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.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute the propriety of the ministerial exception or its core rationale that courts should not decide who will perform the ministerial functions of religious organizations. They do not claim that the ministerial exception is confined only to pastors of congregations. Rather, they dispute the exception's boundaries.

On that issue, every judge below acknowledged conflicting authority. "At least one other circuit has found that this approach is too rigid," Pet. App. 16a n.7 (majority); "split authority in several areas," *id.* 26a-27a n.2 (White, J., concurring); "courts remain sharply divided," *id.* 43a (District Court). Even Respondents concede that there are "some variations" among the circuits, Federal Opp. 12 (Opp.), and that "courts may desire some additional guidance," Perich Opp. 31. The conflict is square, and this case is an excellent vehicle to address it.

I. There is a square conflict among the circuits and states.

Respondents claim there is no real conflict because all the circuits conduct a "fact-intensive" review of an employee's "primary duties." Opp. 12. This is like saying that all this Court's Establishment Clause cases are consistent because each involved a fact-intensive review of whether government supported religion. *Of course* all ministerial-exception cases review the facts and the employee's duties.

But the lower courts divide over the legal standards applicable to that review: (1) how to evaluate

the job and its duties, Pet. 13-14, and (2) whether to also consider the nature of the dispute, Pet. 14-16.

Each of these basic disagreements entails subsidiary disagreements. With respect to the job and its duties, courts disagree over, *inter alia*, whether the religious organization's characterization of duties as religious should receive any deference; the significance of the time spent performing unambiguously religious duties; and whether it matters that the duties could be performed by a person from another denomination. And when the employer offers a religious reason for a discharge, courts disagree over whether duties alone are dispositive, and whether courts can adjudicate claims of pretext.

The first set of splits is exemplified by *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008). In *Schleicher*, the parties disputed whether the work of administering thrift shops was secular or religious, and whether those allegedly secular duties predominated over unambiguously religious duties like "leading worship singing," "leading daily devotions," and "teaching Bible studies." *Id.* at 477. The dispute here is substantially parallel: whether teaching the standard curriculum is secular or religious, and whether Perich's allegedly secular duties predominate over her unambiguously religious duties of leading prayers and daily devotions and teaching religion.

The Sixth Circuit rejected the Church's view that the standard curriculum has religious significance, rejected the Church's view that Perich's ministerial status and her unambiguously religious duties are significant, and emphasized the number of minutes spent in those duties. Pet. App. 20a-21a. The Se-

venth Circuit did just the opposite. It deferred to the Salvation Army's view that running its thrift shops is religious. It adopted a rebuttable presumption that employees with clerical titles are within the ministerial exception. It did not mention time allocations. 518 F.3d at 477-78; Pet. 14.

If this standard were applied here, the Church would win. More weight would be given to Perich's unambiguously religious duties; minutes on the clock would be irrelevant. Teaching the standard curriculum would be a religious duty because the Church requires teachers to "integrate faith into all subjects." Pet. App. 5a. And the Church would be entitled to "a presumption" that Perich is within the ministerial exception, absent evidence that her status as "commissioned minister" was a subterfuge. Two different standards, two different results.

The split is equally apparent in *Coulee Catholic Schools* v. *Labor and Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009). Noting a split between "quantitative" and "functional" approaches to the ministerial exception, the court rejected the quantitative and chose the functional. *Id.* at 881-82. The court "envisage[d] a more limited role for courts in determining whether activities or positions are religious." *Id.* at 882. *Coulee* and this case have substantially similar facts, but different approaches and thus opposite results. Pet. 21-23.

These cases adopt deference, not abdication. The Church claims no right to arbitrarily designate just anyone as a minister. It asks only that secular courts not second-guess religious understandings of religious functions.

Nor has the en banc opinion in *Alcazar* v. *Corporation of the Catholic Archbishop* somehow ended the split. The court declined to choose "either the test created by the three-judge panel," "or one of the tests used by our sister circuits," 627 F.3d 1288, 1292 (9th Cir. 2010), thus acknowledging the split but not wading into it.

The second set of conflicts goes to whether a religious reason for a discharge increases the sensitivity of the litigation and whether courts can adjudicate claims that religious reasons are pretextual. Pet. 14-16, 18-19. Respondents have little to say about these conflicts.

According to the Sixth Circuit, a jury can decide "whether a doctrinal basis actually motivated Hosanna-Tabor's actions." Pet. App. 24a. But other circuits have held just the opposite. *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006); Pet. 15. Respondents cannot reconcile *Tomic* with the decision below. They never even cite it.

The Second Circuit similarly rejected claims of pretext, holding that the nature of the claim is as important to the ministerial exception as the employee's duties. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008); Pet. 16. Respondents argue that *Rweyemamu*'s statement was dictum, "because the *plaintiff* before" the court easily fell within the exception. Opp. 14 (emphasis added). Not so. *Rweyemamu* said that plaintiff's "*claim* easily falls within" the ministerial exception, and it rested this holding on two independent considerations: "the nature of Father Justinian's duties and *the basis for his dismissal*," 520 F.3d at 209 (emphasis added).

Perich argues that *her* pretext claim is different—either because the Synod's dispute-resolution policy does not apply (12 n.3), or the Church raised religious objections too late (23 n.13), or her evidence is so strong that she "does not need to establish pretext" (23). But these arguments go to the strength of her pretext claim, not to the circuit split.

They are also wrong. The dispute-resolution policy states that "[f]itness for ministry and other theological matters must be determined within the church." Pet. App. 77a. Rescinding a commissioned minister's call is a decision about "fitness for ministry." The language Perich quotes (12 n.3) is from an exception to an exception, Pet. App. 80a, and irrelevant here.

Nor did the Church raise its religious concerns too late. From the outset, it stated that Perich's conduct "demonstrates your total lack of concern for the ministry of Hosanna-Tabor Lutheran School" and showed that she was unable "to perform the functions of the sacred office." Record Entries 22-4, 22-5 (Letters to Perich 2/22/05, 3/19/05). And both courts below thought Perich's claim would require her to prove pretext. Pet. App. 24a-25a, 50a. Thus, her claim would fail in the Second and Seventh Circuits.

Respondents also claim that there is no split with respect to teachers in religious schools. Opp. 17 & n.4. But of the eight cases they cite, five decided no issue under the ministerial exception.[1] An overlap-

[1] *Elvig* v. *Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in denial of rehearing en banc) (one-sentence hypothetical); *Geary* v. *Visitation School*, 7 F.3d 324, 326-29 (3d Cir. 1993) (entanglement claim under *Catholic Bishop*); *DeArment* v. *Harvey*, 932 F.2d 721, 722 n.3

ping set of five involved teachers who were not shown to teach religion or lead worship.[2] In the remaining case, the court viewed a math teacher's few religious duties as "easily isolated and defined."[3] Another overlapping set of three cases involved only pay claims, with no dispute about reinstatement.[4]

The relevant cases are those in which a teacher teaches "secular" classes *and* teaches religion classes and leads students in prayer and worship. As Judge White pointed out, there were four such cases before this one, and they were split: Two district courts ruled for the employee, and two appellate courts ruled for the church. Pet. App. 28a-29a; *Coulee*, 768 N.W.2d 868; *Clapper* v. *Chesapeake Conference*, 166 F.3d 1208 (4th Cir. 1998). In short, every factually similar *appellate* decision contradicts the decision below.

Respondents cannot distinguish *Coulee* or *Clapper*. Pet. 20-23. They say the teacher in *Coulee*

(8th Cir. 1991) ("ministerial exemption" at issue based on regulation, not Constitution) *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (same); *Ritter* v. *Mount St. Mary's College*, 814 F.2d 986 (4th Cir. 1987) (collateral estoppel).

[2] *EEOC* v. *Mississippi College*, 626 F.2d 477, 479, 485 (5th Cir. 1980) (psychology professor); *EEOC* v. *Fremont Christian School*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (no description of duties); *Geary*, 7 F.3d at 326 (same); *Dole*, 899 F.2d at 1391-92, 1396-97 (no indication whether teachers taught religion or led worship); *Ritter*, 814 F.2d at 988 (education professor).

[3] *DeMarco* v. *Holy Cross High School*, 4 F.3d 166, 168, 172 (2d Cir. 1993).

[4] *DeArment*, 932 F.2d at 721; *Dole*, 899 F.2d at 1391; *Fremont Christian*, 781 F.2d at 1364.

"'made efforts to integrate Catholicism into all her subjects,'" but "Perich did not do so." Opp. 20. This fails on two grounds. First, Perich's testimony that she generally failed to perform as instructed, if true, shows that she was a bad employee. It does not show what her assigned job duties were. Second, the teacher in *Coulee* gave similar testimony. See 768 N.W.2d at 897, 901 (Crooks, J., dissenting).

Respondents claim that *Coulee* was decided under the state constitution, Opp. 20 n.5, but this is mistaken. After reviewing both the state and federal constitutions, the Wisconsin court explicitly proceeded under the federal: "we proceed under the functional analysis of the ministerial exception as outlined in the First Amendment discussion above." 768 N.W.2d at 888. After twice stating that the state constitution "provides at least the protections" contained in federal law, *id.* at 887, 888, the court concluded that resolution of plaintiff's claims would violate both constitutions. *Id.* at 892. The state law holding unambiguously rested on the federal law holding.

As for *Clapper*, Respondents claim there is no evidence here that the Church "relied on its teachers 'to indoctrinate its faithful into its theology.'" Opp. 18 (quoting Pet. App. 22a). This conclusory statement is simply inconsistent with the record. With respect to the children in the school, the teachers are the *only* employees who teach religion and lead prayers, devotionals, and worship services. There are no other "ministers" or specialized religion teachers to do the "indoctrinating."

Respondents also say that *Clapper* is unpublished and inconsistent with published decisions in the

Fourth Circuit. Opp. 18-19. These published decisions are distinguished *supra* nn.1-2, 4. And this Court has repeatedly counted unpublished decisions in assessing circuit splits. *E.g.*, *Hall Street Associates* v. *Mattel*, 552 U.S. 576, 583 n.5 (2008); *Carter* v. *United States*, 530 U.S. 255, 260 (2000).

Finally, Respondents state—nineteen times—that the Church hires "even non-Lutheran[s]" to do the same work as Perich. Opp. 2 (twice), 4, 8, 9, 12, 18; Perich Opp. i, 3 (four times), 11, 12 (twice), 14, 21 (twice), 22. Like the court below, Pet. App. 21a, Respondents think this shows indifference to the religious beliefs of teachers. But no such inference is supported by the record. Were the Court to draw a non-record inference, it would be far more reasonable to infer that any non-Lutheran teacher is a faithful adherent of some other conservative Protestant church. (The record does not say, but in fact, she was a member of the Assemblies of God.)

Note too that *Coulee* held it irrelevant that teachers were not required to be Catholic; what mattered was that they were required to teach Catholicism. 768 N.W.2d at 891. This is another conflict.

The "non-Lutheran" was also a lay teacher. Pet. App. 5a; Record Entry 34-3 ¶¶ 12-13, 17 (Perich Affidavit). Lay teachers may perform the same duties—one year at a time—but lay teachers and called teachers have fundamentally different relationships with the Church. Called teachers must have college-level theology training, are subject to the same rules as pastors, and have tenure. Pet. App. 3a.

The cases conflict with respect to the boundaries of the ministerial exception generally *and* with respect to teachers in religious schools specifically.

II. There is a conflict with this Court's cases.

This Court has repeatedly prohibited civil courts from interfering with the selection of religious leaders. Pet. 26-29. Respondents attempt to distinguish these cases as involving "essentially ecclesiastical disputes," Opp. 20-21, but that begs the question. Cases within the ministerial exception *are* ecclesiastical disputes. The question is how to determine the boundaries of the ministerial exception.

Nor is it dispositive that Perich was a "teacher at a religious school" instead of a bishop or chaplain. Opp. 21. This Court extended the relevant First Amendment principles to religious school teachers in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), and the *Lemon*-era funding cases, Pet. 27-29. If courts cannot require religious schools to bargain with their lay teachers, and if the state cannot monitor these teachers or directly supplement their salaries, even in secular classes, surely courts cannot force schools to reinstate a commissioned minister to teach religion classes and lead devotionals.

The decision below also conflicts with cases prohibiting secular courts from deciding religious questions. Pet. 29-30. Respondents selectively quote *Ohio Civil Rights Commission* v. *Dayton Christian Schools*, 477 U.S. 619 (1986), to suggest that courts can review religious reasons for a discharge. Opp. 21. But the constitutional defense was not before the Court in *Dayton Christian*. The Court held only that "the District Court should have abstained from

adjudicating this case under *Younger* v. *Harris*," and that the school would have "an adequate opportunity to raise its constitutional claims" in the state proceedings. *Id.* at 625, 628.

Finally, the decision below conflicts with this Court's expressive-association cases. Pet. 31-32. Citing the *Roberts* trilogy, Respondents argue that "prohibiting discrimination is 'a state interest[] of the highest order that generally outweighs *any* burden on the freedom of association." Opp. 22 (emphasis added). This sweeping assertion is as startling as it is wrong. *Roberts* and its progeny all involved large organizations with substantially commercial characters whose message was not materially affected by the admission of women. See *Boy Scouts* v. *Dale*, 530 U.S. 640, 657-59 (2000) (distinguishing these cases). The analysis is different for non-commercial associations with a clear message.

Respondents try to distinguish *Dale* and similar cases, stating that the right of association "protects a right to discrimination where the discrimination itself is integral to the expressive activity." Opp. 22 n.8. But that is not what those cases say. Rather, the right of association protects against "forced inclusion" where the unwanted person "affects in a significant way the group's ability" to communicate its message. 530 U.S. at 648. Here, called teachers are the primary means by which the Church communicates religion to students. Forced retention of a religion teacher deemed unfit undoubtedly "affects in a significant way" the Church's control of its religious message to the children.

III. There has been no waiver.

Respondents say the Church waived any challenge to the primary-duties test because it "did not question the validity of that test before the court of appeals issued its decision." Opp. 23. This argument fails for two reasons. First, it conflates an argument with a claim. "Once a federal *claim* is properly presented, a party can make *any argument* in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). The Church's *claim* is that the suit is barred by the ministerial exception.

Second, even the Church's *arguments* haven't changed. The Church argued below that there was no need to apply the primary duties test because "the fact that Perich was a 'commissioned minister' * * * *in and of itself* should have been sufficient to satisfy the * * * ministerial exception." Pet. Ct. App. Br. 23 (emphasis added). It also objected to using "a 'quantitative' assessment" of Perich's duties, *ibid.* and argued that Perich's claim of pretext would impermissibly "require a court to weigh in on issues of [Church] doctrine and practice." *Id.* at 33-34 (quoting *Schleicher*). It did all this even though the panel was bound to apply the primary-duties test. Pet. App. 16a. The Church repudiated that test outright at its first actual opportunity, in its en banc petition.

Alternatively, Respondents say the Church should have raised a statutory defense under the Religious Freedom Restoration Act (RFRA) and avoided the need to decide any constitutional question. Opp. 24-25. But the Church has no obligation to raise every possible non-constitutional ground before

it raises any constitutional ground. This Court can "take the case as it comes," *United States* v. *Leon*, 468 U.S. 897, 905 (1984), deciding a constitutional defense even if a non-constitutional defense could have been raised but was not, *Brown* v. *Hotel and Restaurant Employees*, 468 U.S. 491, 500 n.9 (1984). Just as plaintiff is "master of the complaint," *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002), so defendant is master of the answer.

The constitutional defense would have to be decided in any event. Because RFRA applies only to "Federal law," 42 U.S.C. § 2000bb-3(a), it is no defense to Perich's *state law* retaliation claim. See Pet. App. 72a-73a. The Sixth Circuit treats the ministerial exception as jurisdictional, *id.* 10a-11a, so it would have to be decided first. And the Sixth Circuit has held (in our view incorrectly) that RFRA "does not apply in suits between private parties." *General Conference Corporation of Seventh-day Adventists* v. *McGill*, 617 F.3d 402, 410-11 (6th Cir. 2010). Assuming that the EEOC's claims were barred by RFRA, Perich's claims were not.

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted.

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