

No. 10-553

In The
Supreme Court of the United States

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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 *AMICI CURIAE* AMERICAN BIBLE
SOCIETY, ASSOCIATION OF CHRISTIAN
SCHOOLS INTERNATIONAL, ASSOCIATION OF
GOSPEL RESCUE MISSIONS, AWANA CLUBS
INTERNATIONAL, AZUSA PACIFIC UNIVERSITY,
BETHESDA MINISTRIES, THE CHRISTIAN AND
MISSIONARY ALLIANCE, CHRISTIAN CAMP &
CONFERENCE ASSOCIATION, COMPASSION
INTERNATIONAL, CRISTA MINISTRIES,
EVANGELICAL COUNCIL FOR FINANCIAL
ACCOUNTABILITY, MOODY BIBLE INSTITUTE
OF CHICAGO, THE NAVIGATORS, NEW TRIBES
MISSION, TRANS WORLD RADIO, AND UPWARD
SPORTS IN SUPPORT OF PETITIONER**

—◆—
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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	8
ARGUMENT.....	15
I. The “ministerial exception” properly defers to the selection by churches and other religious organizations of their ministry leaders	15
A. Ministry leaders determine the religious expression and exercise of their organizations	15
B. Core religious liberty principles prohibit the enforcement of laws that interfere with the selection of ministry leaders.....	20
II. Religious liberty principles of deference and neutrality dictate a “ministerial exception” that applies to all <i>bona fide</i> ministry leadership positions	22
A. Courts cannot independently search for religious meaning or significance in a position’s duties	23

TABLE OF CONTENTS – Continued

	Page
B. Courts cannot limit the “ministerial exception” to positions that conform to traditional standards of ministry leadership or are otherwise sufficiently religious.....	27
C. The distinction between ministerial and other positions turns on whether the organization’s representations regarding a position’s religious leadership purposes are <i>bona fide</i>	30
III. By excluding positions in which the “primary duties” are not sufficiently religious, the Sixth Circuit’s test denigrates religious exercise and disregards constitutional limits	33
A. The premise of the test denigrates religious exercise.....	34
B. The test’s independent search for religious meaning disregards religious deference and neutrality.....	36
CONCLUSION	42

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Church of the Lukumi Babalu Aye v. Hialeah</i> , 508 U.S. 520 (1993).....	38
<i>Colorado Christian University v. Weaver</i> , 534 F.3d 1245 (10th Cir. 2008)	28, 36
<i>Corp. of the Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987).....	<i>passim</i>
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990).....	38
<i>Equal Employment Opportunity Commission v. Hosanna-Tabor Evangelical Lutheran Church and School</i> , 597 F.3d 769 (6th Cir. 2010)	<i>passim</i>
<i>Fowler v. Rhode Island</i> , 345 U.S. 67 (1953)	27
<i>Hernandez v. Commissioner</i> , 490 U.S. 680 (1989).....	23
<i>Jin Soo Lee v. Immigration and Naturalization Service</i> , 541 F.2d 1383 (9th Cir. 1976).....	33
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	28
<i>Leboon v. Lancaster Jewish Community Center Ass’n</i> , 503 F.3d 217 (3rd Cir. 2007).....	30, 35
<i>Maurer v. Young Life</i> , 774 P.2d 1317 (Colo. 1989)	40
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000).....	26
<i>New York v. Cathedral Academy</i> , 434 U.S. 125 (1977).....	23, 25
<i>NLRB v. Catholic Bishop</i> , 440 U.S. 490 (1979)	26

TABLE OF AUTHORITIES – Continued

	Page
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984).....	18
<i>Serbian Eastern Orthodox Diocese v. Milivojevich</i> , 426 U.S. 696 (1976).....	25
<i>U.S. v. Ballard</i> , 322 U.S. 78 (1944).....	31
<i>Unification Church v. Immigration and Naturalization Service</i> , 547 F.Supp. 623 (D.D.C. 1982).....	31
<i>University of Great Falls v. NLRB</i> , 278 F.3d 1335 (D.C. Cir. 2002).....	26, 32, 35, 37, 41
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	24, 27, 32, 40
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	19, 21

FEDERAL STATUTES AND REGULATIONS

26 U.S.C. § 3309(b).....	31
26 U.S.C. § 501(c)(3).....	31

STATE STATUTES

Va. Code Ann. § 57-1 (West 2003).....	21
---------------------------------------	----

MISCELLANEOUS

Compassion Mission Statement, <i>available at</i> http://www.compassion.com/mission-statement.htm (last visited June 14, 2011).....	15
---	----

TABLE OF AUTHORITIES – Continued

	Page
ECFA Servant Match, <i>available at</i> http://www.ecfa.org/ServantMatch.aspx?Type=Haiti ; http://www.ecfa.org/ServantMatch.aspx?Type=Japan+Relief (last visited June 14, 2011)	16
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> , in <i>Everson v. Board of Education of Ewing</i> , 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.)	20

**STATEMENT OF INTEREST
OF *AMICI CURIAE*¹**

Amici constitute a diverse group of religious ministry organizations and collectively they conduct many different types of activities including humanitarian relief, community development, care for seniors, education in “arts and sciences” at all levels and training in religious texts and religious living. *Amici* conduct all of their activities out of a Christian motivation and in furtherance of their respective Christian missions.

Like many other religious organizations, *amici* are guided by their beliefs to carry out their activities as associations of like-minded believers, and their doing so is an expression of those beliefs. Further, the experience of community within such religious associations often inspires and energizes their service to others. Shared religious belief among those carrying out *amici*’s activities also ensures that these activities are conducted in a manner that distinctly expresses and exercises their religious convictions.

¹ The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Just as *amici* hold a variety of distinct beliefs within the broader framework of Christianity, they also take different approaches to leadership. *Amici* apply different labels to their leadership positions, require different qualifications and assign different duties. But notwithstanding these differences, *amici* all require their leaders to define or transmit to others the distinct religious convictions of their respective organizations. These leaders bear the responsibility to determine the activities and policies that will best exercise and express their respective organization's beliefs. Therefore, the selection by *amici* of their ministry leaders lies at the heart of their religious exercise and expression.

The decision in this case could have significant implications for the foundational religious liberty interests *amici* share in selecting their ministry leaders without governmental interference. Further, how this Court characterizes the religious exercise and expression in this case, and the applicable religious liberty interests, will likely establish a framework for future deliberations within all branches of government on questions of religious hiring. In this regard, *amici* believe that the Sixth Circuit's "primary duties" test fails to comprehend *amici*'s religious calling to perform many seemingly secular functions. Therefore, *amici* are respectfully submitting this brief to describe the distinct religious significance of ministry leadership positions and the legal principles that prohibit courts from applying the "ministerial exception" in a manner that defines

ministry leadership positions by independently distinguishing between religious and secular duties.

The religious character and mission of the *amici* are as follows.

American Bible Society (“ABS”) works to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. Established in 1816 and based in New York City, the ministries of ABS include publishing the Good News Translation (1976) and the Contemporary English Version (1991) of the Bible, and creating a variety of Scripture-based materials to help people engage with the message of the Bible.

Association of Christian Schools International (“ACSI”) is the largest association of Protestant schools in the world, having more than 5,000 member Christian schools in more than 100 nations. ACSI is based in Colorado Springs. Its mission is to enable Christian educators and schools worldwide to effectively prepare students for life.

Association of Gospel Rescue Missions (“AGRM”) exists to proclaim the passion of Jesus toward the hungry, homeless, abused, and addicted; and to accelerate quality and effectiveness in member missions. Every year, AGRM member missions located throughout the country serve nearly 42 million meals, provide more than 15 million nights of lodging, bandage the emotional wounds of thousands of abuse

victims, and graduate 18,000-plus individuals from addiction-recovery programs.

AWANA Clubs International provides fully-integrated evangelistic and discipleship programs for ages 2 to 18 that actively involve parents, church leaders and mentors. Each week, more than 1.5 million children and youth, 250,000 volunteers and 170-plus field staff take part in Awana in over 22,000 churches in the U.S. and internationally. Awana is based in the Chicago area.

Azusa Pacific University (“APU”) is a comprehensive, evangelical, Christian university located near Los Angeles. A leader in the Council for Christian Colleges & Universities, APU is committed to God First and excellence in higher education. APU serves more than 8,500 students on campus, online and at 7 regional centers, offering more than 60 areas of undergraduate study, 26 master’s degree programs, and 7 doctorates.

Bethesda Ministries is a nonprofit Christian ministry organization headquartered in Colorado Springs whose mission is to provide child care, education and health care to over 40,000 impoverished children in 19 countries through *Mission of Mercy*. Bethesda Ministries also has a nonprofit subsidiary, whose mission is to care for seniors with dignity, including those whose financial status qualifies them for Medicaid. The subsidiary operates 15 residential senior living communities in 6 states with over 600 employees.

The Christian and Missionary Alliance is a church denomination and missionary organization with about 429,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization also sponsors a number of educational institutions and retirement centers around the country.

Christian Camp and Conference Association (“CCCA”) provides resources for leaders and participants in camping and conference organizations. There are more than 900 Christian camps and conference centers who are CCCA members and every year nearly eight million people participate in their programs.

Compassion International (“Compassion”) is a Christian child advocacy ministry that, in response to Christ’s instructions to his followers (the “Great Commission”), releases children from their spiritual, economic, social and physical poverty and enables them to become responsible and fulfilled Christian adults. Based in Colorado Springs, Compassion provides regular support to more than one million children in 24 countries.

CRISTA Ministries (“CRISTA”) was founded in 1948 and its corporate offices are in Seattle. CRISTA’s mission is to love God by serving people – meeting practical and spiritual needs – so that those it serves will be built up in love, united in faith and maturing in Christ. CRISTA has 2 senior living facilities (over

600 residents), 3 broadcasting stations, 2 K-12 Christian schools, a school for at-risk-teens, 2 camps, a veterinary mission and an international relief organization operating as World Concern. World Concern works with communities in some of the most neglected areas of the world, including Myanmar and Chad.

Evangelical Council for Financial Accountability (“ECFA”), based in Virginia, provides accreditation to leading Christian nonprofit organizations that faithfully demonstrate compliance with established standards for financial accountability, fundraising and board governance. ECFA members include Christian ministries, denominations, churches, educational institutions and other tax-exempt 501(c)(3) organizations. Collectively, ECFA member organizations represent more than \$18 billion in annual revenue.

Moody Bible Institute of Chicago (“Institute”) was established in 1886 by D.L. Moody. The Institute is a nonprofit organization with broadcasting, publishing, and education branches. Approximately 4,000 students representing over 38 countries study each year in the undergraduate and graduate programs. The Institute has 83 full-time faculty members and approximately 600 employees.

The Navigators is an international, interdenominational Christian ministry established in 1933. Navigators are characterized by an eagerness to introduce Jesus to those who don’t know Him, a

passion to see those who do know Jesus deepen their relationship with Him, and a commitment to training Jesus' followers to continue this nurturing process among the people they know. Based in Colorado Springs, the Navigator staff family – 4,600 strong – includes 70 nationalities.

New Tribes Mission (“NTM”) and its more than 3,000 missionaries start tribal churches among people who have no concept of the God of the Bible. Based in Sanford, Florida, NTM missionaries in over 20 countries seek to establish mature churches that can take their rightful place as agents of change in their own communities and partners in the Great Commission of Jesus Christ.

Trans World Radio (“TWR”) is a global media outreach that engages millions in 160 countries with biblical truth. Based in Cary, North Carolina, TWR ministries speak fluently in more than 200 languages and dialects. Together with international partners, local churches and other ministries, TWR provides relevant programming, discipleship resources and dedicated workers to spread hope to individuals and communities around the globe.

Upward Sports provides the world's largest Christian sports program for children. Each year some one million people around the world play, coach, referee or volunteer in Upward Sports Leagues and camps hosted by more than 2,400 churches. These churches have taken Upward Sports Programs to 67

countries. Upward Sports has its headquarters in Spartanburg, South Carolina.



SUMMARY OF ARGUMENT

This case asks whether the “ministerial exception” bars a former teacher from bringing a claim under the Americans with Disabilities Act against Hosanna-Tabor Evangelical Lutheran Church and School (the “School”). The School claims the teacher is subject to the exception because as a teacher she played an important role in the religious mission of the school. She was also recognized as a “commissioned” minister by the Lutheran Church Missouri Synod. The Sixth Circuit, however, determined that her position was not subject to the “ministerial exception” because her “primary duties” were not sufficiently religious. *Equal Employment Opportunity Commission v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 779-81 (6th Cir. 2010).

The question in this case consists of two parts: (1) does the constitution preclude courts from enforcing statutory limitations on the criteria by which churches and other religious organizations select their ministry leaders, and (2) how can courts distinguish between ministry leadership and other positions? With respect to the first part, this brief discusses the diverse types of activities in which religious organizations engage and the foundational role leadership positions play in the religious exercise

and expression of all types of religious organizations. The brief then summarizes how the “ministerial exception” results from applying these factors to principles of religious deference and neutrality.

With respect to the second part, this brief argues that a court cannot parse the duties of various positions to determine independently (without deference to religious organizations) whether they are sufficiently religious or whether they align with the court’s notion of what religious leaders do. Instead, courts must defer to the *bona fide* representations of religious organizations regarding their leadership positions. The brief concludes by explaining how the Sixth Circuit’s “primary duties” test violates these core religious liberty principles.

1. The “ministerial exception” properly defers to the selection by churches and other religious organizations of their ministry leaders.

Many churches and other religious organizations are defined by the common religious commitment of their members and employees. As Justice Brennan wrote in this Court’s leading case upholding religious hiring rights: “determining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is ... a means by which a religious community defines itself.” *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). By associating with fellow believers in

carrying out their activities, religious organizations not only *express* religious beliefs to others, but they also separately and independently *exercise* those beliefs.

These principles apply with additional force to the selection by religious organizations of their ministry leaders. It is these leaders who make the critical determinations referred to above by Justice Brennan; they ensure that each organization's activities and personnel reflect and express its distinctive religious beliefs. Therefore, the selection of these leaders is central to each organization's religious exercise and expression.

This Court's cases, as well as those of lower courts, have consistently deferred to the determination by religious organizations of certain core institutional issues. These determinations include both the interpretation of religious doctrine and, as applied to the "ministerial exception," the selection of ministry leaders. This deference facilitates the flourishing of the diverse religious life that characterizes and energizes this country. And it gives substance to the sentiment that civil government is not the highest authority in human affairs. Separation of church and state would have little practical force if courts or other government officials could dictate the terms by which religious organizations select their leaders.

2. Religious liberty principles of deference and neutrality dictate a “ministerial exception” that applies to all *bona fide* ministry leadership positions.

The contentious issue with respect to the “ministerial exception,” and the immediate question in this case, is how to identify those positions within a religious organization to which the exception applies. The line between minister and non-minister employees, like the line between religious and secular duties, is a difficult line to draw in a way that can be administered by courts. As an initial matter, notwithstanding the “ministerial exception” label, the exception cannot be limited to religious or ministry leaders who happen to be traditional Christian church ministers. The Constitution’s fundamental commitment to neutrality among different forms of religious expression dictates that the exception must encompass both traditional and nontraditional ministry leadership positions within the diverse forms of religious communities in this country. For this reason, courts cannot measure the extent to which a position’s duties align with a particular model of religious activity or ministry leadership. Further, constitutional deference prohibits courts from independently determining whether an employee qualifies as a “minister” pursuant to the tenets of a religious employer.

These same principles of deference and neutrality also prohibit courts from applying the exception only to those positions determined based on the court’s own standards to be sufficiently religious.

Government officials and courts have neither the competence nor the authority to distinguish between “ministerial” and other positions based on their own views of the religious character of the duties, and doing so results in religious entanglement and favoritism.

In applying the “ministerial exception,” then, courts must defer to *bona fide* representations of religious organizations regarding who is a minister or who exercises important religious leadership in an organization. As part of this assessment, the fact that the organization has conferred a ministry leadership title on the position (or the individual holding the position) may create a presumption that the position is a *bona fide* leadership position. But no particular title can be required: the exception applies as much to rabbis, gurus, imams, vicars, campus directors, presidents, executive directors, priests, chaplains and elders as it does to ministers, provided that in each case the title represents a *bona fide* ministry leadership position.

Similarly, a court may consider the duties of the position to determine whether the organization has made false or materially inconsistent representations regarding the religious leadership nature of the position. But to the extent the religious character of duties are relevant, such character must be based on the organization’s purpose for the duties and not on the court’s subjective measure of their apparent religious qualities.

3. By excluding positions in which the “primary duties” are not sufficiently religious, the Sixth Circuit’s test denigrates religious exercise and disregards constitutional limits.

The Sixth Circuit’s “primary duties” test fails on all these points. The test entirely ignores the *bona fide* limitation, and it violates the neutrality requirement by imposing a ministry leader standard based on the Sixth Circuit’s perception of the types of activities in which ministers primarily engage (e.g., “teaching, spreading the faith ... participation in religious worship”). *Hosanna-Tabor*, 597 F.3d at 778. As applied, the court abandons all deference by requiring courts to determine independently whether a position’s duties are sufficiently religious to align with one or more of the activities in this standard. In this case, the court summarily concluded that a position which each day involves teaching “secular” subjects (“without incorporating religion”) for six hours and fifteen minutes and conducting “religious” activities for forty-five minutes is not a ministry leadership position. *Id.* at 780.

Predictably, the Sixth Circuit’s analysis is incoherent. As an initial matter, this analysis rests on the flawed premise that teaching “secular” subjects is only a religious activity if religion is incorporated in some unspecified manner. This premise trivializes the religious convictions which underlie the commitment of many religious organizations to provide educational and/or social services. For instance, the Bible teaches that true religion consists of taking care of

widows and orphans (it does not mandate “incorporating religion” into such care). That a secular organization might embrace a similar mission for nonreligious reasons does not diminish the religious significance of this Biblical mandate to a religious organization. A “ministerial exception” that excludes leadership positions engaged in, for instance, educational or social service activities would require religious organizations which believe they are called to provide such services to sacrifice their religious liberty in order to fulfill their religious duties.

In addition to imposing a false distinction between secular and religious activities, the Sixth Circuit’s test improperly requires courts to determine independently the religious meaning or significance of the various duties of a position. The test provides no criteria for how (or how much) “religion” must be incorporated into “secular” classes, or for how much more time each day must be spent on “religious” activities, in order to satisfy the ministry leadership standard. So, for instance, there is no guidance to compare the position of director of a rescue mission run by a Baptist church that includes a specific denominational prayer and an evangelistic message in each of its activities with the director position of a rescue mission run by a Methodist church that requires no prayers but offers optional Bible studies and worship services. In short, the test sets courts adrift in a sea of subjective religious determinations which they have no competence or authority to

navigate; it will inevitably produce arbitrary and discriminatory results.

Amici respectfully request this Court to affirm that the “ministerial exception” applies to all *bona fide* ministry leadership positions, and that the determination of such positions turns not on the court’s view of whether the “primary duties” are sufficiently religious, but rather on whether the *bona fide* “primary purpose” of the position is religious leadership.



ARGUMENT

- I. **The “ministerial exception” properly defers to the selection by churches and other religious organizations of their ministry leaders.**
 - A. **Ministry leaders determine the religious expression and exercise of their organizations.**

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other religious organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. A number of organizations, such as Compassion International, CRISTA and Bethesda Ministries focus on delivering humanitarian relief and basic life sustenance resources and services to the desperately needy. These organizations and others have been on the front lines responding to

catastrophic events such as the earthquake in Haiti and the tsunami in Japan.²

Other organizations, such as members of the Association of Gospel Rescue Missions reach out to the homeless and others on the margins of society, providing shelters, meals, and job and life skills training to help these persons work back into society. While some organizations serve a range of human needs, others focus on the specific needs of certain social segments. For instance, Upward Sports and Awana Clubs International each operate youth programs providing recreational opportunities and biblical instruction, and CCCA members provide camping experiences.

The Association of Christian Schools International has over 5,000 member institutions providing accredited educational programs. Azusa Pacific University provides fully-accredited higher educational programs to over 8,500 full and part-time students, and Moody Bible Institute provides undergraduate and graduate biblical training (in addition to radio broadcasting and publishing). Other *amici* engage in various forms of missionary work, spreading the

² The Evangelical Council for Financial Accountability, an organization which accredits Christian ministries complying with rigorous financial and governance standards, has posted on its website a list of member organizations responding to these disasters. See ECFA Servant Match, *available at* www.ecfa.org/ServantMatch.aspx?Type=Haiti; www.ecfa.org/ServantMatch.aspx?Type=Japan+Relief (last visited June 14, 2011).

Christian faith and planting and nurturing local church communities in the U.S. and around the world.

Amici and other religious organizations view their respective activities, whether serving the poor or elderly or marginalized, or providing education, or offering distinctly religious worship or evangelism, both as service to God and as an expression of religious faith. For example, Compassion International performs humanitarian work in response to the “Great Commission” (Jesus’ command to his followers to make disciples). Mission Statement, *available at* <http://www.compassion.com/mission-statement.htm> (last visited June 14, 2011). As explained by Justice Brennan in *Amos*: “Churches often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster...” 483 U.S. at 344 (Brennan, J., concurring).

In carrying out their activities, religious organizations often adopt religious requirements for some or all of their workers. Such religious associational policies help these organizations ensure that their activities, some of which may be similar to those of secular organizations, maintain their distinctive religious character. The point is not just that services are being provided, but that services are being provided by religious followers as an expression and exercise of their religious beliefs.

Moreover, the full expression and, separately, exercise of religion comes not just from conducting such activities, but from conducting them as an association of like-minded believers. That associations may have an expressive component entitled to protection has long been recognized by this Court. In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), this Court held that:

... collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, ... implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Through their religious associational policies, religious organizations not only *express* distinctive religious convictions but they also separately *exercise* religion. The carrying out of certain activities in service to society and the associating with fellow believers are intertwined, and often the latter energizes the former. This Court has repeatedly observed that religious activities and association can be a form of religious exercise. In his opinion in *Amos*, Justice Brennan observed that:

Religion includes important communal elements for most believers. They exercise their religion through religious organizations....

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Amos, 483 U.S. at 341-43 (1987) (Brennan, J., concurring) (internal quotation omitted). Similarly, in *Wisconsin v. Yoder*, this Court observed that “Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.” 406 U.S. 205, 210 (1972). This Court further noted that the Amish base this concept on “their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, ‘be not conformed to this world....’” *Id.* at 216.

Clearly different religious organizations, even those of the same general faith, will reach different conclusions regarding the particular activities and associational requirements that best nurture and carry out the dictates of their faith. Perhaps not many religious organizations believe the associational requirements apply as broadly as do the Amish. But the important point is that in each case this determination is based on religious beliefs as interpreted and applied by the leaders of the religious organization.

Religious or ministry leaders bear the responsibility of determining which activities and associational policies will best accomplish the religious missions of their respective organizations. In addition, they must ensure that the activities and policies are carried out in a manner that reflects each organization's distinctive religious beliefs. For these reasons, a religious organization's selection of its ministry leaders lies at the heart of its religious expression and exercise.

B. Core religious liberty principles prohibit the enforcement of laws that interfere with the selection of ministry leaders.

Religious liberty as conceived by this country's Founders started with the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments*:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., reprinted in *Everson v. Board of Education of Ewing*, 330 U.S. 1, 64 (1947) (appendix to dissenting

opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is “a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do...” Va. Code Ann. § 57-1 (West 2003). Because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. Put differently, civil government is not the highest authority in human affairs.

Accordingly, religious liberty in our constitutional system protects religious organizations from intrusive or discriminatory governmental action that impairs the religious character of such organizations. Among other things, such protection fosters religious diversity. As this Court observed in *Yoder*, “... in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’” *Yoder*, 406 U.S. at 223-24. This Court further noted that “[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.” *Id.* at 226.

Rules of religious deference and neutrality based on these fundamental principles dictate an exemption for religious organizations from laws that impose liability with respect to the selection by such organizations of their ministry leaders. As Justice Brennan stated in *Amos*, “ ... religious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: *select their own leaders*, define their own doctrines, resolve their own disputes, and run their own institutions.” *Amos*, 483 U.S. at 341-43 (1987) (Brennan J., concurring) (emphasis added; internal quotation omitted). Such a “ministerial exception” has been widely recognized by federal courts. See *Hosanna-Tabor*, 597 F.3d at 777-78.

II. Religious liberty principles of deference and neutrality dictate a “ministerial exception” that applies to all *bona fide* ministry leadership positions.

The primary issue in this case is how courts can distinguish between minister and non-minister positions. This distinction must be guided by the following rules grounded in religious liberty principles of deference and neutrality.

A. Courts cannot independently search for religious meaning or significance in a position’s duties.

This Court has repeatedly held that government officials have no competence or constitutional authority to interpret or apply religious beliefs, or to determine independently the religious significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, this Court struck down a statute which required government officials to “review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities.” *Id.* at 132. This Court noted that the requirement would place religious schools “in the position of trying to disprove any religious content in various classroom materials” while at the same time requiring the state “to undertake a *search for religious meaning* in every classroom examination offered in support of a claim.” *Id.* at 132-33 (emphasis added). This Court concluded that “[t]he prospect of church and state litigating in Court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.” *Id.* at 133.³

³ See also *Hernandez v. Commissioner*, 490 U.S. 680, 694 (1989) (in income tax exemption context, pervasive governmental inquiry into “the subtle or overt presence of religious matter” is proscribed by the First Amendment Establishment Clause).

Ten years later, this Court in *Amos* upheld against an Establishment Clause challenge, a religious exemption that applied to all activities of a religious organization, not just its *religious activities*. This Court observed that “[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.” *Amos*, 483 U.S. at 336.

This limitation applies not just to distinctions between religious and secular activities, but also to different types of religious activities. In *Widmar v. Vincent*, the Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting “religious worship.” 454 U.S. 263, 269 n.6 (1981). The Court observed that the distinction between “religious worship” and other forms of religious expression “[lacked] intelligible content,” and that it was “highly doubtful that [the distinction] would lie within the judicial competence to administer.” *Id.* The Court noted that “[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.” *Id.*; see also *id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious

worship due to the many and various beliefs that constitute religion).

These cases all recognize that in practice discerning the religious significance of an activity or duty (for instance, whether it constitutes religious worship or religious instruction) requires doctrinal interpretation. Government officials making such a determination independently may, on the one hand, analyze the activity by interpreting the organization's religious doctrine, a task which is clearly outside of their competence. Such discernment requires precisely the inquiry into the religious significance of words and practices expressly rejected in *Cathedral Academy* and *Widmar* (among others). *See also, Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (holding that courts cannot review whether actions of religious organizations "involving matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law" comply with church laws and regulations). Alternatively, government officials may compare the activity with activity they implicitly perceive to be "religious." But this approach not only fails for the reasons described above, it also creates an implicit state-defined orthodoxy regarding religious activities and interferes with the right of religious institutions to determine and apply their own doctrine.

These same constraints preclude courts from independently determining the religious character of an *organization* (and, by extension, a *position*) based

on its activities and policies. As one example, the Court of Appeals for the D.C. Circuit struck down a *substantial religious character* test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider “such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty.” *Id.* (quotation omitted).

The court concluded that the test “boils down to ‘is [an institution] sufficiently religious?’” *Id.* at 1343. The court further held that “very process of inquiry” into the “‘religious mission’ of the University,” as well as “the Board’s conclusions have implicated [] First Amendment concerns...” *Id.* at 1341 (citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)); *see also Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality) (“It is well established, in numerous other contexts, that Courts should refrain from trolling through a person’s or institution’s religious beliefs.”).

B. Courts cannot limit the “ministerial exception” to positions that conform to traditional standards of ministry leadership or are otherwise sufficiently religious.

Distinctions based on a court’s view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in *Widmar*. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. The ordinance resulted in the arrest of a Jehovah’s Witness as he addressed a peaceful religious meeting. The Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

Appellant’s sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some.... [It is not] in the competence of Courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings.... To call the words which

one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 69-70.

More recently, this Court struck down state law that contained an exemption for religious organizations, but only if they received more than half of their total contributions from members or affiliated organizations. *Larson v. Valente*, 456 U.S. 228, 231-32 (1982). Although the law nominally applied secular criteria, this Court held that the criteria created an unconstitutional religious preference because it “effectively distinguish[ed] between well-established churches that have achieved strong but not total financial support from their members ... and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members...” *Id.* at 245 n.23 (internal citation and quotation omitted).

Religious favoritism also results from measuring religiosity. The Tenth Circuit Court of Appeals recently struck down a multi-factor test intended to separate *pervasively sectarian* educational institutions from other religious educational institutions, allowing the latter but not the former to participate in a state student aid program. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The court concluded that the pervasively sectarian

test violated the First Amendment because it “necessarily and explicitly discriminate[d] among religious institutions ...,” *id.* at 1258, and “the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board.” *Id.* at 1259.

Because of the many different types of ministry leadership positions, it is not difficult to see how classifying such positions based on a court’s view of religious characteristics leads to favoritism. For instance, suppose a religious institution expresses its religious value of caring for the needy by providing meals and shelter, and that the theological tradition of this institution emphasizes “teaching by example” over preaching. For such an organization, leadership may consist primarily of providing meals and shelter. However, because courts are not competent to interpret the institution’s doctrine, they cannot conclude based on this doctrine that the activities reflect religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the activities are not religious. But this conclusion favors one religious tradition regarding how to serve and teach over another.

A “ministerial exception” limited to sufficiently religious activities as perceived by a court also creates incentives for organizations to include more distinctly religious content in the duties of their leaders. In the preceding example, the organization

would be well advised to add distinctly religious duties such as prayer and Bible teaching to the leader's position. Doing so would strengthen the argument that the position qualifies for the "ministerial exception" under the Sixth Circuit's test, even though the position would, ironically, be less faithful to the organization's religious tradition.

C. The distinction between ministerial and other positions turns on whether the organization's representations regarding a position's religious leadership purposes are *bona fide*.

The question for "ministerial exception" purposes should not be whether a position is "sufficiently religious" as measured by a court's assessment of the religious significance of the position's duties, or whether it aligns with a particular model of ministry leadership. The question instead should be whether the organization's representations regarding the religious leadership purposes of the position are *bona fide*.

In this regard, the Third Circuit Court of Appeals recently determined that an organization qualified for a religious exemption because its "primary purpose was religious." *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 231 (3rd Cir. 2007). This definition of a religious organization, based on the religious character of its primary purpose(s), is consistent with other statutory definitions.

For instance, federal law provides an exemption from unemployment insurance obligations for employers which are “operated primarily for religious purposes.” 26 U.S.C. § 3309(b). Similarly, the Internal Revenue Code exempts from income tax organizations which are organized and operated exclusively for religious purposes. 26 U.S.C. § 501(c)(3).

To determine whether the primary purpose for a position is religious leadership, government officials cannot (and need not) independently weigh the religious significance of various duties of the position. But they can independently determine whether an organization’s asserted religious purposes for the position are merely a sham, or whether there is at least a plausible connection between the position’s duties and its stated primary purposes. In *U.S. v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual’s asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. *See also Unification Church v. Immigration and Naturalization Service*, 547 F.Supp. 623, 628 (D.D.C. 1982), (“when Congress permitted an alien’s status to turn upon religious considerations[,] it intended that the Immigration and Naturalization Service does no more than to determine if the religion in question is *bona fide*”). As this case suggests, although the First Amendment limits governmental inquiry regarding religious matters, it does not preclude government

officials from determining whether an organization is making false statements regarding its religious beliefs. Accordingly, governmental officials can examine an organization's activities, but only for the limited purpose of verifying that its representations are *bona fide* and sincerely held.⁴

As one example, the court in *University of Great Falls* held that the religious character of an organization may be determined by confirming that the organization holds itself out to the public as a religious organization. 278 F.3d at 1344. Similarly, government officials could inquire into whether an organization has consistently asserted a *bona fide* religious leadership purpose for the position or whether it is opportunistically asserting such a purpose merely to claim the "ministerial exception." Finally, the title given to an individual or position, and the associated qualifications, may also provide some indication of the *bona fide* nature of the religious representations. Indeed, they may even create a presumption of *bona fide* ministry leadership. But no particular title or set of qualifications can be required; different religious

⁴ To the extent specific duties or activities are relevant to a *bona fide* inquiry, it should be clear that the religious character of a duty turns on the purpose for which the duty is performed. See e.g., *Widmar v. Vincent*, 454 U.S. at 271 n.9 (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).

traditions use different titles, or the same title for different purposes, or no titles at all.⁵

III. By excluding positions in which the “primary duties” are not sufficiently religious, the Sixth Circuit’s test denigrates religious exercise and disregards constitutional limits.

The Sixth Circuit’s primary duties test examines the duties of a position not to determine whether the organization’s representations are *bona fide* but rather to determine whether the duties are sufficiently religious to fit a particular model of ministry leadership. Under this model, a ministry leader is one “whose primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.” *Hosanna-Tabor*, 597 F.3d at 778.

⁵ In *Jin Soo Lee v. Immigration and Naturalization Service*, 541 F.2d 1383 (9th Cir. 1976), the court reversed a decision of the INS that a beneficiary was not a *bona fide* “religious worker” under the applicable regulations. The court concluded that a religious worker provision which included a requirement that the alien possess “special skills” did not mean that the alien “must meet some specific standards of training set by the Attorney General or by the Service.” 541 F.2d at 1386. Instead, the regulation “leaves to the particular religious order for whom the alien works the establishment of the kind of skills, training and experience that specially qualify the alien for the religious duties that he performs.” *Id.*

In applying this test, the Sixth Circuit determined that the teaching position did not fit this model because “the primary function was teaching secular subjects.” *Id.* at 780. The court based this conclusion on the findings that the position involved “six hours and fifteen minutes ... teaching secular subjects, using secular text books, without incorporating religion into the secular material,” and that “activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.” *Id.* at 779-80.

A. The premise of the test denigrates religious exercise.

The premise of the Sixth Circuit’s analysis – that certain activities are secular and not religious if they are conducted by others for nonreligious reasons – is not only inconsistent with the case law described above, but it also effectively secularizes a vast array of religious activity. It would essentially mean, for instance, that six of the Ten Commandments (honor your parents and do not murder, steal, lie, covet or commit adultery – Exodus 20: 2-17) are no longer religious because they have been widely embraced by society. Religious organizations formed to fulfill these particular Commandments would not be religious, nor would religious humanitarian organizations, soup kitchens, hospitals, and educational institutions. Indeed, applying this position, Mother Theresa’s activities to serve the poor out of obedience to God would not qualify as serving a religious purpose.

The Third Circuit in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that “[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant.” *Leboon*, 503 F.3d at 230.

The court in *University of Great Falls* also rejected this premise, affirming that a litany of “secular” characteristics of the University:

... says nothing about the religious nature of the University. Neither does the University’s employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes.* That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.... If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty.

278 F.3d at 1346 (emphasis added).

These cases affirm that the purposes and activities of a religious organization are no less religious merely because others may embrace similar purposes or conduct similar activities for nonreligious reasons. The same applies for the duties of employees of such organizations. To hold otherwise would mean that those religious organizations which are called to serve tangible human needs would be required to sacrifice their religious character in order to fulfill their calling. Such a result trivializes religious liberty.

B. The test’s independent search for religious meaning disregards religious deference and neutrality.

The Sixth Circuit’s test not only rests on a false premise, but it also improperly requires courts to search for religious meaning in the duties of a position. The Tenth Circuit in *Colorado Christian* provided several examples of how measuring religious content in various activities results in unconstitutional religious determinations. One of the factors in the *pervasively sectarian* test at issue in that case was whether an institution’s curriculum required religion courses that tended to indoctrinate or proselytize. *Colorado Christian University*, 534 F.3d at 1262. The court noted that the line “between ‘indoctrination’ and mere education is highly subjective and susceptible to abuse.” *Id.* Accordingly, the court concluded that “[t]he First Amendment does not permit government officials to sit as judges of the

‘indoctrination’ quotient of theology classes.” *Id.* at 1263 (emphasis added).

Another factor considered by the Tenth Circuit in the *pervasively sectarian* test was whether the students, faculty, trustees or funding sources of an institution are “primarily” of a “particular religion.” *Id.* at 1264. The court noted that identifying a “particular religion” required a definition of ecclesiology and that “the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology espoused by our citizens.” *Id.* at 1265.

The primary duties test as applied by the Sixth Circuit raises similar analytical issues to those in the pervasively sectarian test (and in the substantial religious character test in *University of Great Falls*). For example, the Sixth Circuit determined that, notwithstanding some distinctly religious content, the position’s activities primarily consisted of teaching “secular” subjects and therefore were not sufficiently religious. Put differently, based on an implicit measure of their *indoctrination quotient*, the court placed these activities on the secular side of the line between “indoctrination” and “mere education.”

The Sixth Circuit’s analysis bears out the Tenth Circuit’s observation that this line is highly subjective and susceptible to abuse. The court’s conclusion appears to have turned in part on its finding the teacher could recall only two times when she introduced the topic of religion into secular discussions, and that the distinct theological training and calling

of the teacher did not affect her duties. *Id.* at 780. But the court offers no measure for how much religion would have to be incorporated, or what that religion would look like. In fact, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

More generally, the court's independent search for religious meaning requires not only a measure of each duty but also a weighing of these duties against each other. In this regard, the court concluded that the "religious" activities the teacher conducted throughout the day were not sufficient to "make her primary function religious." *Id.* at 780. Even assuming the court correctly identified the religious activities, the court offers no standard for how pervasive such activities must be. For instance, would it be sufficient if such activities consumed four of the seven hours of the day?

Perhaps inevitably, the court gets lost in its own search. For instance, the court asserted that the extent of “religious” activities was not sufficient because teachers who were not called or not Lutheran also conducted these religious activities. *Id.* at 780. But the court did not explain how such activities would be more religious, or make other “secular” activities more religious, if they were conducted only by “called” ministers. Similarly, the court also concluded that the teacher’s primary duties were secular “because nothing in the record indicates that the Lutheran church relied on [her] as the primary means to indoctrinate its faithful into its theology.” *Id.* at 781. There is no obvious connection between whether she was the primary means for indoctrination in the Lutheran church and the character of her duties. Is the court suggesting that if she were the “pope” of the Lutheran church, the forty-five minutes per day of “religious activities” would be sufficient?⁶

⁶ The court also appears to second guess the school’s ecclesiology. In discounting her title as a “commissioned minister,” the court reasoned that the fact that non-called teachers have the same duties would mean that the exception would apply to non-Lutheran ministers. *Id.* at 781. The court concluded that applying the exception in that way would be contrary to its underlying intention, which the court stated is “to allow religious organizations to prefer members of their own religion and to adhere to their own religious interpretations.” *Id.* at 781. But the court cannot assume that the School’s ecclesiology prohibits non-Lutheran ministers. Indeed, by imposing its understanding of who can serve as ministers under Lutheran ecclesiology, the

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The arbitrary nature of the court's search will inevitably favor some religious organizations over others based on each court's predilections. In addition, the very structure of the court's primary duties test favors organizations whose model of ministry leadership aligns with the court's standard. In other words, the standard imposes an orthodoxy on religious exercise.

This orthodoxy applies not only to the presumption as to the primary duties ministers perform, but also to the definitions of such duties. For instance, the standard requires courts to determine whether the duties include participation in "religious ritual and worship." *Id.* at 778. But as this court noted in *Widmar*, courts are ill-equipped to distinguish between religious worship and other types of religious activities. Further, religious worship may encompass "secular" activities. In *Maurer v. Young Life*, 774 P.2d 1317 (Colo. 1989), the Colorado Supreme Court upheld a determination by the Board of Assessment Appeals that camp property owned and operated by Young Life qualified for a religious worship exemption. The court cited the testimony of Young Life's president that:

To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome

court precludes the School's religious interpretation of its ecclesiology.

is all a part of the expression of God in worship. There is no [“]we are now doing something secular, we are now doing something spiritual.[”]

Id. at 1328. Based on *bona fide* evidence of a connection between Young Life’s activities and Young Life’s religious purposes and mission, the court concluded that:

Although not all the activities conducted on the Young Life properties are inherently religious in nature, by considering the character of the owner and the competent evidence in the record that the uses of the properties were to advance in an informal and often indirect manner Young Life’s purposes, the Board could and did conclude that any non-religious aspects of these activities were necessarily incidental to the religious worship and reflection purposes for which Young Life claimed the properties were used.

Id. at 1327 (emphasis added).

Again, the critical issue is purpose, not content. In this regard, the Sixth Circuit acknowledged that (i) the School “provides a Christ-centered education that helps parents by ‘reinforcing bible principals [sic] and standards,’” and (ii) the School describes its staff members as “fine Christian role models who integrate faith into all subjects.” *Id.* at 772-73, 780. But the court improperly concluded that these factors did not transform her teaching into “religious activities.” *Id.* at 780.

In fact, the evidence clearly establishes that the School's particular approach to teaching secular subjects furthers its religious mission. Because the teacher plays a leadership role in advancing this mission among the students, and because the *bona fide* nature of this role is supported by her training and her calling, her position is subject to the "ministerial exception."

◆

CONCLUSION

This country has a long tradition of deference for churches and other associations formed around shared religious life and conviction. Our constitutional commitment to religious pluralism respects their duty to their religion and prohibits religious favoritism. For these reasons, *amici* respectfully request this Court to affirm the "ministerial exception" from laws that impose criteria on the selection by religious organizations of their *bona fide* ministry leaders. On this basis, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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