

No. 10-553

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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.*

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

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**BRIEF OF THE LUTHERAN CHURCH —  
MISSOURI SYNOD AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS CURIAE

The Lutheran Church—Missouri Synod (“the Synod”) is the second largest Lutheran denomination in America. It has roughly 2.4 million baptized members. It includes approximately 6,000 congregations, including the petitioner Hosanna-Tabor Evangelical Lutheran Church and School. The Synod’s hallmark is its steadfast adherence to orthodox Lutheran theology and practice.

The Synod places great importance on the Christian education of its children and on introducing other children of willing parents to the Gospel of Jesus Christ. The Synod operates one of the largest Protestant religious school systems in the United States, and its roster of commissioned ministers today includes more than 10,000 teachers.

This case raises important questions about the Synod’s views on commissioned ministers and dispute resolution. The Synod submits this *amicus* brief to outline its relevant religious beliefs and practices, especially its strongly held views on commissioned ministers and dispute resolution, both of which have long histories and deep theological importance.

The Synod’s religious views about church structure and governance go back centuries and are deeply grounded in theological understandings of God’s will, as revealed by Scripture and as traditionally understood by the church. Explaining the theological and historical roots of the Synod’s views is thus the purpose of this brief.<sup>1</sup>

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No

## ARGUMENT

### I. The Role of Commissioned Ministers

We begin by discussing the nature of commissioned ministry and by examining the theological concepts and history associated with ministers generally and with commissioned ministers specifically. We then turn to the current role of commissioned ministers in the life of the Synod.

#### A. Ministers and the Divine Call

Like many Christian denominations, the Synod fervently believes in a divinely established ministerium in which individual ministers are first called by God and then ordained by the church to do God's work. The biblical basis for a divinely established ministerium goes back to Jesus selecting his disciples, impressing them into service, and conferring on St. Peter the keys to the kingdom. *See, e.g., Matthew* 4:18-21, 10:1-41, 16:13-20. In this view, ministers are not chosen by human beings. Rather, they are chosen by God; human beings merely recognize that certain individuals have already been selected for the ministry by God. *See, e.g., Acts* 20:28 ("Pay careful attention to yourselves and to all the flock, in which *the Holy Spirit* has made you overseers . . .") (emphasis added); *Galatians* 1:1 ("[N]ot from men nor through man, but through Jesus Christ and God the Father[.]"). The Synod's Commission on Theology and Church Relations puts it this way:

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person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties, other than the Solicitor General, have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs. The consent of the Solicitor General is being submitted herewith.

It is God who calls an individual to serve the ministry of the Word within the office . . . . But the call also has a human dimension in that God entrusts the task of calling to human beings . . . . Although the divine character of the call is primary, the human activity by which the divine call is issued is not without importance.

The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Theology and Practice of “The Divine Call”* 26 (2003) (hereinafter “LCMS Commission on Theology, *The Divine Call*”), available at <http://www.lcms.org/Document.fdoc?src=lcm&id=410>.<sup>2</sup>

As a result, unless one is first chosen by God to be a minister (that is, unless one has received a “call”), one simply cannot serve in the role of minister. See *Augsburg Confession*, Article XIV (1531), available at [www.lcms.org/Document.fdoc?src=lcm&id=956](http://www.lcms.org/Document.fdoc?src=lcm&id=956) (“Of Ecclesiastical Order they teach that no one should publicly teach in the Church or administer the Sacraments unless he be regularly called.”); Martin Chemnitz, *Ministry, Word, and Sacraments: An Enchiridion* 30 (1593) (English trans. 1981) (“There is no legitimate or ordinary call

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2. By way of introduction, the Commission on Theology and Church Relations was established in 1962 by the Lutheran Church—Missouri Synod in order to “provide guidance to the Synod in matters of theology and church relations.” *Handbook of the Lutheran Church—Missouri Synod* § 3.9.6.2.1, at 176 (2004) (hereinafter “*LCMS Handbook*”), available at [www.lcms.org/Document.fdoc?src=lcm&id=926](http://www.lcms.org/Document.fdoc?src=lcm&id=926). The Commission consists of 20 members—16 voting and 4 not voting—including ordained ministers, a commissioned minister who is a parish teacher, laypeople, seminary faculty, and the President and First Vice-President of the Synod. *Id.* § 3.9.6.1, at 175.

to the ministry except from God[.]”). On this point, the Catholic and Lutheran churches generally agree, although Lutherans believe strongly that congregations have the power to recognize God’s call and ordain ministers for themselves, without permission from the Pope or bishops. This disagreement goes back to the Reformation. *See The Power and Primacy of the Pope* (1537), in *Concordia: The Lutheran Confessions* 304 (2d ed. 2005) (noting that if the bishops are unable or unwilling to appoint suitable people, “the churches are in duty bound before God, according to divine law, to ordain for themselves pastors and ministers”); *Chemnitz, supra*, at 30 (noting that “[a]t all times there have been great, often also bloody, controversies regarding the right to call”).

### **B. The Two Types of Called Ministers**

The Lutheran Church teaches that there are two types of called ministers. First, there are ordained ministers, who serve in the office of public ministry (also known as the pastoral office) and have the power to preach the Word and administer the Sacraments. Second, there are commissioned ministers, who act as auxiliaries to the pastoral office, performing certain important functions of that office (though ordinarily not the administration of Sacraments or the preaching of the Word). *See, e.g.,* The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Ministry: Offices, Procedures and Nomenclature* 4-6 (1981) (hereinafter “LCMS Commission on Theology, *The Ministry*”), available at [www.lcms.org/Document.fdoc?src=lcm&id=423](http://www.lcms.org/Document.fdoc?src=lcm&id=423). This two-tiered structure of called ministers may be unfamiliar to some, but the Synod sees it as grounded in Scripture, most clearly in the Book of Acts:

<sup>1</sup> Now in these days when the disciples were increasing in number, a complaint by the Hellenists arose against the Hebrews because their widows were being neglected in the daily distribution. <sup>2</sup> And the twelve [apostles] summoned the full number of the disciples and said, “It is not right that we should give up preaching the word of God to serve tables. <sup>3</sup> Therefore, brothers, pick out from among you seven men of good repute, full of the Spirit and of wisdom, whom we will appoint to this duty. <sup>4</sup> But we will devote ourselves to prayer and to the ministry of the word.” <sup>5</sup> And what they said pleased the whole gathering, and they chose Stephen, a man full of faith and of the Holy Spirit, and Philip, and Prochorus, and Nicanor, and Timon, and Parmenas, and Nicolaus, a proselyte of Antioch. <sup>6</sup> These they set before the apostles, and they prayed and laid their hands on them.

*Acts 6:1-6.*

In this passage, a set of seven disciples (“commissioned ministers”) are appointed to do certain tasks in order to free up the twelve apostles (“ordained ministers”) to do other work. See Hermann Sasse, *The Lutheran Doctrine of the Office of the Ministry* (1943-44), in *2 The Lonely Way: Selected Letters and Essays* (1941-1976), at 128 (2002) (“The *ministerium ecclesiasticum* may also be unburdened of peripheral tasks through the establishment of new offices. This happened already in the ancient church through the creation of the diaconate, or in more recent times by the creation of the office of church

counselor, church elder, or whatever else those who lead the congregation may be called.”).

The Synod believes that only men are called by God to serve in the pastoral office, though both men and women can serve equally well as commissioned ministers.<sup>3</sup> Commissioned ministers can be either male or female and they serve in a range of positions within the Synod, but most typically as teachers in the church schools, deaconesses, ministers of music, and directors of Christian education. Both types of ministers are called positions; regardless of whether one is an ordained minister or a commissioned minister, a call is absolutely vital. *See, e.g.,* LCMS Commission on Theology, *The Ministry*, at 24 (“The call from and by God through the church is essential for entry into the pastoral ministry or its auxiliary of offices . . . All who serve in the pastoral ministry or its auxiliary offices must be called by the church.”).

The path toward becoming a commissioned minister is a demanding one.<sup>4</sup> One must be a member of a Synod

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3. For a short explanation as to why the Synod believes women can properly serve as commissioned ministers, but not in the office of public ministry, see The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Ministry: Offices, Procedures and Nomenclature* 33 (1981) (hereinafter “LCMS Commission on Theology, *The Ministry*”) (explaining that “[s]ince an auxiliary office is not the pastoral office, there is neither a Scriptural proscription against women holding the auxiliary office of teacher nor a Scriptural basis for considering women teachers inferior to men teachers.”), *available at* [www.lcms.org/Document.fdoc?src=lcm&id=423](http://www.lcms.org/Document.fdoc?src=lcm&id=423).

4. The following information and much more is provided in *Colloquy for Ministers of Religion-Commissioned in the*

congregation, have a bachelor's degree, and possess the professional and spiritual qualities expected of commissioned ministers. Potential candidates include those who are declared qualified by one of the Synod's ten colleges or universities upon graduation as well as those who apply to a Colloquy program at a Synod college or university, and if accepted, engage there in a course of theological study usually involving eight classes and an internship. In the latter case, a candidate must also successfully petition for an endorsement from the Synod district where he or she lives, submitting academic transcripts, letters of recommendation, an autobiographical personal statement, and written answers to various ministry-related questions. If studies are completed successfully and an endorsement is obtained from the relevant Synod district, the candidate must then pass a final oral examination, at which point he or she stands ready to receive a call.<sup>5</sup>

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*Lutheran Church-Missouri Synod, Policy Manual* (2011), available at [http://classic.lcms.org/graphics/assets/media/BHECUS/Colloquy%20Policy%20Manual%203\\_11.pdf](http://classic.lcms.org/graphics/assets/media/BHECUS/Colloquy%20Policy%20Manual%203_11.pdf) and *LCMS Handbook*, § 3.8.3.5.1-3.8.3.5.5, at 144-46.

5. These processes too have an important historical dimension. The oral examination required of ordained and commissioned ministers goes back centuries. See The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *The Theology and Practice of “The Divine Call”* 32 (2003) (hereinafter “LCMS Commission on Theology, *The Divine Call*”) (“In the sixteenth century [the] examination often took place over a period of several hours in front of a panel consisting of Luther, Bugenhagen, and Melancthon.”), available at <http://www.lcms.org/Document.fdoc?src=lem&id=410>.

### **C. The Importance of Religious Education: Commissioned Ministers and Parochial Schools**

Many commissioned ministers end up serving the church by working as parochial school teachers; indeed, the most common call received by commissioned ministers is to serve the church as such a teacher. The importance of religious education to the Synod cannot be overstated. The Synod maintains one of the largest private school systems in the country precisely because it sees the religious education of children as one of the most fundamental ministries of the church. Luther himself may have explained this point best:

Above and elsewhere I have written much about the schools, urging firmness and diligence in caring for them. Although they may be viewed as something external and pagan, in as much as they instruct boys in languages and the arts, they are nevertheless extremely necessary. For if we fail to train pupils we will not have pastors and preachers very long—as we are finding out. The school must supply the church with persons who can be made apostles, evangelists, and prophets, that is, preachers, pastors, and rulers, in addition to other people needed throughout the world, such as chancellors, councilors, secretaries, and the like, men who can also lend a hand with the temporal government. In addition, if the schoolteacher is a godly man and teaches the boys to understand, to sing, and to practice God's word and the true faith and holds them to Christian discipline, then, as we said earlier, the schools are truly young and

eternal councils, which perhaps do more good than many other great councils. . . .

In summary, the schools must be second in importance only to the church, for in them young preachers and pastors are trained, and from them emerge those who replace the ones who die.

Martin Luther, *On the Councils and the Church* (1539), in 41 *Luther's Works, American Edition* 176 (1966).

Centuries later, in the middle of the 19th century, the Missouri Synod emerged as a budding Lutheran denomination in America. C.F.W. Walther was both the first President of the Synod and its most influential theologian. Seeing religious education as paramount to the future of the church, Walther stressed how individual congregations needed to develop strong parochial schools and strong parochial school teachers:

In order that the Word of God may richly dwell in a congregation, the congregation should furthermore, if possible, establish an Ev. Lutheran school for children and for this purpose call in Christian order an orthodox, godly, and competent teacher, pledge him to adherence to the divine Word of the Old and the New Testament and the Confessions of the Lutheran Church, and place him under the supervision of the public ministry.

C.F.W. Walther, *Die rechte Gestalt einer vom Staate unabhaengigen Evangelisch-Lutherischen Ortsgemeinde* (*The Proper Form of an Evangelical Lutheran*

*Congregation Independent of the State*) (1863), in *Walther and the Church* 100 (Dallmann et. al. eds., English trans. 1938) (citations and quotations omitted). Walther explained that parochial school teachers serve in a role auxiliary to the pastor, but central to the church’s purpose:

Hence the highest office is that of the ministry of the Word, with which all other offices are also conferred at the same time. Every other public office in the church is part of the ministry of the Word or an auxiliary office that supports the ministry . . . . Therefore, the offices of Christian day school teachers, almoners, sextons, precentors at public worship, and others are all to be regarded as ecclesiastical and sacred, for they take over a part of the one ministry of the Word and support the pastoral office.

C.F.W. Walther, *Kirche und Amt (Church and Ministry)* 289-90 (1852) (English trans. 1987).

Since Walther’s time, the Synod has placed great emphasis on the religious education of its children and on introducing the Gospel to other children whose parents choose a Lutheran education. Religious education is integrated into every part of school life.<sup>6</sup> The Synod’s

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6. The Court used to give the label “pervasively sectarian” to religious institutions whose “secular activities cannot be separated from [religious] ones.” *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 755 (1976). Though that term has fallen into disfavor, it indeed accurately describes the Synod’s approach to education. See, e.g., *Helms v. Arveson*, No. 85-5533, 1994 WL 406406, at \*7 (E.D. La. July 25, 1994) (enjoining public funds from going to various schools including a Synod school, Faith Lutheran, because of its pervasively sectarian nature), *rev. sub. nom. Mitchell v. Helms*, 530 U.S. 793 (2000).

Commission on Theology and Church Relations puts it this way:

[T]he philosophy of Lutheran education includes the demand that the faith of the church be evident in all activities at the school. Law and Gospel, sin and grace are operative in the curriculum and methodology of a Lutheran school.

LCMS Commission on Theology, *The Ministry*, at 13.

In sum, the Missouri Synod firmly believes in the role of the schoolteacher as one who promotes the faith. While the schoolteacher's work differs in kind from that of a pastor, the two are similar in their importance to the church. Again, to quote Luther:

[P]astors and schoolteachers are the lowly, but daily, permanent, eternal judges who anathematize without interruption, that is, fend off the devil and his raging. A council, being a great judge, must make old, great rascals pious or kill them, but it cannot produce any others. A pastor and a schoolteacher deal with small, young rascals and constantly train new people to become bishops and councils, whenever it is necessary. A council prunes the large limbs from the tree or extirpates evil trees. But a pastor and a schoolteacher plant and cultivate young trees and useful shrubs in the garden. Oh, they have a precious office and task, and they are the church's richest jewels; they preserve the church.

Martin Luther, *On the Councils and the Church* (1539), in *41 Luther's Works, American Edition* 134-35 (1966).

#### **D. The Mutual Obligations of Ministers and Congregations**

Commissioned ministers, like ordained ministers, have unique and divinely ordered relationships of trust with their congregations. And the Synod believes deeply that, in those relationships, both ministers and congregations have important and unwaivable responsibilities to each other. Ministers have certain obligations to their congregations, to be sure. But congregations also have certain obligations to their ministers, including their called schoolteachers. Congregations must, for example, provide their called ministers with appropriate salaries. See, e.g., C.F.W. Walther, *Die rechte Gestalt einer vom Staate unabhaengigen Evangelisch-Lutherischen Ortsgemeinde (The Proper Form of an Evangelical Lutheran Congregation Independent of the State)* (1863), in *Walther and the Church* 106 (Dallmann et. al. eds., English trans. 1938) (noting that it is “the duty of the congregation to provide according to its ability for the maintenance of the pastor that he may have food, clothing, and a dwelling for himself and his family” and that “[t]his applies also in due measure to the teachers of the young”) (citations and quotations omitted).

Important here also is the fact that congregations are not to fire ministers arbitrarily. Indeed, within Lutheran theology, congregations do not fire ministers *at all*. Just as ministers are called by God rather than human beings, so too calls end when God dictates rather than when human beings dictate. Of course, human beings enter into the

process—they are to discern when God has deposed a minister, just as they are to discern when God calls a minister. But ultimately God is the decisionmaker on when a minister’s call begins and when it ends. Perhaps Martin Chemnitz, an early Lutheran theologian, put it best:

Just as God properly claims for Himself the right to call . . . so also has God properly reserved to Himself alone this power of removing someone from the ministry . . . . But as the procedure of a call is to follow the instruction of the Lord of the harvest, so also if one is to be removed from the ministry, the church must show that that also is done by the command and will of the Lord.

Martin Chemnitz, *Ministry, Word, and Sacraments: An Enchiridion* 37 (1593) (English trans. 1981). Centuries later, Walther put it similarly:

A congregation has no right to depose such a faithful servant of Jesus Christ; if it does this, it rejects Jesus Christ himself . . . . A congregation can depose an incumbent of the holy ministry only if it is clear from the divine Word that God Himself has deposed him[.]

C.F.W. Walther, *Kirche und Amt (Church and Ministry)* 304 (1852) (English trans. 1987). *See also* LCMS Commission on Theology, *The Divine Call*, at 20 (pointing out that it would be utterly inconsistent with the divine nature of the office to treat “the call of the preacher as nothing other than a contract of the kind made with a cow[-] or sow-herder”) (quoting C.F.W. Walther, *Americanisch-*

*Lutherische Pastoraltheologie (American Lutheran Pastoral Theology)* 427 (1906)).

With these principles firmly in mind, the Synod teaches that ministers can generally be fired only for certain narrow reasons—“1. Teaching false doctrine, 2. Offensive conduct or scandalous life, 3. Deliberate unfaithfulness in the performance of official duties, 4. Neglect of, or inability to perform, official duties, [or] 5. Domineering in office.” LCMS Commission on Theology, *The Divine Call*, at 25. Called workers can therefore generally only be removed “on the basis of specific faults or failures on the part of the worker, not because a congregation would prefer no longer to have that called worker in their service.” The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *Questions about the Removal of Called Workers from a Dispute Resolution Panel 2* (2010) (hereinafter “LCMS Commission on Theology, *Removal of Called Workers*”), available at [www.lcms.org/Document.fdoc?src=lcm&id=1051](http://www.lcms.org/Document.fdoc?src=lcm&id=1051).<sup>7</sup> As a result,

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7. Somewhat relatedly, congregations may have to abolish positions outright for financial reasons. This is a somewhat different situation, but even so, congregations still have obligations to their called workers. See The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *Questions about the Removal of Called Workers from a Dispute Resolution Panel 2* (2010) (hereinafter “LCMS Commission on Theology, *Removal of Called Workers*”), available at [www.lcms.org/Document.fdoc?src=lcm&id=1051](http://www.lcms.org/Document.fdoc?src=lcm&id=1051) (noting that “there are circumstances (such as financial distress) in which a congregation has no recourse but to abolish an office, including that of a called teacher,” but even then “[c]ongregational responsibility for a called worker, however, would not immediately end with the decision to abolish an office” and would include “mak[ing] every effort to honor the provisions of the current call for pay and benefits while the teacher seeks another call”).

“[a]lthough not pledged to remain in the teaching office for a lifetime, the normal expectancy of the church and of teacher candidates is that, unless prevented by personal circumstances, the teaching ministry of an individual will be followed as a lifelong calling.” LCMS Commission on Theology, *The Ministry*, at 13.

As to the exact details of when ministers can be fired, there is some debate within the church.<sup>8</sup> But all agree that “the removal of a man from the office of the public ministry is a very serious matter and should not be carried out capriciously or arbitrarily.” LCMS Commission on Theology, *The Divine Call* at 43. This is true for ordained ministers in the Synod (all of whom are male). But it is equally true for commissioned ministers. See LCMS Commission on Theology, *Removal of Called Workers*, at 2 (noting that “[w]hile these comments are directed toward the case of a pastor’s removal, they also apply to other called workers, such as teachers”).

Of course, one effect of these protections for ministers is that they become freer to preach the Word of God boldly to their potentially erring congregations, for Scripture has always warned of the temptation for ministers to dilute the Gospel to please their congregations and maintain their positions. See, e.g., *2 Timothy* 4:3-4 (“For the time is coming when people will not endure sound teaching . .

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8. The above list of reasons came from the Synod’s Commission on Theology and Church Relations. One dissenter argued that the list was too expansive and “could easily invite abuse from those looking for an excuse to ‘dump’ their pastor.” The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *Theology and Practice of “The Divine Call”: A Minority Opinion* 15 (2003), available at [www.lcms.org/Document.fdoc?src=lcm&id=1000](http://www.lcms.org/Document.fdoc?src=lcm&id=1000).

. accumul[at]ing] for themselves teachers to suit their own passions, and will turn away from listening to the truth and wander off into myths.”). This is part therefore of the Synod’s powerful interest in protecting a righteous minister from improper treatment by a congregation, because the Synod believes, at bottom, that a called minister is “the one by whom God desires to make known to [the congregation] His will and lead it to eternal life.” LCMS Commission on Theology, *The Divine Call*, at 21 (quoting C.F.W. Walther, *Kirche und Amt (Church and Ministry)* 304 (1852) (English trans. 1987)).

## II. Dispute-Resolution Procedures in the Lutheran Church

We next trace the historical and theological basis for the church’s internal dispute-resolution system and the details of the Synod’s dispute-resolution practice.

### A. The Theology and History of Church Dispute Resolution

St. Paul teaches in his first letter to the Corinthians that Christians should generally resolve their disputes internally without going to the secular courts for relief:

<sup>1</sup> When one of you has a grievance against another, does he dare go to law before the unrighteous instead of the saints? <sup>2</sup> Or do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? <sup>3</sup> Do you not know that we are to judge angels? How much more, then, matters pertaining to this

life! <sup>4</sup> So if you have such cases, why do you lay them before those who have no standing in the church? <sup>5</sup> I say this to your shame. Can it be that there is no one among you wise enough to settle a dispute between the brothers, <sup>6</sup> but brother goes to law against brother, and that before unbelievers? <sup>7</sup> To have lawsuits at all with one another is already a defeat for you. Why not rather suffer wrong? Why not rather be defrauded? <sup>8</sup> But you yourselves wrong and defraud—even your own brothers!

1 *Corinthians* 6:1-8.

The Synod has emphasized the importance of this biblical teaching: “[A]llowing the world to judge Christians and to settle their differences would be to dishonor God, who has given them this glorious position.” The Lutheran Church—Missouri Synod Commission on Theology and Church Relations, *1 Corinthians 6:1-11: An Exegetical Study* 9 (1991) (hereinafter “LCMS Commission on Theology, *An Exegetical Study of Corinthians*”), available at [www.lcms.org/Document.fdoc?src=lcm&id=415](http://www.lcms.org/Document.fdoc?src=lcm&id=415). The early Christian Church was also firmly committed to this view—consider, for example, the Council of Chalcedon’s statement in the middle of the fifth century:

If any cleric has a case to bring against a cleric, let him not leave his own bishop and take himself off to the secular courts, but let him first air the problem before his own bishop . . . . If anyone acts in a contrary fashion, let him be subject to canonical penalties. If a cleric has a case to bring either against his own or against

another bishop, let him bring the case to the synod of the province . . . .

*The Council of Chalcedon*, Canon IX (451).

These Scriptural demands, along with the authoritative church interpretations of them, are not merely good advice that the Synod is free to ignore. The Synod believes that Christians simply must resolve certain disputes within the church. Those who disobey that text disobey God, and the church that tolerates such disobedience also disobeys God. *See* LCMS Commission on Theology, *An Exegetical Study of Corinthians*, at 17 (“The church which fails to discipline its members when they go to court against fellow members in a way which violates the intent of the Word of God and fails to act to correct and eliminate that practice is abdicating its responsibility.”).

### **B. The Synod’s Dispute-Resolution Process**

Flowing from its theological commitments, the Synod has over the years developed an intricate set of detailed procedures for the resolution of controversies within the church. Found in the Synod’s governing handbook, these procedures span 14 pages and are worthy of in-depth review. *See Handbook of the Lutheran Church—Missouri Synod* § 1.10.1-1.10.18, at 36-49 (2004) (hereinafter “*LCMS Handbook*”), available at [www.lcms.org/Document.fdoc?src=lcm&id=926](http://www.lcms.org/Document.fdoc?src=lcm&id=926); Pet. App. at 75a-104a.<sup>9</sup>

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9. This brief generally refers to the dispute-resolution procedures established by the 2004 Handbook, as that was the document in effect when the instant controversy arose. It is, however, generally consistent with later versions of the Handbook as well. *See Handbook of the Lutheran Church—Missouri Synod* (2010), available at [www.lcms.org/Document.fdoc?src=lcm&id=928](http://www.lcms.org/Document.fdoc?src=lcm&id=928).

To begin, it is important to clarify the sorts of disputes that fall within the bounds of the Synod's dispute-resolution process. Two important limitations must be addressed at the outset. First, the Synod's process only applies to disputes between certain parties—principally the Synod itself, member congregations, ordained and commissioned ministers, and lay people holding certain important positions within the Synod. The Synod's process does not apply to congregants generally or to lay teachers. *Id.* § 1.10.2 (Pet. App. 79a-80a) (explaining that the Synod's procedures only apply to disputes between Synod members); *id.* ART. V (*LCMS Handbook*, at 12) (defining members to include called ministers and certain persons in certain Synod positions). Second, the Synod's process does not apply to certain types of issues. Disputes over property or contractual rights are considered purely temporal matters falling outside of the Synod's purview, "unless such matters involve theological, doctrinal, or ecclesiastical issues, including those arising under the divine call of a member of the Synod." *Id.* § 1.10.3 (Pet. App. 80a). Of course, neither of these two limitations would apply in this case, given that respondent was a commissioned minister bound to the Synod's dispute-resolution process and the dispute here specifically did involve a theological issue—the revocation of her divine call. For this type of dispute—and for all disputes such as this one that fall within the scope of the Synod's dispute-resolution process—the Synod's Constitution declares that its internal process "shall be the exclusive remedy to resolve such disputes." *Id.* § 1.10.2 (Pet. App. 79a); *see also id.* § 1.10.1.1 (Pet. App. 77a) ("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.").

The Synod's dispute-resolution procedure is modeled on the 18th chapter of the book of Matthew. The Gospel prescribes a reconciliation process whereby disputants are encouraged to resolve their differences through a series of meetings of escalating formality and increasing numbers of mediating church personnel:

<sup>15</sup> "If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. <sup>16</sup> But if he does not listen, take one or two others along with you, that every charge may be established by the evidence of two or three witnesses. <sup>17</sup> If he refuses to listen to them, tell it to the church. And if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector. <sup>18</sup> Truly, I say to you, whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven. <sup>19</sup> Again I say to you, if two of you agree on earth about anything they ask, it will be done for them by my Father in heaven. <sup>20</sup> For where two or three are gathered in my name, there am I among them."

*Matthew 18:15-20.*

In accordance with these Biblical principles, the first step in the Synod's process is one of informal reconciliation, where the parties meet face to face on their own, with or without an assisting intermediary known as a reconciler. *Id.* § 1.10.5 (Pet. App. 84a-85a). If that fails, the second step is that of formal reconciliation, where one party files a written complaint and the other files a written response.

The parties then meet officially with a reconciler (and perhaps key witnesses), with the reconciler ultimately filing a written but confidential report explaining the controversy, the issues that have been resolved, and the issues that remain unresolved. *Id.* § 1.10.6-1.10.6.5 (Pet. App. 85a-87a).

If that second step fails to resolve the problem, the parties move into the more formal dispute-resolution process, where a panel of three reconcilers decides the issues at a formal hearing. *Id.* § 1.10.7-1.10.7.4 (Pet. App. 87a-90a). After the panel decision is rendered, each party has the right to ask for an appeal from the Appeal Panel, and if an appeal is granted, a Review Panel will decide the issues on the record without further formal hearing. *Id.* § 1.10.8-1.10.8.5 (Pet. App. 90a-91a). At that point, the decisions are binding on the parties and not subject to further appeal. *Id.* § 1.10.8.5(a) (Pet. App. 91a).

In all these processes, the Synod concerns itself deeply with procedural justice. Synod rules provide for limited discovery and compulsory process of witnesses, *id.* § 1.10.18.1 (Pet. App. 100a), forbid *ex parte* contacts, *id.* § 1.10.18.1 (Pet. App. 100a-101a), protect the right to counsel, *id.* § 1.10.18.1 (Pet. App. 101a), establish the right to present evidence, *id.* § 1.10.7.4(a) (Pet. App. 88a-89a), create an appeal process, *id.* § 1.10.8-1.10.8.5 (Pet. App. 90a-91a), and authorize certification of theological issues to the Synod's Commission on Theology and Church Relations, *id.* § 1.10.18.1 (Pet. App. 102a-103a).

This is not to suggest that Synod procedure mimics the Federal Rules. The Synod aims for spiritual reconciliation rather than any purely legal judgment, so its rules differ

from those of the federal courts in understandable ways. While the Constitution requires public trials, *see Presley v. Georgia*, 130 S. Ct. 721 (2010), the Synod keeps its proceedings confidential, *id.* § 1.10.18.1 (Pet. App. 101a). While both the Constitution and the Synod allow attorneys to be present, the Synod does not allow anyone but the parties and witnesses to speak—a non-adversarial model where parties present their own views, the Synod believes, is the one consistent with Scripture and best for finding common ground. *Id.* § 1.10.7.4(a) (Pet. App. 88a-89a).

Indeed, the Synod’s focus on reconciliation can perhaps be seen most clearly in its personnel who assist with the dispute-resolution process, who are called “reconcilers” rather than judges. Four reconcilers, no more than two of whom are pastors, are chosen out of each of the thirty-five Synod districts nationwide. Their terms are six years apiece; their main qualification for the position is that they are “people ‘of good reputation, full of the Holy Spirit and Wisdom.’” *Id.* § 1.10.10.1 (Pet. App. 92a) (quoting *Acts* 6:3). But the Synod gives them significant training in helping to reunite disputing parties. And the Synod also takes care to ensure that reconcilers are chosen neutrally for each individual dispute. Synod procedures require that, for each case in which a panel of reconcilers is required, nine names are randomly chosen from the long list of reconcilers. *Id.* § 1.10.13.1(a) (Pet. App. 95a). Each party can then challenge reconcilers for cause. *Id.* § 1.10.16 (Pet. App. 99a). Each party even has three peremptory strikes. *Id.* § 1.10.13.1(c) (Pet. App. 95a); *cf. Rivera v. Illinois*, 129 S. Ct. 1446, 1453 (2009) (noting the “ancient lineage of the peremptory challenge [which] has long been lauded as a means to guard against latent bias”).<sup>10</sup>

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10. Additional rules govern what to do if so many of the nine reconcilers are struck that they are insufficient to make up

### C. The Dispute-Resolution Process and Commissioned Ministers

Any called minister who has disputes with his or her congregation can bring a claim under these dispute-resolution procedures. As explained before, in part because called ministers must be free to criticize erring congregations, called ministers can only be removed for quite limited reasons. *See* LCMS Commission on Theology, *The Divine Call*, at 25 (explaining those reasons, such as “teaching false doctrine, offensive conduct or scandalous life, deliberate unfaithfulness in the performance of official duties, neglect of, or inability to perform, official duties, or domineering in office”).

Each year reconcilers and dispute-resolution panels work to resolve controversies between commissioned ministers who teach in the parochial schools and their congregations—many of which involve the termination of a call—utilizing these dispute-resolution procedures. *See* LCMS Commission on Theology, *Removal of Called Workers*, at 1-2. While panels of reconcilers strenuously work to bring the parties to some mutually agreeable resolution, they also have the power to issue remedies. Panels can order congregations to reconsider their actions; they can order back pay and other forms of compensation. Although the Synod’s process usually relies on informal pressure on its congregations to ensure compliance with panel decisions, there is always the possibility of harsher sanctions—the harshest sanction being the outright expulsion of a congregation from the Synod itself. And this sanction has historically been used: Wayward

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a three-reconciler panel. *LCMS Handbook* § 1.10.13.1 (Pet. App. 95a) (explaining how additional names will be drawn blindly with each party having additional peremptory challenges).

congregations have indeed been expelled from the Synod for failure to honor decisions of the dispute-resolution process, some relating to how congregations have treated their ministers.

In sum, Synod congregations do not arbitrate their disputes with ministers. Disputes are handled through the Synod's dispute-resolution process, which involves neutrally selected reconcilers, strong procedural protections for ministers, and a powerful substantive decree that a minister's call is not to be terminated except in rare and specifically delineated circumstances. Again all this reflects how the Synod has a strong interest in protecting ministers from improper actions by their congregations so that they can be free to preach the Gospel more boldly.

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The Synod has strongly held religious beliefs about commissioned ministers, their role in the church, and the way in which disputes between them and their congregations should be resolved. These views go back centuries and are evident in the biblical text, the works of early Reformation leaders, the writings of 19th century Missouri Synod theologians, and the more recent publications of the church. But the real origin of all of these views, the Synod believes, is God. The Synod's doctrines, rules, and procedures are what they are because the Synod believes, at bottom, that this is what God desires for the church.

Taking respondent's position in this case would prevent the Synod from following what it believes to be

the will of God. The Synod believes, for example, that God calls commissioned ministers and that God deposes them; respondent's attempt to reinstate her own call therefore goes directly against God's will. The Synod believes that God wants commissioned ministers to raise their disputes within the church; respondent's decision to bring the state in against the church therefore also goes directly against God's plan. These views are not widely shared. They are not even widely understood. But they have been the views of orthodox Lutherans for centuries.

The Sixth Circuit's approach to this case showed manifest disregard to these well-established beliefs. The Court dismissed the office of commissioned minister as an irrelevant "title" (Pet. App. 22a)—contrary to centuries of church teaching. It opened the door for the government to impose a commissioned minister on the church—even when the church believes that the minister had violated church teaching and had been deposed by God. And it held that the church's actions could be treated as illegal retaliation—even when the church is merely adhering to centuries of Lutheran teaching obligating ministers to resolve their disputes within the church.

**CONCLUSION**

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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June 2011