for a court to disregard accusations of employer insincerity.

C. **Is the Employer Either Affiliated with a Recognized Religious Organization or Served or Supported by Persons or Entities Determined, at Least in Part, with Reference to Their Religion or Religious Beliefs?** Church or denominational affiliation is a sufficient, but not necessary, condition to qualify for the § 702 exemption. Id. at 1343. *See* Townley, 859 F.2d at 618. Accordingly, a church, synagogue, mosque, or denomination may be "paradigm" § 702 religious organizations, but they are not the only candidates for § 702 exemption. Given the

breadth of the statutory text ("religious corporation, association, educational institution, or society"); the diversity of American religion, including its often non-denominational nature; and the canon of avoiding constitutional questions; there should be no requirement that the employer be subject to or supported by a church, denomination, or "formally religious" entity. The United States Court of Appeals for the District of Columbia adopted a second means for satisfying the "affiliation" requirement. The employer can be "an entity, membership of which is determined, at least in part, with reference to religion." University of Great Falls, 278 F.3d at 1343. Accordingly, an organization like World Vision could satisfy this requirement if it requires some or all of its members, employees, or directors to satisfy some type of religious test like subscribing to a statement of faith or belonging to a particular church, denomination, or class of churches or religions.

D. **A Court Should Determine Eligibility for the § 702 Exemption Consistent with the Practice of Avoiding Constitutional Questions While Avoiding an Analysis that Separates an Employer's Activities Into Secular and Religious Categories.** When a court assesses eligibility for the § 702 exemption, it must be aware of the limits of judicial competence, the risks of entanglement, of discriminating among different types of religious organizations, of infringing the

rights of expressive association, and of limiting the institutional freedom of religious organizations.

Furthermore, as Congress made clear in its 1972 amendments, courts should not try to distinguish between an employer's religious and secular activities. A court should avoid making such a distinction because of congressional intent and because of the limits of judicial competence, the risk of judicial entanglement, and the risk of favoring some religious entities over others.

V.
WORLD VISION IS A SECTION 702 RELIGIOUS ORGANIZATION EMPLOYER

The affidavit of Julie Regnier provides abundant evidence that World Vision is a nonprofit entity, holds itself out as religious, and is either affiliated with a recognized religious organization or is served or supported by persons or entities determined, at least in part, with reference to their religion or religious beliefs. Therefore, the Court of Appeals should affirm the District Court below and adopt the methodology described herein.

Respectfully submitted

_____

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that pursuant to FRAP 32 (a)(7)(C) and Ninth Circuit Rule 32-1 the foregoing Amicus Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,996 words.

_____

L. Martin Nussbaum

CERTIFICATE OF FILING AND SERVICE

The undersigned declares that on November 24, 2008, the original and 15 copies of this amicus brief, to which this certification is affixed, were sent via Federal Express to the Ninth Circuit at the following address:

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