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 *AMICI CURIAE* OF PROFESSOR EUGENE VOLOKH, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, QUEENS FEDERATION OF CHURCHES, NATIONAL ASSOCIATION OF EVANGELICALS, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

RICHARD W. GARNETT
Notre Dame Law School
3164 Eck Hall of Law
Notre Dame, IN 46556
(574) 631-6981

K. HOLLYN HOLLMAN
MELISSA ROGERS
Baptist Joint Committee
200 Maryland Ave., NE
Washington, D.C. 20002
(202) 544-4226

KIMBERLEE WOOD COLBY
Christian Legal Society
8001 Braddock Rd., Ste. 302
Springfield, VA 22151
(703) 894-1087

THOMAS C. BERG
Counsel of Record
University of St. Thomas
School of Law
MSL 400 1000 LaSalle Ave.
Minneapolis, MN 55403
tcberg@stthomas.edu
(651) 962-4918

CARL H. ESBECK
R.B. Price Professor of Law
University of Missouri
203 Hulston Hall
Columbia, MO 65211
(573) 882-6543

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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INTEREST OF *AMICI CURIAE*[1]

Eugene Volokh is Gary T. Schwartz Professor of Law at the University of California-Los Angeles School of Law. He is the author of several law review articles on the Religion Clauses and on expressive association rights, as well as the textbook *The First Amendment and Related Statutes* (Foundation Press, 4th ed. 2011).

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with chapters in most states and at numerous law schools.

The **National Council of the Churches of Christ in the USA** ("NCC") is a community of 35 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations. The NCC is an active defender of religious liberty, which it believes is served in the protection of the church's autonomy to select its religious leaders and teachers.

The **Baptist Joint Committee for Religious Liberty** serves 15 cooperating Baptist conventions and conferences in the United States, and is

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[1] The parties consented to the filing of this brief through consent letters filed with the Clerk of the Court. Neither a party nor its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made a monetary contribution.

supported by thousands of congregations across the nation. It focuses exclusively on the issues of religious liberty and the separation of church and state, and believes that vigorous enforcement of both the Establishment Clause and the Free Exercise Clause is essential to securing religious liberty for all Americans.

The **Queens Federation of Churches, Inc.**, is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. The Queens Federation of Churches believes that the congregation's selection of its own leaders and teachers is based on a call from God and may not, under religious liberty principles, be subject to regulation, definition or second-guessing by secular government.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States.

SUMMARY OF ARGUMENT

This case is about the separation of church and state, an arrangement that is sometimes misunderstood and whose scope is debated, but which is nevertheless a critical dimension of the religious freedom reflected in, and protected by, the First Amendment to our Constitution. For nearly a thousand years, the tradition of Western constitutionalism and the project of protecting political freedom by marking boundaries to the power

of government have been assisted by the principled commitment to church-state separation, correctly understood. A community that respects – as ours does – both the importance of, and the distinction between, the spheres of political and religious authority is one in which the fundamental rights of all are more secure; a government that acknowledges this distinction, and the limits to its own reach, is one that will more consistently protect and vindicate the liberties of both individuals and institutions.

As we describe in this brief, the religious-freedom-protecting principle of church-state separation – from the time of Becket to Blackstone, to Benjamin Franklin, to today – has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines. This autonomy has been recognized and vindicated in a long line and wide array of this Court's decisions, and is entirely consistent with the appropriate exercise of the civil authorities' regulatory powers.

The "ministerial exception," at issue in this case, is a clear and crucial implication of religious liberty, church autonomy, and the separation of church and state. Reasonably constructed and applied, the ministerial exception not only helps civil decision-makers to avoid becoming entangled in essentially religious questions; it also, and even more importantly, protects the fundamental freedom of religious communities to educate and form their members. Although this may prevent individuals in

some cases from suing for discrimination, it rests on the overriding principle that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach. The civil authority lacks "competence" to intervene in such matters, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdictional power.

We propose an approach that is appropriately protective of the vital interests and values that are at stake. As we explain, the scope and application of the ministerial exception should be animated and guided by its purposes, by our historical experiences with disputes over the selection of religious leaders, and by the practical realities of litigation. The proposed approach is significantly, but not absolutely, deferential to religious organizations' characterization of their employees' duties as ministerial. Given our country's religious diversity, the wide variety of religious organizations and institutions, and the complexity of the modern regulatory state, a one-size-fits-all rule is neither necessary nor appropriate. In this case, the Court need not identify with precision or finality the exception's outer boundaries.

This case should be a straightforward and simple one, as it involves, without question, an employment position that is ministerial. Under the presumptive-deference approach we propose, a "called" Lutheran teacher with religious-education duties in a mission-oriented school integrating faith and learning is easily covered by the ministerial

exception. It should be remembered that at any point in time any given religious community is a mere generation away from extinction, and that teachers in religious schools are commonly on the front line of conveying the faith to children and forming them morally. Given our nation's deeply rooted commitments to religious freedom and church-state separation, an employment-related lawsuit in a civil court is not a permissible vehicle for second-guessing a religious community's decision about who should be responsible for keeping the next generation.

ARGUMENT

I. The Ministerial Exception Follows Directly From The Institutional Separation Of Church And State, A Deeply Rooted American Constitutional Tradition.

The separation of church and state is controversial in some of its applications, but there is long tradition and broad consensus in favor of at least institutional separation. The institutions of the state are distinct from the institutions of the church, and neither can exercise the functions of the other. The "establishment" of religion means not just sponsorship or financial support, but also "active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). In this brief, *amici* elaborate on that principle and its implications for this case.

Over the centuries Western civilization has developed what Princeton historian John Wilson calls

the "two authority structure between church and state."[2] "[S]ince the fourth century Western civilization has presupposed that there are not one but two sovereigns. Each has a jurisdiction of legitimate operation, and while there are areas of shared cognizance, there are other subject matter areas in which each is noncompetent to perform the tasks of the other." Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1392. Thus, "when the civil state overreaches and performs a task within the sole province of the church, or misguided officials attempt to delegate an exclusive state function to the church, the boundary between church and state is transgressed." *Id.*

This differentiation between the institutions of church and state has become a part of the American constitutional tradition. Separation in this sense is an important First Amendment value. Americans have concluded that "[a] jurisdictional separation of the two authorities of church and state best facilitates healthy churches and a republic free of civil strife over religious doctrine." *Id.* at 1497.

Institutional separation of church and state means that the law may not delegate core governmental functions to churches. See, e.g., *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982) (striking down delegation to churches of "discretionary

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[2] John F. Wilson & Donald L. Drakeman, eds., *Church and State in American History: Key Documents, Decisions, and Commentary from the Past Three Centuries* 10 (3d ed. 2003). See *id.* at 1-12.

governmental power" to reject an applicant for a liquor license). This case involves the complementary principle: Government may not insert itself into controversies over the ecclesiastical decisions of religious organizations, in particular disputes over the selection and supervision of ministers.

This Court has long recognized that a key component of religious freedom and church-state separation is the autonomy of religious organizations over matters of governance and doctrine. See *Watson v. Jones*, 80 U.S. 679, 728-29 (1872) (noting "unquestioned" right in America of "voluntary religious associations" to decide "controverted questions of faith" and matters of "ecclesiastical government"); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (holding that the First Amendment guarantees "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").

A religious organization's autonomy rests in both Religion Clauses of the First Amendment; in this area, the two clauses overlap and reinforce each other. This Court, in limiting government intervention into internal church disputes, has frequently relied simply on "the First Amendment" or "the Religion Clauses." See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724 (1976) ("the First and Fourteenth Amendments"); *NLRB v. Catholic Bishop*, 440 U.S. 490, 504, 499 (1979) ("the First Amendment"

and "the Religion Clauses"); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449-51 (1969) ("the First Amendment"). In *Kedroff*, the Court held that a statute transferring institutional authority and property in the Russian Orthodox Church "violate[d] our rule of separation between church and state" as well as "the free exercise of religion." 344 U.S. at 110, 119. The Establishment Clause is equally relevant, for—as we discuss *infra* pp. 10-18—a common feature of establishments of religion was government interference with churches' choice of clergy, including those in the established church. This Court's Establishment Clause decisions speaking of church-state separation repeatedly emphasize that it protects religious communities as well as the body politic. See, e.g., *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) ("[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."); *Engel v. Vitale*, 370 U.S. 421, 429, 431, 435 (1962) ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.").

In sum, the "separation of church and state" in our tradition "denote[s] a structural arrangement involving institutions, a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government." Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like*

the Boy Scouts?, 22 St. John's J. Leg. Comm. 515, 523 (2007).

The ministerial exception is just one manifestation of the tradition of institutional separation and institutional religious freedom. See Pet. Br. 15. But it involves a crucial principle in the tradition: government may not interfere with religious institutions in controversies concerning their selection and supervision of leaders and religious teachers.[3] The following two sections show: (A) that decisions over religious leadership have been central to the development of institutional church-state separation throughout Western history; and (B) the principle of institutional separation supports a strong ministerial exception.

A. A Crucial Component of Institutional Church-State Separation is that Government Should Not Interfere in Disputes over a Religious Institution's Selection and Supervision of Ministers.

The ministerial exception bars any lawsuit by an employee "the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska v. Gannon*

[3] The facts of this case do not involve a position subsidized with government funding. If it did, such funding would change the legal equation for some *amici*. For example, *amicus* Baptist Joint Committee objects to the use of government funding to subsidize positions restricted by religion, including any position to which the ministerial exception applies.

University, 462 F.3d 294, 307 (3d Cir. 2006); see *infra* pp. 19-23. By barring plaintiffs from seeking reinstatement or damages for alleged discrimination or from bringing similar claims, the exception prevents civil judges or juries from undermining religious institutions' ability to choose and supervise their leaders. This ability is of fundamental importance, as history and case law show.

1. The Historical Development of Religious Freedom and Disestablishment

The right of religious organizations to select and supervise their leaders has been vital to the development of institutional religious freedom. Virtually every major advance in that tradition has stemmed from some conflict over the government's intervention in this important area of decision-making.

The first such significant conflict in European civilization was the investiture controversy of the 11th and 12th centuries, in which popes and monarchs fought over who would have authority to appoint Catholic bishops. See Brian Tierney, *The Crisis of Church & State 1050-1300* (1964). Pope Gregory VII excommunicated German emperor Henry IV over the issue until Henry pleaded for forgiveness in a blizzard at the Pope's Alpine fortress of Canossa. The clash broke out again but was settled in 1122 by a compromise that left the church considerable power: "the emperor guaranteed that bishops and abbots would be freely elected by the church alone," although

he retained the right to invest them with their rights of temporal property. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 98 (1983). In England, the famous conflict between King Henry II and Archbishop Thomas Becket, which culminated in Becket's murder, also stemmed from, among other things, the king's assertion of power to appoint bishops. See Leo Pfeffer, *Church, State & Freedom* 18 (rev. ed. 1967).

Because each side in these disputes prevailed only in a limited area—popes over spiritual offices, kings over temporal matters—the result was a "duality" of jurisdictions that "profoundly influenced the development of Western constitutionalism." Tierney, *supra*, at 2. "The very existence of two power structures competing for men's allegiance instead of only one compelling obedience greatly enhanced the possibilities for human freedom." *Id.* Although Gregory VII asserted broad papal supremacy over civil rulers, what he secured was "the independence of the church from secular control" in ecclesiastical matters like clergy selection. Berman, *supra*, at 87. This established the "principle that royal jurisdiction was not unlimited . . . and that it was not for the secular authority alone to decide where its boundaries should be fixed." *Id.* at 269; see Garnett, *supra*, at 524-25. Freedom to select religious leaders has been a landmark in the development of limited government in the West. By setting the precedent for limited government, institutional religious freedom has promoted political as well as religious liberty for all, believers and nonbelievers.

Early Protestantism, in struggling with the Catholic Church, often sought assistance from civil rulers, sometimes to the point of letting them control clergy selection and other important religious functions. In the Church of England, the most familiar example of an establishment to the American founders, the government appointed (and still appoints) the Archbishop of Canterbury and other leading clerics. See William Blackstone, *Commentaries on the Laws of England* ch. 11 (1979 ed.). English civil rulers exercised many other controls as well: the monarch was official head of the church and had the power to punish heresies, and Parliament enacted the Thirty-Nine Articles (the church's doctrinal tenets) and the Book of Common Prayer, requiring for many decades that most ministers pledge conformity to them. Michael W. McConnell et al., *Religion and the Constitution* 15 (2d ed. 2006).

In rejecting a national establishment of religion, Americans rejected any role for the federal government in choosing church leaders. The First Amendment simply confirms this renunciation. In 1783 the Vatican proposed an agreement with Congress to approve a Bishop-Apostolic for America now that the new states were outside English authority. Benjamin Franklin, who received the proposal as ambassador to France, replied that "'it would be absolutely useless to send it to the congress, which . . . cannot intervene in the ecclesiastical affairs of any sect.'" Anson Phelps Stokes, *Church and State in the United States* 478 (1950) (quotation omitted). The proposal triggered political opposition because

the bishop would be French, not American. Congress was urged to reject the appointment on that theologically neutral, "secular" ground. Instead it responded that it had "'no authority to permit or refuse'" the appointment, and the Pope could appoint whomever he wished, because "'[t]he subject . . . being purely spiritual, it is without the jurisdiction and powers of Congress.'" *Id.* at 479 (quotation omitted). This hands-off attitude toward the ministerial selections of any church "was of vital importance to all subsequent American history." *Id.*

Leading founding-era proponents of church-state separation understood it to protect religious institutions' autonomy, especially concerning clergy selection. Baptists and other dissenting groups who fought against religious establishments in New England and the southern colonies did so largely to preserve the autonomy of religious organizations from government interference and manipulation. Isaac Backus, the leading voice among Massachusetts Baptists, emphasized dual authorities in *An Appeal for Religious Liberty* (1773), which has been described as "the best exposition of the eighteenth century pietistic concept of [church-state] separation." William G. McLoughlin, *Isaac Backus and the American Pietistic Tradition* 123 (1967). According to Backus, "God has appointed two kinds of government in the world which are distinct in their nature and ought never to be confounded together": civil and ecclesiastical government. *An Appeal to the Public for Religious Liberty* (1773), reprinted in William G. McLoughlin, *Isaac Backus on Church, State, and Calvinism* 309, 312 (1968). From this distinction,

Backus directly drew implications concerning the appointment of leaders in each institution. The determination of the "offices of civil government is left to human discretion," but "in ecclesiastical affairs we are most solemnly warned not to be subject to ordinances after the doctrines and commandments of men." *Id.* at 313. God "has always claimed it as his sole prerogative to determine by express laws what his worship shall be, *who shall minister in it*, and how they shall be supported." *Id.* (emphasis added).

James Madison viewed the principle as forbidding government involvement in churches' internal affairs, especially clergy selection. His first recorded pronouncement on religion and government was an impassioned denunciation of colonial Virginia's licensing of preachers. Letter from James Madison to William Bradford, Jan. 24, 1774, in James Madison, *Writings* 5, 7 (Jack N. Rakove ed. 1999) (referring to the "diabolical Hell conceived principle of persecution"). In vetoing a bill specially incorporating an Episcopal church in the District of Columbia, President Madison objected that the bill enacted "sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehending even the election and removal of the Minister of the same, so that no change could be made therein* by" the congregation or the denomination. Message to Congress, 27 Annals of Cong. 982-83 (Feb. 21, 1811) (emphasis added). For Madison, too, recognition of authority to choose clergy went hand in hand with recognition of religious autonomy.

Thomas Jefferson also saw church-state separation as guaranteeing church autonomy. In 1804, two years after his famous letter to the Danbury (Connecticut) Baptists endorsing a constitutional "wall of separation," Jefferson wrote another letter, this time to the Ursuline Sisters of New Orleans, who operated a school for orphaned girls. The order's prioress had written asking for assurance that the Louisiana Purchase would not undermine their legal rights. Jefferson replied: "[T]he principles of the constitution and government of the United States are a sure guarantee that [your property] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules, without interference from the civil authority." Quoted in 1 Stokes, *supra*, at 678 (assuring that "your [institution] will meet all the protection which my office can give it"). Jefferson's powerful quote affirming institutional autonomy also encompasses the right of a religious school to select its own leaders, although it does not mention it explicitly.

State religious establishments, some of which continued after the First Amendment, included among their features control over the selection and conduct of clergy; and protests against such controls were essential to the successful fights for religious freedom and disestablishment. Under the establishments of religion in New England and the southern colonies, civil authorities regulated the conduct of clergy in the established church and at first prohibited, then licensed, religious teachers from dissenting sects.

Some regulations of preachers had explicitly theological criteria;[4] others, however, did not but nevertheless imposed serious burdens. For example, in Virginia, licenses only allowed named persons to preach in designated places—requiring multiple applications and seriously burdening the Baptist practice of itinerant teaching and evangelization. See H. J. Eckenrode, *Separation of Church and State in Virginia: A Study in the Development of the Revolution* 37-39 (reprint 1971) (1910); James, *supra,* at 13, 26-38, 41. In New England, controversies focused on whether dissenting clergy would be exempt from paying general taxes (as were Congregational clergy) and whether dissenting groups would be exempt from paying religious, i.e. clergy-support, taxes. Many Baptists and "separate" Congregationalists—both intensely evangelical groups—believed that personal religious conversion was more important for a preacher than professional training. William G. McLoughlin, *New England Dissent: 1630-1833* 351 (1971) (hereinafter *"NED*"). Contrariwise, establishment proponents believed that religious teachers should be professionally educated, and both Connecticut and Massachusetts reacted by passing laws in the mid-1700s "preventing any church or parish from choosing a minister who lacked a college degree." *Id.* at 363; see also Jacob C. Meyer, *Church and State in Massachusetts* 51 (1930). Such laws "embittered" Baptists and led them in 1773 to

[4] For example, Virginia tried preachers in the 1720s for "speaking against the canons of the Church of England." Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* 13 (1900).

begin a "massive civil disobedience" campaign against religious taxes. 1 McLoughlin, *NED* at 546.

Finally, and significantly, the "death blow" to the Massachusetts establishment came because of distress at civil authorities overriding churches' choices concerning clergy. Sanford H. Cobb, *The Rise of Religious Liberty in America* 515 (1970 reprint) (1902). In this instance the issue arose from Massachusetts's rule allowing each local majority to determine which religious leader would receive the proceeds of clergy taxes (subject to dissenters' opt-outs). By the early 1800s, more and more Congregational parishes split between Trinitarians and the growing Unitarian movement. In several cases, one side constituted the majority in the church, the other the majority in the town (or "parish"). The Supreme Judicial Court ruled that the town's vote controlled which clergy member would occupy the "First Church" and receive tax funds. *Burr v. Inhabitants of First Parish in Sandwich*, 9 Mass. 277, 297-98 (1812); *Baker v. Fales*, 16 Mass. 488, 520-22 (1820).

In the key case, *Baker*, the majority of voters in the town of Dedham called a Unitarian minister, but the majority of church members objected and withdrew, taking records, liturgical materials, and trust funds with them. 2 McLoughlin, *NED* at 1190. When the court ruled that the town's vote—the civil determination—controlled, the previously dominant Trinitarians suddenly found themselves on the losing side. Within a few years they "conclude[d] that a religious establishment was no longer workable . . .

[and] that disestablishment was necessary to protect the church against the control of the nonchurched." Steven K. Green, *The Second Disestablishment: Church and State in Nineteenth Century America* 143 (2010). See 2 McLoughlin, *NED* at 1196 (*Baker* "produced the final and fatal crack in the [Massachusetts establishment].")

Under *Baker*, "the secular (non-members) citizens could overrule the communicants (the members) of the church. This was the system of Erastianism from which the original Puritan founders of Massachusetts had fled to the New World—the state as superior to the church." William G. McLoughlin, *Soul Liberty: The Baptists' Struggle in New England, 1630-1833* 299 (1991). As we will elaborate, the ministerial exception aims to prevent the very same harm: a civil body, jury or judge, overruling the selection of minister made by the religious organization's authorities.

2. This Court's Decisions

Given the importance of clergy selection in our tradition of religious institutional autonomy, it is unsurprising that this Court has repeatedly forbidden the government from interfering in religious institutions' decisions concerning the selection and supervision of leaders. *Kedroff*, 344 U.S. 94, invalidated a state statute that transferred authority and property in the Russian Orthodox Church from the Moscow Patriarch to an American convention. The Court held that the state had trespassed on "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." *Id.* at 115. Likewise, *Milivojevich*, 426 U.S. 696, invalidated a state court decision that overturned the Serbian Orthodox Church's defrocking of its American bishop. This Court held that civil courts must accept the decision of a hierarchical church's tribunal in "disputes over the government and direction of subordinate [church] bodies," *id.* at 724-25, including clergy selection and discipline. Finally, *Gonzalez v. Catholic Archbishop*, 280 U.S. 1 (1929), states that "[b]ecause the appointment [of a Catholic chaplain] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id.* at 16 (secular courts must accept "decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights").

B. The Ministerial Exception Follows Directly from the Principle that the State May Not Interfere in Decisions Concerning the Selection or Supervision of Ministers.

The ministerial exception follows directly from the principle that religious organizations should control the selection and discipline of ministers. The exception bars any claim by an employee "the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F.3d at

307; *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008).[5] Unquestionably, a nondiscrimination suit seeks to override the church's decision concerning such ministerial personnel. The threatened government action is especially intrusive when the plaintiff seeks a court order reinstating her to the position—the "presumptively appropriate remedy" under Title VII (*Rweyemamu v. Cote*, 520 F.3d 198, 205 (2d Cir. 2008)), and one that Perich sought here. In that case the court is literally appointing a minister. But an award of damages (including back pay, emotional-distress, punitive damages and attorney's fees) is also highly burdensome; it operates as a tax on protected decisions concerning ministerial personnel. As this Court has recognized, "[f]ear of potential liability [for employment discrimination] might affect the way an organization carried out what it understood to be its religious mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

Ministerial-exception decisions recognize why selection of leaders has historically been so sensitive for religious organizations:

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[5] The absolute bar to liability erected by the ministerial exception applies to lawsuits between the minister and the religious organization; the essence of these cases is a dispute over the organization's right to select ministers. In some other cases, by contrast, a religious organization's selection or supervision of ministers comes into question only as a secondary issue in a suit by a third party: for example, in suits seeking to hold the organization liable for acts of abuse committed by one of its ministers. This Court need not say anything regarding the appropriate standard for liability in third-party suits concerning ministers' conduct.

> A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise. As the Fifth Circuit explained: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." "Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."

Petruska, 462 F.3d at 306 (quoting *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972)).

Like religious institutional autonomy in general, see *supra* pp. 7-9, the ministerial exception rests on both Religion Clauses. The first ministerial-exception case, *McClure*, held that application of nondiscrimination laws violated the Free Exercise Clause. 460 F.2d at 560. But it added that even the process of court intervention and investigation "could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." *Id.* See Pet. Br. 29-32 (cataloging cases relying on free exercise and nonestablishment).

As petitioner argues, one ground for the ministerial exception is that nondiscrimination suits will frequently call on civil courts to make essentially theological judgments about whether the plaintiff was suited for a religious leadership role or performed it well. See Pet. Br. 29-31. Nondiscrimination suits typically turn on questions of "pretext": the employer asserts that it discharged the plaintiff for a nondiscriminatory reason, and the plaintiff challenges that reason as a pretext for discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). In cases involving personnel with important religious functions, the organization's asserted nondiscriminatory motive will usually be religious in nature or have religious implications. To decide whether the organization's assertion of a religious motive is credible, judges and juries inevitably will have to examine it closely; they will have to second guess "[a] church's view on whether an individual is suited for a particular clergy position." *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000); see also Pet. Br. 52-58 and cases cited therein.

The court of appeals found this concern was inapplicable here: "Perich's claim would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich." Pet. App. 24a. But that argument fails—and the ministerial exception remains applicable—for at least three reasons.

1. First, the ministerial exception is not designed merely to keep courts from deciding contested theological questions. The exception protects the distinct interest that religious organizations are free to choose their leaders. The question who will give spiritual leadership to the organization is a "matte[r] of church government," *Kedroff*, 344 U.S. at 116—of "prime ecclesiastical concern," *McClure*, 460 F.2d at 559—whether or not a civil court's interference includes an explicit theological ruling. If a court reinstates a minister over the church's objection or imposes a damage award for the church's decision, the result is no less harmful because it comes from the application of a doctrinally neutral rule. For this reason, most courts applying the ministerial exception hold that it is not contingent on the church identifying a rationale in "church doctrine or ecclesiastical law" for its employment action. See *Petruska*, 462 F.3d at 307; *id.* at 304 n.7 (ministerial exception "protects the act of a decision rather than a motivation behind it") (quoting *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)); see also Pet. Br. 24-25 and cases cited therein; Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 Geo. J. L. & Pub. Pol'y 165, 172-76 (2009).

Case law confirms that government interference with clergy decisions is barred independent of the presence of theological questions. See *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (state may not intervene "in controversies over religious authority or dogma") (emphasis added);

Watson, 80 U.S. at 733 (barring civil courts from matters of "ecclesiastical government" as well as "theological controversy").

As the history in part I-A shows, government can trigger the harms that the Religion Clauses seek to avoid—coercion, division, government overreaching—simply by overriding a church's decision on who is suitable to be its minister. Under the Massachusetts voting scheme for clergy taxes (see *supra* p. 17), the majority of town voters did not need to state a theological rationale for selecting one clergyman for the "First" church; they could choose based on any factor. Nevertheless the distress caused when town voters overrode church members' wishes was enough to end the Massachusetts establishment. Both Virginia's limit on the number of places where a minister could be licensed to speak (*id.* at 16) and Massachusetts' requirement of college training for ministers (*id.*) were formally neutral among theologies and called for no doctrinal determination. Nevertheless Virginia's jailing of unlicensed itinerant preachers provoked Madison to charge "persecution," (*id.* at 14) and the Massachusetts education requirement embittered the Baptists enough to drive them into "massive civil disobedience." *Id.* at 17.

2. In addition, even if the government claims to rest on religion-neutral principles in overriding a church's choice of minister, this claim frequently turns out to be wrong. Indeed, questions that might seem facially nonreligious take on a religious coloration in a dispute between a religious

organization and one of its ministers. Again, case law and history teach this lesson.

For example, in *Milivojevich* the Illinois Supreme Court, in overturning the bishop's defrocking, had "relied on purported 'neutral principles' . . . which would 'not in any way entangle this court in the determination of theological or doctrinal matters.'" 426 U.S. at 721 (quotation omitted). Nevertheless, this Court found, the state court entangled itself in religious questions by "substitut[ing] its interpretation" of the church's constitutions "for that of the [church's] highest ecclesiastical tribunals." *Id.* The pattern repeats throughout history. Requiring college education for ministers could be defended as a theologically neutral means to ensure formal schooling behind their preaching. But in practice it implicated the deep division between Congregationalists and Baptists over the relative importance of formal learning and personal religious experience.

This case exemplifies how theological or religious issues are almost impossible to avoid in cases involving employees with spiritual duties. When Hosanna-Tabor School declined to let Perich return from her leave in the middle of the school semester, she responded by threatening to sue and behaving in other ways that the principal regarded as confrontational. The school believed that her behavior violated New Testament injunctions against resorting to civil courts in disputes among Christians, and that she had "'create[d] upheaval at our school'" and shown "'a total lack of concern for the ministry of

Hosanna-Tabor Lutheran School.'" See Pet. Br. 10 (quotations omitted). A majority of the sponsoring congregation agreed and rescinded her call. Perich claims that these reasons are pretexts for discrimination, but in doing so she asks the courts to delve deep into religious issues. As petitioner notes, the pretext inquiry "would necessarily devolve into an investigation of the Church's beliefs. Do Lutherans really believe in non-litigious, internal resolution of disputes over fitness for ministry? Does that teaching apply to this case? Did it actually motivate the congregation?" Pet. Br. 56.

Ultimately, the church congregation terminated Perich's commission because, given her behavior surrounding the request to return, it had lost confidence in her ability to represent the school's purposes to children. If she were reinstated, every parent and every child would know she had defied Lutheran teaching to get there. Given those circumstances, it is hard to see how she could be an effective "voice to the faithful" on the Church's behalf (*Petruska*, 462 F.3d at 306). More fundamentally, it is up to the Church, not a jury or judge, to decide whether she could be effective.

3. Finally, the ministerial exception protects against the burdens of litigation and investigation, independent of the results. As this Court stated in refusing to extend federal Labor Board jurisdiction to parochial-school teachers: "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading

to findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). If nondiscrimination suits were permitted to proceed, "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171 (combination of EEOC investigation and federal lawsuit makes for "potentially . . . lengthy proceeding"); *EEOC v. Catholic University*, 83 F.3d 455, 466-67 (D.C. Cir. 1996). Religious organizations not only suffer direct burdens from such expense and scrutiny; they also "might make [decisions] with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." *Rayburn*, 772 F.2d at 1171. See *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring) (Title VII litigation may "both produce excessive government entanglement with religion and create the danger of chilling religious activity").

II. Properly Defined, The Ministerial Exception Extends To Teachers With Religious Duties In Religious Schools.

A. The Scope of the Exception Should Be Broad, to Include Employees with Duties of Church Leadership or of Teaching the Faith, as the Religious Organization Defines Them.

The scope of the ministerial exception should be informed by the purposes of the exception, the history of disputes over the selection of religious leaders, and the practical realities of litigation.

1. As a basic definition, *amici* propose that "ministerial" employees are those with duties to lead the religious organization, teach the faith, or participate in the spiritual or moral formation of community members. Clergy status or formal ordination status, although evidence that the plaintiff falls within the exception, should not be requirements.

More specifically, the duties of leadership or religious teaching include one or more of the following: (a) formation or declaration of doctrine; (b) conducting communal worship, ritual, or prayer, including music integral to worship; (c) teaching or instruction in the faith, especially of children and converts; (d) evangelism or outreach to those outside the religion; (e) discipline of wayward clergy or laity; (f) counseling the troubled or the spiritual inquirer, including confession or restoration following

discipline; (g) the selection or promotion of such leaders and teachers; and (h) at the level of policy formation, those administering the organization when decisions are material to the definition, operation, growth, or continued existence of the religious organization. See *Rayburn*, 772 F.2d at 1169 ("clergy" duties include "'teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship'") (quotation omitted).

2. The exception should be defined broadly, with presumptive deference to the organization's understanding of an employee as a religious leader or teacher. Religious organizations have multiple ways of structuring themselves and characterizing their leaders. Some emphasize ordination, others rely heavily on lay leadership as well, and some (such as Quakers) have no clergy whatsoever. In some organizations the pastor is crucial, in others the teacher. The history in part I-A (*supra* pp. 10-18) shows that narrow or formalistic civil definitions of ministerial status have excluded some groups and triggered dissension. Narrow definitions encourage excluded organizations to change their structure and self-understanding, relabeling positions in order to fit within the exception. This undermines the ministerial exception's purpose of preserving churches' control over matters of governance and administration (see *supra* pp. 19-22). The exception can only achieve that purpose if its coverage is defined deferentially.

Presumptive deference to the organization also reduces the chilling and burdensome effects of investigation and litigation. The ministerial exception is designed to avoid such entanglements (see *supra* p. 24-27); courts should not reintroduce them in the very act of determining whether the exception applies. Second-guessing by judges and juries of an employee's "ministerial" status may chill organizations' decisions just as much as second-guessing of what is "religious." *Amos*, 483 U.S. at 336; see *id.* at 343-44 (Brennan, J., concurring). The organization should not be deterred by the prospects of litigation from making decisions about the suitability of an employee who performs religious functions but who a jury may not regard as a minister. See *Rayburn*, 772 F.2d at 1171. Moreover, because presumptive deference increases the likelihood that the ministerial exception will apply, it reduces the prospective burdens of litigation itself (cf. *Catholic Bishop*).

If the organization shows evidence that the plaintiff has one of the duties above (see *supra* pp. 28-29), the presumption of ministerial status should apply. (In part II-B, *infra* pp. 32-38, we define the presumptions of ministerial status applicable to teachers in religious schools.) Presumptions can be overridden, of course. *Amici* suggest that various presumptions of "ministerial" status may be overridden if the plaintiff presents clear and convincing evidence that the status should not apply, either because the plaintiff does not in fact have such duties or because the duties are *de minimis*. See *infra* pp. 36-37. The "clear and convincing" evidentiary

burden has long operated in another, familiar context where civil lawsuits threaten First Amendment values. Defamation suits by public officials or public figures are barred unless the plaintiff proves by clear and convincing evidence that the defendant's false statements were made knowingly or recklessly. *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991); *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964).

3. Presumptive deference to the organization has several implications. The first concerns the relevance of the plaintiff's holding an ecclesiastical title or office. Such a status should create a strong presumption that the employee falls within the exception. But of course, an ecclesiastical office or title should not be a requirement. Making it a requirement would, again, exclude some religious groups based on their polity and encourage them to give their leaders formal offices in order to fit within the exception, even though the designations do not fit the organization's self-understanding.

An approach that errs on the side of liberty to choose ministers is also inconsistent with the court of appeals' conclusion in this case, which relied on a rigidly quantitative approach to determine that Perich's "primary duties" were not religious. Pet. App. 20a. An employee should be covered if teaching religion or leading religious activity—religion classes, group prayer, chapel, or devotionals—are important aspects of her job. They may be important aspects qualitatively even if they do not take up the majority of the employee's time. See Pet. Br. 37-41.

4. Of course, the definition of "ministers" has limits. Not all employees are covered by the exception even if they are generally expected to observe religious standards or model religious behavior. The employee must have responsibilities for leadership, teaching of the faith, or spiritual and moral formation of community members. Moreover, not every kind of lawsuit by a religious leader implicates the exception. If a clergyperson slips and falls on the church stairway, she can sue the church under tort or workers' compensation laws, because—unlike a nondiscrimination suit—the claim has no effect on the church's ability to select ministers or set standards for their conduct.[6]

B. The Exception Covers Teachers with Religious Duties in Religious Schools.

Applying these standards, teachers with religious duties in religious elementary and secondary schools should fall within the ministerial exception. At the very least, a teacher should fall within this category if she has undergone theological training and an ordination or commissioning process, or if she teaches children the faith in a religion class. Perich did both—which makes this an easy case. Such designation or activities alone put the plaintiff in the category of religious leader/teacher, at least unless

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[6] Although claims by ministers under the minimum-wage laws do not directly affect an organization's ability to select its leaders, courts have still applied the exception on the ground that "matters of church administration and government [include] a minister's salary, his place of assignment and his duty." *McClure*, 460 F.2d at 560; *Schleicher*, 518 F.3d at 477.

the plaintiff can prove clearly and convincingly that the designation was "a sham." See Pet. Br. 49 (citation omitted) (arguing that there is no evidence to undercut Perich's designation as a commissioned minister).

This case, however, by no means exhausts the circumstances in which religious school teachers should be considered ministers. Both the teaching of the faith and the spiritual and moral formation of children support designating many teachers as ministers.

Many schools emphasize that teaching the faith occurs throughout the curriculum, even in subjects that an observer might call "secular." For example, the Association of Christian Schools International ("ACSI") believes that "[t]he biblical integration of every planned learning experience is crucial to effective Christian schooling" (ACSI Core Beliefs, http://www.acsi.org/tabid/535/itemid/3113/default.aspx) (last visited June 19, 2011)) and that faculty among other personnel should be "teaching and leading from a biblically integrated perspective." ACSI, Elements of Effective Schools, http://www.acsi.org/tabid/535/itemid/77/default.aspx (last visited June 19, 2011). Catholic school systems also pursue this integration: as a school handbook quoted by this Court put it, "'[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area.'" *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971) (quoting Catholic school handbook). Hosanna-Tabor School fit this model too, since it encouraged teachers to be "'Christian role models who

integrate faith into all subjects'" (Pet. App. 5a, 35a; Pet. Br. 42)—yet another reason to treat Perich as a minister.

The category of spiritual or moral formation is also particularly relevant to religious school teachers. In many such schools, teachers are expected to handle discipline issues throughout the day, which necessarily involves implementing the school's religious viewpoints on right and wrong, grace, obedience to authority, human nature's essential goodness and/or sinfulness, and behaviors that exhibit good and bad character as defined by the faith. Such disciplinary conduct is an unavoidable component of any elementary or secondary schoolteacher's job—regardless of the subject she teaches, and regardless of whether the subject matter explicitly incorporates religious content. A math teacher who simply communicates algebra and geometry concepts, without theological comment, may nevertheless have a vital, daily spiritual role through how she imposes discipline. This responsibility is a primary means of conveying to children what the religious faith holds to be good and bad in personal conduct. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 19 n.3 (1993) (Blackmun, J., dissenting) (religious school's faculty employment agreement required teachers "to assist in the implementation of the philosophical policies of the School, and to compel proper conduct on the part of the students in the areas of general behavior, language, dress and attitude toward the Christian ideal.")

Likewise, teachers often play crucial roles in counseling students on personal issues of religious significance. In the schools in *Lemon*, for example, "the Handbook advise[d] teachers to stimulate interest in religious vocations and missionary work." 403 U.S. at 618.

Teachers who transmit the faith and help form children spiritually and morally epitomize the functions that the ministerial exception was developed to protect. By teaching and guiding children, they act as the religious group's "voice to the faithful" (*Petruska*, 462 F.3d at 306; *McClure*, 460 F.3d at 558)—as well as its "lifeblood" (*id.*), since every religious community is only a generation away from extinction and must transmit its beliefs to the young. Teachers' central role in religious schools confirms that they are "the chief instrument by which the [school] seeks to fulfill its purpose" (*id.* at 559).

In *Catholic Bishop*, this Court "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school" as the predicate for concluding that government intervention in the teacher-school relationship would create serious First Amendment risks. 440 U.S. at 501. Earlier, *Lemon* had documented the importance of teachers, quoting the handbook for Rhode Island Catholic schools: "'The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher . . .'" 403 U.S. at 618 (quotation omitted). The importance of all teachers was reflected in the handbook's statement

that "'[r]eligious formation is not confined to formal courses [or] a single subject area.'" *Id.*[7]

The Court in *Catholic Bishop* found the teacher's role central enough that "the very process of inquiry" into the employment relationship created a serious risk of First Amendment violations. 440 U.S. at 502. These are the very concerns that lower courts have expressed in cases involving the employment of ministers. See *supra* pp. 26-27.

To determine whether teachers qualify as "ministers," courts should utilize presumptions that err on the side of church/state separation and reflect the deference discussed *supra*, pp. 29-31. Such presumptions include, among others: (a) courts should avoid where possible becoming entangled in fine distinctions between who is a "ministerial" teacher and who is not; (b) holding an ecclesiastical office or title indicates that the teacher has "ministerial" duties; (c) teaching a class in religion indicates that the teacher has "ministerial" duties; (d) integration of religion into the course or curricular materials (as

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[7] This Court's recent decisions have been more permissive than *Lemon v. Kurtzman* toward government aid programs benefiting religious schools. In *Mitchell v. Helms*, 530 U.S. 793 (2000), the justices casting deciding votes were more willing than *Lemon* had been to accept that religious school teachers would obey statutory restrictions on the use of state aid. *Id.* at 859-60 (O'Connor, J., concurring in the judgment). But the Court has never questioned the proposition that teachers in religious schools play crucial religious roles. (Some of these *amici* took opposite positions from each other in cases such as *Helms* on whether aid was permissible; but again, all *amici* agree here on the applicability of the ministerial exception.)

indicated by a school handbook or other evidence) indicates that the teacher has "ministerial" duties; (e) including a statement of faith among job requirements indicates that the teacher has "ministerial" duties; and (f) engaging students in religious observances such as chapel, prayer, and devotional Bible reading indicates that the teacher has ministerial duties. The presumptions should be rebuttable on a showing of clear and convincing evidence by the plaintiff either that she did not in fact have such responsibilities or that they were *de minimis* (for example, a janitor at a religious school who was asked once to lead students in a prayer over the intercom).

C. Courts Should Decide the Applicability of the Exception Early in the Litigation.

This Court should encourage early resolution in a lawsuit of questions concerning the applicability of the ministerial exception. Although the definition of "ministers" cannot be entirely bright-line, judges should hear the question on motions to dismiss, for judgment on the pleadings, or for early summary judgment.

As already noted, the ministerial exception aims to avoid subjecting religious organizations to the burdens of investigation and litigation. As such, the ministerial exception closely resembles doctrines of governmental or government-officer immunity, where this Court has adopted rules to prevent "excessive disruption of government and permit the resolution of

many insubstantial claims on summary judgment." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity for officials). The Court has sought to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18; see *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation"); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (value to the State of Eleventh Amendment immunity "for the most part lost as litigation proceeds past motion practice").

This Court should similarly encourage means for the full hearing of ministerial-exception claims before the religious organization must undergo extensive discovery or trial. Courts should consider limiting initial discovery to the question whether the plaintiff is a minister, setting up a summary judgment motion on the question. On summary judgment, the plaintiff's obligation to show evidence of a genuine issue of material fact should be heightened by the fact that the plaintiff has the burden to overcome presumptions of ministerial status by clear and convincing evidence. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986) (holding, in First Amendment case, that because "the judge must view the evidence presented through the prism of the substantive evidentiary burden[,] . . . 'the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions'").

CONCLUSION

The ministerial exception is constitutionally required and valuable, but it does not rest on an assumption that religious institutions and employers never behave badly. Of course, they sometimes do. Its premise is not that churches are somehow "above the law." They are not. Its point is not "discrimination is fine, if churches do it." It is, instead, that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach, and some relationships — such as the one between a religious congregation and the teachers to whom it entrusts not only the "secular" education but also the religious formation of its children — that government should not presume to supervise.

To be sure, not every employee of a religious organization is "ministerial," and religious institutions — like all employers — have legal obligations to their employees. Although there are difficult questions to be asked and fine lines to be drawn, when it comes to interpreting the First Amendment's boundary between church and state, it cannot be the role of civil government to police the decisions of religious communities about who should be their leaders and teachers, any more than the civil courts should review disputes over the meaning of religious doctrines.

Respectfully submitted.

RICHARD W. GARNETT
Notre Dame Law School
3164 Eck Hall of Law
Notre Dame, IN 46556
(574) 631-6981

K. HOLLYN HOLLMAN
MELISSA ROGERS
Baptist Joint Committee
200 Maryland Ave., NE
Washington, D.C. 20002
(202) 544-4226

KIMBERLEE WOOD COLBY
Christian Legal Society
8001 Braddock Rd.,
Ste. 302
Springfield, VA 22151
(703) 894-1087

THOMAS C. BERG
Counsel of Record
University of St. Thomas
School of Law
MSL 400
1000 LaSalle Ave.
Minneapolis, MN 55403
tcberg@stthomas.edu
(651) 962-4918

CARL H. ESBECK
R.B. Price Professor of Law
University of Missouri
203 Hulston Hall
Columbia, MO 65211
(573) 882-6543

Counsel for Amici Curiae

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