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 OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF 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.

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INTEREST OF *AMICUS CURIAE*[1]

Since its founding nearly 30 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking out about religion, or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The Institute has repeatedly demonstrated its commitment to defending freedom of religion, along with our nation's other vital freedoms. To that end, The Institute actively participates in cases addressing the First Amendment's guarantee of religious freedom. The Institute served as *amicus curiae* in prior religious freedom cases before this

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[1] Counsel of record to the parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of the Court. No counsel to any party authored this brief, in whole or in part, nor has any person or entity other than *amicus curiae* and its counsel made a monetary contribution funding the preparation or submission of this brief.

Court, including *Sossamon v. Texas*, __ U.S. __ , 131 S. Ct. 1651 (2011); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Hobbie v. Unemployment Appeals Comm'n. Of Fla.*, 480 U.S. 136 (1987).

Each year, The Institute receives numerous complaints involving misinterpretation of the First Amendment's free exercise and establishment clauses. The extent of misunderstanding regarding the proper scope of the First Amendment's religion clauses, and the number of potential lawsuits resulting from this misunderstanding, is alarming.

This widespread doctrinal confusion is reflected in the varying approaches taken by the lower courts in applying the "ministerial exception," at issue in this case. In addressing the extent to which the ministerial exception applies beyond the easy cases involving priests, rabbis and pastors, the lower courts have not only reached different results in essentially similar cases, they have applied different tests. The Institute presents this brief in the hope that it will assist the Court in bringing clarity to the law. By returning to the fundamental First Amendment principles that animate and justify the ministerial exception, the Court can fashion a standard that is more protective of the important freedoms at stake, flexible rather than rigid and formulaic, easier for the lower courts to apply without unwarranted interference with the internal affairs of religious organizations, and more predictable and principled in its outcomes.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

All of the circuit courts that have addressed the issue have recognized that the Constitutional imperative to protect the "wall of separation" between church and state, *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), requires a strong ministerial exception, barring most employment-related lawsuits between religious organizations and those of their employees who play an important role in the religious mission of the organization, regardless of whether those employees are formally ordained as "ministers."[2] Indeed, in the first circuit court decision to adopt it, the Fifth Circuit recognized that the ministerial exception is vital to protect what this Court has called "'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for

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[2] See, *e.g., Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 (4th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 702-3 (7th Cir. 2003); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1100-1 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F.3d 648, 656 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303 (11th Cir. 2000); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 461 (D.C. Cir. 1996).

themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *McClure v. Salvation Army*, 460 F.2d 553, 558-60 (5th Cir. 1972) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)) (refusing to consider a Title VII discrimination suit brought by a minister against her church because "[t]he relationship between an organized church and its ministers is its lifeblood. * * * Matters touching this relationship must necessarily be of prime ecclesiastical concern.").

Paradoxically, however, although the ministerial exception has gained broad acceptance in the federal courts as a doctrine necessary to safeguard the autonomy of religious organizations, a number of the circuit courts have adopted an intrusive test for determining whether an employee qualifies as a "minister" that is "the very opposite of that separation of church and State contemplated by the First Amendment." *McClure*, 460 F.2d at 560. The "primary duties" test, under which a secular court decides whether, in its view, "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 v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), necessarily involves judicial assessments—as to which of an employee's duties are "religious" activities, and which merely secular, and which of an employee's duties are "primary," and which of lesser importance—that raise the very Free Exercise and Establishment Clause problems that necessitated the creation of the ministerial exception in the first place.

As this Court realized, "[t]he prospect of a church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977). Yet, the primary duties test requires the court to engage in exactly that prohibited debate. A doctrine created to protect the autonomy of religious organizations has been applied by courts using the primary duties test to threaten that very autonomy.

The problem is starkly illustrated by the Sixth Circuit's decision in this case. *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010). The circuit court recognized that Ms. Perich was a "called" teacher and "commissioned minister" hired by a vote of the members of the Hosanna-Tabor congregation. *Id.* at 772. The court acknowledged that to qualify as a "called teacher," Perich was required to complete the colloquy of classes required by the Lutheran Church-Missouri Synod, focusing on various aspects of the faith, and to become a "commissioned minister." *Id.* The court accepted that Perich performed important religious duties: she led her classes in prayer three times every day; taught religion classes four days every week; led students in daily devotional exercises; attended chapel service with her students every week; led the chapel service twice a year in rotation with other teachers; and was required by her calling to "bring God into every subject taught in the classroom," in furtherance of the school's mission to provide "Christ-centered education." *Id.* The court acknowledged that Perich was removed by a vote of

the congregation to rescind her call and terminate her ministry. *Id.* at 775. The court further acknowledged Hosanna-Tabor's belief that Perich was bound by church doctrine to contest the termination of her ministry and employment only within the church (but dismissed the point as a mere "attempt[ ] to reframe the underlying dispute.")[3] *Id.* at 781. Despite all of that, the Sixth Circuit found that the ministerial exception did not apply to bar Perich's legal challenge to the termination of her employment, primarily because "Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects." *Id.* at 780.

The Sixth Circuit disregarded the fact that Perich was a commissioned minister by denigrating that status to a mere "title," thereby rejecting the church's own view of its religious importance. See *id.* at 780-81 (the "primary duties analysis requires a court to objectively examine an employee's actual job function, not her title, in determining whether she is properly classified as a minister."). In conducting

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[3] The record demonstrates that Hosanna-Tabor has a religious basis for the requirement that its disputes with commissioned ministers be decided exclusively within the church, and that Perich *agreed* that such disputes would be settled exclusively within the church. Pet. App. 77a – 104a; J.A. 48, 152. Indeed, the Synod's dispute resolution procedure cites Holy Scriptures (*1 Corinthians* 6:1-7) for the duty of Christians to "settle their disputes by laying them before the 'members of the brotherhood,'" and states that "[f]itness for ministry and other theological matters must be determined within the church." Pet. App. 77a.

this "objective" analysis of Perich's function, the Sixth Circuit believed that "[t]he fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious." *Id.* at 780. Rather, according to the circuit court, "Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology." *Id.* at 781.

The Sixth Circuit's judgments—that Perich spent only "forty-five minutes of the seven hour school day" engaged in what the court considered to be religious duties (*id.* at 780), notwithstanding the church's view that her duty was to "bring God into every subject" she taught; that the length of time spent on religious activities answers the question of the importance of Perich's religious role; that the court could assess whether the church relied on Perich to "indoctrinate its faithful" and that the church was only entitled to invoke the ministerial exception if Perich was the "primary" means by which the church spread the faith—all reflect a narrow, rigid and mechanical application of the ministerial exception that is utterly divorced from the exception's purpose to maintain that "wall of separation" between church and State, of which this Court has said, "[w]e could not approve the slightest breach." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

To protect that "wall of separation," the Court should reject the primary duties test in favor of a

more sensitive and nuanced standard. The issue, after all, is not whether the employee's "primary duties" (measured by the time spent on such activities during the day) are "religious," in the view of the court; the issue is whether dismissal of the suit is necessary "to avoid judicial involvement in religious matters." *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008). The answer to that much broader question does not turn solely, or even primarily, on the quantity of time spent on particular activities during the day, and the Court should reject the "arbitrary 51% requirement implicit in the 'primary duties' test." *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 676 (9th Cir. 2010), *reh'g en banc granted,* 617 F.3d 1101 (9th Cir. 2010) and *vacated in part, adopted in part*, 627 F.3d 1288 (9th Cir. 2010). Moreover, the test for invocation of the ministerial exception should consider not merely the nature of the employee's duties but also the nature of the dispute, *Rweyemamu v. Cote*, 520 F.3d 198, 207-09 (2d Cir. 2008), and whether adjudicating the dispute is likely to entangle the court in matters of religious doctrine.

Finally, and most importantly, to avoid creating the problems of entanglement that the ministerial exception was designed to avoid, courts must defer to religious organizations' own assessments of the religious significance of their employees' duties. In order to safeguard religious liberty while avoiding the risks of entanglement, the Court should adopt a standard similar to the Seventh Circuit's test, which declines to second-guess religious institutions' own views of the religious importance of their employees' functions, but instead employs "a presumption that

clerical personnel" are within the ministerial exception, rebuttable by proof that "the church is a fake," or the minister's title is a sham, or her function "entirely rather than incidentally commercial." *Schleicher,* 518 F.3d at 477-78. There is no doubt that the Petitioner would have prevailed under the Seventh Circuit's standard. More generally, and more importantly, under such a standard, religious institutions would enjoy greater freedom and autonomy in matters of faith, courts would be less at risk of becoming entangled in religious issues, and judicial decisions in this area would be clearer, more consistent and more predictable.

Protecting the "wall of separation" between church and State requires vigilance against even well-intentioned incursions by courts and government bureaucrats (perhaps especially against such). As this Court has warned, "the breach * * * that is today a trickling stream may all too soon become a raging torrent * * *." *School Dist. of Abington, Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

ARGUMENT

I. THE PRINCIPLES ADOPTED IN THE COURT'S PRIOR RELIGION CASES DICTATE RECOGNITION OF A ROBUST MINISTERIAL EXCEPTION.

Although this Court has never decided a ministerial exception case *per se*, the lower courts recognized from the start that the ministerial exception is built on the foundation of this Court's prior seminal religion cases. See, *e.g., McClure v.*

Salvation Army, 460 F.2d 553, 559-60 (5th Cir. 1972) (discussing the Court's key religion decisions, in adopting the ministerial exception). In the nearly forty years since *McClure* was decided, however, some courts have lost sight of the fundamental principles established in the Court's cases, applying the ministerial exception in a mechanical fashion that fails to protect core First Amendment values. To fashion the proper test, the Court should return to the fundamental principles it has long recognized.

The Court began to build the "wall of separation" between church and state in *Watson v. Jones*, 80 U.S. 679 (1871), a contest between two factions for control of church property in Kentucky resulting from a schism over the slavery question. One of the factions had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing body of the church. *Id.* at 694. Rejecting the contrary view of the English courts, the Court held that civil courts have no authority to question such an ecclesiastical ruling. *Id.* at 728-29. Although *Watson* was decided prior to judicial recognition of the Fourteenth Amendment's incorporation of the First Amendment to restrain state action, the opinion "radiates * * * a spirit of freedom for religious organizations" that the Court would later declare to have "Constitutional protection." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1929). See *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969) (although decided before the application of the First Amendment to the States, *Watson* was "informed by First Amendment considerations").

The *Watson* Court grounded its decision on three fundamental liberties: the right to free exercise of religion, the prohibition on government establishment of religion, and freedom of association:

> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine * * * is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all of the individual members, congregations, and officers within the general association, is unquestioned. 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, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical*

> *cognizance, subject only to such appeals as the organism itself provides for.*

Id. at 728-29 (emphasis added). In sweeping language that remains relevant today, the Court declared that a "rule of action" protecting the autonomy of religious organizations to decide religious questions is necessary to protect "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 727-28.

Based on *Watson*, the Court has repeatedly instructed that courts cannot dictate to religious institutions the selection or removal of ministers. The Court relied on *Watson* fifty years later in holding that the courts could not second-guess a decision of the Archbishop of Manila refusing to appoint the petitioner to a chaplaincy for lack of qualification under Canon Law. *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929). Noting that the appointment was "a canonical act," the Court ruled that "it is the function of the church authorities," and not a civil court, "to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16.

In *Kedroff*, the principles espoused in *Watson* and *Gonzalez* were explicitly recognized to be mandated by the Constitution. The Court invalidated a New York statute, passed in the wake of the Russian Revolution, that purported to transfer control over Russian Orthodox churches in this country from the patriarch of Moscow to authorities selected by the North American churches. Although the case involved competing rights to control of a particular

cathedral, the Court understood that what really was at stake was "the power to exercise religious authority," "a claim which cannot be determined without intervention by the State in a religious conflict." 344 U.S. at 121 (Frankfurter, J., concurring). The Court concluded that the New York law violated the Constitution because it "prohibit[ed] the free exercise of religion," which requires that religious institutions have the "power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine." 344 U.S. at 116, 120. Included within this sphere of autonomy is "[f]reedom to select the clergy." *Ibid.*

Nearly fifty years after *Kedroff*, the Court relied on that decision in ruling that civil courts have no authority to entertain a suit seeking to force a church to reinstate a defrocked bishop. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The Court recognized that the "fallacy fatal to the judgment" of the state court was that it had "impermissibly substitute[d] its own inquiry into church polity and resolutions," when religious disputes are matters "for ecclesiastical and not civil tribunals." 426 U.S. at 708-09. The Court declared that "questions of church discipline and the composition of the church hierarchy are at the core of the ecclesiastical concern," and "not the proper subject of civil court inquiry." *Id.* at 717, 713. Significantly, the Court recognized that the First Amendment would be violated not merely by a court's reversal of a church's decision, but even by the intrusion of a "detailed review of the evidence," such as "evaluat[ing] conflicting testimony concerning

internal church procedures." *Id.* at 718. Any other rule would sanction judicial "intrusion into a religious thicket." *Id.* at 719.

The Court returned to this "entanglement" theme in the context of religious schools in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). In that case, the Court declined to interpret the National Labor Relations Act to give the National Labor Relations Board authority to force church-operated schools to engage in collective bargaining with their teachers because allowing such an "intrusion" "could run afoul of the Religion Clauses" of the First Amendment. *Id.* at 499. Recognizing both that "'religious authority necessarily pervades the [parochial] school system,'" (citing *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971)), and "the critical and unique role of the teacher in fulfilling the mission of a church-operated school," *id.* at 501, the Court concluded that "[w]e see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id.* at 504. Anticipating that schools would defend labor charges by responding that "their challenged actions were mandated by their religious creeds," and that courts would then be drawn into an examination of religious doctrine (the "detailed review of the evidence" and "evaluation of conflicting testimony concerning internal church procedures" prohibited by *Milivojevich*), the Court understood that "[i]t is not only the conclusions 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." 440 U.S. at 502.

As this historical review shows, for more than a century, the Court has protected religious freedom by prohibiting the courts from second-guessing a church's decision to appoint or remove a minister, or a church's interpretations on matters of religious faith and doctrine, including the manner in which the church passes on the faith to the next generation through church-operated schools. The Sixth Circuit's decision, and the primary duties test it employed, simply cannot be squared with the Court's teachings.

The Sixth Circuit entertained a suit challenging the removal—and demanding the reinstatement—of a commissioned minister, a matter this Court has recognized to be of prime ecclesiastical concern. In doing so, the circuit court sanctioned Perich's use of the courts to bypass the church's internal dispute resolution process regarding fitness for the ministry, a process of laying disputes before the "members of the brotherhood" which the church understood was mandated by religious doctrine and which Perich had agreed to use exclusively. The circuit court disregarded the church's own views as to the religious significance of Perich's duties and of her fitness for ministry. Substituting an "objective" clock-watching primary duties test that provided no deference to the church's views on matters of its own religious faith, the Sixth Circuit concluded that it could rule on the request for reinstatement of a commissioned minister and called teacher because although she indisputably performed important religious duties, she spent more time teaching the secular curriculum. The Sixth Circuit's narrow interpretation of the ministerial exception, if allowed to stand, would visit on religious organizations the

very intrusion on their autonomy that this Court has defended against for more than a century, while entangling the courts in "a religious thicket."

II. THE SIXTH CIRCUIT'S PRIMARY DUTIES TEST FAILS TO PROTECT CORE FIRST AMENDMENT FREEDOMS.

The Sixth Circuit's "primary duties" inquiry into whether the employee's "primary" function is religious or secular creates the very interference with Free Exercise and Establishment Clause rights that the ministerial exception was originally designed to avoid. The approach has two basic flaws.

First, courts are not competent to distinguish "religious" tasks from "secular" tasks, and they engage in impermissible entanglement when they attempt to do so. This problem is compounded because the inquiry has both quantitative and qualitative elements. Some tasks may take little time but may be considered of great religious importance by a particular church, and vice versa. See *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (per curiam) (explaining that the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology"). Judges are not equipped to assess the qualitative aspect of a minister's duties. *Cf. Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (criticizing balancing tests that require courts to compare items that are "incommensurate," such as whether a "particular line

is longer than a particular rock is heavy"). It is only too understandable, then, that courts will give greater weight to the quantitative analysis because that is within their grasp. See *Note, The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1776-89 (2008).

Second, the difficulty of applying the primary duties test leads to significant uncertainty for churches as they cannot know which of their employees will be covered by the ministerial exception, and which will not. As this Court has explained, such uncertainty can itself be a Free Exercise Clause violation:

> Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987). This uncertainty may lead to churches being overprotective and assigning tasks such as preaching and proselytizing to only one or two employees whom the courts will accept as "ministers," while

prohibiting those employees from engaging in tasks (such as service to parishioner's material needs) that a court might consider "secular," regardless of the importance of those tasks to the church's spiritual mission. When a church is forced to designate "ministers" based on litigation posture rather than spiritual needs, it has changed its core activities and its spiritual message to accommodate or protect against government pressures or expectations. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (warning against "contemporary society['s] exert[ion of] a hydraulic insistence on conformity to majoritarian standards" on religious entities).

The Sixth Circuit's application of its "clock watching" ministerial exception illustrates both of these problems. Although the opinion acknowledged the dangers inherent in judicial interference with religious institutions' selection of employees, see *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 777 (6th Cir. 2010) (explaining that the ministerial exception is "based on the institution's constitutional right to be free from judicial interference in the selection of those employees"), it suffers from a flat, one-dimensional perspective of a teacher's role in the spiritual formation of students by discounting the qualitative aspect of the religious instruction given. The panel instead focused on the minutiae of how many minutes Perich spent on religious or secular tasks to decide whether "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." *Id.* at 778-79. The panel simply weighed

the "religious" time against the "secular" time, and found the religious side wanting. *Id.* at 780 ("[I]t is clear that Perich's primary function was teaching secular subjects."). The panel explicitly refused to give deference to the fact that the church considered Perich to be a "commissioned minister" and held her out as such to the community. *Id.* at 780-81. In criticizing the district court for having credited the church's designation, the panel explained that it was required to "objectively examine an employee's actual job function, not her title." *Id.* at 781. To the panel, this meant counting minutes, and specifically not considering the qualitative aspect.

In counting minutes, the panel lost sight of the larger, obvious truth: the mere fact that the teacher spent more minutes on all her other duties combined does not address the qualitative importance of her consistent daily religious instruction and worship to her students, their parents, or the school and church. Hosanna-Tabor considered Perich to be a commissioned minister and held her out as such to the community. Hosanna-Tabor's understanding was explicitly disregarded by the panel.

The record is clear that Perich was selected for her position at least in part for religious reasons and that she was given responsibility by her church to perform duties important to the religious mission of the church. She served as a "commissioned minister" and "called teacher" who was required to be trained for the ministry, taught religion classes, led students in prayer several times a day, led devotional exercises, and attended chapel services with her students each week. Even when teaching ostensibly

"secular" subjects, Perich was required by her church to "integrate faith into all subjects." Perich's testimony that she rarely incorporated religion into secular subjects and spent only 45 minutes per day on "religious" matters may show that she failed to perform her duties as required by the church, but it cannot answer the dispositive question of what the church considered her duties to be, and hence it cannot be a valid basis to require the church to defend before a secular court its decision to terminate her employment and ministry. Indeed, the Sixth Circuit's decision merely highlights the failure of the primary duties test to protect religious freedom. Regardless of the fact that she taught the full public school curriculum, Perich was selected to teach, inculcate and further the faith, and a secular court cannot adjudicate a challenge to the termination of her employment without violating and weakening the First Amendment. That the Sixth Circuit could reach the conclusion it did speaks volumes about the need to reject the test the Sixth Circuit employed.

The panel's decision also fails to provide certainty for religious entities in similar situations. If the primary duties test is allowed to stand, a church will not be able to rely on its own designation of ministers. Instead, it will have to predict how a federal judge, or a panel of judges, might characterize its employee's activities as religious or secular. The Court has recognized that such uncertainty burdens religious freedom. See *Amos*, 483 U.S. at 336 ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.").

The primary duties test has been criticized for these failings. The original Ninth Circuit panel in *Alcazar* found the test "problematic" because the intrusive judicial analysis of each hour the employee spent on religious or secular duties "could create the very government entanglement into the church-minister relationship that the ministerial exception seeks to prevent," while "the underlying premise of the primary duties test—that a minister must "primarily" perform religious duties—is suspect" because "secular duties are often important to a ministry." *Alcazar v. Corp. of Catholic Archbishop of Seattle*, 598 F.3d 668, 675-76 (9th Cir. 2010), *reh'g en banc granted,* 617 F.3d 1101 (9th Cir. 2010) and *vacated in part, adopted in part*, 627 F.3d 1288 (9th Cir. 2010).[4] See also *Clapper*, 1998 WL 904528, at *7 (the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology"). Moreover, the critical issue is not the tasks the employee performs but the meaning or religious significance with which the church endows those tasks under its own doctrine or creed. See *Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008) (Thrift shops in the Salvation Army "have a religious function." "The sale of goods in a thrift shop is a commercial activity, on

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[4] On rehearing, the Ninth Circuit sitting *en banc* vacated Part IV-C of the original panel's opinion solely because "Rosas is a minister under any reasonable interpretation of the exception," and therefore "we need not and do not adopt a general test." 627 F.3d at 1290.

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.").

Consider the hypothetical example of a homeless shelter operated by a local parish and staffed by lay Christian employees. Assume that the shelter's operations are indistinguishable from those of a non-religious social service center: serving meals, providing a warm place to sleep for the night, and offering job training and placement assistance. The employees do not engage in direct proselytizing. They need not even be of the same creed as the sponsoring parish. The church, however, considers the homeless shelter to be an attempt to fulfill a sacred duty to minister to the poor and fulfill a corporal work of mercy. See *Catechism of the Catholic Church* ¶ 1033 (Doubleday Religion, 2d ed. 1992) ("Our Lord warns us that we shall be separated from him if we fail to meet the serious needs of the poor and the little ones who are his brethren."); *Deuteronomy* 15:11 ("There will always be poor people in the land. Therefore I command you to be openhanded toward your brothers and toward the poor and needy in your land."). The hiring of compassionate Christian persons to "minister" quietly and conscientiously to the poor is therefore of critical importance to the parish. As the "embodiment of [the church's] message," *Petruska v. Gannon Univ.,* 462 F.3d 294, 306 (3d Cir. 2006), the church carefully selects these employees based, in part, on their acceptance of this mission. But if the employees were to bring an employment claim against the church, the Sixth Circuit's primary duties test would deny the parish the protection of the ministerial exception.

Instead, a court would be required to ignore the church's perspective on the employees' role because similar social services are provided in a similar manner by secular entities. If the First Amendment's protection of religious freedom is to be protected from erosion, Federal courts should not disregard the theological understanding of the church regarding its mission in the world and the role its ministers play in that mission. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006) (explaining how easily a court may be drawn into having to rule on a theological question); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) ("[C]hurches must be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) ("Because of the difficulties inherent in separating the message from the messenger, a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents."); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 804 (4th Cir. 2000) (ministerial exception applied to musician who was the "primary human vessel through whom the church chose to spread its message in song"); *Van Osdol v. Vogt*, 908 P.2d 1122, 1126 (Colo. 1996) ("The choice of a minister is a unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief.").

One should not make the perfect the enemy of the good. In rejecting the Sixth Circuit's test, however,

the Court has at its disposal two deferential tests which are demonstrably superior in avoiding unconstitutional entanglements with religious doctrine or infringements upon religious authority, and hence the erosion of religious freedom.

III. THE COURT SHOULD REJECT THE PRIMARY DUTIES TEST AND ADOPT A STANDARD FULLY PROTECTIVE OF THE IMPORTANT LIBERTIES AT STAKE.

Instead of the rigid Sixth Circuit test, this Court should adopt a standard that defers to the church's determination of whether and how an employee is important to the spiritual mission of the church, in the form of a rebuttable presumption. This kind of deferential test has significant advantages. Such a presumption would limit the risk of courts becoming entangled in religious questions because the rebuttable presumption would dictate that the church's articulation of the spiritual significance of the employee's role would generally control. To overcome the presumption, the court would require a clear showing that the church was a fake, or the title of "minister" was a sham, or that the employee's duties were misrepresented and the employee in fact performed no arguably religious duties. The presumption would avoid many difficult cases. Close cases would be governed by the presumption, increasing predictability.

Federal courts give deference in expressive association cases to the decisions of a group over its message. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) ("[W]e must also give deference to an association's view of what would impair its

expression."). A church's selection of religious leaders to carry out its mission and transmit the faith to the next generation is at the intersection of the freedoms of religion and association, and is protected by both, as the Court recognized a century ago in *Watson*, 80 U.S. at 728-29, and reaffirmed in *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990) ("[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."). See also *Amos*, 483 U.S. at 342 (Brennan, J., concurring) ("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.").

A deferential test does not mean abdication. Opposing parties can overcome the presumption by showing that the church's status or the title it bestowed are shams. See *Schleicher v. Salvation Army,* 518 F.3d 472, 478 (7th Cir. 2008). The church also has its institutional integrity to maintain and is accountable to its congregants and employees to operate in a forthright manner.

As a deferential standard, the Seventh Circuit's test in *Schleicher* is more protective of religious freedom, more predictable, and easier for courts to apply with less risk of entanglement than is the primary duties test. *Id.* at 478. In *Schleicher*, Judge Posner adopted "a presumption that clerical personnel" are covered by the ministerial exception that could be rebutted by proof that the employee's function is "*entirely* rather than incidentally

commercial." *Id.* (emphasis added). Such a rebuttable presumption minimizes the risk of entanglement while allowing cases to go forward where the employee has *no* religious function, so that the ministerial exception will not be subject to abuse. Returning to the homeless shelter hypothetical, see *supra* p. 22-23, the deferential test would lead to a different result than the Sixth Circuit test. The deferential test would respect the church's careful choice of employees and its understanding of the shelter's vital spiritual role.

Similarly, the Ninth's Circuit's now vacated[5] test in *Alcazar* is also more protective of religious freedom while minimizing the risk of entanglement. The original panel's test extended the ministerial exception where the employee was selected for the position "based largely on religious criteria" and "perform[s] *some* religious duties." *Alcazar,* 598 F.3d at 676 (emphasis added).

Both of these tests are superior to the Sixth Circuit's test because they take courts out of the constitutionally impermissible business of supplanting the judgment of religious leaders as to which of an employee's duties are most important and whether those so-called "primary" duties serve the faith. The Seventh Circuit's test is preferable because its presumption is more protective of religious freedom and avoids more elegantly the twin constitutional problems of the primary duties test.

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[5] See note 4, supra.

CONCLUSION

In the end, no test can answer every question with fidelity to the First Amendment if that test is applied in a rigid and insensitive manner. The nature of the dispute must always be considered; regardless of the employee's duties, a religious organization may have a religious basis for the termination of employment that is protected by the First Amendment. Whatever test they employ, the lower courts should be instructed to tread with caution and to consider carefully whether adjudicating the issues raised by the particular dispute will entangle the court in matters of faith. There may be no perfect single test that will easily answer all of the hard questions, but the primary duties test is far from perfect. The Court can come closer to the ideal with a more sensitive, flexible and principled test.

Respectfully submitted,

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