

No. 10-553

In The
Supreme Court of the United States

—◆—
HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

—◆—
**BRIEF OF *AMICUS CURIAE*
NEIL H. COGAN IN SUPPORT OF
RESPONDENTS URGING AFFIRMANCE**

—◆—
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QUESTIONS PRESENTED

Amicus curiae respectfully submits that the Court consider the following questions:

1. Whether the text of the Religion Clauses and the “the basic scheme of the Constitution” demand that the federal courts create an affirmative defense of “ministerial exception.”
2. Whether the Congress in the Americans with Disabilities Act displaces the power of the federal courts to create and apply an affirmative defense of “ministerial exception” through the provision of a special exemption and specific defenses for religious entities.
3. Whether the federal courts can create and apply a “ministerial exception” to a neutral, generally applicable civil rights statute such as the Americans with Disabilities Act and thereby shield an employer from litigation of a claim of employment discrimination that may be unrelated to the employer’s religious beliefs and practices.

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INTEREST OF *AMICUS CURIAE*

Amicus Neil H. Cogan is a member of the bar of this Court, who teaches and writes in the area of civil rights, constitutional law, and jurisprudence.¹ He has been in practice for more than forty years in California, New York, Pennsylvania, and Texas, and has submitted briefs *amicus curiae* to this Court.²

Amicus is former dean of Whittier Law School (2001-2009), founding dean of Quinnipiac College (now University) School of Law (1993-2000), and associate dean of Southern Methodist University Dedman School of Law (1988-1993).

He is the editor of *The Complete Bill of Rights* (New York: Oxford University Press, 1997) and *The Constitution in Context* (New York: Foundation Press, 1999), and the forthcoming *Union and States' Rights: 150 Years After Sumter, Interposition, Nullification, and Secession* (Akron: University of Akron Press,

¹ This brief has been filed with the written consent of the parties, copies of which are on file with the Clerk of Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, make a monetary contribution to the preparation or submission of this brief.

² Cogan is co-counsel in an unrelated state court case in which defendants have relied upon the “ministerial exception” as an affirmative defense against a state civil rights claim. As *amicus* affirms in footnote 1 and here specifically reaffirms, neither co-counsel nor the client in the state case has made any monetary contribution or has contributed any assistance to this brief in any manner.

2012); *Freedoms and Rights: Law, Democracy, and Culture in Israel* (Durham: Carolina Academic Press, 2012); *Materials on Constitutional Law* (New York: Aspen Publishers, 2013) (with D. Lively).

Amicus has also been a member of the board of directors of three Jewish day schools and has served as president of one school and vice-president of another. These positions notwithstanding, he believes that religious schools should practice non-discrimination when no religious belief or practice requires otherwise and that religious schools act as good citizens when they adhere to and support neutral, generally applicable federal and state civil rights laws.



SUMMARY OF THE ARGUMENT

Deviating from the arguments of the parties, *amicus* respectfully submits that the Court address the separation of powers issues that precede the decision of the question presented herein.

While Petitioner and its supporting *amici* refer to the Americans with Disabilities Act only in passing, that legislation represents the democratic decisions of Presidents George H. W. Bush and George W. Bush, the overwhelming, bi-partisan votes of two Congresses, and the leadership of Senators Orrin Hatch and Edward Kennedy. In signing the Act on July 26, 1990, having witnessed the fall of the Berlin Wall, President Bush said:

“I now sign legislation which takes a sledgehammer to a . . . wall, one which has for too many generations, separated Americans with disabilities from freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, and we will not tolerate discrimination in America.”

In urging that the Court build a new wall, a metaphorical wall not founded in the text or structure of the Constitution, Petitioner and its supporting *amici* ask this Court to disregard the democratic decisions noted above and, inconsistently with the Constitution’s separation of powers, make law on its own.

Amicus respectfully submits that the Congress has not “directed,” and the text of the Religion Clauses and the “basic scheme of the Constitution” do not demand, that the federal courts create a new, implied affirmative defense of “ministerial exception.” *American Electric Power Co., Inc. v. Connecticut*, No. 10-174 (June 20, 2011). Accordingly, the federal courts have no power to create the “exception” and exceed the proper role of judicial review.

Even if the Religion Clauses and the basic scheme of the Constitution demand that the federal courts create a “ministerial exception,” *amicus* submits that when the Congress protects the civil rights of employees against discrimination and after deliberation specifically provides to what extent religious employers have exemptions and defenses, the federal

courts are displaced from creating additional exemptions and defenses.

Amicus further submits that when the Congress regulates a religious employer by a neutral and generally applicable law, the federal courts may not create an exemption or defense that grants a special privilege to religious employers and that makes them a power unto themselves, separate and apart from the democratic will of the community.



ARGUMENT

I. THE TEXT OF THE RELIGION CLAUSES AND THE “BASIC SCHEME OF THE CONSTITUTION” DO NOT DEMAND THAT THE FEDERAL COURTS CREATE AN AFFIRMATIVE DEFENSE OF “MINISTERIAL EXCEPTION”

Recognizing that the question on which the Court granted certiorari concerns the *scope* of the “ministerial exception,” nonetheless *amicus* respectfully submits that before the Court decides that question, it should decide whether the federal courts may create an implied affirmative defense of “ministerial exception” to a federal civil rights employment claim, in this case, the Americans with Disabilities Act. 42 U.S.C. §§ 12111 *et seq.* (hereinafter “ADA”).

As framed in the Brief for Petitioner and supported by several *amici*, the question before the Court

is not solely whether the Act as applied to a particular employee under a particular circumstance is constitutional, but whether religious employers such as Petitioner have a “ministerial exception” that makes them generally exempt from the application of the ADA and other federal civil rights and employment statutes due to the employer’s self-designation as a religious entity and the employer’s designation of an employee as a “minister.” For reasons sounding in the text and structure of the Constitution and the text of the statute, *amicus* respectfully submits that the decisions of the courts of appeals notwithstanding, the federal courts have no power to create such an implied affirmative defense to the applicability of the ADA.

Before discussing the issue of displacement in point II, *infra*, *amicus* submits that *at a more general level* the Court’s recent opinions in *American Electric Power Co., Inc. v. Connecticut*, No. 10-174 (June 20, 2011); and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), counsel that the federal courts do not have the power or, even if they do have power, that they should exercise hesitancy, to create an implied affirmative defense of “ministerial exception” under the Constitution.

Last Term, in *American Electric Power*, the Court said:

Erie [*Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)] . . . sparked “the emergence of a federal decisional law in areas of national concern.” . . . The “new” federal common law

addresses “subjects within national legislative power where Congress has so directed” or where the basic scheme of the Constitution so demands.

No. 10-174, Slip. Op., p. 7, quoting and relying upon Henry Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405, 408, n. 119, 421-422 (1964).

In the instant case, the Congress has not directed the federal courts to create federal common law; indeed, to the contrary, as argued below, the Congress has spoken directly to the issue of religious exemption and defenses. But, Petitioners argue, the Constitution – the Free Exercise and Establishment Clauses – empowers the federal courts to create an affirmative, even jurisdictional, defense of “ministerial exception.” This, *amicus* respectfully submits, is inconsistent with the text and structure of the Constitution.

Applying *American Electric Power*, *amicus* submits that there is no constitutional demand to create federal common law and that, absent such a demand, the federal courts have no law-making power. The text of the Free Exercise and Establishment Clauses – in providing that “Congress shall make no law” – demands neither a remedy nor an affirmative defense in support of its prohibition. In contrast to, say, the Fifth Amendment, the text is wholly silent about

enforcement, whether in the form of a claim or a defense. For those for whom the history of the text is pertinent, a reading of the drafts of the Religion Clauses shows that while Madison’s proposal would have protected “civil rights” and thereby alluded arguably to a remedy, those words were deleted. See Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (1997), pp. 1-11.³

Consistent with the structure of the Constitution they amend, the Religion Clauses leave to the Congress to legislate, if it wishes, how the Clauses may be enforced. Consistent with the role of the federal courts within the constitutional structure, if in a case otherwise properly before the courts, the application of a federal law is challenged as unconstitutional – e.g., because an issue involves an unconstitutional burden or entanglement – then the courts may decide that issue within its fact-framed context. But it does not follow that the federal courts are empowered to go further and legislate an implied exemption or implied affirmative defense in order to protect against a possible violation of the Clauses. That is, because on some occasions there may arise the burden or entanglement that Petitioner and several *amici* fear, it does not follow that the federal courts are empowered to create a prophylactic defense for every religious

³ With profound respect for the scholarship of counsel for Petitioner and several *amici*, their history – even if unchallenged – does not convert the text of the Religion Clauses into a “demand” that the Church be *outside* the jurisdiction of the civilian courts.

entity against every employee whom it designates as a minister because of the mere possibility of that burden or entanglement. If burdens and entanglements become notorious, as they have not, the Congress may consider further exemptions and defenses.

The treatment by the Court of implied remedies under the Constitution illustrates the above. In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), where petitioner sought an implied remedy under the Free Exercise Clause, the Court stated that implied remedies under the Constitution are “disfavored” and indicated that petitioner’s claim would have been dismissed had the government raised the point. 129 S.Ct. at 1948.⁴ If the Court denies a remedy for a party plaintiff who may have no alternative to vindicate an asserted wrong, how much more so should it deny a special affirmative defense for a party defendant who is fully able to defend on the merits.

⁴ Forty years ago, the Court recognized that federal courts may create federal common law remedies where the abridgment of a right requires a judicial remedy. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court continues to follow the holding in *Bivens*, although two Members have suggested its abandonment. See *Correctional Services Corp. v. Malesko*, 543 U.S. 61, 75 (2001) (Scalia and Thomas, JJ., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action – decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition. . . . There is . . . reason to abandon it. . . .”).

The Court has recognized that the “constitutional scheme” does empower the federal courts to create an affirmative defense of official immunity. Quoting Judge Jose Cabranes, the Court indicated that an immunity defense is “‘rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure. . . .’” 129 S.Ct. at 1945. But our constitutional scheme does not demand an independent realm for religious entities. While our constitutional scheme may recognize the existence of religious entities and give their judgments appropriate respect, it does not follow that our constitutional scheme demands that those entities oust federal and state courts of jurisdiction or preempt federal and state courts from making decisions under federal and state law. Our constitutional scheme does not contemplate that every minister, priest, imam, and rabbi who functions as a teacher, adviser, counselor, or trainer, is by such designation of his or her employer beyond the jurisdiction of the federal and state courts. Each of them is entitled to bring a good faith claim of discrimination under the ADA, and religious entities are entitled, in addition to statutory exemptions, to a case-by-case application of the Religion Clauses to those claims.

The much misused “wall of separation” metaphor cannot be used to hide the uncomfortable and distressing fact that wrongs are sometimes committed by religious entities, including when they act as religious employers. And it cannot be used as an impenetrable wall against democratically chosen claims for justice.

II. THE CONGRESS DISPLACES THE POWER OF THE FEDERAL COURTS TO CREATE AND APPLY A “MINISTERIAL EXCEPTION” TO THE AMERICANS WITH DISABILITIES ACT, WHERE IT HAS PROVIDED A SPECIFIC EXEMPTION AND SPECIAL DEFENSES FOR RELIGIOUS ENTITIES

On a more *specific* level, the Congress displaces the power of the federal courts to create an affirmative defense of “ministerial exception” by its considered deliberation and provision of a specific exemption and special defenses for religious entities under the Americans with Disabilities Act. Further, the Congress has not eliminated the ability of religious entities to assert the unconstitutional application of the statute to a particular claim of discrimination; rather, it has structured when a religious employer is totally exempt and when a non-exempt employer must participate in litigation and show, if it can, that a claim involves an unconstitutional burden on free exercise or entanglement with religious decision-making.

The Court has long recognized that separation of powers requires that the federal courts defer to the Congress when it structures the procedures by which federal claims are litigated, see *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514-515 (1869); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938); *Felker v. Turpin*, 518 U.S. 651, 658 (1996), as well as when the Congress displaces federal common law. See *American Electric Power Co., Inc. v. Connecticut*, *supra*,

pp. 9-10. The Court has deferred to the Congress in limiting the creation of implied remedies under the Constitution, see, e.g., *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (the Congress’s remedial scheme is a “special factor counseling hesitation”).⁵

After years of deliberation about the historic discrimination suffered by tens of millions of Americans with disabilities and the inadequacy of federal protection, in 1990, the Congress and the Administration of President George H. W. Bush carefully crafted the Americans with Disabilities Act; and after further deliberation about the inadequacy of the statute, both as written and interpreted, in 2008, the Congress and the Administration of President George W. Bush carefully crafted strengthening amendments. 42 U.S.C. §§ 12101, *et seq.* On both occasions, the legislation was a product of bi-partisan collaboration and overwhelming majorities. Prominent legislative leaders, such as Senators Orrin Hatch of Utah and Edward

⁵ Guidance is found in due regard to the action or even inaction of a coordinate Branch. Thus, in *Bivens*, 403 U.S. 388 (1971), the Court emphasized the significance of “special factors counseling hesitation in the absence of affirmative action by Congress. . . .” *Id.* at 396. Elaborating the ambit of special factors, the Court said that they have “proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent.” *Chilicky v. Schweicker*, 487 U.S. 412, 423 (1988) (O’Connor, J.). “When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.” *Ibid.*

Kennedy of Massachusetts, led the 1990 legislation, with Senator Hatch having a direct and specific role in fashioning the provisions related to religious entities.

In Title I of the ADA, dealing with discrimination in employment, the Congress specifically included an exemption for “religious entities” allowing them to prefer persons of a particular religion. 42 U.S.C. § 12112.⁶ In the section on defenses, the Congress provided a general defense, namely, that “[i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.” 42 U.S.C. § 12113(a).

And in the next section, the Congress provided yet a further religious defense, namely, “[t]his subchapter shall not prohibit a religious corporation . . .

⁶ (1) In general. This title 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 title, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities. 42 U.S.C. § 12113(c)(1). And further, it is a defense that “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).

By contrast with the specific defenses in Title I, the Congress provided a *complete* exemption to religious entities from the application of Title III, the public accommodations section. “The provisions of this subchapter shall not apply . . . to religious organizations or entities controlled by religious organizations, including places of worship.” 42 U.S.C. § 12187.

In fashioning the ADA and its varying exemptions and defenses, the Congress has structured the procedures by which claims are litigated and the substance of exemptions and defenses that are available. The Congress’s actions reflect democratic decisions about the need of those with disabilities to participate fully in American life and the need of religious entities to be exempt or otherwise protected. In no provision did the Congress deny the ability of religious entities to raise Free Exercise and Establishment Clause defenses as they apply. At the same time, in the employment section, Congress did not give religious entities complete absolution, as Petitioner and several *amici* urge. As the Court has recognized in its displacement jurisprudence, the Congress need not specifically say that religious

entities do not have a “ministerial exception.” The Congress need only speak to the subject of exemptions and defenses, which it so evidently did.

Recognition that direct statements from the Congress displace its own law-making, means of course that the Court is enforcing democratic decision-making. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, p. 10 (1997) (“once we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of separation of powers) becomes apparent.”); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, p. 37 (2005) (“[i]ncreased recognition of the Constitution’s democratic objective – and an appreciation of the role courts can play in securing that objective – can guide judges both as actors in the deliberative process and as substantive interpreters of relevant constitutional and statutory provisions.”).⁷

Two distinguished Presidents and overwhelming majorities of the Congress have spoken twice. The Court should hesitate in holding that their expression of the democratic will notwithstanding, the Church is

⁷ This learning is found analogously in the concurring opinions of Justices Felix Frankfurter and Robert Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), explaining why President Harry Truman was required to adhere to the democratic will expressed by the Congress even in the midst of the war on the Korean peninsula.

wholly exempt from claims by those it deems to be its ministers.

III. THE FEDERAL COURTS HAVE NO POWER TO CREATE A “MINISTERIAL EXCEPTION” TO A NEUTRAL AND GENERALLY APPLICABLE CIVIL RIGHTS STATUTE AND SHIELD AN EMPLOYER FROM LITIGATING A CLAIM OF EMPLOYMENT DISCRIMINATION THAT MAY BE UNRELATED TO THE EMPLOYER’S RELIGIOUS BELIEFS AND PRACTICES

If, despite the absence of a constitutional “demand” for a “ministerial exception” and despite Congressional provision of specific defenses, the federal courts may nonetheless create a new federal common law defense, that defense to the application of the ADA is subject to the standard of scrutiny applied in *Employment Division v. Smith*, 494 U.S. 872 (1990). Under that scrutiny, the federal courts cannot grant to a religious entity a general “ministerial exception” for each of its employees whom it designates a minister, or priest, or imam, or rabbi.

Rather, the federal courts should examine the employment decision that is the basis for the employee’s claim under the ADA and determine whether accommodation of the disability would substantially interfere with the employer’s practice of religion and, if it would, whether it is rational to require accommodation. A contrary decision, *amicus* suggests, would turn the Free Exercise argument of Petitioner and its

supporting *amici* into an unbounded establishment of religion. Due caution, *amicus* further suggests, counsels further experience with case-by-case litigation of employment discrimination claims brought by employees against religious employers.



CONCLUSION

Amicus respectfully submits that the judgment of the Court of Appeals be affirmed.

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