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March 25, 2011

House of Representatives
Committee on Human Services
Chairman: Rep. John M. Mizuno
Vice Chairman: Rep. Jo Jordan

RE: TESTIMONY IN STRONG OPPOSITION TO HCR 141 and HR 123

> **"The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."**
> *McClure v. Salvation Army, 460 F.2d at 558-59 (5th Cir. 1972)*

Dear Committee Members:

This is written to oppose HCR 141 and HR 123 in the strongest possible language. I am a civil rights attorney having practiced law in Honolulu since 1984.

I understand that as resolutions, these two expressions of the opinions of the legislature do not carry the force of law. However, when the legislature embarks on the expression of its opinion in a manner that is such a flagrant violation of the two constitutions the members took an oath to uphold, the expression of that oath violation must be opposed as quickly and as demonstrably as possible.

While it is elementary to state the obvious, these two resolutions demand that the obvious be stated. For at least the 220 years since the First Amendment to the Constitution of the United States of America was ratified on December 15, 1791, our nation and its citizens have enjoyed something very precious called the freedom of religion. That includes the constitutionally sacred right held firmly by all religious institutions to be free from government intrusion into ecclesiastic affairs. Your two resolutions have breached the constitutional barrier known in the law as church autonomy.

At its core, church autonomy gives religious organizations independence from secular control or manipulation and the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116. More modern Supreme Court cases often integrate church autonomy indirectly in answering constitutional questions. For instance, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Supreme Court ruled against the government which argued that an employee who sought worker's compensation benefits did not correctly understand the teachings of his church. *Id.* at 715.

The Court stated that it is not within the judicial function or judicial competence to inquire whether a person correctly perceives the commands of their faith and that courts are not arbiters of scriptural interpretation. *Id.* at 716.

For the same reasons, your resolutions far exceed legitimate legislative authority with respect to the autonomy of the religious institutions the resolutions seek to influence. The critical importance of remaining within the proscribed boundaries of legislative authority cannot be overstated. Your resolutions violate those proscribed boundaries. To assist you understand these limits on legitimate legislative actions, the balance of this testimony will describe how the legal doctrine of church autonomy enshrines religious freedom. The goal is to refresh the recollection to avoid future violations.

The most important issue regarding church autonomy is whether government action fits within the scope of the doctrine. The scope of church autonomy can be categorized into four separate areas: (i) questions of doctrine, the resolution of doctrinal disputes, and weighing the religious importance of a church's words and events;[1] (ii) ecclesiastical polity and its administration;[2] **(iii) the selection, credentialing, promotion, discipline, and conditions of appointment of clergy and**

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[1] *See Maryland & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367, 368 (1970)(per curiam); Presbyterian Church v. Hull Church, 393 U.S. 440, 449-51 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679, 725-33(1872); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914).*

[2] *See Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-24 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440, 451 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.).*

other ministers;[3] and (iv) the admission, guidance, expected moral behavior, and discipline of church parishioners.[4]

While the legal landscape of the First Amendment generally, and that of church autonomy specifically, is indeed very broad, deep and wide, the specific prohibition of the government from regulating employment relations within religious institutions is clear. The seminal case is *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). In *McClure* the Fifth Circuit held that, the application of Title VII to the employment relationship within religious institutions would result in a violation of the Free Exercise Clause and therefore the court interpreted Title VII to avoid this conflict.[5] The Fifth Circuit based its holding on Supreme Court precedent applying the church autonomy doctrine.[6] Nine federal circuits currently recognize the ministerial exception, based on either the Free Exercise or Establishment Clauses (or both).[7] The majority of Circuits addressing the

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[3] *See Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-24 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952); Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929); See also NLRB v. Catholic Bishop, 440 U.S. 490, 501-04 (1979); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).*

[4] *Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872); Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872); cf. Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914).*

[5] This part of the court's opinion only applies the same canon of construction as found in *NLRB v. Catholic Bishop of Chicago.* Later opinions in the Fifth Circuit make it clear that the Free Exercise Clause bars an employment discrimination claim filed by a church's minister. *See Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

[6] *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

[7] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989)(Free Exercise Clause and Establishment Clause); *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006)(Free Exercise Clause); *E.E.O.C. v. Roman Catholic Dioceses of Raleigh*, 213 F.3d 795 (4th Cir. 2000)(Free Exercise Clause); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985)(Free Exercise Clause and Establishment Clause); *McClure*, 460 F.2d 553 (5th Cir. 1972)(Free Exercise Clause); *Aliciea-Hernandez v. Catholic Bishop of*

issue agree that the ministerial exception has survived the Supreme Court's decision of *Employment Division v. Smith*, 494 U.S. 872 (1990). *See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Combs v. Central Texas Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999).

The ministerial exception bars any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions. When a claimant is a "minister" it is inherent in the nature of the job that litigation will entangle the church and state.[8] Why the legislature would seek to encourage such claims by passing resolutions such as HCR 141 and HR 123 is puzzling.

The resolutions which are opposed by this testimony constitute by the very text thereof the illegitimate interference by the legislature into the employment relationships dealing with the "Leadership Positions" within Hawaii's religious institutions. There is no doubt under any reading of any of the cases that the "Leadership Positions" constitute positions held by the various "minister" for purposes of the ministerial exception. This is so under the Fourth and Sixth Circuits' "Primary Duties" test which states that "if an employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." *E.E.O.C. v. Roman Catholic Dioceses of Raleigh*, 213 F.3d 795 (4th Cir. 2000). The Fourth Circuit also requires a court to "determine whether a position is important to the spiritual and pastoral mission of the church" in order to

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Chicago, 320 F.3d 698 (7th Cir. 2003)(Free Exercise Clause); *Young v. Northern Illinois Conf. of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994)(Free Exercise Clause); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991)(Establishment Clause); *Werft v. Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004)(Free Exercise Clause); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000)(Free Exercise Clause and Establishment Clause); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996)(Free Exercise Clause and Establishment Clause).

[8] *McClure stated the reasoning as follows: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church." 460 F.2d at 558-59 (5th Cir. 1972)*

determine whether the exception applies. *Id. See also EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School,* 597 F.3d 769, 780 (6th Cir. 2010).

Other courts have fashioned other ministerial position tests. The Ninth Circuit determined that a seminarian who spent his time "mostly cleaning sinks" fell within the ministerial exception because "secular duties are often important to a ministry." *Alcazar v. Corp. of the Catholic Archbishop of Seattle,* 598 F.3d 668, 676 (9th Cir. 2010). And in *Coulee Catholic Schools v. Labor and Industry Review Commission,* 768 N.W.2d 868, 882 (Wis. 2009), the Wisconsin Supreme Court rejected the sacred/secular distinction because it "serves to minimize or privatize religion" by calling a subject of study "'secular' because it does not involve worship and prayer."[9]

The Circuit Courts do agree, however, on the strength of the ministerial exception. When it applies, the exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. *Id.* And a church need not proffer any religious justification for an employment decision because the Free Exercise Clause protects the act of the decision rather than motivation behind it. Id. The two resolutions at issue in this legislative session, HCR 141 and HR 123, clearly and unambiguously violate the long-standing limitation on the legislature's legitimate authority.

The church autonomy doctrine specifically protects a church's selection, credentialing, promotion, discipline, and conditions of appointment of clergy and other ministers. *See Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Gonzales v. Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929). *Kedroff* holds in part that "[f]reedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116. The credentialing and conditions of appointment of clergy and other ministers are also protected by church autonomy. *See Gonzales v. Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929). *Gonzales* holds that a religious organization's determination of the qualifications, credentialing, and conditions of appointment are binding on a civil government. The Court stated that "[b]ecause the appointment [of the chaplaincy] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16. As you no doubt are aware, the canon law of the Roman Catholic and Mormon faiths require that the ministers be male. Your resolutions urging the contrary result fly in the face of the preeminence of the canon law of those faiths.

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[9] *See* ADF's Amicus Brief filed in *EEOC v. Hosanna-Tabor* for a more thorough analysis of these conflicting views. It can be accessed at:
http://adfwebadmin.com/userfiles/file/EEOC%20v%20Hosanna%20Amicus%20Brief.pdf

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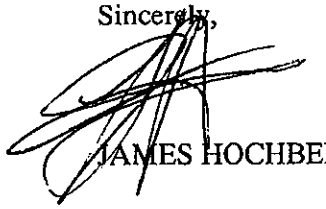
The church autonomy doctrine prohibits the government from second-guessing a church's hiring and conditions of employment of clergy and other ministers. The basic rule that a church has the right to select and promulgate conditions of employment for its clergy and other ministers has never been questioned. Selection of clergy is protected by church autonomy. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Why the Hawaii legislature crossed that line with HCR 141 and HR 123 raises a serious, constitutional question.

Church autonomy is the guarantee encompassed in the Bill of Rights that protects religious organizations from governmental interference in ecclesiastical affairs. This legal principle offers a strong and broad shield for churches and para-church organizations when legislators, government officials, courts, or laws attempt to dictate a church's doctrine, polity, relationship with its ministers, or interaction with its members. To the extent that the target of HCR 141 and HR 123 includes religious institutions and the qualifications for leadership thereof, both resolutions and the legislature's actions in introducing and hearing them, are illegitimate. This committee is called to unequivocally and unambiguously pronounce that both resolutions are improper to the extent they target religious institutions. All references in the resolutions to religious institutions must be stricken.

Sincerely,



JAMES HOCHBERG

JH:lz

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Sent: Friday, March 25, 2011 1:28 AM
To: HUStestimony
Cc: web@cartoonistforchrist.org
Subject: Testimony for HCR141 on 3/28/2011 9:00:00 AM

Testimony for HUS 3/28/2011 9:00:00 AM HCR141

Conference room: 329
Testifier position: oppose
Testifier will be present: No
Submitted by: Lee McIntosh
Organization: Individual
Address:
Phone:
E-mail: web@cartoonistforchrist.org
Submitted on: 3/25/2011

Comments:
Mr. Chair and Members of the Committee on Human Services:
Aloha, my name is Lee McIntosh. I live in Kau on the Big Island. I am shocked and appalled that the House has included religious institutions in the language of HCR 141. Independent Baptist Churches are governed by the Bible, not government or flawed humanistic thinking. One of the requirements for Pastors and Deacons in Scripture is that they must be men, not women (1 Timothy 3:1-13). Women also cannot teach men, but they can teach boys (1 Timothy 2:12). HCR 141 is a direct attack on Scripture, which in turn is an attack on my personal faith. I do not appreciate this treatment, especially when more pressing matters should hold the attention of the Legislature, such as balancing the budget without raising taxes or fees. This resolution can also be considered a violation of the First Amendment of the US Constitution. Please remove all references to religious institutions in this resolution. Thank you for the opportunity to testify on HCR 141.

Sent: Friday, March 25, 2011 1:26 AM
To: HUStestimony
Cc: web@cartoonistforchrist.org
Subject: Testimony for HR123 on 3/28/2011 9:00:00 AM

Testimony for HUS 3/28/2011 9:00:00 AM HR123

Conference room: 329
Testifier position: oppose
Testifier will be present: No
Submitted by: Lee McIntosh
Organization: Individual
Address:
Phone:
E-mail: web@cartoonistforchrist.org
Submitted on: 3/25/2011

Comments:
Mr. Chair and Members of the Committee on Human Services:
Aloha, my name is Lee McIntosh. I live in Kau on the Big Island. I am shocked and appalled that the House has included religious institutions in the language of HR 123. Independent Baptist Churches are governed by the Bible, not government or flawed humanistic thinking. One of the requirements for Pastors and Deacons in Scripture is that they must be men, not women (1 Timothy 3:1-13). Women also cannot teach men, but they can teach boys (1 Timothy 2:12). HR 123 is a direct attack on Scripture, which in turn is an attack on my personal faith. I do not appreciate this treatment, especially when more pressing matters should hold the attention of the Legislature, such as balancing the budget without raising taxes or fees. This resolution can also be considered a violation of the First Amendment of the US Constitution. Please remove all references to religious institutions in this resolution. Thank you for the opportunity to testify on HR 123.

Sent: Saturday, March 26, 2011 3:10 PM
To: HUStestimony
Cc: thirr33@gmail.com
Subject: Testimony for HCR141 on 3/28/2011 9:00:00 AM

Testimony for HUS 3/28/2011 9:00:00 AM HCR141

Conference room: 329
Testifier position: support
Testifier will be present: No
Submitted by: Arvud Youngquist
Organization: I Love Kalihi Valley
Address:
Phone:
E-mail: thirr33@gmail.com
Submitted on: 3/26/2011

Comments:
Chair, HUS Committee
Honorable Committee Members

We support HCR 141.

Recommend measure be reported out favorably.

Mahalo for this opportunity to submit written testimony in support.

Sincerely,

Arvid Youngquist
Founder & Editor
I Love Kalihi Valley