No. 10-

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN J. HASSON
ERIC C. RASSBACH
HANNAH C. SMITH
LUKE W. GOODRICH
LORI H. WINDHAM
ASMA T. UDDIN
The Becket Fund for Religious Liberty
3000 K St., NW Ste. 220
Washington, DC 20007
(202) 955-0095

DOUGLAS LAYCOCK
Counsel of Record
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903
(434) 924-7354

Counsel for Petitioners

[Additional counsel listed on inside cover]

SHERRI C. STRAND
JAMES W. ERWIN
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

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.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.. i

PARTIES TO THE PROCEEDINGS.......................... ii

TABLE OF AUTHORITIES...................................... vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 8

I. The decision below widens an acknowledged conflict over the scope of the First Amendment's ministerial exception................... 11

 A. Federal circuits are evenly divided over the legal standard that governs the scope of the ministerial exception................ 11

 B. Even circuits that have accepted the "primary duties" test are in sharp conflict with the Sixth Circuit over what that test means. 20

 C. The conflict is firmly entrenched and is only growing wider. 23

II. The decision below conflicts with this Court's cases forbidding secular courts from interfering in religious disputes. 25

III. The scope of the ministerial exception is a vital and recurring question for thousands of religious organizations across the country 32

CONCLUSION 36

APPENDIX A: *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church and School*, Nos. 09-1134/1135, Opinion, United States Court of Appeals for the Sixth Circuit, March 9, 2010 .... 1a

APPENDIX B: *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church and School*, No. 07-14124, Opinion, United States District Court for the Eastern District of Michigan, Southern Division, October 23, 2008 .... 31a

APPENDIX C: *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church and School*, No. 07-14124, Opinion and Order Denying Plaintiff Perich's Amended Motion for Reconsideration, United States District Court for the Eastern District of Michigan, Southern Division, December 3, 2008 .... 54a

APPENDIX D: *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church and School*, Nos. 09-1134/1135, Order Denying Rehearing, United States Court of Appeals for the Sixth Circuit, June 24, 2010 .... 62a

APPENDIX E: The Americans with Disabilities Act, 42 U.S.C. §§ 12111 and 12203 .... 64a

APPENDIX F: The Michigan Persons with Disabilities Civil Rights Act, M.C.L. §§ 37.1201 and 37.1602.................................... 66a

APPENDIX G: Complaint, United States District Court for the Eastern District of Michigan, Southern Division, March 11, 2008 .... 67a

APPENDIX H: Dispute Resolution Policy of the Missouri Synod Lutheran Church, as found in the Handbook of The Lutheran Church Missouri Synod, 2004 Edition 75a

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alcazar v. *Corporation of Catholic Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010)..... 12, 13, 24, 25, 33

Alicea-Hernandez v. *Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003)................ 10, 17, 24

Bell v. *Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997)............................ 23

Bethea v. *Nation of Islam*, 248 Fed. Appx. 331 (3d Cir. 2008)................... 33

Boy Scouts v. *Dale*, 530 U.S. 640 (2000)... 31

Bryce v. *Episcopal Church*, 289 F.3d 648 (10th Cir. 2002).......................... 10

California Democratic Party v. *Jones*, 530 U.S. 567 (2000)... 31

Clapper v. *Chesapeake Conference of Seventh-day Adventists*, 166 F.3d 1208 (4th Cir. 1998).. 20-22

Combs v. *Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999)... 10, 24

Cooper-Igwebuike v. *United Methodist Church*, 160 Fed. Appx. 549 (8th Cir. 2005) 33

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. *Amos*, 483 U.S. 327 (1987) 13, 29, 35

Coulee Catholic Schools v. *Labor & Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009) 21-23

Democratic Party v. *Wisconsin*, 450 U.S. 107 (1981) 31

EEOC v. *Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996) 10, 11, 23, 24, 34

EEOC v. *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000) 10, 23, 24

Employment Division v. *Smith*, 494 U.S. 872 (1990) 10, 27

Eu v. *San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) 31

Friedlander v. *Port Jewish Ctr.*, 347 Fed. Appx. 654 (2d Cir. 2009) 33

Gellington v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) 10, 12

Gonzalez v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929) 9, 26, 27

Guinan v. *Roman Catholic Archdiocese*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) 20

Hankins v. *Lyght*,
441 F.3d 96 (2d Cir. 2006) 33

Hankins v. *New York Annual Conf. of United Methodist Church*,
351 Fed. Appx. 489 (2d Cir. 2009).................... 33

Hollins v. *Methodist Healthcare, Inc.*,
474 F.3d 223 (6th Cir. 2007)................. 10, 25, 33

Jones v. *Wolf*,
443 U.S. 595 (1979)... 26

Kedroff v. *St. Nicholas Cathedral*,
344 U.S. 94 (1952)................................... 8, 26, 27

Lemon v. *Kurtzman,*
403 U.S. 602 (1971)..................................... 28, 29

Md. & Va. Churches v. *Sharpsburg Church*,
396 U.S. 367 (1970)... 26

McCants v. *Ala.-W. Fla. Conf. of United Methodist Church, Inc.*,
372 Fed. Appx. 39 (11th Cir. 2010) 33

McClure v. *Salvation Army*,
460 F.2d 553 (5th Cir. 1972)......................... 9, 23

Natal v. *Christian & Missionary Alliance*,
878 F.2d 1575 (1st Cir. 1989) 12

New York State Board of Elections v. *Lopez Torres*, 552 U.S. 196 (2008) 31

NLRB v. *Catholic Bishop*,
440 U.S. 490 (1979) 18, 19, 27, 28, 30

Petruska v. *Gannon Univ.*,
462 F.3d 294 (3d Cir. 2006) 10, 11, 24, 33, 34

Presbyterian Church v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*,
393 U.S. 440 (1969) 26, 29

Rayburn v. *Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164
(4th Cir. 1985) 11, 23, 24

Redhead v. *Conf. of Seventh-day Adventists*,
440 F. Supp. 2d 211 (E.D.N.Y. 2006) 20

Roberts v. *U.S. Jaycees*,
468 U.S. 609 (1984) 31

Rweyemamu v. *Cote*,
520 F.3d 198 (2d Cir. 2008) .... *passim*

Scharon v. *St. Luke's Episcopal Presbyterian Hosps.*,
929 F.2d 360 (8th Cir. 1991) 10, 12, 34

Serbian E. Orthodox Diocese v. *Milivojevich*, 426 U.S. 696 (1976) 9, 26, 27

Schleicher v. *Salvation Army*,
518 F.3d 472 (7th Cir. 2008) .... *passim*

Shaliehsabou v. *Hebrew Home*,
363 F.3d 299 (4th Cir. 2004) 23, 24, 34

Skrzypczak v. *Roman Catholic Diocese*,
611 F.3d 1238 (10th Cir. 2010) 12, 33

Starkman v. *Evans*,
198 F.3d 173 (5th Cir. 1999) 12, 14, 24

Tomic v. *Catholic Diocese*,
442 F.3d 1036 (7th Cir. 2006) ... 15, 16, 19, 24, 33

Watson v. *Jones*,
80 U.S. 679 (1871) 8, 26

Werft v. *Desert Southwest Annual Conf. of the United Methodist Church*,
377 F.3d 1099 (9th Cir. 2004) 10

Zelman v. *Simmons-Harris*,
536 U.S. 639 (2002) 29

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) 9

OTHER AUTHORITIES

1 Corinthians 6:1-7 18

Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*,
79 Colum. L. Rev. 1514 (1979) 11

Inst. for Educ. Scis., U.S. Dep't of Educ., *Characteristics of Private Schools in the United States* (2009) 34

Petition for Writ of Certiorari, *Archdiocese of Wash.* v. *Moersen*, 128 S.Ct. 1217 (2007) (No. 07-323)................... 24

Petition for Writ of Certiorari, *Petruska* v. *Gannon Univ.*, 127 S.Ct. 2098 (2007) (No. 06-985)............. 24, 25

Petition for Writ of Certiorari, *Tomic* v. *Catholic Diocese*, 127 S.Ct. 190 (2006) (No. 06-15)....................... 25

PETITION FOR WRIT OF CERTIORARI

Petitioner Hosanna-Tabor Evangelical Lutheran Church and School respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-30a) is published at 597 F.3d 769. The district court's opinion (Pet. App. 31a-53a) is published at 582 F. Supp. 2d 881. The district court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. The court denied rehearing on June 24, 2010. Pet. App. 62a-63a. On September 2, 2010, Justice Thomas extended the time within which to file this petition to and including October 22, 2010. App. No. 10A235. This Court has jurisdiction under 28 U.S.C. 1254(1).

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 the appendix to this petition. Pet. App. 64a-66a.

STATEMENT

This petition arises from an employment discrimination lawsuit brought against a church-owned school by one of its teachers. The district court dismissed the suit based on the "ministerial exception," concluding that the suit would infringe on the church's First Amendment right to choose its religious leaders. But the Sixth Circuit reversed, concluding that the former employee was not covered by the ministerial exception, because she spent a majority of her time performing "secular" duties. In doing so, the court widened an existing circuit split, acknowledging that other circuits had "found that [its] approach is too rigid." *Id.* 16a n.7.

1. Petitioner Hosanna-Tabor Evangelical Lutheran Church and School ("the Church") is an ecclesiastical corporation and member congregation of The Lutheran Church—Missouri Synod. *Id.* 3a. The Missouri Synod is generally regarded as the most theologically conservative of the major Lutheran bodies. The Church operates a religious school that teaches kindergarten through eighth

grades. The purpose of the school is to provide a "Christ-centered education" based on biblical principles. *Id.* 4a-5a.

The school has two types of teachers: "lay" teachers and "called" teachers. Lay teachers are hired by the school board for a one-year term. *Id.* 3a. Called teachers are hired by a vote of the Church congregation and, like the Church pastor, cannot be summarily dismissed by the congregation without cause. *Ibid.*

Respondent Cheryl Perich served as one of the school's "called teachers." *Id.* 3a-4a. To become a called teacher, Perich was required by The Lutheran Church—Missouri Synod to complete university-level training in Lutheran theology and to be declared by a faculty committee to be prepared for ministry. *Id.* 3a, 33a, 51a. She was also required to be selected for her position by the voting members of the Church congregation; once selected, she was issued a call by the Church to serve as a "commissioned minister." *Id.* 3a-4a, 33a-34a. The Synod recognizes both "ordained" ministers and "commissioned" ministers; either status is clearly distinguished from the laity and from church employees who are not ministers.

As a commissioned minister, Perich was listed in a directory of qualified teachers published by The Lutheran Church—Missouri Synod. *Id.* 3a. She was authorized to claim a housing allowance for ministers on her federal income taxes (which she did). *Id.* 4a. And she was subject to the same employment and dispute resolution procedures as the Church pastor. *Id.* 51a.

Like all teachers at the school, Perich was expected to serve as a "Christian role model[]" and to "integrate faith into all subjects." *Id.* 5a, 35a. She taught the customary fourth-grade curriculum. *Id.* 4a. Critical here, she also taught religion classes four days a week, led students in daily devotional exercises, led students in prayer three times a day, and attended a chapel service with her students each week. *Ibid.* Twice a year, she led a school-wide chapel service. *Ibid.*

2. During the 2004-05 school year, Perich missed more than half the school year when her doctor diagnosed her with narcolepsy, and it was unclear when or if she would be able to return to work. *Id.* 5a-6a, 35a-36a. The school suggested that Perich apply for a disability leave of absence for the school year, which Perich did, and the school principal assured her that she would still have a job when she returned to health. *Id.* 5a.

In Perich's absence, the school first attempted to combine three grades into a single classroom, but when that proved infeasible, the school hired a replacement teacher for the rest of the year. *Id.* 7a n.1, 35a. The school then asked Perich to discuss with her doctor what responsibilities she could undertake in the following school year (2005-06). *Id.* 35a-36a.

Perich, however, obtained a release from her doctor and sought permission to return to work in the middle of the school year. *Id.* 7a, 37a. The school declined, expressing concern about Perich's ability to safely supervise students, and about the students' ability to adjust to a third new teacher in a single school year. *Id.* 6a-7a, 36a-37a. It asked Perich to

resign her call for the remainder of the school year, with the understanding that her call could be reinstated upon her return to work in the following school year. *Id.* 6a-7a, 36a-37a.

Perich refused this arrangement and told the school that she would report to work. When she reported to work, the school had no job for her. Citing the school handbook, which states that failure to return to work on the first day following the expiration of medical leave may be considered voluntary termination, Perich refused to leave school grounds until the school gave her a letter acknowledging that she had reported for work. *Id.* 8a, 37a. The school gave her a letter stating that she had provided improper notification of her return to work and asking her to continue her leave so that the school could develop a plan for her return. Later that day, when the school principal suggested that her conduct had placed her continued employment in jeopardy, Perich threatened to sue. *Id.* 8a, 38a.

The following month, the school board sent Perich a letter stating that it would recommend that the Church rescind Perich's call, citing her "insubordination and disruptive behavior," as well as her "threat[s] to take legal action." *Id.* 38a, 9a. Perich's attorney responded with a letter threatening legal liability. *Id.* 39a, 9a. At the next congregational meeting, pursuant to the Church's Constitution and Bylaws, the Church members voted 40 to 11 to rescind Perich's call. *Ibid.*; Record Entry 24-24 (4/10/05 Meeting Minutes at 1).

3. In May 2005, Perich filed a charge of discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC). The EEOC then

filed a complaint against the Church under the Americans with Disabilities Act (ADA). The complaint did not allege disability discrimination; it alleged only a single count of retaliation. Pet. App. 9a-10a. Perich intervened and filed a complaint seeking an order reinstating her to her former position as a commissioned minister. *Id.* 73a.

The parties filed cross-motions for summary judgment. The Church claimed that the suit was barred by the ministerial exception because called teachers play a crucial role in the religious mission of the Church: They are trained in Lutheran theology; they are commissioned as ministers; they are subject to the same disciplinary rules as the church pastor; they teach religion classes; they lead students in prayer and worship; they lead chapel services; they incorporate religion into all subjects; and they serve as role models of the Church's teaching. Thus, a court order reinstating a called teacher, or imposing liability for the Church's selection of called teachers, would violate the Church's right to select its religious leaders.

The Church also emphasized that it fired Perich not for filing an ADA claim but because her insubordination and threats of litigation violated Church teaching. Like many Christian denominations, the Synod encourages its members to resolve most disputes within the Church rather than in civil court. *Id.* 50a. That teaching is embodied in the Synod's Bylaws, which provide a detailed procedure for internal dispute resolution and appeals. *Id.* 75a-104a. Perich made no attempt to use that procedure, even though the Synod's Bylaws require commissioned ministers to do so. *Id.* 77a-80a.

Perich argued that the ministerial exception should not apply because the majority of her duties consisted of teaching secular subjects from secular textbooks, and she said she rarely incorporated religion into secular subjects. She also claimed that the alleged doctrinal motivation for her firing was merely a pretext for unlawful retaliation.

The district court ruled in favor of the Church. It emphasized that the Church called Perich as a commissioned minister and held her out to the world as such, entering a "give-and-take relationship" with her that was "governed by the same rules as the church applies to its ordained ministers." *Id.* 51a. It also refused to second-guess the Church's view of the religious significance of called teachers, noting that federal courts are "inept when it comes to [deciding] religious issues." *Id.* 52a. Finally, it declined to adjudicate Perich's claim of pretext because doing so would "require[] some exploration of religious doctrine in violation of the First Amendment." *Id.* 50a-51a. However, the court acknowledged that "there are courts on both sides of the [ministerial exception issue] when it comes to elementary school teachers in religious schools," and "the courts remain sharply divided." *Id.* 44a, 43a.

4. The Sixth Circuit reversed. According to the two-judge majority, in order to determine whether the ministerial exception applies, a court must examine the "primary duties" of the employee. *Id.* 16a-17a. Under this standard, "an employee is considered a minister if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and

worship." *Ibid.* (internal quotations omitted). Applying this test, the Court held that Perich was not subject to the ministerial exception because "she spent the overwhelming majority of her day teaching secular subjects using secular textbooks." *Id.* 22a, 20a. The panel also emphasized that "lay" teachers and "called" teachers had the same basic teaching responsibilities, and that "at least one teacher at [the school]"—a lay teacher—"was not Lutheran." *Id.* 21a, 20a, 23a. It thus held that Perich's primary duties were not religious.

Judge White concurred separately to emphasize that she viewed "the relevant cases as more evenly split than does the majority." *Id.* 26a. As Judge White pointed out, "application of the primary-duties test has created a split of authority in several areas," and "several courts have recognized the lack of uniformity in this area." *Id.* 26a-27a n.2. Ultimately, however, Judge White agreed that the ministerial exception should not apply because called teachers and lay teachers had the same duties, and lay teachers were not required to be Lutheran. *Id.* 29a-30a.

The Sixth Circuit denied rehearing en banc on June 24, 2010. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court has long recognized the right of religious organizations to control their internal affairs. *Watson* v. *Jones*, 80 U.S. 679, 728-29 (1871). This right includes the freedom of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Most importantly, it

includes the right of religious organizations to select their own religious leaders. *Ibid.*; *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724-25 (1976); *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

Based on this right, twelve federal circuits have recognized the "ministerial exception." (The Federal Circuit has no jurisdiction over cases that could present the issue.) The ministerial exception bars lawsuits that interfere in the relationship between a religious organization and employees who perform religious functions—most obviously, lawsuits seeking to compel a religious organization to reinstate such an employee or seeking to impose monetary liability for the selection of such employees. As the first court adopting the ministerial exception explained: "The relationship between an organized church and its ministers is its lifeblood"; allowing the state to interfere in that relationship—effectively allowing judges and juries to pick ministers—would produce "the very opposite of that separation of church and State contemplated by the First Amendment." *McClure* v. *Salvation Army*, 460 F.2d 553, 558, 560 (5th Cir. 1972).[1]

---

[1] The constitutional ministerial exception should not be confused with Title VII's religious exemption. 42 U.S.C. 2000e-1(a), 2000e-2(e)(2) (2006). See Pet. App. 26a n.1 (White, J., concurring). The statutory exemption applies to *any* employee of a religious organization, but only with respect to claims of *religious* discrimination. The ministerial exception applies only to employees performing religious functions, but it bars all employment-law claims that might dictate which employees perform those functions. The statutory exemption applies to all employees but few claims; the ministerial exception applies to many fewer employees but to many more claims.

Based on this principle, every circuit has agreed that the ministerial exception bars most lawsuits between a religious organization and its leaders. Every circuit has also agreed that the ministerial exception extends beyond formally designated "ministers" to include other employees who play an important religious role in the organization. And all eleven circuits to consider the question[2] have agreed that the ministerial exception survives this Court's decision in *Employment Division* v. *Smith*, which reaffirmed the cases underlying the ministerial exception—namely, cases forbidding the government from "lend[ing] its power to one or the other side in controversies over religious authority or dogma." 494 U.S. 872, 877 (1990).

But the agreement ends there. Federal circuits are in sharp and acknowledged conflict over what legal standard controls the boundaries of the ministerial exception, and specifically over the "primary duties" test used by the Sixth Circuit here. The conflict has produced directly conflicting results in

---

[2] See, *e.g.*, *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-10 (2d Cir. 2008); *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 303-09 (3d Cir. 2006); *EEOC* v. *Roman Catholic Diocese*, 213 F.3d 795, 800-05 (4th Cir. 2000); *Combs* v. *Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 702-04 (7th Cir. 2003); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft* v. *Desert Southwest Annual Conf. of the United Methodist Church*, 377 F.3d 1099, 1100-04 (9th Cir. 2004); *Bryce* v. *Episcopal Church*, 289 F.3d 648, 656-58 (10th Cir. 2002); *Gellington* v. *Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

factually indistinguishable cases, and is widely recognized and firmly entrenched. This case presents an ideal vehicle for resolving the split and providing guidance on an important constitutional question.

I. The decision below widens an acknowledged conflict over the scope of the First Amendment's ministerial exception.

Four circuits have adopted the "primary duties" test; four have rejected it; and four have not opined on it. And even the circuits that have adopted the primary duties test are in conflict over how it should be applied.

A. Federal circuits are evenly divided over the legal standard that governs the scope of the ministerial exception.

1. The Third, Fourth, Sixth, and D.C. Circuits have adopted the "primary duties" test. See *Petruska*, 462 F.3d at 304 n.6, 307 (3d Cir. 2006); *Rayburn* v. *Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); Pet. App. 16a-17a; *Catholic Univ.*, 83 F.3d at 463 (D.C. Cir. 1996). First adopted in 1985, that test holds that an employee is subject to the ministerial exception "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Rayburn*, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1545 (1979)). The basic idea is that courts must determine whether the employee is "important to the spiritual and pastoral mission of the church," *ibid.*;

and focusing on the employee's primary job duties is, in the view of these circuits, the best way to do so.

The Second, Fifth, Seventh, and Ninth Circuits have rejected the primary duties test, either criticizing it as "too rigid," *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008), "arbitrary," "suspect," and "problematic," *Alcazar* v. *Corp. of the Catholic Archbishop*, 598 F.3d 668, 675, 676 (9th Cir. 2010), reh'g granted en banc, 2010 WL 3169590 (Aug. 5, 2010), or simply ignoring it and applying a different test, *Starkman* v. *Evans*, 198 F.3d 173, 176-77 (5th Cir. 1999); *Schleicher* v. *Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008). These circuits consider all of the employee's job duties, not just those that are characterized as "primary"; and they consider the nature of the underlying employment dispute, emphasizing the need for secular courts to avoid becoming entangled in religious questions.

The First, Eighth, Tenth, and Eleventh Circuits have resolved ministerial exception claims on a case-by-case basis without enumerating a particular test; thus, they have not opined on the primary duties test either way. See, *e.g.*, *Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989) (pastor of a church); *Scharon*, 929 F.2d at 362-63 (8th Cir. 1991) (chaplain at a religious hospital; court would "consider these situations on a case-by-case basis"); *Skrzypczak* v. *Roman Catholic Diocese*, 611 F.3d 1238, 1244 (10th Cir. 2010) (director of religious formation for a Catholic diocese); *Gellington*, 203 F.3d at 1302-04 (11th Cir. 2000) (minister of a church).

2. The circuits that have rejected the primary duties test have criticized it on two grounds, both

related to the entanglement of courts in religious questions.

a. First, as the Ninth Circuit has explained, "the 'primary duties' test [is] problematic" because its application frequently entangles courts in religious questions. *Alcazar*, 598 F.3d at 675. To apply the primary duties test, courts must first determine which duties are "secular" and which are "religious." But this labeling exercise is not a straightforward task. *Id.* at 675-76. As this Court has warned: "The line [between secular and religious] is hardly a bright one," and secular courts should not "require [a religious organization], on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987).

Rather than classifying duties as secular or religious, the Fifth, Seventh, and Ninth circuits ask merely whether the employee has some substantial duties that are considered religious from the standpoint of the religious organization. In *Alcazar*, for example, the parties disputed whether the employee (a Catholic seminarian) spent more time assisting with Mass or performing maintenance duties around the church. 598 F.3d at 675. But the Ninth Circuit panel declined to classify the disputed activities as secular or religious. *Id.* at 675-76. Instead, it held that the ministerial exception applied simply because the seminarian performed undisputedly religious duties (*i.e.*, assisting at Mass). *Id.* at 676. Unlike the "arbitrary 51% requirement implicit in the 'primary duties' test," this approach "acknowledg[es] that secular duties are often important to a

ministry," thus avoiding entanglement in religious questions. *Ibid.* The Fifth Circuit has adopted a similar test. *Ibid.* (citing *Starkman*, 198 F.3d at 176 (ministerial exception applied where choirmaster "engaged in activities traditionally considered ecclesiastical or religious," even though she claimed these activities were "not a primary duty")).

Similarly, in *Schleicher*, the Seventh Circuit considered whether the ministerial exception applied to the "administrators" of a Salvation Army rehabilitation center. 518 F.3d 472. The administrators led worship and had other unambiguously religious functions, but they also spent much of their time supervising Salvation Army thrift shops. The court refused to second-guess the religious significance of that work:

> [S]alvation through work is a religious tenet of the Salvation Army. The sale of the goods in the thrift shop is a commercial activity, on which the customers pay sales tax. But the selling has a spiritual dimension, and so, likewise, has the supervision of the thrift shops by ministers.

Id. at 477. Rather than applying the primary duties test, Judge Posner adopted "a presumption that clerical personnel" are covered by the ministerial exception, subject to "proof that * * * the minister's function [is] entirely rather than incidentally commercial." *Id.* at 477-78. (It is clear that "clerical" referred to clerics, not to clerks.) Unlike the primary duties test, this approach did not entangle the court in any religious questions.

b. Federal circuits have also rejected the primary duties test as "too rigid" because it "fails to consider

the nature of the dispute." *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008). Some disputes, by their nature, are more likely than others to involve religious questions. For example, a suit brought by a minister who was fired for heresy will likely involve religious questions; a suit brought by a minister who was "struck on the head by a falling gargoyle as he is about to enter the church" will not. *Ibid.* Focusing exclusively on the employee's "primary duties" is inadequate because some disputes have a greater potential than others to "entangle [the court] in doctrinal disputes." *Ibid.*

Most often, this issue arises when the religious organization offers a religious justification for a discharge, and the plaintiff claims that the religious justification is a pretext. In *Tomic* v. *Catholic Diocese*, 442 F.3d 1036 (7th Cir. 2006), for example, a Catholic church claimed that it discharged its organist for a religious reason (his choice of music for Easter Mass); the plaintiff claimed that the religious reason was a pretext for age discrimination. In another opinion by Judge Posner, the Seventh Circuit held that it could not resolve the claim of pretext:

> [I]f the suit were permitted to go forward, * * * [the plaintiff] would argue that the church's criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and [the plaintiff] might in turn dispute the church's claim. The court would be asked to resolve a theological dispute.

Id. at 1040. The Second Circuit has rejected the primary duties test for the same reason. *Rweyemamu*, 520 F.3d at 208-09 (rejecting the primary duties test as "too rigid" and concluding that a claim of pretext "cannot be heard by us without impermissible entanglement with religious doctrine"); see also *Schleicher*, 518 F.3d at 474-75 (concluding that resolving a claim of pretext would produce "entanglements of the secular courts in religious affairs").

In sum, the Second, Fifth, Seventh, and Ninth Circuits have rejected the primary duties test because it causes two types of religious entanglement: (a) It forces courts to decide which duties are secular and which are religious; and (b) It forces courts to decide whether an employment decision was truly motivated by religious doctrine.

c. Both types of entanglement are on full display here. First, although the parties agree on the *content* of Perich's teaching duties, they disagree over whether some of those duties are secular or religious. According to Perich, using secular textbooks to teach secular subjects is a secular activity (Pet. App. 20a); but according to the Church, the same activity is religious because all teachers are required to serve as "fine Christian role models," provide a "Christ-centered education," and "integrate faith into all subjects" (*Id.* 4a-5a). The parties also disagree over the importance of Perich's indisputably religious duties: teaching religion, leading prayer, and leading worship.

Based on the primary duties test, the Sixth Circuit sided with Perich. On the nature of her duties, it held that the school's "generally religious character * * * does not transform [the teaching of secular

subjects] into religious activities." *Id.* 21a. And on the importance of her duties, it held that teaching religion, leading prayer, and leading worship were not her "primary function." *Id.* 20a. Thus, the court rejected the Church's views of which duties were religious, and which duties were most important.

This type of religious second-guessing is precisely why the Seventh and Ninth Circuits have rejected the primary duties test. And in those circuits, there is no doubt that the case would have come out differently. Under the Ninth Circuit's approach, the key question would be whether, from the standpoint of the Church, Perich performed religious duties. *Alcazar*, 598 F.3d at 676. There would be no need to decide whether classes were secular or religious, or which duties were most important; her unambiguously religious duties—teaching religion, leading prayer, leading worship—would be dispositive. *Ibid.* (ministerial exception applied where seminarian assisted with Mass).

The same is true under the Seventh Circuit's approach, where there is "a presumption that clerical personnel are [covered by the ministerial exception]," subject to rebuttal if, for example, "the minister's function [is] entirely rather than incidentally commercial." *Schleicher*, 518 F.3d at 478. Here, Perich is a commissioned minister and it is undisputed that her job is not entirely secular. Thus, like the administrators in *Schleicher*, her claim would be barred by the ministerial exception in the Seventh Circuit. *Ibid.*; accord *Alicea-Hernandez*, 320 F.3d at 703-04 (7th Cir. 2003) ("press secretary" with typical public-affairs duties was subject to the ministerial excep-

tion because she was "responsible for conveying the message of [the religious] organization").

This case also presents the second major class of entanglement concerns: entanglement due to claims of doctrinal pretext. Perich has brought a single count of retaliation, claiming that the Church fired her for suing under the ADA. The Church justifies the firing based on doctrinal concerns—namely, Perich's insubordination, and the Synod's teaching that church members should attempt to resolve their disputes within the church. Pet. App. 50a. That teaching is not only broadly shared among many Christian denominations and rooted in Scripture, it is also embodied in the Synod's Bylaws, which require all ministers to submit disputes over their calls to the Synod's dispute resolution process. Pet. App. 77a-80a; see 1 Corinthians 6:1-7 ("If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints?").

The Sixth Circuit dismissed the risk of entanglement, suggesting that it would be fairly easy to determine "whether a doctrinal basis actually motivated Hosanna-Tabor's actions." Pet. App. 24a. But the court never says how. The decision to rescind Perich's call was a complex process, involving the interplay of Church doctrine, Church leaders, and a vote of the Church congregation. A court cannot determine the "true" motivation for the decision without scrutinizing Church doctrine, allowing the plaintiff to interrogate Church members and leaders, and no doubt resolving Perich's claims that their answers should not be credited. As this Court pointed out in *NLRB* v. *Catholic Bishop*, "the very process of inquiry" would inevitably entangle courts

in religious questions and "impinge on rights guaranteed by the Religion Clauses." 440 U.S. 490, 502 (1979). That is why the Second and Seventh Circuits have rejected the primary duties test and have consistently refused to resolve claims of pretext. See Part I.A.2.b, *supra*. There is no doubt that this case would come out differently under *Rweyemamu*, *Tomic*, and *Schleicher*.

3. There is a third and more fundamental problem with the primary duties test: It results in judges and juries deciding who will perform important religious functions. Perich is responsible for transmitting the faith to the next generation. She teaches their religion class; she leads them in prayer and in devotionals; she leads chapel services; she serves as a Christian role model. These are duties of great religious significance, and they are inseparable from the rest of her job. The children get religious instruction not from some "special" teacher they see for only a few minutes a day, but from their full-time teacher, with whom they develop a close personal relationship.

Under the Sixth Circuit's decision, a jury will decide whether Perich will continue to perform these essential religious functions. The jury will displace the duly constituted religious authorities and usurp control over who shall represent the faith to the next generation. Such displacement of religious authority is exactly what the ministerial exception is designed to prevent.

B. Even circuits that have accepted the "primary duties" test are in sharp conflict with the Sixth Circuit over what that test means.

Review is also warranted because the Sixth Circuit's decision widens a split among courts that have adopted the primary duties test. Specifically, these courts disagree over whether the primary duties test is predominantly qualitative or quantitative, and how that test applies to teachers at religious schools.

Here, the Sixth Circuit treated the primary duties test as a largely *quantitative* one, relying heavily on the fact that Perich's religious duties consumed only "forty-five minutes of the seven hour school day." Pet. App. 19a-20a. Two other courts have adopted the same quantitative approach, holding that parochial school teachers are not subject to the ministerial exception when they spend the majority of their time teaching secular subjects. See *Redhead* v. *Conf. of Seventh-day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006) (ministerial exception did not apply because "[plaintiff's] religious [duties] were limited to only one hour of Bible instruction per day); *Guinan* v. *Roman Catholic Archdiocese*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) (ministerial exception did not apply because "the vast majority of [plaintiff's] duties involved her teaching secular courses, such as math or science").

But other courts—including the Fourth Circuit and the Wisconsin Supreme Court—have criticized this quantitative approach and reached the opposite result on identical facts. In *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, the Fourth Circuit considered age and race discrimination

claims brought by an elementary teacher at a Seventh-day Adventist school. 166 F.3d 1208, 1998 WL 904528 at *1 (4th Cir. Dec. 29, 1998) (unpublished). As in this case, the teacher led students in prayer and religion classes each day, but the teacher argued that he was not covered by the ministerial exception because he spent only thirty percent of his time on religious activities. *Id.* at *3 n.2, *6.

The Fourth Circuit rejected the teacher's argument, explaining that it "incorrectly limit[ed] the primary duties test to a purely quantitative test rather than one that obviously has both quantitative and qualitative elements." *Id.* at *7. Based in part on the qualitative elements of his employment duties—such as the fact that "the Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose"—the Fourth Circuit held that the teacher was subject to the ministerial exception. *Ibid.*

Similarly, in *Coulee Catholic Schools* v. *Labor & Industry Review Commission*, 768 N.W.2d 868 (Wis. 2009), the first grade teacher at a Catholic elementary school had duties indistinguishable from Perich's: She taught religion class three days per week, led students in prayer twice per day, and helped plan a worship service every four weeks. *Id.* at 873. Moreover, the school did not require teachers to be Catholic, and "[t]he majority of [plaintiff's] duties were teaching 'secular' subjects" using secular textbooks. *Id.* at 887-88, 873; *id.* at 897 (Crooks, J., dissenting).

Nevertheless, the Wisconsin Supreme Court held that the teacher was subject to the ministerial exception. Rejecting a "quantitative approach" to the

primary duties test, the court instead adopted a "'functional' approach," focusing not only on the time spent on various duties, but also on other employment factors, such as "hiring criteria, the job application, the employment contract, * * * performance evaluations, and the understanding or characterization of a position by the organization." *Id.* at 882, 883. Based on these qualitative factors, it was "obvious" that her primary duties were religious. *Id.* at 889-90.

Clapper and *Coulee* are indistinguishable from this case. The majority below attempted to distinguish *Clapper* on the ground that teachers there "were required to be 'tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances.'" Pet. App. 22a-23a (quoting *Clapper*). But nothing in *Clapper* suggested that the church-membership requirement was dispositive, and in any event, Perich was subject to more stringent religious requirements: She was required to complete university-level theology training, was hired by a vote of the congregation, and was subject to the same disciplinary rules as the church pastor.

The majority did not try to distinguish *Coulee*, and the concurrence conceded that *Coulee* "present[s] [a] situation[] similar to that here." Pet. App. 28a. Although the concurrence tried to distinguish *Coulee* on the ground that it involved a more rigorous "religious yardstick for qualification as a teacher," *id.* 29a, that is simply incorrect. In *Coulee*, "[teachers] w[ere] not required to be Catholic," but simply to "engage in Catholic worship, model Catholic living, and impart Catholic teaching." 768 N.W.2d at 891.

Here, too, it is undisputed that all teachers must participate in Lutheran worship, be "fine Christian role models," and impart Lutheran teaching. Pet. App. 5a. But this case is significantly stronger: Called teachers are required to be Lutheran and to have university-level theology training (*id.* 3a), they are subject to the same disciplinary rules as the Church pastor (*id.* 51a), and Perich was discharged for reasons of Church doctrine (*id.* 49a-50a). None of these facts was present in *Coulee*. In short, the Sixth Circuit's decision squarely conflicts with the decisions of the Wisconsin Supreme Court and the Fourth Circuit.

C. The conflict is firmly entrenched and is only growing wider.

The 4–4 split over the primary duties test is mature and entrenched. The Fifth Circuit first recognized the ministerial exception almost forty years ago, *McClure*, 460 F.2d at 560, and the Fourth Circuit adopted the primary duties test in 1985, *Rayburn*, 772 F.2d at 1169. By 1997, the primary duties test was well-established in the law of the Fourth and D.C. Circuits. See *ibid.*; *Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996); *Bell* v. *Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997); *Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000); *Shaliehsabou* v. *Hebrew Home*, 363 F.3d 299 (4th Cir. 2004).

Yet from 1999 to 2008, in a series of five decisions, the Fifth and Seventh Circuits considered the views of the Fourth and D.C. Circuits and repeatedly

applied a different test.[3] Moreover, the Third and Sixth Circuits have also adopted the primary duties test, despite considering contrary authority from the Second, Fifth, and Seventh Circuits. *Petruska*, 462 F.3d at 304 n.6 (3d Cir. 2006); Pet. App. 16a n.7. And now the Second and Ninth Circuits have weighed in, expressly considering and rejecting the approaches of the Third, Fourth, and D.C. Circuits. *Rweyemamu*, 520 F.3d at 208 (2d Cir. 2008); *Alcazar*, 598 F.3d at 676 (9th Cir. 2010) ("We decline * * * to adopt the Fourth and D.C. Circuits 'primary functions' test."). Although *Alcazar* is subject to en banc review, that cannot resolve the conflict; at most it can make the split 5–3 instead of 4–4. Thus, as the opinions below demonstrated (Pet. App. 16a n.7; 26a-27a n.2 (White, J., concurring)), federal circuits are well-aware of the conflicting approaches to the ministerial exception; the conflict has persisted for many years; and the conflict has only become sharper and more entrenched.

Although other petitions have been filed in ministerial exception cases,[4] the split has become sharper

---

[3] See *Combs*, 173 F.3d at 347-49 (5th Cir. 1999) (citing *Rayburn* (4th Cir. 1985), and considering *Catholic University* (D.C. Cir. 1996)); *Starkman*, 198 F.3d at 175-76 (5th Cir. 1999) (citing *Rayburn* and *Catholic University*); *Alicea-Hernandez*, 320 F.3d at 703-05 (7th Cir. 2003) (discussing *Rayburn* and *Roman Catholic Diocese* (4th Cir. 2000)); *Tomic*, 442 F.3d at 1038-42 (7th Cir. 2006) (citing *Rayburn*, *Catholic University*, and *Roman Catholic Diocese*); *Schleicher*, 518 F.3d at 475 (7th Cir. 2008) (citing *Shaliehsabou* (4th Cir. 2004)). Each of these cases cited or discussed cases applying the primary duties test, but none adopted it.

[4] See, *e.g.*, Petition for Writ of Certiorari, *Archdiocese of Wash.* v. *Moersen*, 128 S.Ct. 1217 (2007) (No. 07-323); Petition for Writ of Certiorari, *Petruska* v. *Gannon Univ.*, 127 S.Ct. 2098 (2007)

and deeper in the last three years. The Seventh Circuit has adopted a totally different approach. *Schleicher*, 518 F.3d at 477-78 (2008). The Second and Ninth Circuits have strongly criticized the primary duties test. *Rweyemamu*, 520 F.3d at 208 (2008); *Alcazar*, 598 F.3d at 675 (2010). And the Sixth Circuit has joined the primary duties side of the split, first in dictum in *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007), where the employee had waived the issue, *ibid.*, and now in its holding here.

Finally, this case presents an ideal vehicle for resolving the conflict. The constitutional question is directly presented by the facts of the case, was fully litigated below, and formed the sole basis of the Sixth Circuit's decision.

II. The decision below conflicts with this Court's cases forbidding secular courts from interfering in religious disputes.

Certiorari is also warranted because the decision below conflicts with the decisions of this Court. Although this Court has never decided a ministerial exception case by that name, three lines of precedent bear directly on the case at hand. One line prohibits courts from interfering in matters of church governance; another prohibits courts from deciding religious questions; and a third prohibits state interference with the right of expressive association. The decision below conflicts with all three.

(No. 06-985), Petition for Writ of Certiorari, *Tomic* v. *Catholic Diocese*, 127 S.Ct. 190 (2006) (No. 06-15).

1. This Court has long prohibited state interference in matters of church governance. A long series of cases limits the role of the civil courts in resolving property disputes between competing factions of a church. *Jones* v. *Wolf*, 443 U.S. 595 (1979); *Md. & Va. Churches* v. *Sharpsburg Church*, 396 U.S. 367 (1970); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson* v. *Jones*, 80 U.S. 679 (1874).

More closely in point are cases precluding the civil courts from interfering with the selection of religious leaders. In *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), the plaintiff claimed a legal right, under the terms of a will, to be appointed to an endowed chaplaincy in the Catholic Church. The archbishop refused, deeming the plaintiff unqualified. Noting that "it is the function of the church authorities to determine what the essential qualifications of a chaplain are," this Court refused to order the church to accept a chaplain it had rejected. *Id.* at 16-17.

Similarly, in *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952), the Court struck down a New York law that would have transferred control of a cathedral. According to the Court, religious organizations have a constitutionally protected freedom "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. Thus, the state had no business "displac[ing] one church administrator with another." *Id.* at 119.

In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), a church defrocked a bishop for insubordination, and the bishop chal-

lenged his removal in state court. The Illinois Supreme Court invalidated the removal under state law. *Id.* at 712-13. But this Court reversed, concluding that the First Amendment protects the right of religious organizations, free from state interference, "to establish their own rules and regulations for internal discipline and government." *Id.* at 724. Most recently, in *Employment Division v. Smith*, this Court cited *Kedroff* and *Serbian* for the principle that government cannot take sides in disputes over religious authority. 494 U.S. at 877.

As in *Gonzalez*, *Kedroff*, and *Serbian*, rules of internal church government and selection of religious leaders are at the heart of this case. Perich lost her job not because school officials fired her, but because the Church congregation, acting pursuant to its own governing documents and the Synod Constitution and Bylaws, voted to rescind her "call" as a commissioned minister. Her lawsuit challenges that vote as pretextual; but pretextual or not, the vote is the ultimate exercise of Church authority on Perich's fitness to serve as a minister. (She was entitled to challenge the congregational vote to rescind her call through the Synod's dispute resolution process, but she has not done so.) Just as secular courts in *Serbian* had no business reinstating a bishop, the courts here have no business reinstating a commissioned minister and called teacher who teaches religion and leads children in worship.

This Court has similarly rejected government interference in the control of religious schools. In *NLRB* v. *Catholic Bishop*, the NLRB ordered Roman Catholic high schools to engage in collective bargaining with their lay teachers. 440 U.S. at 494. But this

Court reversed, holding that mandatory collective bargaining would raise "serious First Amendment questions." *Id.* at 504. As the Court explained: "Religious authority necessarily pervades" a religious school, and teachers play a "critical and unique role" in fulfilling the school's religious mission. *Id.* at 501. Forcing a school to bargain with its teachers would inject the state into the middle of that relationship, "giv[ing] rise to entangling church–state relationships of the kind the Religion Clauses sought to avoid." *Id.* at 503 (quoting *Lemon*). To avoid such entanglement, the Court interpreted the Act not to apply to church-operated schools. *Id.* at 507.

If it is constitutionally problematic to force a religious school to bargain with a teachers' union over the terms and conditions of employment, it is even more problematic to force a religious school to reinstate a teacher responsible for religious instruction.

This Court's earlier cases on financial aid to religious schools reinforce the same principle. In *Lemon* v. *Kurtzman*, this Court struck down state funding to teachers of secular subjects in religious schools. 403 U.S. 602 (1971). Because of the "substantial religious character" of the schools, there was a "danger that a teacher under religious control and discipline" would inject "some aspect of faith or morals in secular subjects." *Id.* at 616-17. At that time, the Court required the state to forestall this danger; and to do that, the state would have to monitor the schools to ensure that government funds were not used for religious instruction. Such monitoring would produce "excessive and enduring entanglement between state and church" in violation of the First Amendment. *Id.* at 619. The Court eventually held that no such

monitoring is required if the funds are delivered through a program of true private choice. *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). But it has never suggested that such monitoring would be permissible, or that government interference with the religious functions of religious school teachers would be permissible.

The problem here is much greater than in the *Lemon*-era funding cases. Under *Lemon*, the government is prohibited from monitoring even secular classes to ensure that religious doctrine does not intrude; but under the decision below, the government can dictate who will teach religion classes, organize religious services, and lead students in prayer.

2. The decision below also conflicts with cases prohibiting secular courts from deciding religious questions. See, *e.g.*, *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (forbidding courts from deciding "controversies over religious doctrine"). In *Corporation of the Presiding Bishop* v. *Amos*, the Court emphasized "the difficulties" inherent in distinguishing between secular and religious activities. 483 U.S. 327, 336 n.14 (1987). According to the Court, religious organizations should not face liability based on "which of its activities a secular court will consider religious." *Id.* at 336.

But that is just what the court below has threatened here. Under the primary duties test, the court rejected the Church's view of which duties were secular and which were religious, and it rejected the relevance of indisputably religious duties. Thus, it has exposed the Church to liability, and even rein-

statement of a commissioned minister, based on what the court believes to be religiously significant. Pet. App. 20a-23a.

Religious questions are also at the heart of Hosanna-Tabor's defense on the merits. According to the Church, it rescinded Perich's call for doctrinal reasons—namely, disruption and insubordination, along with its belief that congregations and ministers should use the Synod's dispute resolution process. *Id.* 38a, 50a, 77a-80a. Perich claims that this doctrinal motivation is a pretext. In order to resolve this dispute, the court will have to decide whether the Church was truly motivated by its religious doctrine.

This Court prohibited just such an inquiry in *NLRB* v. *Catholic Bishop*. There, the Court noted the inevitable entanglement that would result from mandatory collective bargaining at religious schools: Teachers would charge the schools with an unfair labor practice; the school would defend on the ground that its conduct was doctrinally motivated; and the teachers would claim the doctrinal motivation was pretextual. 440 U.S. at 502. The Board would then be forced to inquire "into the good faith of the position asserted by the [school] and its relationship to the school's religious mission." *Ibid.* "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses," the Court said, "but also the very process of inquiry leading to findings and conclusions." *Ibid.* That is precisely why other circuits, in conflict with the court below, have refused to resolve claims of pretext. See Part I.A.2.b, *supra*.

3. Finally, the decision below conflicts with cases protecting the First Amendment freedom of association. This Court has long recognized that the rights of free speech and free exercise include "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984). Burdens on this right of association can take many forms, but "[t]here can be no clearer example of an intrusion" on this right "than a regulation that forces the group to accept members it does not desire." *Id.* at 623.

This principle applies to both religious and nonreligious organizations. It protects the right of political parties to select their own leaders, *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 229 (1989), to select who can vote in party primaries, *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000), and to select who can be a member, *New York State Board of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008); *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 122 (1981). It protects the Boy Scouts' right to exclude a leader who undermines the Scouts' message on an important issue. *Boy Scouts* v. *Dale*, 530 U.S. 640, 659 (2000).

These cases are fully applicable by analogy here. Just as the right of free speech includes the right to associate for purposes of speaking, the right of free exercise includes the right to associate for purposes of religious exercise. *Roberts*, 468 U.S. at 618. Teaching religion to children is both—free speech and religious exercise. The ministerial exception is designed precisely to protect the right to associate for the purpose of teaching a religious message—a

message chosen by the religious organization and subject to that organization's control.

4. These three lines of authority—protecting the right to exercise religious governance, to resolve religious questions, and to select religious spokespersons—converge in the ministerial exception. They fully apply to a teacher who teaches religion to young children, leads them in devotional exercises, leads them in prayer, and leads them in worship—even if she also teaches them reading, writing, and arithmetic. The Sixth Circuit's narrow understanding of the ministerial exception threatens to force a religious school to reinstate an unwanted teacher to perform all these functions. Such a result violates the core intuition, central to both Religion Clauses, that no agency of government should appoint religious leaders.

III. The scope of the ministerial exception is a vital and recurring question for thousands of religious organizations across the country.

Finally, review is warranted because of the sweeping practical significance of the question presented. That question is both frequently recurring and vital to the daily operations of religious organizations.

1. Conflict over the scope of the ministerial exception arises frequently in the lower courts. In the last five years alone, federal circuit courts have issued fourteen opinions in cases involving the ministerial

exception;[5] federal district courts have issued forty;[6] and state courts have issued many more.[7]

One reason the issue is so often litigated is procedural. Unlike many constitutional questions, courts treat the ministerial exception as a threshold issue that must be decided before the merits. Some courts analogize the ministerial exception to qualified immunity, *e.g.*, *Petruska*, 462 F.3d at 302-03; others treat it as a limitation on courts' subject matter jurisdiction, *e.g.*, Pet. App. 10a-11a. Either way, courts decide the ministerial exception before the merits, making the ministerial exception a frequent basis of decision.

The ministerial exception also arises in many different types of cases. Although it is probably invoked

---

[5] See *Skrzypczak*, 611 F.3d 1238 (10th Cir. 2010); *McCants* v. *Ala.-W. Fla. Conf. of United Methodist Church, Inc.*, 372 Fed. Appx. 39 (11th Cir. 2010) (unpublished); *Alcazar*, 598 F.3d 668 (9th Cir. 2010); *Hosanna-Tabor*, Pet. App. 1a-30a; *Hankins* v. *New York Annual Conf. of United Methodist Church*, 351 Fed. Appx. 489 (2d Cir. 2009) (unpublished); *Friedlander* v. *Port Jewish Ctr.*, 347 Fed. Appx. 654 (2d Cir. 2009) (unpublished); *Rweyemamu* v. *Cote*, 520 F.3d 198 (2d Cir. 2008); *Schleicher*, 518 F.3d 472 (7th Cir. 2008); *Bethea* v. *Nation of Islam*, 248 Fed. Appx. 331 (3d Cir. 2008) (unpublished); *Hollins*, 474 F.3d 223 (6th Cir. 2007); *Petruska*, 462 F.3d 294 (3d Cir. 2006), *Tomic*, 442 F.3d 1036 (7th Cir. 2006); *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), *Cooper-Igwebuike* v. *United Methodist Church*, 160 Fed. Appx. 549 (8th Cir. 2005) (unpublished).

[6] A Westlaw search for "ministerial exception" in the last five years yields fifty-seven results in federal district courts. Forty of those results address the ministerial exception.

[7] A Westlaw search for "ministerial exception" in the last five years yields thirty-nine results in state court. Twenty-six of those results address the ministerial exception.

most often in employment discrimination cases, it also applies to other employment claims in which reinstatement is a potential remedy or in which monetary liability might be based on a decision to employ or not to employ a particular religious leader. It applies to "any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F.3d at 307.

Finally, the scope of the ministerial exception is important to many religious employers. Not including colleges and universities, there are over 20,000 religious schools in the country. Inst. for Educ. Scis., U.S. Dep't of Educ., *Characteristics of Private Schools in the United States* 7 (2009), http://nces.ed.gov/pubs2009/2009313.pdf. Each one is affected by the rule in this case. Beyond that, the scope of the ministerial exception is relevant to religious colleges, *Catholic University*, 83 F.3d 455, hospitals, *Scharon*, 929 F.2d 360, social service organizations, *Shaliehsabou*, 363 F.3d 299, and churches themselves.

2. The scope of the ministerial exception also has immense practical consequences for religious groups. A narrow primary duties test—covering only priests, pastors, and others focusing on "church governance" and "supervision," Pet. App. 20a—leaves religious organizations exposed to liability for many important decisions about internal governance and core religious functions. Under such a narrow test, a religious organization cannot simply make employment decisions based on its religious principles. It must consider whether the employee might sue, whether the organization can afford costly litigation and

potential liability, and whether it will be clear to the court that the employee has religious duties and that those duties are primary. The religious organization may feel compelled to retain an employee who is teaching the faith, or misteaching it, even when the religious authorities have no confidence in that employee. As this Court warned, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Amos*, 483 U.S. at 336.

Potential liability can also affect the way religious organizations apportion duties among their employees. A narrow primary duties test creates an incentive for religious organizations to concentrate religious functions in a few individuals who are unambiguously clergy, rather than spreading those functions across a broader group of employees. The distribution of authority and function between the clergy and the laity is of course one of the central issues dividing Christian denominations. In the context of religious schools, a narrow primary duties test encourages religious schools to have one religion teacher instead of entrusting that task to the teachers the children know and love best. That way, if a dispute over religious functions arises, the school can dismiss the one clearly ministerial employee without risk of liability. But it buys this protection at the price of undermining its mission and changing its organizational structure. Narrowing the scope of the ministerial exception thus presses religious organizations to change the way they are organized.

To some extent, employment laws exert this sort of influence on all organizations, whether secular or religious. But with respect to religious organizations,

this Court has repeatedly recognized that there are important constitutional limits. Thus, the question presented in this case not only affects thousands of religious organizations, but it presents an issue of core ecclesiastical, and constitutional, concern.

CONCLUSION

The petition should be granted.

Respectfully submitted.

DOUGLAS LAYCOCK
Counsel of Record
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
(434) 924-7354

KEVIN J. HASSON
ERIC C. RASSBACH
HANNAH C. SMITH
LUKE W. GOODRICH
LORI H. WINDHAM
ASMA T. UDDIN
The Becket Fund for
Religious Liberty
3000 K St., NW Ste. 220
Washington, DC 20007
(202) 955-0095

SHERRI C. STRAND
JAMES W. ERWIN
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000

Counsel for Petitioners

OCTOBER 2010