

No. 10-553

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**In the Supreme Court of the United States**

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HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH  
AND SCHOOL, PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION, ET AL., RESPONDENTS

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**REPLY BRIEF FOR THE PETITIONER**

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**RULE 29.6 STATEMENT**

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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## ARGUMENT

In their merits briefs in this Court, respondents for the first time attack the ministerial exception outright. They have abandoned their arguments below, their briefs in opposition to certiorari, and the Sixth Circuit's opinion, all of which recognized the ministerial exception. They have abandoned the EEOC's Compliance Manual, which has recognized the ministerial exception for two decades. Most important, they have repudiated four decades of unanimously settled law in the lower courts.

They propose instead that courts decide virtually any dispute between a church and its minister. If it is irrelevant whether Perich is a minister, as they say, then any would-be priest, rabbi, pastor, or nun could sue her church on any claim, and juries could overturn religious judgments of fitness for ministry on a preponderance of the evidence. This would be a revolution in relations between church and state.

### **I. This Court should confirm the ministerial exception.**

Respondents' rejection of the ministerial exception is extreme, unprecedented, and unworkable.

#### **A. Respondents repudiate the unanimous judgment of the lower courts and the political branches.**

Respondents treat "a so-called 'ministerial exception'" like some strange new doctrine invented by petitioner. Perich 17. But for forty years, the lower courts have unanimously concluded that they cannot decide ministers' employment claims without evaluating ministers and deciding religious disputes. Pet. Br. 16-19. This is not the lower courts' opinion

on an abstract question of law, but their experience-based judgment on what would be required to decide such claims. Longstanding unanimity on such a practical judgment is “entitled to strong consideration.” *United States v. Tinklenberg*, 131 S.Ct. 2007, 2014 (2011).

Pointing to statutory exemptions and legislative history, including an irrelevant amendment to exempt *all* employees of *all* religious organizations, EEOC 15-18, Perich 24, 44, respondents claim that the “political Branches” have rejected the ministerial exception. EEOC 51.

Not so. When Congress enacted the ADA, the ministerial exception was settled law,<sup>1</sup> and Congress intended to preserve it. The House committee report quoted by the EEOC (at 17-18) expressly endorsed the ministerial exception as a matter of statutory interpretation: “[I]t is the Committee’s intent that title I of the ADA be interpreted in a manner consistent with title VII of the Civil Rights Act of 1964 *as it applies to the employment relationship between a religious organization and those who minister on its behalf.*” H.R. Rep. No. 101-485(II), at 76-77 (1990) (emphasis added); accord, S. Rep. No. 101-116(I), at 42 (1989).

EEOC Policy Guidance, contemporaneous with enactment of the ADA, also acknowledged the min-

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<sup>1</sup> *E.g.*, *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986); *Kaufmann v. Sheehan*, 707 F.2d 355 (8th Cir. 1983); *Minker v. Baltimore Annual Conference*, 894 F.2d 1354 (D.C. Cir. 1990).

ministerial exception, relying in part on *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952). EEOC Policy Guidance, *Religious Organizations*, 1990 WL 1104706, at \*4-5 (1990). The current Compliance Manual continues to recognize the ministerial exception, emphasizing that it “is not limited to ordained clergy.”<sup>2</sup>

In short, all three branches have recognized the ministerial exception, without dissent, for decades.

**B. Respondents’ rejection of the ministerial exception is contrary to history and precedent.**

Respondents would distinguish this Court’s clergy-selection and entanglement cases into insignificance. They would expand *Employment Division v. Smith* to fill the universe of free-exercise doctrine. They rely on self-contradictory theories of freedom of association. Every lower court to consider these cases has rejected respondents’ strained interpretations.

**1. *Watson*, *Gonzalez*, *Kedroff*, and *Serbian*.**

Respondents dismiss *Gonzalez*, *Kedroff*, and *Serbian* as “church-property cases.” EEOC 24-28; Perich 45-48. But those cases were about selection of clergy; control of church property was only a derivative consequence. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (“this case essentially involves not a church property dispute, but a religious dispute” over removal of the

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<sup>2</sup> EEOC Compliance Manual, §12-I(C)(2) (2008), [http://www.eeoc.gov/policy/docs/religion.html#\\_Toc203359494](http://www.eeoc.gov/policy/docs/religion.html#_Toc203359494); see also *id.* §2-III(B)(4)(b)(i) (2000), <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-4-b-i>.

bishop); *Kedroff*, 344 U.S. at 96-97 (right to property depended on which church authority “validly selects the ruling hierarch for the American churches”); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 18 (1929) (“Since Raul is not entitled to be appointed chaplain, he is not entitled to a living from the income of the chaplaincy.”).

These cases do not merely bar courts from choosing “among competing interpretations of Lutheran doctrine.” EEOC 24; see Perich 45-47. These cases apply to “matters of *church government as well as* those of faith and doctrine,” Pet. Br. 20 (quoting *Serbian* and *Kedroff*), and to “theological controversy, *church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.*” *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872). Churches may “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,*” and the decisions of those tribunals “should be binding.” Pet. Br. 53 (quoting *Serbian* and *Watson*) (all emphases added). This Court repeatedly protected doctrine *and* governance; respondents pretend it mentioned only doctrine.

These cases were not repudiated or reinterpreted in *Jones v. Wolf*, 443 U.S. 595 (1979). Cf. EEOC 26-28. That case *was* just a church property dispute—between two factions of laypeople and not between an intact church and an individual demanding to be its minister. Far from repudiating *Serbian* or *Watson*, *Jones* relied on them. 443 U.S. at 602-04. *Jones* was decided the same term as *NLRB v. Catholic*

*Bishop*, 440 U.S. 490 (1979), which protected decisions concerning teachers in religious schools. *Jones* says that courts can apply neutral principles of law only if they can do so without deciding questions of “religious doctrine *or polity*.” 443 U.S. at 602 (emphasis added). It does not redefine what counts as a religious question.

Respondents emphasize *Jones*’s dictum that neutral principles of law apply to the manner in which churches “hire employees.” EEOC 27; Perich 43. The Church has never disputed that as a general matter. The ministerial exception is confined to a unique category of employees not at issue in *Jones*.

Respondents also dismiss this Court’s cases as not involving neutral and generally applicable statutes. EEOC 24-25. But in each case, lower courts applied neutral principles of law. *Avery v. Watson*, which later became *Watson v. Jones*, 80 U.S. at 687, 732-34, applied “rights of property \*\*\* as in ordinary cases of injury resulting from the violation of a contract.” 65 Ky. 332, 349 (1867). *Gonzalez* involved enforcement of a trust, 280 U.S. at 16, and the Philippine trial court treated decedent’s will as “the supreme law to be observed,” *Gonzalez* Record 230, 277. *Kedroff*, on remand, applied principles governing “the conduct of trustees” to determine who would faithfully execute the trust. 114 N.E.2d 197, 201-02 (N.Y. 1953). This Court reversed. *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960). *Catholic Bishop* exempted religiously sensitive positions from a generally applicable statute. 440 U.S. 490.

In *Serbian*, the lower court applied principles of contract and “rights of members in an association.” 328 N.E.2d 268, 283-84 (Ill. 1975). The dissent in



this Court argued that the Illinois courts resolved the dispute “just as they would have attempted to decide a similar dispute among the members of any other voluntary association.” 426 U.S. at 726 (Rehnquist, J., dissenting). Justice O’Connor later explained that the *Serbian* line of cases involved “the application of otherwise neutral property or contract principles to religious institutions.” *Board of Education v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring).

Respondents’ reasoning tracks the reasoning rejected in these cases. These lower courts thought they were righting wrongs; they took narrow views of what counts as a religious question; and they concluded that they were not deciding any religious dispute beyond their authority. This Court rejected these holdings, because the lower courts had interfered in the churches’ self-governance or selection of ministers. Neutral principles of law cannot be applied to resolve religious disputes.

## **2. Free exercise.**

Citing *Employment Division v. Smith*, 494 U.S. 872 (1990), respondents say the ADA is a generally applicable law that can be applied even to the selection of ministers. EEOC 21-24; Perich 42-43.

But *Smith* preserved a longstanding distinction between internal church governance, including selection of ministers, and conscientious objection to general regulation. These two kinds of free-exercise claims have been doctrinally distinct in this Court since the 1870s. Pet. Br. 25-26. They have been conceptually distinct since the writings of John Locke, who supported the principles underlying both

*Smith* and the ministerial exception. International Mission Board Brief 25-27. And they have been distinct in the lower courts: Eleven circuits have rejected respondents' reading of *Smith*. Pet. Br. 17, 23-24.

*Smith* says that government cannot take sides in “controversies over religious authority *or* dogma.” 494 U.S. at 877 (citing *Serbian* and *Kedroff*) (emphasis added). Respondents pretend the Court mentioned only “dogma”; they repeatedly equate religious disputes with disputes over religious *doctrine*. Perich 44-45, 52; EEOC 23, 25-26, 27, 32, 35-36, 37, 38, 42.

This argument is wrong at multiple levels. Ministers occupy positions of religious authority, so a dispute over who should be a minister is necessarily a controversy over “religious authority.” Pet. Br. 23. Courts cannot decide such disputes even if they somehow avoid theological questions. *Supra* 4-6. Either the church picks the minister or the court does.

This case is also a dispute over religious doctrine. Disputes over *application* of religious doctrine are as much doctrinal disputes as disputes over broad statements of religious principle. Perich says she is fit for ministry; the Church says she is not. On either characterization—doctrine or authority—the government cannot take sides in this dispute.

### **3. Establishment.**

a. Respondents do not deny that “government-appointed ministers were one of the quintessential features of the established church.” Perich 50. They cannot distinguish this history.

First, Perich says that “literally” appointing ministers is different from reinstating ministers or regulating the grounds on which they can be fired. Perich 50-51. But government-appointed ministers would not have been a problem if churches could just fire them. They could not. See *Pet. Br. 27* (Virginia); *Avery v. Inhabitants of Tyringham*, 3 Mass 160, 181-82 (1807) (holding that minister could be removed only for cause, and that except for teaching false doctrine, the court was the judge of cause). Government limits on firing ministers were a necessary element of establishment.

Second, Perich claims there were no historical concerns with “application of a neutral law” to churches. Perich 51. But the Massachusetts court restricted the discharge of ministers pursuant to the law of contract; *Avery* was a suit in *assumpsit*. 3 Mass. at 160. And in 1875, Congress specifically refused to apply “neutral” public accommodations laws to churches, concluding after substantial debate that churches have a constitutional right to decide “with whom they will worship.” Evangelical Covenant Church Brief 20-24.

Finally, Perich suggests that religion teachers are different from “clergy.” Perich 50-51. But the 1875 debate was over members, not just clergy. And much of the founding-era debate over disestablishment explicitly included pastors and “*religious teachers*.” Evangelical Covenant Church Brief 15 (collecting constitutions).

*Amicus* National Employment Lawyers Association claims that courts have decided many employment disputes regarding ministers. Several of NELA’s cases, including the one they quote most

frequently, involved established churches with government-appointed ministers. *Avery*, 3 Mass. 160. (Massachusetts' establishment was not repealed until 1833. See sources cited at Pet. Br. 28.)

Most of NELA's cases were contract or property disputes, decided on the basis of legal documents signed by the church, as in *Jones v. Wolf*, 443 U.S. 595. When a church signs a contract written in secular language, the contract can be enforced unless the basic dispute is entangled in religious questions. So, for example, a contract claim challenging discharge for cause generally cannot proceed, but a contract claim for unpaid salary or benefits generally can. Such secular contract claims have always co-existed with the ministerial exception. See *Petruska v. Gannon University*, 462 F.3d 294, 310 (3d Cir. 2006); *Minker*, 894 F.2d at 1358-61 (both distinguishing secular contract claims from discrimination claims). Courts in some of NELA's cases decided questions they should not have reached, but such cases are why this Court decided *Watson*, *Gonzalez*, *Kedroff*, and *Serbian*.

b. Respondents claim that *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), authorizes courts to decide claims of religious pretext. *Dayton* held no such thing. As already explained, Cert. Reply 9-10, *Dayton* held only that "the District Court should have abstained from adjudicating this case under *Younger v. Harris*," notwithstanding any "constitutional attack on state procedures themselves." 477 U.S. at 625, 628. The Court expressly left the merits to the state proceedings. *Id.* Moreover, there is no indication

whether the employee was a minister, under petitioner’s test or any other.

The Court addressed the pretext issue two years later in *Catholic Bishop*. Respondents would limit *Catholic Bishop* to “comprehensive oversight of a religious institution,” EEOC 40 n.10, see Perich 57, but that was only part of the holding. The Court also said that an “inquiry into the good faith of the position asserted by the clergy-administrators”—*i.e.*, a pretext inquiry—“presents a significant risk that the First Amendment will be infringed.” 440 U.S. at 502.

Perich argues that rules against entanglement have “changed considerably” since *Catholic Bishop*, citing cases on funding the secular functions of religious schools. Perich 57-58, 53. But this case is not about a neutral funding program that defers to private choices. This case is about institutional separation—the least controversial core of separation of church and state. Eugene Volokh Brief 5-27. The government cannot control the internal affairs of churches any more than churches can control the institutions of government.

#### **4. Freedom of association.**

Respondents claim that freedom of association is both so strong that it single-handedly protects the male-only clergy, EEOC 31-32, Perich 35-36, and so weak that it is irrelevant to this case, EEOC 29-31, Perich 28-35. They cannot have it both ways.

a. Eliminating the ministerial exception would make many religious requirements for ministry illegal—including male-only rules, ethnicity rules, and celibacy rules. Pet. Br. 18. Respondents attempt to preserve the all-male clergy with the exception for

bona fide occupational qualifications, EEOC 31, Perich 36 n.9, or with freedom of association, EEOC 31-32, Perich 35-36. Neither argument works.

The BFOQ exception is “extremely narrow.” *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1997); accord, *UAW v. Johnson Controls*, 499 U.S. 187, 200-07 (1991). Without an assist from the First Amendment, the male-only clergy is simply a discriminatory rule announced by the employer. Nor does the BFOQ exception apply to ethnicity rules, such as those in some strands of Judaism, Islam, and Hinduism. There are good reasons why neither respondent commits to its BFOQ argument.

Alternatively, respondents say the male-only clergy could survive under *Boy Scouts v. Dale*, 530 U.S. 640 (2000), because appointing a woman would undermine teachings that only men can serve as priests or rabbis. EEOC 31; Perich 36. So it would. But a ruling for Perich would equally undermine the Church’s teaching that ministers should resolve religious disputes within the church.

Respondents cannot distinguish the two teachings. They say the male-only clergy is “deeply embedded and long-standing,” EEOC 31, but so is the teaching on internal resolution of disputes over ministry. It is based on explicit Scripture, developed in formal theological teachings, and implemented in an elaborate dispute-resolution process. Pet. Br. 7-8, 54-55; LCMS Brief 16-24. The male-only priesthood may be more familiar to non-members, and respondents may be afraid to attack it, but these are not legally cognizable distinctions.

b. Nor can respondents distinguish *Dale*. It is undisputed that Perich was the primary means by which the Church communicated its faith to her students, Pet. Br. 40-41, that the Church teaches that disputes over ministry should be resolved within the church, and that Perich violated this teaching.

If Perich were reinstated, every parent and child in this small school would know that she got there by defying the Church's teaching. Having defied that teaching, she could not credibly teach that religious obligation or any other. The Church's message would be undermined, especially to its internal audience, at least as severely as anything at issue in *Dale*.

All nine Justices agreed that freedom of association can justify exemption from civil-rights laws if an organization has a clear message "inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude." *Dale*, 530 U.S. at 686-87 (Stevens, J., dissenting). The disagreement was whether the Boy Scouts had such a message. It is undisputed that Hosanna-Tabor does. Its teaching on internal dispute resolution is far more developed and clearly stated than the Boy Scouts' disapproval of homosexuality. See *id.* at 666-78.<sup>3</sup>

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<sup>3</sup> Perich relies on irrelevant cases about students and professors with no role as spokespersons for their schools. Perich 28-31 (citing *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990); *Runyon v. McCrary*, 427 U.S. 160 (1976)). Academic freedom means that secular universities disclaim responsibility for what their professors say. The University of Pennsylvania had no relevant message and did not argue freedom of association.

This case is also stronger than *Dale* because, as *Smith* anticipated and respondents concede, freedom of association is “reinforce[d]” by free-exercise concerns. EEOC 31-32; Perich 48; see Pet. Br. 36; *Smith*, 494 U.S. at 882. Freedom of religious association is based not only on freedom of expressive association, but also on free exercise and separation of church and state. All these rights are at their maximum when churches evaluate ministers.

### 5. Compelling interest.

Respondents claim that these constitutional rights are overridden by the government’s compelling interest in eliminating discrimination. EEOC 30-31; Perich 22-24. But compelling interest depends on context. *Gonzales v. O Centro Espirita*, 546 U.S. 418, 431-32 (2006). Here, the context is selection of ministers. Claims of discrimination in selection of ministers are necessarily claims that churches applied impermissible criteria, or misapplied acceptable criteria, to inherently religious decisions. The government can have no compelling interest in a church’s criteria for choosing ministers. This is simply a matter beyond the authority of government—as Perich concedes with respect to the clergyman in *Kedroff*. Perich 49. The government has no greater interest in who teaches religion at Hosanna-Tabor.

The government’s interest in *secular* education at Hosanna-Tabor does not require regulation of religion teachers. The Church may discharge a minister it considers unfit, even if she also teaches secular subjects. But her replacement must satisfy the secular standards required by law for teachers of those secular subjects. This case turns on the gov-



ernment’s alleged interest in the criteria for choosing religion teachers; that interest is nil.

**C. Respondents’ rejection of the ministerial exception is unworkable.**

Under respondents’ approach, *every* claim by *every* minister can be resolved on the merits, subject only to respondents’ inconsistent views of expressive association and modest limits on admissible evidence. EEOC 35-42. This “solution” would be deeply entangling and wholly unworkable.

1. The EEOC posits four types of cases:
  - a. *No-religious-reason cases*, where the church “proffers no religious reason for the employee’s termination.” EEOC 36-37.
  - b. *Prohibited-religious-reason cases*, where the church’s religious reason is illegal. EEOC 37-38.
  - c. *Pretextual-religious-reason cases*, where the minister claims “that the religious reason was pretextual.” EEOC 38-40.
  - d. *Disputed-religious-reason cases*, where the minister offers direct evidence to dispute the church’s religious reason. EEOC 40-41.

According to the EEOC, courts can decide cases in the first three categories without entanglement, but the final category would pose a “risk” of entanglement. EEOC 40. In fact, all the categories run together, and all pose intractable religious questions.

The distinction between pretextual- and disputed-religious-reason cases is illusory. Both are about pretext, differing only in the evidence. Take the EEOC’s example of a disputed-religious-reason case, in which a church discharges a minister for being

“insufficiently spiritual.” EEOC 40. The EEOC admits that the minister could not show pretext by offering evidence of how spiritual he really was, because that would require the courts to weigh evidence for and against “the religious organization’s religious assessment.” EEOC 41.

But the same problem occurs in pretextual-religious-reason cases. There, the minister offers less direct evidence of pretext—suspicious remarks by the bishop, inconsistent treatment of another minister allegedly lacking in spirituality, *etc.* But the church’s best evidence will still be evidence of how unspiritual the minister was. Either the court would have to ignore that evidence, depriving the church of the right to defend itself, or it would have to evaluate that evidence and weigh it against the minister’s pretext evidence, thus “entangling the court in religious questions beyond its adjudicative capacity.” EEOC 41; accord, Perich 54-55 (“inherently religious determination outside the ken of a civil court”).

This is why the lower courts have overwhelmingly agreed that they cannot adjudicate a minister’s pretext claim. Pet. Br. 57-58. Respondents cite two cases allegedly to the contrary, EEOC 42, but as already documented, these cases did not involve ministers. Pet. Br. 59.

The EEOC’s prohibited-religious-reason cases are also entangling. At the heart of these cases is a dispute over the qualifications for ministers. The church says that a particular characteristic is essential—*e.g.*, maleness, celibacy, theological training, moral virtue, or willingness to resolve disputes within the church. Plaintiff claims that she is qualified without that characteristic. Respondents would

have the courts resolve this religious dispute against the church by ignoring it. Government would dictate to the church what are the legitimate qualifications for ministry.

Beyond that, prohibited-religious-reason cases present further entangling issues. Here, respondents argue that the religious reason is not only prohibited, but also pretextual. Perich 34-35. And the Church offers an additional religious reason that is not prohibited: it might have rescinded Perich's call for insubordination even if she had not threatened to sue. J.A. 55. Finally, a minister who publicly violates church teaching destroys her credibility and becomes ineffective, giving rise to still another religious reason for the Church's decision. Prohibited-religious-reason cases thus become pretextual-religious-reason cases and mixed-motive cases.

The rare and mostly theoretical no-religious-reason cases also lead to entanglement. Requiring churches to state a religious reason to invoke the ministerial exception would lead courts to evaluate that reason. Is it really religious? Is it really the reason? Is it pretextual? Plaintiffs would argue that many religious reasons are not really religious, just as respondents argue that few disputed questions are religious. Such entanglements would arise far more often than true cases of no religious reason. More fundamentally, the lower courts have properly viewed decisions about ministers as "*per se* religious matters." *Petruska*, 462 F.3d at 304 n.7; see Pet. Br. 24-25.

If a church ever dismisses a minister for stated reasons wholly unrelated to religion, the Court can consider whether to make an exception. But no such

issue is presented here; the Church's explicitly stated reason is firmly rooted in religious teaching.

2. The EEOC's fallback position is that any ministerial exception should be limited to "those employees who perform exclusively religious functions" and have "no secular equivalent." EEOC 51. This is an empty category.

No ministers have "exclusively" religious functions. Pastors manage church finances, supervise personnel, maintain buildings, and solicit contributions. All these tasks have secular equivalents. The more senior a minister becomes, the more he is burdened with administration. Under the EEOC's test, even a bishop is not a minister: He supervises the property and finances of the diocese like a corporate CEO.

3. In the end, because respondents view religious functions and ecclesiastical office as irrelevant, EEOC 48, Perich 45, 61, they would let all clergy sue their churches. And because respondents think that hardly any question is religious, these clergy could pursue any claim, with at most some limit on the evidence they could offer.

A Catholic priest dismissed for poor performance and lack of commitment could sue his bishop. *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008). A nun could sue the Pontifical University that denied her tenure as a canon-law professor. *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996). A rabbi could sue the temple that judged her performance unacceptable. *Friedlander v. Port Jewish Center*, 588 F. Supp. 2d 428 (E.D.N.Y. 2008). White males could claim they were passed over because of affirmative

action.<sup>4</sup> Respondents do not deny that they would open the door to class actions alleging disparate impact and statistical underrepresentation. Pet. Br. 32; see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. ---, part V.B. (forthcoming 2011), <http://ssrn.com/abstract=1883657>.

In all these cases, judges and juries would evaluate ministers' religious qualifications or job performance and churches' religious reasons for decisions. Such a regime would drag courts into religious disputes and have disastrous effects on churches.

## **II. The ministerial exception has a workable scope.**

Based on this Court's cases, as interpreted by four decades of settled lower-court precedent, petitioner has argued that the ministerial exception is limited to plaintiffs who perform important religious functions or hold ecclesiastical office, Pet. Br. 37-50, and to claims that seek reinstatement or would require the court to decide religious questions, including questions about plaintiff's qualifications or job performance. *Id.* at 50-59. Respondents attack the ministerial exception as too broad, too entangling, or too horrible in its consequences.

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<sup>4</sup> For illustrative affirmative-action commitments, see Presbyterian Church (U.S.A.), *Book of Order* §G-9.0104a, [http://oga.pcusa.org/boo/fog\\_ch9.htm](http://oga.pcusa.org/boo/fog_ch9.htm); Episcopal Church (U.S.A.), *Journal of the General Convention of the Episcopal Church 1985*, at 133, [http://www.episcopalarchives.org/cgi-bin/acts/acts\\_resolution-complete.pl?resolution=1985-C023](http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1985-C023).

**A. The ministerial exception is neither overbroad nor entangling.**

1. Underlying many of respondents' criticisms is the notion that the ministerial exception is an overly "broad," "categorical," and "prophylactic" "immunity," inconsistent with case-by-case resolution of constitutional questions. They use these four labels fifty-eight times. This labeling exercise is neither illuminating nor accurate. Respondents opposed certiorari on the opposite ground—that ministerial-exception cases require a "fact-intensive inquiry." EEOC BIO 16-17; see *id.* at 12, 19-20, Perich BIO 19.

The ministerial exception defines a narrow category of cases. Some cases will be easy—pastors or rabbis dismissed for poor job performance. Cases close to the line will indeed require a "fact-specific inquiry." *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000).

2. An important-religious-functions approach does not make nearly everyone a minister. Cf. EEOC 49; Perich 38-39, 41-42. Courts have emphasized religious duties for forty years, and they say "no" when churches overreach—as shown by respondents' only example of alleged overreaching. EEOC 49; Perich 41 (both citing *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981)). *Southwestern Baptist* held that support staff, physical-plant staff, and non-academic administrators of a seminary are not ministers. *Id.* at 284-85.

Respondents also cite cases holding that many teachers in religious schools are not ministers. Perich 26 n.8; EEOC 53 (citing Pet. App. 17a-18a). But this only proves our point. When teachers taught

only secular subjects, or had only incidental religious duties, lower courts excluded them from the ministerial exception. Cert. Reply 5-6. Teachers who teach religion, lead worship, and lead prayer are a different matter.

3. Respondents say that the ministerial exception applies to too many kinds of claims. Four decades of experience show that that is not true either.

First, the ministerial exception applies only to suits *by ministers* (or suits on their behalf, like the EEOC complaint here). Pet. Br. 15. It does not apply to suits by third parties, even if they allege wrongdoing by a minister and negligent hiring or supervision by a church. So tort claims against ministers and churches go forward.

Second, because the exception applies only to suits by ministers, it does not apply to criminal prosecutions, EEOC 47, or to laws that limit the pool of eligible employees to qualified teachers, lawful immigrants, or adults. Immigration and child labor laws remain untouched. Cf. EEOC 29. In terms of interference with religious decisions, such general regulation of the labor pool is not remotely comparable to evaluating a minister's qualifications or job performance or imposing an unwanted minister on a church.

Third, even many suits by ministers go forward. Contract claims go forward when they do not turn on religious questions. *Supra* 9. Tort claims, such as those arising from unsafe working conditions, go forward. *Rweyemamu*, 520 F.3d at 208. Sexual-harassment claims, when separable from a claim of entitlement to a ministerial position, go forward.

*Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). The claims that are barred are those that challenge a church’s right to hire, fire, evaluate, or make rules for its own ministers.

4. Respondents claim it is inappropriate to apply the ministerial exception to schools. EEOC 52-53; Perich 32. Perich describes the Church’s school as “commercial”—some twenty-nine times. This argument misstates the law and mischaracterizes religious schools.

The ministerial exception applies to “religious institution[s],” not secular businesses. Pet. App. 16a-17a. Hosanna-Tabor clearly qualifies. *Ibid.* Its school has never even been separately incorporated. Pet. Br. 3. A religious nonprofit does not become “commercial” the minute it charges a fee for service. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (rejecting “commercial” characterization as applied to nonprofit organization). Religious schools have long received constitutional protection alongside churches. *Catholic Bishop*, 440 U.S. 490.

Respondents’ “commercial” label also misunderstands schools that impose important religious duties on their teachers. Schools like Hosanna-Tabor’s exist to transmit the faith to children already in the church and to share the faith with interested newcomers. That is why Hosanna-Tabor runs a school, why it carries on despite deficits, Pet. Br. 3 n.1, and why it subsidizes the school with church funds and member contributions.<sup>5</sup>

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<sup>5</sup> Perich’s claim that “80% of the funding for LCMS schools came from tuition,” Perich 3, is both irrelevant and mistaken.



Hosanna-Tabor's school is a religious enterprise and not merely "a substitute for compulsory public education." Perich 32. Not even respondents claim that government could regulate the content of the religious curriculum directly. But they would regulate that content indirectly, dictating that teachers who flout it can still teach it. The government can regulate the school's secular functions, but it can and must do so without regulating the selection of ministers. *Supra* 13-14.

5. Respondents also claim that the ministerial exception is entangling. EEOC 48-49; Perich 56. But it is far less entangling than respondents' invitation to probe deeply into every case and decide as much as possible. Under the ministerial exception, most cases are easy. Bishops, priests, rabbis, pastors, assistant pastors, theology professors, church governance officials, and full-time religion teachers are obviously covered if they challenge a church's evaluation of their job performance. Janitors, secretaries, accountants, and bus drivers are obviously not covered. Even this case is easy: Respondents no longer deny that Perich performed important religious functions and held ecclesiastical office. Perich 45, 61.

If respondents are serious about preserving any limitations on what courts can decide, then all these cases become difficult under their approach. The court must evaluate the arguments each side plans

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This is the figure for pre-schools. LCMS, *Lutheran School Statistics 2* (2004), <http://classic.lcms.org/graphics/assets/media/dcs/04-05schlstats.pdf>. For elementary schools, 48% comes from tuition and fees, 42% comes from the congregation's budget, and 10% comes from "other." *Id.*

to make, and even what evidence plaintiff plans to introduce. EEOC 41; Perich 54. The court must resolve disputes over the nature of each side's arguments and over what questions are religious. Parts of the case could go forward and parts, perhaps, could not.

In the end, if respondents' narrow view of what counts as a religious question prevails, all cases would reach the merits. Courts would be deciding questions that are religious in fact and religious under this Court's precedents. *Supra* 4-6, 10, 14-17. They would be dictating to churches who will perform important religious functions.

**B. The ministerial exception applies to retaliation claims.**

Finally, respondents claim that the ministerial exception should not apply to retaliation claims. EEOC 42-47; Perich 39-40. But no court has treated retaliation claims differently,<sup>6</sup> and with good reason.

1. In any gradually escalating dispute, retaliation is easy to allege. Once a minister makes any comment about discrimination, any adverse employment action that follows might be retaliatory. He cannot be terminated, suspended, or moved to a less sensitive

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<sup>6</sup> *Petruska*, 462 F.3d at 307-08 & n.11; *Roman Catholic Diocese*, 213 F.3d at 798-99; *Starkman v. Evans*, 198 F.3d 173, 174-75 (5th Cir. 1999); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 700 (7th Cir. 2003); *Elvig*, 375 F.3d at 965; *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1300-01 (11th Cir. 2000); *Catholic University*, 83 F.3d at 457; *Van Osdol v. Vogt*, 908 P.2d 1122, 1125-34 (Colo. 1996); *Pardue v. Center City Consortium Schools*, 875 A.2d 669, 673 (D.C. 2005); *Williams v. Episcopal Diocese*, 766 N.E.2d 820, 821-22 (Mass. 2002).

position without risking a retaliation claim. Retaliation is a broad concept. *Thompson v. North American Stainless*, 131 S.Ct. 863, 868 (2011). If retaliation claims are outside the ministerial exception, plaintiffs will plead every case as a retaliation claim.

Retaliation claims present the same problems as other employment claims by ministers: Plaintiff claims she was a victim of retaliation; the church claims she was a bad minister. A jury cannot resolve that dispute without assessing the minister's religious performance.

Here, respondents' retaliation claim is also an attack on the Church's rules for ministers. Perich violated Church teaching and was found unfit for ministry; that religious teaching is "an independent and adequate ground" for an employment decision. *Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008). Perich now challenges that teaching as illegitimate. To resolve that claim, the court must assess the effect of flouting church teaching on the minister's continued effectiveness and "explore the doctrines of the [church] that define the role of its ministers." *Ibid.*

2. There is nothing extreme about the Church's teaching that ministers have to resolve disputes over fitness for ministry within the church. Secular employers may require *all* employees to arbitrate discrimination claims. *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Respondents have no answer to the much older and narrower rule that churches may "create tribunals \*\*\* for the ecclesiastical government of \*\*\* [their] officers." Pet. Br. 53 (quoting *Serbian* and *Watson*). The two procedures

are not identical, but they are similar. Each limits access to the courts, which is what respondents find so shocking. The Synod's dispute-resolution procedure is independent of the employer (the local church), guarantees procedural fairness, and mandates unbiased panel members. Pet. App. 76a-104a; LCMS Brief 16-24; see Religious Tribunal Experts Brief (discussing other traditions).

3. Respondents' parade of horrors, from OSHA complainants to grand jury witnesses, EEOC 44-47, Perich 39-40, has not happened. The ministerial exception has been the law for forty years, but respondents offer almost no examples of the consequences they fear. They cite *no* examples of retaliation for reasonable-accommodation complaints, OSHA complaints, or for testifying in criminal proceedings—all are purely hypothetical. EEOC 44-47; Perich 39-40.

Moreover, barring retaliation claims by ministers does not prevent the government from pursuing its legitimate interests. This is illustrated by the only two examples respondents cite.

The EEOC's example is a sexual-harassment claim, EEOC 45, which the court treated as a tort that is separate from the employment decision. *Elvig*, 375 F.3d at 960. Thus, while a minister claiming sexual harassment cannot challenge her termination, she has powerful remedies for the harassment itself: damages for emotional distress and loss of reputation, punitive damages, and attorneys' fees, 42 U.S.C. §1981a (2006), similar remedies under state laws, and tort claims for assault or intentional infliction of emotional distress.

The same is true in Perich’s example of a minister allegedly fired for reporting possible sexual abuse. Perich 40 (citing *Weishuhn v. Catholic Diocese*, 787 N.W.2d 513 (Mich. Ct. App. 2010)).<sup>7</sup> The government can criminally prosecute the abuser, impose tort liability on the abuser, impose tort liability on the church for negligent supervision, and make evidence of retaliation or other cover-up admissible in the tort case. It can impose mandatory reporting requirements. It can prosecute individual retaliators under the laws cited at EEOC 47, or for obstruction of justice. It can create many remedies; what it cannot do is give a minister a claim to be hired or retained as a minister. Retaliation claims are never the only way to pursue the government’s interest; they are only one possibility among many.

4. Nor is a bar on some claims or remedies unique to the ministerial exception. Many claims and remedies are barred because the resulting litigation would be too problematic or too threatening to other constitutional values. Familiar examples include governments’ power to retaliate against their employees’ speech, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the actual-malice rule in defamation, *New York Times v. Sullivan*, 376 U.S. 254 (1964), and the absolute immunity of judges and prosecutors, *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009). Respondents can imagine hypotheticals that seem easy, but “the easy cases bring difficult cases in their wake.” *Id.* at 864. Within the scope of the ministerial exception, nearly

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<sup>7</sup> The facts in *Weishuhn* do not match Perich’s description. Compare Perich 40 with Brief in Opposition 3-6, *Weishuhn*, No. 10-760. Many incidents and parent complaints culminated in plaintiff’s dismissal. The alleged abuser was unconnected with the school, so the school had no reason not to report him.

all the cases would be hard, because they turn on religious judgments about the qualifications and job performance of ministers.

5. Finally, respondents' hypotheticals are easily distinguished. Respondents fear two things: retaliation for filing claims that fall outside the ministerial exception (such as sexual harassment or OSHA), and retaliation for reporting wrongdoing directed at third parties. But if either scenario were ever to become a serious problem, the Court could allow those categories of retaliation claims to proceed. Such a rule would have substantial costs, because the resulting retaliation claims would raise the same problems as other ministerial-exception cases. But it would solve respondents' fears for third parties and for claims outside the ministerial exception.

These issues are not presented here. Perich's threatened disability complaint falls squarely within the ministerial exception and has nothing to do with third parties. Even if there were separate rules for these other sets of cases, her retaliation claim would still fall within the exception.

### **III. Perich's suit is barred by the ministerial exception.**

#### **A. Perich performed important religious functions and held ecclesiastical office.**

Perich now concedes that she performed important religious functions and held ecclesiastical office. Perich 45, 61. The EEOC does not dispute it. Rather than challenging these points directly, respondents try to undermine them indirectly, repeatedly pointing out that contract teachers and called teachers

performed the same duties. *E.g.*, EEOC 33; Perich 45.

Respondents ignore the undisputed fact that contract teachers were hired only if no called teachers were available. Pet. Br. 39-40. Perich identified only one contract teacher at Hosanna-Tabor, who taught for only one year. J.A. 225. Perich was hired as a contract teacher for less than a year and only in the final stages of completing preparation for her call. Pet. App. 3a. Entrusting important religious functions to these occasional contract teachers does not show that the religious functions were unimportant, or that an important-religious-functions standard is overbroad. And Perich's ecclesiastical office makes her an a fortiori case.

In the Synod as a whole, contract teachers are more numerous. Perich 5. This is because Synod schools face a shortage of synodically-trained teachers.<sup>8</sup> Whether these difficulties have changed the roles of called and contract teachers at other Synod schools is not a question presented here. At Hosanna-Tabor, the preference for called teachers remains strong.

**B. Perich seeks reinstatement or its financial equivalent.**

Respondents also seek unconstitutional remedies. Both complaints demand reinstatement, Pet. App. 73a, J.A. 17, which results "in government appointment of ministers over the objections of churches." Pet. Br. 28.

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<sup>8</sup> See Commission on Ministerial Growth and Support, *Teaching 2000 Survey 1*, <http://classic.lcms.org/graphics/assets/media/CMGS/qualreport.pdf>.

The EEOC now concedes that “reinstatement may pose entanglement concerns.” EEOC 33. Perich now announces that she “no longer seeks reinstatement.” Perich 21. These retreats suggest doubts about the full implications of respondents’ doctrinal claims.

Perich also claims that she never sought reinstatement “of her religious status as ‘called.’” Perich 15. This is inaccurate. Both complaints sought reinstatement “*to the position from which she was terminated*” with pay and benefits equal to that which she would have attained had she not been terminated.” Pet. App. 73a, J.A. 17 (emphasis added). That “position” was called teacher and commissioned minister, which has different status, tenure, and “benefits” from the position of contract teacher.

Respondents still demand back pay, front pay, damages for emotional distress, punitive damages, and attorneys’ fees. EEOC 34-35; Perich 59-61; J.A. 17-18; Pet. App. 73a-74a. Some of these remedies are the exact monetary equivalent of reinstatement, calculated by the value of the job. All these remedies depend on the forbidden judgment that Perich was entitled to remain in her ministerial position. Some of these elements of recovery are highly subjective, and in Michigan, there is no cap on the liability of small employers. Compare 42 U.S.C. §1981a with Mich. Comp. Laws §37.1606 (West 2001).

A large judgment for damages or attorneys’ fees would destroy this financially struggling church and others like it. Fear of such liability would effectively deprive many churches of the right to discharge a minister, no matter what he did. Pet. Br. 51-52. Half the churches in America have 50 or fewer regularly participating adults. Mark Chaves, *Congregations in*



*America* 18 (2004). And churches with only one employee are subject to Michigan employment-discrimination laws. Mich. Comp. Laws §37.1201(b), §37.2201(a) (West 2001).

Perich says churches need only avoid violating the discrimination laws, Perich 60-61, but that is naïve. The preponderance-of-the-evidence standard tolerates a 49% error rate, and employer state of mind is difficult to assess. A church's teachings, practices, and vocabulary will often be unfamiliar to judges and juries, who may be skeptical or even hostile. If these cases go forward on respondents' view that courts should just ignore many of the religious questions, then the church's reasons for decision will be ignored, discounted, or distorted into some secular analog. In such a legal environment, no church can assume that it will be vindicated if it just refrains from discrimination. Some churches will act badly on occasion, but under respondents' proposal, many more churches will be entangled in high-risk litigation for acting on religious judgments about their ministers.

**C. Perich's claim would entangle the courts in religious questions.**

The fundamental question in this case is whether Perich was entitled to her ministerial position. The highest church authority to consider the question decided that she was not. Perich now seeks a court order overturning that determination. This is an inherently religious question. *Supra* 15.

This religious question raises subsidiary religious questions: Did the congregation rescind her call because she defied church teaching? Could she be

effective at Hosanna-Tabor after doing so? Would the congregation have rescinded her call anyway, for insubordination? These are questions about religious authority, the application of religious doctrine, and the congregation's religious reasoning. Respondents claim that courts can ignore these questions and simply override the Church's religious reasons under *Smith*. But *Smith* said that courts cannot take sides in "controversies over religious authority." *Supra* 6-7.

Respondents raise additional religious questions by insinuating pretext. They claim that the Church did not invoke its religious reasons soon enough, EEOC 42, Perich 34-35, that it did not discipline Perich harshly enough, Perich 34, that its teaching is not absolute enough, Perich 33-34, that it does not discriminate enough, EEOC 4, Perich 18, and that two closely related and cumulative reasons for rescinding Perich's call were somehow inconsistent, EEOC 41. All of these assertions are apparently intended to imply that the Church did not really have a religious reason for rescinding Perich's call.

Respondents argue these points only implicitly; spelling out their arguments would clearly raise religious questions. For example, respondents' repeated claim that the teaching on dispute resolution was not invoked soon enough rests on implicit assertions about the teaching—that it does not apply to Perich, or that it was so obscure that she couldn't know what the Church was talking about. The Church told Perich exactly what she had done wrong; there was no more need to explain the underlying rule than if she had been discharged for drunkenness. Pet. Br. 58.

Perich’s claim that she didn’t know about the dispute-resolution policy, EEOC 8, Perich 15, is not remotely credible. She was a lifetime Lutheran, with eight courses in Lutheran theology and eleven years in Lutheran schools. Pet. Br. 5, 44. But even if she were unaware, that would be irrelevant. Like “[a]ll who unite themselves” to a religious body, she did so “with an implied consent to [its] government.” *Watson*, 80 U.S. at 729.

Another example is Perich’s claim that she remained “on the LCMS roster.” Perich 34. This argument, too, rests on implicit religious assertions—that violation of church teaching must lead to removal from the roster and that Hosanna-Tabor had authority to remove her. These implicit assertions are mistaken. The very bylaw cited by Perich (at 14) indicates that individuals can remain on the roster even when they have “unresolved issues involving fitness for ministry.”<sup>9</sup> Hosanna-Tabor had no authority to remove Perich from the Synod’s roster, no authority to decide Perich’s fitness for other congregations, which issue their own calls, and no religious reason to do more than it did.

The larger point is that courts should not be resolving these religious disputes at all—much less resolving them against the Church on the basis of misleading insinuations.

#### **D. Respondents pleaded no disability claim.**

Respondents devote pages to a disability claim they never filed. EEOC 5-7; Perich 7-11. They never filed it because the Church far exceeded the re-

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<sup>9</sup> LCMS Bylaws §2.11.2.2, [www.lcms.org/Document.fdoc?src=lcm&id=928](http://www.lcms.org/Document.fdoc?src=lcm&id=928).

quirements of law in its effort to accommodate Perich's disability. Pet. Br. 8-9. It held her job open from June to January. It was not required to suffer "undue hardship," 42 U.S.C. §12112(b)(5)(A) (2006), but it did, combining three grades into one classroom and enduring the inevitable parent complaints and loss of educational quality. Pet. Br. 8. It was not required to keep Perich on full pay through the fall semester, but it did, J.A. 166-68, 200, despite its financial difficulties. Cf. 29 U.S.C. §2612(a)(1)(D), 2612(d) (2006) (requiring only twelve weeks of unpaid leave).

Relations deteriorated as hardship mounted and diagnoses and projected return dates came and went. *E.g.*, J.A. 126-27. On February 13, some members of the school's volunteer Board expressed their medical concerns in ill-advised ways. But they were entitled to require additional medical information and a second medical examination to answer questions about Perich's ability to perform the job.<sup>10</sup> And by then, Perich had already been replaced for that semester. J.A. 158-59. The Board's remarks were not an employment action.

The only cause of action alleged is retaliation in terminating Perich's employment on April 10, J.A. 16, Pet. App. 72a-73a, 71a, which is when the congregation rescinded her call, J.A. 211-12. That action could be taken only by the congregation, not the Board. Pet. Br. 4.

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<sup>10</sup> 29 C.F.R. §1630.14(c) (2010); EEOC Enforcement Guidance, *Disability Related Inquiries* ¶17 (2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html#8>.

## CONCLUSION

This Court should confirm the ministerial exception and hold that respondents' claims are barred. It is now undisputed that Perich performed important religious functions and held ecclesiastical office. She was removed for violating Church teaching, and she asks the courts to override the decision of the highest church authority to consider her fitness for ministry. Such a result cannot be squared with the First Amendment.

The judgment of the Sixth Circuit should be reversed, and the judgment of the District Court should be reinstated.

Respectfully submitted.

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