Supreme Court, U.S.
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In the

Supreme Court of the United States

MADELINE WEISHUHN,
Petitioner,

v.

CATHOLIC DIOCESE OF LANSING
and ST. MARY'S CATHOLIC CHURCH,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the ministerial exception grounded in the First Amendment should be so broadly defined as to bar employees of religious institutions, such as teachers of secular and religious classes, from asserting a state civil rights claim where the employment action does not involve selection of employees or an examination of church doctrine?

2. Whether an employee of a religious institution who is found to be a ministerial employee should be barred from bringing a state whistleblowers' action when the employee was discharged for reporting suspected violations of state law which the employee was required to report?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Madeline Weishuhn (hereafter referred to as "Plaintiff"), respectfully petitions for a writ of certiorari to review a decision of the Michigan Court of Appeals.

OPINIONS BELOW

The order of the Michigan Supreme Court (App. at 52a) is unreported. The opinion of the Michigan Court of Appeals after dismissal on remand (App. at 1a–18a) is reported at 287 Mich. App. 211. The opinion of the trial court (App. at 19a-34a) which was incorporated in the order after remand granting defendant's second motion for summary disposition pursuant to MCR 2.116(C)(4) is unreported. The first opinion of the Michigan Court of Appeals is reported at 279 Mich. App. 150. The opinion of the trial court (App. at 35a-40a) which was incorporated in the order denying defendant's second motion for summary disposition pursuant to MCR 2.116(C)(4) is unreported. The opinion of the trial court (App. at 41a-51a) which was incorporated in the order denying in part and granting in part defendant's motion for summary disposition is unreported.

JURISDICTION

The Michigan Supreme Court order denying application for leave to appeal was entered on September 9, 2010 (App. at 52a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the scope of the constitutionally created ministerial exception, and the application of employment and civil rights statutes to religious institutions and their employees.

A. The Creation of the Ministerial Exception.

One of the first cases to adopt what was later referred to in cases as the "ministerial exception" was the Fifth Circuit case of *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). In *McClure*, a commissioned minister with the Salvation Army brought a Title VII action against her employer alleging, "she had received less salary and fewer benefits than similarly situated male officers." *Id.* at 555-56. The Fifth Circuit held the district court lacked subject matter jurisdiction over the case because application of Title VII to a minister and her employer would result in an encroachment by the State into an area of religious freedom, which is forbidden by the principles of the Free Exercise Clause of the First Amendment. *Id.* at 560.

The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law respecting an establishment of

religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I. The First Amendment applies to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Establishment Clause guarantees governmental neutrality with respect to religion and guards against excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Free Exercise Clause generally prohibits governmental regulation of religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). Eight circuits have explicitly adopted the ministerial exception. *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3rd Cir. 2006), *cert. denied*, 127 S.Ct. 2098 (2007).

In addition to Title VII claims, some federal courts have held that the ministerial exception bars claims under the Americans with Disabilities Act, the Age Discrimination in Employment Act, and some common law claims. *Rosati v. Toledo*, 233 F. Supp. 2d 917 (N.D. Ohio 2002) (The Northern District of Ohio found that a nun was a ministerial employee and could not bring an Americans with Disabilities Act claim); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (The Sixth Circuit held a pastoral resident at a religiously affiliated hospital fell within the ministerial exception, and was barred from bringing an Age Discrimination in Employment Act claim); *Petruska*, 462 F.3d at 312 (The Third Circuit held the ministerial exception applied and dismissed not only the Plaintiff's Title VII claims, but her state civil conspiracy, negligent retention and negligent supervision claims, however, permitted a state contract claim to move forward). Moreover, several appellate state courts, like the present case, have applied the ministerial

exception to state civil rights laws. *Coulee Catholic Sch. v. Labor Indus. Review Comm'n*, 320 Wis. 2d 275; 768 N.W.2d (2009) (The Wisconsin appellate court held a first grade teacher was a ministerial employee and was barred from bringing claims under the Wisconsin Fair Employment Act for age discrimination).

Many courts have adopted the ministerial exception because "[t]he right to choose ministers without government restriction underlies the well-being of a religious community...for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985). Federal court cases have cautioned, however, that "[t]he ministerial exception does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes." *Weishuhn v. Catholic Diocese of Lansing*, 279 Mich. App. 150; 750 N.W.2d 483, 489 (2008), citing *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000); *see also Hartwig v. Albertus Magnus College*, 93 F. Supp. 2d 200, 211 (D.Conn. 2000) ("the Free Exercise Clause does not shield all employment decisions by religiously-affiliated institutions."). The Third Circuit has explained that the ministerial exception "requires federal courts to determine only whether the resolution of the Plaintiff's claim would limit a church's right to choose who will perform particular spiritual functions." *Weishuhn, supra,* citing *Petruska*, 462 F.3d at 305 n 8.

As set forth above, most federal circuits have adopted the concept that there is a ministerial

exception necessitated by the First Amendment. The next logical inquiry then is how the courts have decided who qualifies as a ministerial employee.[1]

B. Adoption of the Primary Duties Test by Most Federal Circuits to Determine Whether an Employee Qualifies as a Ministerial Employee.

To determine whether an employee qualifies as a minister for purposes of the exception, most circuits have adopted the primary duties test first presented by the Fourth Circuit in the case of *Rayburn,* 772 F.2d at 1169. In *Rayburn*, the Fourth Circuit set forth the primary duties test which considers whether "the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation of religious ritual and worship." The Michigan Court of Appeals in the first appeal in this case explicitly recognized application of the ministerial exception in Michigan, and essentially adopted the primary duties test by instructing the trial court to look at the totality of the Plaintiff's duties and responsibilities, her position, and her function. *Weishuhn*, 279 Mich. App. at 152.

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[1] Courts have also held for the ministerial exception to apply, the employer must be a religious institution. *Hollins*, 474 F.3d at 225. However, whether the employer is a religious institution is not an issue in this case. Petitioner admits that Respondent is a religious institution.

The Second Circuit noted in a 2008 case that,

> [w]hile we agree that courts should consider the 'function' of an employee, rather than his title or the fact of his ordination...we still find this approach too rigid as it fails to consider the nature of the dispute... [H]owever high in the church hierarchy he may be, a plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court. *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008).

The decision seems to suggest that in determining whether an employee is a minister the Courts should consider the particular wrongs by the church and whether they are non-religious in nature. However, most Circuits have not adopted this view and instead have consistently held that the primary duties test should apply. Once a Court decides that the ministerial exception applies, the next inquiry is what, if anything, does the Court do next.

C. What Courts Do Once it is Decided that the Employee Qualifies as a Ministerial Employee.

Once the court decides that an employee qualifies as a ministerial employee, the circuits differ as to how that ministerial employee will be treated. Most circuits have found that a finding that an employee is a ministerial employee, bars most, if not all, claims against the church by that employee. The First, Third, Ninth, and Tenth Circuits have treated the exception as an affirmative defense under Rule 12(b)(6). *EEOC v. Hosanna-Tabor Evangelical Lutheran Church &*

Sch., 597 F.3d 769 (6th Cir. 2010), citing, *Petruska*, 462 F.3d at 302; *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989). The Sixth and Seventh Circuits have interpreted the exception as jurisdictional in nature and an appropriate basis for a motion to dismiss pursuant to Rule 12(b)(1). *EEOC v. Hosanna-Tabor Evangelical Lutheran Church*, *supra*, citing *Hollins*, 474 F.3d at 225; *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006), *cert. denied,* 127 S.Ct. 190 (2006). The Fifth and Eleventh Circuits treat the ministerial exception as a mandate to interpret the discrimination laws as not applying to claims between ministers and their church. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church, supra,* citing *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *McClure*, 460 F.2d at 560.

Although most circuits have barred employment claims, such as Title VII claims, where the employee has been found to be a ministerial employee, circuits such as the Ninth Circuit have allowed employment claims to go forward even where the Court has found the employee to be a ministerial employee. For example, in *Bollard*, 196 F.3d 940, the case involved a novice in the Society of Jesus, commonly known as Jesuits, who left the Order before taking his vows as a Priest because he was subjected to pornographic materials and inappropriate and unwelcome sexual discussions by his superiors. He subsequently brought a sexual harassment claim under Title VII. The Ninth Circuit found that the ministerial exception was not

triggered under the Free Exercise clause because the church did not offer a religious justification for the harassment and neither the employee nor the church alleged that the church had sought to prevent the employee from taking the vows of priesthood. *Id.* at 959. The Ninth Circuit also analyzed the case under the Establishment Clause and found that the suit did not present a danger of entanglement between church and state sufficiently significant to violate the Establishment Clause. *Id.* at 959. The Ninth Circuit followed the *Bollard* case in *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004). In *Elvig*, a minister claimed her supervisor sexually harassed her and subjected her to a hostile work environment and that she was terminated and prevented from obtaining employment with another church. *Id.* The Ninth Circuit held the plaintiff could bring an action under Title VII for sexual harassment, however, could not proceed in civil court with her Title VII claim based on her termination in retaliation for making a complaint of sexual harassment. *Id.* at 955.

These cases demonstrate that there is conflict among the federal circuits whether a finding that an employee is a ministerial employee will be a complete bar to that employee asserting employment related claims against the church employer.

D. The Michigan Court of Appeals' Decisions in this Case.

In the present case, after remand, the trial court concluded the plaintiff was a ministerial employee and found the Court lacked jurisdiction and dismissed the plaintiff's civil rights action. A panel of the Michigan Court of Appeals affirmed the trial court's conclusion

that the plaintiff was a ministerial employee and found the plaintiff was barred from bringing both her civil rights claim for retaliation and her whistleblowers' claim. (App. at 18a). The Court of Appeals held that termination of a ministerial employee by a religious institution is an absolutely protected action under the First Amendment, regardless of the reason the termination. *Id.*

In the decision, the Michigan Court of Appeals reiterated that the court, by a different panel, had concluded the ministerial exception exists in Michigan and essentially adopted the primary duties test. *Id.* at 5a-6a. The first Court of Appeals panel remanded this case back to the trial court to decide whether plaintiff was a ministerial employee. The trial court then concluded plaintiff was a ministerial employee and this matter was then appealed again to the Michigan Court of Appeals.

The Michigan Court of Appeals found there was no error with the trial court's determination that plaintiff's duties were primarily religious in nature. (App. at 8a-10a). The Michigan Court of Appeals' decision found that although the plaintiff was hired part-time to teach, in part, mathematics, she also taught religion, was actively involved in religious planning, planned student masses and prepared students for confirmation and reconciliation services. *Id.* at 3a. In concluding that the plaintiff was a ministerial employee, the Michigan Court of Appeals also relied on the fact that plaintiff stated she incorporated religious teachings into her mathematics lessons. *Id.* at 9a.

The Michigan Court of Appeals, after remand, applied the four factors which the first Court of Appeals' decision enumerated in deciding that the plaintiff was a ministerial employee, which included:

> (1) Whether [plaintiff] had primarily religious *duties* and *responsibilities* in the sense that her primary *duties* consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship; (2) Whether [plaintiff's] *duties* had religious significance; (3) Whether [plaintiff's] *position* was inherently, primarily, or exclusively religious, whether that *position* entailed proselytizing on behalf of defendants, whether that *position* had a connection to defendant's doctrinal mission, and whether that *position* was important to defendant's spiritual and pastoral mission; and (4) Whether [plaintiff's] *functions* were essentially liturgical, that is, related to worship, and whether those *functions* were inextricably intertwined with defendants' religious doctrine in a sense that [plaintiff] was intimately involved in the propagation of defendants' doctrine in the observance and conduct of defendants' liturgy by defendants' congregation. *Id.* at 6a-7a. (Italics in the original).

The panel of the Michigan Court of Appeals, after remand, also held that the plaintiff's whistleblowers' claim was subject to the ministerial exception. *Id.* at 17a-18a. The Michigan Court of Appeals noted that Michigan courts had not addressed the applicability of the ministerial exception to whistleblowers' claims. *Id.* The Court recognized that it seemed "unjust that

employees of religious institutions can be fired without recourse for reporting illegal activities, particularly given that members of clergy, as well as teachers, are mandated reporters. MCL 722.623(1)(a)." *Id.* at 16a.

REASONS FOR GRANTING THE PETITION

The decision below demonstrates the conflict and confusion that exists among the circuits as to the application of the ministerial exception.

First, federal circuit court decisions and state court decisions are in conflict with regard to who qualifies as a ministerial employee. For example, the Seventh Circuit held that a church organist was a ministerial employee in *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied,* 127 S.Ct. 190 (2006). However, a Maryland state appellate court found that a church organist did not qualify as a minister under the ministerial exception in a 2008 decision. *Archdiocese of Washington v. Moersen*, 399 Md. 637; 925 A.3d 659 (MD. 2007), *cert. denied*, 128 S. Ct. 1217 (2008).

Once an employee is found to be a ministerial employee, a second conflict arises between federal circuits and state courts as to which claims the employee is barred from bringing against the employer church.

I. The Federal Circuit and State Court Decisions on Who Qualifies as a Ministerial Employee and What Actions can be Brought by that Employee are in Conflict.

The breadth of the ministerial exception differs among the federal circuits and state court decisions. As indicated, infra, instead of attempting to steer a ministerial Title VII claim through the demands of the First Amendment, the majority of the courts have decided that Title VII claims are barred altogether under the First Amendment Establishment Clause because of the danger of excessive government entanglement. However, this Court enumerated the test for determining whether a statute is permissible under the Establishment Clause in *Lemon v. Kurtzman* as follows:

"First, the statute must have a secular legislative purpose; Second, its principal or primary effect must be one that neither advances nor inhibits religion; Finally, the statute must not foster 'an excessive government entanglement with religion'." Notably, however, the ministerial exception analysis often requires a court to engage in a substantial debate regarding who qualifies as a "minister" as seen from the primary duties test enumerated above without taking into account what, if any, religious justification there was for the employment action. The federal circuit court opinions and the state court opinions have differed vastly with regard to the scope of the ministerial exception and who qualifies as a minister due to this entanglement while denying adjudication of Title VII Civil Rights claims and other employment claims to employees who have suffered egregious actions with no religious justification.

The federal circuit decisions and state court decisions on who qualifies as a minister under the ministerial exception are in conflict. As set forth above, in the *Moersen* case out of Maryland, and the *Tomic* case out of the Seventh Circuit, both involving organists, the courts conflicted in whether the employee qualified as a minister. In the more recent *Moersen* decision, the Maryland Court held that the employee was not a minister. *Moersen*, 399 Md. at 669. The *Moersen* case involved an organist, who reported that he had been sexually abused by a parish choir master in the past. *Id.* After his report, his employment deteriorated until he was ultimately terminated. *Id.* In contrast, in a Michigan case involving a music director the employee was found to be a ministerial employee. *Assemany v. Archdiocese of Detroit*, 173 Mich. App. 752; 434 N.W.2d 233, 238 (1988). In *Assemany*, a music director brought a discrimination claim against the church after he was told that he was too old for the job and the congregation was becoming a black parish and it was time it had a black organist. The Fourth Circuit also held that a director of music ministry was a ministerial employee in *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000). The plaintiff in the *Roman Catholic Diocese of Raleigh* case asserted a sex discrimination claim based on a reassignment of duties to men and subsequently being discharged in retaliation for bringing that charge. *Id.* In the Seventh Circuit decision of *Tomic*, 442 F.3d at 1041, the Court held that a church organist was found to be a ministerial employee. The plaintiff in *Tomic* asserted an age discrimination claim, although the church argued that the plaintiff was instead terminated due to a dispute between him and the

Bishop's assistant, concerning the suitability of particular music for Easter services. *Id.*

Accordingly, unlike the other cases involving a church organist or music director, the *Tomic* case possibly involved a religious justification for the employee's termination. However, the Seventh Circuit decision, like the Fourth Circuit and the Michigan decision, barred the employment action because of the finding that the employee was a ministerial employee irrespective of the justification for the employment action. In contrast, the more recent decision by the Maryland appellate court allowed the organist to bring his claim forward based upon the conclusion that he was not a minister.

Like the conflict in the court decisions identified above involving church organists and music directors, there has been a wide range of opinions concerning whether lay teachers employed by churches fall within the ministerial exception, as set forth more fully in Subsection A, infra.

A conflict in the federal circuits has also risen once the Court finds that the employee qualifies as a minister. Most federal circuits and state courts bar Title VII claims and employment claims altogether. However, some Courts have allowed hostile work environment Title VII claims while other federal circuits have also barred such claims from adjudication. As set forth above, in *Elvig v. Calvin Presyterian Church*, 375 F.3d 951 (9th Cir. 2004), the Ninth Circuit held the plaintiff was permitted to assert a harassment claim reasoning that the harassment was not a protected employment action because it did not go to the selection of the church's ministers, nor

did the defendant assert a doctrinal reason which justified the harassment. In contrast, a recent Tenth Circuit decision declined to follow the Ninth Circuit's reasoning and dismissed a hostile work environment claim brought by an employee who was found to be a ministerial employee. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010). It therefore remains for this Court to decide not only the conflict with regard to Title VII claims brought by ministers, but how far beyond Title VII with regard to employment actions will the Court bar employees from asserting claims when they are found to be ministerial employees.

Although the Court did not analyze the ministerial exception, in *Brock v. Wendell's Woodwork Inc.*, 867 F.2d 196 (4th Cir. 1989), the Fourth Circuit held the United States has a substantial interest in regulating child labor and that child employment is an appropriate area for a state to exercise broad authority. Therefore, the church was not exempt from Child Labor laws under the Free Exercise Clause in that case. In *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990), the Court rejected a hypothetical argument that the ministerial exception would immunize churches from liability under homicide statutes if they forced their ministers to play Russian roulette as part of the hiring process because, "the Supreme Court has consistently recognized that the religion clauses are subject to a balancing test." In addition, the Third Circuit has permitted state contract claims to be asserted against the church by an employee. See e.g., *Petruska v. Gannon University*, 462 F.3d 294 (3rd Cir. 2006), *cert. denied*, 127 S.Ct. 2098 (2007). The conflicts that have arisen in the federal circuit court

and state court decisions concerning the ministerial exception are highlighted by the decision in the present case.

A. This Case Squarely Presents the Conflict of How Broadly the Ministerial Exception has been Applied and the Unfairness that Results in the Barring of Claims Where no Religious Justification Exists and it is Applied Beyond the Civil Rights Act.

This case involves a lay teacher teaching at a Catholic School in Michigan. The Michigan Court of Appeals found that the Plaintiff taught, in her final year, four mathematics classes and two religious classes each day. (App. at 3a). The Michigan Court of Appeals also found that the Plaintiff assisted with planning Masses and student Liturgies. *Id.* Twice a year, the Plaintiff prepared her seventh and eighth graders for the Sacrament of Confirmation and developed a Reconciliation Service. The Court noted how the Plaintiff acknowledged that as a Christian, she integrated her religious beliefs into her own curriculum by choice. *Id.* at 9a. Notably, neither of the Michigan Court of Appeals decisions in this case discussed the fact that the Plaintiff's employment action was grounded on a discharge where the church-employer had asserted no religious justification.[2] The

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[2] In the present case, the Plaintiff asserted a claim under the Michigan Elliott-Larsen Civil Rights Act, after she was retaliated against for making complaints of sex discrimination in the workplace. Plaintiff also asserted a claim under the Michigan Whistleblowers' Protection Act after being terminated for reporting suspected sexual abuse of a student to the appropriate governmental authority.

Michigan Court of Appeals found that the Plaintiff was a ministerial employee and applied the ministerial exception to bar her from bringing both her state civil rights claim and her state whistleblower claim against the church-Defendant.

In conflict with this case is a recently decided Sixth Circuit case. *See* EEOC *v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010)[3]. In that case, the Sixth Circuit held a teacher who taught six hours of secular courses, but also taught religion four days a week and chapel twice a year, was not a ministerial employee. The plaintiff in *Hosanna-Tabor Evangelical Lutheran Church and School* led each class in prayer three times a day, and in her final year, her fourth grade class engaged in a devotional five to ten minutes each morning. *Id.* The defendant in the case described its staff members, including the plaintiff, as a "fine Christian role model who integrated faith into all subjects." *Id.* Applying the primary duties test, the Sixth Circuit held the teacher was not a ministerial employee concluding the following:

> In this case, it is clear from the record, that [Plaintiff's] primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular text books, but also because nothing in the record indicates the Lutheran Church relied on [Plaintiff] as the primary

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[3] A petition for writ of certiorari was filed to this Court by Hosanna-Tabor Evangelical Lutheran Church and School in October of 2010.

means to indoctrinate its faithful into its theology. *Id.* at 16.

The recent Sixth Circuit case and the present case show the conflict between Court decisions in determining the scope of the ministerial exception.

The present case demonstrates the unfairness of barring a religious employee's claims where there is no religious justification, simply on the grounds that the employee is found to be a minister under the primary duties test. Plaintiff, who is a lay teacher, was discharged because she made complaints of sex discrimination and reported suspected child abuse. No religious justification was ever asserted in the record below by the church-Defendant as to the Plaintiff's discharge. Notwithstanding this, a lay teacher's civil rights and whistleblowers' claims were completely barred by the Michigan Court of Appeals simply because she was found to be a minister under the ministerial exception.

This case highlights the unfairness that results from broadly interpreting the ministerial exception, excluding plaintiffs such as the one in this case, who is a lay teacher, from bringing claims against the church-Defendant. The unfairness is magnified in the present case because not only was the Plaintiff barred from bringing her civil rights action, but the Michigan Court of Appeals also barred her from bringing a claim under the state's whistleblowers' act.

The Michigan Court of Appeals noted that at least one state has explicitly applied the ministerial exception in a whistleblowers' action. *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640 (Fla. Dist. Ct.

App. 3d Dist. 2007). However, in that case, the Florida Court of Appeals considered a whistleblowers' claim brought by a principal of a Catholic School who had complained about her supervisor assaulting and battering her, who then retaliated against her by firing her. *Id.* at 641.

The present case is distinguishable from the Florida case in that the Florida plaintiff did not make a report to a governmental entity nor was she required to lawfully make a report to a governmental entity like the Plaintiff in the present case. In this case, the Plaintiff was discharged after reporting suspected child abuse to the appropriate authorities. The Michigan Court of Appeals recognized that the Plaintiff, as a teacher, was a mandated reporter under Michigan law to report such illegal activities. (App. at 16a, citing, MCL 722.623(1)(a)). The Michigan Court of Appeals recognized the unfairness of their position and indicated that although the Plaintiff would be barred from bringing an action for retaliation its ruling did not reduce or immunize statutory reporters of religious institutions if they fail to meet their mandatory reporting duties because they feared retaliation without civil recourse. *Id.*

B. The Issues Presented by the Conflict is Recurring and of Great Importance.

The aforementioned cases demonstrate the difficult task the court has in examining the role of the employee in relation to the church in order to assess the spiritual nature of the employee's duties, and the conflict in the court decisions as to who qualifies as a ministerial employee. As long as the circuits continue to apply the primary duties test without guidance by

this Court, the conflict will continue to occur. In addition, the courts continue to bar employees from bringing actions when the employee is found to be a ministerial employee even where there is not religious justification for the employment action, creating a grossly unfair result in favor of religion over the compelling interest in prohibiting discrimination. One solution explored in a Law Review article would allow so-called "ministers" to bring a civil rights action where the religious employer is unable to set forth a religious justification for the employment action. Lauren P. Heller, Note, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN'S L. REV. 663 (2007). By focusing the analysis on whether or not there is a religious justification, ministers who are not selected due to church doctrine would still be barred from bringing a claim against the church, e.g., a female who is not selected to be a Priest with a Catholic Church. However, a minister with the United Methodist Church, for instance, would not be barred from making a claim where she was discharged after complaining of sexual harassment by a district superintendent. Notably, the ministerial exception cases have justified disallowing plaintiffs to bring a civil rights claim when found to be ministers based on the church's right to select clergy or decide matters of church governance, faith and doctrine. *Elvig*, *supra*.

However, many of the cases demonstrate that the ministerial exception has been applied far beyond "selection" of ministers and has barred claims by long-term employees who have been terminated in violation of their civil rights. In those circumstances, the

employee was already selected by the church, however, discriminated against for some non-religious reason, yet foreclosed from bringing a claim based simply on the fact that some of their duties and functions touched on the religious and spiritual mission of the church. The issues presented by the conflict in this case will continue until this Court sets guidelines for the federal circuits and state courts to fairly balance the First Amendment rights of the church and the employee's rights under employment statutes, such as Title VII.

II. The Decision of the Michigan Court of Appeals is Incorrect.

A. The Court Below Erred In Concluding that the Plaintiff was a Ministerial Employee.

In the first appeal in this case, the Court of Appeals concluded that the ministerial exception exists in Michigan, and concluded that the exception bars discrimination claims where religious employers employ plaintiffs with religious positions. *Weishuhn,* 279 Mich. App. at 179. The court cautioned, however, that "it is a tailored exception to the application of employment-discrimination and other statutes," and that its application is limited, "because it does not apply to all employment decisions by religious institutions, nor does it apply to all claims by ministers." *Id.* at 159. Remanding the case to the trial court for a determination of whether the Plaintiff was in fact a ministerial employee, the Court of Appeals directed the trial court to consider the following factors:

> (1) Whether [plaintiff] had primarily religious *duties* and *responsibilities* in the sense that her primary *duties* consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship; (2) Whether [plaintiff's] *duties* had religious significance; (3) Whether [plaintiff's] *position* was inherently, primarily, or exclusively religious, whether that *position* entailed proselytizing on behalf of defendants, whether that *position* had a connection to defendant's doctrinal mission, and whether that *position* was important to defendant's spiritual and pastoral mission; and (4) Whether [plaintiff's] *functions* were essentially liturgical, that is, related to worship, and whether those *functions* were inextricably intertwined with defendants' religious doctrine in a sense that [plaintiff] was intimately involved in the propagation of defendants' doctrine in the observance and conduct of defendants' liturgy by defendants' congregation. *Id.* at 178. (Italics in the original).

Following remand, the trial court found that Plaintiff was a ministerial employee.

On appeal, after remand, the Court of Appeals affirmed this decision, but improperly disregarded the court's own instructions and focused on factors outside of those detailed in the first appeal. The Michigan Court of Appeals improperly injected into the analysis an evaluation of the Plaintiff's own personal belief, and failed to focus on whether Plaintiff's position, duties, and functions were secular in nature. In coming to the conclusion that the plaintiff's position as a math

teacher was a ministerial position, the Michigan Court of Appeals relied heavily on an interview with the Plaintiff which appeared in *The Catholic Times*. In this interview, the Plaintiff explained that she did not separate religion from her teaching duties, stating "it's part of who I am and what I teach." (App. at 9a). However, the fact that the Plaintiff has the freedom to express her personal belief in the employment setting does not transform the position, duties, and functions of her employment from a secular position as a math teacher into a ministerial position. Under the Court of Appeals' analysis, any employee who works for a religious institution and maintains personal religious belief is transformed into a ministerial employee. Such a holding impermissibly expands the parameters of the ministerial exception and improperly shifts the focus from the position, duties, and functions, to the beliefs of the individual employee.[4] This effectively gives religious institutions carte blanche to categorize any employees who hold religious beliefs and who express them in the workplace into ministerial employees, permitting religious institutions to avoid review of any employment decisions. This position has been expressly rejected by other courts. *See Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981)

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[4] The problem with this position is easily demonstrated by comparing an employee with the identical job duties as the plaintiff, but who has no religious beliefs. Under the Court of Appeals' rationale, this individual would not be a ministerial employee, but the plaintiff, with the exact same job duties, would be a ministerial employee. Such a result cannot be reconciled with existing case law.

The Michigan Court of Appeals erred in holding the Plaintiff was a ministerial employee. The majority of Plaintiff's classes that she taught were mathematics, even though she also taught religion and planned student mass and confirmation. (App. at 8a). When these facts are applied to the test enunciated in the first Michigan Court of Appeals' decision in this case, it is clear that the correct conclusion is that the Plaintiff was not a ministerial employee. Her primary duties did not consist of teaching or spreading the faith, church governance, or supervision of a religious order. Her participation in religious services was ancillary to her duties as a math teacher, and similarly, her duties had only ancillary religious significance.

Likewise, the plaintiff's position as a math teacher was not inherently, primarily, or exclusively religious. Her employment as a math teacher did not primarily involve proselytizing on behalf of Defendants. Her functions were not essentially liturgical, nor were her main functions as a math teacher "inextricably intertwined" with the Defendants' religious doctrine. Again, the fact that the Plaintiff chose to incorporate her personal religious beliefs into some aspects of her teaching does not transform her secular position as a math teacher, a position which did not require her to be a member of the Catholic faith, into a ministerial position.

Indeed, the conclusion that the plaintiff is not a ministerial employee is well supported by applicable case law. In fact, the majority of the cases involving teachers cited by the Michigan Court of Appeals in the first decision in this case concluded that the teachers were not ministerial employees. *Weishuhn*, 279 Mich.

App. at 164-65. The two cases cited by the Court of Appeals that held the plaintiff-teachers were ministerial employees involved a nun teaching canon law[5] and a director of music ministry at a religious school[6]. These cases are distinguishable from the present case. Plaintiff was not a nun nor did she teach canon law. In addition, Plaintiff was not involved in the music ministry.

Case law supports Plaintiff's argument that she was not a ministerial employee. Indeed, *Guinan*, 42 F. Supp. 2d at 849 is on-point and demonstrates that Plaintiff was not a ministerial employee. In *Guinan*, the plaintiff was employed as a fifth grade teacher at All Saints Elementary School, a Catholic school. *Guinan* taught secular courses, such as math, social studies, science, art, computers, and language arts, but also taught a class in religion. Once a month she organized Mass and assisted the priests in the service. As a teacher in a Catholic school, *Guinan* perceived one of her principle duties to be "an example of Christianity" and an "evangelist" to her students. *Id.* at 850. After her teaching contract was not renewed, she filed a claim alleging age discrimination. The defendant sought dismissal of her Complaint, arguing the ministerial exception barred her claim.

In evaluating the issue, the Third Circuit noted that while *Guinan* was not an ordained minister, and taught mostly secular subjects, she did teach some

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[5] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-465 (D.C. Cir. 1996).

[6] *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000).

religion classes and organized Mass once a month. Notably, the Third Circuit found that the fact that *Guinan* perceived one of her principle duties to be an "example of Christianity" did not require a conclusion that the ministerial exception should apply. *Id.* at FN 6, citing *EEOC v. Southwestern Baptist*, 651 F.2d 277 (5th Cir. 1981) (affirming the fact "[t]hat faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.")

Holding that Guinan was not a ministerial employee, the Third Circuit stated:

> Guinan did participate in some religious activities as a teacher at All-Saints, but it cannot fairly be said that she functioned as a minister or a member of clergy. The vast majority of Guinan's duties involved her teaching secular courses, such as math or science. Indeed, the secular nature of her position is underscored by the fact that the Archdiocese did not require teachers at All Saints to be Catholic and, as a matter of fact, some were not. Moreover, the application of the ministerial exception to non-ministers has been reserved generally for those positions that are, at the very least, close to being exclusively religious based, such as a chaplain or a pastor's assistant. This clearly is not the situation here. Accordingly, we find the ministerial exception inapplicable to this case. *Id.* at 852-853

Additionally, the recent Sixth Circuit decision in *Hosanna-Tabor Evangelical Lutheran Church and School*, detailed in I.A., above, held a teacher, such as the plaintiff in this case, was not a ministerial employee.

By improperly infusing into the ministerial employee analysis an evaluation of the Plaintiff's personal beliefs, instead of focusing on the Plaintiff's position, functions, and duties, and by ignoring pertinent case precedent, the Court of Appeals committed error which should be reversed by this Court. See *Guinan*, supra; see also *EEOC v. Southwestern Baptist*, *supra*. If the Court of Appeals decision is permitted to stand, it will effectively enlarge the scope of the ministerial exception and improperly insulate religious institutions from review of any employment decisions.

B. The Michigan Court of Appeals Erred in Concluding that even if the Plaintiff was a Ministerial Employee that She could not Bring a State Whistleblowers' Action.

Although Plaintiff believes that given her position, functions, and duties, she was not a ministerial employee while employed with the Defendants, the Michigan Court of Appeals erred in finding that she was barred from also asserting her whistleblowers' claim. The facts of this case distinguish it from the cases relied upon by the Court of Appeals. Further, there are compelling reasons to protect employees who are statutorily required to report suspected violations of law. Accordingly, the decision of the Court of Appeals should be reversed by this Court.

It is undisputed that the plaintiff reported suspected child abuse to governmental authorities and was subsequently terminated from her employment according to the record below. Michigan's whistleblower statute ("WPA"), MCL 15.361 et seq., provides that "an employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee reports, or is about to report, a violation or suspected violation of a state or federal statute or regulation to a public body." MCL 15.362. The Court of Appeals has explained that

> The underlying purpose of the [WPA] was to protect the public and to promote public health and safety by removing barriers that may interfere with employee efforts to report violations or suspected violations of law. *Trepanier v. Nat'l Amusements, Inc.*, 250 Mich. App. 578, 649 N.W. 2d 754 (2002).

The Michigan Court of Appeals acknowledged that the question of the applicability of the ministerial exception to the WPA had not been addressed by Michigan courts. (App. at 12a). The Michigan Court of Appeals analogized the WPA to anti-retaliation provisions of other employment discrimination statutes. *Id.* After reviewing case law promulgated under Title VII, the Court of Appeals concluded that the Plaintiff's WPA claim was barred due to the ministerial exception. App. at 18a.

However, there is a critical distinction in the present case which simply cannot be reconciled with the Court of Appeals' decision. The plaintiff was required by Michigan statute to report the suspected child abuse to law enforcement personnel. MCL

722.623 requires a number of professions, including both school teachers and members of the clergy, to immediately report to a public agency suspected child abuse or neglect. MCL 722.623(1)(a). Failure to comply with these reporting requirements can subject an individual to both civil and criminal liability. MCL 722.633. Notably, the Michigan legislature extended this reporting requirement to members of the clergy; thus, religious institutions are not immune from its reach. This is not surprising, as this Court has long recognized that a state has an interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might prevent their growth into free and independent, well-developed citizens. *Ginsberg v. New York*, 390 U.S. 629 (1968).[7] By concluding that the ministerial exception may be applied to bar WPA claims that involve a religious institution, the Michigan Court of Appeals has created an untenable conflict between the legislatively mandated reporting requirements, designed to further the state's interests in protecting children, and the

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[7] See also *Brock v. Wendell's Woodwork Inc.*, 867 F.2d 196 (4th Cir. 1989). In *Brock*, the Defendants claimed an exemption from child labor laws in connection with the employment of children as young as 9 years old in a church apprenticeship program. *Id. at* 197. While in this program, young children were required to use heavy farm equipment and other tools such as power saws and forklift trucks. *Id.* at 198. The Fourth Circuit rejected the Defendants' argument that the training program was shielded by the Free Exercise Clause, and that the attempt to enforce child labor laws against the church was unconstitutional. The Fourth Circuit noted that the United States has a substantial interest in regulating child labor, and that child employment is a particularly appropriate area for a state to exercise broad authority. Thus, the concept that a state has an interest in protecting children of that state is not a novel idea.

fear of reprisal by the religious institution which is, itself, bound by the same statutory reporting requirement. In fact, the Michigan Court of Appeals recognized this fact, stating:

> Although we recognize the unfairness of the position, we lack the power to alter the legislative reporting requirements and the Legislature cannot trump the United States Constitution. Our ruling does not reduce or immunize statutory reporters who are ministerial employees of religious institutions if they fail [to] meet their mandatory duties because they fear retaliation for which there would be no civil recourse. App. at 16a.

This conflict is created by the Michigan Court of Appeals' failure to acknowledge the unique facts of this case and analogizing the WPA to Title VII retaliation claims without reconciling the statutory confines presented.[8] The Title VII retaliation claims relied upon by the Michigan Court of Appeals in issuing its decision involves protecting only the interests of the affected employee, and nothing more. The present case, however, involves a statutory mandate designed to protect third parties, i.e., children, from abusive situations. Thus, this is not just a matter of protecting the employee, this Court must also reconcile the interest in protecting children from abuse and a

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[8] While the Michigan Court of Appeals did cite one case brought under a Whistleblower statute, *Archdiocese of Miami v. Minagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 3d. Dist. 2007), this case is distinguishable, as it did not involve a statutorily mandated reporting requirement as the present case does.

statutory obligation imposed upon teachers and clergy alike.

If the Michigan Court of Appeals' decision is permitted to stand, it will likely have a chilling effect on the willingness of employees of religious institutions to report suspected abuse, an outcome which is directly contrary to the state's interest in promulgating the reporting statute, MCL 722.623. This outcome cannot be reconciled when it is considered that the church and its ministers are not insulated from this reporting requirement. Thus, even if Plaintiff was a ministerial employee, she would still have been required to report any suspected child abuse. While the legislature could have exempted the ministry from this reporting requirement, it chose not to do so, undoubtedly because of the compelling reasons behind the reporting statute. Yet under the Michigan Court of Appeals' rationale, Plaintiff would have no protection for doing what she, and her employer, were required by law to do.

This Opinion essentially frees a religious institution to engage in conduct which violates state law and insulates them from any reprisal if an employee reports that illegal conduct. For example, a religious institution may require staff members to engage in corporal punishment which rises to the level of child abuse, yet the teacher has no protection if she reports the illegal activity. A religious institution is free to practice animal torture under the guise of religious doctrine, yet an employee who reports the behavior is subject to discharge with no recourse.

There is another critical distinction between the present case and the Title VII cases relied upon by the

Michigan Court of Appeals. The Defendants in this case voluntarily chose to operate a school in the State of Michigan, and therefore voluntarily subjected itself and its employees to the reporting requirements of MCL 722.623. In light of the voluntary nature of the Defendants' actions in choosing to operate a school which subjected its teacher-employees to the reporting requirements, this case is more akin to *Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006), *cert. denied*, 127 S.Ct. 2098 (2007). In *Petruska*, the Third Circuit dismissed the Plaintiff's Title VII discrimination and retaliation claims, along with state claims of civil conspiracy, negligent retention, and negligent supervision pursuant to the ministerial exception. However, the Third Circuit permitted the plaintiff's state law contract claim to move forward, stating "unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary . . . . a church is always free to burden its activities voluntarily . . . ." *Id.* By choosing to operate a school within the State of Michigan, the Defendants voluntarily subjected its employees to the reporting requirements of MCL 722.623. The Defendants should not be able to freely retaliate against those employees for fulfilling their statutory obligations.

Further, the present case does not infringe upon the Defendants' freedom to select its ministers, a key factor in the *Petruska* case, supra. In evaluating the plaintiff's fraudulent misrepresentation claim, the Third Circuit found that such a claim would not violate the Free Exercise Clause, because "it does not infringe upon Gannon's freedom to select its ministers . . . ." *Id.* at 310. Similarly, resolution of the plaintiff's contract claims likewise "does not involve government-imposed limits on Gannon's right to select its ministers

. . . ." *Id.* Likewise, in *Elvig v. Calvin Presbyterian* Church, 375 F.3d 951, 965 (9th Cir. 2004), the plaintiff was permitted to maintain a retaliation claim against the church for retaliatory harassment in the form of verbal abuse and intimidation. *Elvig* at 965. The Ninth Circuit reasoned that this harassment was not a protected employment action because it did not go to the selection of the church's ministers, nor did the defendant assert a doctrinal reason which justified the harassment.[9] *Id.*

Similarly, the present case does not go to the selection of the Defendants' employees. The plaintiff was already employed by Defendants, i.e., had already been "selected" by the Defendants, and had been employed by the Defendants for a number of years at the time of her discharge. Permitting Plaintiff's claims to proceed does not infringe upon the Defendants' right to select their employees; it merely requires the Defendants to refrain from retaliating against those already selected employees when they report harassment or discrimination, or, as in this case, report suspected child abuse as required to do by state law. Plaintiff's retaliation claims under WPA and state civil rights act do not relate to "selection" and enforcement of those claims do not infringe on Defendant's selection of ministerial employee.

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[9] Indeed, the *Elvig* case, supra, demonstrates that even if Plaintiff is determined to be a ministerial employee, she would have a basis to assert a harassment claim based upon the treatment that she sustained while employed by Defendants; therefore, it is logical that she should likewise be able to assert a retaliation claim arising out of those same complaints of harassment under MCL 37.2701.

The decision of the Michigan Court of Appeals creates an untenable result. The Plaintiff, by virtue of her employment with the Defendants, was required by law to report suspected child abuse, and fulfilled that obligation. The Defendants should not be permitted to retaliate against the Plaintiff for acting in accordance with state law. Yet this is precisely the outcome that the Michigan Court of Appeals has sanctioned. Under the Michigan Court of Appeals ruling, a religious institution has carte blanche to violate state laws designed to protect third parties, and employees have no protection if they report those violations. Petitioner submits that the Michigan appellate court committed error in its decision.

CONCLUSION

For the reasons stated more fully above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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