No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should apply the ministerial exception to the federal discrimination laws to constitutionally bar respondent Cheryl Perich from pursuing her retaliation claim under the Americans with Disabilities Act, where she served as an elementary teacher in Petitioner's parochial school, teaching secular subjects using secular materials and textbooks, performed relatively minor religious based duties that were also performed by contract and non-Lutheran teachers, did not serve in any pastoral or liturgical role, did not act as an intermediary between the church and its members, and Petitioner did not rely on her as the means for indoctrinating the faithful into its theology.

2. Whether this Court should apply the ministerial exception to the federal discrimination laws to constitutionally bar respondent Cheryl Perich from pursuing her retaliation claim under the Americans with Disabilities Act, where Petitioner perceived her as being disabled notwithstanding her doctor's authorization for her to return to work and refused to allow her to return to her position as an elementary school teacher, and, when she threatened to assert her federal rights against discrimination, Petitioner terminated her employment.

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STATEMENT OF THE CASE

Federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, serve a compelling governmental interest in the "highest order," *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996), and apply to religious institutions, subject to exceptions inapplicable here. The two religion clauses in the first amendment preclude governmental interference in a religious institution's selection of its religious leaders. *See generally Serbian E. Orthodox Diocese for the United States & Can. v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). The judicially implied ministerial exception, as an exemption from the federal anti-discrimination laws, balances the state's compelling interest in eliminating discrimination and the church's constitutional right to manage its own affairs and choose its leaders. The circuits generally agree that ordained, practicing ministers fall within that exception, as well as other religious employees who serve the same type of function and role. In this case, the Sixth Circuit, relying on prior decisions from numerous circuits, correctly determined that Intervenor Cheryl Perich's position of an elementary school teacher did not have the same function or role of spiritual leaders and ordained ministers, and her retaliation claim under the ADA was not constitutionally barred.

STATEMENT OF FACTS

Perich's Employment and Duties with Hosanna-Tabor

Hosanna-Tabor Evangelical Lutheran Church and School, a Michigan corporation, operates a Lutheran church and elementary school and is jointly governed by a number of Boards, including a School Board of Education.[1] The school provides educational services to students from pre-school to eighth grade.

Teachers for Hosanna-Tabor School are hired in two different ways, contracted and "called." Contract and called teachers also differ in the manner in which they are hired. Contract teachers are hired directly by the Board of Education, while called teachers are hired by the voting members of the Congregation based on the recommendation of Hosanna-Tabor's various Boards, including the Board of Education.

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[1] While Petitioner is correct that Hosanna-Tabor is a member of The Lutheran Church - Missouri Synod, there is no evidence in the record that The Missouri Synod "is generally regarded as the most theological conservative of the major Lutheran bodies." In addition and contrary to a number of assertions in one of the amici briefs, there is no record evidence that the the purpose of the school is to inculcate the faithful or that parents spend money for a religious education. There are a number of different reasons why a parent may choose a Lutheran school, including the very modest cost and the latchkey program, and, although it is not in the record, the school's records show that 40 percent of the students were non-Lutheran, and an additional 5 percent do not go to church at all. Too much focus on the Lutheran religion may well limit the size of the student body.

Perich began her employment with Hosanna-Tabor in August 1999 as a contract elementary school teacher. After completing eight classes at Concordia College, Hosanna-Tabor hired her as a called Kindergarten Teacher, and starting in August, 2000, she taught Kindergarten until the end of the 2002-2003 school year. Perich taught fourth grade during the 2003-2004 school year.

Perich was not required to be a member of the Hosanna-Tabor Evangelical Lutheran Church in order to be employed as a contract or called teacher for the school. Her duties also did not include serving in a pastoral role to the congregation of the church. Moreover, Hosanna-Tabor did not even require all of its employees or teachers to be Lutheran, even though all teachers had the same duties.

As a contract teacher, and later as a called teacher, Perich's primary duties were the instruction of students in secular subjects, including Math, Language Arts, Social Studies, Science, Gym, Art and Music, using secular books. While Perich did teach a short religion program four days a week, the school did not require that its religion program be taught by a Lutheran or by a called teacher. In fact, the year before Perich began teaching the fourth grade, the fourth grade teacher who taught the religion program was not Lutheran. Both as when a contract and then a called teacher, her other religiously-related duties were attending chapel service with her students once each week, which she led two or three times a year, same as the other called, contract, and non-Lutheran teachers. Her only other religious related duties included five to ten minutes of devotional reading or listening, and participated with her students in a short

prayer each day in the morning, before lunch and at the end of the school day.

Perich's Disability and Leave of Absence

In the summer of 2004, Perich became ill during a Hosanna-Tabor golf event and began to undergo a series of medical tests to determine the cause. The school principal, Stacy Hoeft,[2] informed Perich that she should go out on a disability leave, but that she would "still have a job with us" when she returned. Perich agreed and took a disability leave of absence.

In about December 2004, a neurologist diagnosed Perich as having narcolepsy and began the process of prescribing and adjusting her medications so that she could return to a fully functioning state. Perich informed Hoeft of the same and that it would take about two months for her to return, without any restrictions. On January 10, 2005, Hoeft informed Perich that the school had hired a teacher to substitute for her during her disability.

On January 19, 2005, Hoeft asked Perich to "start thinking about what you'll be able to do" and "discuss it with your doctor." Hoeft also asked Perich whether she was "ever going to be allowed to drive again," stating that she "know[s] nothing about narcolepsy." On January 21, 2005, after Perich again clarified that she would be fully functional and able to return to work, Hoeft responded by stating that "I know you

[2] According to Hoeft, the school "board was pretty much under me."

want to come back, I just didn't know if you would be ***able*** to."

In another email on January 27, 2005, Perich reported that she would be able to return to work sometime during the last two weeks of February 2005. Hoeft reacted with surprise, stating:

> "I am surprised to hear that you will be able to return so soon…. Is he [the doctor] going to permit you to come back full time? I (and the board especially) am going to have so many questions for you! I guess I wonder how you're not permitted to drive yet you can be responsible for the safety of a classroom of children. You can see why I'd be concerned. . . . I'm sorry if I don't sound excited for you. I guess the administrator in me is nervous about how to make the best of this situation for everyone." (RE 24-14, email messages, at 2; RE 24-7 at 18)

In closing, Hoeft informed Perich that she would "pass this information along to the Board of Ed and the Board of Directors."

Three days later, on January 30, 2005, Hosanna Tabor held its annual shareholder (congregation) meeting, and one of the points of discussion at the meeting was Perich, her medical condition, and a proposal to request her resignation and thus terminate her employment. Despite Perich having informed Hoeft that her medical condition had been diagnosed, that the condition was being fully treated with appropriate medication, and that she would resume work the following month, it was announced to the

voting members that neither Hoeft nor the School Board actually believed that Perich would be physically capable of returning to work that year or the next. Neither Hoeft nor the School Board, however, possessed or requested any medical information that actually supported their conclusion that Perich would be physically incapable of returning to work.

Nevertheless, after presenting the Boards and Hoeft's opinion that Perich was physically unable to work, it was recommended to the members a plan for the termination of Perich's employment, wherein her resignation would be requested in return for paying a portion of her medical premium payments through December 2005, with the intent that she would not return to work the following school year. The members approved the recommended plan.

On February 8, 2005, Perich's neurologist provided her with a written release to return to work without restrictions effective February 22, 2005, as expected. On the following day, Scott Salo, the School Board Chair, called Perich to arrange a meeting, to which she responded that she would instead prefer to meet with the entire School Board, and a School Board meeting was scheduled for February 13, 2005.

School Board Meeting

The meeting took place as scheduled, and Salo gave Perich a proposal for her resignation in return for a partial payment for her medical insurance. In response, Perich provided the Board with a copy her doctor's return to work note signed by her neurologist and informed the members that she was willing and

able to return to her job. There is no dispute that the note was a statement of the doctor's opinion that Perich was able to return to work, and that she could do so without restrictions. (RE 24-7 at 88; RE 24-18 at 43-44)

According to Hoeft, the Board was not satisfied with the doctor's return to work note because it did not include "education on the medical condition itself." (RE 24-7 at 31-32; *see also* RE 24-18 at 26) One of the Board members opined to the effect that he "wouldn't drive if I were you, not even if the doctor says you can." (RE 24-6 at ¶9) Another Board member stated "I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms…. If I were a parent who has a child in this school, I'd want you to be without symptoms for 6 months, with no episodes for 6 months or maybe even a year before I'd want my child in your class." (RE 24-6 at ¶9; RE 24-18 at 29-30, 43; RE 24-4 at 74-75) She also stated her "concern that it would frighten the children and they wouldn't know how to handle seeing Cheryl pass out, if that were to happen."

Perich reiterated that she was able and wanted to go back to work. Salo asked Perich to reconsider her decision not to resign, and Pranschke told Perich to email her decision by February 21, 2005.

On February 21, 2005, Perich sent an email to Hoeft stating that she had decided not to resign from her position at the School, and she intended to return to work the following day, consistent with her prior notice of her returning and the expiration of her six-

month disability leave. Pursuant to the School's handbook pertaining to medical leaves, her "[f]ailure to return to work on the first day following the expiration of an approved leave of absence may be considered a voluntary termination."

Upon arriving at the school the following morning, Perich went to the room where the teachers met each morning before classes began. Hoeft, however, told her to go home, saying to the effect of, "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." (RE 24-6 at ¶12) Due to the handbook provisions concerning leaves, Perich requested that she be provided with a written confirmation that she had tried to return to work. According to Hoeft, Perich's request for the written confirmation was appropriate. (RE 24-7 at 48)

Accordingly, Hoeft and School Board Chairman Salo provided Perich a letter extending her leave. The letter, however, was hostile in tone:

> Due to your improper notification to return to work, we are asking that you continue your leave on Tuesday, February 22, 2005 in order to allow the congregation a chance to develop a plan for your possible return. The congregational leaders will attempt to meet this evening to develop this plan. You will be informed of the steps that will be in place to allow for your possible return to work as soon as they developed.

The "congregational leaders" referred to in the letter were Hoeft, Salo and the other members of the Board

of Directors. Upon receiving the letter, Perich left the School.

Termination of Perich's Employment

Later that day, Perich emailed Hoeft stating again that she wanted to return to work, full time, just as the School had promised her. Hoeft responded by calling her, and Perich told Hoeft that although she had been trying to work out the issue with Hoeft and the Board, she had been talking to an attorney and intended to assert her legal rights against discrimination and, if necessary, file a lawsuit.

Later that evening, a meeting of the School Board was convened to discuss Perich's situation. Hoeft informed the Board of her telephone conversation with Perich, and the decision was made to terminate Perich's employment because she had threatened to file a lawsuit. Significantly, when Hoeft had earlier notified Bruce Braun, School Superintendent for the Michigan District Lutheran Church Missouri Synod, the district covering Hosanna-Tabor School, that Hosanna-Tabor was considering termination of Perich's employment, Braun advised Hoeft to seek the advice of a labor lawyer knowledgeable about disability issues because he was concerned that the termination would be illegal.

Braun's advice, however, was apparently completely ignored. On March 19, 2005, Salo sent Perich a letter informing her that a Voter's Meeting was scheduled for April 10, 2005 at which time a vote would take place to terminate her employment. As written by Salo, "**We are also requesting this because we feel that you have damaged, beyond**

repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School." (RE 24-3, emphasis added) While the letter also refers to "due to insubordination and disruptive behavior on Tuesday, February 22, 2005," Congregational President Jim Pranschke admitted that Perich was not fired for that reason and that "the main action there was threatening to sue." (RE 24-4 at 90) In addition, Hosanna-Tabor did not choose doctrinal reasons for her termination, although that was one of the optional, prestated reasons stated in the letter. There was also no reference to an alternative dispute resolution or that filing a lawsuit would violate Lutheran beliefs.

Pranschke called a meeting of the members, and, at that April 10, 2005, meeting, recommended to the members that Hosanna-Tabor terminate Perich's employment. Following that recommendation, the members voted to terminate her employment.

District Court Proceedings

On cross-motions for summary judgment, the district court granted Hosanna-Tabor's motion. Applying the primary duties test for the ministerial exception adopted in *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir.), *cert denied* 552 U.S. 857, 128 S.Ct. 134, 169 L.Ed.2d 92, 76 USLW 3160 (2007), the district court reasoned that the "commissioned ministerial title" Hosanna-Tabor bestowed on Perich "suggests that the school values called teachers "as ministerial," and "it seems prudent in this case to trust Hosanna-Tabor's characterization of its own employee in the months and years *preceding* the events that led

to litigation." Accordingly, "[b]ecause Hosanna-Tabor considered Perich a 'commissioned minister'" and because Perich is employed by a "religious school with a sectarian mission," the district court concluded that "Perich was a ministerial employee."

Court of Appeals Proceedings

The Sixth Circuit reversed, applying the ministerial primary duties test to Perich's position of an elementary school teacher to determine the function of that position and her role at the school. As part of its analysis, the court reviewed and compared cases addressing parochial school teachers in numerous other circuits, with the far majority of those cases holding that teachers "who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception." 597 F.3d at 778. The court further noted that in cases where teachers were classified as ministerial employees, "those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church." *Id.* at 779, *citing Catholic Univ. of Am.*, 83 F.3d at 463-65. The court found that the district court's factual findings were not clearly erroneous and Perich's primary duties were secular in nature and were identical to the duties of contract and even non-Lutheran teachers.

The court further examined whether Perich's position "is important to the spiritual and pastoral mission of the church," finding that there was nothing in the record that would indicate that the church "relied on Perich as the primary means to indoctrinate its faithful into its theology." *Id.* at 778, 781. The court further concluded that it would be "illogical and

contrary to the intention of the exception" to classify Perich as "ministerial," when contract and even non-Lutheran teachers performed the same duties and would thus also be deemed as "ministerial," excluding coverage from the discrimination laws.

The court further described Hosanna-Tabor as having "attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution," finding that the Missouri Synod's personnel manual "clearly contemplate that teachers are protected by employment discrimination" laws and "none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution."[3] *Id.* at 781. The court further held that "Perich's claim would not require the court to analyze any church doctrine" or "be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions." *Id.* at 781-782.

In Judge White's concurrence, she found that "tipping the scale" was the fact that "*the school itself* did not envision its teachers as religious leaders, or as occupying 'ministerial' roles," since the "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities." *Id.* at 784.

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[3] The actual internal dispute resolution policy expressly states that it is not an exclusive remedy, except for theological, doctrinal, or ecclesiastical issues. (Appx. 80a, §1.10.3)

REASONS FOR DENYING THE WRIT

The Court should deny the petition for a writ of certiorari because this case does not present any of the circumstances upon which the Court grants certiorari. Under ordinary circumstances, the Supreme Court does not grant a petition for certiorari unless (1) there is conflict among the circuits, (2) the case is one of general importance, or (3) the lower courts' decisions are wrong in light of Supreme Court precedent. *See Hubbard v. U.S.*, 514 U.S. 695, 699 (1995) (granting the petition for certiorari when there was a split in the federal circuits); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998) (granting the petition for certiorari when considering the "manifest importance of the case"); *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (granting the petition for certiorari where the Eighth Circuit's decision on remand conflicted with a recent Supreme Court decision on issue).

Petitioner and amici point to a number of circuit decisions in decrying a conflict, but those cases are easily distinguishable on their facts, primarily involving plaintiffs who were practicing ministers, which was not the case here. In addition, Petitioner heavily relies on the Ninth Circuit's prior opinion in *Alcazar v. Catholic Archbishop of Seattle,* 598 F.3d 668 (9th Cir. 2010), although that opinion had been vacated, 617 F.3d 1101 (Aug. 5, 2010), and the portion of the original panel decision now relied upon by Petitioner has been subsequently rejected. *See Alcazar v. Catholic Archbishop of Seattle,* ___ F.3d ___, 2010 WL 5029533 (9th Cir. 2010) (en banc).

Moreover, as stressed by both the majority and concurrence opinions below, the specific unique facts found in this case were determinative. As found by the panel, the "undisputed evidence" showed that "all teachers at Hosanna-Tabor were assigned the same duties" regardless of whether the teachers were "called, contract, Lutheran, and non-Lutheran" and that "applying the [ministerial] exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception." *Hosanna-Tabor*, 597 F.3d at 781; *see also* 597 F.3d 784 (J. White, concurring) ("The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling.").

In addition, while Petitioner now asks the Court to review and reject the primary duties test previously adopted by the Sixth Circuit, at no time prior to the issuance of the opinion below did Petitioner ask the panel to use a different test or advocate a different analysis.

Petitioner also cannot show any issue of general importance that was actually decided in this case. This and similar cases were predominately decided on their unique factual circumstances, and even though the ministerial exception has been utilized for the past forty years, there are a relatively small number of applicable cases. The paucity of the number of the cases applying the ministerial exception makes clear that this case does not exhibit general importance.

Finally, Petitioner and perhaps more importantly the amici are now attempting to use this case to obtain this Court's blessing for a subjective and deferential

test obviously preferred by religious employers. More specifically, they seek wide leeway to avoid the federal statutory prohibitions on discrimination. If successful, they will unilaterally be able to decide which of its employees will be not be protected by the discrimination laws, precluding any further inquiry by the courts. Those anti-discrimination laws, however, serve a compelling governmental interest, and free exercise rights must be weighed against those compelling interests. *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972). Such a deferential approach would obviate the state's compelling interest and would be over inclusive as to which religious relationships would be protected by the first amendment.

I. The Appropriateness of the Primary Duties Test was Not Litigated Below

It is well established that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). While appellate courts are given the discretion to decide when to deviate from this general rule of waiver, *see Singleton*, 428 U.S. at 121, "prudential considerations" articulated by the Supreme Court counsel against hearing new arguments for the first time on appeal absent limited circumstances. For example, in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *See also, United*

States v. Ortiz, 422 U.S. 891 (1975) (declining to address scope of search and seizure case where the issue was raised for the first time in the petition for certiorari.)

These "prudential considerations" are particularly applicable here because, contrary to Petitioner's arguments, this case was never about whether the Sixth Circuit was utilizing the appropriate test or analysis in determining whether Perich should be classified as ministerial. All parties had relied upon and argued from the Sixth Circuit's prior decision in *Hollins*, wherein the court adopted the primary duties test. *See Hollins*, 474 F.3d 223 at 227 ("We agree with this extension of the rule [primary duties test] beyond its application to ordained ministers and hold that it applies to the plaintiff in this case, given the pastoral role she filled at the hospital.") After the panel issued its opinion and Petitioner having lost the battle, Petitioner for the first time advocated that a different test should be used, with that issue raised in a motion for reconsideration or hearing en banc. That motion was denied, without a single vote to rehear the case en banc to address this new issue. Accordingly, other than Petitioner in its motion for reconsideration, the parties have never briefed or argued the applicability of any other test, and that issue has not been decided below. Accordingly, this case presents a poor vehicle for Petitioner and the amici to address this issue in the first instance before this Court.

II. The Ministerial Exception to Federal Anti-Discrimination Laws

In promulgating the ADA, Congress intended that employees of religious institutions be protected from

discrimination based on disability and retaliation, with the sole exemption being that religious employers allowed a "preference in employment to individuals of a particular religion," and to "require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. §12113(c); 42 U.S.C. §§12112(a) and 12203. Congress further intended that the ADA be applied to religious employers in the same manner as Title VII of the Civil Rights Act of 1964. *See* H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 75-76 (1990). In turn, Title VII allows sectarian schools to prefer employees of a specific religion, but otherwise prohibits discrimination and retaliation as set forth in that statute. 42 U.S.C. §2000e-2(e)(2).

Almost forty years ago and eight years after the passage of Title VII, the Fifth Circuit first implied a religious-based exception to Title VII, when addressing whether that statute "applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment."[4] *McClure v. Salvation Army*, 460 F.2d 553, 554-555 (5th Cir. 1972). Finding that the application of Title VII would pose serious constitutional questions, the court chose to avoid those questions by holding that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and

[4] Although *McClure* did not involve gender discrimination, it would not be surprising if the court was cognizant that several large religions, including Catholicism and the Lutheran religion, prohibit women from serving as priests.

minister." *Id.* at 560-561. As further found by the court, the "relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-559.

Since *McClure*, every circuit has adopted the ministerial exception.[5] *See Petruska v. Gannon Univ.*, 462 F.3d 294, 303-304 (3d Cir. 2006) (collecting cases). The circuits further agree that practicing ordained ministers, clergymen, rabbis, etc., fall within that exception, since the first amendment precludes governmental interference in the relationship between religious institutions and its leaders. *See generally Milivojevich*, 426 U.S. 696.

On the other end of the spectrum, the circuits who have addressed the issue have also held that lay employees of religious institutions do not fall within that exception and are protected by the federal anti-discrimination statutes, as Congress intended. *See, e.g. Alcazar*, 2010 WL 5029533 at *2; *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1282 (9th Cir. 1982) (all employment with a sectarian publishing company is not immune from EEOC scrutiny); *DeMarco v. Holy Cross High School*, 4 F.3d 166, 169 (2d Cir. 1993) ("majority of courts considering the issue have determined that application of the ADEA to religious institutions generally, and to lay teachers

[5] The Seventh Circuit has renamed the exception to the "internal affairs doctrine." *Schleicher v. Salvation Army*, 518 F.3d 472, 474 (7th Cir. 2008)

specifically, does not pose a serious risk of excessive entanglement"); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Churches are not above the law, and "[t]heir employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions").

The circuits who have addressed the issue have also agreed that the exception is not limited to ordained ministers, but also encompasses those employees whose positions are functionally the same as ministers or serve in a pastoral role. *See e.g. Rayburn,* 772 F.2d at 1168; *Hollins,* 474 F.3d 223. In determining whether a religious employee is within that exception, the circuits have generally engaged in a factually intensive and objective analysis, relying on decisions from other circuits in determining the exception's applicability, regardless of the designation or name of a specific test. The circuits have focused on the function of the employee's position and "whether a position is important to the spiritual and pastoral mission of the church." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). *See also Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703-704 (7th Cir. 2003); *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1045 (8th Cir. 1994) (exception does not bar discrimination claim because the "overwhelming majority of [the plaintiff's] responsibilities are wholly secular").

III. The Petition Should be Denied Because There is No True Conflict Between Circuits

In order to establish a true conflict between the circuits, the conflicting decisions must have been decided in opposite ways, based on the very similar and indistinguishable facts. Here, Petitioner argues that the referenced circuit cases are "factually indistinguishable," resulting in "directly conflicting results." (Petition, pp. 10-11) To say that those cases are "indistinguishable," however, is to take abstraction to its highest level.

Those "conflicting" cases involved practicing ordained ministers, clergymen, chaplains, and employees who participated in church rituals as plaintiffs. *See, e.g. Petruska*, 462 F.3d at 300, 397, fn. 10 (selection of university chaplain, who would perform spiritual duties); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (race claim made by African-American minister); *Alcazar v. Corp. of the Catholic Archbishop,* 2010 WL 5029533 at *3 (seminarian in training program for ordained ministers); *Starkman v. Evans*, 198 F.3d 173, 176-177 (5th Cir. 1999) (choir director who had been designated to be a ministerial presence to ailing parishioners, and she is part of an "integral part of worship services and Scripture readings"); *Schleicher*, 518 F.3d at 474, 477 (FLSA claim made by ordained ministers whose duties included preaching, leading worship singing, teaching Bible classes, and teaching new prospective ministers).

In this case, however, Perich was not an ordained minister and at no time did she act as an intermediary between the church and its congregation, lead or a

play a role in the church's spiritual rituals, participate in church governance, or provide pastoral services to congregation members. Instead, she was simply an elementary school teacher, primarily teaching secular subjects to kindergarteners and fourth graders utilizing secular texts, with very few, minor duties that are religious based. The only commonality between Perich and these cases is that Perich had been bestowed the title of a "commissioned minister." Yet such a title is neither material nor determinative. *See e.g. Rweyemamu*, 520 F.3d at 208 (courts should not rely on titles). Accordingly, those cases are readily distinguishable from the instant case, and cannot be relied upon in determining a conflict exists.

IV. This Case Was Decided on Unique Facts and Does Not Compel Supreme Court Review

Petitioner also ignores that *Hosanna-Tabor* is unique among the circuits, in several regards. First, the panel below relied upon the unique facts in this case. Specifically, the majority emphasized that all teachers at Hosanna-Tabor were assigned the same duties, regardless of being a "contract" teacher (without the commissioned minister title), "called" teacher, or even non-Lutheran. 597 F.3d at 781. To classify Perich as minister would necessarily mean that all Hosanna-Tabor teachers would not be protected by the anti-discrimination statutes, notwithstanding the fact that the teachers are not even Lutheran and whose "primary function is not religious." *Id.* The concurrence also found that those facts were determinative:

> Tipping the scale against the ministerial exception in this case is that, as the majority points out, there is evidence there that *the school itself* did not envision its teachers as religious leaders, or as occupying "ministerial" roles. Hosanna-Tabor's teachers are not required to be called or even Lutheran to teach or to lead daily religious activities. The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling. This presence (or lack) of a predominantly religious yardstick for qualification as a teacher is a key factor in decisions finding the ministerial exception applicable and those finding it inapplicable alike.

Id. at 784.

This case is also unique in that Perich has direct evidence of retaliation, without having to rely on the *McDonnell-Douglas* shifting burden of proof. Perich may produce either direct or circumstantial evidence of retaliation. *DiCarlo v. Potter,* 358 F.3d 408, 414 (6th Cir. 2004) (Rehabilitation Act); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996) (ADA). Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.,* 176 F.3d 921, 926 (6th Cir. 1999). Perich has presented direct evidence of retaliation in this case. The undisputed facts show that Perich opposed Hosanna-Tabor's discriminatory acts during the February 13, 2005 meeting when the School Board rejected her doctor's opinion and assumed that she was

still disabled and unable to work. It is also undisputed that when Hosanna-Tabor continued its discriminatory acts, Perich threatened to assert her legal rights and file a lawsuit. Finally, it is also undisputed that Hosanna-Tabor terminated her employment for the reason that she threatened to file a lawsuit to protect her legal rights against disability discrimination, as evidenced in Salo's March 19, 2005 letter.

This direct evidence sets this case apart from the cases relied upon by Petitioner. In a number of discrimination cases involving religious employees, courts have raised first amendment concerns arising at the pretext stage in a circumstantial evidence case, where religious beliefs and doctrines may be challenged. *See e.g. Rweyemamu*, 520 F.3d at 209. Other courts have allowed such claims, where the case presents a simple factual determination as to whether the religious reason or unlawful reason motivated the adverse employment decision. *See e.g. DeMarco*, 4 F.3d at 170-171; *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993). Under the unique facts of the instant case, however, Perich does not need to establish pretext or rely on the shifting burden of proof.[6]

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[6] Salo's March 19, 2005 letter provided four possible reasons for the termination. Two of those reasons included "persistent adherence to false doctrine" and "scandalous lifestyle which causes offense." Hosanna-Tabor did not select either of those religious reasons. Three years later, at the summary judgment stage of this case, Hosanna-Tabor alleged for the first time that Perich violated its religious doctrine by not pursuing alternative dispute resolution process, not previously mentioned before, and "Christians do not sue Christians." The panel below expressed skepticism as to this after-the-fact position, but, as in *Geary* and

V. No Circuit Has Determined that a Conflict Exists or has Expressly Rejected the Primary Duties Test

It is not uncommon that when a true conflict exists, one circuit or another will so state. That is not the case here. While Petitioner relies on the original decision in *Alcazar*, 598 F.3d 668 (9th Cir. 2010), wherein the Ninth Circuit expressly criticized and rejected the primary duties test, this decision was vacated, even before the Petition was filed. As it turns out, Petitioner's reliance on that case was premature, given that in its subsequent en banc decision, the Ninth Circuit neither rejected nor adopted that test. *Alcazar*, 2010 WL 5029533 (9th Cir. 2010). Instead, based on the specific facts of that case, involving a seminarian in the process of becoming an ordained minister, regardless of any specific test, the plaintiff clearly fell within the ministerial classification. *Id.* at *3.

Starkman, also relied upon by Petitioner, does not portray a true conflict, and the Fifth Circuit did not reject or criticize the primary duties test in that case. Instead, while there are some variations in its approach, the *Starkman* court looked at the function of the position and the role of the employee in the church's mission, which is the same analysis made by the circuits who utilized the primary duties test by name. 198 F.3d at 175-176 ("To determine whether Ms. Starkman qualifies as 'spiritual leader' for purposes of the ministerial exception, this court will

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DeMarco, held that the district court is not precluded from determining the true reason motivating Perich's termination.

examine the employment duties and requirements of the plaintiff as well as her actual role at the church," and the "ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission").

Similarly, in *Schleicher*, the Seventh Circuit examined the actual function and duties of two ordained ministers worked for the Salvation Army and brought FLSA claims, finding that their duties included preaching, leading worship singing, teaching Bible studies, ministering to employees, teaching new potential ministers, and were employed by a church instead of the thrift shops and engaged in ecclesiastical administration. Given those circumstances, the court adopted a rebuttable presumption that those ordained ministers should be exempt from the FLSA. Notably, in a prior Seventh Circuit decision, *Alicea-Hernandez*, 320 F.3d 698, where the plaintiff was not an ordained minister, the court held that, for purposes of the exception, it would determine "the function of the position," and then inquire as to the duties and role of that position. *Id.* at 703-704. That is the same analysis used by circuits who have adopted the primary duties test by name.

In addition and contrary to Petitioner's assertion otherwise, the Second Circuit in *Rweyemamu* did not "reject" the primary duties test. As set forth in that case, the Second Circuit performs the same analysis as the Sixth Circuit and others do, but with small variations, consisting of considering whether the non-ministerial employee-employer relationship is so pervasively religious to raise first amendment concerns and allowing non-discrimination claims, such

as tort and contract claims, even if an employee is classified as ministerial. Neither of those variations are applicable here, and *Rweyemamu* is not a denunciation or rejection of the primary duties test.

Petitioner also cites to an unpublished case, *Clapper v. Chesapeake Conference of Seventh Day Adventists,* 166 F.3d 1208 (table), 1998 WL 904528 (4th Cir. Dec. 29, 1998),[7] as a decision critical of the primary duties test. In a subsequent, published decision, however, *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 306 (4th Cir. 2004), the Fourth Circuit affirmed its adoption of the primary duties test, same as adopted by the Sixth Circuit. Moreover, even if the *Clapper* decision held precedential weight, the determinative facts in that case were that the teachers, who were required to be tithe paying members of the religion, were charged with salvation of the children's souls through indoctrination and incorporated religion into the subjects, including teaching the Bible's story of creation in science class. As noted by the panel below, the "quality" referred to in the *Clapper* case was the religion's reliance on teachers indoctrinating the students into the Seventh-day Adventist Church's theology. *Hosanna-Tabor*, 597 F.3d at 781. Those facts are not present in the instant case.

Petitioner also relies upon a decision by the Wisconsin Supreme Court, *Coulee Catholic Schools v.*

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[7] Notably, in its local rules, the Fourth Circuit disfavors citation to its own unpublished decisions issued prior to January 1, 2007. See Local Rule 32.1; Local Rule 36 (standards for publication and limitations as to unpublished decisions).

Labor and Industry Review Comm., 768 N.W.2d 868 (Wis. 2009), as being a case critical of the "quantitative" approach allegedly used by some courts in applying the primary duties case. In *Coulee*, the court weighed not only the relative amount of time spent on religious duties, but also whether the the "position is important to the spiritual and pastoral mission of the church." *Id.* at 882, *quoting Rayburn*, 772 F.2d at 1169. Or, in the words of the court, a court should engage an "inquiry into how important or closely linked the employee's work is to the fundamental mission of that organization," and this "highly fact-specific" inquiry should include objective indicators, such as "[t]eaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services." *Id.* at 883.

Petitioner and amici now argue that the Sixth Circuit, in applying the primary duties test, is only counting minutes in a day, describing this as a "quantitative" approach. This interpretation of the panel's decision below ignores the fact that, in addition to determining the actual amount of time spent on religious duties, the panel also took into account the function and role of the position in furthering the religion's mission:

> Other circuits have further instructed that courts must "determine whether a position is important to the spiritual and pastoral mission of the church." *See e.g., Rayburn*, 772 F.2d at 1169.
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> * * *

> In this case, it is clear from the record that Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology.

Hosanna-Tabor, 597 F.3d at 778, 781. No circuit has relied upon counting minutes, utilizing the clock, in determining whether the function and primary duties of an employee are ministerial in nature. The concept of "primary" is not limited to time, but also encompasses the nature of the duties and role of the employee in the church's mission. This approach, taken below, includes the qualitative side of the analysis, which is consistent with the approach taken in *Coulee*.

VI. Published Circuit Cases have Consistently Held that Parochial School Teachers were not Ministerial

There are some variations between the various circuits in their analysis of the ministerial exception, including having the Fifth and Second Circuits adding additional factors, although each circuit has utilized a fact-specific inquiry in determining the function and role of the employee's position. Yet, in considering whether parochial school teachers who primarily teach secular subjects fall within the ministerial exception, the results have been remarkably consistent in finding the ministerial exception did not apply. *See EEOC v. Fremont Christian School,* 781 F.2d 1362, 1364, 1369-1370 (9th Cir. 1986) (elementary and high school

teachers); *DeMarco*, 4 F.3d at 172-163 (Catholic high school teacher); *Mississippi College*, 626 F.2d at 485-486 (faculty and staff of Baptist college); *Geary*, 7 F.3d at 331 (Catholic elementary school teacher); *Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1392, 1396-1397 (4th Cir. 1990) (pay discrimination claim brought by teachers in an elementary and high school); *DeArment v. K.L. Harvey*, 932 F.2d 721, 721-722 (8th Cir. 1991) (wage claim brought by class supervisors and monitors).

VII. Petitioner's Preferred Test Would Provide Total Deference to Religious Employers

Throughout the Petition, a general theme is that any question as to an employee's actual duties or allowing judicial objective determinations as to her functions would violate either or both of the religious clauses, citing to this Court's decisions, such as *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) and *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In Petitioner and amici's view, the rule should be, much like the district court held below, that the government and courts should take the word of the religious institutions as to whether any particular employee should be considered ministerial and exempted from a plethora of laws governing the workplace, including the federal and state discrimination laws.

What is missing in that argument, however, is that the government has a compelling interest in eradicating unlawful discrimination, an interest in the "highest order." *Catholic Univ. of Am.*, 83 F.3d at 460. This issue comes up involving employment discrimination claims against religious employers, and

not in cases that have involved collective bargaining, church governance, religious beliefs, or church property. In the employment law arena, the circuit courts have developed and continue to develop the balance between those interests of the highest order, through the ministerial exception. Each of these cases have been necessarily fact specific, which means complete consistency is hard to accomplish. But the cost of not obtaining complete consistency in the decisions is the price of honoring and addressing both of those most important interests. On the other hand, the cost of complete consistency, obtained by providing total deference to religious employers, would be to ignore the state's compelling interest in eradicating unlawful discrimination.

The instant case is a clear example of the need to educate employers, religious or otherwise, and provide disincentives from discriminating against persons with disabilities, actual or perceived. The Principal and the School Board chose not to believe Perich's doctor that she was able and ready to return to work, replacing the doctor's opinion with their own. Their comments, including those that Perich may scare the children and parents do not want her in the building, evinces the exact same type of stereotypes and bias that prompted the passage of the ADA. When Perich complained that it was unlawful and asserted her federal rights, the School's immediate response was to fire her. This is a blatant violation of the ADA, and it had nothing to do with religion.

VIII. There is No Compelling Reason to Grant the Petition

Although the courts have applied the ministerial exception for almost forty years, relatively few cases have been brought that involve that exception.[8] These cases consist of a very small subset of discrimination claims, and very few religious institutions have been named as defendants. In addition, at least on the circuit level, most of the cases involve ordained ministers or clergymen, and it is even a smaller subset of the ministerial exception cases that involve plaintiffs such as Perich, who was not an ordained minister or otherwise provided pastoral or liturgical services to the members of the congregation. Accordingly, very few new cases would benefit this Court's review of this case.

In addition, the ministerial exception has been percolating through the district and circuit court levels for the past forty years, with those courts still refining and developing the scope of that exception. This Court has declined available opportunities to review this exception thus far, and there is no compelling reason to step into the fray now, since the developments continue to be made without this Court's supervision or creating any intolerable conflict. While some courts may desire some additional guidance, absent the type of deference desired by Petitioner and the amici through a blanket rule, these cases will continue to be fact specific cases that defy clear lines, since the courts

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[8] According to Petitioner's research, over the past five years, there have been on average 2.8 circuit court opinions and 8 district court opinions per year that involve the ministerial exception.

will be required to balance high order interests in the specific circumstances of each case.

Of course, and as noted above, Petitioner and amici would like total immunity from employment discrimination claims through their ability to designate which employees would be covered by the federal discrimination laws and which would not. They could avoid any potential liability based on their employment decisions, acting with impunity, and would be able to plan budgets and make reorganizations without having to review and determine if they are in fact acting lawfully. Accordingly, for Petitioner and amici, this case is quite important.

The problem with their reasoning, however, is that a number of corporations, businesses, and organizations would also like to benefit from such a rule and to plan without worrying as to violating the federal discrimination laws. But we, as a nation, have a compelling interest in eradicating unlawful discrimination and, if a corporation, business, or organization violates those laws by discriminating against its employees, the price to be paid is to compensate those employees for their losses.

The second fallacy in Petitioner and amici's logic is that there is only additional cost and liability if religious institutions have chosen to unlawfully discriminate against its employees. The applicable federal employment laws already allow leeway for religious employers to hire persons of a certain religion and believers of its doctrines. This Court's precedent and the ministerial exception also allow complete and total deference for religious institutions in employing,

retaining, or dismissing their religious leaders. As to their other employees, not performing ministerial duties, the only thing that those institutions need to do is to not make employment decisions based on membership of a protected class. In other words, do not discriminate on the basis of race, gender, ethnicity, disability, etc., and it would not cost them a dime.

CONCLUSION

For all of the forgoing reasons, respondent Cheryl Perich asks the Court to deny the writ.

Respectfully submitted,

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