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 UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

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Supreme Court of the United States

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INTEREST OF THE *AMICI* [1]

The United States Conference of Catholic Bishops is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their members made any such monetary contribution.

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association with over fourteen million members.

The Most Rev. Katharine Jefferts Schori is the Presiding Bishop, Chief Pastor, and Primate of the Episcopal Church, also named the Protestant Episcopal Church in the United States of America, a hierarchical religious denomination with nearly 7,700 worshipping congregations in the United States and other countries. The Church has charged the Presiding Bishop with the responsibility for speaking for the Church on matters of vital importance to the Church, such as those now before the Court.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly one thousand synagogues throughout the United States. The Orthodox Union also represents the interests of hundreds of Orthodox Jewish day schools whose primary mission is the inculcation of the Jewish faith in the community's children.

The *amici* share an interest in preserving the freedom of religious organizations to govern themselves and to choose who may serve in ministry. The issues presented in this case have arisen in countless cases in which these *amici* or their members have been involved as parties. The outcome will have a profound impact upon their ability to advance their spiritual and pastoral missions.

SUMMARY OF ARGUMENT

1. The question in this case is whether those who seek to serve a church in a religious capacity may invoke the power of the state in support of their desire to serve—or whether the church has the right

to choose those who perform religious functions without regard to secular standards and without interference by the state. The answer to that question, *amici* submit, is clear. The church has the right to select its ministers, and when the dispute is between the church and the church member who seeks to serve in ministry, there is no occasion—no justification whatsoever—for the state to become involved. Church members who seek to serve the church in ministry may invoke whatever procedure is provided by the church to challenge their exclusion. But they cannot seek redress in the civil courts—because they have consented, at least implicitly, to church governance, and because the state has no authority to interfere with the church's choice of its ministers.

"Freedom to select the clergy . . . [has] federal constitutional protection . . . against state interference." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). This protection stems from the Establishment Clause and the Free Exercise Clause, which together embody a principle of separation between the institution of church and the institution of state. The Religion Clauses were designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch v. Donnelly,* 465 U.S. 668, 672 (1984) (quotation marks omitted). And the selection of a church's ministers lies squarely within the church's precinct, not the state's.

Even without the Religion Clauses, the Court's expressive association cases would support the right of a church to exclude a person from ministry. But the Religion Clauses do more than add weight to the right of any association to choose its members: they

erect a structural barrier against state interference with the selection of a church's ministers.

2. When a would-be minister sues a church complaining of exclusion from service in ministry, the protection of the First Amendment is unqualified and absolute. There is no occasion in such a case to "balance" the church's right against the asserted interest of the state. The state simply lacks the authority and competence to operate in the realm of choosing ministers for the church. The reason for the church's decision is beside the point. The point is that under our constitutional structure, *who* decides the question is determinative, not *what* is decided or *why*.

Even if one were to attempt to "balance" the church's right against the state's asserted interest in eliminating employment discrimination, the outcome would be the same in every case involving a minister. For no matter how "compelling" the state's interest might be in general, or in other contexts, the state has no legitimate interest, compelling or otherwise, in imposing its notions of equality or fairness on a church in the selection of its ministers. *See Boy Scouts v. Dale*, 530 U.S. 640, 657-69 (2000) (state's interest in eradicating discrimination does not justify intrusion on right of expressive association).

Keeping the state out of this distinct category of church decisions not only respects doctrinal principles, but avoids practical dangers. The "very process of inquiry" "may impinge on rights guaranteed by the Religions Clauses." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). In addition, civil courts are "incompetent judges" of the "matters of faith, discipline, and doctrine" that are often presented in such cases. *Watson v. Jones,* 80 U.S. (13 Wall.) 679, 732-34 (1872). Unpopular churches may be vulnerable to bias. The

risk of an erroneous decision can never be eliminated. And the prospect of intrusive and costly litigation would itself have a chilling effect on the decision of churches whether to remove someone from ministry.

3. There is uniform agreement among the Courts of Appeals that employment discrimination laws cannot be applied to challenge a church's decision to exclude a person from ministry. And the courts agree, as well, that for this purpose "ministry" is not limited to ordained clergy. Some courts, including the Court of Appeals in this case, have held that an employee is subject to the exception for ministers "if the employee's *primary* duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 778 (6th Cir. 2010) (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)) (emphasis added). But this case illustrates the flaw in the "primary duties" formulation: the Court of Appeals decided that a "called" teacher of religion, who also led students in prayer three times a day, could nonetheless challenge her termination because these duties were not "primary"—too many other "secular" duties were *also* part of her job. In *amici's* view, the church must have the right, free from state interference, to select those engaged in church governance, worship, teaching or other related functions, regardless of whether they have other duties as well.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF RELIGIOUS INSTITUTIONS TO SELECT THEIR MINISTERS.

No First Amendment right is more critical to religious liberty than the right of churches freely to select their own ministers.[2] For religious organizations like *amici* and the tens of millions they represent, the issue is an existential one. "The relationship between an organized church and its ministers is its lifeblood." *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied*, 409 U.S. 1050 (1972).

The First Amendment denies the state authority to review a church's decision to exclude a person from ministry. State regulation of the exquisitely sensitive process of selecting or dismissing ministers is nothing short of state control of religion. It is anathema to the American tradition of non-establishment of religion, free exercise of religion, and freedom of religious association.

A. The Religion Clauses Recognize a Zone of Church Autonomy.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

These first two clauses of the First Amendment recognize that there is a sphere of human activity involving religion that is beyond the power of government to regulate. Together, these clauses declare

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[2] In this brief, the term "church" is intended to refer to a broad class of houses of worship and religious institutions of varied faiths and denominations.

a foundational—even jurisdictional—limit on the power of government in the spiritual realm.

It has often been said that the Free Exercise Clause and the Establishment Clause complement each other. The Free Exercise Clause protects individuals and churches from direct interference in their individual and collective "exercise" of religion. The Establishment Clause guards against the twin evils of an established religion—coercion and discrimination from the perspective of those outside the established religion, intrusion and corruption from the perspective of those within it. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) ("[T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'") (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)). Both of these overlapping protections are implicated in this case. Together, they acknowledge and protect a zone of church affairs that the state is powerless to regulate—a zone that unquestionably includes the right of a church to select its ministers.

Thomas Jefferson wrote, and this Court has noted, that the Religion Clauses create a wall of separation between church and state. *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (citing Jefferson's Letter to the Danbury Baptist Church). That metaphor, of course, is overly simplistic, *see Lynch v. Donnelly*, 465 U.S. 668, 678 (1984), and susceptible to manipulation and abuse, *see* Philip Hamburger, *Separation of Church and State* (2002).

But taken together, the Religion Clauses do embody a principle of separation between the institution of church and the institution of state that we in the United States hold dear. To Christians, it echoes the

command of Jesus to "Render to Caesar the things that are Caesar's and to God the things that are God's." *Mark* 12:7. In the words of this Court, the Religion Clauses are designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch*, 465 U.S. at 672 (quotation marks omitted). "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference [and] it has secured religious liberty from the invasion of the civil authority." *Watson*, 80 U.S. at 730. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Ill. ex. rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

To be sure, the line of demarcation between these separate spheres is not always clear. But in its simplest and most obvious application, the principle of separation, rightly understood, means this: there are some areas in which the church has no control—for example, whether a candidate is eligible for state office; and some areas in which the state has no control—for example, whether a person is eligible for church office.

The church, in other words, has the authority to conduct its internal affairs without state interference—not simply because there are certain limits on the exercise of powers properly within the state's authority, but because certain powers lie outside the state's authority entirely.

1. This Court Has Long Recognized the Right of Religious Institutions to Conduct Their Internal Affairs, Including the Selection of Ministers, Without State Interference.

In a well-established line of cases, this Court has acknowledged the "power [of churches] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff,* 344 U.S. at 116. First formulated in the context of church property disputes, *see Watson,* 80 U.S. at 679, the doctrine has been applied as well to disputes over who is entitled to serve as a chaplain, *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929), and a bishop, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976).

In *Watson*, this Court firmly rejected English common-law principles allowing civil courts to adjudicate church disputes. "[W]henever . . . questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried," the Court held, "the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them." 80 U.S. at 727. Believers have "[t]he right to organize voluntary religious associations" and to provide for "ecclesiastical government," the Court explained, and "[a]ll who unite themselves to such a body do so with an implied consent to this government." *Id.* at 728-29. Civil courts, the Court explained further, are "incompetent judges of matters of faith, discipline, and doctrine." *Id.* at 732-34. As a result, "the civil courts exercise no jurisdiction" over such disputes. *Id.*

In *Gonzalez*, the Court applied these principles in a case involving the appointment of clergy. A Roman Catholic Archbishop had refused to appoint the petitioner to a chaplaincy on the ground that he was unqualified. 280 U.S. at 12. In an opinion by Justice Brandeis, the Court rejected the civil court challenge and upheld the autonomy of the church "to determine what the essential qualifications of [clergy] are and whether the candidate possesses them." *Id.* at 16 (citing *Watson*, 80 U.S. at 727, 733).

Watson and *Gonzalez* were decided as a matter of general federal common law, before *Erie* and selective incorporation. But the principles of these cases were adopted and integrated fully into contemporary First Amendment doctrine in *Kedroff*, another case involving the appointment of clergy. There, the Court struck down a New York statute that had been invoked to resolve a dispute over who was entitled to serve as the Russian Orthodox Archbishop of New York and occupy St. Nicholas Cathedral. The "controversy," the Court explained, "is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." 344 U.S. at 115. And the statute that purported to transfer that power to governing bodies in America offended both Establishment Clause and Free Exercise Clause principles. The "transfer by statute of control over churches," the Court observed, "violates our rule of separation between church and state." *Id.* at 110. And "[l]egislation that regulates church administration, the operation of the churches, [and] the appointment of clergy . . . prohibits the free exercise of religion." *Id.* at 107-08.

Expanding upon the opinion in *Watson,* the Court stated:

> The opinion [in *Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Freedom to select the clergy*, where no improper methods of choice are proven, we think, *must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference*.

344 U.S. at 116 (emphases added) (footnote omitted); *see also Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 190 (1960) (per curiam) (extending *Kedroff* to include judicial action).

In *Milivojevich*, the Court rejected another attempt by the state to resolve a dispute over church leadership. 426 U.S. at 718-19. The Supreme Court of Illinois had invalidated the church's removal of a bishop as "arbitrary," because in the Court's view the removal proceedings had not been conducted in accordance with the church's constitution and penal code. *Id.* at 712-13. Quoting *Watson*, the Court reiterated that the First Amendment dictates that "civil courts exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." 426 U.S. at 713-14. Disgruntled clergy or church members may not call on civil courts to review the decisions of church officials on such matters, no matter how arbitrary or irrational those decisions may appear:

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith *whether or not rational or measurable by objective criteria*. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Id. at 714-15 (footnote omitted). In short, "the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government . . . ." *Id.* at 724.

Having applied this principle to invalidate a state statute and state judicial action interfering with the church's right to appoint its leadership, the Court in *Catholic Bishop,* 440 U.S. at 499 (1979), confronted an issue similar to the issue in this case: whether a federal employment statute can be applied in circumstances implicating the church's right to control its internal affairs. Like this case, that case involved teachers in a church-run school. But unlike this case, the teachers in *Catholic Bishop* included lay teachers of purely secular subjects. Still, the Court recognized that applying the National Labor Relations Act to the employment of teachers in church-run schools could violate the Religion Clauses.

> The resolution of [claims that certain decisions were religiously motivated], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board [in adjudicat-

> ing such claims] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. at 502. To avoid these constitutional questions, the Court interpreted the National Labor Relations Act narrowly so as to preclude the exercise of jurisdiction.

Thus, in case after case, this Court has recognized the church's right to resolve matters of church governance, faith, and discipline on its own, without state interference. Nowhere does this principle of non-intervention apply more firmly than when the dispute involves the selection and retention of a church's ministers. When believers come together to form a church, they must have the freedom to decide for themselves who will be placed in positions of responsibility for the church's religious affairs. This is as fundamental as the notion that when the people come together to form a democracy, they, not the church, must have the ability to decide for themselves who will be placed in positions of responsibility for the affairs of the state.

2. The Church Autonomy Cases Are Unaffected by Employment Division v. Smith.

The cases recognizing this kind of structural barrier between church and state—a barrier that rests upon both the Establishment and Free Exercise Clauses—have been reaffirmed by this Court, even as it has limited the claims of individual citizens to exemption under the Free Exercise Clause alone from the demands of laws of general applicability. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause does

not require exemptions for individuals from "valid and neutral law[s] of general applicability." *Id.* at 879 (quotation marks omitted). But at the same time, *Smith* explicitly cited with approval the Court's decisions in *Kedroff* and *Milivojevich*. *Id.* at 877.

Smith itself did not involve an internal dispute between church members or between a church and one of its members or clergy. It was a dispute between an individual and the state over the use of peyote in violation of state law. The case, therefore, did not present any issue of a *church's* institutional right to autonomy in the handling of its internal affairs. And recognizing the church's right to control its own *internal affairs*—at least its right to select its ministers—presents none of the threats to civil government that recognition of individual exemptions from laws of general applicability might present. Allowing each citizen, by virtue of his religious beliefs, "to become a law unto himself" would threaten "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct." *Id.* at 885 (quotation marks omitted). But the government's ability to prohibit socially harmful conduct, or to encourage socially beneficial conduct, is not undermined to any substantial degree, if at all, by recognizing a church's right to decide matters of internal governance, faith and discipline—in particular, its right to exclude someone from ministry.

Every court that has considered the issue presented in this case has recognized the distinction between an individual's desire, founded upon the Free Exercise Clause alone, to be excused from compliance with secular laws and a church's right, founded upon the Establishment and Free Exercise Clauses, to control its internal affairs and decide who may perform its religious functions. Every court, in

other words, has concluded that the church autonomy cases are unaffected by *Smith*.[3]

It is by now, therefore, well established that the church has the right to decide matters of internal governance, faith, and discipline by itself. Neutral, generally applicable laws may be applied to regulate the secular affairs of a church, but not those religious affairs that fall within the zone that is structurally removed from the state's proper authority. The church's selection of its ministers falls within that zone.

B. This Court's Freedom of Association Cases Reinforce the Right of Religious Institutions to Select Their Ministers.

The church's right to select its ministers, free from state interference or review, draws additional strength from the Court's freedom of association cases. Indeed, the earliest decisions described this structural freedom of the church as "[t]he right to organize voluntary *religious associations* to assist in the expression and dissemination of any religious doctrine." *Watson*, 80 U.S. at 728-29 (emphasis added).

This Court has held that the freedom of association protected by the First Amendment includes the right not to associate. It includes, in particular, the right of a group formed for expressive purposes to exclude those whose membership would undermine the group's message. In *Boy Scouts of America v. Dale*, 530 U.S.

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[3] *See, e.g.*, *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.* (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999); *EEOC v. Catholic Univ.*, 83 F.3d 455, 463 (D.C. Cir. 1996).

640, 646 (2000), this Court held that the Boy Scouts' "freedom of expressive association" prevented a state from enforcing its public accommodations law to require the Boy Scouts to accept a gay scoutmaster. Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held unanimously that the organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was thought to communicate a message about homosexual conduct that the organizers "did not like." *Id.* at 574.

Churches have an even stronger right than parade organizers and the Boy Scouts to join together to advance their religious message through their members and leaders: they enjoy the additional protection of the Religion Clauses. In *Smith* this Court noted that "it is easy to envision a case in which a challenge on freedom of association grounds would . . . be reinforced by Free Exercise Clause concerns." 494 U.S. at 882. This is such a case. If the Boy Scouts have the right to exclude a gay scoutmaster whose mere presence would undermine their message, and if the organizers of a St. Patrick's Day parade have a right to exclude those who would propound a message they do not like, then a church surely has a right to select those who are entrusted with the responsibility of preserving the church's message and transmitting it to the next generation. And as in those cases, general anti-discrimination legislation does not defeat that right. *See* Part III of this brief.

C. The Courts of Appeals Have Faithfully Applied This Court's Decisions to Protect the Right of Religious Institutions to Select Their Ministers.

Applying the principles established by this Court, the Courts of Appeals for every Circuit except the Federal Circuit, which has no occasion to consider such issues, have uniformly held that disputes between a church and its minister—or between a church and one who aspires to be its minister—are for the church to resolve, not the state. In particular, they all agree that employment discrimination laws cannot be invoked to challenge a church's selection of its ministers.[4]

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[4] *See, e.g.*, *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *Friedlander v. Port Jewish Ctr.*, 347 F App'x. 654, 655 (2d Cir. 2009), *cert. denied,* 130 S.Ct. 1714 (2010); *Rweyemamu v. Cote*, 520 F.3d 198, 205-08 (2d Cir. 2008); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993); *Hankins v. Lyght,* 441 F.3d 96, 117-18 (2d Cir. 2006); *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985); *Shaliehsabou v. Hebrew Home, Inc.*, 363 F.3d 299, 309 (4th Cir. 2004); *Roman Catholic Diocese*, 213 F.3d at 802; *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1999); *Starkman v. Evans,* 198 F.3d 173 (5th Cir. 1999); *Combs*, 173 F.3d at 343; *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. 1981); *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *McClure*, 460 F.2d 553; *Hollins*, 474 F.3d at 226 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 474-76 (7th Cir. 2008); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1040 (7th Cir. 2006); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994); *Scharon v. Saint Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 361-63 (8th Cir. 1991); *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010) (en banc); *Werft v. Desert Southwest Annual Conf.*, 377 F.3d 1099, 1103

The first court to reach this result explained the rationale succinctly: "The relationship between an organized church and its ministers is its lifeblood." *McClure*, 460 F.2d at 558. A church without the right to select its ministers is a church without the ability to govern itself, conduct its liturgy, control the content of its faith, or determine its message to the faithful and the world.

Subsequent courts have uniformly agreed that the selection of a church's ministers is a matter for the church, not the state, to decide—and that those who are excluded from the ministry, either by not being selected or by being removed, have no cognizable claim against the church under federal or state anti-discrimination laws. In short, the relationship between a church and its ministers, which is central to the life of the church, can be created and sustained only by the consent of the church, not by force of the state.

II. THE RIGHT OF RELIGIOUS INSTITUTIONS TO SELECT THEIR MINISTERS EXTENDS TO ALL WHO PERFORM RELIGIOUS FUNCTIONS.

A. The Right Is Not Limited to Ordained Clergy or to Those Who Exercise Purely or Primarily Religious Duties.

The courts are in agreement that the "ministerial exception" is not limited to—though it certainly

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(9th Cir. 2004); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1243-45 (10th Cir. 2010); *Gellington*, 203 F.3d at 1299; *Catholic Univ.*, 83 F.3d at 461-65 (11th Cir. 2000); *Minker v. Balt. Annual Conf. of United Methodist Church,* 894 F.2d 1354, 1356-57 (D.C. Cir. 1990).

includes—ordained clergy. Thus, courts have refused to entertain discrimination claims by a non-ordained chaplain at a Catholic college,[5] a non-ordained associate of pastoral care at a Seventh-day Adventist Sabbath school,[6] a non-ordained pastoral resident at a religiously affiliated hospital,[7] a Catholic seminarian,[8] a director of pastoral studies for a diocese,[9] a Salvation Army "minister,"[10] a teacher of canon law at the Catholic University of America,[11] a press secretary of a religious organization,[12] a Kosher food supervisor,[13] a choir director,[14] and an organist.[15]

All courts agree that a clerical title is not required; rather, the question is to be determined by reference to religious functions. The courts have taken slightly different approaches to determining whether an employee's functions are religious or secular. But we think the correct approach is clear: if the employee's functions lie within any of the zones of activity that are protected from state interference, general employment laws cannot apply.

This Court has said that the First Amendment protects the right of churches "to decide for themselves,

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[5] *Petruska,* 462 F.3d at 307 n.10.

[6] *Rayburn*, 772 F.2d at 1168.

[7] *Hollins*, 474 F.3d at 226.

[8] *Alcazar*, 627 F.3d at 1288 (en banc).

[9] *Skrzypczak*, 611 F.3d at 1243-45.

[10] *Schleicher*, 518 F.3d at 474-76; *McClure*, 460 F.2d at 553.

[11] *Catholic Univ.*, 83 F.3d at 461-65.

[12] *Alicea-Hernandez*, 320 F.3d at 704.

[13] *Shaliehsabou*, 363 F.3d at 309.

[14] *Tomic*, 442 F.3d at 1040.

[15] *Starkman*, 198 F.3d at 173.

free from state interference, *matters of church government as well as those of faith and doctrine,*" and that church autonomy "applies with equal force to church disputes over *church polity* and *church administration*." *Kedroff,* 344 U.S. at 116 (emphasis added); *see also Milivojevich*, 426 U.S. at 710. If the employee's function lies within one of these protected zones—if the function is one of religious worship, governance, or teaching—then the position can only be filled by decision of the church, not the state.

Several Circuits have held that an employee is subject to the exception for ministers "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Hollins*, 474 F.3d at 226 (quotation marks omitted); *Petruska*, 462 F.3d at 306; *Scharon*, 929 F.2d at 361-63; *Catholic Univ.,* 83 F.3d at 461-65; *Rayburn*, 772 F.2d at 1169. There is no disagreement among the courts that these functions are ecclesiastical. But five Circuits have quite properly rejected the requirement that these be the employee's "primary" duties.

Whether or not one occupies a ministerial position does not depend on whether the person *also* performs some non-ministerial functions. Nor can it be made to depend upon a mathematical calculation of what percentage of time a person spends on activities deemed religious. The proper question is simply whether the position imposes responsibilities for church governance, worship, teaching, or other related functions. Governance includes the conduct of church affairs and the development and application of church law and discipline. Worship includes prayer and liturgical services. Teaching includes the

definition and transmission of the faith and its implications. If a position has responsibilities in any of these areas, the church alone must have the power to fill it, regardless of whether the position entails responsibilities in other areas as well.[16]

This approach is consistent with that of all the other Circuits—including the Fifth Circuit, which has looked to whether the employee is "engaged in activities traditionally considered ecclesiastical or religious," *Starkman*, 198 F.3d at 173, 176,[17] the Tenth Circuit, which applies the First Amendment exception when the employee's position is "important to the spiritual and pastoral mission of the church," *Skrzypczak*, 611 F.3d at 1243 (quotation marks omitted), and the other Circuits, which have applied the "ministerial exception" on a case-by-case basis.

B. Religious Institutions Have the Right to Choose Those Who Teach Religion and Lead Their Children in Prayer.

Certainly one critical function of any church is to define what it believes and to transmit those beliefs to the next generation. It is unthinkable that the state would have the authority to tell the church who should define its doctrine. It is equally unthinkable

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[16] Some courts also look to the nature of the claim. We are limiting our discussion, however, to the kind of claim asserted in this case—a claim of unlawful exclusion from a position with religious functions.

[17] The Fifth Circuit also looks to whether the person is hired based on religious criteria and whether the person is authorized to perform "ceremonies of the Church." *Starkman*, 198 F.3d at 176. But "probably [the] most important" criterion is that the person performs "religious duties." *Id* at 176-77.

that the state would have the authority to tell the church who may teach its religion to the young.

The First Amendment's protection of beliefs is absolute. *See Smith*, 485 U.S. at 670 n. 13 (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)). The state may not dictate what a church and its members may believe. The teaching of a church's faith—and, in particular, its transmission to the next generation—is essential to the preservation of the faith. So, too, is the leading of young children in prayer and worship. These activities, therefore, are no less deserving of absolute protection than the beliefs themselves. "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction . . . ." *Larkin*, 459 U.S. at 126 (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 625 (1971)).

If the government can control *who* transmits religious beliefs to the young—through religious instruction and worship—then it can control *what* religious beliefs are transmitted and *how effectively* they are preserved. In short, deciding who will transmit the church's teachings to the young lies at the core of the church's mission and falls well within the area in which the church enjoys maximum protection from state interference. *See Catholic Bishop*, 440 U.S. at 501 ("[W]e have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school."); s*ee also Minker*, 894 F.2d at 1356 ("[D]etermination of 'whose voice speaks for the church' is *per se* a religious matter.").

In this case, a formally commissioned Minister of Religion taught religion classes four days a week, led students in daily devotional exercises, led students in prayer three times a day, attended a chapel service

with her students each week, and led a school-wide chapel service twice a year. Whether or not she had other duties that were secular, these duties were religious under any test. That is enough to trigger the exception. For the church, not the state, must have the final say on whether she may perform these functions.

III. THE RIGHT OF RELIGIOUS INSTITUTIONS TO EXCLUDE A PERSON FROM MINISTRY IS ABSOLUTE.

This case presents the question whether the Hosanna-Tabor Evangelical Lutheran Church and School can be sanctioned for removing a person from her position in church ministry—whether, in other words, its decision *to exclude a person from ministry* is subject to challenge *by that person*. There is no injured third party before the court—only the church and a litigant who has given her "implied consent to [church] government, and [is] bound to submit to it." *Watson*, 80 U.S. at 728. The real parties in interest to the case are the parties to the church-minister relationship itself—a relationship that is protected by the First Amendment—and the dispute between them is whether that relationship can be imposed by the state upon an unwilling church.[18] In such a case, we submit, the protection of the First Amendment is unqualified and absolute. The aggrieved party in such a case may have resort to church law and remedies, but the meaning of the First Amendment is that resort may not be had to a civil court—because such disputes lie exclusively within the province of the church, not the state.

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[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.

A. "Balancing" the Right to Exclude a Person from Ministry Against State Interests Mistakes the Nature of the Right.

There is no occasion in a case such as this to "balance" the church's interest against the asserted interest of the state. The appropriate metaphor in a case like this is, indeed, a wall, not a scale. The nature of the right, after all, is one of autonomy—the right of the church to decide for itself who it wants to serve as a minister. It may make that decision for doctrinal reasons that are contrary to prevailing secular values; it may make that decision for reasons that appear "arbitrary" or inconsistent with "due process" and "secular notions of 'fundamental fairness'" or in furtherance of what secular institutions deem "impermissible objectives." *Milivojevich*, 426 U.S. at 714-15. The reason for the decision is beside the point. The point is that under our constitutional structure *who* decides the question is more important than *what* is decided or *why*. For a civil court, therefore, to second-guess the church's decision to exclude a person from *its* ministry is indefensible, regardless of how offensive the church's decision might appear to civil authorities.

The point can be seen most clearly in a case in which the church's decision is undeniably based on an articulated religious reason. Consider this case:

- A woman who aspires to the priesthood sues the Catholic Church for sex discrimination when she is denied admission to a Catholic seminary. "Balancing" the secular interest in eliminating sex discrimination against the church's religious freedom is incoherent. It would invite a civil court to weigh the

> importance of the church doctrine that limits the priesthood to men on the same scale with the state's general interest in assuring equal employment opportunities for women, when the resolution to the case lies in the recognition that the church, not the state, has the right to decide.

The point—that the church has the right of decision—is also obvious when its decision is based on disputed religious teachings:

- An Episcopal priest in a same-sex relationship is denied a position as pastor of a local Church, because the members of the local governing body believe that relationship to be contrary to Biblical teaching. The priest sues for discrimination on the grounds of sexual orientation, pointing out that the local bishop had chosen to allow same-sex unions. Any difference in interpretation of Scripture should obviously be left to the church to resolve. As between the church and the state, the right of decision remains with the church.

The church's right to decide for itself who may serve as its minister applies with equal force when there is a dispute over whether a stated religious reason was a pretext, and even when the reason is not explicitly religious at all—because the minister's function is itself religious, even if the reason for excluding someone from that function is not.[19]

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[19] *See, e.g.*, *Roman Catholic Diocese*, 213 F.3d at 801 ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'") (citation omitted);

- A male religion teacher in a Catholic elementary school is fired on the stated ground that he is living with his girlfriend in contravention of church teaching. He alleges that this was a pretext for unlawful sex discrimination by a principal who simply preferred female teachers.
- A church pastor removed from his position on grounds of general ineffectiveness claims that the asserted grounds were but a pretext for discrimination on the basis of race, which is itself condemned by the church.

In resolving the question of pretext in the first of these two cases, the court would presumably have to assess not only what the church's teaching is on premarital sex, but also how important the teacher's adherence to that teaching is to the accomplishment of the church's educational mission, how consistent the local church school had been in sanctioning teachers for non-compliance, and, indeed, whether living together without proof of illicit sexual activity presents an issue of morality or scandal. This Court, however, has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)); *see also Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*,

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Alicea-Hernandez, 320 F.3d at 703 ("It is . . . not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment . . . . [T]he only question is that of the appropriate characterization of her position."); *Bell v. Presbyterian Church*, 126 F.3d 328, 332-33 (4th Cir. 1997) (termination of minister allegedly for fiscal reasons not subject to civil court review).

393 U.S. 440, 449, 451 (1969) (noting that courts are "forbidden" from "interpreting and weighing church doctrine," and that when courts intrude into ecclesiastical matters, "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern").

In the second case, the court would be required to assess the pastor's religious duties, how they should be performed, and how effectively he performed them: Were his sermons inspiring? How well did he lead the flock? One can readily see that these inquiries would themselves be intrusive. As in *Catholic Bishop*, "[i]t is not only the conclusions that may be reached . . . 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.

Even apart from the intrusiveness of the inquiry, there are serious questions whether a civil court would be competent to assess church teachings or the effectiveness of a pastor's leadership. As this Court has stated, civil courts are "incompetent judges of matters of faith, discipline, and doctrine." *Watson*, 80 U.S. at 733-34. And putting competence aside, imposition of a civil court's judgment would be harmful to the church no matter how sound the judgment may be. If a court were to determine that the church had been inconsistent in enforcing a particular teaching in a particular context, that would undermine the church's ability to safeguard and control its teaching.

The profound risk is that the church's very "process of self-definition would be shaped in part by the prospects of litigation." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987).

The danger to the church is compounded by the fact that a jury deciding these questions might be influenced by bias. Unpopular churches are particularly vulnerable to this risk. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

Even assuming competence and the absence of bias, the risk of an erroneous decision can never be eliminated: juries will sometimes be wrong, especially if they need only decide a case by a preponderance of the evidence. And the prospect of intrusive and costly litigation that distracts from the church's mission, as well as the possibility of losing, would be strong deterrents for churches deciding whether to remove someone from ministry.

As a practical matter, therefore, allowing these cases to be litigated in civil courts would severely inhibit churches in making decisions about who may serve in ministry. But even if one discounts the intrusive nature of the inquiry, the questions of competence and bias, and the possibility of error, the fact remains that the decision to be made is whether a person may serve in a position with religious duties—and that decision under our constitutional scheme must be reserved to the church. In ordinary civil matters, we accept the burdens of litigation and the possibility of human error because we have no real choice—and because in the context of civil disputes the Constitution places a value on trial by jury. In cases involving constitutional rights, we employ additional safeguards like independent review

to minimize the risk of bias and error, while still recognizing the value of trial by jury in assessing credibility and making basic factual determinations. But in cases involving whether a person may serve as a minister of a church, the Constitution places the decision-making authority in the church itself.

For this reason, the church's absolute right to decide who may serve as a minister remains inviolable even when it decides to exclude someone for a concededly improper reason that finds no apparent justification in any church teaching or practice—or, indeed, when the church has purportedly acted inconsistently with its underlying beliefs. In such a case, the person wrongfully denied a ministerial position must seek relief and reform within the church that she seeks to serve, not from the state. For the state can provide neither relief nor reform without trespassing on the overriding principle that internal church affairs are to be governed by the church itself.

B. In Any Event, the State Categorically Lacks Any Interest, "Compelling" or Otherwise, in Gainsaying the Decision of a Religious Institution to Exclude a Person from Ministry.

Even were one to apply a "compelling state interest" test to cases like this, the outcome would always be the same. The state has no legitimate interest, compelling or otherwise, in trespassing on a church's right to select its ministers.

To the contrary, the state itself has a particular interest in vindicating the constitutional principle at stake in cases such as this, because the principle exists for the protection of the state as well as the church. It protects the state against the imposition of religious tests for state office, no less than it protects

the church from the imposition of secular tests for ministerial positions. It "prevent[s], as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch*, 465 U.S. at 672. In this case, then, the state's interest is aligned with the church's in maintaining the dividing line between church authority and state authority. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling . . . .'") (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

The state's general interest in eliminating employment discrimination would not satisfy the compelling state interest test in any event. As this Court emphasized in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006), strict scrutiny requires a "more focused" inquiry. In cases applying the compelling interest test, "this Court [has] looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. The compelling interest test "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'"—here, that there is a compelling interest in applying the ADA to this church's employment of this "called" teacher of religion. *Id.* at 430.[20]

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[20] The Court was quoting the Religious Freedom Restoration Act, but it made clear that that Act "expressly adopted the compelling interest test 'as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),'" two

"'Context matters' in applying the compelling interest test." *Id.* (quoting *Grutter* v. *Bollinger,* 539 U.S. 306, 327 (2003)). The context here is that of a church seeking to determine who may serve as its minister, and that context makes all the difference. The government has no legitimate interest—and certainly no compelling one—in second-guessing a church's exclusion of a person from ministry. The government has an interest in enforcing principles of equality *in secular employment*, but it has no comparable interest in imposing its notions of equality upon a church *in the selection of its ministers*.

The importance of context in applying anti-discrimination laws was explicitly noted in this Court's opinion in *Dale*. There the Court explained that in its prior associational freedom cases, it had "recognized . . . that States have a compelling interest [in general] in eliminating discrimination against women in public accommodations." 530 U.S. at 657. But that did not resolve the question in those cases. Rather, the Court noted in *Dale*, "after finding a compelling state interest, the Court [in those prior cases] went on to examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association." *Id.* at 658-59. In the prior cases cited, the Court explained, it had found no serious burden. *Id.* But in *Dale* itself, there was such a burden, and the Court held unequivocally that the state's general interest in eliminating discrimination did not justify its enforcement against the Boy Scouts:

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cases that applied the compelling interest test to Free Exercise claims. *Gonzales*, 546 U.S. at 431 (citation omitted).

> The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Id. at 659.

To the extent that courts applying the "ministerial exception" have engaged in any balancing at all, they have uniformly reached a similar conclusion—that "the Government's interest in eliminating employment discrimination is insufficient to overcome a religious institution's interest in being able to employ the ministers of its choice." *Catholic Univ.,* 83 F.3d at 467-68; *accord Minker*, 894 F.2d at 1357 ("certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests"); *Rayburn*, 772 F.2d at 1169 ("While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs."); *Powell v. Stafford,* 859 F. Supp. 1343, 1347 (D. Colo. 1994) ("[A]lthough the government has an interest in eradicating age discrimination, it is not compelling in light of the fundamental right of a church to determine who may be trusted with the spiritual function of teaching its ecclesiastical doctrine under the free exercise clause.").[21]

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[21] *See* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 653 (2001) ("When the state's position on the matter can prevail only by

In short, however weighty the state's interest might be in eliminating discrimination or retaliation when it comes to employment of workers in the secular arena, the state never has a compelling interest in sanctioning a church, under the rubric of "discrimination" or otherwise, for excluding a person from ministry.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

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significantly undercutting a . . . group's ability to carry out its expressive or otherwise constitutionally protected mission, one cannot automatically assume that the state's condemnation of the contested practice as 'discrimination' furnishes a compelling justification sufficient to negate the liberty of the . . . group.").