Appeal No. 14-1549
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALYCE T. CONLON,

Plaintiff-Appellant,

v.

INTERVARSITY CHRISTIAN FELLOWSHIP/USA; FRED BAILEY; AND MARC PAPAI,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Civil Case No. 1:13-CV-1111 (Hon. Gordon J. Quist)

BRIEF OF CHRISTIAN LEGAL SOCIETY, BETA UPSILON CHI, THE CARDINAL NEWMAN SOCIETY, FELLOWSHIP OF CHRISTIAN ATHLETES, AND RATIO CHRISTI AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1549 Case Name: Conlon v. Intervarsity Christian

Name of counsel: David J. Hacker, David A. Cortman and Kevin H. Theriot

Pursuant to 6th Cir. R. 26.1, CHRISTIAN LEGAL SOCIETY
Name of Party
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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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I certify that on August 4, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ David J. Hacker
Alliance Defending Freedom

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Name of counsel: David J. Hacker, David A. Cortman and Kevin H. Theriot

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Name of Party
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***Cases*:**

***Statutes*:**

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IDENTITY AND INTEREST OF *AMICI*[1]

Amici are a coalition of Christian ministries that work on college campuses nationwide and who, similar to Defendants-Appellees, employ ministers to carry out their Christian mission and doctrines.

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors with chapters in nearly every state and at approximately 90 law schools. Since 1975, CLS's legal advocacy arm, the Center for Law and Religious Freedom, has worked with the judicial, legislative and executive branches to protect religious liberty.

CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly. For that reason, the Center was instrumental in the passage of three landmark federal laws that protect religious liberty and freedom of speech for all Americans. The Equal Access Act, 20 U.S.C. §§ 4071, *et seq.*, protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 128 CONG. REC. 11,784-85 (1982) (Sen. Hatfield statement) (noting

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5). The attorney-authors of this Brief (as shown on the cover thereof) wish to acknowledge the assistance of Gregory C. Treat, a second-year law student at the University of the Pacific, McGeorge School of Law, in the preparation of this Brief.

CLS role). The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq.*, protects the religious liberty of all Americans. Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 1 n.a (1994) (describing the Center for Law and Religious Freedom as "one of the prime proponents of the Religious Freedom Restoration Act"). The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.*, protects religious liberty for congregations and institutionalized persons of all faiths. *See, e.g., Protecting Religious Freedom After* Boerne v. Flores *(Part III):* Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary 105th CONG. 26-37 (1998) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

The Center frequently files *amicus curiae* briefs in federal and state courts to protect religious liberty, including religious organizations' autonomy from the government. Its brief in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2001), 2011 WL 2470847 (No. 10-553, filed June 20, 2011), urged the Court to affirm that the Free Exercise and Establishment Clauses protect the ability of religious organizations to choose who will carry out their religious ministries, as the Court unanimously ruled. "The principle of church-state separation—from the time of Becket, to Blackstone, to Benjamin Franklin, to

today—has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck, Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception,* 106 Nw. U. L. Rev. Colloquy 175 (2011) (article derived from Center's brief).

Beta Upsilon Chi (BYX) is a life-long brotherhood of committed Christian men seeking the bonds of brotherhood and unity in Christ through the avenue of a social fraternity on a college campus. BYX is committed to the tenants of the Christian faith as presented in its doctrinal statement at every level of the fraternity. Pledges, members, National Staff, and its Board of Directors affirm BYX's doctrinal statement on a yearly basis.

The **Cardinal Newman Society** ("CNS") is a 501(c)(3) non-profit organization that promotes and defends faithful Catholic education. It fulfills this mission by supporting education that is faithful to the teaching and tradition of the Catholic Church, producing and disseminating research and publications on developments and best practices in Catholic education, and keeping Catholic leaders and families informed. CNS ministry staff must agree with CNS's religious mission and beliefs.

The **Fellowship of Christian Athletes** ("FCA") challenges coaches and athletes on the professional, college, high school, junior high and youth levels to use the powerful medium of athletics to impact the world for Jesus Christ. Current and prospective FCA ministry staff must agree with FCA's vision, statement of faith, and mission, all of which outline the organization's biblically-based purpose and beliefs.

Ratio Christi is a non-profit organization encouraging and strengthening the faith of Christian students at universities around the world through the use of intellectual investigation and apologetics while sharing Christ's message and love to those that have yet to receive it. Ratio Christi's employees and campus directors work with its student organizations to advance these goals and must agree with Ratio Christi's Statement of Faith.

Religious employers have constitutional and statutory rights to hire and fire employees who agree with and abide by religious doctrines. This protects the religious liberty of these institutions from governmental interference. Recognizing that the Court's decision in this case could have an impact on the ability of *Amici*, and religious employers generally, to protect their First Amendment rights to employ persons who agree with and abide by their religious doctrines, *Amici* submit this brief in support of the Appellees.

Counsel for all parties consented to the filing of this brief pursuant to Fed. R. App. P. 29(a).

SUMMARY OF THE ARGUMENT

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all." *Watson v. Jones*, 80 U.S. 679, 728 (1871).

Over 140 years ago, *Watson* first articulated that civil courts must refuse to hear cases interfering with the internal governance of a religious institution. Two years ago, a unanimous Supreme Court formally recognized the ministerial exception as a necessary consequence of those same structural features of our constitutional system. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012).

Today this Court is being asked to evaluate whether InterVarsity Christian Fellowship ("IVCF"), by posting boilerplate Equal Employment Opportunity Commission ("EEOC") language on its website, waived this fundamental constitutional right, and, thus, can be sued by one of its former ministers. While the District Court properly applied *Hosanna-Tabor* and this Circuit's controlling precedent in *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007), *Amici* urge this Court to take this opportunity to answer the question posed by

Judge McKeague's concurring opinion in *Hollins*: can the ministerial exception be waived? *See* 474 F.3d at 227 *abrogated on other grounds by Hosanna-Tabor*, 132 S. Ct. 694. The legal underpinnings of the exception, the experience of the federal courts, and the facts of this case demonstrate that the answer is undoubtedly, no. IVCF could not, as a matter of law, waive the exception and the District Court's ruling should be affirmed on those grounds.

ARGUMENT

I. THE MINISTERIAL EXCEPTION IS AN AFFIRMATIVE DEFENSE BASED ON THE STRUCTURE OF THE CONSTITUTION AND FOR THAT REASON CANNOT BE WAIVED.

IVCF did not, and could not, waive the ministerial exception because it is based on structural constitutional principles that the courts must enforce regardless of the wishes of the parties. While the standard of proof for waiver of constitutional rights is extremely high, it is settled law that personal constitutional rights can be waived either expressly or by failure to raise them at the appropriate procedural moment. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

The most familiar exception to this rule is subject-matter jurisdiction, which can be raised at any time because of the structural concerns if a federal court were to overstep its constitutional boundaries as identified in Article III § 2. *See Schor*, 478 U.S. at 851 (reasoning that issues of subject-matter jurisdiction cannot be

waived because the limitations on subject-matter jurisdiction of the federal courts serve institutional interests that the parties cannot be expected to protect).

But in addition to subject-matter jurisdiction, the Court has identified a category of "nonjurisdictional structural constitutional objections" which cannot be waived. *See Freytag v. C.I.R.*, 501 U.S. 868, 878-80 (1991) (holding structural principles embodied in the Appointments Clause could not be waived because they served the institutional interests of the government as a whole). This is because notions of consent and waiver cannot be dispositive when the limitations serve institutional interests that the parties cannot be expected to protect. *See Schor*, 478 U.S. at 851 (holding that Article III § 1 conferred a personal right on litigants to an impartial and independent adjudication which could be waived, and served an institutional interest in separation of powers which could not be waived). The unwaivable nature of such structural principles was recently reaffirmed in *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (holding that the structural constitutional interest in federal cases being heard before an impartial federal judiciary allowed affirmative defense to be raised despite effective waiver of personal right), and the existence of a category of nonjurisdictional unwaivable rights has been recognized by several Circuits, including this one. *See Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1604 (2013) (holding preserving independent federal judiciary was a structural constitutional interest and an

affirmative defense based on that interest could not be waived); *Kuretski v. C.I.R.*, No. 13-1090, 2014 WL 2782209 (D.C. Cir. June 20, 2014) (same); *Brown v. United States*, 748 F.3d 1045, 1070 (11th Cir. 2014) (same); *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 768 (7th Cir. 2013) (same); *In re BP RE, L.P.*, 735 F.3d 279, 286 (5th Cir. 2013) (same). While *Hosanna-Tabor* stated that the ministerial exception was an affirmative defense, it did so simply because waiver was never raised in that case and the Court could not adjudicate that precise issue.[2] 132 S. Ct. at 709 n.4. *Hosanna-Tabor* and the religious freedom cases upon which it is based make clear that the refusal of civil courts of the United States to decide religious matters is a fundamental structural principle of our constitutional system and courts have an institutional interest in maintaining that limitation which no party has the right to waive.

II. THE MINISTERIAL EXCEPTION IS A NECESSARY LIMITATION ON THE POWER OF CIVIL COURTS BASED ON STRUCTURAL CONSTITUTIONAL PRINCIPLES.

The District Court properly held that IVCF did not waive the ministerial exception and applied that doctrine to bar Plaintiff-Appellant Alyce Conlon's suit, because hearing the case would have entangled the court in religious matters. In

[2] Footnote 4 in *Hosanna-Tabor* addresses whether Rule 12 (b)(1) or 12 (b)(6) is the appropriate motion to raise the ministerial exception. The Court determined that Rule 12 (b)(6) was the appropriate motion to raise the exception, which gave the Court jurisdiction to decide the matter after looking at the facts. 132 S. Ct. 709 n.4. But the footnote says nothing about the ultimate structural nature of the ministerial exception.

Hosanna-Tabor, the Supreme Court held that the ministerial exception was constitutionally compelled by both the Free Exercise and Establishment Clauses of the First Amendment. 132 S. Ct. at 702. The Court concluded:

> The members of a religious group put their faith in the hands of their ministers. 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. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. 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 706. The court reached this conclusion after reviewing the principles of religious institutional autonomy, from the common law recognition that civil courts must refuse to make religious determinations to the modern affirmation of that position on foundational constitutional grounds.

A. As a Structural Feature of Our Constitutional System, Civil Courts Must Refuse to Determine Ministerial Matters, Including Matters of Religious Governance.

Instead of directly analyzing the Free Exercise or Establishment Clauses to support the ministerial exception, the Supreme Court relied on the principles of religious freedom, which demands that our system of government refuse to determine religious matters. *Id.* at 702. The development of this principle and its

necessary application to ministerial positions is shown in the line of church property cases preceding *Hosanna-Tabor*, 132 S. Ct. at 704-05.

The first of these cases is *Watson*, where the Court reasoned that religious groups had the right to form associations or institutions, to decide for themselves the doctrinal positions of those institutions, and to create a system of church government with methods of discipline to enforce and maintain those beliefs among their members. *Watson*, 80 U.S. at 729. The court recognized that these rights would be effectively subverted if "any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Id.* Additionally, the Court reasoned that civil courts were not competent to decide strictly religious matters, including matters of theological controversy, church discipline, or ecclesiastical government. *Id.* at 729-33.

This reasoning was affirmed in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, where lower courts opined on the appointment of an Archbishop on the theory that while matters of church administration and government were generally subject to ecclesiastical control, the exercise of that control was not free from government interference. 344 U.S. 94, 117 (1952). The Supreme Court firmly rejected this view, holding that matters of church government, including the selection of clergy, were strictly religious and the civil government fundamentally lacked the power to interfere in such matters. *Id.* at 118.

Finally, in *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709, 713 (1976), the Court examined whether civil courts could review the removal of an Archbishop for arbitrariness.[3] The Court declined to intervene because any arbitrariness analysis must "inherently entail inquiry" into the procedures and substantive religious criteria by which the religious institution is supposedly to decide the religious question. *Id.* at 713.

The rule derived from this precedent is that civil courts must refuse to hear cases that require the evaluation of religious questions to protect institutional interests rather than the personal rights of the parties. The reasoning never considers whether religious bodies have the right to be arbitrary or to exceed their jurisdiction. *Watson*, 80 U.S. at 733; *Milivojevich*, 426 U.S. at 713. The rule, which is thoroughly affirmed in *Hosanna-Tabor*, does not consider the relative rights of the parties. 132 S. Ct. at 705. Instead it relies on an institutional interest in protecting the structural features expressed by the First Amendment, which precludes any consideration of the parties' personal rights.

[3] In earlier cases the Court left open the question of whether fraud, collusion, or arbitrariness would allow a court to hear a case turning on the possession of a ministerial office. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).

B. The Ministerial Exception in *Hosanna-Tabor* was an Application of the Principles of Religious Institutional Autonomy to the Employment Context.

The Court in *Hosanna-Tabor* declined to lay out a "rigid formula" defining a formal legal category called "ministers," and instead identified four factors which, in effect, apply the principles of religious institutional autonomy to the employment context. 132 S. Ct. at 707. The four factors were: the formal title given to the "minister" by the Church, the substance of the requirements and procedural protections of the title, the "minister's" own use of that title, and important religious duties, such as duties reflecting a role in conveying the Church's message and carrying out its mission. *Id* at 708. These factors indicate that the employment relationship in question is effectively an act of ecclesiastical government. Therefore the inquiry considers whether the nature of the employment relationship implicates the larger doctrine of religious freedom.

First, the employee's formal title is constitutionally significant because it carries with it the right to speak or even make decisions on behalf of the institution related to theological controversies, church discipline, or ecclesiastical government, just to name a few. *Watson*, 80 U.S. at 733. The title signifies to those both outside and inside the church that this person has been chosen at least in some measure, to "embody the church" and "personify its beliefs." *Hosanna-Tabor*, 132 S. Ct. at 706; *Milivojevich*, 426 U.S. at 717.

Second, the substance of the requirements for the title and the procedural protections granted by the title also implicate governance of religious institutions. The primary purpose of courses in biblical interpretation, church doctrine, and the ministry of the Lutheran teacher, particularly as qualifications for a job with a religious institution, is to equip the individual to deal with theological controversies, church discipline, religious government, and other ecclesiastical matters. *Hosanna-Tabor*, 132 S. Ct. at 707; *Watson*, 80 U.S. at 733. Endorsements by local religious leadership and the faculty of a religious school are given on religious grounds, and a court could not effectively evaluate them without delving into the procedures and substantive criteria of the religious institution. *Milivojevich*, 426 U.S. at 713. If such acts can be reviewed and overturned by a civil court, it is difficult to see how the right of ecclesiastical government can be exercised. *Watson*, 80 U.S. at 729.

Third, accepting and using the employee's title indicates to the members and non-members of the religious institution that the minister embodies and personifies the religious institution in question, making what would otherwise be personal beliefs and decisions into statements and examples of church doctrine and practice. *Hosanna-Tabor*, 132 S. Ct. at 708; *Milivojevich*, 426 U.S. at 717; *Watson*, 80 U.S. at 733. When an employee claims a ministerial title, he or she is invoking the religious authority that comes with that title. The government cannot take a

position on who holds that title without violating the Establishment Clause. *Hosanna-Tabor*, 132 S. Ct. at 708.

Fourth, conveying the message of a religious institution or carrying on its mission are, by definition, religious acts, which can only be evaluated by theological standards. *Watson*, 80 U.S. at 733. Such duties also reinforce the implication that the minister embodies and personifies the religious institution. *Hosanna-Tabor*, 132 S. Ct. at 708; *Milivojevich*, 426 U.S. at 717. Because these duties are an exercise of religious authority, any act placing government imprimatur on a particular person carrying out those duties also raises serious entanglement concerns. *Hosanna-Tabor*, 132 S. Ct. at 708.

The ministerial exception is simply short-hand for the analysis mandated by religious freedom on a particular set of facts. The designation of minister is a recognition that hearing a dispute involving a position of this nature would intrude on the governance of religious institutions. The ministerial exception, specifically including the factors identified by the Court in *Hosanna-Tabor*, therefore necessarily implicates the same institutional interests, which are fundamental limitations on the courts that cannot be waived.

III. THE EXPERIENCE OF THE FEDERAL COURTS DEMONSTRATES THE UNWAIVABLE NATURE OF THE MINISTERIAL EXCEPTION.

The ministerial exception is not a judgment based on the rights of the parties but an invocation of a basic structural feature of our constitutional system. It was

precisely this principle which this Court articulated in *Hollins v. Methodist Healthcare*, where it held that the plaintiff's claim could not be maintained in federal court. *See* 474 F.3d at 227 (finding minister's claim that she was terminated by her church on the basis of dream analysis sympathetic but barred by the ministerial exception). Because the ministerial exception is based on foundational constitutional considerations, rather than the rights of religious institutions, a waiver of those rights cannot remove the serious constitutional dilemma presented by a case which turns on a religious matter. For this reason, federal courts have relied on the ministerial exception without regard to arguments of waiver and estoppel, and, in a logically consistent exercise of judicial authority, have even invoked the exception *sua sponte*.

The Seventh Circuit has most clearly and directly discussed this issue, holding that the "the ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel." *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) *abrogated on other grounds by Hosanna-Tabor*, 132 S. Ct. 694. In *Tomic*, the defendant, a Catholic diocese, represented itself in its handbook as an equal opportunity employer and the plaintiff claimed that this should estop the diocese from invoking the ministerial exception. *Tomic*, 442 F.3d at 1041-42. The Seventh Circuit found that civil courts had an interest "independent of party preference" to refuse to hear these cases

which is so strong that a federal court must refuse to be dragged into a religious dispute even against the affirmative desire of a religious institution.[4] *Id.* at 1042.

The inextricably religious nature of these cases has prompted similar statements from other circuits. *See Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (rejecting pretextual argument because reaching the merits would require the court to assess the plaintiff's "devot[ion] to ministry" and "the quality of his homilies"); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (affirming the district court's decision to raise the ministerial exception *sua sponte* because it was impossible to filter out the religious elements of an evaluation of canon law scholarship in a way that would avoid entanglement concerns); *Combs v. Cent. Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (citing with approval the district court's decision in *Catholic Univ.* because evaluating canon law scholarship would place a court in "an untenable position…" in "violent opposition to the constitutional principle of the separation of church and state"); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1356 (D.C. Cir. 1990) (rejecting argument that non-

[4] While the Seventh Circuit viewed the ministerial exception as jurisdictional, it did not reason that the unwaivable nature of the exception was a function of subject-matter jurisdiction. *Tomic*, 442 F.3d at 1042. Rather the Seventh Circuit found civil courts had an institutional interest to refuse to hear issues that they could not resolve intelligently, likening a waiver of the ministerial exception to a choice of law provision stipulating that any dispute would be governed by the Code of Hammurabi. *Id.*

discrimination language in the Methodist Book of Discipline estoped the exception because reaching the merits would require the court to evaluate the "gifts and graces" of a pastor).

These cases recognize that, in the context of the ministerial exception, notions of waiver have not and cannot be dispositive, just as they cannot be dispositive when similarly foundational institutional interests are at issue. *Schor*, 478 U.S. at 851 (finding when limitations on federal courts serve institutional interests that the parties cannot be expected to protect notions of waiver cannot be dispositive). Allowing putative waivers, such as posting EEOC language on a website, to remove the shield of the ministerial exception would force courts to evaluate what remains a quintessentially religious employment relationship, raising serious constitutional objections.

IV. THIS CASE DEMONSTRATES THE UNWAIVABLE NATURE OF THE MINISTERIAL EXCEPTION.

As the facts of this case demonstrate, the unavoidable constitutional objections which arise if the ministerial exception may be waived are quite serious. As a general matter, Conlon alleges that she was treated differently than two other male employees who divorced. First Am. Compl. ¶ 40 & 45, Page ID# 138 & 140, ECF No. 10-1, Dec. 31, 2013. Divorce and remarriage are very sensitive subjects in the Christian community and determinations of if and when divorce is proper turn on subtle interpretations of religious texts and traditions. As a Christian

organization with ties across a broad spectrum of the Christian community, IVCF must present the religious grounds for every decision on these matters to their partners, and will necessarily defend their decision before the courts on the same grounds. If reached, the merits of this case will inevitably present this and numerous other religious questions, and no waiver by IVCF, express or implied, can remove the constitutional dilemma faced by a civil court asked to decide such matters.

Without the ministerial exception the court will be forced, at a minimum, to interpret the Separating and Divorcing Staff Policy ("Policy"), a document rife with religious concepts and doctrines. Complaint, Ex B – IVCF Policy regarding Separating and Divorcing, Page ID# 17-20, ECF No. 1-3, Oct. 8, 2013. In addition to the generally religious nature of the Policy, the procedure it lays out will force the court to review the decision making process of IVCF, including doctrinal stands on divorce, a pervasively religious Position Description, and the advancement of IVCF's overall mission. Even the limited review of the issues which follows demonstrates that hearing this case would require a court to decide religious questions, and no waiver by IVCF can remove that constitutional objection.

A. The Policy's Procedure Is Rife with Religious Terms, and Waiver Cannot Remove the Constitutional Objection to Judicial Evaluation of Theological Interpretation.

The very first sentence of the Policy's Preamble states that IVCF "believes in the sanctity of marriage" and the second sentence links this belief with Part I of the Position Description, which requires all employees to be "maturing disciples of Jesus Christ." Policy, Page ID# 18; Defs' Mot. to Dismiss Am. Compl., Ex 2 - IVCF Position Description, Page ID# 172-175, ECF No. 14-3, Jan. 9, 2014. The next paragraph informs readers that the Policy is concerned with "pastoral and procedural care." Policy, Page ID# 18. The policy then lays out several responses when a divorce or separation is contemplated. *Id*. at 18-20. First, that the employee in question inform his or her superiors. *Id*. at 18. Second, that the employee is to be granted a period of paid leave, three months for certain positions and one month for others, to focus on his or her marriage. *Id*. at 18. The event of divorce or separation triggers a mandatory evaluation of the employee's fitness to continue in ministry. *Id*. at 20. The evaluation examines several factors including biblical teaching on marriage, divorce and remarriage; the impact on work competency and funding; and the effect of the separation and divorce and on colleagues, students, and faculty. *Id*. at 19-20. The Policy also lays out procedures for maintaining transparency with the rest of the ministry when a divorce or separation occurs; along with IVCF's minimum standards for remarriage, including "having

thoughtfully and carefully considered the Bible's teaching on divorce and remarriage." *Id*. at 20.

B. Waiver Cannot Remove the Constitutional Objection to Judicial Evaluation of Conlon's Divorce in Light of Biblical Teaching, Necessarily Interfering in an Ongoing and Quintessentially Religious Controversy.

Conlon alleges that she informed her superiors of her contemplated divorce and that they placed her on paid leave. First Am. Compl. ¶ 21, Page ID# 135. She then obtained a "work ready" determination through a number of outside individuals. *Id*. ¶ 25, Page ID# 136. Conlon's complaint then alleges that the fourth and final step in the process, the mandatory evaluation by staff directors outlined by the policy, was made in an improper manner. *Id*. ¶ 29-35, Page ID# 137-38. Therefore, if the ministerial exception is waived, the court will be put in the position of second-guessing the IVCF's evaluation of Conlon's divorce in the light of "biblical teaching on marriage, divorce and remarriage." Policy, Page ID# 19. In order to decide this, the court will first have to determine both what IVCF's doctrinal positions on divorce are and whether Conlon's actions violated those positions. Merely framing the issue demonstrates that the court cannot decide the question of whether Conlon's divorce complied with biblical doctrines without involving itself in the ongoing and quintessentially religious controversy on the issue of divorce. *Hosanna-Tabor*, 132 S. Ct. at 705, *Milivojevich*, 426 U.S. at 713.

Yet, if the ministerial exception were waived, that is precisely what the court would be asked to do.

C. Waiver Cannot Remove the Constitutional Objection to a Judicial Evaluation of a Pervasively Religious Position Description and a Determination of Whether Conlon Is Competent to Perform Religious Duties, Including Spiritual Direction.

Another major consideration which the Policy calls staff directors to consider is the impact on work competency. Policy, Page ID# 20. This would require the court to interpret IVCF's Position Description and requirements for the position held by Conlon.

Conlon's position description as a "Collegiate Ministries – Spiritual Formation Specialist" is pervasively religious. Position Description, Page ID# 175. It includes giving spiritual direction both to individuals and groups, working on programs, retreats and other activities that advance spiritual formation, praying both publicly and privately, and advising others on how to pray. *Id.* Finally, the position requires that the employee actually be in spiritual direction and that they be certified as a spiritual director through a program. *Id.* This position centers around the meaning and implications of "spiritual formation," a core commitment of IVCF that a court could not adequately interpret without a deep and intimate examination of IVCF's doctrine. Defs' Mot. to Dismiss Am. Compl., Ex 1 - IVCF Spiritual Formation, Page ID# 170-171, ECF No. 14-2, Jan. 9, 2014.

Even the position "Collegiate Ministries – Campus Ministry Focus," the general position of which Conlon's specialist position is a subset, is filled with religious responsibilities. Position Description, Page ID# 172-174. The first of the major responsibilities is to be "a maturing disciple of Jesus Christ," which is defined as "growing in love for God, God's Word, God's people of every ethnicity, and God's purposes in the world." *Id.* at 172. The leadership responsibility includes setting "vision and direction," leading "in ministry to student and faculty," "promot[ing]… the Mission on Campus," "advance[ing] witnessing communities," "seek[ing] opportunities to proclaim and demonstrate the Gospel of Christ," "model[ing] and assist[ing] students… in growing their love for God's people," "encourag[ing] a prayerful lifestyle in students and faculty," and "teach[ing] students to love, study and apply scripture to their lives." *Id.* The Oversight responsibilities include "providing pastoral care." *Id.* A civil court is patently unable to evaluate these responsibilities without delving into the internal affairs and religious doctrine of IVCF. *See Tomic*, 442 F.3d at 1040 (finding evaluation of responsibilities of music minister would propel the court into quintessentially religious controversy).

Additionally, the Qualifications require Conlon to "Annually affirm InterVarsity's Statement of Faith" and to have an "Ongoing call to InterVarsity and its mission." Position Description, Page ID# 173. A statement of faith is pure

doctrine, and the "ongoing call" is a reference to an experience that is primarily, if not wholly, spiritual. [5]

Marriage is considered so significant to the ministry and mission of IVCF that when an employee divorces, IVCF requires its staff directors to formally evaluate whether the employee still meets the requirements and qualifications of his or her position. Policy, Page ID# 18-19. The requirements, responsibilities, and qualifications for this position are of such a religious nature that evaluation of them is an religious decision. Position Description, Page ID# 172-173. Again, this reinforces the reality that the ministerial exception protects the institutional interest of the court in avoiding entanglements, which no action by IVCF can waive. *See Hosanna-Tabor*, 132 S. Ct. at 706 ("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"); *Schor*, 478 U.S. at 851 (finding that "parties cannot by consent cure the

[5] A court faced with even this preliminary barrage of strictly religious matters might appropriately raise the exception *sua sponte*, even if IVCF had not. *See Catholic Univ.*, 83 F.3d at 466 (affirming the district court's decision to raise the ministerial exception *sua sponte* because it was impossible to filter out the religious elements of an evaluation of canon law scholarship in a way that would avoid entanglement concerns); *Combs*, 173 F.3d at 350 (citing with approval the district court's decision in *Catholic Univ.* because evaluating canon law scholarship would place a court in "an untenable position…" in "violent opposition to the constitutional principle of the separation of church and state").

constitutional difficulty" when "[limitations on federal courts] serve institutional interests that the parties cannot be expected to protect").

D. Waiver Cannot Remove the Constitutional Objection to a Judicial Evaluation of the Effect of Conlon's Actions on IVCF's Ministry and Mission.

The final considerations which the Policy calls staff directors to consider are funding and the effect of the separation and divorce and on colleagues, students, and faculty. Policy, Page ID# 20. Colleagues are the other agents of the ministry, students and faculty are the general object of the ministry and donors are necessary supporters of the ministry because they provide the funding. That is to say, the staff directors must evaluate the effect of this divorce on the mission of their ministry as a whole. This requirement goes to the heart of the ministerial exception, recognizing the critical role of an individual who embodies and personifies the religious institution. *See Hosanna-Tabor*, 132 S. Ct. at 706 (finding minister personified the beliefs of the faithful); *Milivojevich*, 426 U.S. at 717 (finding bishop was the embodiment of his church).

Amici urge the court to recognize that this interest in the overall ministry and mission of the religious institution is present whenever such an institution makes a determination regarding a minister, regardless of the presence or absence of a specific provision invoking this interest in the various documents defining the position. As the Supreme Court found in *Hosanna-Tabor*, the members of a

religious group "put their faith in the hands of their ministers" which makes evaluating the fitness of a person who will "personify their beliefs" a matter of internal church governance. 132 S. Ct. at 706. There is simply no way to waive this concern, or the institutional interest of the civil courts in avoiding the entanglement of giving government approval to the possession of a religious office or the exercise of religious authority.

V. IVCF DID NOT WAIVE ITS CONSTITUTIONAL RIGHT TO THE MINISTERIAL EXCEPTION.

While the ministerial exception cannot be waived, the District Court was clearly correct in holding that no waiver of a constitutional right took place on these facts. It is well established that a valid waiver of a constitutional right must be made knowingly, voluntarily, and intelligently. *VIBO Corp., Inc. v. Conway*, 669 F.3d 675, 690 (6th Cir. 2012); *Hollins*, 474 F.3d at 227; *Fuentes*, 407 U.S. at 94–95. Courts indulge every reasonable presumption against a waiver of constitutional rights. *Fuentes*, 407 U.S. at 95. In the First Amendment context this presumption can only be overcome with clear and compelling evidence that there was an intentional relinquishment or abandonment of a known right or privilege. *VIBO*, 669 F.3d at 690; *Hollins*, 474 F.3d at 226; *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981).

In the specific context of the ministerial exception courts have held that an employer does not waive the exception by holding itself out as an equal

opportunity employer or even by affirmatively representing that it will not discriminate. *See Hollins*, 474 F.3d at 227 (holding that affirmative representations made by employer that it would not discriminate as a part of seeking and obtaining accreditation did not waive the ministerial exception); *Petruska v. Gannon Univ.*, 462 F.3d 294, 309 (3d Cir. 2006) (holding employer holding itself out as an "equal opportunity employer" only acknowledged that it would comply with Title VII to the extent the statute applies to its employment decisions not that it waived the ministerial exception).

Here, IVCF posted standard EEOC language on its website as part of its compliance with relevant labor laws, which do apply to IVCF's non-ministerial employees. This is similar to Gannon University holding itself out as an "equal opportunity employer" in *Petruska*, and just as in that case, signifies nothing more than that the employer in question acknowledges its duties under Title VII. 462 F.3d at 309. On the facts of this case, there can be little doubt that IVCF did not waive the ministerial exception.

Even without these specific precedents the basic principles of the waiver doctrine demonstrate that IVCF did not waive its right to the ministerial exception. Conlon has not and almost certainly cannot show that when IVCF posted the statutorily required EEOC language on its website it was actually aware that this posting might in any way affect their constitutional rights, much less that they did

so intelligently. *Fuentes*, 407 U.S. at 94-95. Furthermore, the fact that the posting itself was statutorily compelled casts grave doubts on the voluntariness of the action. *Id.* IVCF is required by the Fair Labor Standards Act ("FLSA") to post the language which constitutes their supposed waiver where notices for "…applicants for employment…are customarily posted." 42 U.S.C. § 2000e–10. The nature of the modern organizational website, which even Conlon asserts is "essentially the exclusive way to begin an application process with any entity," compels IVCF to post EEOC language there in order to comply with Federal law. Brief of Plaintiff-Appellant at 16, Page ID# 22, ECF No. 18, Jun. 26, 2014.

As a matter of public policy the court should be aware that many religious organizations are not organized in such a way that every single employee falls under the ministerial exception. Those employers, unless exempt from the FLSA and other federal and state anti-discrimination laws on other grounds, are legally mandated to post this or similar language just as IVCF is. If this Court holds that IVCF waived the ministerial exception on these facts, thousands of such organizations in this jurisdiction and across the country would be forced to choose between complying with the law and safeguarding their First Amendment right to invoke the ministerial exception. *Hosanna-Tabor*, 132 S. Ct. at 705. Such a holding would also appear to bring the FLSA and other anti-discrimination posting requirements into conflict with the First Amendment, a construction which courts

are clearly to avoid, if at all possible. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

CONCLUSION

Amici urge the court to uphold the dismissal of this case on the ground that, as a matter of law, the ministerial exception belongs to a category of nonjurisdictional structural constitutional objections that cannot be waived. While upholding the District Court's reasoning would safeguard both the rights of IVCF and the interests of the federal courts for today, leaving an open door for waiver tomorrow runs contrary to the counsel of logic, the experience of the federal courts and the gravity of the institutional interests at play. The Supreme Court's holding in *Hosanna-Tabor* demonstrates that facts which inform the conclusion that a position is ministerial necessarily implicate the larger structural constitutional interests of religious freedom. Those interests are not something that either party, particularly a religious institution, has the power to waive. Deciding the merits of this case would require the court to inquire into and make decisions on a quintessentially religious controversy. No waiver, no matter how explicit, would justify the impermissible entanglement that would result. It is time for this Court to close the door on such a line of reasoning.

Respectfully submitted this the 4th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify the foregoing document is proportionally spaced, has a typeface of 14 points or more, and contains 6,251 words as calculated by Microsoft Word.

Dated: August 4, 2014.

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DESIGNATION OF COURT DOCUMENTS

DISTRICT COURT		
RECORD ENTRY #	**DESCRIPTION**	**PAGE ID #**
1-3	Complaint, Exhibit B – IVCF Policy	17-20
10-1	First Amended Complaint	135-38, 140
14-2	Defendants' Motion to Dismiss Amended Complaint - Exhibit 1- IVCF Spiritual Formation	170-175
14-3	Defendants' Motion to Dismiss Amended Complaint - Exhibit 2 – IVCF Position Description	172-175
SIXTH CIRCUIT		
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18	Brief of Plaintiff-Appellant	22