No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION, INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, COUNCIL OF HINDU TEMPLES OF NORTH AMERICA, UNION OF ORTHODOX JEWISH CONGREGATIONS OF NORTH AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, UNITED SIKHS, AND LUTHERAN CHURCH–MISSOURI SYNOD IN SUPPORT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2, the International Mission Board of the Southern Baptist Convention, International Society for Krishna Consciousness, Council of Hindu Temples of North America, Union of Orthodox Jewish Congregations of North America, National Council of Young Israel, UNITED SIKHS, and Lutheran Church–Missouri Synod respectfully move for leave to file the following *amicus* brief in support of the petition for certiorari.

The Acting Solicitor General, on behalf of Respondent Equal Employment Opportunity Commission, has consented to the filing of this brief. Petitioners too have consented. These consent letters are on file with the Court. *Amici* sought consent from Respondent Cheryl Perich on November 11, 2010. On November 23, however—more than ten days later—Ms. Perich's counsel informed *amici* that she neither opposes nor consents to the filing of the following brief, thus necessitating the Court's consideration of this motion.

The *International Mission Board of the Southern Baptist Convention* (IMB) is an entity of the Southern Baptist Convention, the nation's largest evangelical denomination with more than 40,000 churches and nearly 16 million members. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, the IMB employs more than 5,000 Christian workers.

The *International Society for Krishna Consciousness* (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture

and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As part of its tradition, ISKCON has affiliated parochial schools that teach secular topics as well as spiritual subjects and values. It is a core belief among ISKCON's members that religiously qualified teachers should teach in ISKCON's schools and should be appropriate role models in their belief, practice, and application of spiritual ethics. ISKCON has an interest in this case because it supports an interpretation of the ministerial exception that protects the autonomy of its temples and schools to implement their spiritual values.

The *Council of Hindu Temples of North America* is a voluntary association of Hindu Temples in North America. It is one of the largest Hindu umbrella bodies in North America, with a membership of over 100 Hindu Temples. The council advocates on behalf of Hindu Temples and Hindus in both the United States and Canada. The Council has an interest in this case because it supports an interpretation of the ministerial exception that recognizes the religious nature of Hindu Temple workers such as priests, *swamis*, monks, *paricharakaras* (religious food preparers), *sthapatis* (religious architects), and *shilpis* (religious artisans). Although these roles may be unfamiliar to the secular court system, they have been recognized by Hindus as religious for millennia, and are integral to the religious life of Hindu Temples.

The *Union of Orthodox Jewish Congregations of America* (UOJCA) is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. Founded in 1898, it is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the

UOJCA advocates legal and public policy positions on behalf of the Orthodox Jewish community. The American Orthodox Jewish community has flourished in no small measure due to the constitutional freedoms that allow it to educate its children in Jewish "day schools." Such schools offer children a dual curriculum that combines standard secular studies with extensive in-depth study of Jewish religious texts and teachings. Many Jewish day schools strive to integrate study of the secular and the sacred, such that teachers in the English or science classroom are as much engaged in "Jewish education" as those teaching Bible and Talmud. The schools' ability to recruit and employ teachers capable of this type of teaching is essential to the educational enterprise, and thus critical to the welfare of the American Jewish community.

The *National Council of Young Israel* (Young Israel) is a Jewish religious organization that seeks to promote the religious observance of the families that attend the Jewish congregations that comprise its membership. Young Israel was established in 1912, a time when observance of Torah laws and customs required extraordinary sacrifice. Young Israel worked tirelessly then and continues to do so now to facilitate and enhance the Torah observance of its congregational constituents. Today, Young Israel's membership includes approximately 150 congregations (representing approximately 25,000 families), and it additionally represents hundreds of synagogues, Jewish day schools, and Jewish community institutions throughout the United States. Young Israel's principal objective is to foster and maintain a program of spiritual, cultural, social, and communal activity towards the advancement and perpetuation of tradi-

tional Torah-true Judaism. Young Israel joins this brief in support of protecting the autonomy of religious associations—a freedom that has permitted traditional Torah-true Judaism to flourish in this country.

UNITED SIKHS is an international, nonprofit, nonpartisan organization that has 11 chapters globally. UNITED SIKHS has four major thematic areas: (1) International Civil and Human Rights Advocacy; (2) Humanitarian Disaster Relief; (3) Education; and (4) Community Health Care. In defending religious freedom both domestically and internationally, UNITED SIKHS has seen the detrimental effects of government policies that restrict religious rights. UNITED SIKHS is thus compelled to voice its concern when it is witness to the government's encroachment on constitutional rights that safeguard a faith group's choice in selecting its religious leaders.

The *Lutheran Church–Missouri Synod* (the Synod) is a nonprofit religious corporation organized under the laws of the State of Missouri. With more than 6,000 member congregations and 2.3 million baptized members, it is the second-largest Lutheran denomination in North America. For generations the Synod, which places great importance on the Christian education of its children, has operated one of the largest Protestant religious school systems in the United States. Today, the Synod roster of commissioned ministers includes more than 10,000 teachers. The Synod has a profound interest in its First Amendment rights and in the preservation of the ministerial exception to safeguard against judicial intervention in the church's decisions regarding the hiring and termination of its ministers, including commissioned ministers serving as teachers.

The unique perspectives and arguments of the *amici*, as reflected above and as further set forth in the following brief, demonstrate that this brief will be "of considerable help to the Court" by "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties." Rule 37.1.

For these reasons, this motion for leave to file the following brief should be granted.

Respectfully submitted.

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NOVEMBER 2010

QUESTION PRESENTED

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Amici strongly believe that religious institutions must be able to choose their own leaders without undue government interference; that a robust "ministerial exception" is critical to safeguarding free exercise rights; and that the Sixth Circuit's decision to narrow that exception, deepening an acknowledged circuit split, requires this Court's attention.

For decades, the lower courts have recognized the risks inherent in regulating the relationship between a church—by which we mean religious organizations and houses of worship of all kinds—and its leaders. A church's freedom to choose its own leaders is essential to its ability to control its own voice. And a church's leaders—including teachers who serve pastoral and devotional roles in its religious schools—are the chief means by which it passes on the faith to the next generation. The ministerial exception thus safeguards religious freedom by requiring secular courts to abstain from certain employment disputes between religious institutions and their leaders. Those disputes are sensitive, complex, and often dependent on matters of religious doctrine. Courts must tread carefully.

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[*] Counsel for all parties received timely notice of the filing of this brief. Counsel for Petitioner and Respondent EEOC have consented to its filing, and their letters of consent are on file with the Clerk. Counsel for Respondent Cheryl Perich did not consent. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

The Sixth Circuit's approach does not. Joining three other circuits, the Sixth Circuit adopted a rigid and unduly narrow version of the ministerial exception—a version that has been directly rejected by four other circuits.[1] The Sixth Circuit's test requires courts to resolve church employment disputes unless a court decides that an employee's "primary duties" are religious. Pet. App. 16a. Under this approach, secular courts must decide which of a leader's duties are "religious" and whether those duties are "primary"—even where, as here, the employee in question was a religious school teacher who was required to be trained for the ministry, was selected by vote of the Church congregation, and served the Church as a "commissioned minister." *Id.* 4a-5a. Further, under the Sixth Circuit's approach, secular courts must resolve employment disputes that turn on matters of religious doctrine—even where, as here, resolution requires the court to determine whether the religious reason given for the employer's action is pretextual or truly reflective of Church teaching.

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[1] In addition to the Sixth Circuit, the Third, Fourth, and D.C. Circuits have adopted the "primary duties" test. See *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006); *Rayburn* v. *Gen. Conf. Of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 463 (D.C. Cir. 1996). The Second, Fifth, Seventh, and Ninth Circuits have rejected it. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *Alcazar* v. *Corp. of the Catholic Archbishop*, 598 F.3d 668, 675-76 (9th Cir. 2010) (pending reh'g en banc); *Starkman* v. *Evans*, 198 F.3d 173, 176-77 (5th Cir. 1999); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008). The remaining circuits have taken a case-by-case approach, adopting no particular test.

Other circuits have crafted standards that avoid the pitfalls of entanglement while drawing sensible boundaries that exclude employees whose duties are clearly secular. The Ninth Circuit, for example, requires that an employee of a religious institution be "chosen for the position based largely on religious criteria" and "perform some religious duties." *Alcazar*, 598 F.3d at 676 (quotations omitted). This kind of rule strikes the appropriate balance between protecting employees and respecting the integrity of religious institutions and the leaders who run them.

Although *amici* represent a diverse array of religious faiths, they are united in their concern that the "primary duties" test will excessively entangle secular courts in the internal affairs of religious institutions and in the intricacies of religious doctrine. Here, the dispute turns on the Church's belief that disputes should be resolved internally—a belief common to many religious traditions. The potential for entanglement posed by the decision below is well-illustrated by the richness and complexity of those traditions on just this one matter of faith. By requiring a secular court to second-guess the Church's religious commitment to internal dispute resolution, the decision below requires entanglement.

Amici are also united in their practical concern over the uncertainty generated by the lower courts' decisions in this area. In the absence of clear guidance, religious institutions must make employment decisions about their most important leaders, unable to predict which of their duties a court will ultimately find important. And as this Court has recognized, the "[f]ear of potential liability" has an unfortunate chilling effect on "the way an organization carrie[s]

out * * * its religious mission." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987).

Amici, religious denominations and institutions who are described more fully in Appendix A, respectfully request that the Court grant the petition to address this uncertainty and to prevent undue entanglement of church and state.

STATEMENT OF THE CASE

This case is an employment dispute between Petitioner Hosanna-Tabor Evangelical Lutheran Church and School and one of its teachers, Respondent Cheryl Perich. The Church is an ecclesiastical corporation and a member congregation of The Lutheran Church–Missouri Synod. Its school is dedicated to providing a "Christ-centered education" based on biblical principles. Pet. App. 3a-5a.

As one of the school's "called teachers," Perich was required to complete training in Lutheran theology and to receive a declaration from a faculty committee that she was prepared for the ministry. *Id.* at 3a, 33a, 51a. Perich was appointed to her position by a vote of the Church's congregation, and she was issued a call by the Church to serve as a "commissioned minister." *Id.* at 3a-4a, 33a-34a. Unlike "non-called" teachers, who are hired by the School's Board of Education, Perich was (like all commissioned ministers) hired by the Church itself. She could not be fired without cause, and she was subject to the same dispute resolution procedures as the Church's pastor. *Id.* at 3a, 51a.

Perich taught the school's fourth-grade curriculum. Her obligations to her students and her employer included "integrat[ing] faith in all subjects," serving as a "Christian role model[]," teaching relig-

ion classes four days a week, leading her students in prayer and devotional exercises several times every school day, and attending chapel services with her students every week. *Id.* at 5a, 35a.

Just prior to the 2004-2005 school year, Perich became ill. With the school's support, she took leave to deal with her illness, but she subsequently insisted on returning to work in the middle of the school year. *Id.* at 7a, 37a. Concerned about Perich's ability to safely supervise students, and about disruption to the students who had grown accustomed to their replacement teacher, the school asked Perich to continue her leave while they developed a plan for her return. *Id.* at 6a-7a, 36a-37a. Perich refused and reported to work even though the school had no job for her. When the School's principal suggested to Perich that her conduct had jeopardized her continued employment, Perich threatened to sue. *Id.* at 8a, 38a.

Church teaching, however, provides that such disputes should be resolved within the Church rather than in civil court. Accordingly, the Church has adopted bylaws providing a detailed procedure for internal dispute resolution and appeals. See *id.* at 77a-104a. As a called teacher serving the Church as a commissioned minister, Perich had the right and the obligation to use these procedures. *Id.* at 51a.

Perich nevertheless chose to reject the obligation inherent in her call. Thus, citing her "insubordination and disruptive behavior," as well as her "threat[s] to take legal action," the school board recommended rescinding Perich's call. *Id.* at 38a, 9a. At the next meeting of the congregation, the Church members voted to do so. *Ibid.*

Following the Church's termination of her commission, Perich filed a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC in turn filed a complaint against the Church, alleging a single count of retaliation (not discrimination) under the Americans With Disabilities Act. Perich intervened, seeking a court order requiring the Church to reinstate her as a commissioned minister.

In the district court, the Church maintained that the suit was barred by the ministerial exception. Forcing it to reinstate a called minister (or bear other liability), the Church explained, would violate its right to choose and discipline its own religious leaders. The district court agreed. Although it acknowledged that courts are "sharply divided" over the scope of the ministerial exception, the district court found that Perich "must be considered a ministerial employee." *Id.* at 50a. It was clear that "the school values [its called teachers] as ministerial even if some courts would not." *Id*. at 51a. The Church also explained that Perich's threats of litigation violated Church teachings regarding the need to resolve disputes internally. As the district court recognized, applying the ministerial exception enabled the court to avoid scrutiny and "exploration of religious doctrine." *Id*. at 50a; see also *id*. at 50a-52a.

The Sixth Circuit reversed. Although it acknowledged that other circuits disagreed with its approach, the court chose to "look to the function, or 'primary duties' of the employee," and to apply the ministerial exception if the employee's primary duties are religious in nature. *Id*. at 16a. Even though Perich was a commissioned minister, the court "look[ed] at the function of the plaintiff's employment position," rather than her status as a minister, to determine

whether her position was "important to the spiritual and pastoral mission of the church." *Id.* at 17a (quotation omitted). In the court of appeals' view, Perich's role—as a minister teaching the Church's children—was not sufficiently important.

The court of appeals further concluded that going forward with this case "would not require the court to analyze any church doctrine." *Id.* at 24a. The court reasoned that church policies "clearly contemplate that teachers are protected by employment discrimination and contract laws." *Ibid.* The court did not explain how those laws are to be reconciled with the Church's explicitly faith-based requirement for internal dispute resolution.

Judge White separately concurred to emphasize that the courts of appeals remain "evenly split" on the scope of the ministerial exception. *Id.* at 26a. As she observed, "several courts have recognized the lack of uniformity in this area." *Id.* at 26a n.2.

REASONS FOR GRANTING THE PETITION

The lower courts are deeply split over the proper scope of the ministerial exception. Moreover, the test that the Sixth Circuit applied to determine whether an employee falls under the ministerial exception suffers from two grave deficiencies. First, the "primary duties" test unduly interferes with the autonomy of religious institutions to make their own judgments about the religious significance of their leaders' duties, and to control who teaches the faith to the next generation. Second, the "primary duties" test entangles secular courts in questions of religious doctrine. Further, the particular issue here—whether and to what extent a religious institution may insist that disputes be resolved internally—is, in many religious

traditions, an article of faith. Certiorari should be granted to bring clarity to this area of law, and to confirm that religious organizations may choose their leaders without undue government interference.

I. The Sixth Circuit's "Primary Duties" Test Ignores The Many Important Ways In Which Religious Institutions Pass On Their Faith To Future Generations.

At the heart of the ministerial exception is the understanding that a religious organization "in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message" to both faithful followers and the world at large. *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006). In order for that freedom to be meaningful, a religious institution "must retain the corollary right to select its voice." *Ibid*. That is, the organization must be permitted to control the clergy and leaders who speak on its behalf.

Indeed, many religious organizations speak with a religious voice even when they speak about seemingly secular topics. By requiring courts to decide which of a religious leader's duties are secular, and which are religious, the "primary duties" test impedes the ability of religious organizations to transmit their faith in ways other than the most overt religious instruction. By categorizing, distinguishing, and weighing the activities of a religious organization's leaders, the "primary duties" test does not and cannot respect the sanctity of the process by which a religious organization transmits the faith from one generation to the next.

A. Religious organizations must be able to control who teaches their faith.

The ministerial exception plays a vital role in ensuring that churches and religious organizations retain control over the selection and dismissal of their leaders. For *amici* and other churches and religious groups around the country, the right to control who teaches their faith, and who transmits the faith to the next generation, remains indispensible to the free exercise of religion.

Clergy and religious leaders are a church's "lifeblood"—the "chief instrument by which [it] seeks to fulfill its purpose." *McClure* v. *Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Accordingly, this Court has long recognized that government interference in matters of "church polity and church administration" poses a great risk of "implicating secular interests in matters of purely ecclesiastical concern." *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 710 (1976) (quotation omitted). And nothing could be of more ecclesiastical concern than a church's choice of its own key leaders. *Ibid.*

Among those leaders are teachers in a church's religious schools. In light of the "admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith," teachers play a "critical and unique role * * * in fulfilling the mission of a church-operated school." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501, 503 (1979). For this reason, in cases indistinguishable from this one, many courts have not hesitated to apply the ministerial exception to teachers in religious schools. See, *e.g.*, *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (unpublished)

(teacher at Seventh-day Adventist school); *Coulee Catholic Sch.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009) (teacher at Catholic school). The decision below is in square conflict with these decisions, warranting this Court's review.

B. The "primary duties" test denigrates religious activities that courts may misperceive as secular.

Invoking the "primary duties" test, the Sixth Circuit declined to apply the ministerial exception to Perich because, in the court's judgment, her "primary duties" did not "consist of teaching [the faith], spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." Pet. App. 20a. "[I]t is clear," the court thought, "that Perich's primary function was teaching secular subjects." *Ibid.* In fact, however, this was not at all clear. And precisely because it is rarely clear where a religious leader's "religious duties" end and her "secular duties" begin, the "primary duties" test should be rejected.

1. Perich led her class in prayer three times a day, conducted devotional exercises each morning, taught religion classes four days a week, took her students to weekly school-wide chapel services, and occasionally led those chapel services herself. Pet. App. 4a. As Perich herself testified, teaching at Hosanna-Tabor gave her the freedom to "bring God into every subject taught in the classroom." *Id.* at 5a.

Yet none of this mattered to the Sixth Circuit because Perich spent most of her day "teaching secular subjects." *Id.* at 20a. That court thus made its *own judgment* that Perich's so-called secular activities were more important to her role than the religious

ones. That is a debatable judgment, to say the least, and in all events a risky one for *the state* to make. Embedded within the judgment is a bias foreign to many religious faiths—that the quantity of devotional activity, rather than its quality, matters most.

The Sixth Circuit's judgment was also troubling for an even more fundamental reason, as it assumed that Perich's activities were in fact "secular." Pet. App. 20a. This too was a questionable judgment at odds with how many religious traditions understand their faith—and here, at odds with the description of Perich's position as her employer, the Church itself, had defined it. The Lutheran school's purpose here is to provide a "Christ-centered education" based on biblical principles. *Id.* at 4a-5a. But overt religious instruction is only one way to advance that purpose. The school also expects its teachers to serve as "Christian role models" and to "integrate faith into all subjects." *Id.* at 5a, 35a. Only the most distant view of religious schooling could assume that religious teachers inculcate their faith only by lecturing about God.

2. Although the Sixth Circuit's application of the "primary duties" test leaves much to be desired, the more fundamental problem is the nature of the inquiry that a court applying that test is required to conduct. The test draws a sharp distinction between a religious leader's "secular" and "religious" duties; and it asks courts to decide which of those duties are more important. As this Court has noted, however, the "prospect of church and state litigating in court about what does and does not have religious meaning touches the very core of the guarantee against religious establishment." *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977). Yet that is exactly what the

"primary duties" test demands. Indeed, the very assumption that a religious leader's "secular duties" can be siphoned off and separately measured is impossible to reconcile with how many religious traditions understand their faiths.

Christianity. In many Christian traditions, for example, all deeds have a religious import: "whether ye eat, whether ye drink, or whatsoever ye do, do all to the glory of God." I *Corinthians* 10:31. Or, as the same point is expressed in the *Epistle of James* (2:18, 20): "show me thy faith without thy works, and I will show thee my faith by my works. * * * But wilt thou know, O vain man, that faith without works is dead?" While caring for orphans and widows may appear on its face to be a secular task, it would be anything but secular to followers of *James* 1:27: "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress."

Roman Catholicism. To take another example from the Christian faith, the Catholic tradition emphasizes the importance of a natural moral law that can be derived through reason, and need not find its source in biblical revelation. Yet moral instruction in a Catholic school could hardly be considered secular —even if it might appear that way from afar. In the Catholic understanding, moral inquiry and teaching arise from, and reinforce, religious duty. As Pope Pius XI wrote in the encyclical, *On Christian Education*, "all the teaching and the whole organization of the school, and its teachers, syllabus and text-books in every branch, [are to] be regulated by the Christian spirit, under the direction and maternal supervision of the Church." Recounting the words of Pope Leo XIII, Pope Pius XI explained: "It is necessary not only that religious instruction be given to the young

at certain fixed times, but also that every other subject taught, be permeated with Christian piety." All learning, in this view, is imbued with a "sacred atmosphere." *Ibid.*

Judaism. Jewish sources likewise illustrate how superficially secular activities can nevertheless hold religious significance to the faithful. Rabbi Joseph Soloveitchik writes: "As men of God, our thoughts, feelings, perceptions and terminology bear the imprint of a religious world outlook." Rabbinical Council Record, Feb. 1996, reprinted in N. Lamm & W. Wurzburger, *A Treasury of Tradition* 78-80 (1967). "We define ideas in religious categories and we express our feelings in a peculiar language which quite often is incomprehensible to the secularist." *Ibid.* It is easy for an outside observer, lacking a "religious yardstick" and unschooled in the "religious idiom," to fail to comprehend. *Ibid.*

These examples cannot begin to capture the richness and complexity of the Protestant, Catholic, and Jewish traditions, much less that of the many other religious denominations that abound. But they confirm that, in many religious traditions, it is not even coherent to distinguish between "religious" instruction, on one hand, and instruction on "secular" topics from a religious perspective, on the other.

These examples further underscore the wisdom in this Court's observation that the line between religious and secular duties "is hardly a bright one." *Amos*, 483 U.S. at 336. In light of the subtlety and complexity of the task, there is every reason to "be concerned that a judge would not understand [an institution's] religious tenets and sense of mission" (*ibid.*), particularly in cases involving religious minori-

ties or less familiar traditions. Courts will either misunderstand the religious institutions they are called upon to judge, or they will make an earnest attempt at understanding—in which case they will quickly find themselves in deep theological waters. What looks secular may not be; what looks unimportant may be indispensible.

3. Because the "primary duties" test requires courts to parse a religious leader's duties and make judgments about the religious significance of those duties, it inevitably entangles courts in religious matters.

Indeed, the risk of "excessive government entanglement" here mirrors the risk that this Court perceived in *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971) (quotation omitted). There, in determining whether state funding of teacher salaries in religious schools could be secular in nature, the Court declined to parse the teachers' religious and secular functions, finding instead that a "conflict of functions inheres in the situation." *Id*. at 617. After all, "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Id*. at 618. And to the extent that such conflicts are relevant when the government provides a religious school with aid, they are no less relevant when the government's actions interfere with the inner workings of a religious school's employment decisions.[2]

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[2] In the state-aid context, the Court subsequently held that parents' true private choice concerning where to send their children to school could obviate the dangers of entanglement. *Zelman* v. *Simmons-Harris*, 536 U.S. 639

4. In addition to entanglement, the "primary duties" test imposes a great practical burden on religious institutions. For one thing, it undermines the autonomy of religious institutions to pass on their teachings to the next generation in all but the most literal ways. It deprives religious organizations of the freedom to control leaders who play more subtle, but no less important, roles in passing on the faith. In addition, the difficulty of determining a religious leader's "primary duties"—as evidenced by the inconsistent results reached in cases involving religious school teachers, see Pet. 20-23—leaves religious institutions unable to know how a court might classify particular leaders. As this Court has recognized, it is "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 336.

None of this is to suggest that every employee of a church or religious school must fall within the ministerial exception. As other circuits have recognized, it is possible to minimize entanglement while also ensuring that the ministerial exception does not reach employees whose duties, unlike those of a religious school teacher, are clearly secular. The test applied by the Ninth Circuit, for example, requires that an employee of a religious institution be "chosen for the

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(2002); cf. *Mitchell* v. *Helms*, 530 U.S. 793, 807-835 (2000) (plurality op.) (discussing constitutional limits on direct aid); *id*. at 857-867 (O'Connor, J. concurring) (same). Here too, the parallel with this case is instructive: Just as a parent's freedom to choose her child's school avoids entanglement in funding, so too a church's freedom to choose its leaders—and a minister's freedom to choose her vocation—avoids entanglement in employment.

position based largely on religious criteria" and "perform some religious duties." *Alcazar*, 598 F.3d at 676 (quotations omitted); see also *Starkman*, 198 F.3d at 176 (5th Cir.) (considering only whether a choirmaster "engaged in activities traditionally considered ecclesiastical or religious"); *Schleicher*, 518 F.3d at 478 (7th Cir.) (adopting a "presumption that clerical personnel" are subject to the ministerial exception). Such a test guards against abuse of the ministerial exception while avoiding the need for intrusive inquiry into a leader's "primary" duties. The circuit split should be resolved in favor of that more sensible approach.

II. By Requiring Courts To Second-Guess A Religion's Own Dispute Resolution Processes, The "Primary Duties" Test Entangles Courts In Questions Of Religious Doctrine.

The "primary duties" test presents a second risk of entanglement. Even a religious leader whose "primary duties" are secular may nevertheless be subject to an adverse employment decision motivated by religious reasons. Yet by looking only to a religious leader's duties, the "primary duties" test ignores the nature of the employment dispute and declines to apply the ministerial exception where the dispute is religious in nature. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (rejecting test as "too rigid").

The result of this overly rigid standard is that the ministerial exception fails to screen out disputes that are at heart religious. Where a religious organization asserts a religious motive for discharging an employee, the employee typically responds by alleging that the religious motive is pretext. The inevitable result is to "entangle [the court] in doctrinal disputes"

over the sincerity, coherence, or truth of the religious motive. *Ibid*. For example, to resolve a church's claim that it fired its organist for his inappropriate choice of music at Easter Mass, the courts would have had to "resolve a theological dispute" over the "liturgically proper music." *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006) (rejecting "primary duties" test). Although the ministerial exception is not limited to such theological disputes, it must—at a minimum—keep courts out of disputes of that nature.

This case illustrates why the "primary duties" test will often fail to achieve that fundamental objective. For here, the Church's own bylaws, like those of many other religious bodies, required that the dispute be resolved not through litigation, but through internal Church processes.

A. The Church's bylaws provided for internal resolution of this dispute in a "manner pleasing to God."

Here, Perich characterizes her firing as retaliation for threatening suit under the ADA. The Church essentially agrees with what happened, but explains that she was fired for what it concluded was her *un-Christian* behavior—for insubordination and failing to participate in the church's internal dispute resolution process. The Church's bylaws explain that process:

> The Holy Scriptures (1 *Cor*. 6:1-7) urge Christians to settle their differences by laying them before the "members of the brotherhood." Therefore, *the Synod, in the spirit of 1 Corinthians 6, calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod's system of reconciliation and*

> *conflict resolution*. The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute.

Pet. App. 77a (emphasis added). The bylaws go on to describe a lengthy series of rules, exceptions, and procedures for resolving disputes within the Church. *Id.* at 77a-104a.

This dispute resolution process is explicitly intertwined with Church doctrine; it seeks to resolve disputes over a leader's "[f]itness for ministry" in a "manner pleasing to God." *Id.* at 77a, 78a. Under the decision below, therefore, resolving this case will require the district court to decide what the Church's procedures require—what, in the Church's view, truly pleases God.

B. Many religious traditions believe in resolving disputes internally.

The Church's reason for dismissing Perich—her failure to avail herself of religious dispute resolution processes—is just one example of the many religiously-grounded reasons a religious organization may have for taking an employment action. Any religiously-grounded reason raises the same entanglement concern; the concern need not be limited to religious dispute resolution. Nevertheless, the views of the Missouri Synod are not uncommon. Many religious traditions stress the need to resolve disputes within the faith, and the widespread nature of such beliefs further underscores the need for review.

As one commentator has noted: "Whether or not lawyers like to admit it, human beings with scores to settle did not go straight from clubbing each other with rocks and bones to serving each other with summons." R. Seth Shippee, *"Blessed Are the Peace-*

makers": Faith-Based Approaches to Dispute Resolution, 9 ISLA J. INT'L & COMP. L. 237, 237-238 (2002). Even in the age of the summons, "traditional, faith-based alternatives to the mainstream legal system are alive and well." *Id.* at 238.

Judaism. Judaism, for example, has a long tradition of internal dispute resolution. At the heart of the Jewish approach is the concept of *shalom*, or peace. *Id.* at 249. Jewish law commands religious leaders to avoid conflict in their communities by promoting peace. Forms of dispute resolution range from informal mediation conducted by a single individual, known as *p'sharah*, to more formal adjudication by an official rabbinic court, known as a *beth din*. *Id.* at 251-53. *Beth dins* rely primarily on Jewish law (*halacha*) in reaching their decisions, and typically involve a panel of three rabbinic judges.

Under traditional Jewish law, Jews are prohibited from accusing other Jews in a secular court. In the words of the great rabbinic scholar Moses Maimonides, one who forgoes a *beth din* has behaved "as if he had raised his hand against the Torah." *Hoshen Mishpat* 26:1. Some modern Jewish authorities likewise hold that "[a] central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts." Dov Bressler, *Arbitration and the Courts in Jewish Law*, 9 J. HALACHA & CONTEMP. SOC'Y 105, 109 (1985).

Protestant Christianity. Christianity has a similar history of intra-faith dispute resolution. The early Christians did not permit the use of the Roman courts, and some contemporary Christian teachings strongly encourage resolving disputes within the faith. See, *e.g.*, Alice Curtis, *Good Question: Should*

Christians Sue?, CHRISTIANITY TODAY, Aug. 6, 2001 (instructing that "a Christian must evaluate more than just the letter of the law").[3]

This aversion to resolving disputes in secular courts finds support in many passages of the New Testament. In his First Letter to the Corinthians, for example, the Apostle Paul asked, "If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints?" I *Corinthians* 6:1 He answered, "The very fact that you have lawsuits among you means you have been completely defeated already." I *Corinthians* 6:7.

Christians are urged to forgive one another, and in some circumstances to resolve their differences out of court—particularly when the dispute is one among fellow believers. As a result, hundreds of Protestant Christian denominations, churches, and organizations offer their own intra-faith dispute resolution services. See Shippee, *Blessed Are the Peacemakers*, at 242-245.

Roman Catholicism. In another Christian tradition, building on those sources from the New Testament, Catholic teachings similarly discourage litigation between fellow members of the Church. In the Catholic understanding, disputes between Church members are of concern to the whole Church, not merely the individual disputants. If "dispute resolution processes are not congruent with the nature and teaching of the Church, the image of the Church may be distorted and the integrity between the Church and its members jeopardized." J. Michael Fitzgerald

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[3] Available at http://www.christianitytoday.com/ct/2001/-august6/27.66.html.

& Lynne M. L. Fitzgerald, *Meditation: A Systemic Alternative to Litigation for Resolution of Church Employment Disputes*, 5 ST. THOMAS L. REV. 507, 510 (1993).

The 1917 Code of Canon Law thus provided a system for resolving disputes over administrative action—such as employment disputes—which makes bishops responsible for conciliation. Canons 1732-1739. And in the years since, more formal processes have been explored and many Catholic dioceses have adopted their own systems for internal dispute resolution. Fitzgerald & Fitzgerald, *Meditation*, at 524-525.

Islam. Islamic tradition too emphasizes internal dispute resolution. The Quran provides instruction as to how Muslims should resolve disputes, much of which centers around the concept of *sulh*, meaning "settlement." Hence the Quranic verse (4:128): "[I]t shall not be wrong for the two to set things peacefully to rights between them: for sulh is best." Islamic tradition relies on special intermediaries, known as *quadis*, who interpret Islamic law and seek to resolve disputes between Muslims.

In sum, the Lutheran Church–Missouri Synod is far from alone in preferring that its adherents—and especially its leaders—resolve disputes with other believers within the Church before rushing to court. For a great many faiths, it is critical that they be able to resolve disputes between co-religionists in their own ways, and with minimal government interference. Doing so maintains the integrity of the religious community, and preserves its witness to the culture at large.

C. The ministerial exception should preclude second-guessing a religious employer's adherence to church teaching.

When a preference for internal dispute resolution is implicated by an employee's retaliation claim, a weak ministerial exception invites secular courts to second-guess the sincerity and scope of that preference. Entanglement will inevitably ensue.

The Court recognized this danger in *Serbian Eastern Orthodox Diocese*, a dispute involving a bishop who had been "defrocked" on the ground that he no longer possessed the necessary "fitness to serve as Bishop." 426 U.S. at 702. The Illinois Supreme Court deemed the Bishop's removal to have been "arbitrary" because the Church "had not followed its own laws and procedures in arriving at [its] decision[]." *Id*. at 712-713. But this Court reversed, observing that any attempt to determine whether the Church's actions were arbitrary "must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question." *Id*. at 713. That is "exactly the inquiry that the First Amendment prohibits." *Ibid*.

If it must decide whether a church's actions are "arbitrary," a court will inevitably be obliged to "substitute[] its own inquiry into church polity and resolutions" for that of the church's. *Id*. at 708. Such an exercise will risk "judicial rewriting of church law" in "circumvention of the tribunals set up to resolve internal church disputes." *Id*. at 719-720. These concerns strongly favor a ministerial exception that

avoids any such entanglement with religious dispute resolution processes.

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Although the courts below are unanimous in their acceptance of the ministerial exception, some (like the Sixth Circuit) have adopted tests that frustrate the doctrine's purpose of minimizing entanglement. This Court's review is needed, therefore, not only because a robust and properly-defined ministerial exception is critical to the ability of religious institutions to control the transmission of their faith to the next generation, but also because religious institutions such as the *amici* here need predictability. Even circuits ostensibly applying the same standard have reached conflicting results on the question presented here—whether the ministerial exception applies to sectarian school teachers. This question is of the utmost importance to religious groups of every conceivable stripe.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A:
LIST OF *AMICI*

The *International Mission Board of the Southern Baptist Convention* (IMB) is an entity of the Southern Baptist Convention, the nation's largest evangelical denomination with more than 40,000 churches and nearly 16 million members. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, the IMB employs more than 5,000 Christian workers.

The *International Society for Krishna Consciousness* (ISKCON) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As part of its tradition, ISKCON has affiliated parochial schools that teach secular topics as well as spiritual subjects and values. It is a core belief among ISKCON members that religiously qualified teachers should teach in ISKCON's schools and should be appropriate role models in their belief, practice, and application of spiritual ethics. ISKCON has an interest in this case because it supports an interpretation of the ministerial exception that protects the autonomy of its temples and schools to implement their spiritual values.

The *Council of Hindu Temples of North America* is a voluntary association of Hindu Temples in North America. It is one of the largest Hindu umbrella bodies in North America, with a membership of over 100 Hindu Temples. The council advocates on behalf of Hindu Temples and Hindus in both the United States and Canada. The Council has an interest in this case

because it supports an interpretation of the ministerial exception that recognizes the religious nature of Hindu Temple workers such as priests, *swamis*, monks, *paricharakaras* (religious food preparers), *sthapatis* (religious architects), and *shilpis* (religious artisans). Although such roles may be unfamiliar to the secular court system, they have been recognized by Hindus as religious for millennia, and are integral to the religious life of Hindu Temples.

The *Union of Orthodox Jewish Congregations of America* (UOJCA) is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. Founded in 1898, it is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA advocates legal and public policy positions on behalf of the Orthodox Jewish community. The American Orthodox Jewish community has flourished in no small measure due to the constitutional freedoms that allow it to educate its children in Jewish "day schools." Such schools offer children a dual curriculum that combines standard secular studies with extensive in-depth study of Jewish religious texts and teachings. Many Jewish day schools strive to integrate study of the secular and the sacred, such that teachers in the English or science classroom are as much engaged in "Jewish education" as those teaching Bible and Talmud. The schools' ability to recruit and employ teachers capable of this type of teaching is essential to the educational enterprise, and thus critical to the welfare of the American Jewish community.

The *National Council of Young Israel* (Young Israel) is a Jewish religious organization that seeks to promote the religious observance of the families that

attend the Jewish congregations that comprise its membership. Young Israel was established in 1912, when observance of Torah laws and customs required extraordinary sacrifice. Young Israel worked tirelessly then and continues to do so now to facilitate and enhance the Torah observance of its congregational constituents. Today, Young Israel's membership includes approximately 150 congregations (representing approximately 25,000 families) and it additionally represents hundreds of synagogues, Jewish day schools, and Jewish community institutions throughout the United States. Young Israel's principal objective is to foster and maintain a program of spiritual, cultural, social, and communal activity towards the advancement and perpetuation of traditional Torah-true Judaism. Young Israel joins this brief in support of protecting the autonomy of religious associations—a freedom that has permitted traditional Torah-true Judaism to flourish in this country.

UNITED SIKHS is an international, nonprofit, nonpartisan organization that has 11 chapters globally. UNITED SIKHS has four major thematic areas: (1) International Civil and Human Rights Advocacy (ICHRA); (2) Humanitarian Disaster Relief; (3) Education; and (4) Community Health Care. In defending religious freedom both domestically and internationally, UNITED SIKHS has seen the detrimental effects of government policies that restrict religious rights. UNITED SIKHS is thus compelled to voice its concern when it is witness to the government's encroachment on constitutional rights that safeguard a faith group's choice in selecting its religious leaders.

The *Lutheran Church–Missouri Synod* (the Synod) is a nonprofit religious corporation organized under

the laws of the State of Missouri. With more than 6,000 member congregations and 2.3 million baptized members, it is the second-largest Lutheran denomination in North America. For generations the Synod, which places great importance on the Christian education of its children, has operated one of the largest Protestant religious school systems in the United States. Today, the Synod roster of commissioned ministers includes more than 10,000 teachers. The Synod has a profound interest in its First Amendment rights and in the preservation of the ministerial exception to safeguard against judicial intervention in the church's decisions regarding hiring and terminating its ministers, including commissioned ministers serving as teachers.