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.

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

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether application of the anti-retaliation provision of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, to this case violates the Free Exercise Clause, petitioner's right to freedom of association, or the Establishment Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 597 F.3d 769. The opinion of the district court (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881. The opinion of the district court denying a motion for reconsideration (Pet. App. 54a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. A petition for rehearing was denied on June 24, 2010 (Pet. App. 62a-63a). On September 2, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including

October 22, 2010, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, prohibits an employer with 15 or more employees from discriminating against a qualified individual with a disability in all terms and conditions of employment. See 42 U.S.C. 12111(5), 12112(a).[1] A separate provision of the ADA prohibits discrimination "against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. 12203(a).[2]

The ADA provides religious entities with two defenses to claims of disability discrimination in employment. 42 U.S.C. 12113. First, a "religious corporation, association, educational institution, or society" may "giv[e] preference in employment to individuals of a par-

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[1] Unless otherwise indicated, all statutory citations are to the 2006 edition of the United States Code.

[2] The ADA also makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA]." 42 U.S.C. 12203(b).

ticular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. 12113(c)(1). Second, "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. 12113(c)(2).[3] The ADA contains no defenses for religious entities that retaliate against employees in violation of Section 12203.

2. a. Petitioner is an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS or Synod). At the time of the events giving rise to this suit, petitioner operated a school serving children in kindergarten through the eighth grade in Redford, Michigan. Pet. App. 3a. That school has since closed. See Pet. Br. 3 n.1.

Teachers at the school were classified in two categories: "contract" and "called." Pet. App. 3a. Contract teachers were hired by the school's board for one-year renewable terms of employment. Called teachers were usually hired on an open-ended basis by the voting members of the church congregation. *Ibid.* A teacher could become a called teacher by completing a course of study, called a "colloquy," and earning a certificate of admission into the teaching ministry of the LCMS. *Ibid.* Once "called" by a congregation, the teacher received the title of "commissioned minister." *Ibid.* Petitioner required all teachers—called or contract, Lutheran or not—to perform the same job duties. *Id.* at 5a.

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[3] Both of these defenses apply under "[t]his subchapter" of the ADA, *i.e.*, Subchapter I, which prohibits discrimination based on disability in employment. The ADA's prohibitions against retaliation and coercion, see 42 U.S.C. 12203, appear in a different subchapter (Subchapter IV), which includes no comparable defenses for religious entities.

b. The LCMS's *Employment Resource Manual for Congregations and Districts* acknowledges that the civil rights laws, and the ADA in particular, apply to LCMS churches and schools. The manual states that LCMS churches and schools "may not discriminate against a qualified individual because of his or her disability, [but] churches may prefer employees of a particular religion for carrying out the organization's activities. In addition, church[es] may require applicants (disabled and non-disabled) and employees to conf[o]rm to their religious tenets." LCMS, *Employment Resource Manual for Congregations and Districts* (June 2003), www.lcms.org/Document.fdoc?src=lcm&id=1188; see Pet. App. 24a.

c. In July 1999, petitioner hired respondent Cheryl Perich as a contract teacher to teach kindergarten for the 1999-2000 school year. Pet. App. 3a. Perich completed the required colloquy classes and became a called teacher in 2000. *Id*. at 3a-4a. Her duties remained the same after she was hired as a called teacher. *Id.* at 4a.

Perich taught kindergarten for the next three years, and taught fourth grade during the 2003-2004 school year. Pet. App. 4a. As she had done as a contract teacher, Perich taught secular subjects including math, language arts, social studies, science, gym, art, music, and computer skills. *Id*. at 4a-5a. In her teaching, Perich used "secular textbooks commonly used in public schools." *Id.* at 5a. Perich could recall only two instances in which she introduced religion into her teaching of secular subjects. *Ibid*.

In addition to their secular teaching duties, contract and called teachers alike engaged in certain religious activities. Pet. App. 4a-5a. Perich, like the contract teachers, taught a religion class four days a week for 30

minutes and attended a chapel service with her class once a week for 30 minutes. *Id.* at 4a. Perich, like the contract teachers, led each class in prayer three times a day for a total of approximately five or six minutes. *Ibid.* During her final year, Perich's fourth-grade class engaged in a devotional for five to ten minutes each morning. *Ibid.* Approximately twice a year, Perich led the chapel service. Teachers all took turns leading chapel services regardless of whether they were called or contract, Lutheran or non-Lutheran. *Id.* at 4a-5a.

Perich was assigned to teach third and fourth grade for the 2004-2005 school year. Pet. App. 4a. In June 2004, however, Perich became ill and was hospitalized. *Id.* at 5a. By August, Perich's doctors had not yet diagnosed her illness. *Ibid.* The school's principal, Stacey Hoeft, assured Perich that she would "still have a job with [the school]" when she regained her health. *Ibid.*; see J.A. 161. Perich applied for disability benefits and began a disability leave of absence at the beginning of the 2004-2005 school year. Pet. App. 5a.

In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy and that her doctor estimated that she would be able to return to work once her medications were adjusted, a process that usually takes about two months. Pet. App. 6a. In January 2005, Perich notified Hoeft "that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication." *Ibid.*

On January 27, 2005, Perich notified Hoeft by email that she would be able to return to work between February 14 and February 28. J.A. 172. Later that day, Hoeft responded that she was surprised to hear Perich would be able to return so soon and "expressed concern

that Perich's condition would jeopardize the safety of the students in her care." Pet. App. 6a; see J.A. 173-174. Hoeft also informed Perich that once she was able to return, she would not teach third and fourth grades, because Hoeft had contracted a substitute to teach through the end of the year. Pet. App. at 6a-7a. The hired replacement teacher was a contract teacher. J.A. 134.

Three days later, petitioner held its annual congregational "shareholder" meeting. Pet. App. 7a. Notwithstanding Perich's notification that she could return to work sometime in February, Hoeft and the school's board told the voting members of the congregation that it was unlikely that Perich would be physically capable of returning to the classroom that school year or the next. *Ibid*. The congregation then adopted the board's proposal that Perich be asked to "accept a peaceful release agreement" under which she would resign in exchange for the congregation's agreement to pay a portion of her health insurance premiums through December 2005. *Ibid*.

On February 8, Perich's physician gave her a written release to return to work without restrictions starting on February 22. Pet. App. 7a. On February 13, Perich met with the school board. *Ibid.* At that meeting, board chairman Scott Salo presented Perich with the proposal that she resign; in response, Perich produced her medical release, and said that she wanted to return to work on February 22. *Id*. at 7a-8a. The board urged Perich to reconsider her refusal to resign and asked that she provide her decision by February 21. *Id.* at 8a.

On February 21, Perich sent Hoeft an email confirming her decision not to resign and informing Hoeft that Perich planned to return to work the next day, Febru-

ary 22. Pet. App. 8a. Perich reported for work the next morning, the first day on which she was medically cleared to work. *Ibid*. She did so because she feared that a failure to report would be construed as a resignation under the terms of petitioner's employee handbook, which provided that an employee's "failure to return to work on the first day following the expiration of an approved medical leave may be considered a voluntary termination." *Ibid*.

Hoeft directed Perich to leave the school. J.A. 115. She told Perich that "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." *Ibid.* Perich left after she obtained written confirmation that she had reported to work and was instructed to leave. Pet. App. 8a.

Later that same day, Hoeft called Perich at home, informing her that she likely would be fired. Pet. App. 8a; J.A. 115. During their conversation, Perich told Hoeft that she had spoken with an attorney and if they were unable to reach a compromise she intended to "assert her legal rights" against discrimination based on disability. J.A. 115. In an email to Hoeft that evening, Perich said that her doctor had "reaffirmed" that she was healthy and ready to return to work. Pet. App. 8a.

Following a school board meeting on the evening of February 22, Salo sent Perich a letter describing her conduct as "regrettable" and stating that the board would begin the process of rescinding her call based on her "disruptive behavior." Pet. App. 8a-9a. On March 19, Salo informed Perich by letter that a congregational meeting was scheduled for April 10, and that the school board would recommend terminating her employment at that time. J.A. 55. As grounds for termination, the

letter cited Perich's "insubordination and disruptive behavior on Tuesday, February 22, 2005" and said that Perich had "damaged, beyond repair, [her] working relationship" with Hosanna-Tabor "by threatening to take legal action." *Ibid.* At the meeting on April 10, the congregation voted to rescind Perich's call. None of petitioner's communications with Perich during this period mentioned the Synod's dispute-resolution process or Perich's failure to use it. Perich testified that she was not even aware of that process until petitioner raised it years later in this litigation. See J.A. 228.

3. a. Perich filed a charge with the EEOC alleging discrimination and retaliation in violation of the ADA. Pet. App. 9a. On September 28, 2007, the EEOC filed suit against petitioner, and Perich intervened. *Id.* at 9a-10a; see 42 U.S.C. 12117(a) and 2000e-5(f)(1). Both the EEOC and Perich claimed unlawful retaliation under the ADA; Perich also claimed retaliation in violation of Michigan law. Pet. App. 9a-10a.

The district court granted petitioner's motion for summary judgment, concluding that the ADA retaliation claim was barred by the "ministerial exception," a judge-made exception to the civil rights laws, including the ADA and Title VII. See Pet. App. 41a, 53a. Although the district court noted that "courts remain sharply divided about what positions fit the criteria" for identifying a ministerial employee, *id.* at 43a, the court concluded that Perich was a ministerial employee whose retaliation claim was beyond the court's subject-matter jurisdiction, *id.* at 41a, 50a-53a.

b. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-25a. The court noted that, in determining whether an employee is a "ministerial" employee barred

by the exception from litigating employment claims against her religious employer, "this Circuit has instructed courts to look at the function, or 'primary duties' of the employee * * * rather than the fact of ordination." *Id.* at 16a-17a. The court also noted that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception," *id.* at 17a, and that "when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church," *id.* at 18a-19a.

The court of appeals concluded that the district court erred in classifying Perich as a ministerial employee in light of undisputed evidence that: "Perich's employment duties were identical when she was a contract teacher and a called teacher"; "she taught math, language arts, social studies, science, gym, art, and music using secular textbooks" and "seldom introduced religion during secular discussions"; "teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not"; and "activities devoted to religion"—such as religious instruction and prayer—"consumed approximately forty-five minutes of the seven hour school day." Pet. App. 19a-20a.

The court of appeals also noted that petitioner on appeal had "attempted to reframe the underlying dispute from the question of whether [it] fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal

dispute resolution." Pet. App. 24a. The court of appeals held that a court "would not be precluded from inquiring into whether a doctrinal basis actually motivated [petitioner's] actions." *Id.* at 24a-25a. The court noted in this regard that "the LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws [and] none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures." *Ibid.*

Judge White concurred. Pet. App. 26a-30a. She explained that this case differs from others in which courts found parochial school teachers to be ministerial employees because "there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying 'ministerial' roles." *Id.* at 29a. Judge White emphasized that petitioner's "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities," and that "the duties of the contract teachers are the same as the duties of the called teachers." *Ibid.*

SUMMARY OF ARGUMENT

1. The ADA, by its plain terms, forbids employers—including religious employers like petitioner—from retaliating against their employees for complaining about or reporting discrimination. The history of the ADA confirms that Congress made a conscious choice to include religious employers within its scope. Although it provided certain defenses for religion-based discrimination in employment, Congress has provided no comparable defense for a religious entity that retaliates

against its employees for invoking their rights under the statute.

2. The only question presented in this case is therefore whether the ADA's anti-retaliation provision is unconstitutional as applied to a religious employer that fires an employee—here, a teacher of secular subjects in a parochial school who also performed religious functions—for asserting her rights under the ADA. The answer to that question is no. Petitioner asserts that a categorical "ministerial exception" to enforcement of the civil rights laws bars the ADA claim at issue in this case. But none of the three constitutional provisions upon which petitioner relies to support its categorical claim of immunity stands as a bar to adjudication of this case.

a. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not provide a defense to those who violate neutral and generally applicable laws, even when their actions are based on religious belief. See *id.* at 877-878. The ADA is just such a law. It neutrally prohibits both discrimination in employment against those with disabilities and retaliation against those who seek to vindicate their rights. It does not single out for disfavorable treatment any religious organization, activity, or belief. Accordingly, the Free Exercise Clause provides petitioner with no defense to an ADA claim for unlawful retaliation.

Petitioner attempts to avoid *Smith*'s logic by pointing to that decision's citation of older cases concerning church-property disputes, which held that the government may not constitutionally take sides in "controversies over religious authority or dogma." 494 U.S. at 877. None of those church-property cases involved a neutral

statute of general application. As the Court has explained, the church-property cases do not require deference to religious authorities in church-related litigation where, as here, neutral principles of law provide a rule of decision. See *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979).

b. The First Amendment right to expressive association likewise provides no defense to the claim of retaliation in this case. That right is implicated only when the presence of an unwanted person in an expressive association would "affect[] in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000). There may be cases in which the right to expressive association would defeat an employment-discrimination claim against a religious employer. For example, a challenge to a church's announced practice of ordaining only male ministers would fail because compelled ordination of a woman would be incompatible with such a church's ability to express its religious message that only men are spiritually eligible for such positions. Petitioner, however, fails to demonstrate that dismissal of Perich was necessary to allow it to express any message, much less acknowledge the compelling governmental interest in enforcement of anti-retaliation laws.

c. The Establishment Clause likewise provides no support for a categorical ministerial exception that would bar adjudication of this case. While, under some circumstances, a judicial remedy of reinstatement to ministerial office could pose an entanglement problem under the Establishment Clause, no such problem is presented here. Perich has disclaimed any interest in reinstatement, and it is not clear that such a remedy would even be feasible because the school where she worked has closed. In any event, the court could rein-

state Perich to a non-commissioned contract teaching position without reinstating her to her former ecclesiastical office.

Moreover, reinstatement is not the only, or an automatic, remedy in discrimination and retaliation cases. Plaintiffs may seek purely monetary forms of relief, including damages and attorney's fees, which do not pose the same concerns that reinstatement might. There is accordingly no basis for dismissing the complaint because of constitutional concerns about a subset of the possible remedies that might be available upon a finding of liability. Such concerns can be addressed when and if a remedial proceeding occurs.

The anti-entanglement principle of the Establishment Clause can also bar adjudication of claims that would require a court to take sides in a dispute over religious doctrine. But such concerns are not present in this case. Petitioner has variously contended, on the one hand, that it did retaliate against Perich for threatening to sue but had a religious reason for doing so—her failure to use the church's mandatory dispute-resolution process—and, on the other hand, that it did not retaliate against Perich but instead terminated her because of her "disruptive" attempt to return to work. The district court could adjudicate either defense without entanglement. When an employer admits discrimination or retaliation but asserts a religious reason for its actions, a court can accept the employer's articulation of its religious doctrine while rejecting its defense (under *Smith*) without any entanglement. And cases in which an employer denies retaliation and asserts an alternative religious justification for its actions can proceed, "if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil*

Rights Comm'n v. *Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986).

3. Petitioner's request for a broad exemption to the ADA's neutral and generally applicable anti-retaliation provision, if accepted, would critically undermine the protections of the ADA and a wide variety of other generally applicable laws. The government has a compelling interest in protecting those who come to it with information about possibly illegal conduct. An exemption for religious employers would chill employees' ability to invoke their rights under numerous statutes. The logic of petitioner's position, moreover, could easily be invoked as a justification for violating generally applicable laws forbidding retaliation against witnesses in civil or criminal proceedings. No provision of the Constitution demands that result.

4. The constitutional issues that can arise in litigation between religious entities and their employees are best resolved on a case-by-case basis. There is no basis for adoption of petitioner's overly broad prophylactic rule, which is contrary to this Court's normal method of as-applied constitutional decision-making. Petitioner's rule would result in dismissal of numerous cases raising no constitutional concern and would thus unnecessarily strip many employees of their protections under the civil rights laws. Moreover, a rule like petitioner's that turns on the job responsibilities of the plaintiff presents difficult line-drawing problems and can itself entangle the courts in religious matters. Case-by-case adjudication focusing on the nature of the claim, the employer's defense, and the possible remedies at issue avoids those pitfalls.

If, however, the Court adopts a categorical exemption, it should be limited to those plaintiffs who perform

exclusively religious functions and whose claims concern their entitlement to occupy or retain their ecclesiastical office. Such a rule would limit the exclusion's overbreadth while at the same time covering that small group of employees whose disputes with their employers are most likely to turn on entangling subjective religious questions. That narrow exemption would not cover parochial school teachers, like Perich, who perform a mix of secular and religious functions. Plaintiffs in that category should be able to proceed with their claims, subject to careful trial management by the district courts and appropriate sensitivity to entanglement concerns.

ARGUMENT

I. THE ADA'S ANTI-RETALIATION PROVISION APPLIES TO RELIGIOUS ENTITIES THAT RETALIATE AGAINST THEIR EMPLOYEES FOR OPPOSING DISCRIMINATION

The ADA expressly prohibits retaliation against employees who report or complain about discrimination in the workplace. The text and history of the statute make clear that Congress intended the prohibition against retaliation to apply to religious entities in the same manner that it applies to other, non-religious employers.

The ADA's anti-retaliation provision is framed in broad terms: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual * * * participated in any manner in an investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. 12203(a). The ADA further provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment

of, or on account of his or her having exercised or enjoyed, * * * any right granted or protected by [the ADA]." 42 U.S.C. 12203(b).

As explained above, see pp. 2-3, *supra*, the ADA contains defenses for religious employers alleged to have discriminated against an employee or applicant for employment on the basis of disability. In particular, the statute permits a religious entity to "giv[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities," 42 U.S.C. 12113(c)(1), and to "require that all applicants and employees conform to the religious tenets of such organization," 42 U.S.C. 12113(c)(2). But the statute contains no provisions permitting religious entities to discriminate on bases other than religion or to retaliate against employees who oppose discrimination. See pp. 2-3 & n.3, *supra*.

In this regard, the ADA is similar to Title VII of the Civil Rights Act of 1964. Title VII provides an exemption to its prohibition on discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its activities." 42 U.S.C. 2000e-1(a); see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987) (upholding the exemption in Section 2000e-1(a) against an Establishment Clause challenge). Title VII also provides that educational institutions may "hire and employ employees of a particular religion" if the institution is "in whole or in substantial part, owned, supported, controlled, or managed" by a religious entity or if its "curriculum

* * * is directed toward the propagation of a particular religion." 42 U.S.C. 2000e-2(e).

Like the ADA, Title VII does not provide additional exemptions permitting religious employers to discriminate on any basis other than religion. The legislative history indicates that the limitation on available defenses was by conscious design. See *EEOC* v. *Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982). In 1972, Congress considered an amendment to Title VII that would have categorically provided that the statute "shall not apply to * * * any religious corporation, association, or society." 118 Cong. Rec. 1981. The lead sponsor of the bill pending at the time (which became the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103) opposed the proposed exemption, explaining that "of all the institutions in this country who should be setting the example of equal employment opportunity, of equal opportunity for that matter in all aspects of life, it is America's religious institutions." 118 Cong. Rec. at 1992 (statement of Sen. Williams); see *ibid.* ("I am confident that the Houses of God in this country do not shirk that responsibility[;] nor should we."). The Senate rejected the amendment by a vote of 55-25. *Id.* at 1995.

The ADA's legislative history indicates that the statute's defenses for religious entities were to be interpreted in the same manner as the parallel defenses in Title VII. See, *e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 76-77 (1990). The House report provides an illustrative example:

> [A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her.

> However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.

Id. at 76; see 29 C.F.R. Pt. 1630, App. § 1630.16(a) (EEOC guidance making same distinction).

The history of the ADA's religious defenses makes clear what is already apparent from the statute's text: Congress considered the application of the statute to religious employers, and rather than exempt them entirely from the statute's prohibitions on discrimination and retaliation, it crafted particular exemptions for certain forms of religion-based discrimination in employment. As in Title VII, these statutory exemptions provide for a substantial accommodation of religious belief and practice. But they do not exempt retaliation. Congress intended the ADA's anti-retaliation provision to apply to religious entities as it applies to other employers. See *Hishon* v. *King & Spalding*, 467 U.S. 69, 77-78 & n.11 (1984) ("When Congress wanted to grant an employer complete immunity [from Title VII], it expressly did so.").[4]

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[4] Although the Fifth Circuit in *McClure* v. *Salvation Army*, 460 F.2d 553, cert. denied, 409 U.S. 896 (1972), concluded that the Congress that enacted Title VII did not intend by the broad wording of the statute "to regulate the employment relationship between church and minister," *id.* at 560-561, courts of appeals have since repeatedly acknowledged that the text and history of the statute clearly manifest Congress's intent to permit claims by all employees of religious entities, subject only to certain exceptions for discrimination on the basis of religion. See, *e.g.*, *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 303 n.4 (3d Cir. 2006), cert. denied, 550 U.S. 903 (2007); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165-1167 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

II. APPLICATION OF THE ADA'S ANTI-RETALIATION PROVISION IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioner does not dispute that the ADA's anti-retaliation provision, by its plain terms, applies in this dispute. It instead cites three separate First Amendment guarantees—the Free Exercise Clause, the right to freedom of association, and the Establishment Clause—in support of a categorical "ministerial exception" that would bar courts from hearing "discrimination claims by employees who carry out important religious functions" (as defined by the religious employers). Pet. Br. 16, 19-37; see also *id.* at 13 (describing the ministerial exception as "prevent[ing] ministers from suing their churches over most employment disputes"). In particular, petitioner urges the Court to adopt a categorical rule that would bar adjudication of any suit—including the ADA retaliation suit at issue in this case—concerning a religious employer's termination of an employee who performs important religious functions. Pet. Br. 50; accord *id.* at 14, 19; see *id.* at 48-49.

This Court, however, has repeatedly made clear that it will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." See *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (internal quotation marks and citation omitted); see also *ibid.* (this Court will not pronounce a statute void as unconstitutional "except as it is called upon to adjudge the legal rights of litigants in actual controversies"). Although significant constitutional questions may arise in other cases concerning the application of the civil rights laws to religious entities, neither the Free Exercise Clause, nor the right to freedom of association, nor the Establishment Clause, stands as an im-

pediment to adjudication of Perich's claim that she was unlawfully terminated from her teaching position for exercising her rights under the ADA. The Free Exercise Clause does not exempt religious entities from the reach of generally applicable laws like the ADA, nor has petitioner made the context-specific showing necessary to establish that the ADA's anti-retaliation provision unconstitutionally interferes with its association rights. And while the Establishment Clause places important limits on the remedies a court may order and the types of questions it may resolve, not every employment dispute between a religious employer and an employee with religious functions risks excessive governmental entanglement in matters of religion, and no such entanglement concerns arise here.

A. The Free Exercise Clause Does Not Bar Application Of The ADA's Anti-Retaliation Provision In This Case

As originally conceived, a categorical ministerial exception to the employment-discrimination laws was thought to be compelled by the Free Exercise Clause of the First Amendment. See *McClure* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir.) ("Only in rare instances where a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' is shown can a court uphold state action which imposes even an 'incidental burden' on the free exercise of religion.") (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963)), cert. denied, 409 U.S. 896 (1972); accord *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (citing, *inter alia*, *Sherbert*, 374 U.S. at 403), cert. denied, 478 U.S. 1020 (1986). Subsequent decisions of this Court have, however, made clear that the Free Exercise Clause does not

exempt religious entities from generally applicable laws, such as those forbidding discrimination and retaliation in the workplace.

1. The Free Exercise Clause does not forbid application of neutral, generally applicable laws that incidentally burden religious practice

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court rejected the proposition that the Free Exercise Clause requires the government to make exceptions to neutral laws of general applicability that have the incidental effect of burdening religious practice. See *id.* at 885 (rejecting the balancing test announced in *Sherbert, supra*). In *Smith*, two members of the Native American Church had "ingested peyote for sacramental purposes at a ceremony" of the church. 494 U.S. at 874. Yet use of peyote violated generally applicable state law, and the church members were fired from their jobs as a result. *Ibid.* They were then denied unemployment compensation on the ground that they had been discharged for "work-related 'misconduct.'" *Ibid.*

The church members argued that "their religious motivation for using peyote place[d] them beyond the reach of a criminal law that [was] not specifically directed at their religious practice, and that [was] concededly constitutional as applied to those who use the drug for other reasons." *Smith*, 494 U.S. at 878. This Court rejected that contention.

The Court first noted that the "free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires" and that the First Amendment therefore "obviously excludes all 'governmental regulation of religious *beliefs*

as such.'" *Smith*, 494 U.S. at 877 (quoting *Sherbert*, 374 U.S. at 402). The Court explained, however, that when such beliefs involve "the performance of (or abstention from) physical acts," a different analysis is required. *Ibid.* In that setting, the Free Exercise Clause does no more than prohibit the government from prohibiting "such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Ibid.* But where "burdening" or even "*prohibiting* the exercise of religion" "is not the object" of a "generally applicable and otherwise valid provision" but "merely [its] incidental effect," then "the First Amendment has not been offended." *Id.* at 878 (emphasis added).

Like the law at issue in *Smith*, the ADA is neutral and generally applicable: it applies to all employers with more than 15 employees. 42 U.S.C. 12111(5), 12112(a). It does not single out religious organizations for disfavor or interference. To the contrary, the statute provides special solicitude to religious employers by providing them defenses unavailable to secular employers. See 42 U.S.C. 12113(c). Under *Smith*, petitioner cannot claim that the Free Exercise Clause provides it an exemption from the ADA's generally applicable prohibition on retaliation.

2. The Free Exercise Clause does not forbid application of neutral, generally applicable employment laws to religious entities

Petitioner contends that, notwithstanding *Smith*, the Free Exercise Clause confers on religious entities a right "to manage their own internal affairs" and "select their key personnel" without regard to neutral, generally applicable laws (and, moreover, without regard to

the strength of the government's interest in enforcing those laws). Pet. Br. 24. That contention is incorrect.

a. Petitioner emphasizes that the Court in *Smith* reaffirmed the proposition, established in a series of cases concerning disputes over church property, that "[t]he government may not * * * lend its power to one or the other side in controversies over religious authority or dogma," 494 U.S. at 877 (citing *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952)). In petitioner's view, that statement means that the "government may not take sides in a dispute" between a religious employer and a terminated "employee who performs important religious functions" (as defined by the employer), even when the government is seeking to enforce a neutral, generally applicable law. Pet. Br. 23.

The broad rule petitioner attempts to derive from a single sentence in *Smith* is irreconcilable with the decision itself. First, *Smith* cited the government's "lend-[ing] its power to one or the other side in controversies over religious authority or dogma" as an example of an impermissible government attempt to "regulat[e] * * * religious *beliefs* as such." 494 U.S. at 877 (quoting *Sherbert*, 374 U.S. at 402). Accordingly, a court may not choose between competing interpretations of church doctrine because to do so would amount to an attempt to regulate religious belief. But the Court in *Smith* also made clear what the government *can* permissibly do when it enforces a generally applicable law: regulate "the performance of (or abstention from) *physical acts*," even where those acts are religiously grounded and even where the government's regulation would therefore bur-

den religious practice. See *id.* at 877-878 (emphasis added).

Adjudication of this case would not require a court to choose among competing interpretations of Lutheran doctrine or otherwise regulate petitioner's religious belief as such; instead, it involves a "physical act[]" (*Smith*, 494 U.S. at 877)—the dismissal of Perich on grounds made unlawful by the ADA. Indeed, *Smith* made clear that "laws providing for equality of opportunity for the races" are precisely the kind of generally applicable statutes regulating physical acts that pose no free-exercise problem, even when applied to religious entities and even when the entity claims a religious motivation for its actions. *Id.* at 889 (citing *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 603-604 (1983)). So too the ADA, a generally applicable law providing for equality of opportunity for persons with disabilities and for the protection of individuals who speak out about discrimination.

b. Nor do the church-property cases cited in *Smith* support the proposition that "the right of churches to manage their own internal affairs" (Pet. Br. 24) invariably trumps neutral, generally applicable laws. See *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996) (acknowledging that "*Kedroff* and the other Supreme Court cases that we and other courts have cited in support of the ministerial exception did not involve neutral statutes of general application").

Kedroff involved a New York statute that "by its terms * * * transfer[red] the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, to the governing authorities of the Russian Church in

America." 344 U.S. at 107. The statute was neither neutral nor generally applicable; it expressly singled out the Russian Orthodox Church for interference. As the Court explained, the statute "[b]y fiat * * * displace[d] one church administrator with another" and "thus intrude[d] for the benefit of one segment of a church" in violation of the First Amendment. *Id.* at 119.

Petitioner's reliance on *Serbian Eastern Orthodox Diocese* and *Presbyterian Church* is likewise misplaced. Neither involved a church's attempt to exempt itself from a neutral, generally applicable law; instead, those cases "[were] premised on a perceived danger that in resolving intrachurch disputes the State [would] become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *General Council on Fin. & Admin., United Methodist Church* v. *California Superior Court*, 439 U.S. 1369, 1373 (1978) (Rehnquist, J., in chambers); see *Serbian E. Orthodox Diocese*, 426 U.S. at 698 (rejecting defrocked bishop's claim that his removal by church authorities was "procedurally and substantively defective under the internal regulations of the Mother Church"); *Presbyterian Church*, 393 U.S. at 449 ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").[5] Indeed, *Presbyterian Church* emphasized

[5] *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872), on which petitioner also relies (*e.g.*, Pet. Br. 25), did not involve any constitutional claim; it held, as a matter of common law, that civil courts should not disturb the ruling of a religious tribunal on a religious matter. See *id.* at 731 ("When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out

that although civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine" in resolving church property disputes, they can apply "neutral principles of law, developed for use in all property disputes, * * * without 'establishing' churches to which property is awarded." *Id.* at 449, 451.[6]

Any remaining doubt about the meaning of the church-property cases was dispelled by *Jones* v. *Wolf*, 443 U.S. 595 (1979). In that case, a majority of a local congregation voted to withdraw from the Presbyterian Church in the United States, while a minority faction wanted to retain the affiliation. *Id.* at 598. Presbyterian church authorities concluded that "the minority faction constituted the true congregation" of the local church, and the minority faction sought "declaratory and injunctive orders establishing [its] right to exclusive posses-

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of which the civil right arises as it finds them."). At the same time, *Watson* made clear that ecclesiastical bodies could not supplant civil courts on matters of generally applicable law. See *id.* at 733 ("[I]f the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else.").

[6] *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929), upon which petitioner also relies (Pet. Br. 16, 55), is even further afield. That decision involved interpretation of a trust document and presented no question under the First Amendment. *Gonzalez* rejected the Archbishop's contention that "every controversy concerning * * * the right to appointment" to the chaplaincy at issue "was removed from the jurisdiction of secular courts" and entrusted solely to an "ecclesiastical forum." 280 U.S. at 15-16. The question before the Court involved "the terms of [a] trust," and the Archbishop prevailed because the Court found the trust to include "an implied term" that it be "administered" consistent with the rulings of church "tribunals for the determination of ecclesiastical controversies." *Id.* at 16.

sion and use of the * * * church property." *Id.* at 598-599 (internal quotation marks and citation omitted).

The *Jones* Court rejected the contention "that whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself.'" 443 U.S. at 604-605 (internal citation omitted). Had the Court adopted that rule of automatic deference, it would have directed judgment for the minority faction because church authorities had already declared it the true congregation. The earlier property-dispute cases, the Court explained, merely "prohibit[] civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Id.* at 602. They do not disable courts from deciding such disputes according to "neutral principles of law." *Ibid.*; see *id.* at 604. The First Amendment, the Court held, does not "require[] the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved." *Id.* at 605. The Court thus remanded to the Georgia courts to apply the "neutral-principles approach" to the case, noting that such an inquiry might result in judgment for the majority faction, *id.* at 607-609, even though the ecclesiastical authorities had ruled for the minority.

In discussing the "neutral-principles approach" in *Jones*, the Court made clear that the approach was not limited to disputes over property. As the Court noted, the "neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or

purchase goods." *Jones*, 443 U.S. at 606 (emphasis added).

c. Petitioner argues that the ministerial exception "does not present the dangers warned of in *Smith*." Pet. Br. 24 (quoting *Catholic Univ. of Am.*, 83 F.3d at 462). Specifically, petitioner contends that because the exemption is "limited to the right of churches to manage their own internal affairs," it would "not make every individual conscience 'a law unto itself.'" *Ibid.* (quoting *Smith*, 494 U.S. at 890).

It is true that petitioner's conception of the ministerial exemption would not allow a single individual to opt out of a specific law as applied to himself, but it would confer a comparable opt-out power on groups of individuals who form religious organizations. This Court has not adopted that approach. See *Christian Legal Soc'y Chapter of the Univ. of Cal.* v. *Martinez*, 130 S. Ct. 2971, 2995 n.27 (2010) (holding that *Smith* foreclosed religious association's argument that the Free Exercise Clause entitled it to an exemption from an across-the-board policy); cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) (affirming that *Smith* applies to a church's claim of exemption from generally applicable zoning laws).

Petitioner also argues that the categorical nature of the ministerial exception avoids "the balancing condemned in *Smith*." Pet. Br. 24. That is hardly a virtue. Petitioner's approach would exempt a religious organization from a neutral, generally applicable law, no matter how compelling the government's countervailing interests and no matter how negligible the burden on a particular religious practice. Even Members of the Court who have criticized the holding of *Smith* have not advocated that type of per se categorical exemption.

See *Smith*, 494 U.S. at 897 (O'Connor, J., concurring in the judgment) ("Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs.").

d. To recognize a "right of churches to manage their own internal affairs" (Pet. Br. 24), without regard to generally applicable employment laws, would produce anomalous consequences. Although petitioner claims unfettered discretion to fire a purportedly "ministerial" employee, the logic of petitioner's argument would also presumably confer on religious employers unfettered discretion to *hire* "ministerial" employees of their choice, including, for example, aliens not authorized to work in the United States, see *Intercommunity Ctr. for Justice & Peace* v. *INS*, 910 F.2d 42, 44 (2d Cir. 1990) (rejecting religious organization's free-exercise challenge to prohibition on hiring unauthorized workers), or children, see *Prince* v. *Massachusetts*, 321 U.S. 158, 161, 164, 170 (1944) (rejecting free-exercise challenge to child-labor laws preventing the "preach[ing]" of "the gospel" by an "ordained" child "minister[]"). The Free Exercise Clause confers no such "private right to ignore generally applicable laws." *Smith*, 494 U.S. at 886.

B. Petitioner's First Amendment Right To Freedom Of Association Does Not Require Dismissal

Petitioner also contends (Pet. Br. 33-36) that this Court's cases recognizing a First Amendment right to associate with others for expressive or religious ends provide an "independent" basis for a ministerial exception from the civil rights laws. But like the right of free exercise, the right of association provides no basis for crafting a categorical exemption for religious entities.

1. In its expressive association cases, the Court has recognized that "[t]he forced inclusion of an unwanted person in a group" may infringe the group's First Amendment rights, but only "if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000). Although an association's assessment of "what would impair its expression" is entitled to deference, an association may not "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653. Even when a court finds that compliance with the antidiscrimination laws would impose a significant burden, "the freedom of expressive association, like many freedoms, is not absolute." *Id.* at 648. "[T]he freedom [can] be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Ibid.* (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984)).

The principles set forth in these cases provide no support for a categorical, *ex ante* limitation on application of the civil rights laws to all religious employers and employees who perform religious functions. To the contrary, this Court's decisions require careful consideration of a particular group's expression, whether inclusion of the individual in question would significantly impair that expression, and, if so, whether, under all the circumstances, the government's compelling interest should nonetheless prevail. See, *e.g.*, *Dale*, 530 U.S. at 659. Petitioner fails to make any such showing in this case. Indeed, petitioner declines even to consider the

government's compelling interest in preventing retaliation against those who report or speak out about illegal conduct, see Pet. Br. 24-25, much less explain why that interest is insufficient to override any interest petitioner might have in terminating a school teacher for asserting her rights under the ADA.

2. Under different circumstances, a religious employer would be able to successfully invoke a freedom of association defense to application of the civil rights laws. The availability of such a defense provides a full response to petitioner's concern that the operation of generally applicable employment discrimination laws "would prohibit many common religious practices," including, for example, "the all-male clergy among Catholics and Orthodox Jews." Pet. Br. 18. As an initial matter, it is unclear whether Title VII would permit claims challenging such gender-based qualifications because gender could well be considered a bona fide occupational qualification for such positions. See 42 U.S.C. 2000e-2(e)(1); *Dothard* v. *Rawlinson*, 433 U.S. 321, 332-337 (1977). But assuming *arguendo* that the statute otherwise permitted such claims, religious employers could defend against them on the ground that compelled ordination of women would be impossible to square with their religious view that only men should occupy such roles. In light of the deeply embedded and long-standing nature of such ecclesiastical rules, the government interest in enforcement of anti-discrimination laws would necessarily give way. Cf. *Dale*, 530 U.S. at 656-659 (state interest not sufficiently compelling to outweigh Boy Scouts' right to shape message on homosexuality); see also *Smith*, 494 U.S. at 882 ("[I]t is easy to envision a case in which a challenge on freedom of asso-

ciation grounds would likewise be reinforced by Free Exercise Clause concerns.").

But the fact that the First Amendment association right forbids certain applications of the anti-discrimination laws to religious entities does not mean that it must forbid them all. The right of association poses no bar to adjudication of this case.

C. The Establishment Clause Does Not Require Dismissal

Finally, petitioner contends that the "ministerial exception is also, and independently, grounded in the Establishment Clause." Pet. Br. 26. It argues that "[t]he Establishment Clause imposes two important limits on the power of government to interfere in religious organizations: government cannot appoint ministers; and government cannot entangle itself in religious questions." *Ibid.* These two Establishment Clause limits form the foundation of the rule petitioner ultimately asks this Court to adopt: a rule that would bar adjudication of claims by "ministerial" employees when the dispute "could impose an unwanted minister on a church or would entangle the government in religious questions." *Id.* at 50.

That particular formulation of the ministerial exception does not threaten to invalidate the broad swath of statutory applications that a rule "prevent[ing] ministers from suing their churches over most employment disputes" would. Pet. Br. 13. But petitioner's narrower formulation is nevertheless overbroad, sweeping in a substantial number of cases—like this one—that raise no constitutional concerns about governmental appointment of ministers or entanglement in matters of religious doctrine.

1. This case does not present the question of reinstatement to a ministerial office

Petitioner contends that "[p]erhaps the most fundamental problem with discrimination suits by ministers is that when successful, they end in reinstatement." Pet. Br. 26. Petitioner is correct that reinstatement may pose entanglement concerns insofar as it entails actual "government appointment of [a] minister[] over the objections of [a] church[]." *Id.* at 28. But the theoretical availability of such relief does not justify barring adjudication of respondents' retaliation claim in this case, for three reasons.

First, reinstatement may not be feasible in this case because, as petitioner now informs the Court, its school has closed. Pet. Br. 3 n.1; cf. Pet. 2. Perich is not, in any event, seeking reinstatement. See Perich Brief. Accordingly, this case does not present the question whether such a remedy would be constitutional.

Second, an order to reinstate Perich would not necessarily require "reinstatement to her ecclesiastical office." Pet. Br. 15. The school employed contract teachers who performed the same duties as "called" teachers, Pet. App. 5a; on occasion, "called" teachers asked to assume contract status, J.A. 71; and Perich herself previously served in a contract position. Unless non-Lutheran contract teachers, too, are to be considered "ministers," reinstating Perich to such a position would raise no Establishment Clause concerns.[7]

[7] Petitioner argues (Pet Br. 39-40) that lay contract teachers at the school performed important religious functions, even though they were not required to be called or even Lutheran. It is unclear whether petitioner means to suggest that reinstatement of lay teachers to their teaching positions would raise the same Establishment Clause concerns as reinstating a commissioned minister to that ecclesiastical office.

Third, and most fundamentally, reinstatement is not the only remedy in discrimination or retaliation cases, nor is it a remedy to which successful plaintiffs are automatically entitled. See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001). The theoretical availability of a reinstatement remedy therefore provides no grounds for dismissing a complaint that seeks other forms of relief.

Purely monetary relief, for example, does not pose the same risk of entanglement that an order of reinstatement might. Religious organizations are not generally immune from lawsuits, including suits for negligent hiring of clergy, see, *e.g.*, *Malicki* v. *Doe*, 814 So. 2d 347, 364 (Fla. 2002) (First Amendment did not bar a suit for negligent hiring of a minister accused of sexual assault), so religious institutions already must make employment decisions with potential monetary liability in mind. Thus, "it cannot be that the First Amendment prohibits suits simply because they have the potential to affect (or 'regulate') churches' hiring and firing decisions." *Elvig* v. *Calvin Presbyterian Church*, 397 F.3d 790, 792 (9th Cir. 2005) (W. Fletcher, J., concurring in the denial of rehearing en banc); see *id.* at 795 (Kozinski, J., concurring in the denial of rehearing en banc) ("Suits by parishioners or non-ministerial employees resting on generally applicable law are just as likely * * * if not more likely * * * to affect the incentives to hire, fire and supervise ministers as suits by clergy.").

In an analogous setting, this Court distinguished between the burden on a religious practice posed by a monetary penalty and that which could be posed by more intrusive forms of relief. In *Bob Jones University*, the Court recognized that "[d]enial of tax benefits" to discriminatory private religious schools would "inevita-

bly have a substantial impact on [their] operation" but nonetheless rejected religion-clause challenges to that denial. 461 U.S. at 603-604. Schools that wished to persist in their practices could do so; a regulatory regime merely making that course of action more expensive did not "prevent [them] from observing their religious tenets." *Id.* at 604. So too here. Monetary relief—even relief in the form of back and front pay—is categorically different in effect from an order reinstating an employee to ordained or commissioned office. Cf. *Minker* v. *Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990) ("remedy * * * limited to the award of money damages" in breach-of-contract action provided "no potential for distortion of church appointment decisions").

Even if back and front pay were properly considered the "monetary equivalent of reinstatement," as petitioner contends (Pet. Br. 51), both the EEOC and Perich also seek money damages for pecuniary and non-pecuniary losses, as well as attorney's fees. See J.A. 17-18; Pet. App. 73a-74a; see also 42 U.S.C. 1981a(a)(2); *Pollard*, 532 U.S. at 854. This case thus falls outside petitioner's articulation of its own rule: this is not a case that will inevitably "end in reinstatement or * * * back pay and front pay." Pet. Br. 14. Establishment Clause concerns about the remedies available to Perich, should respondents succeed in proving their retaliation claim, provide no basis for refusing to hear the claim altogether.

2. This case does not pose a risk of entanglement on any question of religious doctrine

Petitioner also argues that adjudication of this case would inevitably "entangle the courts in religious ques-

tions." Pet. Br. 52. That argument, too, provides no basis for dismissing this suit at the very outset. Some employment discrimination disputes could present a problem of "excessive" government entanglement with religion, see *Agostini* v. *Felton*, 521 U.S. 203, 233 (1997), if those disputes required a court to take sides in a dispute over religious doctrine. See, *e.g.*, *Serbian E. Orthodox Diocese*, 426 U.S. at 713 ("[R]eligious controversies are not the proper subject of civil court inquiry."). That is not, however, true of every case in which an employee who performs religious functions challenges her termination as unlawful, and it is not true of this case.

a. Most obviously, there is no danger of entanglement when the religious employer proffers no religious reason for the employee's termination. For example, had Perich been dismissed on the stated ground that her class's scores on standardized math tests were subpar, Perich might attempt to show that this reason was pretextual, and that the real reason for her dismissal was illegal retaliation. Such a case would be litigated just like any employment discrimination case involving a non-religious organization and would pose no risk of entanglement on any matter of religious doctrine. See *Rweyemamu* v. *Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("[H]owever high in the church hierarchy he may be, a plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court.").[8]

[8] The same analysis would apply in a sexual-harassment case where, as typically occurs, the employer does not suggest that the harassment alleged was religiously motivated but will instead deny that the harassment took place. See *Bollard* v. *California Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (permitting sexual-harassment suit against religious employer to proceed; "The Jesuits do not offer a

Petitioner counters that, "when the employee was performing important religious functions for a church, the employer's proffered legitimate reasons are nearly always religious." Pet. Br. 29 (citing *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir.), cert. denied, 549 U.S. 881 (2006)). It is not clear why that would be true as an empirical matter, particularly where the employee also performs non-religious duties. In any event, petitioner's predictive judgment about the types of reasons religious employers are likely to offer does not provide a constitutional basis for relieving employers of the task of offering *any* reason at all. See Pet. Br. 24 (citing, with apparent approval, the "dominant understanding of the ministerial exception in the courts of appeals" that the exception applies regardless of the employer's reasons).

b. Merely proffering a religious reason for terminating an employee does not, moreover, invariably raise entanglement concerns. For example, when a religious employer acknowledges that it retaliated against an employee but claims it did so for a religious reason, there is no risk of entanglement. The court will not have to evaluate church doctrine, assess the centrality of the employer's religious belief, or "resolve a theological dispute" (Pet. Br. 29) in order to adjudicate the case. The court can accept the employer's articulation of its religious reasons for retaliation but nevertheless conclude that the employer is bound by *Smith* to follow generally applicable prohibitions on such conduct. *Smith* itself, which rejected church members' religious defense to the application of neutral, generally applica-

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religious justification for the harassment [the plaintiff] alleges; indeed, they condemn it as inconsistent with their values and beliefs.").

ble law, demonstrates that resolving such a case raises no danger of excessive entanglement.[9]

c. In other cases, the employer may deny any motive to discriminate or retaliate, but argue that it acted for an alternative religious reason, *e.g.*, because the employee had violated the tenets of the faith. The plaintiff may respond by arguing that the religious reason was pretextual (without disputing the employer's interpretation of religious doctrine or gainsaying the centrality of the tenet at issue). This Court's decision in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (*Dayton Christian Schools*), demonstrates that such cases, too, may proceed.

The respondent in *Dayton Christian Schools* was a school that was an "extension of the Christian education ministries of * * * two churches." 477 U.S. at 622. The school professed a "belief in the internal resolution of disputes through the 'Biblical chain of command'" and that "one Christian should not take another Christian into courts of the State." *Id.* at 622-623. After a female teacher informed the school that she was pregnant, she was told her contract would not be renewed because of the school's "religious doctrine that mothers should stay home with their preschool age children." *Id.*

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[9] Similarly, no entanglement problem is posed by testing, as a factual matter, the sincerity of a party's professed religious belief. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005); *Hernandez* v. *Commissioner*, 490 U.S. 680, 693 (1989) ("[U]nder the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayers' alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently irreligious."); *United States* v. *Seeger*, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.").

at 623. The teacher threatened to sue for sex discrimination. She was then suspended and terminated on the stated ground that she had violated the church's mandatory internal dispute-resolution procedure. *Ibid.*

The teacher filed a complaint with the Ohio Civil Rights Commission alleging that the non-renewal decision constituted sex discrimination and that her termination constituted unlawful retaliation. The school filed an action in federal district court "seeking a permanent injunction against the state proceedings on the ground that any investigation of [its] hiring process or any imposition of sanctions for [the school's] nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment." *Dayton Christian Schools*, 477 U.S. at 624-625. The court of appeals reversed the district court's decision denying the injunction, "holding that the [state agency's] exercise of * * * jurisdiction would violate both the Free Exercise Clause and the Establishment Clause of the First Amendment." *Id.* at 625.

This Court reversed, noting that "[e]ven religious schools cannot claim to be wholly free from some state regulation." *Dayton Christian Schools*, 477 U.S. at 628. The Court concluded that "however [the school's] constitutional claim should be decided on the merits, the [Ohio] Commission violates no constitutional rights by merely investigating the circumstances of [the teacher's] discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge*." *Ibid.* (emphasis added). Although Justice Stevens, writing for himself and three other Justices, concurred in the judgment, the Court was unanimous on this point. See *id.* at 632 (Stevens, J., concurring in the judgment).

The decision in *Dayton Christian Schools* refutes petitioner's suggestion that, under *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the very "process of inquiry" in "religious employment discrimination cases" is impermissibly entangling. Pet. Br. 31 (internal citation omitted). The court of appeals in *Dayton Christian Schools* had embraced the very same argument, see *Dayton Christian Schs., Inc.* v. *Ohio Civil Rights Comm'n*, 766 F.2d 932, 959-960 (6th Cir. 1985) (citing *Catholic Bishop*, 440 U.S. at 502-503), rev'd, 477 U.S. 619, and this Court rejected it.[10]

d. Cases in which the religious employer offers a reason relating to an evaluation of the plaintiff's performance of religious functions for an adverse action pose the greatest risk for entanglement. If, for example, petitioner in this case had claimed it fired Perich because she was insufficiently spiritual, it would be constitution-

[10] In *Catholic Bishop*, this Court construed the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, not to apply to teachers in church-operated schools, in order to avoid potential entanglement problems that would arise if the NLRB were found to have jurisdiction. 440 U.S. at 502, 504-507. The Court explained that "[t]he Board will be called upon to decide what are 'terms and conditions of employment' and therefore mandatory subjects of bargaining," *id.* at 502-503—a category that includes "nearly everything that goes on in the schools," including both secular and religious matters. *Id.* at 503. Such ongoing, comprehensive oversight of a religious institution by a government agency raises entanglement concerns of a sort that a carefully circumscribed, backward-looking inquiry into the basis for a single employment action does not. See *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328 (3d Cir. 1993); see also *Pacific Press Publ'g Ass'n*, 676 F.2d at 1282 ("The present case is distinguishable from *NLRB* v. *Catholic Bishop* because neither the judgment in this suit nor Title VII's enforcement mechanisms result in any ongoing scrutiny of Press' operations."); *Hankins* v. *Lyght*, 441 F.3d 96, 116 (2d Cir. 2006) (Sotomayor, J., dissenting).

ally problematic for Perich to challenge that assessment in precisely the same way that an employee of a non-religious employer might attempt to challenge a comparable subjective defense in a secular setting, *e.g.*, that she was insufficiently professional. By contending that she was in fact just as spiritual or more spiritual than other teachers, Perich's claim would risk entangling the court in religious questions beyond its adjudicative capacity.

In such cases, the district court could limit the pretext inquiry to cordon off challenges to the religious organization's religious assessment. If plaintiff's only pretext evidence consisted of a challenge to that assessment, then the suit might have to be dismissed altogether. See *Rweyemamu*, 520 F.3d at 200, 209 (affirming dismissal of complaint brought by priest where stated grounds for dismissal were his "insufficient[] devot[ion] to ministry" and poor homilies).

e. Petitioner in this case has variously contended on the one hand that it did retaliate against Perich for threatening to sue but had a religious reason for doing so—her failure to use the church's mandatory dispute-resolution process—and, on the other hand, that it did not retaliate against Perich but instead terminated her because of her "disruptive" attempt to return to work. The district court could adjudicate both these defenses without entanglement.

Petitioner's proffered reasons do not call upon the district court to evaluate Perich's spiritual "gifts and graces." *Rweyemamu*, 520 F.3d at 209 (internal quotation marks and citation omitted). Nor does petitioner's invocation of Lutheran teaching necessarily invite the district court to evaluate whether "Lutherans really believe in non-litigious, internal resolution of disputes over

fitness for ministry," based on the testimony of warring Lutheran theological experts. Pet. Br. 56-57.

Much as in *Dayton Christian Schools*, the district court can inquire into whether petitioner's proffered doctrinal reason for terminating Perich actually motivated its actions without questioning the validity of the doctrine. See Pet. App. 24a; *ibid.* (noting that "none of the letters that [petitioner] sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures"); see also *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329 (3d Cir. 1993) (First Amendment did not preclude the court from "determin[ing] whether the religious reason stated by [the school] actually motivated the dismissal"); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993) (court can conduct an "inquiry * * * [into] whether the articulated purpose is the actual purpose for the challenged employment-related action" without "calling into question the value or truthfulness of religious doctrine"). Moreover, even were the district court to conclude that petitioner retaliated against Perich for religious reasons, the court could conclude that those reasons must yield to the ADA's across-the-board prohibition on such reprisals. There is, in short, no basis to conclude that adjudication of this case will inevitably result in excessive governmental entanglement in matters of religious doctrine.

III. RELIGIOUS EMPLOYERS, LIKE OTHER EMPLOYERS, CANNOT BE PERMITTED TO RETALIATE AGAINST EMPLOYEES WHO REPORT ILLEGAL CONDUCT TO THE GOVERNMENT

If accepted, petitioner's request for an exemption from the generally applicable prohibitions of the ADA's

anti-retaliation provision would critically undermine the protections of the ADA and other generally applicable laws.

A. When an employee files a complaint with the EEOC, she does so "not only [to] redress[] [her] own injury but also [to] vindicate[] the important congressional policy against discriminatory employment practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The "primary purpose" of anti-retaliation provisions of the ADA, Title VII, and other similar statutes is to ensure "unfettered access to statutory remedial mechanisms" as a means of furthering the compelling interest in eliminating discrimination in the workplace. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); see *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009) ("If it were clear law that an employee who reported discrimination * * * could be penalized with no remedy, prudent employees would have a good reason to keep quiet."). Accordingly, "[t]o permit [religious employers] to retaliate against employees who challenge discrimination through EEOC procedures would defeat Congress' intention to protect employees of religious employers. The effect would be to withdraw [the ADA's] protections." *Pacific Press Publ'g Ass'n*, 676 F.2d at 1280; see *id.* at 1281.

B. Petitioner purports to define the scope of its ministerial exception so as to preserve some statutory protections for employees who qualify as ministers. Pet. Br. 14, 50. But those protections would become hollow guarantees if such employees could be terminated any time they complained about their employer's failure to comply. For example, in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985) (*Alamo*),

this Court held that there was no constitutional impediment to applying the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to employees of a religious foundation's commercial operations, *Alamo*, 471 U.S. at 294 n.6, 303-306, and the Fourth Circuit reached the same conclusion with respect to teachers at church-operated schools, see *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1395, 1397-1399, cert. denied, 498 U.S. 846 (1990). If, after these decisions, an employee who had been wrongfully denied the minimum wage filed a complaint with civil authorities to recover the shortfall from a religious employer, federal law would ordinarily protect the employee from retaliation for having filed such a complaint. See 29 U.S.C. 215(a)(3). On petitioner's view, however, the employer would be able to terminate the complaining employee without penalty if she was "ministerial."

Permitting religious employers to retaliate against "ministerial" employees would produce other similarly anomalous effects. For example, petitioner's proposed rule would not bar a suit brought under the Equal Pay Act of 1963, 29 U.S.C. 206, by a female "ministerial" employee paid less than a man because, as a current employee, she would not be seeking reinstatement.[11] See Pet. Br. 14; see also *Shenandoah Baptist Church*, 899 F.2d at 1397-1399 (Equal Pay Act applicable to church-run school). Yet, on petitioner's view, as soon as that employee filed a complaint for the Equal Pay Act violation, see, *e.g.*, *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1365 (9th Cir. 1986), the employer could

[11] It is possible, however, that petitioner would view even this suit as barred on entanglement grounds if the employer asserted a religious reason for paying women less than men. See Pet. Br. 52-54.

fire her in response, and she would have no cause of action for retaliation, see 29 U.S.C. 215(a)(3). Likewise, a present employee with a disability could sue because of her employer's failure to provide a reasonable accommodation, see 42 U.S.C. 12112(b)(5)(A), but would have no protection if her employer fired her in retaliation, see 42 U.S.C. 12203. A present employee could complain about a recognized workplace hazard "causing or * * * likely to cause death or serious physical harm," 29 U.S.C. 654(a); see 29 C.F.R. 1975.4(c)(1) (religious schools are employers for purposes of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* (OSHA)), but could be terminated for doing so, see 29 U.S.C. 660(c) (prohibiting retaliation against employees who file complaints regarding OSHA violations). A present employee could seek money damages for "emotional distress and reputational harm caused by * * * sexual harassment," *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 966 (9th Cir. 2004), but could be fired the moment she filed such a complaint, see 42 U.S.C. 2000e-3(a).

C. Petitioner's proposed rule would chill reporting of unlawful workplace conditions by "ministerial" and "non-ministerial" employees alike. Because the test petitioner proposes for determining whether an employee is ministerial is indeterminate, employees of religious employers often will not know in advance whether they would be considered a ministerial employee or not. The employment discrimination laws would not ordinarily require an employee to guess correctly about eligibility for relief before complaining, nor would they permit the employer to defend against a retaliation suit by contending that the employee's underlying complaint of discrimination lacked merit. See *Pettway* v. *American Cast*

Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969) ("The employer may not take it on itself to determine the correctness" of employee's complaint.); *Wallace* v. *DTG Operations, Inc.*, 442 F.3d 1112, 1118 (8th Cir. 2006) ("In general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination * * * the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination * * * claim."). Yet, under petitioner's view, the employer could immediately dismiss such a complaining employee and face no liability if she were ultimately deemed ministerial; the price of the employee's having guessed wrong on that question at the outset would be her job. In this case, for example, Perich's view that she was not ministerial was at the least reasonable: the EEOC and three judges of the courts of appeals agreed with her. Pet. App. 19a-23a, 29a-30a. Yet, under petitioner's view, it may fire Perich for having invoked rights she reasonably believed she possessed under the ADA. As one of petitioner's amici allows, such a rule would create a substantial incentive for all employees to remain quiet about their employers' unlawful practices. American Jewish Comm. Amicus Br. 21-22 ("Allowing retaliation claims despite a claimant's ministerial status would serve the important function of minimizing the chilling effect that an absolute ministerial exception would have on arguably ministerial employees—or even clearly non-ministerial employees—from asserting their statutory rights to report or complain of discrimination both to their employers and to outside enforcement agencies.").

D. Finally, the logic of petitioner's position threatens to impair both court proceedings and government investigations of unlawful conduct in a variety of circum-

stances involving religious organizations. Petitioner justifies terminating Perich on the ground that she violated its tenet that "fellow believers generally should not sue one another in secular courts." Pet. Br. 54. A different religious entity might similarly invoke its teachings to forbid its employees from testifying in a civil lawsuit between other church members, or from reporting other members' criminal misconduct to civil authorities, or from testifying against other members before a grand jury or in a criminal trial. If petitioner's religious reason for retaliating against Perich suffices to excuse petitioner from complying with the ADA's anti-retaliation provision, it is not clear why other religious organizations could not similarly justify their noncompliance with laws forbidding retaliation against witnesses in criminal investigations and other proceedings. See *Haddle* v. *Garrison*, 525 U.S. 121 (1998) (42 U.S.C. 1985(2) provides cause of action to employee terminated in retaliation for participation in grand-jury proceedings); 18 U.S.C. 1513(e) (Supp. I 2007) (federal offense to "knowingly, with the intent to retaliate, take[] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense"); 18 U.S.C. 1512(b) (Supp. I 2007) (offense to "use[] intimidation * * * with intent to * * * induce any person to * * * withhold testimony * * * from an official proceeding"); *United States* v. *Craft*, 478 F.3d 899, 900-901 (8th Cir. 2007) (affirming 18 U.S.C. 1512(b) conviction against employer who threatened to dismiss employee if he provided incriminating information to investigators). No provision of the Constitution demands that result.

IV. THE COURT SHOULD ADDRESS CONSTITUTIONAL ISSUES RAISED BY APPLICATION OF CIVIL RIGHTS LAWS TO RELIGIOUS EMPLOYERS AS THEY ARISE, RATHER THAN BY CRAFTING A BROAD PROPHYLACTIC RULE

Because there is no constitutional impediment to adjudication of this lawsuit, there is no valid basis for reversing the court of appeals' judgment that the suit should be permitted to proceed. To the extent that petitioner suggests that the Court should nevertheless resolve this case by crafting a broad prophylactic rule that would require dismissing some or all suits brought by "ministerial" employees at the outset, the Court should reject that suggestion.

A. "It is neither [this Court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Id.* at 168 (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). As explained above, there is no constitutional impediment to allowing this case to proceed. Nor is there any reason to resolve the case by crafting a broad prophylactic exception to the civil rights laws that would bar more applications of those laws than the Constitution demands.

B. Any prophylactic rule that turns on whether the plaintiff qualifies as "ministerial" would inevitably bar the adjudication of claims that raise no constitutional concerns, and for that reason would be substantially overbroad. See pp. 36-40, *supra*; see *Rweyemamu*, 520 F.3d at 208. Moreover, as the cases demonstrate,

any such rule would itself require difficult line-drawing. See *ibid.* (acknowledging that "[c]ircuit courts applying the ministerial exception have consistently struggled to decide whether or not a particular employee is functionally a 'minister.'"). The predominant test employed by the courts of appeals, which requires an assessment of whether an employee's duties are sufficiently religious to qualify her for the ministerial exception, may itself raise entanglement concerns. See *Elvig*, 397 F.3d at 797 (Kozinski, J., concurring in denial of rehearing en banc) ("The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.").

Petitioner recognizes this difficulty, but its solution is to require courts to defer to a religious employer's position on the religious significance of an employee's duties (unless the position is a "sham"). Pet. Br. 49. Yet experience shows that religious employers invoking the ministerial exception as a defense in employment discrimination lawsuits often take a very broad view of which employees qualify as "ministers." See, *e.g.*, *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (rejecting seminary's contention that "*all* its employees," including "support staff," "serve a ministerial function") (emphasis added), cert. denied, 456 U.S. 905 (1982). To lend near-dispositive weight to a religious employer's characterizations could well result in unnecessarily depriving large numbers of employees of the statutory protections Congress intended to afford them.

Petitioner's proposal to add certain claim-based limitations (Pet. Br. 14, 19, 50) to the inquiry into the plaintiff's job duties does not cure these difficulties. Nor, for the reasons explained above, see pp. 36-40, *supra*, do

those claim-based limitations effectively cabin the reach of the ministerial exception to cases in which adjudication of employment disputes would violate the First Amendment. Petitioner's rule depends on a series of generalizations and predictive judgments—that discrimination suits like this one "*could* impose an unwanted minister on a church," Pet. Br. 50 (emphasis added), or that an employer will "*nearly always*" proffer inherently entangling religious reasons for terminating a ministerial employee, *id.* at 29 (emphasis added)—that do not apply categorically and thus do not justify a categorical rule that could require dismissing this suit, and others like it, at the very threshold.

C. The First Amendment unquestionably places important constraints on the manner in which disputes against religious entities are litigated. See pp. 31-32, 33, 40-41, *supra*. But to evaluate whether those constraints preclude adjudication of a dispute, the focus should be on the nature of the plaintiff's claim, the employer's defenses, and the appropriateness of various remedies, not the job responsibilities of the plaintiff. If it appears that a case will require the court to interpret church doctrine or resolve a dispute over religious matters, then the entanglement principle of the Establishment Clause should generally require dismissal. See *Minker*, 894 F.2d at 1360 (declining to dismiss minister's breach-of-contract claim against church but stating that district court should grant summary judgment to church if it "turn[s] out that in attempting to prove his case, [the minister] will be forced to inquire into matters of ecclesiastical policy"). Courts must also examine remedies to ensure that they do not impermissibly entangle the government in inherently religious matters. But in a case

(like this one) where entanglement problems can be avoided, there is no basis for dismissal at the threshold.

D. Were this Court nevertheless to decide to craft a prophylactic categorical exemption to the civil rights laws, that exemption should be narrowly tailored so as to disturb no more than necessary the judgment of the political Branches about the appropriate scope of those laws. See *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936). Any such exemption accordingly should be limited to those employees who perform exclusively religious functions, *i.e.*, those employees whose positions have no secular equivalent and whose claims concern their entitlement to occupy or retain their ecclesiastical office.

Such a limited rule is most consistent with the church-property cases on which petitioner principally relies. See pp. 24-26, *supra*. The Court's references to religious personnel in those cases were to "clergy," *Kedroff*, 344 U.S. at 116; a bishop, *Serbian E. Orthodox Diocese*, 426 U.S. at 708; and a chaplain, *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929). None of those cases involved personnel with a mix of religious and secular duties, such as Perich. And it is those employees performing exclusively religious functions whose disputes with their employers are most likely to involve subjective judgments about spiritual qualifications that courts are ill-equipped to resolve. See p. 41, *supra*; *Hankins* v. *Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting) (ministerial exception covers employment disputes involving "spiritual leaders," but not parochial school teacher with "some religious duties"). In contrast, when employees' duties mix the secular and religious, there is no basis for applying a categorical exemption. Churches have less claim to unfet-

tered discretion over employees performing duties that resemble those performed by employees of secular organizations, and disputes between such employees and their employers are less likely to be of a religious nature.

A ministerial exception applied to teachers in religious schools, like Perich, would be particularly unwarranted because those employees perform a public function: like teachers in public schools, they offer a service necessary to satisfy state compulsory education laws. "[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education." *Board of Educ.* v. *Allen*, 392 U.S. 236, 245 (1968). Accordingly, "a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." *Id.* at 245-246.[12] "[I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in

[12] In order to satisfy Michigan's compulsory-education law, the subjects taught by private religious schools must be "comparable to those taught in the public schools," Mich. Comp. Laws Ann. § 380.1561(3)(a) (West 2005). Michigan law provides that "[n]o person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach in like grades of the public schools of the state." *Id.* § 388.553; see *Sheridan Road Baptist Church* v. *Department of Educ.*, 348 N.W.2d 263 (Mich. Ct. App. 1984) (rejecting religion-clause challenge to state teacher-certification requirements as applied to parochial school teachers), aff'd, 396 N.W.2d 373 (Mich. 1986), cert. denied, 481 U.S. 1050 (1987).

which those schools perform their secular educational function." *Id.* at 247.

One part of that recognized state interest in religious schools' secular functions is ensuring that they do not discriminate against their employees. Cf. *Bob Jones Univ.*, 461 U.S. at 604 & n.29 (holding that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education" and emphasizing that "[w]e deal here only with religious *schools*—not with churches or other *purely religious* institutions") (second emphasis added). Consistent with this principle, "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception." Pet. App. 17a-18a (citing cases).

That is not to say that lawsuits involving such mixed-duty employees will never raise constitutional questions. Those questions should, however, be addressed when and if they arise. The mere prospect that constitutional questions may arise in some such cases is an insufficient reason to bar those lawsuits from the very outset, thereby categorically depriving Perich and others like her of the protections Congress intended to afford them.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX[1]

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 42 U.S.C. 2000e provides in pertinent part:

Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

* * * * *

[1] The text is from the 2006 edition of the United States Code.

3. 42 U.S.C. 2000e-5 provides in pertinent part:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management

committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and deter-

mine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney

General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order grant-

ing preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate

a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a

union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * * *

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

4. 42 U.S.C. 12111 provides in pertinent part:

Definitions

* * * * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * * * *

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

* * * * *

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

* * * * *

5. 42 U.S.C. 12112 provides in pertinent part:

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * * *

6. 42 U.S.C. 12113 provides in pertinent part:

Defenses

* * * * *

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

* * * * *

7. 42 U.S.C. 12117 provides in pertinent part:

Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provi-

sion of this chapter, or regulations promulgated under section 12116 of this title, concerning employment

* * * * *

8. 42 U.S.C. 12203 provides:

Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.