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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The federal courts of appeals have long recognized the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions. The circuits are in complete agreement about the core applications of this doctrine to pastors, priests, and rabbis. But they are evenly divided over the boundaries of the ministerial exception when applied to other employees. The question presented is:

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.

PARTIES TO THE PROCEEDINGS

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School was the defendant-appellee below. Respondent Equal Employment Opportunity Commission was the plaintiff-appellant below, and respondent Cheryl Perich was the intervenor-plaintiff-appellant below.

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School has no parent corporation and issues no stock.

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The Sixth Circuit's opinion (Pet. App. 1a-30a) is reported at 597 F.3d 769 (6th Cir. 2010). The District Court's opinion (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881 (E.D. Mich. 2008). The District Court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is unpublished.

JURISDICTION

The judgment of the Sixth Circuit was entered on March 9, 2010. J.A. 279. That court denied rehearing on June 24, 2010. Pet. App. 62a-63a. On September 2, 2010, Justice Thomas extended the time within which to file a petition for certiorari to and including October 22, 2010, and the petition was filed on that date. The petition was granted on March 28, 2011. This Court has jurisdiction under 28 U.S.C. §1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant statutory provisions are reproduced in Pet. App. 64a-66a.

INTRODUCTION

The courts of appeals agree that there is a ministerial exception to employment-law litigation. They agree that it extends beyond pastors, priests, and rabbis, but not as far as janitors or secretaries. The question is where to draw the line.

The Sixth Circuit gave a mechanistic answer to the question, adding up minutes of the day in columns it labeled "secular" and "religious," and comparing the totals. But counting minutes does not measure the importance of an individual's religious functions; it does not account for the concept of an ecclesiastical office; and it does not serve the purposes of the ministerial exception.

The private plaintiff here is within the ministerial exception because she performed important religious functions. She taught religion classes, led worship, and led prayer. She was required to integrate faith into secular subjects. She was the Church's primary instrument for communicating the faith to her students. She held ecclesiastical office as a commissioned minister in the Lutheran Church.

She violated church teaching, was found unfit for ministry by a vote of the Church congregation, and was removed from ecclesiastical office. Instead of challenging that ruling within the church, she filed a claim in civil court seeking reinstatement as a commissioned minister and "called" teacher. Such a claim would run roughshod over the Lutheran system for resolving internal religious disputes. It would entangle the courts in the religious question of her fitness for ministry. And it would result in the government dictating to the Church who will teach its

religious message. That result cannot be squared with the First Amendment.

STATEMENT

1. Petitioner Hosanna-Tabor Evangelical Lutheran Church and School ("the Church") is a member congregation of The Lutheran Church—Missouri Synod ("the Synod"). In 2004, just before this dispute arose, the Church had 429 members on the rolls, 151 of whom were sufficiently active that they attended services at least twice a month. J.A. 177.

As part of its ministry, the Church operates a K-8 school. Pet. App. 3a, 33a. The school is not separately incorporated, but is simply one of the ministries of the Church. It is governed by the voting members of the Church congregation, together with two boards composed of volunteers. J.A. 59-60. In 2005, the school had eighty-four students and seven teachers, including the principal, who also taught half-time. J.A. 119, 120-21, 177. The school offered a "Christ-centered education" based on biblical principles. Pet. App. 4a-5a, 35a.[1]

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[1] The Church and school operated at a financial deficit in 2004-05. See J.A. 233, 235, 242, 245. At the end of the 2008-09 school year, the Church closed the school and released all the teachers. The case is not moot, because the school never had a separate legal existence. The Church was the employer, and the Church is the defendant.

Beginning in academic year 2009-10, the Church agreed to jointly operate a school with another Lutheran church nearby. See Concordia Lutheran School, http://www.concordials.org/. The new school is a joint venture of the two churches and is not separately incorporated.

2. Missouri Synod schools may have two types of teachers: "called" teachers and "lay" teachers. Pet. App. 3a, 33a. Called teachers are chosen by a vote of the Church congregation. *Ibid.* They are called for open-ended terms, and their call can be rescinded only for cause and only by a supermajority vote of the congregation. Pet. App. 3a, 33a, 38a; J.A. 65, 212. Respondent Cheryl Perich was a called teacher in Hosanna-Tabor's school. Pet. App. 3a-4a, 34a.

Lay teachers are selected by the school board, without a vote of the congregation, and only for one-year terms. Pet. App. 3a, 33a; J.A. 120. Lay teachers are employed only if the Church cannot fill all positions with called teachers. J.A. 63, 270-71. In 2002-03, the Church employed one lay teacher who was not Lutheran. J.A. 225. All lay teachers are required to be Christian and to teach and act in accordance with Lutheran doctrine. J.A. 46.

3. Called teachers occupy an important position within the Synod. Since its founding in the mid-1800s, the Synod has held that the work of called teachers is sacred because, by teaching the faith in word and deed, they perform part of the pastoral functions of the church.[2] Because called teachers perform pastoral functions, they must first receive a

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[2] Commission on Theology and Church Relations, *The Ministry: Offices, Procedures and Nomenclature* 6, 11-14, 22-27, 30 (1981) (*The Ministry*), available at http://www.lcms.org/Document.fdoc?src=lcm&id=423. The Synod's Commission on Theology and Church Relations publishes statements on theological issues, which are available on the Synod's website and help explain the theological offices and terms at issue in this case. For further explanation of these offices and terms, see Brief of Lutheran Church—Missouri Synod as Amicus Curiae (LCMS Brief).

"call." The call is a rich theological concept within Lutheranism, dating to the Augsburg Confession of 1530, which states that "no one should publicly teach in the Church or administer the Sacraments unless he be regularly called."[3]

To be eligible for a call, teacher candidates must satisfy religious, character, and educational standards.[4] The educational standards may be certified on graduation with appropriate courses from a Lutheran college or university. LCMS Br., *supra* n.2; J.A. 267. Candidates without such certification must complete eight college-level theology courses known as the "colloquy." Pet. App. 3a, 33a; J.A. 267. These courses are also taught by the Synod's system of colleges and universities; Perich took hers at Concordia College in Ann Arbor. J.A. 41, 51. Currently, the required courses must include "biblical interpretation (Old and New Testament), church history, the Lutheran Confessions, doctrine, the beliefs of other religious bodies, and the ministry of the Lutheran teacher."[5] The courses are termed "colloquy" because after completing them, the candidate must be orally examined by a committee of faculty in a final interview, or colloquy.[6] Once the candidate has passed the colloquy and satisfied the other requirements, she is

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[3] *The Augsburg Confession* Art. XIV (1530), available at http://www.lcms.org/page.aspx?pid=414.

[4] *Colloquy for Ministers of Religion—Commissioned in the Lutheran Church—Missouri Synod* 5-8 (2011), available at http://classic.lcms.org/graphics/assets/media/BHECUS/Colloquy%20Policy%20Manual%203_11.pdf.

[5] *Colloquy for Ministers*, *supra* n.4, at 8.

[6] *Id.* at 7.

listed on the Synod's roster of persons eligible for a call. Pet. App. 3a, 33a, 51a; J.A. 41.

To receive a call, a candidate must be selected by a local church congregation. Pet. App. 3a, 33a. At Hosanna-Tabor, the school board typically presents a choice of candidates to the congregation, J.A. 62, 91, and after prayerfully considering the candidates, the congregation extends a call via congregational vote, J.A. 42. Once the call has been accepted, the candidate is installed in office via the public rite of "commissioning," and is recognized as a "Minister of Religion, Commissioned"—also known as a "commissioned minister." J.A. 42, 48; Pet. App. 3a, 33a.

4. Hosanna-Tabor first employed Perich as a lay teacher in 1999. Pet. App. 3a, 34a; J.A. 46. She received her call in March 2000, J.A. 42-43, and thereafter, served as one of the Church's commissioned ministers and called teachers. Pet. App. 3a-4a, 34a. As a commissioned minister, Perich was subject to the same employment and dispute resolution rules as the pastor of the congregation. Pet. App. 51a; J.A. 55. Because she was working "in the exercise of the ministry," she was authorized to claim special tax treatment for a housing allowance for ministers, J.A. 217-20, which she did. Pet. App. 4a, 34a.

The District Court found that the Church's classification of Perich as commissioned minister was a sincere religious practice, Pet. App. 51a, and that "Hosanna-Tabor treated Perich like a minister and held her out to the world as such long before this litigation began." Pet. App. 52a. The Sixth Circuit did not disagree.

During the 2003-04 school year, Perich taught fourth grade. Pet. App. 4a. Perich taught religion classes four days a week, led students in prayer three times a day, led students in daily devotional exercises, and attended a school-wide chapel service with her students every week. Pet. App. 4a, 34a. In rotation with the other teachers, she led that chapel service, selecting the liturgy, Scripture readings, and hymns to be sung, and delivering a short message of her own composition based on the Scripture readings. J.A. 224.

In addition to these duties, Perich taught an academic fourth-grade curriculum. Pet. App. 4a. In accordance with Lutheran teaching, she was expected to "integrate faith into all subjects." Pet. App. 5a, 35a. She did so, for example, by teaching a student about the Lutheran doctrine of justification by faith in connection with an essay in English, J.A. 53, answering questions about God in social studies, J.A. 227, commenting on God as Creator in science, *ibid.*, and discussing theological questions during a parent-teacher conference, J.A. 53.

As a called teacher, Perich was pledged "[t]o exemplify the Christian faith and life" and "to live in Christian unity with the members of the congregation and co-workers." J.A. 48.

5. Like many Christian denominations, the Synod has long taught that Christians should resolve religious disputes within the church rather than sue each other in the civil courts. This teaching is based

on 1 *Corinthians* 6:1-11, and is further developed in Lutheran interpretations of that Scripture.[7]

The teaching is embodied in an elaborate internal process for resolving disputes arising within the Synod. Pet. App. 77a-104a. The process provides for informal and formal reconciliation, reconcilers and facilitators, dispute resolution panels, appeals panels, and review panels. Pet. App. 84a-98a. It emphasizes that "[f]itness for ministry and other theological matters must be determined within the church." Pet. App. 77a.

6. In June 2004, Perich became ill with what was eventually diagnosed as narcolepsy. Pet. App. 5a-6a, 35a. Symptoms included sudden and deep sleeps from which she could not be awakened. J.A. 271. She received various treatments, and offered several estimated dates of return to work, but all passed without her being able to return. J.A. 126-27, 131, 132.

Because of the school's small staff and limited budget, Perich's absence created immediate difficulties. For a full semester, the school attempted to preserve a job for Perich by combining three grades into a single classroom. J.A. 161; Pet. App. 35a. But parents complained about that arrangement. Pet. App. 7a n.1. Finally, in January 2005, seven months after Perich fell ill, the school hired a replacement for the spring semester. Pet. App. 6a-7a & n.1, 35a-36a.

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[7] See Commission on Theology and Church Relations, *1 Corinthians 6:1-11: An Exegetical Study* (1991), available at http://www.lcms.org/Document.fdoc?src=lcm&id=415.

Perich continued to offer revised estimates for her possible return, Pet. App. 6a, 36a; J.A. 172, but the school's principal, Stacey Hoeft, explained that she could not breach the contract with the replacement teacher or impose a third new teacher on the fourth-grade class in a single year. Pet. App. 6a-7a, 36a; J.A. 173. Instead, she asked Perich to discuss with her doctor whether she would be able to return the following school year. J.A. 168.

On January 30, foreseeing no early end to Perich's inability to work, the congregation voted to ask Perich for a "peaceful release from her call." Pet. App. 7a, 36a. "Peaceful release" is a religious act by which a congregation and a called minister agree to release one another from the mutual obligations of the call. Peaceful releases are common, and they leave the called minister in good standing and eligible for a new call. J.A. 56, 89, 106.

Perich refused the request for a peaceful release. J.A. 199. Instead, on February 8, she obtained a note from her doctor that said, without explanation, that she would be "able to return to work/school on 2/22/05." J.A. 190; Pet. App. 7a, 37a. The school board and the school's principal reiterated that because of the replacement teacher's contract, there was no position for Perich to return to until at least the following school year. J.A. 146, 229; see also J.A. 158-59. They also expressed concern about the children's safety, given Perich's recent reports of severe symptoms and the risk that she could collapse into a deep sleep while supervising children. J.A. 173. Because the doctor's note contained no explanation, it did little to alleviate these concerns. J.A. 135-36. In fact, Perich continued to report sleep symptoms

and "a lot of problems" to her doctor throughout 2005. J.A. 250-57.

On February 13, the school board told Perich that "since there was no opening for her to return to, she could not return to work on February 22." Docket Entry 25-5; see also J.A. 146, 229. But on February 22, with no notice save a late-night email on February 21, Perich showed up at the school and refused to leave until Hoeft gave her a letter acknowledging that she had reported to work. Pet. App. 8a, 37a; J.A. 141-42, 146. Later that day, Perich told Hoeft that if she were not reinstated, she would sue the Church. Pet. App. 8a, 38a; J.A. 151-52. Hoeft immediately asked Perich if that were what she really meant, because a lawsuit would clearly violate the Church's conflict resolution policy applicable to called employees. J.A. 152. Perich repeated the threat. *Ibid.*

Scott Salo, who chaired the school board, J.A. 149, wrote Perich that night. He said that her actions had demonstrated an intent "not to return to work, but rather to create upheaval at our school." J.A. 229; Pet. App. 8a-9a, 38a. In the board's opinion, Perich had evinced "a total lack of concern for the ministry of Hosanna-Tabor Lutheran School." J.A. 229.

On March 19, after consulting with the Michigan District Office (a component of the Synod), Salo wrote Perich that the school board had decided to recommend that the congregation rescind Perich's call. J.A. 55. He said this decision was based on her "insubordination and disruptive behavior" on February 22, and because she had "damaged, beyond repair, the working relationship [she] had with the Administration and School Board by threatening to take legal action." *Ibid.*; Pet. App. 9a, 38a. At its next

meeting, after hearing from Church leaders and from Perich, the congregation voted 40 to 11 to rescind Perich's call. J.A. 211-12; Pet. App. 9a, 38a-39a.

7. The Equal Employment Opportunity Commission filed a complaint against the Church under the Americans with Disabilities Act, Pet. App. 64a-65a, alleging a single count of retaliation. Pet. App. 9a-10a, 32a; J.A. 16-17. Perich intervened, alleging the same retaliation claim and adding a retaliation claim under state law. Pet. App. 10a, 32a, 66a, 72a-73a. Neither complaint alleges disability discrimination.

Both complaints request an order reinstating Perich to her former position as a commissioned minister, together with back pay, compensatory damages, punitive damages, and injunctive relief ordering new "policies, practices, and programs" at the Church. Pet. App. 73a-74a; J.A. 17-18.

Perich and the Church filed cross-motions for summary judgment. The Church argued that the suit was barred by the ministerial exception, because called teachers have important religious functions and are commissioned ministers who play a crucial role in the pastoral and religious mission of the Church. Docket Entry 22. The Church also argued that its belief in internal resolution of religious disputes was a legitimate reason for rescinding Perich's call. *Ibid.* The Church argued that it had replaced Perich and asked for her peaceful release before she complained of discrimination, that she was not able to perform the essential functions of the job at any relevant time, and that she had come to school on February 22 for the purpose of provoking something that could be called retaliation and thus creating a claim. Docket Entry 36.

Perich and the EEOC argued that rescinding her call was an act of retaliation, Docket Entries 24, 35, and that the ministerial exception did not apply because the majority of her duties consisted of teaching secular subjects. Docket Entries 34, 35.

The District Court granted the Church's motion for summary judgment. Pet. App. 53a. The court emphasized that the Church called Perich as a commissioned minister and held her out to the world as such. Pet. App. 51a-52a. The court refused to second-guess the Church's view of the religious significance of called teachers, noting that "separation of church and state in the United States has made federal courts inept when it comes to religious issues." Pet. App. 52a. It further held that it could not adjudicate Perich's claim without "exploration of religious doctrine in violation of the First Amendment." Pet. App. 50a.

The Sixth Circuit disagreed.[8] It reasoned that an employee falls within the ministerial exception only if the employee's "primary" duties are religious. Pet. App. 17a. The court applied this test by counting the number of minutes Perich spent on various tasks. Pet. App. 4a, 19a-20a. The court concluded that Perich was not subject to the ministerial exception because she spent the "majority of her day teaching secular subjects using secular textbooks." Pet. App. 22a. It also emphasized that lay teachers could

[8] Although the case was presented on cross-motions for summary judgment, the Sixth Circuit held, for reasons rooted in Sixth Circuit doctrine, that the District Court had appropriately found facts. It reviewed these facts under the clearly erroneous standard. Pet. App. 10a-12a. Neither side has contested this determination, and it is not at issue here.

perform the same tasks as called teachers. Pet. App. 23a. It remanded "with instructions that the district court make a finding on the merits of Perich's retaliation claim," Pet. App. 25a—thus implicitly granting partial summary judgment to Perich on the ministerial exception defense.

Judge White, concurring, found the precedents "more evenly split" than the majority, Pet. App. 26a, but ultimately joined the panel's judgment because lay teachers performed the same tasks as called teachers. Pet. App. 29a.

SUMMARY OF ARGUMENT

I. This Court has long held that government cannot override the decisions of churches concerning the appointment of clergy. From this principle, the courts of appeals have unanimously developed the ministerial exception, which prevents ministers from suing their churches over most employment disputes.

The question presented is whether Perich's religious functions and her claim fall within the boundaries of the ministerial exception. Those boundaries must be drawn in light of the ministerial exception's constitutional foundations and purposes. The ministerial exception is independently rooted in the Free Exercise Clause, the Establishment Clause, and freedom of religious association.

The Free Exercise Clause protects the right of churches to select and control the employees who perform important religious functions. These employees speak for the church and are essential to its religious mission.

The Establishment Clause prevents government from appointing ministers. And it therefore prevents courts from reinstating ministers.

The Establishment Clause also prevents courts from deciding the religious questions that are inevitably involved in employment disputes over ministers. Employment discrimination suits turn on whether the employer acted for legitimate or prohibited reasons. When an employee performs important religious functions, the proffered legitimate reasons are nearly always religious, and courts cannot evaluate those reasons without deciding religious questions.

Freedom of association protects the right of religious associations to control their membership, their leadership, and those authorized to speak for the association, to the end that these associations can control their religious message.

These sources of law are independent grounds of the ministerial exception, and together, they define it. The ministerial exception is limited to employees who perform functions important to the employer's religious mission. And it is limited to cases that would end in reinstatement or its financial equivalent in back pay and front pay, *or* that would require the court to decide religious questions.

II. Perich's claim satisfies both requirements. She was important to the religious mission of the Church because she taught religion classes, led worship, and led prayer. She was expected to, and did, integrate faith into the secular curriculum. She was commissioned as an ecclesiastical officer pursuant to longstanding theological teachings. And she was the

Church's primary means of communicating the faith to her students.

She seeks reinstatement to her ecclesiastical office and other intrusive relief. She was dismissed for violating church rules, and the courts cannot decide her claim without resolving the religious disputes arising from her challenge to those rules. Allowing her claim to go forward would leave the Church unable to control who teaches the faith to the next generation.

ARGUMENT

I. The Constitution limits government interference in the selection of ministers and the resolution of religious questions.

A minister cannot sue to force a church to accept or retain him as a minister. This Court and the lower courts have enforced this principle with striking unanimity, and neither respondent has questioned it at any stage of this litigation. The disputed boundaries of the principle must be determined in light of the underlying bases of the rule: the Free Exercise Clause, the Establishment Clause, and freedom of association.

A. This Court and the lower courts have unanimously barred most lawsuits between ministers and their employers.

This Court has long recognized the right of religious organizations to control their internal affairs. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727-29 (1872). Courts cannot reverse religious tribunals on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727. They cannot "re-

solve a religious controversy." *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979).

Most important, government cannot interfere with "[f]reedom to select the clergy." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). "[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 711 (1976) (quoting *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929)).

Consequently, the government cannot install a chaplain whom the church has found unqualified. *Gonzalez*, 280 U.S. at 17-18. It cannot transfer religious authority from one bishop to another. *Kedroff*, 344 U.S. at 119. And it cannot reinstate a bishop who has been removed by higher church authorities. *Serbian*, 426 U.S. at 708, 720. The First Amendment bars all such government interference—whether perpetrated by the legislature, *Kedroff*, or sought from a court, *Serbian*, *Gonzalez*, and *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

Applying these principles, the lower courts have unanimously agreed that courts may not hear discrimination claims by employees who carry out important religious functions. They have typically called this rule the "ministerial exception." Every court to consider the question has recognized the ministerial exception—including ten state supreme courts[9] and all twelve federal circuits with jurisdic-

[9] *El-Farra* v. *Sayyed*, 226 S.W.3d 792 (Ark. 2006); *Pardue* v. *Center City Consortium Schools*, 875 A.2d 669 (D.C. 2005); *Pierce* v. *Iowa-Missouri Conference*, 534 N.W.2d 425 (Iowa 1995); *Music* v. *United Methodist Church*, 864 S.W.2d 286 (Ky.

tion over such cases. And all eleven circuits to consider the issue since 1990 have affirmed or reaffirmed the ministerial exception in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990).[10]

The lower courts are nearly as unanimous that the ministerial exception is *constitutionally* required, not just a matter of statutory interpretation. Some circuits rely on the Free Exercise Clause alone;[11]

1993); *Archdiocese of Washington* v. *Moersen*, 925 A.2d 659, 661-63 (Md. 2007); *Williams* v. *Episcopal Diocese*, 766 N.E.2d 820 (Mass. 2002); *Miller* v. *Catholic Diocese*, 728 P.2d 794 (Mont. 1986); *McKelvey* v. *Pierce*, 800 A.2d 840, 859 (N.J. 2002); *Cha* v. *Korean Presbyterian Church*, 553 S.E.2d 511 (Va. 2001); *Coulee Catholic Schools* v. *Labor and Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009). In other states, there are decisions from intermediate appellate courts.

[10] *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008); *Petruska* v. *Gannon University*, 462 F.3d 294, 303-07 (3d Cir. 2006); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 800-05 (4th Cir. 2000); *Combs* v. *Central Texas Annual Conference*, 173 F.3d 343, 347-50 (5th Cir. 1999); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon* v. *St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft* v. *Desert Southwest Annual Conference*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce* v. *Episcopal Church*, 289 F.3d 648, 655-57 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301-04 (11th Cir. 2000); *EEOC* v. *Catholic University*, 83 F.3d 455, 460-63 (D.C. Cir. 1996). The most recent decision in the First Circuit is *Natal* v. *Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[11] *Natal*, 878 F.2d at 1578; *Petruska*, 462 F.3d at 306-07; *Combs*, 173 F.3d at 345.

most rely on both Religion Clauses.[12] A few judges have read the ministerial exception into silent federal statutes in order to avoid constitutional questions.[13]

Without constitutional protection, federal, state, and local employment laws would prohibit many common religious practices—including the all-male clergy among Catholics and Orthodox Jews, rules about ethnicity and descent in some branches of Judaism, Islam, Hinduism, Zoroastrianism, and Native American religions, and in states that prohibit marital-status discrimination, celibacy rules. Although some anti-discrimination laws contain exemptions that allow religious organizations to hire on the basis of *religion*,[14] these exemptions do not protect hiring on the basis of any other protected category. And they do not prevent ministers willing to claim discrimination on the basis of other categories from demanding that courts second-guess the church's assessment of their religious qualifications. The constitutional ministerial exception is thus

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[12] *Rweyemamu*, 520 F.3d at 208-09; *Shaliehsabou* v. *Hebrew Home*, 363 F.3d 299, 306 n.7 (4th Cir. 2004); *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Scharon*, 929 F.2d at 363; *Werft*, 377 F.3d at 1100-01; *Bryce*, 289 F.3d at 655; *Gellington*, 203 F.3d at 1304; *Catholic University*, 83 F.3d at 460-67; see also *Hollins*, 474 F.3d at 225 ("the First Amendment's guarantees of religious freedom").

[13] *Schleicher*, 518 F.3d at 475; *Hankins* v. *Lyght*, 441 F.3d 96, 116-17 (2d Cir. 2006) (Sotomayor, J., dissenting).

[14] 42 U.S.C. §12113(d) (Supp. 2009) (Americans with Disabilities Act); 42 U.S.C. §2000e-1(a), §2000e-2(e)(2) (2006) (Title VII).

essential to the right of churches to choose their own ministers.

Finally, the lower courts agree that the ministerial exception applies not just to pastors of congregations, but to other employees who are important to the religious mission of the church. See, *e.g.*, *Coulee*, 768 N.W.2d at 890 (teacher); *Roman Catholic Diocese*, 213 F.3d at 804 (music director and teacher); *Catholic University*, 83 F.3d at 463-64 (canon law professor). What they disagree about is how far beyond pastors of congregations the ministerial exception extends.

The scope of the ministerial exception must be informed by the reasons for the ministerial exception. Those reasons lie in the exception's three constitutional bases: the Free Exercise Clause, the Establishment Clause, and freedom of religious association. Together, they establish that the ministerial exception applies to employees who perform important religious functions and to claims that would impose an unwanted minister on a church or entangle the government in religious questions.

B. The Free Exercise Clause protects the right of religious organizations to choose who will perform important religious functions.

1. In *Kedroff*, this Court grounded the church's right to select its own clergy principally in the Free Exercise Clause. "Legislation that regulates church administration, the operation of the churches, *the appointment of clergy* * * * prohibits the free exercise of religion." 344 U.S. at 107-08 (emphasis added). Thus, a law interfering with the church's selection of

a bishop "directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Id.* at 119.

In *Serbian*, the Court held that requiring the church to reinstate a bishop would violate "the First Amendment"—thus invoking both the Free Exercise Clause and the Establishment Clause. 426 U.S. at 709-10, 712, 719. Relying on *Kedroff*'s free exercise analysis, the Court emphasized that churches have power "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 722 (quoting *Kedroff*, 344 U.S. at 116). This includes the right to decide who will serve as clergy: "[Q]uestions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern." *Id.* at 717. By attempting to reinstate the bishop, the state court had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." *Id.* at 720.

In light of these cases, the courts of appeals have uniformly recognized that the ministerial exception is an essential part of the free exercise of religion. See *supra* nn.11-12. And they have recognized that the right extends beyond bishops, to pastors and to others who carry out the religious mission of the church. See p. 19, *supra*. If a religious organization is to shape its doctrine and manage its internal affairs, it must be able to control the employees who teach its message and carry out its mission.

As many courts have now said: "The relationship between an organized church and its ministers is its

lifeblood." Pet. App. 15a; *Petruska*, 462 F.3d at 306; *Gellington*, 203 F.3d at 1304; *Catholic University*, 83 F.3d at 461 (all quoting *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972)). Ministers play a critical role in the operation of churches and in the spiritual lives of religious Americans. "Ministers marry their children and bury their parents; they act as their spiritual counselors and serve as their moral advisors." *Petruska*, 462 F.3d at 306 n.9. Ministers lead worship and perform sacraments. They teach the tenets of faith to children and adults. Not just pastors of congregations, but also religion teachers, may teach the tenets of faith, lead worship, and give spiritual advice.

For many believers, their relationship with their minister, religious counselor, or religious teacher is one of deep trust and confidence. "Federal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional 'trespass[] on the most spiritually intimate grounds of a religious community's existence." *Hankins*, 441 F.3d at 117 (Sotomayor, J., dissenting) (quoting *Roman Catholic Diocese*, 213 F.3d at 800).

The lower courts have uniformly agreed that the ministerial exception applies not just to pastors, but to other employees who perform important religious functions. Examples include a professor of canon law who was "entrusted with instructing students in the 'fundamental body of ecclesiastical laws' that governs the Church's sacramental life," *Catholic University*, 83 F.3d at 464; a music director and teacher who was "the primary human vessel through whom the church chose to spread its message in song," *Roman*

Catholic Diocese, 213 F.3d at 804; an Hispanic Communications Director who was "integral in shaping the message that the Church presented to the Hispanic community," *Alicea-Hernandez* v. *Catholic Bishop,* 320 F.3d 698, 704 (7th Cir. 2003); and, in some courts, elementary school teachers who were "an important instrument in a faith-based organization's efforts to pass on its faith to the next generation," *Coulee*, 768 N.W.2d at 890. Teachers in religious schools are responsible for "teaching and spreading the * * * faith and supervising and participating in religious ritual and worship." *Clapper* v. *Chesapeake Conference*, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (unpublished). See also *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-04 (1979) (noting the "critical and unique role" of teachers in religious schools, *id.* at 501, and holding that mandatory collective bargaining and unfair labor practice charges on behalf of teachers would raise constitutional questions under both Religion Clauses).

The lower courts have formulated various tests, but they have largely agreed that the ministerial exception applies to employees who perform functions "important to the spiritual and pastoral mission of the church." Pet. App. 17a; *Young* v. *Northern Illinois Conference*, 21 F.3d 184, 186 (7th Cir. 1994); *Werft*, 377 F.3d at 1101 n.4; *Catholic University*, 83 F.3d at 461 (all quoting *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). The ministerial exception extends to all those the church selects "to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1168. These are objectively important functions in any religion.

2. This Court's more recent free exercise cases are fully consistent with the ministerial exception. In *Smith*, 494 U.S. 872, plaintiffs claimed an individual constitutional right to use peyote. The Court rejected the claim, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879.

In reviewing what the Free Exercise Clause *does* protect, the Court reaffirmed the cases underlying the ministerial exception: "The government may not * * * lend its power to one or the other side in *controversies over religious authority* or dogma." *Id.* at 877 (emphasis added), citing *Serbian*, *Kedroff*, and *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-52 (1969). An employee who performs important religious functions is empowered to speak for the church, and is thus in a position of religious authority. *Smith* reaffirms that government may not take sides in a dispute over who should occupy such a position.

All eleven circuits to address the question since *Smith* have agreed that the ministerial exception remains good law. See *supra* n.10. As several of these courts have explained, the ministerial exception presents issues "of a fundamentally different character" from those in *Smith*. *Catholic University*, 83 F.3d at 462; accord, *Roman Catholic Diocese*, 213 F.3d at 800 n.*; *Schleicher*, 518 F.3d at 475; *Gellington*, 203 F.3d at 1303; *Combs*, 173 F.3d at 349. In *Smith*, the Court believed that imposing strict scrutiny any time a law substantially burdened any religious individual "would open the prospect of

constitutionally required religious exemptions from civic obligations of almost every conceivable kind"—thus empowering every individual, "by virtue of his beliefs, 'to become a law unto himself.'" *Smith*, 494 U.S. at 888, 885 (quoting *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878)). To avoid that outcome, judges would have to "weigh the social importance of all laws against the centrality of all religious beliefs." *Id.* at 890.

The ministerial exception "does not present the dangers warned of in *Smith*." *Catholic University*, 83 F.3d at 462. It is limited to the right of churches to manage their own internal affairs, and most especially, to select their key personnel. This right is entirely internal to each religious organization. It is narrowly focused; there is no claim to a prima facie right to regulatory exemption whenever any individual acts on a religious motivation. The ministerial exception does not make every individual conscience "a law unto itself." *Smith*, 494 U.S. at 890.

Nor does it require the balancing condemned in *Smith*. The ministerial exception is a categorical rule; if a claim falls within it, the claim must be dismissed. There is no compelling interest test and no case-by-case balancing. See *Bollard* v. *California Province*, 196 F.3d 940, 946 (9th Cir. 1999); *Williams*, 766 N.E.2d at 825. Indeed, under the dominant understanding of the ministerial exception in the courts of appeals, the court need not even identify the church's religious beliefs, let alone balance them. See *Petruska*, 462 F.3d at 304 n.7 (ministerial exception "protects the act of a decision rather than a motivation behind it") (quoting *Rayburn*, 772 F.2d at 1169); accord, *Starkman* v. *Evans*, 198 F.3d 173, 176

(5th Cir. 1999); *Young*, 21 F.3d at 186; *Scharon*, 929 F.2d at 363; *Catholic University*, 83 F.3d at 465.

Moreover, the origins of the ministerial exception are completely independent of the doctrine at issue in *Smith*. *Smith* rejected "the *Sherbert* test" of *Sherbert* v. *Verner*, 374 U.S. 398 (1963). *Smith*, 494 U.S. at 882-85. But the right of a church to select its own clergy never rested on *Sherbert*. *Serbian* cited no case in the *Sherbert* line. Freedom to choose ministers was expressly attributed to the Free Exercise Clause in 1952, a decade before *Sherbert*. *Kedroff*, 344 U.S. at 107, 116. *Kedroff* relied on cases reaching back to *Watson* v. *Jones* in 1872, and *Watson* relied on still earlier cases in the state courts. 80 U.S. at 730-32. Although *Watson* was a common law decision, it relied on "that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles," *id*. at 728, and *Kedroff* "converted the principle of *Watson* * * * into a constitutional rule." *Presbyterian Church*, 393 U.S. at 447.

So the roots of *Smith* go back to *Reynolds* in 1878; the roots of the ministerial exception go back to *Watson* in 1872. *Reynolds* and *Watson* were decided by six of the same justices, and no one in *Reynolds* either criticized or relied on *Watson*. The issues are different, and they have always been perceived as different.

In short, the ministerial exception is historically unrelated to the issues in *Smith* and addresses fundamentally different concerns. This is why *Smith* could expressly reaffirm the principle and the cases underlying the ministerial exception. The right of a church to select the personnel who perform impor-

tant religious functions is an essential part of free exercise.

C. The Establishment Clause limits the government's authority to appoint ministers or resolve religious questions.

The ministerial exception is also, and independently, grounded in the Establishment Clause. *Serbian* attributed the church's right to choose its own clergy to both Religion Clauses. And nine circuits have attributed the ministerial exception to both Clauses. See *supra* n.12; see also *Kedroff*, 344 U.S. at 110 (relying on, in addition to free exercise, "our rule of separation between church and state").

The Establishment Clause imposes two important limits on the power of government to interfere in religious organizations: government cannot appoint ministers; and government cannot entangle itself in religious questions.

1. Government appointment of ministers.

Perhaps the most fundamental problem with discrimination suits by ministers is that when successful, they end in reinstatement. In effect, a judge or jury appoints a minister. But government-appointed ministers were one of the quintessential features of the established church.

In the Church of England, the King was head of the church, and ministers were appointed under his authority.[15] In the colonies, Anglican ministers were

[15] Supremacy Act, 1534, 26 Hen. 8, c.1 (Eng.); An Acte Restrayning the Payment of Annates, &c (Ecclesiastical Appointments Act), 1534, 25 Hen. 8, c.20, §3 (Eng.). These Acts are

generally appointed by the governor. 2 George MacLaren Brydon, *Virginia's Mother Church* 260 (1952). Early on in Virginia, parish vestries successfully claimed that power for themselves. *Id.* at 259-60; Thomas E. Buckley, *Church and State in Revolutionary Virginia* 9-10 (1977). But in 1760, Governor Fauquier began appointing ministers in the frequent cases in which the vestry failed to act within a statutory time limit. 2 Brydon at 324-25. Some of his appointments were unacceptable to the vestries; indeed, some were public drunks. But the vestries had no power to remove these ministers, and the church in Virginia had no ecclesiastical court. Prominent leaders of the colony tried unsuccessfully to remove these ministers by litigation in the civil courts. *Id.* at 324-35. Similar controversies accompanied gubernatorial appointment of ministers in Maryland. Sanford H. Cobb, *The Rise of Religious Liberty in America* 392 (1970 reprint) (1902).

In the established Congregationalist churches of Massachusetts, ministers were elected by the voters of the town or parish, which were units of local government. See Mass. Const. of 1780, part I, art. III, *reprinted in* Jacob C. Meyer, *Church and State in Massachusetts* 234-35 (1968 reissue) (1930). Local practice had varied, Meyer at 173, but it was eventually settled that the right to elect a minister resided in the parish, notwithstanding "the nonconcurrence of the church in the choice of the minister." *Baker* v. *Fales*, 16 Mass. 488, 513 (1820). See Meyer at 172-83; 2 William G. McLoughlin, *New England Dissent* 1189-95 (1971); 3 Anson Phelps

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reprinted in 3 Statutes of the Realm 492, 463 (photo. reprint 1993) (1817).

Stokes, *Church and State in the United States* 377-80 (1950) (all analyzing *Baker*).

Disagreements between the voters of the town and the members of the church were a source of great dissatisfaction, often prompting the losers to abandon their church en masse. Meyer at 177-78, 182; 3 Stokes at 380. The losing side in many of these conflicts had historically been the strongest supporters of the establishment. Now they switched sides, powerfully reinforcing the demand for disestablishment. These conflicts over the election of ministers soon led to dismantling the whole system by state constitutional amendment. Cobb at 514-15; Meyer at 211-20; 2 McLoughlin at 1195-97, 1207. In short, government appointment of ministers was one of the principal evils of the established church—an evil now prohibited by the Establishment Clause.

Absent the ministerial exception, employment discrimination claims by ministerial employees would result in government appointment of ministers over the objections of churches. "[T]he presumptively appropriate remedy in a Title VII action is reinstatement." *Rweyemamu*, 520 F.3d at 205. But by ordering reinstatement, judges and juries would exercise the power to appoint the person who speaks for the church—just as the Crown, the governor, or the voters did in the days of the established church. In *Serbian*, the Court capsulized what the state court had done wrong in precisely these terms: "the court purported in effect to reinstate [the plaintiff] as Diocesan Bishop." 426 U.S. at 708. Reinstating a minister would violate the Establishment Clause.

2. Government entanglement in religious questions.

The Establishment Clause also prohibits government from becoming entangled in religious questions. As this Court explained in *Serbian*, "religious controversies are not the proper subject of civil court inquiry." *Id.* at 713. Courts must accept the decision of the church on "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Ibid.* Consequently, courts may not decide who gets to perform important religious functions.

a. Employment disputes between a minister and a church involve inherently religious questions. At the core of most such disputes is a disagreement over the reasons for an adverse employment action. The plaintiff says the reasons were discriminatory; the employer says the reasons were legitimate and job-related; plaintiff claims that these reasons are a pretext. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). But when the employee was performing important religious functions for a church, the employer's proffered legitimate reasons are nearly always religious. See *Tomic*, 442 F.3d at 1040. Even reasons that sound superficially secular are often religious at their core. For example, decisions about budget are decisions about religious priorities.

Resolving the dispute over the proffered religious reasons would require the court "to resolve a theological dispute." *Ibid.* Accordingly, the lower courts have held that such claims are barred by the ministerial exception. As the Fifth Circuit explained: "[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate

grounds without inserting ourselves into a realm where the Constitution forbids us to tread * * * ." *Combs*, 173 F.3d at 350. See also *Catholic University*, 83 F.3d at 465-66 (court cannot resolve claims of pretext); *Rweyemamu*, 520 F.3d at 209 (same); *Schleicher*, 518 F.3d at 474-75 (same). Some cases hold that courts can decide claims of religious pretext when the employee is not a minister. Pet. App. 24a-25a. But we are aware of no case in which a court held that it could decide a *minister's* pretext claim.

In *Serbian*, this Court held that it could not resolve even the procedural religious questions presented by the bishop's claim to reinstatement. The Court held that it "need not, and under the First Amendment cannot, demonstrate the propriety or impropriety of each of [the bishop's] procedural claims." 426 U.S. at 719. Inquiring into the church's procedures would plunge the courts "into a religious thicket" and would require "resolution of quintessentially religious controversies." *Id.* at 719, 720.

In *Catholic Bishop*, this Court explained the inevitable entanglement that would result from NLRB supervision of the employment relationship between teachers and religious schools. Teachers would charge the schools with an unfair labor practice; the school would say that there were religious reasons for its conduct. Resolving such charges would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 440 U.S. at 502. Such an inquiry "presents a significant risk that the First Amendment will be infringed." *Ibid.*

The Court has been especially vigilant about entanglement with teachers in religious schools. In *Catholic Bishop*, the issue was unionization of teachers in religious schools. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), prohibited government subsidies for the salaries of teachers in religious schools. Both cases recognized a risk of excessive entanglement due to what *Catholic Bishop* summarized as "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." 440 U.S. at 501 (citing *Lemon*, 403 U.S. at 617). Yet the subsidy program in *Lemon* excluded all religion classes, 403 U.S. at 608, 610, and the bargaining unit in *Catholic Bishop* was confined to lay teachers, 440 U.S. at 493 n.5. Perich's claim—involving a *commissioned minister* who teaches *religion*—presents an even greater risk of entanglement.

b. The Establishment Clause limits not just the judicial resolution of religious questions, but also the process of investigating them. As the Court explained in *Catholic Bishop*: "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502.

This "process of inquiry" is particularly entangling in religious employment discrimination cases. "Church personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171; accord, *Catholic University*, 83 F.3d at 466-67. Even after entry of judgment, "questions of compliance

may result in continued court surveillance of the church's policies and decisions." *Rayburn*, 772 F.2d at 1171.

c. All these entangling consequences would flow even from claims by individual ministers against local churches. But that is not all. In hierarchical churches, and in many presbyterial and connectional churches, the local church is not free to select its own minister. Instead, ministers are employed, assigned, or referred by bishops or denominational conferences. If there were no ministerial exception, there could be class actions alleging that a church's criteria for ordination have disparate impact on protected minorities, or that some group is statistically underrepresented among the clergy, or otherwise seeking judicially imposed reform of the church in the guise of combating discrimination in the employment of ministers. If such a claim seems implausible, that is only because the ministerial exception has obviously barred it.

The ministerial exception is "designed to avoid these ends by avoiding these beginnings." *West Virginia* v. *Barnette*, 319 U.S. 624, 641 (1943). By barring claims that would require the government to resolve religious questions, the ministerial exception prevents entanglement. And by barring claims that would impose an unwanted minister on a church, the exception prevents government appointment of ministers. Both limitations are required by the Establishment Clause.

D. Freedom of religious association limits government interference in the selection of those who communicate a religious organization's message.

Finally, the freedom of religious association limits government interference in a religious organization's choice of ministers. "'[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political * * * [or] religious'" ends. *Boy Scouts* v. *Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984)). Freedom of *religious* association has additional roots in the Religion Clauses, and is not necessarily identical to freedom of *expressive* association, which is rooted only in the Speech, Press, and Assembly Clauses. But the substantial body of law on expressive association is instructive.

1. Freedom of expressive association protects the right of an organization "to express those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. The right to control the organization's message includes the right to control its membership, its leadership, and its choice of spokespersons.

In *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989), this Court held that freedom of expressive association "encompasses a political party's decisions about the identity of, and the process for electing, its leaders." At issue in *Eu* were the criteria for selecting members of the party's state central committee. *Id.* at 218. Even with respect to these low-visibility positions, the Court said that interference with the parties' choice of

leaders "may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Id.* at 231 n.21.

The Court has also protected membership decisions. "Insisting that an organization embrace unwelcome members * * * 'directly and immediately affects associational rights.'" *Christian Legal Society* v. *Martinez*, 130 S. Ct. 2971, 2985 (2010) (quoting *Dale*, 530 U.S. at 659). Forced inclusion violates freedom of association when it "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. And the courts must "give deference to an association's view of what would impair its expression." *Id.* at 653.

The Court has repeatedly applied this rule to political parties, protecting their right to insist that only members of the party may vote or participate in party deliberations. "A political party has a First Amendment right to limit its membership as it wishes * * * ." *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008). "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 122 (1981) (internal citation omitted). Accord, *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000).

2. The associational rights of religious organizations are stronger than those of political parties, because political parties are sometimes constrained by their quasi-governmental "role in the election process." *Lopez Torres*, 552 U.S. at 203. Moreover, the associational rights of religious organizations

stem not just from their members' expressive speech rights, but also from the Religion Clauses.

This Court has long recognized the "right to organize voluntary religious associations" and to provide for the governance of those associations. *Watson*, 80 U.S. at 728-29. Courts therefore "have no power to revise or question ordinary acts of church discipline, or of excision from membership." *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872). The courts "cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Id.* at 139-40. Thus, lower courts regularly dismiss tort suits in which individuals attempt to challenge church discipline or exclusion from membership. See, *e.g.*, *Westbrook* v. *Penley*, 231 S.W.3d 389 (Tex. 2007) (refusing to interfere with scriptural disciplinary process); *O'Connor* v. *Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994) (refusing to interfere with excommunication); *Paul* v. *Watchtower Bible and Tract Society*, 819 F.2d 875 (9th Cir. 1987) (refusing to interfere with practice of shunning disciplined members).

What is true for members is even more true for leaders. Religious organizations must be "free to * * * select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (internal quotation omitted). "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a

means by which a religious community defines itself." *Id.* at 342.

Thus, the ministerial exception is also grounded in the freedom of religious associations to control their own messages. Government interference in the choice of the messenger inevitably affects the message. "A minister is not merely an employee of the church; she is the embodiment of its message." *Petruska*, 462 F.3d at 306. And courts have recognized that a teacher who teaches religion similarly speaks for the church and embodies its message when she addresses her students. *Coulee*, 768 N.W.2d at 890; *Clapper*, 1998 WL 904528, at *7.

This Court was careful to preserve freedom of religious association in *Smith*: "[I]t is easy to envision a case in which a challenge on *freedom of association grounds* would * * * be reinforced by Free Exercise Clause concerns." 494 U.S. at 882 (emphasis added) (citing *Jaycees*, 468 U.S. at 622). The scope and meaning of "hybrid rights" has been debated, but this example was no artificial combination of unrelated rights. The Court simply recognized that two closely related rights genuinely "reinforce" each other. The ministerial exception lies at the intersection of the Establishment Clause, the Free Exercise Clause, and freedom of association.

* * * * *

In sum, three important limits on governmental power are independent grounds for the ministerial exception. The ministerial exception extends not only to pastors, priests, and rabbis, but to other employees whose religious functions are important to a religious organization's mission, and to claims that

would impose an unwanted minister or entangle the courts in religious questions.

II. Perich's suit is barred by the ministerial exception.

Perich's lawsuit is barred by the ministerial exception because she performed important religious functions, and because her claim would impose an unwanted minister on the Church and entangle the government in religious questions.

A. Perich performed religious functions that were important to the mission of the Church.

Perich taught religion classes, led worship, and led prayer. She was expected to, and did, integrate faith with the secular curriculum. These are important religious functions, and their importance is independently confirmed by the ecclesiastical office that she held.

1. Perich taught religion classes, led worship, and led prayer.

Perich's first responsibility, as explained in the document extending her call, was "[t]o teach faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church." J.A. 48. To fulfill this responsibility, she taught religion to her students four days a week and took them to chapel on the fifth day; she led them in devotional exercises every day; she led them in prayer three times a day. Pet. App. 4a, 34a. In turn with the other teachers, she planned and led the worship services at the all-school chapel. For those services she chose liturgies, hymns, and Scripture readings and com-

posed and delivered a message based on the Scripture selections. J.A. 224.

These are objectively important religious functions, because they communicate the faith to the next generation. Indeed, Perich was the Church's *primary* means of teaching the faith to her students. She gave her students more religious instruction than all other employees and volunteers combined. She "preach[ed] [the Church's] values, t[aught] its message, and interpret[ed] its doctrines." *Rayburn*, 772 F.2d at 1168. She was thus important to the pastoral and spiritual mission of the Church.

Although the Sixth Circuit acknowledged that these duties were "devoted to religion," Pet. App. 20a, it dismissed their significance for three reasons. None withstands analysis.

a. First, the Sixth Circuit counted minutes on the clock. Pet. App. 4a, 19a-20a. It said that Perich's unambiguously religious activities consumed forty-five minutes every day, while "secular" activities consumed six and a quarter hours. *Ibid*. Thus, Perich's religious duties were not "primary." Pet. App. 20a.

This quantitative approach is a poor measure of importance. Other courts have rightly rejected it, emphasizing that an employee's role "obviously has both quantitative and qualitative elements." *Clapper*, 1998 WL 904528, at *7; see also *Coulee*, 768 N.W.2d at 882. Here, for example, if the Church hired a part-time teacher who performed only Perich's "religious" duties, the Sixth Circuit's rule would count that teacher as a minister, because 100% of her time would be devoted to "religious"

activities. But increase that teacher's hours, and tell her to also teach history and English, and suddenly she ceases to be important to the school's religious mission. Surely a teacher does not become *less* important to the school's religious mission when she assumes *more* responsibility.

The clock-driven approach also disregards far more probative evidence of Perich's importance to the Church. It disregards Perich's role as her students' primary source of religious instruction. It disregards her responsibility to integrate religion into "secular" subjects; it disregards her status as a commissioned minister; it disregards her mandatory religious education; and it disregards her religiously ordered relationship with the Church. By focusing on minutes, the Sixth Circuit missed the big picture of Perich's role in the religious mission of the Church.

b. Second, the Sixth Circuit repeatedly emphasized that Perich's duties could be performed by lay teachers who were "not required to be called or even Lutheran." Pet. App. 19a-20a, 21a, 29a; accord, 5a, 23a. The implicit premise is that teaching religion, leading worship, and leading prayer must not be religiously important if non-Lutherans can do these things. But this reasoning is mistaken in multiple ways.

For starters, the underlying premise is faulty. Teaching religion, leading worship, and leading prayer are religious duties regardless of who performs them. They do not become less religious merely because they are performed by lay teachers.

More important, the Sixth Circuit ignored the undisputed evidence that lay teachers are employed

only when no called teacher is available. J.A. 63; J.A. 271 (Perich Deposition). That the Church would employ a lay teacher rather than leave a class untaught says nothing about the importance of Perich's religious functions.

The Sixth Circuit also ignored the religious requirements that apply to lay teachers. Although lay teachers need not be Lutheran, they must be Christian, and they must teach Lutheran doctrine. Each lay teacher is contractually obligated "to set a Christian example," "to maintain Christian discipline in love," and to teach "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures and found in the Book of Concord, particularly in Dr. Martin Luther's Small Catechism." J.A. 46 (Perich's contract as lay teacher). Cf. *Coulee*, 768 N.W.2d at 891 (although a teacher "was not required to be Catholic," the important fact is that "she was required to live, embody, and teach Catholicism in her role as a teacher consistent with the mission of the school").

c. Finally, the Sixth Circuit said that "nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology." Pet. App. 22a. The court offered no explanation or evidentiary support for this legal conclusion, which is both irrelevant and mistaken. It is irrelevant because Perich does not have to be the "primary" means of religious instruction; it is enough that she is an important means. A church may have more than one important means of instruction.

It is mistaken because, in fact, for the children in her class, Perich *was* the primary source of religious instruction. There was no pastor teaching at the school, and no specialized religion teacher. The religious instruction came from Perich.

Unlike the pastor in the adult worship service, Perich provided age-appropriate religious instruction and developed a close, personal relationship with her students. And unlike Sunday-school teachers, *The Ministry*, *supra* n.2, at 24-25, Perich was called. Thus, only Perich combined theological training with age-appropriate instruction and a personal relationship with students. And that instruction was substantial: forty-five minutes a day is nearly four hours a week, significantly more religious instruction and worship than the children could get from the Sunday school class for children and the Sunday worship service combined.

Both qualitatively and quantitatively, Perich was the Church's primary instrument for "indoctrinating" her students into the Lutheran faith. These religious duties were important to the mission of the Church and are sufficient in themselves to bring Perich within the ministerial exception.

2. Perich served as a Christian role model and integrated religion into secular subjects.

In addition to teaching religion, leading worship, and leading prayer, Perich was expected to serve as a Christian role model and to integrate faith into all subjects. Pet. App. 5a, 35a. These religious duties are a significant increment to her other religious duties.

The Church publicly held out its teachers as "fine Christian role models who integrate faith into all subjects." *Ibid.* The Synod emphasized the same duty: "Although [a teacher] may teach some 'secular' subject, the philosophy of Lutheran education includes the demand that the faith of the church be evident in all activities of the school." *The Ministry*, *supra* n.2, at 13.

Respondents have claimed that these duties are irrelevant because Perich rarely performed them. See Pet. App. 5a, 21a, 35a. But this argument confuses Perich's actual duties with her claim that she neglected these duties, and it ignores important evidence from Perich herself that she did, in fact, perform these duties.

a. Even assuming that Perich rarely integrated faith into secular subjects, that would merely show that she was not doing her job. The relevant question is what the Church relied on her to do, not whether she actually did it. If an employee could evade the ministerial exception by neglecting religious duties, or claiming to have neglected them, it would be more difficult to remove derelict ministers than good ones.

b. The record also demonstrates that Perich *did* perform these duties. Even her affidavit, which consists largely of an effort to minimize the religious functions of her job, admits that she integrated religion into secular subjects on multiple occasions. She "talk[ed] to a student about God during an English class"; she commented on God as Creator during Science; and she answered two students'

"questions about God during Social Studies." J.A. 227.[16]

Perich's affidavit is not the only evidence of how she integrated faith into secular subjects. The best evidence is her Personnel Information Form, filled out in June 2005 in hopes of finding employment as a called teacher with another Synod school. J.A. 51-54. There, Perich spoke in glowing terms of the importance of integrating faith into every subject:

> Educational Ministry is special not just because of the devotional time and the religion class, but because the teacher can bring God into every subject taught in the classroom. Students also, feel free to bring up topics that mention God or Religion during all times of the day. This is very important for them to be able to do as they are growing in their faith. * * * During English class, a year ago, I found out through reading a rough draft of an essay that [a student] understood that good people went to heaven. I showed her several scripture passages that tell that we get to heaven through faith in what Jesus has done for us. She wrote the passages in her notebook and

[16] Her affidavit says that there were no other such instances "during my final academic year at the school." J.A. 228. At some point, a mistake slipped into the lower courts' summaries of this evidence. The multiple examples already summarized, plus another example discussed below, were reduced to two, and the limitation to Perich's "final academic year" was expanded to "her career." Pet. App. 5a, 21a, 35a. Undoubtedly the mistake was inadvertent, but it creates the misimpression that Perich's job was less religious than it was, that she was a worse employee than she was, or both. Perich's testimony shows otherwise. J.A. 53, 227-28.

> underlined them in her Bible, then changed her rough draft. She told other students about her new discovery at recess.

J.A. 53.

Perich also emphasized her opportunities to share the Gospel with parents:

> An Educational Ministry also opens the door to sharing the Gospel Message with parents. I still remember a very memorable parent teacher conference at Immanuel, Macomb. It was the last conf. of the evening. The Mom got a serious look on her face and said, "I have an important question for you." I got out a Bible and a small catechism. We stayed until mid-night discussing theological questions.

Ibid.

In her affidavit, Perich tried to downplay these examples as isolated events. J.A. 227-28. But she was "a lifetime Lutheran," J.A. 267, who had worked in Lutheran schools in various capacities for eleven years. J.A. 51. She knew what congregations were looking for. She knew they would be attracted to a candidate who could "bring God into every subject taught in the classroom"; who could get a child so excited about justification by faith that she told her friends at recess; and who could deftly wield Luther's Small Catechism and talk theology with parents late into the night. This was Perich's judgment when she had every incentive to make herself attractive to congregations and call committees. It tells us what she understood were the responsibilities of a called teacher.

Serving as a role model and integrating faith into all subjects were significant religious duties in addition to teaching religion classes, leading worship, and leading prayer. In combination, these duties were critically important to the religious mission of the Church.

3. Perich occupied ecclesiastical office as a commissioned minister.

Perich also occupied the ecclesiastical office of commissioned minister. The office is not necessary to establish that Perich is within the ministerial exception; that is independently established by her important religious job functions. In all but exceptional circumstances, discussed below and not remotely present here, ecclesiastical office is also independently sufficient to establish that an employee is within the ministerial exception. Perich's ecclesiastical office is powerful confirmation of the religious importance of her role.

a. The Lutheran Church has always taught that teachers occupy an important office within the Church. That teaching goes back to Martin Luther himself:

> I am speaking of those schoolteachers who instruct the children and the youth not only in the arts, but also train them in Christian doctrine and faithfully impress it upon them; * * * [A] pastor and a schoolteacher plant and cultivate young trees and useful shrubs in the garden. Oh, they have a precious office and task, and they are the church's richest jewels; they preserve the church.

Martin Luther, *On the Councils and the Church* (1539), in 41 *Luther's Works* 3, 132, 135 (Eric W. Gritsch ed., 1966).

The Synod has adhered to these teachings since its founding in the mid-1800s. As the Synod's first president explained in an 1852 treatise: "[T]he offices of Christian day school teachers, almoners, sextons, precentors at public worship, and others are all to be regarded as ecclesiastical and sacred, for they take over a part of the one ministry of the Word and support the pastoral office." C.F.W. Walther, *Church and Ministry (Kirche und Amt)* 290 (J.T. Mueller trans. 1987) (1852).

The Synod's understanding of called teachers is based on its theology of ecclesiastical office. There is the "pastoral office," also referred to as "the public ministry," which includes "all the functions of the ministry of Word and sacrament in the church." *The Ministry*, *supra* n.2, at 6. And there are "auxiliary offices," which "perform certain of the function(s) of the office of the public ministry." *Ibid.* "The most common auxiliary office today is the office of the teaching ministry," *ibid.*, which is occupied by called teachers. Thus, "a professional trained teacher who is called as a teacher by the church may be said to be performing a function of the office of the public ministry. The teaching of the faith to the children and youth of the flock is a major duty of the pastoral office." *Id.* at 12.

Because teachers perform pastoral functions, the Church relies on called teachers whenever possible. J.A. 63, 271. The theology of the call goes back to the Augsburg Confession of 1530, *supra* n.3, and involves important religious requirements that further dem-

onstrate the importance of Perich's ecclesiastical office.

First, Perich had to complete college-level theology courses and an oral examination by a faculty committee. See pp. 5-6, *supra*. Second, Perich had to be selected by a vote of the congregation. The Synod emphasizes that the call ultimately comes from God, J.A. 42-43; *The Ministry*, *supra* n.2, at 24, and that the congregation acts with His "guidance," J.A. 42, and is "led by the Spirit," J.A. 120. Third, Perich had to be installed in office via "commissioning," a "solemn and public act" by which she is "brought into a unique relationship with the church." *The Ministry*, *supra* n.2, at 24.

Perich testified that she worked six years to complete her colloquy courses so that she would be eligible for a call. J.A. 268. She also testified: "I was very excited that I completed it after those long years of working on it, and * * * the two pastors and the principal was very excited for me also." J.A. 270. A requirement of substantial religious training is additional evidence of the religious importance of the job. *Starkman*, 198 F.3d at 176.

b. The Sixth Circuit treated the difference between called teachers and lay teachers as an irrelevant "title." Pet. App. 22a. That view is utterly alien to the Church's religious understanding of the call. A church does not spend five centuries developing the theology of a meaningless title. And an employee does not work six years to acquire a meaningless title.

The record shows that called teachers and lay teachers have completely different relationships to

the Church. Perich was required to have much more religious training. She was chosen in a prayerful process by a vote of the congregation; she was called for an indefinite term; and she was subject to the same disciplinary rules as the Church pastor. Pp. 4-6, *supra*; Pet. App. 51a; J.A. 55. She could be dismissed only for cause and only by a supermajority vote of the congregation. Pet. App. 3a, 33a, 38a; J.A. 212. She was held out to the Church and Synod as a commissioned minister and claimed a housing allowance for ministers on her taxes. Pet. App. 3a-4a, 33a.

Lay teachers, by contrast, were selected by the school board and limited to one-year terms, so that the Church could refuse at will to renew them. Pet. App. 3a, 33a. They were not subject to the same requirements of training in Lutheran theology, and they were employed as one-year expedients.

Perich falls within the ministerial exception because she had important religious duties, and because she occupied an important ecclesiastical office within the Church. Her duties are independently sufficient, and on these facts, her ministerial status within the Church is also independently sufficient.

4. The Church is entitled to reasonable deference on these questions.

The Church's religious understanding of Perich's job functions and her ecclesiastical office, and of their importance to the Church's religious mission, is entitled to deference. In the analogous context of expressive associations, the Court has said that "we give deference to an association's assertions regarding the nature of its expression," and "we must also give deference to an association's view of what would

impair its expression." *Dale*, 530 U.S. at 653. In the case of internal church matters, deference should be even greater, because the courts cannot "resolve a religious controversy." *Jones* v. *Wolf*, 443 U.S. at 604; part I.C.2, *supra*.

This Court need not investigate and resolve the issues of Lutheran theology raised by Perich's attempt to deny the religious significance of her duties, her call, and her status as a commissioned minister. Neither should it resolve all those theological issues against the Church by simply ignoring them. Rather, it should defer to the religious authorities that both sides acknowledged before this dispute arose. Cf. *Serbian*, 426 U.S. at 710-11 (quoting *Watson*, 80 U.S. at 728-29).

At the same time, deference is not abdication. The Church claims no right to arbitrarily designate just anyone as a minister, even if there were no substance to the designation. In fact, Lutheran teaching condemns leaving persons in a called position when they are not actually doing important religious work. *The Ministry*, *supra* n.2, at 34-35. The Church asks only that secular courts not second-guess good-faith religious understandings of religious functions and positions.

In *Schleicher*, 518 F.3d at 478, the Seventh Circuit adopted a rebuttable presumption that personnel treated as ministers by their church are within the ministerial exception, absent proof that the title was a sham or that the job was entirely secular. That is a sensible approach. Perich should be presumed to be within the ministerial exception, and she has offered nothing that can overcome that presumption.

* * * * *

An employee who performs important religious functions is a minister for purposes of the ministerial exception. An employee who holds an ecclesiastical office should be presumed to perform important religious functions, absent evidence that the office is a sham or that the job is entirely secular. Everything else—the required theology courses, the religiously driven selection process, the belief that the process is divinely guided, the requirement of congregational votes, the ministerial housing allowance, the fact that Perich was subject to the same disciplinary rules as the pastor—is evidentiary. Facts such as these are not essential, but they help confirm that the Church viewed Perich's functions as religious and as important to the mission of the Church.

B. Perich's claim would impose an unwanted minister and entangle the government in religious questions.

Although the ministerial exception applies to employees who are important to the religious mission of the church, it does not apply to every claim in which such an employee might be involved. Rather, it is limited to disputes between employer and employee that could impose an unwanted minister on a church or would entangle the government in religious questions. Perich's claim threatens both.

1. If successful, Perich's claim would end in an order reinstating her to the ministry or awarding the monetary equivalent.

Each complaint in this case requests an order reinstating Perich to her former position as a com-

missioned minister, together with back pay, compensatory damages for emotional distress, punitive damages, and injunctive relief ordering new "policies, practices, and programs" at the Church. J.A. 17-18; Pet. App. 73a-74a. Perich's complaint also seeks attorneys' fees. Pet. App. 74a.

Reinstatement of an unwanted minister is a uniquely intrusive remedy. See *Serbian*, 426 U.S. at 708 ("the court purported in effect to reinstate [the plaintiff] as Diocesan Bishop"); *Rweyemamu*, 520 F.3d at 205. It violates the core of the Establishment Clause, creating a class of government-appointed clergy. Part I.C.1, *supra*. It also violates the right of religious organizations to select their own ministers under the Free Exercise Clause and to select their spokespersons under the freedom of religious association. Parts I.B and I.D, *supra*.

Awarding the monetary equivalent of reinstatement, in the form of back pay and front pay, does much the same. To give a discharged employee the monetary value of her former job requires the judge or jury first to determine that she is entitled to the job—that she should have been the minister. And that is precisely the decision they are constitutionally forbidden to make.

Substantial monetary liability would also have enormous deterrent effect on the right of churches to select their own ministers. A small church like Hosanna-Tabor, struggling to keep its school open at all, would have to be exceedingly cautious about rescinding a call, no matter what the minister had done. Respondents seek to compound this deterrent effect by seeking compensatory and punitive damages and attorneys' fees, in addition to reinstatement

and backpay. As this Court warned in *Amos*: "Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." 483 U.S. at 336.

Because the complaints seek reinstatement to a ministerial position or its monetary equivalent, the claim in this case is at the heart of the ministerial exception.

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

Perich's claim would entangle the courts in religious questions, in two related ways. It would require the courts to overturn the Church's decision on a contested religious matter—Perich's fitness for ministry. And it would require the courts to decide religious questions in the course of resolving Perich's claim of pretext.

a. Perich's claim would require the courts to overturn the Church's determination of a religious question.

At the center of this suit is a dispute over Perich's fitness to serve as a called teacher and commissioned minister. The very act alleged as retaliation is a religious act—the rescission of her call. Like the issuance of the call, pp. 4-6, *supra*, the rescission of a call is a fundamentally religious act: It removes an individual from ecclesiastical office, and it severs the religious relationship between the calling church and the called employee.

Perich lost her call not because school officials fired her, but because the Church congregation voted to rescind her call. She could have challenged that decision through the Synod's dispute resolution

process, but she chose not to do so. The congregation is therefore the highest Church body to decide Perich's fitness to serve as a minister.

Perich's lawsuit directly challenges the congregation's decision. She argues that she is, in fact, fit to serve as a commissioned minister, but that the Church fired her for discriminatory reasons. The court cannot sustain her claim without overturning the determination of the Church body authorized to decide.

That is precisely what this Court prohibited in *Watson* and *Serbian*. Religious organizations have the right "to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association." *Serbian*, 426 U.S. at 711 (quoting *Watson*, 80 U.S. at 729).

> All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions * * * that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Ibid. (emphasis omitted) (quoting *Watson*, 80 U.S. at 729).

Because Perich's claim would require the government to overturn the Church's decision on her fitness for ministry, it falls squarely within the ministerial exception.

b. Perich's claim of pretext would require the courts to decide religious questions.

Perich's claim of pretext would require the courts to decide religious questions. The Church says that it rescinded Perich's call for religious reasons—namely, her insubordination and disruption on February 22, and her threats to sue in violation of Church teaching. J.A. 55. Perich claims that these reasons are pretextual. No court can resolve this dispute without becoming entangled in religious questions.

i. Perich's threats to sue violated the Synod's longstanding teaching. The Synod has long taught that fellow believers generally should not sue one another in secular courts—and never over religious matters. Biblically, that teaching is rooted in 1 *Corinthians* 6:1-11, where the Apostle Paul denounced lawsuits between believers as scandalous. It is elaborated in Lutheran interpretations of that passage. *An Exegetical Study*, *supra* n.7.

The Synod's teaching is further embodied in an elaborate dispute resolution mechanism. Pet. App. 75a-104a. Disputes over called positions are at the very heart of this process: "The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. *Fitness for ministry and other theological matters must be determined within the church*." Pet. App. 77a (emphasis added).

When Perich threatened to sue, the school principal's first reaction was that "we have a conflict resolution policy through our synod," and to sue the Church "is very, very much against what is expected of us as church workers when we sign on with our call." J.A. 152. The school board's view at the time of Perich's threat was that Perich "was not following the guidelines set out for called workers for a conflict resolution." J.A. 155. The president of the congregation testified that threatening a lawsuit "is not acceptable conduct of a call person. A call person there is—there is a dispute resolution process that they are required to—to go through." J.A. 96.

Thus, in response to Perich's threats to sue, the Church invoked a religious rule and made a religious decision. By flouting Lutheran teaching, Perich disqualified herself from service as a called minister. Just as a church might decide that it could not retain a minister who abused alcohol or seduced a parishioner, Hosanna-Tabor could decide that threatening to sue the Church was a serious sin that undermined religious credibility and destroyed the religious relationship.

This Court has upheld the rights of other churches that invoked similar doctrines restricting secular lawsuits over religious matters. In *Gonzalez*, the church argued "that the failure to take an appeal to the Pope from the decision of the archbishop, as provided by the canon law, precluded resort to legal proceedings." 280 U.S. at 17. The Court decided for the Church on other grounds. *Ibid.* In *Serbian*, the Court accepted the church's view that a bishop's "decision to litigate the Mother Church's authority in the civil courts rather than participate in the discip-

linary proceedings before the Holy Synod," and his "circumvention of the tribunals set up to resolve internal church disputes," were "clear substantive canonical violations." 426 U.S. at 720. See also *Watson*, 80 U.S. at 729 (quoted at p. 53, *supra*).

ii. In the face of the Synod's longstanding teaching, Perich claims that the religious justification for rescinding her call is a pretext. There is no way to resolve this claim without assessing the religious merit of the Church's reasons and how the Church applied them. Either inquiry would entangle the court in "the forbidden process of interpreting and weighing church doctrine." *Presbyterian Church*, 393 U.S. at 451.

To adjudicate pretext, a court must determine—at a minimum—whether the proffered legitimate reason or the alleged discriminatory reason actually motivated the job decision. *McDonnell Douglas*, 411 U.S. at 804-05; *Tomic*, 442 F.3d at 1040. If there is evidence of mixed motives, the court must determine whether the defendant would have made the same decision in the absence of the improper motive. *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 96-97 (2003).

In this case, Perich's insubordination and threats to sue cannot be separated from the religious obligations of a commissioned minister and the Church's teachings on internal dispute resolution. Perich's pretext claim would necessarily devolve into an investigation of the Church's beliefs. Do Lutherans really believe in non-litigious, internal resolution of disputes over fitness for ministry? Does that teaching apply to this case? Did it actually motivate the congregation? The parties would offer conflicting

evidence and arguments on Lutheran teaching. If sufficient resources were available, they would call experts, or alleged experts, in Lutheran theology. And the judge or jury would sit in judgment.

That would be precisely the "detailed review" that this Court prohibited in *Serbian*. 426 U.S. at 718. There, the Court held it unconstitutional to "evaluate[] conflicting testimony concerning internal church procedures." *Ibid.*; see also *Jones* v. *Wolf*, 443 U.S. at 602, 604; *Watson*, 80 U.S. at 728-29. Here, the inquiry is even more entangling than in *Serbian*: The question is not whether the Church followed its own internal procedures—an issue that is not in dispute—but whether the substantive decision was motivated by the Church's religious beliefs.

Applying this Court's cases, the courts of appeals have overwhelmingly agreed that the ministerial exception bars inquiries into pretext. Reviewing the reasons churches offer for their employment actions "would require the courts to determine the meaning of religious doctrine and canonical law and to impose a secular court's view of whether in the context of the particular case religious doctrine and canonical law support the decision the church authorities have made." *Scharon*, 929 F.2d at 363. See also, *e.g.*, *Rweyemamu*, 520 F.3d at 209; *Schleicher*, 518 F.3d at 475; *Catholic University*, 83 F.3d at 465-66. Most courts of appeals have gone further and held that the church need not even state its reason for an employment decision concerning a minister, see pp. 24-25, *supra*, thus precluding any possibility of considering whether that reason is pretextual. Because the First Amendment does not permit courts to decide reli-

gious questions, it does not permit courts to adjudicate Perich's claim.

iii. In holding that this case could proceed, the Sixth Circuit first appeared to indicate that the religious issues could be avoided by simply ignoring them. "Perich's claim would not require the court to analyze any church doctrine." Pet. App. 24a. But to ignore the religious issues would not avoid deciding them; it would simply decide them against the Church without analysis or explanation.

The Sixth Circuit also said that the Church did not "reference church doctrine or the LCMS dispute resolution procedures" in its letters to Perich. *Ibid.* The implication is that the Church's religious reasons must be a pretext, because they were not stated contemporaneously with the decision to seek rescission of Perich's call. But to find pretext is to decide the religious controversy—precisely what this Court's cases prohibit.

The statement is also unsound factually, because the Church *did* state its reasons: "[Y]ou have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action" against the Church. J.A. 55. The Church was not required to recite the teaching that made the described behavior a religious offense. This was a letter within the Church, to a commissioned minister trained in church teachings. There was no need to recite what everyone already knew.

Finally, the Sixth Circuit said that courts could decide "whether a doctrinal basis actually motivated Hosanna-Tabor's actions." Pet. App. 24a. It gave no

reasons for this view, but it cited two cases, neither of which involved an employee within the ministerial exception. See *Geary* v. *Visitation School*, 7 F.3d 324, 330-31 (3d Cir. 1993) (explicitly distinguishing ministerial exception cases); *DeMarco* v. *Holy Cross High School*, 4 F.3d 166, 171-72 (2d Cir. 1993) (same). DeMarco was a math teacher, 4 F.3d at 168; Geary was described only as a "lay teacher," with no mention of any religious duties, 7 F.3d at 325. It is hardly surprising that entanglement problems become more severe as the plaintiff's duties become more religious. The Sixth Circuit's mistaken holding that it can decide Perich's pretext claim is derivative of its mistaken holding about Perich's religious functions.

C. Permitting Perich's claim to proceed would discriminate among churches based on how they allocate religious authority.

Different churches have allocated responsibilities between the clergy and the laity in a great variety of ways. Some have bright-line divisions between a clergy entrusted with nearly all the church's important religious functions and a laity entrusted with few or none. Some have no paid clergy. Others have a great variety of positions that exercise fewer religious responsibilities than an ordained pastor, but many more religious responsibilities than ordinary laity and staff.

The office of commissioned minister is such an in-between position. It is clearly distinguished from the ordinary laity and staff on one side, *The Ministry*, *supra* n.2, at 5, and from the ordained office of the public ministry on the other. *Id.* at 6. If such an in-

between office is excluded from the ministerial exception, the churches in the Synod lose the ability to select and control many of the people who perform important ministries.

A too-narrow ministerial exception, with no deference to religious understandings of mixed or in-between positions, would discriminate among churches. It would protect churches with a bright line between clergy and laity, but it would fail to protect the many theological alternatives. The Court should draw the boundaries of the ministerial exception in a way that protects the many variations in how churches allocate religious authority.

* * * * *

Any reasonable boundary to the ministerial exception would include Cheryl Perich. She led worship and prayer; she was the primary source of religious instruction for her students; she held ecclesiastical office; and she was removed from that office for violating church teaching. Her claim is barred by the ministerial exception.

CONCLUSION

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

Respectfully submitted.

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