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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 JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Sixth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds degrees in theology (M.A.R., Westminster Seminary, Escondido, CA) and taxation (M.S., Taxation, California State University, Fullerton).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner Perich is a duly commissioned minister who applied for and received a tax-exempt minister's parsonage allowance (26 U.S.C. § 107) as part of her compensation package. Based on her employer's undisputed status as a church, and her routine

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

religious duties, she meets the stringent requirements for this benefit. Her acceptance of the monetary benefits of the allowance, and her agreement to resolve disputes in accordance with internal church policy, imply that she has conceded her ministerial status—contrary to her assertions in this litigation.

Amicus curiae concurs with Petitioner's careful analysis of the ministerial exception, which guards the First Amendment freedom of religious employers to select representatives who are essential to its spiritual mission. The exception is far broader than the narrow class of employees who qualify as ministers for tax purposes. But it should never exclude those employees a church or other religious organization has chosen to ordain, license, or commission to carry out its mission. Tax-purpose ministers should be a subset of those who fall within the broader ministerial exception. Otherwise, if even this narrowly defined group is in danger of government reclassification, the ministerial exception is essentially a dead letter and religious employers must operate under a cloud of uncertainty.

The ministerial exception was crafted in order to *expand* the flexibility of religious organizations to make critical personnel decisions. Courts examine an employee's duties in order to stretch the religious employer's freedom beyond the boundaries of its formally ordained leadership—not to interfere with the ability to make decisions about an employee's fitness for ministry. The ministerial exception is subject to judicial restraint concerning internal church affairs and relationships more generally. Just as courts refuse to step into the relationship between a church and its religious employees, they typically abstain from

becoming entangled in church discipline or doctrine, and they routinely reject “clergy malpractice” claims.

ARGUMENT

I. THE MINISTERIAL EXCEPTION SHOULD NEVER EXCLUDE A CHURCH EMPLOYEE WHO HAS BEEN ORDAINED, LICENSED, OR COMMISSIONED AND THUS QUALIFIED TO RECEIVE A TAX-EXEMPT MINISTERIAL HOUSING ALLOWANCE.

“[T]he fact that Perich was a ‘commissioned minister’...*in and of itself* should have been sufficient to satisfy the...ministerial exception.” Reply Pet. 11, citing Pet. Ct. App. Br. 23 (emphasis added).

When Hosanna Tabor-Lutheran commissioned Perich and hired her as a “called” teacher, she was authorized to receive a minister’s parsonage allowance as part of her compensation. Cert Pet. 3. “Called” teachers are hired by the church congregation, given the title “commissioned minister,” and eligible to receive the minister’s housing allowance as part of their compensation. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 772 (6th Cir. 2010). That allowance provides a substantial tax benefit to ministers: exemption from income tax to the extent it is used for housing costs and does not exceed the fair rental value of the minister’s home. 26 U.S.C. § 107. Perich claimed this benefit on her income tax return during her employment with the school. *EEOC v. Hosanna-Tabor Evangelical Lutheran*, 597 F.3d at 772.

The definition of "minister" for tax purposes is more restrictive than the ministerial exception. Certainly the latter should never *exclude* those employees a church or other religious organization has chosen to ordain, license, or commission to carry out its religious mission. If even this narrow category is at risk of government reclassification, the "ministerial exception" is effectively stripped of its meaning and usefulness. Petitioner admits the exception extends beyond ordained ministers. Opp. Pet. 19. But her proposed application of it would eliminate some of those who meet the narrow Sect. 107 criteria, creating great uncertainty and damaging the ability of even churches—let alone other religious entities—to select the persons whose positions are "important to the spiritual and pastoral mission of the church." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). No employee is more important to the religious mission of a church school than the teachers who train its students. "The relationship between an organized [church school] and its [teachers] is its lifeblood. The [teacher] is the chief instrument by which the [church school] seeks to fulfill its purpose." *McClure v. Salvation Army,* 460 F.2d 553, 558-559 (5th Cir. 1972). The question of "who will teach" in a church-operated school is just as fundamental as "who will preach" from the church pulpit—and should not be "corrode[d] with an overlay of civil rights legislation and other parts of the Constitution." *Simpson v. Wells Lamont Corp.,* 494 F.2d 490, 492 (5th Cir. 1974).

A. Courts Examine Employee Duties To *Expand*—Not *Restrict*—The Freedom Of Religious Organizations To Handle Internal Personnel Decisions Free Of Government Interference.

The "paradigmatic application" of the ministerial exception is to ordained ministers, but it "encompasses more than a church's ordained ministers." *Alcazar v. Corporation of Catholic Archbishop*, 627 F.3d 1288, 1291 (9th Cir. 2010) (seminary student hired to perform maintenance duties); *see also Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990) (United Methodist minister).

> The ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.

Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999), quoting *EEOC v. Catholic Univ. of Am.*, 83 F. 3d 455, 463 (D.C. Cir. 1996); *see also EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d at 801. The exception embraced the choir director in *Starkman* (barring her disability claim), the non-ordained nun in *Catholic Univ. of Am.* who taught canon law, the elementary school music teacher in *Roman Catholic Diocese of Raleigh*, and many others: *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (organist/music director); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003) (press secretary); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309-11 (4th Cir. 2004) (Jewish nursing home staff). These cases stand in stark contrast to

those where employees have unmistakably secular duties and would not qualify as ministers for any legal purpose. *See, e.g., Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1995) (supervisor of administrative, clerical, building maintenance, and custodial personnel); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (administrative and support staff); *EEOC v. Pacific Press Publishing Ass'n,* 676 F.2d 1272 (9th Cir. 1982) (editorial secretary); *Whitney v. Greater New York Corporation of Seventh-day Adventists,* 401 F. Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist).

As these cases illustrate, the ministerial exception was never intended to *exclude* "ordained, licensed, or commissioned" ministers who qualify for the parsonage allowance. Courts examine duties in order to *expand* the reach of the exception to cover other employees whose functions are essential to an organization's religious mission. It is an "extension of the rule beyond its application to ordained ministers." *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 226 (6th Cir. 2007) (hospital chaplain). Just as "religious music plays a highly important role in the spiritual mission of the church" (*Starkman v. Evans,* 198 F.3d at 176), teachers play an essential role in the spiritual mission of a church-operated school.

The "primary duties" test appears to lift language from a law review article with little thought as to how it might mesh with other ministerial employment tests such as the parsonage allowance:

> "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious

> order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Columbia L. Rev. 1514, 1545 (1979).

Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) ("*Rayburn*"); *see also Hollins v. Methodist Healthcare, Inc.,* 474 F.3d at 226, *EEOC v. Hosanna-Tabor Evangelical Lutheran*, 597 F.3d at 778. Even so, "[t]his approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church." *Rayburn*, 772 F.2d at 1169. And no position is more important to the "spiritual and pastoral mission" of a church *school* than its teachers.

B. Perich's Position And Duties Are Consistent With Her Eligibility To Receive The Minister's Parsonage Allowance.

As a commissioned minister employed by a church to perform religious duties, Perich qualifies for the tax benefits of the minister's parsonage allowance—and there is no indication that she disputes her eligibility.

1. Perich Was Commissioned By The Church Congregation.

Perich argues that she was "not an ordained minister." Opp. Pet. 20. But to qualify for the parsonage allowance, a minister need only be ordained *or* licensed *or commissioned*, allowing for differences in terminology and varying levels of ministerial service. The test is disjunctive—any one of the three categories

is sufficient. *Knight v. Commissioner*, 92 T.C. 199, 203 (1989); *Wingo v. Commissioner*, 89 T.C. 922, 933, 937 (1987); *Ballinger v. Commissioner*, 728 F.2d 1287 (10th Cir. 1984); *Silverman v. Commissioner,* 57 T.C. 727 (1972), aff'd (8th Cir. 1973) (Jewish cantor qualified even though the Jewish faith only ordains rabbis); *Salkov v. Commissioner*, 46 T.C. 190, 197 (1966) (same); Rev. Rul. 78-301, 1978-2 C.B. 103 (same). The Lutheran Missouri Synod recognizes both ordained and commissioned ministers. Cert. Pet. 3. It is not necessary that the minister attain the highest level of service or be able to perform all the ministerial functions of the particular faith. *Knight v. Commissioner*, 92 T.C. at 202-203 (licensed pastor could not perform all the duties of formally ordained minister); *Wingo v. Commissioner*, 89 T.C. at 933, 923, 934-935 (probationary member of United Methodist Church was ordained as a deacon and licensed as a local pastor but not qualified for ordination as an elder). The ministers in *Wingo* and *Knight* argued unsuccessfully against their own ministerial status so that their late-filed self-employment tax exemptions might be timely. The Tax Court found both of them to be "ministers" for tax purposes.

The overlapping disjunctive terminology (ordained, licensed, *or* commissioned) applies to the ministerial exception as well. The exception was crafted in the context of a *commissioned* minister working for the Salvation Army. *McClure v. Salvation Army,* 460 F.2d at 555. In a later example, the ministerial exception barred the discrimination claims of a female denied employment as an associate pastor. The position was open to an ordained minister (male), a ministerial intern (male), or a female associate such as Rayburn—eligible for a "commissioned minister

credential" or "commissioned minister license" but not ordination. *Rayburn*, 772 F.2d at 1165.

Perich's lack of ordination is not a bar to her eligibility for the parsonage allowance or her status as a ministerial employee. Both apply to commissioned ministers.

2. Perich Was Employed By A Church.

Ministers may qualify for the parsonage allowance while employed by either a church or other organization—but church employers, like Hosanna-Tabor Lutheran, have far greater flexibility in assigning duties without jeopardizing the allowance.

The Internal Revenue Code and related regulations specify the types of duties a minister must be performing in order to qualify for the parsonage allowance. Treas. Regs. §§ 1.107-1(a), 1.1402(c)-5. The employer may be a church, an integrated auxiliary of a church, or some other organization. If the employer is a church or other religious organization, the minister can be performing any or all of the following three types of duties:

- Ministration of sacraments ("sacerdotal functions")
- Conduct of religious worship
- Control, conduct, and maintenance of a religious organization (including the boards, societies, and other integral agencies of such organization), under the authority of a religious body constituting a church or church denomination.

Treas. Reg. § 1.402(c)-5(b)(2)(iv). Ministers who work for non-church organizations must be performing sacerdotal functions or conducting religious worship. Some have failed this stricter test, e.g., *Tanenbaum v. Commissioner,* 58 T.C. 1 (1972) (minister performing public relations duties for the American Jewish Committee); *Toavs v. Commissioner,* 67 T.C. 897, 901, 905 (1977) (minister serving in administrative position for nursing home affiliated "in spirit and charity" with the Assemblies of God but lacking any legal relationship with the church); *Colbert v. Commissioner*, 61 T.C. 449, 452 (1974) (minister employed as director of missions for Christian Anti-Communism Crusade). Ministers may also perform services under a valid assignment by a church, but "the minister must have been assigned by the church for reasons directly related to the accomplishment of purposes of the church"—"perfunctory ratification" is insufficient. *Boyer v. Commissioner*, 69 T.C. 521, 532 (1977) (minister who taught business data processing at a state college did not qualify).

"Petitioner Hosanna-Tabor Evangelical Lutheran Church and School (the Church) is an ecclesiastical corporation and member congregation of The Lutheran Church—Missouri Synod." Cert. Pet. 2. It is a *church*. It was the voting members of the *church* congregation who commissioned Perich and later rescinded her call. Cert. Pet. 3, 5. As a church, Hosanna-Tabor has greater latitude in assigning duties to the ministers it designates to fulfill its spiritual mission. This tax-related rule should be no less true when considering the ministerial exception.

3. Perich's Routine Duties Are Quintessentially <u>Religious</u> In Nature.

Perich's duties—involving devotional exercises, prayer, and chapel—fit squarely within Sect. 107 as leading the religious worship of the school's students:

- Teaching religion classes four days a week
- Leading students in daily morning devotional exercises
- Leading students in prayer three times a day
- Attending chapel with her students each week and leading the service in rotation with other teachers

EEOC v. Hosanna-Tabor Evangelical Lutheran, 597 F.3d at 772.

Perich argues that she did not "serv[e] in a pastoral role to the congregation" (Opp. Pet. 3), "act as an intermediary between the church and its congregation, lead or play a role in the church's spiritual rituals, participate in church governance, or provide pastoral services to congregation members" (Opp. Pet. 20), or "indoctrinate its faithful into its theology" (Opp. Pet. 28). Neither Sect. 107 nor the broader ministerial exception adopts such a truncated view of a minister's duties. Ministers do all of these things when serving a church congregation directly, but they perform many other functions that are no less important to the church's mission, including teaching children, community outreach, and evangelism.

> [P]erpetuation of a church's existence may depend upon those whom it selects to preach its values, *teach* its message, and interpret its

> doctrines both to its own membership *and to the world at large*.

Rayburn, 772 F.2d at 1168 (emphasis added). Churches often serve their local communities through day care services and undergraduate schools. These facilities have an essential religious component and purpose even if teachers are not required to belong to a particular congregation, and even though substantial time is devoted to teaching "secular" subjects. Hosanna-Tabor may not require every teacher to be Lutheran or to maintain membership in a particular congregation, but it does require them to belong to the *Christian* faith, and those it commissions as "called" teachers must undergo training in Lutheran theology.

In the educational context, there is specific legal authority concerning the eligibility of religious teachers to receive the minister's parsonage allowance:

- Rev. Rul. 57-107, 1957-1 C.B. 277 (non-ordained teachers in parochial schools of a church denomination, who are inducted into the teaching ministry according to the rites of the particular church)
- Rev. Rul. 62-171, 1962-2 C.B. 39 (ministers who have teaching or administrative positions at a parochial school or college that is an "integral agency" of a religious organization, under the authority of a church or church denomination)
- Rev. Rul. 55-243, 1955-1 C.B. 490 (heads of religious departments, teachers, and administrators on the faculty of a college that is an "integral agency" of a church) (*see also* Rev. Rul. 70-549, 1970-2 C.B. 16)

- Treas. Reg. § 1.107-1(a)(2) (professors at a theological seminary)

Perich fits squarely within this framework, having been trained, commissioned, and called within the established practices of the Lutheran Church—Missouri Synod. If she qualifies for the strictly scrutinized parsonage allowance, she is per se a ministerial employee. It is a patent violation of the First Amendment to require a church-owned school to retain a commissioned teacher-minister after the congregation has determined she is no longer fit for ministry.

4. There Are No Facts To Indicate That Perich's Commissioning Was A Sham Or Subterfuge To Evade A Legal Obligation Or Secure A Legal Benefit.

A few cases have ruled that a ministerial designation was a sham or subterfuge designed solely to secure tax benefits. *Lawrence v. Commissioner,* 50 T.C. 494, 498 (1968) (church minutes stated that minister of education was commissioned so that he could receive certain tax benefits—but his duties remained the same); *Johnston v. Commissioner*, 56 T.C.M. (CCH) 520 (1988) (individual who obtained charter from Universal Life Church to form congregation of which she was pastor and only donor was not entitled to housing allowance exclusion).

Similarly, "if a church labels a person a religious official as a mere subterfuge to avoid statutory obligations, the ministerial exception does not apply." *Alcazar v. Corporation of Catholic Archbishop*, 627 F.3d at 1292; *Tomic v. Catholic Diocese*, 442 F.3d at

1039. In order to avoid encroaching on the sanctity of religious territory in personnel matters, courts would be wise to adopt a presumption that could be rebutted by proof that either the church is a fake or the title "minister" is a sham bestowed solely to evade legal obligations. *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) ("internal affairs" doctrine barred claims of ordained ministers working for thrift shop operated by the Salvation Army).

The 2.4 million member Lutheran Church-Missouri Synod is the eighth largest Protestant denomination and was founded in the nineteenth century. Perich was commissioned according to established church procedures, including a requirement for theological training. No one has attacked either the church's status or its commissioning process as a sham.

II. PETITIONER SHOULD BE ESTOPPED FROM DENYING HER MINISTERIAL STATUS.

Perich and the school have agreed that she is a ministerial employee. She completed the required theological training, accepted the substantial tax benefits associated with the minister's housing allowance, accepted her commission, and agreed to abide by the internal dispute resolution policy for ministers. Her denial of her ministerial status is *inconsistent with the benefits she accepted and policies she agreed to*. She should be estopped from making that argument now—after accepting benefits available only to qualified ministers and claiming them on her tax returns. It would wreak havoc inside religious institutions if its good faith classifications were subject to judicial review even for ministers it identifies as eligible for the parsonage allowance under tax

regulations far more restrictive than the ministerial exception required by the First Amendment.

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

A. Perich's Inconsistencies Fall Within The Rubric Of Judicial Estoppel And Its Rationale.

Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id*. at 749, quoting *Pegram v. Herdrick*, 530 U.S. 211, 227 n. 8 (2000). Although filing an income tax return is not a legal proceeding (the normal context for judicial estoppel), Perich claimed substantial tax benefits and had to sign her return under penalty of perjury—identifying herself as a minister. Her inconsistencies warrant the application of standard judicial estoppel principles:

- Her position on her tax return (ministerial status) is "clearly inconsistent" with her position in this litigation. *New Hampshire v. Maine*, 532 U.S. at 750. Perich claimed substantial tax benefits available only to an ordained, licensed, or commissioned minster.

She now denies her status as a "ministerial employee" because that would preclude her claims against the school under the ADA.

- Perich successfully asserted her ministerial status on her tax return. *Id*. at 750. She claimed the housing allowance on at least one year's tax return while employed by the Church. *EEOC v. Hosanna-Tabor Evangelical Lutheran*, 597 F.3d at 772.

- Through her assertion of inconsistent positions. Perich "derive[s] an unfair advantage" and "impose[s] an unfair detriment" on the Church if she is not estopped. *New Hampshire v. Maine*, 532 U.S. at 751. She secures the tax benefits of the minister's parsonage allowance *and* holds her church employer liable using federal statutes that cannot constitutionally be applied to a ministerial employment relationship.

Judicial estoppel was created to uphold "the proper reverence for the sanctity of [the] oath." *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 48 (1857). It was designed "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co*., 690 F.2d 595, 598 (6th Cir. 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). Perich has met the "exigenc[y] of the moment" by denying the ministerial status she asserted on her income tax returns.

B. Perich Consented To The Internal Dispute Resolution Policies Applicable To Pastoral Staff.

Perich acknowledged her ministerial status when she accepted her call from the congregation and agreed to be subject to the same dispute resolution procedures as the church's pastor. Cert. Pet. 3. The bylaws of the Lutheran Church-Missouri Synod (LCMS) require that disputes over fitness for ministry be resolved exclusively through a binding dispute resolution procedure. The Preamble to those bylaws provides that:

> The Synod in the spirit of 1 Corinthians 6 calls upon all parties to a disagreement, accusation, controversy, or disciplinary action to rely exclusively and fully on the Synod's system of reconciliation and conflict resolution. The use of the Synod's conflict resolution procedures shall be the exclusive and final remedy for those who are in dispute. *Fitness for ministry and other theological matters must be determined within the church*.

Jenkins v. Trinity Lutheran Church, 825 N.E.2d 1206, 1209 (Ill. Ct. App. 2005), quoting the Preamble (emphasis added) (dismissing claims of associate pastor other than contract claims the bylaws expressly excluded from binding arbitration). *See also Simpson v. Wells Lamont Corp.,* 494 F.2d at 494 (after pastor was dismissed according to procedures in the Church's *Book of Discipline*, his sole remedy was the appellate process within the church hierarchy). The congregation rescinded Perich's call according to procedures she agreed to abide by when she was hired.

She cannot now complain that those procedures do not apply to her.

III. THE MINISTERIAL EXCEPTION IS PART OF A BROADER PATTERN OF JUDICIAL RESTRAINT WHEREIN COURTS DO NOT INTERFERE IN THE INTERNAL RELATIONSHIPS OF A RELIGIOUS ORGANIZATION.

Long before *Lemon* introduced entanglement concerns into First Amendment jurisprudence, this Court declined to become embroiled in ecclesiastical matters. Perich misses the point when she complains that the church is seeking "total immunity from employment discrimination claims"—and alleges that all sorts of other corporations would also prefer such immunity. Opp. Pet. 32. But the Religion Clauses guarantee leeway to religious organizations to define the contours of its internal relationships "independen[t] from state control or manipulation." *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952). The Church seeks only the deference this Court has routinely granted in past decades. Reply Pet. 3. Protected relationships include clergy-congregant, church-member, and employer-ministerial employee.

The ministerial exception is a logical consequence of the conclusions that (1) "the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion" and (2) "the state's interest in eliminating employment discrimination is outweighed by a church's constitutional right of autonomy in its own domain." *EEOC v. Catholic Univ. of Am.*, 83 F.3d at 467. Even

if a church has failed to follow its own procedures or its removal of a ministerial employee appears arbitrary to those outside the church, no court may "impermissibly substitute its own inquiry into church polity and resolutions based thereon of those disputes." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976). Nor may the court demand "a minimum basis in doctrinal reasoning." *Rayburn*, 772 F.2d at 1169. The ministerial exception protects the "action taken," not merely the "possible motives." *EEOC v. Catholic Univ. of Am.*, 83 F.3d at 465.

This Court understands that "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). Allowing the National Labor Relations Board to interfere in this relationship was ruled unconstitutional under both Religion Clauses because it "would impinge upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion." *Id*. at 496.

Churches are not above the civil law in every respect. The nature of the claim shapes the legal analysis. There is a huge difference between telling a church who it must hire or retain to carry out its mission, and requiring it to follow laws about minimum wage or equal pay after it has selected a religiously qualified employee. *Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1392, 1397 (4th Cir. 1990) (equal pay for male and female employees at a religious school); *EEOC v. Fremont Christian Sch.,* 781 F.2d 1362, 1370 (9th Cir. 1986) (equal health insurance benefits for male and female church school

employees); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-305 (1985) (religious organization required to comply with minimum wage, overtime, and recordkeeping laws). Courts sometimes take a "hands off" approach to even this limited level of regulation. *Schleicher v. Salvation Army*, 518 F.3d at 474 (ordained ministers were outside the ambit of the Fair Labor Standards Act). Regulating particular aspects of a mutually satisfactory employment relationship is not comparable to requiring a church to maintain that relationship when the employee ceases to meet the religious requirements for the position. Courts may also examine the duties of a duly "ordained, licensed, or commissioned" minister to determine whether that employee qualifies for the tax-exempt parsonage allowance. Such scrutiny does not encroach on a church's decision about who it will hire or retain.

As Perich admits, federal law allows churches to consider religion in its initial hiring decisions. Opp. Pet. 32. In additional to hiring decisions, churches need flexibility to make decisions about retention—to respond to changes in an employee's religious beliefs or conduct that would imperil that person's ability to carry out the organization's mission. That is the essence of this case—requiring a *church* school to reinstate a commissioned minister originally hired to teach *religion* to its students and lead them in *worship*. This Court cannot substitute its view of Perich's current qualifications "without entangling the government in questions of religious doctrine, polity, and practice." *Gellington v. Christian Methodist Episcopal Church, Inc*. 203 F.3d 1299, 1304 (11th Cir. 2000), quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979).

Requiring equal pay or compliance with a minimum wage law pales in comparison to monetary damages. If Perich were allowed to collect damages for wrongful discharge or discrimination, the Church would be penalized for maintaining the religious beliefs underlying the congregation's conclusion that she is no longer fit for ministry. *Madsen v. Erwin,* 481 N.E.2d 1160, 1165 (Mass. 1985) (church-owned newspaper entitled to deference in religiously motivated decision to dismiss a reporter). The Free Exercise Clause prohibits exacting such a harsh penalty for a church's handling of its internal affairs—and so does the Establishment Clause:

> Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991).

A. Courts Decline To Interfere In The Relationship Between Minister And Congregant—Uniformly Rejecting Clergy Malpractice Suits.

This case is not about clergy malpractice, but it does involve an inherently religious relationship—one that blends secular and religious components and cannot be adjudicated without breaking and entering the church doors and trespassing on sacred territory.

"[T]he Free Exercise Clause protects religious relationships, including the counseling relationship

between a minister and his or her parishioner...." *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998) ("*Sanders*"). When adjudicating civil claims, courts must guard against intruding on matters of internal church governance. *Watson v. Jones*, 80 U.S. (913 Wall.) 679, 728-729 (1872); *Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007). The First Amendment recognizes church and state as separate spheres of sovereignty that "can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Ed.*, 333 U.S. 203, 221 (1948). Government burdens the free exercise of religion when it "encroach[es] on the church's ability to manage its internal affairs." *Westbrook v. Penley*, 231 S.W.3d at 395, citing *Kedroff v. St. Nicholas Cathedral,* 344 U.S. at 116.

Clergy malpractice actions would improperly "entangle the courts in the examination of religious doctrine, practice or church polity." *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001) (LDS church defendants allegedly breached a duty to Franco by advising her to "forgive, forget, and seek atonement" or seek help from an unlicensed counselor they recommended). Courts have frequently and uniformly rejected this species of claim, holding that "'a spirit of freedom for religious organizations' prevails...even if that freedom comes at the expense of other interests of high social importance." Constance Frisby Fain, *Article: Minimizing Liability for Church-Related Counseling Services: Clergy Malpractice and First Amendment Religion Clauses*, 44 Akron L. Rev. 221, 241 (2011) ("*Minimizing Liability*"), citing *Westbrook v. Penley*, 231 S.W.3d at 403. *See Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J. concurring in part and

dissenting in part, joined by Coffey, J., concurring) ("Indeed, a cause of action for clergy malpractice has been rejected uniformly by the states that have considered it."); *Sanders*, 134 F.3d at 337 (same). Based on the same rationale, courts have declined to burden religious counselors with a "duty to refer" to secular psychological counselors. *Nally v. Grace Community Church*, 763 P.2d 948, 959 (1988) (family of young man who committed suicide sued the church that provided spiritual counseling); *White v. Blackburn*, 787 P.2d 1315, 1318-1319 (Utah Ct. App. 1990) (no duty to make further inquiry into alleged family conflicts and refer to therapist outside the church).

1. Church-Minister Employment Discrimination Claims Are Closely Analogous To Clergy Malpractice Claims.

Perich's claim is "closely analogous" to the clergy malpractice claims that courts uniformly reject. In both cases, "the government's interest in eradicating discrimination collides with the church's constitutional right to manage its internal affairs free from government interference," and even claims of racial and sexual discrimination must yield. *Westbrook v. Penley*, 231 S.W.3d at 396; *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d at 460. Even where the alleged discrimination is "purely nondoctrinal," intrusion into church governance is "inherently coercive." *Westbrook v. Penley*, 231 S.W.3d at 401-402, citing *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (dismissing minister's Title VII claims of sex and pregnancy discrimination). It would be equally

intrusive for this Court to uphold the Sixth Circuit decision overruling the Church's decision that Perich is no longer fit for religious ministry.

2. Clergy Malpractice Claims Would Entangle Courts In Defining The Legal Duty Of Pastors Across A Broad Spectrum Of Religious Faiths.

The primary hurdle—which courts cannot overcome—is defining the duty of care that is a required element of any negligence claim. *Minimizing Liability*, 44 Akron L. Rev. at 226, 250. "Clergy malpractice theory requires breach of a professional duty unique to that profession." *Hester v. Barnett*, 723 S.W.2d 544, 551 (Mo. App. 1987). Moreover, the theory presupposes that every pastor owes the *same* duty regardless of variations in religious doctrine. *Id*. at 555. Clergy are typically exempt from state licensing requirements. Access to pastoral counseling should not be hindered by state imposed standards, and "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations." *Nally v. Grace Community Church*, 763 P.2d at 959-960, quoting Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 Val.U.L.Rev. 163, 176 (1981).

Defining the legal duty of a pastor would require courts to engage in the "constitutionally dubious task of setting a standard of reasonable care for clergymen engaged in counseling" (*Schmidt v. Bishop*, 779 F. Supp. at 324) and to examine "the differing theological views espoused by [a] myriad of religions" (*Nally v. Grace Community Church*, 763 P.2d at 960). Courts would become entangled in evaluating the training

and skills for clergy serving a wide variety of faiths with divergent beliefs—and then have to determine whether a particular pastor's conduct fell below the standard of care. *Sanders*, 134 F.3d at 337; *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d at 206. "This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion." *Schmidt v. Bishop*, 779 F. Supp. at 328.[2]

Just as courts may not craft a standard legal duty for pastors who counsel, they cannot construct a minimum standard of competence for religious school teachers or require a church to retain a teacher who no longer meets the criteria to carry out its spiritual mission. Adjudication of Perich's claim would entail an unconstitutional inquiry into the Church's policies for retention and supervision of its commissioned ministers. "The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation." *Schmidt v. Bishop*, 779 F. Supp. at 332.

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[2] Occasionally courts have imposed liability on clergy who "held themselves out" as professional psychological counselors. *Dausch v. Rykse*, 52 F.3d 1425 (pastor held himself out to church member as able to provide secular counseling—and forced her to have sex with him as part of therapy); *Sanders*, 134 F.3d at 334 (two church employees sought counseling from pastor, who represented that he was qualified by education and experience to provide marriage counseling—and then had sex with each of them); *cf. Nally v. Grace Community Church*, 763 P.2d at 950 ("defendants held themselves out as *pastoral* counselors—not as professional, medical or psychiatric counselors"). In both *Dausch* and *Sanders*, pastoral counselors held themselves out as "professionals" and then proceeded to engage in egregious conduct unrelated to their churches' religious doctrine.

3. It Is Both Impractical And Unconstitutional For Courts To Unravel The Secular And Religious Aspects Of a Blended Role—Whether Pastoral Counselor Or Religious Teacher.

One clergy malpractice case is particularly pertinent because it involved a counselor acting in a dual secular-religious capacity—initially as a professional therapist and later as a pastor to the same person. *Westbrook v. Penley*, 231 S.W.3d 389. Perich's teaching role implicates both secular subjects and religious duties. In *Westbrook*, the counselor/pastor owed conflicting duties to the woman he counseled: as a professional counselor, he owed a duty of absolute confidentiality, but as a pastor, he had a religious obligation to disclose the extramarital affair she confessed to him. *Id*. at 391. The Texas Supreme Court cautioned that courts must "avoid...having to determine which acts are done in a secular role and which are done in an ecclesiastical capacity, *particularly when there is such a blend of roles*, as here, that makes it impossible to perceive where one ends and the other begins." *Id*. at 397 (emphasis added). Similarly, Perich's teaching role is a blend of secular and religious duties, not a neat mathematical separation. She teaches religion as well as secular subjects, and she leads religious worship, all in a pervasively religious educational environment. As in *Westbrook* and other "clergy malpractice" cases, "parsing those roles for purposes of determining civil liability...would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline." *Id*. at 392. Judicial line drawing is likely to "impinge upon religious tenets or standards of conduct to which the

church and [Perich] have voluntarily bound themselves." *Id*. at 396. Like the pastoral counselor:

> While some degree of overlap and similarity may exist, the religious [teacher] remains distinct and unique from his secular counterpart, approaching [education] from an entirely different perspective.

Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L. Rev. 137, 139 (1986).

B. Courts Decline To Interfere In The Relationship Between Church And Congregant—Allowing Churches Autonomy In Matters Of Discipline And Internal Dispute.

A church's disciplinary policies are "unquestionably among those hallowed First Amendment rights with which the government cannot interfere." *Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766, 779 (Okla. 1989) ("*Guinn*"). This Court has long accepted the decisions of ecclesiastical authorities in "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Watson v. Jones*, 80 U.S. at 727 (church split between competing factions, both claiming authority as trustees). Although this case is about the Church's discipline of Perich as an employee rather than as a member, there is a common thread: informed consent. Perich freely chose to pursue theological training and then accept the congregation's call to become a commissioned minister. The Free Exercise Clause guards the right to organize and join voluntary religious associations. Those who do so agree to be

bound by its discipline, but "it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. at 114-115, quoting *Watson v. Jones*, 80 U.S. at 728-729. That is just as true here as it is in the context of a church's discipline of its members.

Informed consent is typically the lynchpin of church discipline cases. In a seminal case decided by the Supreme Court of Oklahoma, a former church parishioner (Guinn) sued church elders for their actions both before and after she withdrew from church membership during the course of a disciplinary proceeding. The elders confronted Guinn about an extramarital relationship and threatened to disclose it to the congregation. The Court's analysis hinged on the principle that:

> When people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization.... Parishioner's willing submission to the Church of Christ's dogma, and the Elders' reliance on that submission, collectively shielded the church's prewithdrawal, religiously-motivated discipline from scrutiny through secular judicature.

Guinn, 775 P.2d at 774. In addition to protecting the elders' reliance on Guinn's decision to join the church and submit to its discipline, the Free Exercise Clause also protected Guinn's choice to remove herself from membership and withdraw her consent. *Id*. at 779.

Informed consent may either be express or implied through conduct. A person who has never formally joined a church may consent by engaging in its activities with full knowledge of the church disciplinary policies. "[C]hurch membership alone is not dispositive of whether plaintiff consented to the church's practices." *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 687 (Mich. 2000). In *Smith*, the plaintiff expressly consented to the church policies when he joined and later impliedly consented by continuing to actively participate in the church after formally withdrawing his membership.

Where discipline consists of mere exclusion rather than active control and involvement, informed consent is not even necessary. "A church clearly is constitutionally free to exclude people without first obtaining their consent." *Guinn*, 775 P.2d at 781. *See Paul v. Watchtower*, 819 F.2d 875, 879 (9th Cir. 1987) (Jehovah Witnesses' practice of "shunning" a disfellowshipped member is protected by the First Amendment).

Informed consent is one of the guiding stars in this litigation, just as in *Guinn* and other church discipline cases. Perich voluntarily sought training in Lutheran theology. She accepted the Church congregation's call, the title of "commissioned minister," employment as a "called" teacher, and the benefits of the minister's parsonage allowance. She consented to the dispute resolution procedures in the Synod's bylaws. Moreover, the Church congregation was constitutionally free to exclude her from the ministry even without her consent.

CONCLUSION

This case has important ramifications for churches that employ people to carry out its spiritual mission. The Sixth Circuit decision is out of step with decades of precedent concerning the internal affairs and relationships of religious organizations. Unless this Court reverses that decision, even a church's decision to ordain, license, or commission a minister is not safe from state intrusion if the minister becomes disgruntled and decides to sue. *Amicus curiae* urges this Court to guard the First Amendment right of Hosanna Tabor-Lutheran and other churches to select the persons who are integral to achieving its religious purposes.

Respectfully Submitted,

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