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 AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is the anti-retaliation provision of the Americans with Disabilities Act, 42 U.S.C. § 12203, unconstitutional as applied to the claim of respondents?

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INTEREST OF AMICUS

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.[1]

SUMMARY OF ARGUMENT

I. For two centuries American courts have heard and resolved employment-related claims of ministers. Religious organizations themselves have

[1] All parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part and no person other than the amicus or its counsel made a monetary contribution to this brief.

filed suit asking courts to determine who was entitled to serve as the minister of a congregation. Lawsuits of this sort have been sufficiently common that both Justice Holmes and Justice Brewer wrote opinions in such cases while serving on state courts.

Since the early nineteenth century lower courts have recognized that some, but not all, of these cases turned on the resolution of theological disputes, and have declined to decide such cases. That case-specific neutral-principles approach remains the appropriate method of addressing employment disputes regarding employees of religious organizations.

II. The First Amendment right of free expression applies in equal measure to religious and non-religious organizations. While a religious organization has a particular interest in those who serve as its leaders and teachers, that is equally true of non-religious organizations that engage in expressive activity. Just as the First Amendment did not create a categorical "Scout Leader exception" in *Boy Scouts of America v. Dale*, so too the First Amendment does not create a categorical "ministerial exception."

III. Adoption of the proposed "ministerial exception" would force the lower courts to face a plethora of vexing constitutional questions.

Petitioner contends that an employee falls within the "ministerial exception" if he or she engages in "important ministerial functions." It is unclear whether this would be an objective or subjective test; petitioner appears to advance both views.

Similarly, it is unclear which types of legal claims would and would not be barred by the proposed "ministerial exception." Petitioner has advanced four different proposed standards.

ARGUMENT

I. FOR TWO CENTURIES AMERICAN COURTS HAVE RELIED ON NEUTRAL PRINCIPLES TO RESOLVE EMPLOYMENT-RELATED DISPUTES REGARDING MINISTERS

A. American Courts Have Long Resolved Employment-Related Disputes Regarding Ministers

From the earliest days of the Republic, secular courts have heard and resolved employment-related disputes regarding ministers.[2] Many of these lawsuits were brought by dismissed ministers, but a substantial number were actions by religious organizations themselves. Virtually every state in the growing union had a constitutional guarantee of freedom of religion, and there was – as petitioners and numerous amici emphasize – a long history of resistance to government appointment of clerical officials. Yet the propriety of this litigation was widely accepted so

[2] For simplicity we use the term "minister" to refer to those of any denomination who lead religious services.

long as a court could resolve the litigation without deciding a matter of theological doctrine.

Until the late twentieth century, most of the litigation brought by ministers themselves was based on contract claims.[3] Other actions were grounded on deeds of trust executed when land was donated for the building of a church[4] or on state statutes governing decisionmaking by congregational religious organizations (e.g., requiring notice to the congregation before a meeting to hire or dismiss a minister). Religious organizations as well as plaintiffs successfully invoked state laws in these disputes.[5]

The earliest post-Revolution case appears to have been *Runkel v. Winemuller*, 4 H. & McH. 429, 1799 WL 422 (Md.Gen.Ct.), commenced when Justice Chase was the Chief Judge of the Maryland General Court. Runkel asserted that he had been improperly dismissed as minister of the High Dutch Reformed Christian Church in Frederickstown, Maryland, and successfully sued for an order "to recover the pulpit ...

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[3] See pp. 5-6, *infra*.

[4] *Combe v. Brazier*, 2 Des. 431, 2 S.C. 431, 1806 WL 366 (S.C.); *Robertson v. Bullions*, 9 Barb. 64 (S.Ct. N.Y.Cty. 1850); *Feizel v. Trustees of First German Society of Methodist Episcopal Church of Wyandotte City*, 9 Kan. 592 (1872).

[5] *Landers v. Frank Street Methodist Episcopal Church*, 97 N.Y. 119 (1884); *Downes v. Bowdoin Square Baptist Soc.*, 21 N.E. 294, 296, 149 Mass. 135, 139 (1889); *Bartlett v. Hipkins*, 76 Md. 5, 23 A. 1089 (1892); *Kupperman v. Congregation Nusach Sfard*, 39 Misc.2d 107, 240 N.Y.S.2d 315 (Sup.Ct.Bronx Cty. 1963).

and the emoluments" of the position. 1799 WL 422 at *1.

A Massachusetts decision of 1807 noted that the Supreme Judicial Court of Massachusetts had repeatedly heard employment-related claims by ministers "[b]efore and since the revolution." *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 179 (1807)(Parsons, C.J.); see *id*. at 172 (noting that four earlier opinions of that court had held that appointments of ministers were for life unless otherwise stated)(Parker, J.); *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281, 286-87, 41 Mass. 281, 286-87 (1836)(noting "the numerous cases which this Court unfortunately have from time to time been called upon to decide" about when a minister forfeits his contractual rights). Successful contract-based actions by dismissed ministers have continued to this day.[6] Religious organizations invoked traditional contract

[6] *Tendler v. Bais Knesses of New Hempstead*, 52 A.D.3d 500, 860 N.Y.S.2d 551 (App.Div.2d 2008); *Trinity Baptist Church v. Howard*, 869 N.E.2d 1225 (Ct.App.Ind. 2007); *Mayhew v. Vanway*, 371 S.W.2d 90 (Tex. Ct.Civ.App. 1963); *Pape v. Ingram*, 69 N.M. 32, 363 P.2d 1209 (N.Mex. 1961); *Lynd v. Menzies*, 33 N.J.L. 162 (1868); *Whitmore v. Fourth Congregational Society of Plymouth*, 68 Mass. 306 (1854); *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281, 41 Mass. 281 (1836); *Peckham v. Inhabitants of North Parish in Haverhill*, 16 Pick. 274, 33 Mass. 274 (1834); *Thompson v. Catholic Congregational Society in Rehoboth*, 5 Pick. 469, 22 Mass. 469 (1827); *Cochran v. Inhabitants of Camden*, 15 Mass. 296, 1818 WL 1748 (Mass. 1818); *Avery v. Inhabitants of Tyringham*, 3 Mass. 160 (1807).

principles, or state statutes, in defeating contract claims.[7]

There have also been repeated lawsuits by ministers claiming that they had not been paid for work they had actually done.[8] These wage claims were sometimes intertwined with disputes about the propriety of a dismissal, e.g. where a minister had continued to conduct services after a disputed dismissal, or where a minister asserted both compensation and unlawful termination claims. When a minister asserting a wrongful dismissal claim asked for the salary that had been withheld following that termination, he would typically argue that he was entitled to compensation because the defendant itself had prevented him from meeting his contractual obligation to continue serving the congregation.

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[7] *Bartlett v. Hipkins*, 76 Md. 5, 23 A. 1089 (1892); *West v. First Presbyterian Church of St. Paul*, 41 Minn. 94 (1889); *Congregation of Children of Israel v. Peres*, 42 Tenn. 620 (1866); *Dow v. Town of Hinesburgh*, 2 Aik. 18, 1826 WL 1229 (Vt. 1826); *Van Vlieden v. Welles*, 6 Johns. 85 (N.Y.Sup.Ct. 1810); see *Smith v. First Principle Church*, 2011 WL 264318 (Cal.App. 6th Dist.).

[8] *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill.App.3d 504, 510, 835 N.E.2d 1206, 1212, 292 Ill. Dec. 195, 201 (App.Ct.3d Dist. 2005)(citing cases); *Pendleton v. Waterloo Baptist Church*, 2 N.Y.S. 383 (Sup.Ct.5th Dep't 1888); *Bird v. St. Mark's Church of Waterloo*, 62 Iowa 567 (1883); *Jones v. Trustees of Congregation of Mount Zion*, 30 La. Ann. 711 (1878); *Miller v. Trustees of Baptist Church of Allowaystown*, 16 N.J.L. 251 (1837); *Riddle v. Stevens*, 2 Serg. & Rawle 537 (Pa. 1816), 1816 WL 1577; see *Vestry of St. Luke's Church v. Mathews*, 4 Des. 578, 4 S.C.Eq. 578 (S.C. 1815); *Combe v. Brazier*, 2 Des. 431, 2 S.C. 431, 1806 WL 366 (S.C.).

Courts gave several reasons for enforcing contract claims by ministers. They explained, first, that ministers had the same right as anyone else to judicial enforcement of their legal rights.

> [F]rom the nature of the contract, ... [the plaintiff] had a right to insist upon being retained as a minister of this church, until [the end of the period contracted for], unless he lost that right by some fault of his own; and ... there can be no legal distinction between a contract with a minister and his congregation, and any other civil contract for personal service.

Congregation of Children of Israel v. Peres, 42 Tenn. 620, 622 (1866).[9]

> The right to the salary stipulated at the time the plaintiff accepted the position of rector, is a valuable property right secured to the plaintiff by contract.... The civil courts will not revise decisions of churches or religious associations upon ecclesiastical matters, but they will interfere with such associations when rights of property or civil rights are involved.

Bird v. St. Mark's Church of Waterloo, 62 Iowa 567, 17 N.W. 747, 750 (1883).

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[9] *Runkel v. Winemuller*, 4 H. & McH. 429, 1799 WL 422 at *14 (Md.Gen.Ct.); see *Worrell v. First Presbyterian Church of Millstone*, 23 N.J.Eq. 96, 1872 WL 6871 at *1 (N.J.Chanc. 1872).

Second, the courts insisted that religious organizations were subject to the same secular obligations as others. "[R]eligious societies are left at liberty to make such contract, ... as shall be agreed between them and their minister; but the contract once made, it is subject to all such rules of law as govern other engagements." *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 169 (Parker,J.)(1807).

> The salary of the minister ariseth wholly from the contract which the people make with him. These contracts are altogether voluntary; but ... are considered as being of equal force and obligation as any other contracts....

Williams v. Town of North Hero, 46 Vt. 301, 317 (1873).

Third, courts noted that religious organizations themselves could sue ministers, and reasoned that it would be inequitable if ministers themselves could not bring such suits. In *Avery v. Inhabitants of Tyringham*, Chief Judge Parsons explained that an improperly dismissed minister should be permitted to seek redress in court because the parish itself, if a minister broke his contract without justification, could obtain damages from the former minister. 3 Mass. at 180.

Fourth, courts expressed concern that ministers would be deterred from meeting their responsibilities if they were subject to improper dismissal without recourse in the courts.

> If these contracts are merely at the will and pleasure of the parties ... on the part of the minister, must not a consciousness of dependence on the mere pleasure of the people affect that firmness of mind which is essential to an impartial and effectual reproof of vice and immorality?

Avery v. Inhabitants of Tyringham, 3 Mass. at 176 (Sedgwick, J.); see *id.* at 177 (Parsons, C.J.). Courts saw no conflict between contract claims and the right of religious organizations, guaranteed by several state constitutions, to select their own ministers. *Avery v. Inhabitants of Tyringham*, 3 Mass. at 169-70 (Parker, J.); *id.* at 172-74 (Sedgwick, J.); see *id.* at 179-80 (rejecting argument that Massachusetts constitution gave parish a right to dismiss minister)(Parsons, C.J.).

There were also numerous cases in which religious organizations sought redress from secular courts in employment disputes regarding ministers. A substantial portion of these involved a disputed dismissal, the religious organization seeking a court order to enjoin a previously appointed minister from continuing to hold services or engage in other functions.[10] These lawsuits necessarily turned at least in

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[10] *Williams v. Wilder*, 397 S.W.2d 696 (Kansas City Ct.App. 1965); *Grosse v. Beideman*, 239 Md. 283, 211 A.2d 298 (Md.Ct.App. 1965); *Evans v. Criss*, 39 Misc.2d 314, 240 N.Y.S.2d 517 (Sup.Ct.Bronx Cty. 1963); *Rush v. Yancy*, 233 Ark. 883, 349 S.W.2d 337 (Ark. 1961); *Bentley v. Shanks*, 48 Tenn.App. 512, 348 S.W.2d 900 (Tenn.Ct.App. 1960); *Rector, Churchwardens and Vestrymen of Church of Holy Trinity v. Melish*, 3 N.Y.2d 476, 146

(Continued on following page)

part on the legality of the defendant's termination, and a decision in favor of the minister-defendant overturned the purported dismissal and confirmed his right to remain in the pulpit.[11] In defending the propriety of these lawsuits, it was the religious organizations themselves which invoked the principle that secular courts could resolve disputes about ministerial appointments and dismissals. *Williams v. Wilder*, 397 S.W.2d 696, 703 (Kansas City Ct.App. 1965). In other instances individuals appointed as ministers by higher ranking authorities[12] sought injunctions to compel officials at a particular church to accept their appointment; these disputes at times resolved issues concerning which officials, under which circumstances and procedures, were empowered to

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N.E.2d 685, 168 N.Y.S.2d 952 (1957); *Providence Baptist Church of San Francisco v. Superior Court*, 40 Cal.2d 55, 251 P.2d 10 (1953); *Longmeyer v. Payne*, 205 S.W.2d 263 (Ct.App. Mo. 1947); *Evangelical Lutheran St. Paul's Congregation v. Hass*, 177 Wis. 23, 187 N.W. 677 (1922); *Prickett v. Wells*, 117 Mo. 502, 24 S.W. 52 (1893); *Hatchett v. Mt. Pleasant Baptist Church*, 46 Ark. 291 (1885); see *Chatard v. O'Donovan*, 80 Ind. 20 (1881); *Vestry of St. Luke's Church v. Mathews*, 4 Des. 578, 4 S.C.Eq. 578 (S.C. 1815).

[11] *Evans v. Criss*, 39 Misc.2d 314, 240 N.Y.S.2d 517 (Sup.Ct.Bronx Cty. 1963) (action by church officials to enjoin defendant from acting as minister). The court entered judgment "in favor of defendant determining that he is still the minister of Sharon Baptist Church, Inc. and entitled to act and hold himself out as such." 39 Misc.2d at 320.

[12] *Whitecar v. Michenor*, 37 N.J.Eq. 6, 1883 WL 7944 (N.J.Ch.); *Feizel v. Trustees of First German Society of Methodist Episcopal Church of Wyandotte City*, 9 Kan. 592 (1872); *Brosius v. Reuter*, 1 H. & J. 551, 1805 WL 479 (Md.Gen.Ct.).

appoint (or dismiss) a minister. Some lawsuits by religious organizations involved both types of claims.[13]

Because of the frequency with which these various types of actions were heard by the lower courts, several Members of this Court participated in them while serving on a state court. In *Downes v. Bowdoin Square Baptist Soc.*, 21 N.E. 294, 296, 149 Mass. 135, 139 (1889), the decision for the Supreme Judicial Court of Massachusetts was written by Justice Oliver Wendell Holmes. In *Feizel v. Trustees of First German Soc. of Methodist Episcopal Church of Wyandotte City*, 9 Kan. 592 (1872), the decision for the Kansas Supreme Court was written by Justice David Brewer. Justice Chase was the Chief Judge of the Maryland General Court during the early phase of *Runkel v. Winemuller*, 4 H. & McH. 429, 1799 WL 422 (Md.Gen.Ct.).

B. Lower Courts Have Historically Resolved Employment-Related Claims Regarding Ministers If They Could Do So Based on Neutral Principles

For two centuries the lower courts have recognized that in some instances an employment claim

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[13] *Rector, Churchwardens and Vestrymen of Church of Holy Trinity v. Melish*, 3 N.Y.2d 476, 146 N.E.2d 685, 168 N.Y.S.2d 952 (1957); *Robertson v. Bullions*, 9 Barb. 64 (S.Ct.N.Y.Cty. 1850).

regarding a minister could turn on a theological dispute that secular courts were not competent to resolve. The lower courts have addressed that potential problem on a case-by-case basis.

In *Avery v. Inhabitants of Tyringham*, the defendants objected that "there is no jurisdiction competent to declare when the [minister's] office is forfeited, or when the contract may be dissolved." To the contrary, Chief Justice Parsons insisted, secular courts could resolve such a case. If a minister were dismissed because he assertedly neglected his duties, and he

> sue[d] for his salary, the charges made ... , as creating a forfeiture, are questions of fact properly to be submitted to the jury. If they find the allegations true, the minister shall not be considered as holding his office after the vote of dismission. If the allegations are false, justice requires that he shall recover his salary. These allegations the jury are competent to inquire into, and on such inquiry ultimately to decide.

Id. at 181-82. On the other hand, the Chief Justice noted, if there were "objections to a minister founded on questions of doctrine," that would be resolved by "an ecclesiastical council mutually chosen." *Id.* at 182.

In *Burr v. Inhabitants of First Parish in Sandwich*, 9 Mass. 277 (1812), the Massachusetts Supreme Judicial Court concluded that the dispute that had given rise to the dismissal of the plaintiff minister was one that the courts could not resolve. In *Burr* the

parish had voted to fire the minister on the grounds that he no longer adhered to the religious views of the congregation, and "now preaches, and endeavors to support, doctrines totally different [from those he held when first hired], which the parish do not approve of or believe to be doctrines of the gospel." 9 Mass. at 289. At trial the judge "avoided any inquiry into the truth of the former [beliefs], or the present religious faith of the plaintiff," 9 Mass. at 290; the appellate court explained that "we should be at a loss to find legal principles on which to decide them." *Id.* "[A] court of law has no means of deciding on" "a difference [on the part of the parish] with their minister merely relating to points of doctrine." 9 Mass. at 298. "[D]isputes in theology" cannot "come into courts of law for decision, [because] the law has not furnished the jury with weapons of polemic divinity." *Id.*

Sheldon v. Congregational Parish in Easton, 24 Pick. 281, 41 Mass. 281 (1836), codified the previous caselaw regarding the types of cases a court would and would not resolve. The court held that a minister would forfeit his right to employment under a contract under three circumstances: "[a]n essential change of doctrine," "[a] willful neglect of duty," or "[i]mmoral or criminal conduct." *Id.* at 287. A secular court could resolve the second and third types of issues, but not the first.

> A clergyman, before he assumes the high duties of pastor, is bound fully and frankly to disclose his theological tenets, and impliedly undertakes to continue of the same faith and

> to preach the same doctrines. If he changes these, he ceases to perform one of the conditions of his settlement, and entitles the parish to dissolution of the contract.... But this subject is more peculiarly fit for the investigation of an ecclesiastical council....

Id.[14] Where the underlying dispute was one which a secular court was competent to resolve, the factual conclusions of the defendant religious organization itself were not controlling. *Congregation of Children of Israel v. Peres*, 42 Tenn. 620, 628-29 (1866).

This nineteenth century distinction has been followed in a number of more recent decisions, relying on the now-familiar constitutional principle that secular courts can resolve disputes related to religious organizations if it is possible to do so based on neutral principles. For example, in *Thibodeau v. American Baptist Churches of Connecticut*, 120 Conn.App. 666, 994 A.2d 212 (2010), the court held that

> employment disputes between clergy and religious institutions can be litigated in civil courts only if neutral principles of law can be allied without entanglement with religious considerations.... Courts, however, may not inquire into matters whose enforcement would

[14] An ecclesiastical council was a group of ecclesiastical officials, generally agreed to and jointly selected by a disputing minister and religious organization, to assess the nature of their differences. Although the council's decision was not binding, its views would often constitute justification for a party with which it sided.

> require "a searching and therefore impermissible inquiry" into church doctrine. *Serbian Eastern Orthodox Diocese v. Milivojevich*, ... 426 U.S. at 723.
>
> * * *
>
> The plaintiff ... contends ... that the defendant "blacklisted" him based on, inter alia, his theological perceptions. Resolution of this claim would involve an impermissible inquiry into the defendant's ... judgement regarding the qualification of clergy....

120 Conn.App. at 677, 992 A.2d at 221. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir.1993) explained that

> [p]ersonnel decisions are protected from civil court interference where review by civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical laws.... The First Amendment does not shield employment decisions made by religious organizations from civil court review, however, where the employment decisions do not implicate religious beliefs, procedures or law.... The Synod has not offered any religious explanation for its actions which might entangle the court in a religious controversy in violation of the First Amendment.

991 F.2d at 471-72.[15]

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[15] See *Mundie v. Christ United Church of Christ*, 987 A.2d 794, 799, 802 (Pa. Super. 2009); *Jenkins v. Trinity Evangelical*

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Applying this neutral principles approach, the lower courts have on a case-specific basis declined to decide actions which required determination of some theological issue. There have, however, been relatively few cases in which the defendant in fact justified its action in a manner that would have required the court to resolve some doctrinal issue. In administering the distinction, appellate courts have directed trial courts to carefully monitor the developing issues and discovery in a case, and authorized trial courts to end the litigation if it became apparent that the case would require determination of some theological issue which secular courts could not resolve. *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d at 472. This case-specific neutral-principles approach to avoiding entanglement in theological questions remains the appropriate method of dealing with employment-related claims by employees of religious organizations.

Lutheran Church, 356 Ill.App.3d 504, 509-10, 835 N.E.2d 1206, 1211-12, 292 Ill.Dec. 195, 200-01 (App.Ct.3d Dist. 2005); *Providence Baptist Church of San Francisco v. Superior Court*, 40 Cal.2d 55, 60, 251 P.2d 10, 13 (1953); *Tendler v. Bais Knesses of New Hempstead*, 52 A.D.3d 500, 860 N.Y.S.2d 551 (App.Div.2d 2008); *St. Matthew Church of Christ Disciples of Christ, Inc. v. Creech*, 196 Misc.2d 843, 848, 768 N.Y.S.2d 11, 115 (Sup.Ct.Kings Cty. 2003); *Yates v. El Bethel Primitive Baptist Church*, 847 So.2d 311, 346 (Ala. 2002).

II. THE FIRST AMENDMENT RIGHT TO ENGAGE IN EXPRESSIVE ACTIVITY DOES NOT WARRANT THE CATEGORICAL EXCLUSION OF ENTIRE CATEGORIES OF EMPLOYEES FROM THE PROTECTIONS OF EMPLOYMENT LAWS

A. The Protection of Expressive Activity Recognized In *Boy Scouts of America v. Dale* Is Limited To Cases In Which A Defendant Demonstrates That Employment of A Particular Individual Would In Fact Interfere With Its Expressive Activity

Organizations that engage in expressive activity, whether the expression is religious in nature or wholly secular, have a First Amendment interest (subject to certain limitations not relevant here) in refusing to employ, or accept as volunteers, individuals whose actions or circumstances would interfere with that expression. "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." *Boy Scouts of America, Inc. v. Dale,* 530 U.S. 640, 648 (2000). Thus because the Catholic Church has long taught that only men may be ordained as priests,[16] the government could no

[16] Catechism of the Catholic Church, part 1577, available at http://www.usccb.org/catechism/text/pt2sect2chpt3.shtml#vi

Apostolic Letter Ordinatio Sacerdotalis of John Paul II to the Bishops of the Catholic Church on Reserving Priestly Ordination to Men Alone (1994), available at http://www.vatican.va/holy_

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more require the Church to ordain women than it could require the Boy Scouts to accept Mr. Dale as a Scout leader.

Dale clearly requires that the organization asserting a constitutional objection to application of an anti-discrimination statute must demonstrate that continued employment of the particular worker in question would in fact obstruct its expressive activity. 530 U.S. at 650; see *id*. at 653. This Court necessarily rejected the defendant's argument in *Dale* – similar to the "ministerial exception" proposed by petitioner – that the First Amendment barred application of anti-discrimination laws to *all* adult leaders in Scouting.[17] *Dale* did not recognize a constitutionally mandated "Scoutmaster exception" barring all applications of state anti-discrimination statutes to the Boy Scouts; it held only that the state-mandated appointment of Mr. Dale as a Scoutmaster would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct....'" 530 U.S. at 653 (*quoting* Reply Brief for Petitioners).

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father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html

Congregation for the Doctrine of the Faith, *Declaration Inter Insigniores on the Question of the Admission of Women to the Ministerial Priesthood* (1976), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-signiores_en.html

[17] Brief for Petitioners, *Boy Scouts of America v. Dale*, No. 99-699, at 34.

B. The Free Expression Rights of Religious Organizations Are No Greater than The Free Expression Rights of Secular Organizations

The claimant-specific rule in *Dale* applies to all organizations challenging the application of anti-discrimination laws as an interference with their expressive activity. The constitutionally protected right to engage in expressive activity is the same for every type of organization.

> In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

530 U.S. at 647.

Petitioner points out that the employees of a religious organization who formulate, interpret or teach its doctrines are of great importance to its expressive role. That is undoubtedly correct, but it is equally true of those who formulate, interpret or teach the doctrines of other, entirely secular organizations. When an organization – religious or secular – exists primarily for the purpose of advancing certain views or beliefs, those who articulate those ideas are of central significance. But that is no more true for employees of the Hosanna-Tabor church than it is, for example, for employees of the Boy Scouts, the Sierra Club, the Heritage Foundation, or the NAACP. The

free expression rights of religious organizations are not greater than the rights of groups such as the American Atheists or the Americans United for Separation of Church and State.

One amicus brief notes that teachers in a religious school "implement[ ] the school's religious viewpoints on right and wrong, ... obedience to authority, ... and behaviors that exhibit good and bad character as defined by faith ... [or] 'assist in the implementation of the philosophical policies of the school.'"[18] But teachers in any school, religious or secular, do many of the same things. The "School Philosophy" of the Quaker-affiliated Sidwell Friends School[19] stresses many of the same concerns as the "History and Philosophy" of the non-sectarian Georgetown Day School.[20] Of course, some parochial schools place greater emphasis on religious training and conformity than do others. But the First Amendment does not establish different constitutional rules depending on the beliefs and practices of particular denominations.

The expressive activities engaged in by employees whom religious organizations insist should be classified as "ministers" at times resemble the

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[18] Brief Amici Curiae of Professor Eugene Volokh, et al., 34 (*quoting Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 19 n.3 (1993)(Blackmun, J., dissenting)).

[19] Available at http://www.sidwell.edu/about_sfs/school-philosophy/index.aspx

[20] Available at http://www.gds/podium/default.aspx?t=123451

activities engaged in by employees of secular organizations. For example, petitioner argues that the "ministerial exception" should be applied to a "Communications Director" for a religious organization. (Pet. Br. 22)(citing *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 702 (7th Cir.2003)). But that is the same type of expressive work engaged in by communications directors for secular groups,[21] by Madison Avenue advertising executives, and by K Street lobbyists.[22] A church music director should be within the "ministerial exception," petitioner insists, because he or she is "the primary human vessel through whom the church chose to spread its message in song." (Pet. Br. 21)(*quoting EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795, 804 (4th Cir.2000)). But a choirmaster leading the

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[21] The court in *Alicea-Hernandez* explained the role of the Bishop's press secretary by reference to secular press secretaries.

> A press secretary, as is evident from observing various public officials and entities, is often the primary communications link to the general populace. The role of the press secretary is critical in message dissemination, and a church's message, of course, is of singular importance.

320 F.3d at 704.

[22] In *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir.1997), one of the key responsibilities of the plaintiff had been "advocating to the United States government the enactment of public policies that are just, promote peace and protect the environment." 126 F.3d at 329. Employees of the Carnegie Endowment for Peace and the Sierra Club presumably engage in similar advocacy.

singing of Handel's *Messiah* or "Swing Low, Sweet Chariot," or a Cantor chanting "Kol Nidrei," enjoys no different constitutional status than a group of union officials singing "Solidarity Forever" or "Joe Hill."

To be sure, the modes of expression and substantive beliefs characteristic of religious organizations and meetings often differ from those of secular associations such as labor unions, political parties, environmental groups or civil rights organizations. But these are not differences of constitutional significance. Just as there is no categorical "exception" for employees of secular organizations that engage in expressive activity, so too there is no such categorical exception for any particular set of employees of religious organizations.

III. ADOPTION OF A CATEGORICAL "MINISTERIAL EXCEPTION" DOCTRINE WOULD LEAD TO A LARGE NUMBER OF DIFFICULT CONSTITUTIONAL QUESTIONS

Petitioner and its amici recognize that there are a large number of vexing constitutional issues which would have to be addressed if this Court were to adopt the proposed "ministerial exception." They urge the Court to take only the first step down that long and winding road, embracing in principle the existence of such a new, open-ended constitutional rule, and leaving to future generations of judges the task of figuring out what this all means. The more prudent

course, we urge, would be to decline to start down that road at all.

A. Is The Standard Defining "Important Ministerial Functions" Objective or Subjective?

Petitioner argues that a worker should be denoted a "minister" within the meaning of the proposed categorical rule if he or she engages in certain types of activities. (Pet. Br. 2, 13, 14, 16, 19, 21, 23, 26). The central issue posed by petitioner's function-based approach is whether an activity is deemed an "important religious function" should be governed by an objective standard, which the courts themselves would apply in determining whether the activity was religious in nature (and importantly so), or by a subjective standard, which would be governed by whether the defendant itself (for whatever theological reason) regarded the activity as religious in nature. Petitioner adopts both positions.

(1) Petitioner's Objective Standard

Petitioner describes its standard as delineating as covered activities responsibilities that "are objectively important functions in *any* religion." (Pet. Br. 22)(Emphasis added).

To implement this proposed objective standard, petitioner urges the Court to adopt a list of eight specific activities which would be deemed as a matter of law to be "objectively important religious functions."

(*Id.* at 38).[23] Elsewhere petitioner identifies three additional functions which it contends should be held to be objectively religious functions;[24] petitioner does not indicate whether these additional functions should be classified as objectively important. Petitioner does not suggest that these are exhaustive lists of the objectively religious functions or objectively important religious functions. Secular courts would apparently be tasked in future litigation with deciding what other activities are and are not objectively important religious functions.

A number of religious organizations emphatically denounce this proposed objective approach, arguing that secular courts have no ability to decide what functions are (and are not) religious in nature; indeed, they insist, it would be unconstitutional for the judiciary to attempt to do so. "[C]ourts are not

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[23] The eight listed factors are whether an employee (1) "taught religion classes" (Pet. Br. 37), (2) "led worship" (*id.* at 37), (3) "led prayer" (*id.* at 37)), (4) "took [students] to chapel" (*id.* at 37), (5) "planned ... the worship services.... chose liturgies, hymns, and Scripture readings" (*id.* at 37-38), (6) "delivered a message based on the Scriptural selections" (*id*. at 38), (7) "interpret[ed] [the church's] doctrines" (*id*. at 38), and (8) "was expected to, and did, integrate faith with the secular curriculum." (*Id.* at 37).

[24] The additional factors are whether an employee is (1) "expected to serve as a Christian role model" (Pet. Br. at 41), (2) "obligated ... to teach 'according to the Word of God and the confessional standards of the Evangelical Lutheran Church'" (*id.* at 40), and (3) required "to maintain Christian discipline in love." (*Id.* at 40).

competent to distinguish 'religious' tasks from 'secular' tasks, and they engage in impermissible entanglement when they attempt to do so." (Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 16).[25]

(2) Petitioner's Subjective Standard

Elsewhere in its brief petitioner suggests that the employer itself is to decide which activities are important religious functions, and that the courts must ordinarily accept the employer's view of this issue. "The Church's religious understanding of Perich's job functions ... and of their importance to the Church's religious mission, is entitled to deference." (Pet. Br. 48). "The church asks only that secular courts not second-guess good-faith religious understandings of religious functions." (*Id.* at 49). Several amici also argue that the controlling question is whether the religious organization itself regards a task as religious. "[T]he 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." (Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner,

[25] See Brief of Amici Curiae Muslim-American Public Affairs Council, 15; Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 9; Brief of the Council for Christian Colleges and Universities as Amicus Curiae Supporting Petitioners, 2; Brief of Amici Curiae American Bible Society, et al., 12.

21).[26] They too urge the courts to generally accept as conclusive a defendant's position as to whether an employee meets the legal standard for the ministerial exception.[27]

Neither petitioner nor these amici, however, explain how a court is to ascertain whether a particular religious organization regards a specific job activity as an "important religious function." All repeatedly direct this Court to religious tracts and documents, insisting that these make clear to secular judges the theological views of the denomination involved. But most major religions have a large number of books and treatises expounding, and at times disagreeing about, the meaning of their sacred texts, and many centuries of debates about those issues. While in some instances it might seem clear to a judge that a denomination regarded a particular activity as an important religious function, discerning the denomination's position on other activities would at times be beyond the constitutional competence of a secular court.

The difficulty that the courts would face in determining the subjective views of a particular

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[26] Brief of Amici Curiae Muslim-American Public Affairs Council, 15.

[27] Brief Amici Curiae of Professor Eugene Volokh, et al., 29; Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 24; Brief Amicus Curiae of Trinity Baptist Church of Jacksonville, Inc. in Support of Petitioner, 6; Brief of Amici Curiae American Bible Society, et al., 11.

denomination is well illustrated by the arguments in this case. Counsel for petitioner advises the Court that the Missouri Synod construes a passage in the New Testament to strongly disapprove of suits against fellow believers.

> The Synod has long taught that fellow believers generally should not sue one another in secular courts – and never over religious matters. Biblically, that teaching is rooted in 1 *Corinthians* 6:1-11, where the Apostle Paul denounced lawsuits between believers as scandalous. It is elaborated in Lutheran interpretations of that passage. [Commission on Theology and Church Relations, *1 Corinthians 6:1-11:] An Exegetical Study* [(1991)].

(Pet. Br. 54). But the *Exegetical Study*[28] cited by petitioner appears not to support counsel's construction of *Corinthians*.

> The legal system by which order is maintained is a gift of God not to be despised. It may be used properly for certain purposes.... When the legal system is used and when action is motivated by reasons other than [greed, anger, revenge, or the desire strictly to defend one's own rights], the use may not only be appropriate but may be of benefit to both Christian and non-Christian.[29]

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[28] The *Study* is available at http://www.lcms.org/Document.fdoc?src=lcm&id=415

[29] *Exegetical Study*, 16.

Indeed, the *Exegetical Study* looks with particular favor on the enforcement of anti-discrimination laws.

> [T]here are undoubtedly instances in which the Christian not only may but must utilize the secular court system. We cannot, for example, deny ... the fairer treatment of minorities and the less fortunate because of civil rights actions, discrimination cases and labor lawsuits. Because of this, both Christian and non-Christian have benefitted from our legal system.[30]

We express no position regarding the meaning of any passage in *Corinthians*, or about how the Synod interprets any portion of the Bible. But these assuredly are not matters which the federal or state courts should attempt to resolve, or regarding which the judiciary should simply accept the theological account proffered by counsel.

Several amici suggest, in the alternative, that the courts could and ought to inquire into the subjective good faith of a representation by a religious organization that a particular job activity involves an important religious function. One suggests that courts should decide "whether the organizations' representations ... are *bona fide* ... [or] merely a sham."[31] Another urges that the "[c]ourts are more than capable of identifying insincere and self-serving invocations of

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[30] *Exegetical Study*, 14.

[31] Brief of Amici Curiae American Bible Society, et al., 20-21.

ministerial status" by church officials.[32] To the contrary, this Court should avoid adopting a constitutional standard that would in every case require the courts to sit in judgment on the subjective good faith of representations made by religious organizations regarding the nature of their particular theological views.

B. Are "Religious Functions" Limited To Communicative Tasks?

Petitioner's description of the types of activities that would qualify as religious functions is consistently limited to expressive activity. E.g., Pet. Br. 21 ("Not just pastors of congregations, but also religion teachers may teach the tenets of faith, lead worship, and give spiritual advice"). A number of religious groups, on the other hand, reject such a view of the types of actions that would qualify for the "ministerial exception." They insist, rather, that any function undertaken for a religious purpose can render the actor a "minister," even if the activity itself has nothing to do with expounding (other than, perhaps, by example) some theological doctrine. The proper standard, they urge, is whether the actions were taken "by religious followers as an expression and exercise of their religious beliefs." (Brief of Amici Curiae American Bible Society, et al., 17). Thus, so

[32] Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 2.

long as such a religious motive is present, an individual can be within the "ministerial exception" if he or she "tak[es] care of widows and orphans" (*id.* at 13-14), "car[es] for the needy by providing meals and shelter" (*id.* at 29), or provides "skiing, horseback riding, swimming, opportunities to ... young people in a setting and in an activity that is wholesome." (*Id.* at 40).[33]

C. Are There Additional Relevant Factors Other Than An Employee's Job Functions?

Although petitioner's proposed standard apparently concerns only whether an employee performed "important religious functions," petitioner's brief identifies a number of other factors – distinct from the presence or absence of particular job functions – that it urges would make more likely (or, in their absence, less likely) a conclusion that the employee

[33] See Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 4-5 (a "religious organization's own self-understanding of" "the appropriate roles of a ministry of the church" can include "cleaning, nursing, farming, stocking shelves, making furniture, grading papers, writing newsletters"), 5 ("charitable works like teaching adult literacy classes, performing social work, and nursing can all be 'secular' activities, but the nun who takes vows of poverty and obedience and performs these services to live out the gospel in service to other is a 'minister' of the church – even though she is not ordained"; "mopping floors" and "cleaning sinks"), 6-7 ("[m]anaging a thrift shop," "[G]rowing grapes and selling wine," "playing an instrument").

falls within the "ministerial exception." Petitioner asks the Court to hold, for example, that application of the "ministerial exception" would be more appropriate if a teacher "developed a close, personal relationship with her students (Pet. Br. 41), something that might be true of any good elementary school teacher, or was required to be of a particular faith (here Christian), even though that was not the more specific denomination of the employer. Several amici suggest other non-performance criteria.[34] Neither petitioner nor amici explain how these factors are to be weighed with (or against) an employee's assertedly religious functions.

D. What Quantum of Ministerial Functions Renders An Employee A "Minister" For The Purposes of The "Ministerial Exception"?

Petitioner's standard requires that an employee's religious functions (together with the non-function factors?) be assessed both "qualitatively and quantitatively." (Pet. Br. 41; see Pet. Br. 38). Qualitatively a court is to assess the religious importance of the type of functions at issue; giving a sermon presumably outranks passing the collection plate. Quantitatively a court is to evaluate how often, and for how long,

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[34] Brief of the American Jewish Committee, et al., as Amicus Curiae in Support of Petitioner, 11; Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 3, 18, 19.

those religious functions occurred. In the instant case, for example, petitioner argues that the religious instruction given by Perich "was substantial: forty-five minutes a day is nearly four hours a week." (Pet. Br. 41).

Petitioner insists that the facts of the instant case satisfy this proposed qualitative/quantitative analysis. But petitioner does not explain how a court would decide a case in which an employee's religious functions were less frequent (for example, a parochial school teacher who provided religious instruction only forty-five minutes a month, or a year) or less important (for example, a parochial school teacher whose only religious function was to escort the students to and from chapel).

A number of religious groups attack petitioner's ambiguous standard as too demanding. Rather than assess the amount or importance of religious functions, they insist, any religious function at all would render an employee a "minister" for purposes of the "ministerial exception."[35] While this standard has the value of simplicity, it would likely mean that the ministerial exception would apply to virtually every employee of a religious organization, particularly if

[35] Brief Amici Curiae State of Michigan and Seven Other States, 2; Brief Amici Curiae of Professor Eugene Volokh, et al., 30, 36; Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 24, 26; Amicus Curiae Brief of the National Jewish Commission on Law and Public Affairs, et al., 11, 14.

"religious function" encompassed any action taken by the employee for a religious purpose.

E. Are Individuals with an "Ecclesiastical Office" Ministers *Per Se*, and If So What Is An Ecclesiastical Office?

Wholly apart from its proposed function-based analysis, petitioner contends that the "ministerial exception" would apply "[i]n all but exceptional circumstances" to an employee who holds an "ecclesiastical office." (Pet. Br. 45). Petitioner sets out eleven factors to be considered by a court in determining whether an employee's position is ecclesiastical in nature.[36] Evaluation of a number of the proposed factors would require examining a church's official tracts or publications. (Pet. Br. 46-47). Petitioner contends that in

[36] The factors are (1) whether church authors have labeled the position "ecclesiastical and sacred," (2) whether there is a theological explanation as to why this is an ecclesiastical office, (3) whether the position has been regarded as ecclesiastical for hundreds of years, (4) whether the occupant had been required to complete substantial theological training, (5) whether the individual was "chosen in a prayerful process by a vote of the congregation," (6) whether the employee had been hired "for an indefinite term," (7) whether the employee was "subject to the same disciplinary rules as the Church pastor," (8) whether the employee "could be dismissed only for cause and only by a supermajority of the congregation," (9) whether the employee was "held out to the Church ... as a commissioned minister," (10) whether the employee "claimed a housing allowance for ministers on her taxes," and (11) whether the employee had been "installed in office via ... a 'solemn and public act.' " (Pet. Br. 46-48).

this case all eleven factors were present; it offers no account of when a lesser number of factors would and would not be sufficient to demonstrate the existence of an ecclesiastical position. Even where the necessary combination of factors is shown, however, petitioner urges that a court would still determine whether the ecclesiastical position was really "a sham." (Pet. Br. 49, 50). None of the religious groups that have filed amicus briefs appear to endorse this rule.

F. Which Types of Employment-Related Claims Are and Are Not Barred By The "Ministerial Exception"?

The "ministerial exception" proposed by petitioner does not bar every dispute that relates in some fashion to the employment of a "minister." Rather, petitioner argues that the so-called "exception" applies only to some, but not all, minister-related claims. Petitioner offers a number of conflicting accounts of the types of claims which the proposed exception would preclude.

First, petitioner states that the "ministerial exception" applies only where either the claim "would require the government to resolve religious questions" or "*would* impose an unwanted minister on a church." (Pet. Br. 19, 32, 36-37)(emphasis added). The first clause merely restates the entanglement doctrine, and thus bars only claims that would be precluded even if there were no "ministerial exception."

Thus on this iteration the only new bar created by the proposed exception would be to claims that "would" require a church to reinstate, or hire, a "minister." That rule would be essentially a prohibition against a particular form of relief; it would not bar actions by "ministers" insofar as they sought other types of remedies.

Second, petitioner explains that "the ministerial exception ... is limited to disputes between employer and employee that *could* impose an unwanted minister on a church or would entangle the government in religious questions." (Pet. Br. 50)(emphasis added). This is somewhat broader than the first version, since a lawsuit which merely requested reinstatement "could" result in that remedy (putting aside petitioner's argument that such remedies are constitutionally impermissible). This iteration may be a pleading rule, barring lawsuits by ministers if the complaint asked for (or, perhaps, failed to expressly disclaim), reinstatement.

Third, petitioner states that the "ministerial exception" applies to cases "that would end in reinstatement or its financial equivalent in back and front pay, *or* would require the court to decide religious questions." (Pet Br. 14)(emphasis in original). Putting aside the second clause, which restates the entanglement doctrine, this proposed rule would be a broader limitation on remedies, barring not only reinstatement but "its financial equivalent in back or front pay." It would not preclude all claims by ministers, but would apparently permit compensatory,

punitive, or liquidated damages, as well as back pay that was not the "equivalent" of reinstatement (e.g., back pay arising out of a claim for salary discrimination or a violation of state minimum wage laws).

Fourth, and most broadly,[37] petitioner states that "[t]he ministerial exception bars lawsuit that interfere in the relationship between a religious organization and employees who perform religious functions – most obviously, lawsuits seeking ... to impose monetary liability for the selection of such employees." (Petition, 9). This formulation would bar the imposition of tort liability on a church because it "select[ed]" a known or suspected child molester to "perform religious functions," such as serving as the minister for a congregation, and would preclude fines for employing minors, in violation of federal or state child labor laws, to perform such functions. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Some courts have gone even further, and held that the "ministerial exception" "applies without regard to the type of claims being brought." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir.2003).

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[37] Petitioner also repeatedly asserts that a church has an absolute right to "control" the actions of "ministers." (Pet. Br. 13, 14, 20).

G. Other Unanswered Constitutional Questions

In addition to the problems discussed above, the amicus briefs in this case and the decisions in the lower courts identify a wide range of other novel constitutional issues that would have to be addressed if this Court were to adopt some form of the proposed "ministerial exception." Many of these are constitutional issues which – wholly aside from the dispute about the standard for determining who is a "minister" – have already divided the lower courts that have struggled to make sense of the proposed "ministerial exception."

Does the "ministerial exception" bar claims of sexual racial harassment of a "minister"?[38]

Does the "ministerial exception" bar claims of discrimination in compensation or claims of violations of state minimum wage laws?[39]

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[38] *Compare Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir.1999)(sexual harassment claim not barred by exception), *with* 211 F.3d 1331 (Wardlaw, J., dissenting from denial of rehearing en banc).

[39] *Compare Mundie v. Christ United Church of Christ*, 987 A.2d 794, 798 (Pa. Super. 2009)(compensation claims not barred) and Brief of Justice and Freedom Fund as Amicus Curiae Supporting Petitioner, 19-20 (same) *with Alcazar v. Corporation of Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir.2010)(en banc)(compensation claims barred) and *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343, 344-45 (5th Cir.1999)(claim regarding denial of pregnancy benefits barred).

Does the "ministerial exception" bar retaliation claims?[40]

Does the "ministerial exception" immunize a religious organization that uses threats of dismissal to tamper with a witness, influence a juror or affect how an employee votes?

Does the "ministerial exception" bar tort or workers' compensation claims?[41]

Does the "ministerial exception" bar contract claims?[42]

Does the "ministerial exception" bar claims of third parties, such as children molested by ministers

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[40] Brief of the American Jewish Committee, et al., 12 ("Court should reserve for another day" whether exception applies to retaliation claims).

[41] Brief Amici Curiae of Professor Eugene Volokh, et al., 32 (injury-based action permissible); *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1171 (4th Cir.1985)(tort claims not barred); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 1998 WL 904528 at *6 (4th Cir.)(tort claims barred); *Petruska v. Gannon University*, 462 F.3d 294, 300, 307, 309 (3d Cir.2006)(bar applies to negligent supervision claim but not to fraudulent misrepresentation claim).

[42] *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 950 (9th Cir.1999)(contract claim barred); *Rayburn*, 772 F.2d at 1171 (contract claim not barred); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 1998 WL 904528 at *6 (4th Cir.)(contract claims barred); *Petruska v. Gannon University*, 462 F.3d 294, 310 (3d Cir.2006)(contract claims not barred).

whose danger to children was known to church officials?[43]

Does the "ministerial exception" apply to organizations other than churches?[44] If so, when is an organization sufficiently religious in nature to qualify for the "ministerial exception"?[45]

Can the courts, in applying the "ministerial exception," question whether a defendant's claim to being a religious organization is a "sham"?[46]

Can the "ministerial exception" be invoked by a for-profit organization?[47]

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[43] *Compare* Brief of the United States Conference of Catholic Bishops,2-3 ("the church has the right to choose those who perform religious functions without regard to secular standards") *with id.* 23 n.18 ("Whether and under what circumstances the church has a duty to third parties to protect them from harm caused by one of its employees is not before the Court"); *compare Malicki v. Doe*, 814 So.2d 347 (Fla. 2002) *with Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.2d 818, 824 (Mo.Ct.App. 2010).

[44] See *Thibodeau v. American Baptist Churches of Connecticut*, 120 Conn.App. 666, 994 A.2d 212 (2010)(defendant was organization that provided employment placement services); *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir.1993)(defendant prepared personal information file used by churches in hiring minsters).

[45] See *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 309 (4th Cir.2004).

[46] Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 9 (no "ministerial exception" if "the church is a fake")(*quoting Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir.2008)), 24 (same).

Does the "ministerial exception" mean that government investigation of employment-related claims by a "minister" is unconstitutional?[48]

Can the "ministerial exception" be invoked to bar a government agency from providing representation to an asserted "minister"?[49]

Does the "ministerial exception" apply to doctors and nurses working in a hospital affiliated with a religious organization?[50]

Does the "ministerial exception" bar claims by *all* teachers at parochial schools?[51]

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[47] Brief of Amici Curiae Religious Organizations and Institutions in Support of Petitioner, 20 n.5 ("the ministerial exception's applicability to ... for-profit institutions need not be settled to decide this case").

[48] *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir.2003)(mere investigation violates constitution); but see *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

[49] See *Gipe v. Superior Court*, 124 Cal.App. 3d 617, 177 Cal.Rptr. 590 (Ct.App.4th Dist. 1981).

[50] Brief of Amicus Curiae International Center for Law and Religion Studies at Brigham Young University in Support of Petitioner, 4, 24.

[51] Brief for International Mission Board of the Southern Baptist Convention, et al., 32 (all parochial school teachers within "ministerial exception"); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir.1993)(claims by parochial school teacher at issue not barred).

Can an employee be a "minister" (within the "ministerial exception") of a particular religious organization even though he or she is a member of some other denomination?[52]

Does the "ministerial exception" bar suits *against* the "minister"?[53]

What standard of proof must a plaintiff meet to defeat a "ministerial exception" defense?[54]

Does the "ministerial exception" prevent the federal government from denying entry into the United States to an alien who has been selected as a minister by a domestic organization?[55]

Is the "ministerial exception" a jurisdictional bar?[56]

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[52] Brief of the Rutherford Institute Amicus Curiae in Support of Petitioner, 22 ("employees ... need not even be of the same creed as the sponsoring parish").

[53] Amicus Curiae Brief of the National Jewish Commission on Law and Public Affairs, et al., 2 ("ministerial exception" applies to claims against ministers).

[54] Brief Amici Curiae of Professor Eugene Volokh, et al., 30, 38 (plaintiff must overcome presumption of "ministerial exception" with "clear and convincing" evidence).

[55] Brief of the United States Conference of Catholic Bishops, 15 ("church's right to select its ministers, free from state interference").

[56] Brief Amici Curiae of Professor Eugene Volokh, et al., 4 ("ministerial exception" is jurisdictional); Brief of the American Jewish Committee, et al. as Amici Curiae In Support of Petitioner, 23-25 ("ministerial exception" is not jurisdictional); *Hutchison v.*

(Continued on following page)

Is the "ministerial exception" subject to waiver and estoppel?[57]

The large number of vexing constitutional questions posed by the proposed "ministerial exception" weighs heavily against the adoption of such an ill-defined doctrine.

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Thomas, 789 F.2d 392, 396 (6th Cir.1986)("ministerial exception" is jurisdictional).

[57] *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir.2007)(McKeague, J., concurring)(noting this is an "open question").

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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