IN THE SUPREME COURT OF THE STATE OF OREGON

HOTCHALK, INC., both individually and derivatively on behalf of Concordia University, aka Concordia University-Portland,
Plaintiff-Relator,

v.

LUTHERAN CHURCH–MISSOURI SYNOD; LUTHERAN CHURCH EXTENSION FUND–MISSOURI SYNOD; CONCORDIA UNIVERSITY SYSTEM; CONCORDIA UNIVERSITY, ST. PAUL; CONCORDIA UNIVERSITY; CHARLES E. GERKEN; KATHLEEN HONE; TERRY WILSON; JERRY BALTZELL; DAVID O. BERGER; MICHAEL BORG; CHARLES E. BRONDOS; GERALD KOLL; PAUL LINNEMAN; JEFF OLTMANN; KURT ONKEN; TIMOTHY PAULS; BEV PELOQUIN; ROD WEGENER; SAM WISEMAN; BRIAN T. YAMABE; THOMAS JOHN ZELT; THOMAS RIES; RICHARD DOUGHERTY; CONCORDIA FOUNDATION; CHRIS DUNNAVILLE; GEORGE THURSTON; LUTHERAN CHURCH EXTENSION FUND; JOHN ANDREA,
Defendants-Adverse Parties.

S069765

Brief of *Amici Curiae* Oregon Trial Lawyers Association, CHILD USA, Zero Abuse Project, Oregon Abuse Advocates & Survivors in Service, National Crime Victim Law Institute, and The National Center for Victims of Crime

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On Mandamus Review from the Judgment of the
Multnomah County Circuit Court,
Hon. Eric L. Dahlin, Circuit Court Judge

February 2023

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INTRODUCTION

Defendants ask this court to interpret the First Amendment to mandate a shield from producing any documents that touch on church governance or polity during discovery in civil litigation. Plaintiff rightly responds that the First Amendment does not require, or even support, a right for religious organizations to demand secrecy over the very documents that can be used to prove their wrongdoing against third parties. And it should be clear: Defendants' request for the kind of broad First Amendment discovery privilege they now seek is not merely a request for privilege; it is a veiled request for immunity.

Amici curiae share a mission to protect the rights of plaintiffs, including children and vulnerable adults who have been victims of clergy sexual abuse and assault. In their fight to hold religious organizations accountable for the harm they have caused to third parties, *amici* have repeatedly fought for transparency and defeated the same kinds of arguments that defendants now raise. They urge this court to reach the same ruling in this breach of contract and fraudulent transfer case that courts across the country have reached in child sex abuse cases: Religious organizations do not enjoy a blanket First Amendment privilege from discovery in civil lawsuits.

ARGUMENT

A. Child sex abuse cases show that courts and litigants can review religious organizations' internal communications about governance and faith without infringing on First Amendment rights.

Even though this case does not involve a claim of child sex abuse, litigation in that arena is instructive and should inform the court's analysis here. Sexual abuse of children within religious organizations is tragically widespread. Litigation against religious organizations that allow, enable, or conceal child sexual abuse has become more common in recent decades.

As a first line of defense in those cases, religious organizations routinely argue that their religious status should block discovery and civil or criminal liability in child sex abuse cases. This despite the fact that many religious organizations have adopted internal policies that induce clergy and members to keep child sex abuse secret. *See* Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment's Religion Clauses*, 69 Md L Rev 115, 119–26 (2009); Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why It Is Not Protected Under Religious Liberty Constitutional Provisions*, 18 Wm & Mary Bill Rts J 953, 964–65 (2010). When fighting discovery, in particular, religious organizations often characterize their documents as "purely ecclesiastical" internal church communications about

governance, religious doctrine, and the selection and retention of their ministers. Indeed, that is the very argument defendants make here. *See* Opp. Br. at 4 (arguing that defendants do not have to produce documents because they are "internal communications among and between church leaders dealing with matters of religious doctrine, governance and the church's selection of ministers").

Contrary to defendants' argument, in child sex abuse and sexual misconduct cases across the country, courts have consistently held that the First Amendment does not impede haling religious organizations to court, requiring them to produce discovery, and ultimately holding them liable for their wrongdoing. *Strock v. Pressnell*, 527 NE2d 1235 (Ohio 1988) (sexual activities of a minister were not protected by the Free Exercise Clause of the First Amendment); *Moses v. Diocese of Colo.*, 863 P2d 310 (Colo 1993) *cert den*, 511 US 1137 (1994) (First Amendment was not a defense to claims about priest's sexual misconduct because the facts of the case did not require interpreting or weighing church doctrine); *Smith v. O'Connell*, 986 F Supp 73 (DRI 1997) (child sex abuse case did not turn on interpretations of religious doctrine, the defendants' exposure to tort liability did not violate their right to the free exercise of their religion, and there was no excessive entanglement between church and state as a result of exposure to tort liability); *F.G. v. MacDonell*, 150 NJ 550 (1997) (free exercise of religion did not permit members of the clergy to engage in

inappropriate sexual conduct with parishioners seeking pastoral counseling); *Sanders v. Casa View Baptist Church*, 134 F3d 331 (5th Cir 1998) (First Amendment did not categorically insulate religious relationships from judicial scrutiny and the plaintiffs' claims of sexual misconduct did not stem from religious doctrine); *Heroux v. Carpentier*, 1998 WL 388298 (RI Super Ct 1998) (court could exercise jurisdiction over child sex abuse claims to extent the plaintiffs' claims asserted failure of clergy to prevent harm at the hands of the perpetrator priests); *C.J.C. v. Corp. of Cath. Bishop of Yakima*, 138 Wash 2d 699 (1999), *as amended* (Sept. 8, 1999) (First Amendment did not provide churches with immunity from tortious conduct in adult sex abuse case); *Smith v. Raleigh Dist. of N. Carolina Conf. of United Methodist Church*, 63 F Supp 2d 694 (EDNC 1999) (First Amendment did not divest the federal district court of jurisdiction over claims against church for negligently failing to prevent sexual abuse of minors by priests; claims did not involve an internal dispute within church and did not require interpretations of religious doctrine or ecclesiastical law); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F3d 940 (9th Cir 1999) (novice priest's Title VII claim for sexual harassment during training did not violate the Free Exercise and Establishment Clauses); *Richelle L. v. Roman Cath. Archbishop*, 106 Cal App 4th 257 (2003), *as modified* (Mar. 17, 2003) (religious organization not immune from tort liability under the Free Exercise Clauses for sexually

inappropriate conduct by priest and pastor that breached fiduciary duty arising out of a confidential relationship with parishioner); *Dolquist v. Heartland Presbytery*, 342 F Supp 2d 996 (D Kan 2004) (First Amendment did not preclude plaintiff from stating claim for sexual harassment); *Fortin v. The Roman Cath. Bishop of Portland*, 2005 ME 57 (2005) (imposition of fiduciary duty on Roman Catholic diocese to protect child from sexual abuse by priest did not violate Free Exercise Clause).

Even after plaintiffs typically defeat religious organizations' motions to dismiss on spurious First Amendment grounds, they still face substantial challenges to proceeding on civil claims for child sexual abuse. That is, on top of overcoming shame, stigma and the effects of trauma, victims of child sexual abuse (like all plaintiffs) bear the burden of proving their claims. The evidence necessary to prove common core elements of their claims (such as notice of danger and the organization's response upon receiving that notice) is often secreted away in internal and "confidential" (but not privileged) church documents that touch on matters of religious belief.

Courts across the country have long recognized that internal church documents—like those that defendants seek to shield from discovery here—are not only relevant, they go to the heart of proving clergy misconduct in sex abuse claims and are not protected from production simply because of their religious context. *Hutchison v. Luddy*, 414 Pa Super

138 (1992) (discovery contained in the priest's file did not impermissibly intrude upon the practice of religion and the requested documents were relevant to church officials' conduct); *Corsie v. Campanalonga,* 317 NJ Super 177 (App Div 1998), *appeal granted in part, decision rev'd in part*, 160 NJ 473 (1999) (First Amendment did not protect against application of judicial discovery rules to uncover relevant material in personnel files related to alleged sexual misconduct); *Soc'y of Jesus of New England v. Commonwealth*, 441 Mass 662 (2004) (subpoena duces tecum, which sought documents from a religious order about a priest of that order, was permitted because matter did not involve resolving a dispute within the church itself); *People v. Campobello*, 348 Ill App 3d 619 (2004) (Free Exercise and Establishment Clauses permitted enforcement of a subpoena seeking documents from a church about internal investigation of accusations against priest for sexual assault); *Roman Cath. Archbishop of Los Angeles v. Sup. Ct.*, 131 Cal App 4th 417 (2005), *as modified on denial of reh'g* (Aug. 16, 2005) (grand jury's subpoenas duces tecum seeking documents relating to child sexual abuse committed by priests did not violate the Free Exercise and Establishment Clauses); *Roman Cath. Diocese of Jackson v. Morrison*, 905 So 2d 1213 (Miss 2005) (no privilege under First Amendment allowing church to evade production of religious-oriented documents); *Thopsey v. Bridgeport Roman Cath. Diocesan Corp.*, No. NNHCV106009360S, 2012 WL 695624 (Conn

Super Ct Feb 15, 2012) (defendant not protected from disclosure of documents under the Free Exercise Clause because plaintiff's claims of child sex abuse were not rooted in religious belief).

Were child sex abuse victims foreclosed from discovering internal church documents that touch on matters of governance or polity, they would be stifled in pursuing civil accountability against the religious organizations that enabled the abuse. They would be hard pressed to prove that the religious organization had received reports of similar incidents of abuse or otherwise knew about the perpetrator's sexual misconduct; they would have no insight into the organization's policies and practices for responding to the reported abuse; and they would lack insight into the relationships between (and potential liability of) various related entities within a religious organization or denomination. A religious organization's handbooks, policies, personnel files, training manuals, internal investigations, organizational documents, governance documents, leadership charts, and more—none of them privileged under evidentiary standards—are often relevant and necessary for a victim to carry their burden to prove liability in a child sex abuse case.

If religious organizations are allowed to avoid producing this type of discovery, the result would not merely be to make litigating child sex abuse cases harder; it would effectively immunize religious organizations from liability.

The First Amendment does not compel that result in child sex abuse cases. Nor should it here.

B. The First Amendment does not shield religious organizations from civil discovery rules.

This court should reject the notion that the First Amendment blindfolds opposing parties when they litigate claims against religious organizations that have directly harmed them. Neither *Perry v. Schwarzenegger*, 591 F3d 1147 (9th Cir 2010), nor the doctrine of "religious autonomy" compel that result.

Amici agree with plaintiff that the trial court erred in extending the Ninth Circuit's decision in *Perry* to this case. Put simply, the First Amendment privilege described in *Perry* acknowledges that, in limited circumstances, the very act of disclosing membership lists, membership contact information, or campaign strategy to the government or a political opponent in litigation may chill the freedom of association. *See, e.g.*, *id.* (disclosure of campaign strategy to political opponent); *NAACP v. Alabama*, 357 US 449 (1958) (disclosure of membership list to government); *Sexual Minorities of Uganda v. Lively*, No. 3:12-30051-MAP (D Mass Aug 10, 2015) (disclosure of member and donor lists, email addresses, and personal phone numbers to political opponent). The federal courts have taken the *Perry* test no further, and this court should not accept defendants' invitation to do so now.

But even if this court were to apply *Perry*, defendants have failed to meet their burden to show that producing documents in discovery would interfere with their religious freedom. *See Perry*, 591 F3d at 1160 (party asserting the privilege bears burden to show infringement of First Amendment right). Contrary to defendants' assertion, the First Amendment does not stand for "religious autonomy" from civil discovery rules. *Cf.* Opp. Br. at 12. In fact, "religious autonomy" is a common misnomer for the "ministerial exception." *See Soc'y of Jesus of New England*, 441 Mass at 667–68 ("church autonomy" is misnomer for "ministerial exception); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F3d 648, 654 (10th Cir 2002) (applying ministerial exception but calling it "church autonomy").

The "ministerial exception," in turn, is a narrow immunity that applies only when aggrieved ministers challenge their employers' decisions to fire them. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 US 171, 182–89 (2012) (discussing Supreme Court cases applying exception). The Supreme Court has explained the rationale behind the immunity:

> "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. * * * By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to

> shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."

Id. at 188–89. In other words, allowing ministers to sue their former employers offends the Religion Clauses because it forces religious organizations to choose between keeping unwanted ministers or paying money damages.

This case is a far cry from presenting the constitutional problem that the ministerial exception was designed to avoid. Plaintiff here is not a minister alleging wrongful termination; it is a third-party business alleging fraud, breach of fiduciary duties, breach of the duty good faith and fair dealing, and breach of contract. Merely requiring defendants to produce relevant documents so that plaintiff can investigate its claims does not come close to depriving defendants of their autonomy to choose who will serve as ministers in their organizations. This court should not accept defendants' invitation to extend the exception that far.

C. Oregon's discovery rule is a neutral, generally applicable rule that does not offend the Free Exercise Clause.

Oregon's discovery rule, ORCP 36, does not offend the free exercise of religion: It is neutral toward religion and generally applicable to all parties in civil lawsuits. *See Emp't*

Div., Dep't of Hum. Res. of Or. v. Smith, 494 US 872, 878 (1990). Defendants' novel argument that ORCP 36 invites discrimination on the basis of religion, is not generally applicable, and thus must pass strict scrutiny under the Free Exercise Clause (Opp. Br. at 16–18) can be handily rejected.

Under the Free Exercise Clause, the Supreme Court has instructed that if burdening the exercise of religion is not the "object" of a law but is instead "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Smith*, 494 US at 878. Otherwise, granting religious exemptions to neutral and generally applicable laws "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879 (citing *Reynolds v. United States*, 98 US 145, 166–67 (1879)).

Under that rule, the Supreme Court has held religious entities and believers accountable under many neutral, generally applicable laws, including those governing drugs and unemployment compensation, *Smith*, 494 US 872; employer Social Security deductions, *United States v. Lee*, 455 US 252 (1982); sales taxes, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 US 378 (1990); polygamy, *Reynolds*, 98 US 145; prison regulation, *O'Lone v. Estate of Shabazz*, 482 US 342 (1987); military conscription, *Gillette v. United States*, 401 US 437 (1971); Sunday closing laws,

Braunfield v. Brown, 366 US 599 (1961); Social Security identification requirements, *Bowen v. Roy*, 476 US 693 (1986); and the federal oversight of federal lands, *Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 US 439 (1988). "Neutral principles of law" also can be applied to religious entities without violating the Establishment Clause. *Jones v. Wolf*, 443 US 595, 602 (1979).

By contrast, a law must survive strict scrutiny if it is not neutral or generally applicable. *Smith*, 494 US at 884; *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi*"), 508 US 520, 542–46 (1993) (holding regulation of "sacrifice" is not generally applicable). When strict scrutiny applies, the government must prove that the law serves a compelling interest and is narrowly tailored. *Lukumi*, 508 US at 546.

A law may not be "generally applicable"—and thus will be subject to strict scrutiny—if it "has in place a system of individual exemptions," lending itself to *ad hoc* governmental decisions. *Smith*, 494 US at 884. For instance, in *Sherbert v. Verner*, 374 US 398 (1963), the Court addressed an unemployment compensation scheme that approved applicants according to whether their reason for missing work was for "good cause." The government had unfettered discretion to decide what a "good cause" was and exercised that discretion to conclude that a worker who missed work for her Sabbath did not meet that standard,

while others missing work for secular reasons did. *Id.* at 405–06. The law did not satisfy strict scrutiny. *Id.* at 406–08.

Defendants argue that the phrase "good cause" automatically means that a law is unconstitutional. Opp. Br. at 16–18. That is simply inaccurate. ORCP 36 C uses the term to limit the scope of discovery neutrally and generally applicably, to prevent "annoyance, embarrassment, oppression, or undue burden or expense." No reason raised by a religious defendant is given lesser treatment than any other defendant.[1]

But defendants' argument is wrong for an even more fundamental reason. A plain text reading of the civil discovery rule shows that ORCP 36 C is not the section that governs this court's analysis—that defendants do not call on this court to decide whether "religious hardship" counts as "good cause" to limit the scope of discovery. ORCP 36 C provides:

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[1] Suppose, for instance, that plaintiff's discovery request in this case had requested all documents in defendants' possession, custody, or control that discussed any matters related to the LGBTQ community, regardless of whether those documents had any nexus to the breach of contract or property transfers at issue. A court would, of course, exercise its discretion to limit that request because those documents bear no relevance to the dispute and the request would be designed to embarrass the defendants for their beliefs. But that is not what happened here: The document requests are tailored specifically to this dispute and seek only relevant information.

> "On motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"

Defendants do not argue (and did not argue to the trial court) that they should be granted a religious exemption from the civil discovery rule because producing the requested documents would annoy them, embarrass them, oppress them, or impose an undue burden or expense on them. ORCP 36 C does not apply.

Defendants' argument instead asks the court to formulate a new *privilege* for religious defendants, that immunizes them from the neutral and generally applicable civil discovery rule.[2] Arguments about privilege fall under a

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[2] Defendant appears to distance itself from the word "privilege" in its Opposition to Petition for Alternative Writ of Mandamus, likely because it now prefers to paint the trial court's decision as discretionary and inappropriate for mandamus review. Opp. Br. at 7–12. But make no mistake: Defendant was adamant below that the information it seeks to withhold is *privileged* from discovery:

- "Relying on these constitutional guarantees, LCMS moves for a protective order prohibiting Plaintiff from using discovery to infringe on LCMS's rights, *privileges*, and protections under the First Amendment[.]" LCMS Motion for Protective Order, at 2 (Aug. 27, 2021) (emphasis added).

different section of the discovery rule entirely: ORCP 36 B. That section provides: "For all forms of discovery, parties may inquire regarding any matter, *not privileged*, that is relevant" to the parties' claims or defenses. (Emphasis added.) ORCP 36 B does not include a "good cause" exception, and for good reason: questions about privilege are not discretionary; a privilege either exists or it does not. *State v. Langley*, 314 Or 247, 263 (1993).

ORCP 36 as a whole is generally applicable, and its requirement that parties to civil litigation produce relevant, nonprivileged documents as part of civil discovery is no more of a burden on religion than laws that require religious organizations and believers to file tax returns, to obey child labor laws, or to get Social Security Numbers or Tax ID numbers.

CONCLUSION

This court should grant the writ of mandamus and order the trial court to vacate the protective order shielding defendants' documents from discovery.

- "[T]his information is *privileged*, protected, and immune from discovery[.]" *Id.* at 7 (emphasis added).
- "This motion for a protective order asserts LCMS's First Amendment *privilege* against discovery[.]" *Id.* (Emphasis added).

The trial court's order reflects its understanding that defendant was asking it to rule on a privilege, not to make a discretionary decision about undue burden or oppression. ER 3.

DATED this 27th day of February, 2023.

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