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 THE AMERICAN JEWISH COMMITTEE AND THE UNION FOR REFORM JUDAISM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The undersigned *amici curiae* respectfully submit this brief in support of Petitioner Hosanna-Tabor Evangelical Lutheran Church and School ("Hosanna-Tabor").[1]

INTEREST OF THE *AMICI CURIAE*

The American Jewish Committee ("AJC"), a national organization of over 125,000 members and supporters and 26 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the most effective way to achieve that goal is to safeguard the civil and religious rights of all Americans. AJC has a long tradition of defending Americans' religious liberty, and believes that maintaining church-state separation through limiting government entanglement with religion is the surest guarantor of that liberty. With these paramount First Amendment rights in mind, AJC urges the Court to find that the Sixth Circuit erred when it applied an overly-rigid, quantitative test to determine that Respondent Cheryl Perich ("Perich") was not a minister for purposes of the judicially-created "ministerial exception" to employment discrimination laws. The ministerial exception safeguards the right of religious institutions to select clergy free from government interference. And whether grounded in the First Amendment's Free Exercise Clause, the Establishment Clause, or both, the ministerial exception is a necessary adjunct to the

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 person other than the amici, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

guarantee of religious liberty. A court's determination that an employee of a religious institution is not a member of its clergy based on arbitrary factors such as the comparative quantity of time spent on activities the court deems "religious" severely curtails that freedom. The Court should make clear that the Sixth Circuit was wrong in its benchmark for determining whether a claimant is a ministerial employee.

The Union for Reform Judaism ("Union") is the congregational arm of the Reform Movement of Judaism in North America including 900 congregations encompassing 1.5 million Reform Jews. The Union comes to this issue out of its longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights and opportunities than have been known anywhere else throughout history. The Union believes deeply that the ability of houses of worship to make employment decisions are a vital manifestation of First Amendment principles. At the same time, the Union remains committed to civil rights laws that ensure essential protections to individuals who have been and continue to be victims of discrimination. Such civil rights laws reflect core American values of equality, liberty and due process. The petitioner and respondents each raise vital religious liberty and civil rights concerns. As an entity committed to both religious liberty and civil rights, the Union has a vested interest in ensuring that the standard for applying the ministerial exception to employment discrimination laws reflects an appropriate balance between these two important, long recognized interests.

SUMMARY OF ARGUMENT

All courts and parties considering the matter have uniformly recognized a ministerial exception to employment discrimination laws as a necessary means of protecting religious institutions' right to select and appoint clergy. When the employee in question is not clearly "ministerial," trial and appellate courts have determined whether the exception encompasses that employee by analyzing whether the employee's "primary" job function is religious.

Here, the Sixth Circuit erred in the standard it applied to evaluate whether Respondent Cheryl Perich's position as a teacher in a Lutheran school was "ministerial." It applied a simplistic, quantitative test – counting minutes per day spent on various job activities – and concluded that Ms. Perich was not ministerial because the quantitative majority of her work time was spent on duties the Sixth Circuit cursorily determined were *not* religious.

This Court should make clear that the proper approach for determining who is "ministerial" for purposes of the ministerial exception must be holistic, objectively examining the nature of the position and the particular employee's function within the religious organization. Such an approach would ascertain – through verifiable factors – whether furtherance of a religious entity's religious or spiritual mission is integral to an employee's position, and whether religious duties represent a *qualitatively* significant function of the employee's job. If so, that employee should be considered ministerial for purposes of the exception.

One specific issue, not presented on this record, and which the Court should reserve for another day, is whether some employment-related claims such as retaliation claims – as distinct from claims of substantive employment discrimination – may be brought by any, some or all employees deemed ministerial for purposes of the ministerial exception.

Finally, because a determination of whether the ministerial exception bars a plaintiff's claims involves an assessment of the nature of the claim and whether plaintiff's ministerial status prevents her from asserting it, this Court should clarify that the ministerial exception is not jurisdictional, and that a dismissal based on the exception should be predicated upon Federal Rule of Civil Procedure 12(b)(6), not Rule 12(b)(1).

ARGUMENT

I. THE COURT SHOULD ADOPT A FUNCTIONAL, OBJECTIVE APPROACH TO DETERMINING WHO IS A "MINISTERIAL" EMPLOYEE FOR PURPOSES OF THE MINISTERIAL EXCEPTION.

The ministerial exception to the application of employment discrimination laws to religious entity employers prevents "an encroachment by the State into an area of religious freedom which it is forbidden to enter": a church's freedom to select and set standards for its own religious leaders. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972). The exception also limits the unconstitutional entanglement between church and

state that may otherwise result when a court adjudicates employment-related claims asserted against a church by its clergy. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007). This doctrine of ecclesiastical abstention is thus firmly rooted in both the Free Exercise and Establishment Clauses of the First Amendment. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference"); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 7-8 (1929) ("Because the appointment [to a collative chaplaincy] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. . . . the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive"); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) ("[t]he objective [of the Establishment Clause] is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other"); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) ("The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the . . . exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow"). Every Federal Court of Appeals (except for the Federal Circuit, which has not had occasion to consider it) has recognized and adopted the ministerial exception in some form as a

constitutional necessity.[2] No party to this litigation has challenged the existence of the exception.

But the Circuits have struggled to determine which employees of religious institutions other than traditional religious leaders employed by a house of worship or place of religious instruction – *i.e.* ordained priests, pastors, rabbis, imams – are "ministerial employees" subject to the ministerial exception. These struggles generally have involved application of variously articulated versions of a so-called "primary duties" test, which – broadly – attempts to assess whether the employee's primary employment duties are religious. *See Alcazar v. Corp. of the Catholic Archbishop of Seattle,* 627 F.3d 1288, 1291 (9th Cir. 2010) (listing circuit courts applying the "primary duties" test, or tests like it, but emphasizing that "[f]or our part, we have declined to adopt any particular test"). If the balance tips in favor of religious activity, courts generally apply the exception to bar the employee's claim.

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2. *See, e.g., Natal v. Christian & Missionary Alliance,* 878 F.2d 1575 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008); *Petruska,* 462 F.3d 294 (3d Cir.); *EEOC v. Roman Catholic Diocese,* 213 F.3d 795 (4th Cir. 2000); *McClure*, 460 F.2d 553 (5th Cir.); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769 (6th Cir. 2010); *Tomic v. Catholic Diocese,* 442 F.3d 1036 (7th Cir. 2006), *cert. denied,* 549 U.S. 881 (2006); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.,* 929 F.2d 360 (8th Cir. 1991); *Elvig v. Calvin Presbyterian Church,* 375 F.3d 951 (9th Cir. 2004); *Bryce v. Episcopal Church in the Diocese of Colorado,* 289 F.3d 648 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.,* 83 F.3d 455 (D.C. Cir. 1996).

Defining "primary" is a salient part of the struggle to apply the test; the label itself is somewhat inappropriate. Here, the Sixth Circuit's quantitative analysis of Ms. Perich's duties as a fourth grade teacher in a Lutheran church-affiliated school was a misguided implementation of the test; it relied on an overly literal definition of "primary." But in this context, "primary" should be understood to mean "significant" or "essential," not "predominant" or "first." The proper test should recognize that quantity is relevant, but not dispositive. And the District Court's excessive reliance on the school's subjective labeling of Perich as a "minister" was misguided as well. The key issue is whether religion or religious inculcation or practice is integral to the employee's job based on an analysis of objective criteria, in which event the employee should be deemed "ministerial" for purposes of the exception.

A. Courts Should Determine Who is a Ministerial Employee Using an Objective Assessment of the Employee's Role Within the Religious Entity.

If furtherance of a religious entity's religious or spiritual mission is integral to an employee's position within a religious institution and is a qualitatively significant function of the employee's position, that employee should be considered ministerial for purposes of the ministerial exception. The determination that furtherance of religion is integral to an employee's job should be based on an objective assessment of the employee's duties, the nature of his or her position, and whether religious duties are in fact an essential component of the employee's job. An objective assessment could consider externally verifiable factors such as: job descriptions or mission statements

published by the religious entity; tasks and duties regularly performed by the employee; whether qualification for the position includes particular religious training or courses of study; and whether the employee acts as an intermediary between the faith and its followers, or between the faith and the general populace within the religious entity's known hierarchical structure.

The Fourth Circuit in *Rayburn v. General Conference of Seventh-Day Adventists* first advanced Professor Bruce Bagni's most-often quoted articulation of the so-called "primary duties" test for examining whether the "function of the position" of an employee can be characterized as ministerial: "'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."'" 772 F.2d 1164, 1168-69 (4th Cir. 1985) (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Columbia L. Rev. 1514, 1545 (1979)). The plaintiff in *Rayburn* alleged that she had been refused employment as an "associate in pastoral care" at a particular Seventh-day Adventist church on account of her sex and race, constituting discrimination prohibited by Title VII of the Civil Rights Act of 1964 ("Title VII"). 772 F.2d at 1165. Because the position for which Rayburn applied "so embodie[d] the basic purpose of the religious institution," the Fourth Circuit concluded that the position was ministerial, even though Rayburn could never have become an ordained minister in the Seventh-day Adventist Church (the Church did not ordain women). *Id.* at 1168. In concluding that an "associate in pastoral care" position

within the Seventh-day Adventist Church was ministerial, the Fourth Circuit relied on objective evidence and applied the "primary duties" test articulated above. It considered the associate in pastoral care job description, the fact that lay members of the congregation sometimes served in similar capacities as associates in pastoral care, and the fact that the position did not require (indeed could not require, if filled by a woman) ministerial ordination. *See id.* at 1165, 1168. Weighing these objective criteria, the Fourth Circuit concluded that "[t]he role of an associate in pastoral care is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty." *Id.* at 1168.

Rayburn was an "easy" case; the job description of associate in pastoral care focused on religious activities and included no secular aspects. *See id.* at 1165 (the "position entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo and other churches, and other evangelical, liturgical, and counselling [sic] responsibilities," as well as the possibility of receiving a "'commissioned minister credential'"). But the *Rayburn* model can be and has been appropriately applied to determine that a position with significant secular aspects is nevertheless functionally ministerial from an objective perspective. *Rayburn* thus serves as a baseline for the proper application of an objective, role-based approach to determining who is "clergy" for purposes of the ministerial exception.

Two recent decisions from the highest courts of Wisconsin and the District of Columbia employed this role-based, functional approach to analyze whether a

teacher at a Catholic elementary school in Wisconsin and a principal at a Catholic elementary school in the District of Columbia – positions involving significant secular components – were "ministerial" under the ministerial exception. *See Coulee Catholic Schs. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009); *Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Wash.*, 875 A.2d 669 (D.C. 2005). In *Coulee*, the Supreme Court of Wisconsin found that a first grade teacher at a Catholic elementary school was ministerial because she "was not simply a public school teacher with an added obligation to teach religion. She was an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Coulee*, 768 N.W.2d at 890. The plaintiff's "position as a first-grade teacher was important and closely linked to the religiously-infused mission of the school. . . . [She] was required to perform quintessentially religious tasks as a central part of her job, and her role was an essential part of the Catholic Church's educational ministry to its youth." *Id.*

In finding that the plaintiff's "role was of high importance and closely linked to the mission of the school," the Wisconsin Supreme Court considered such objective and externally verifiable factors as (1) the "nature and mission" of the employer-school (by reference to testimony regarding the Catholic school's role within the general Catholic church, a faculty handbook that included a statement of the school's and church's religious mission, expectations stated in plaintiff's employment contract, and religious curricular components); (2) plaintiff's formal job description; (3) plaintiff's daily activities within her school day – which included leading students in prayer, attending mass with her students, and instructing her students in

a thirty minute religion class four days per week; and (4) the presence of religious objects in her classroom. The *Coulee* decision recognized that the quantitative majority of the teacher's workday consisted of secular activities such as preparing for class and instructing the students in secular subjects or supervising them during recess. *See id.* at 872-875. But this "functional," "holistic" approach encompassed – as its "primary concern" – the "function of the employee, not only the enumerated tasks themselves." *Id.* at 882.

The *Coulee* court emphasized the objective nature of its "functional" approach to determining whether a position is "closely linked" to the "fundamental mission" of the religious employer:

> Relevant evidence as to the employee's importance to the religious mission of the organization will include objective employment indicators such as hiring criteria, the job application, the employment contract, actual job duties, performance evaluations, and the understanding or characterization of a position by the organization. Teaching, evangelizing, church governance, supervision of a religious order, and overseeing, leading, or participating in religious rituals, worship, and/or worship services will serve as important factors, rather than the only evidence we measure or consider as under the quantitative approach. These quintessentially religious tasks will evince a close link and importance to an organization's religious mission.

Id. at 883. Because courts' consideration of religious-entity employees with both secular and religious job components will necessarily be fact-specific, the proper test of whether a particular employee is ministerial must rely – as much as possible – on objective and externally verifiable factors such as these.

The District of Columbia Court of Appeals employed a similar functional approach in determining that the principal of a Catholic elementary school was a ministerial employee. *See Pardue*, 875 A.2d at 675 ("'Our inquiry . . . focuses on "the function of the position" at issue and not on categorical notions of who is or is not a "minister"'") (quoting *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000)). In applying a functional, holistic "primary duties" test, the *Pardue* court relied on externally verifiable objective factors such as general statements of "The Mission of Catholic Schools in the Church of Washington" and the "Catholic Schools Office Mission Statement," a list of "Major Areas of Responsibility" for the principal, performance evaluations, the employment contract signed by the plaintiff, plaintiff's recounting of her own hiring process for teachers and her duty to work with the pastor in matters of administration, religious education and school policy. 875 A.2d at 676. The *Pardue* court acknowledged that a quantitatively large portion of the plaintiff's daily duties were "secular in appearance – designed to meet public licensing requirements and to maintain the standing of the institution." *Id.* at 677. But the court also emphasized that, based on an evaluation of the principal's position as a whole within the Catholic school as well as externally verifiable articulations of the D.C. Catholic schools' religious purpose, "these many responsibilities

– some predominantly 'secular' and some predominantly religious – are inextricably intertwined in the school's mission and in the principal's role in fulfilling it." *Id.*

Recent decisions in the Fourth, Fifth and Seventh Circuits have taken a similarly functional, holistic – though less specifically articulated – approach to determining whether religion is qualitatively significant to an employee's role within the religious institution that employs him or her. *See EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802-03 (4th Cir. 2000) (recognizing that a "fact-specific examination of the function of the position" is required; finding – after consideration of job descriptions, job duties performed, and the objective centrality of the role of music in the Catholic faith – that position of Director of Music Ministry in Catholic Church and part-time music teacher in Catholic School were ministerial); *Clapper v. Chesapeake Conference of Seventh–day Adventists*, No. 97-2648, 166 F.3d 1208, 1998 WL 904528, at *1, *6-7 (4th Cir. Dec. 29, 1998) (unpublished) (classifying teacher in Seventh-day Adventist elementary school as ministerial after considering the Seventh-day Adventist Education Code, the employment contract, generally accepted principals of Seventh-day Adventism, plaintiff's teaching duties, the fact that plaintiff's salary was partially funded by Church tithes, and "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology," even though majority of teacher's daily teaching time was spent on secular subjects); *Starkman v. Evans*, 198 F.3d 173, 175-77 (5th Cir. 1999) (choirmaster and director of music in Methodist Church was ministerial based on multi-factor test considering plaintiff's employment duties, job requirements, qualifications and authorizations to perform

Church ceremonies and "actual role" at the church, as well as whether employment decisions regarding plaintiff's job were generally made based on religious criteria); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006) (music director and organist of Catholic Church was ministerial because – based on consideration of his job description, job duties, and the role of music within the Catholic tradition – his duties "had a significant religious dimension"); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703-04 (7th Cir. 2003) ("In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position;" finding that Hispanic Communications Manager for Catholic Church was ministerial based on consideration of plaintiff's duties and the fact that plaintiff "was integral in shaping the message that the Church presented to the Hispanic community"). A common thread among these decisions is their consideration of a broad variety of externally verifiable, largely objective factors; no one factor is dispositive of whether the employee is ministerial, and in each case significant secular duties were involved in the position.

B. The Court Should Reject the Sixth Circuit's Quantitative Approach to Determining Who is a Ministerial Employee.

Here, the Sixth Circuit paid lip service to the proper test for determining whether Perich's position was ministerial when it stated that "[t]he governing primary duties analysis requires a court to objectively examine an employee's actual job function." *Hosanna-Tabor*, 597 F.3d at 781. But the Sixth Circuit, in ultimately determining

that Perich was not a ministerial employee of Hosanna-Tabor, did *not*, in fact, objectively examine Perich's actual job function. Rather, the Court of Appeals based its determination almost exclusively on the fact that "Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects" and that she only "participated in and led *some* religious activities throughout the day." *Id.* at 780 (emphasis added).[3]

The Court should reject the Sixth Circuit's quantitative approach to determining whether an employee is ministerial. As this Court has consistently recognized, determining what is "'religious'" is "a difficult and delicate task." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Surely it is more delicate than a matter of counting hours or minutes.

Indeed, "[w]hat makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987). That a particular teacher may spend

3. The Sixth Circuit also appears to have added in a requirement that, for Perich to be considered ministerial, the Lutheran church "rel[y] on Perich as *the primary* means to indoctrinate its faithful into its theology." *Hosanna-Tabor*, 597 F.3d at 781 (emphasis added). *Amici curiae* are aware of no other court that has required a religious employee to be the "*the* primary" means of a religious entity's indoctrination of its faithful to be eligible for the ministerial exception. *Clapper*, which the Sixth Circuit cites in support of the proposition, does not endorse such a requirement. *See Clapper*, 1998 WL 904528, at *7. The Court should reject this "*the* primary means" requirement, along with the Sixth Circuit's generally quantitative approach.

thirty percent, or fifty-one percent of her work day on overtly religious activities cannot, in isolation, determine the overall religious character of her employment. A test under which arbitrary percentages alone determine if an employee is ministerial undercuts the very foundation on which the exception rests – that it is for a religious organization to determine its means and methods of inculcation and religious practice. For some schools, it may very well be that the forty-five minutes per day that a teacher devotes to religious instruction infuses the rest of the school day – and the rest of that teachers' duties – with a palpable religious character.

Without doubt, the quantity of time an employee spends on religious activity is relevant to the determination of whether furtherance of a religious entity's religious or spiritual mission is a qualitatively significant function of an employee's position. And as noted, determining what is a "religious" activity is not always obvious or easy. In that regard, an appropriately holistic inquiry recognizes that secular-sounding job activities may actually be religious in nature, though perhaps to a lesser degree than overtly religious-sounding job activities. *See*, *e.g.*, *Pardue*, 875 A.2d at 677 ("merely enumerating the duties in Pardue's job description, many under secular-sounding headings such as 'materials management' and 'office management,' tells us little about whether her 'position is important to the spiritual and pastoral mission of the church'") (quoting *Rayburn*, 772 F.2d at 1169).

As The Wisconsin Supreme Court appropriately recognized, "the quantitative approach means as a practical matter . . . that the state can interfere with the hiring and firing of the leaders of religious organizations

and houses of worship so long as the leaders are spending (presumably) 49 percent or less of their time or tasks on whatever the court determines to be 'religious' activities." *Coulee*, 768 N.W.2d at 882. Such a test does not appropriately vindicate the principles that underlie the ministerial exception. And such a test is a classic illustration of the relentless preference for secular over religious that Justices Goldberg and Harlan warned against in their concurrence in *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963): "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

By contrast, a role-based, functional approach to determining who is ministerial – particularly in the parochial school context – furthers both the Free Exercise and Establishment Clause underpinnings of the ministerial exception. This approach leaves religious schools free to structure their day as they see fit, and to integrate religious and secular teachings into one curriculum taught by one teacher so that the school may convey to its young faithful – in visible ways – its commitment to the compatibility of secular and sacred pursuits. A quantitative approach forces parochial schools to artificially divide the secular from the religious – which may impede a school's spiritual mission – to protect its freedom to select its own ministers.

It is not the business of the state to tell parochial schools whether or to what extent they may integrate secular and sacred studies; the state surely could not mandate such a separation directly. The state should not be permitted to enforce this separation indirectly by acknowledging the ministerial status of only those teachers who limit themselves exclusively or predominantly to religious instruction. Courts should not strip these dual-role teachers of their ministerial status based on a quantitative analysis alone any more than they could deny the ministerial status of a church's pastor, synagogue's rabbi or mosque's imam who offered secular as well as religious counseling.

C. The Court Should Reject Overly Subjective Approaches to Determining Who is a Ministerial Employee.

Objectively verifiable factors such as whether the employee in question has been given a ministerial title by the religious institution are a proper part of the inquiry into whether a particular employee is ministerial. Indeed, courts ought to give substantial deference to a church's designation, where – as here – the church's designation of "minister" was pursuant to a long-standing and externally verifiable church policy, clearly not created for the purpose of avoiding its obligations under Title VII or the Americans with Disabilities Act ("ADA"). *See Watson v. Jones*, 80 U.S. 679, 729 (1871) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so").

But titles and other similarly subjective criteria alone cannot be dispositive. *See Dickinson v. United States*, 346 U.S. 389 (1953) (in selective service context, "[c]ertainly all members of a religious organization or sect are not entitled to the [statutory ministerial] exemption [to selective service] by reason of their membership, even though in their belief each is a minister").

Here, the District Court – like the Sixth Circuit on appeal – recited the elements of the proper ministerial inquiry, that "an employee may be considered ministerial, although not ordained, depending on the function and actual role of his or her position in the religious institution." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 582 F. Supp. 2d 881, 887 (E.D. Mich. 2008). But the District Court's decision then appeared to rest primarily on the fact that "Hosanna-Tabor considered Perich a 'commissioned minister.'" *Id.* at 892. Instead of considering Perich's title as one factor within the larger inquiry into Perich's status, the District Court concluded that since "there is no indication that Hosanna-Tabor uses the title 'commissioned minister' as subterfuge to avoid employment litigation," it could give almost complete deference to Hosanna-Tabor's use of the title to qualify Perich for the ministerial exception. *Id.* at 891.

The District Court's approach was far too narrowly focused. "While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981). This Court's Free Exercise jurisprudence – whether pre-or-post

Employment Division Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) – has always sought to strike a balance between legitimate state interests and unfettered religious liberty. A ministerial exception analysis that gives total deference to a religious entity's definition of minister would unjustifiably upset that balance.

* * *

We leave it to the parties to argue whether Ms. Perich should be deemed ministerial on the facts presented. However, even on the facts as marshaled by the Sixth Circuit, a court very likely could find – under the proper test – that Ms. Perich's role was objectively ministerial, similar to that of the teacher in *Coulee*. Indeed – while the inquiry in this case must be specific to its facts, this Court has several times "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). The Court should reverse the Sixth Circuit and instruct it to remand to the District Court with direction to determine whether an objective, holistic assessment of Ms. Perich's role and function as a fourth grade teacher at Hosanna-Tabor requires the conclusion that she was a ministerial employee.

II. A DETERMINATION THAT AN EMPLOYEE IS MINISTERIAL MAY NOT NECESSARILY BAR RETALIATION CLAIMS.

Because the Sixth Circuit found that Perich was not a ministerial employee, it had no occasion to consider whether – if she qualified as ministerial – her retaliation

claims might nevertheless have gone forward.[4] *See*, *e.g.*, *Rweyemamu*, 520 F.3d at 208 (Second Circuit examines both a plaintiff's status as a ministerial employee *and* the nature of plaintiff's claim before deciding whether the claim is barred by the ministerial exception). In this case's current posture, the issue of whether the ministerial exception creates absolute and complete immunity from anti-discrimination lawsuits by ministerial employees against their religious entity employers – particularly in relation to retaliation claims – is not before the Court. This issue raises difficult questions, which ought not to be resolved in this case, on this record, and the Court should reserve the question.[5]

Courts confirming the ministerial exception have not considered whether retaliation claims – as distinct from claims of substantive discrimination – may be brought by employees deemed ministerial for purposes of the ministerial exception.[6] Allowing retaliation claims despite

4. Only retaliation under the Americans with Disabilities Act and the corresponding Michigan state law were at issue. Perich and the EEOC brought no claims of substantive discrimination. *See Hosanna-Tabor*, 582 F. Supp. 2d at 883.

5. It is also not clear whether this issue was preserved by the Respondents, and whether the district court may even reach it on remand.

6. A New York district court briefly addressed retaliation as a non-barred claim in a recent ministerial exception case, and concluded that because the defendant Diocese "does not claim that Plaintiff's [alleged retaliatory] termination had anything to do with religious doctrine or the inner workings of the Catholic Church," consideration of the retaliation claim would not "result in any entanglement with religious doctrine." *Rojas v. Roman Catholic Diocese of Rochester*, No. 07-cv-6250, 2010 WL 3945000,

a claimant's ministerial status would serve the important function of minimizing the chilling effect that an absolute ministerial exception would have on arguably ministerial employees – or even clearly non-ministerial employees – from asserting their statutory rights to report or complain of discrimination both to their employers and to outside enforcement agencies.[7] It is also not necessarily clear that retaliation claims implicate religious doctrine or the right of a church to choose its own clergy in the way that claims of substantive discrimination do. Even for employees who are "ministerial," adjudication of a retaliation claim may be more comparable to the permissible application of a neutral, generally applicable and incidentally burdensome

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at *22 (W.D.N.Y. Oct. 6, 2010). *Rojas* did not address the usual freedom to select clergy justification for the ministerial exception in that context.

7. Providing a forum for retaliation claims in situations where the ministerial exception bars claims of substantive discrimination would thus be consistent with the distinction this Court recently made between Title VII discrimination and retaliation claims. This Court explained that, while the employment-related language of the substantive discrimination provisions of Title VII, 42 U.S.C. § 2000e-2 "limit[s] the scope of that provision to actions that affect employment or alter the conditions of the workplace," with regard to the anti-retaliation provision, "[n]o such limiting words appear." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 62 (2006). This difference, the Court explained, stems from the differing purposes of the two provisions. While "[t]he antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the "antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* at 63.

law to a religious organization. *See*, *e.g. Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 380 (1990).

Nevertheless, whether to allow retaliation claims by at least some employees whose substantive discrimination claims are barred by the ministerial exception is an issue not framed in the question presented, and not addressed by the trial court or the Sixth Circuit. While there are arguments in favor of allowing retaliation claims in some circumstances, such a carve out or limitation to the ministerial exception could create an unintended loophole for backdoor litigation of substantive discrimination claims. It may well be that it is impossible for courts to adjudicate retaliation claims by ministerial employees without opening the door to the underlying claims of substantive discrimination. Or it may be possible in some cases and not in others. *Amici* take no position now on how these issues ought to be resolved where presented. Such issues should be reserved for further consideration on a more appropriately articulated record.

III. THE MINISTERIAL EXCEPTION IS NOT JURISDICTIONAL.

The District Court dismissed Respondents' claims under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, without explaining its basis for doing so. *See Hosanna-Tabor*, 582 F. Supp. 2d at 887. The Sixth Circuit noted that the District Court had invoked Rule 12(b)(1), and that other circuits had taken different approaches, but failed to analyze *why* the ministerial exception was "jurisdictional in nature." 597 F.3d at 775. But a determination as to whether a claim is barred by

the ministerial exception is not a jurisdictional matter. That determination does not implicate a federal court's authority to adjudicate employment discrimination claims or constitutional defenses to those claims. Rather, "the exception . . . is best viewed as a challenge to the sufficiency of [a claimant's] claim. . . . the question does not concern the court's power to hear the case – it is beyond cavil that a federal district court has the authority to review claims arising under federal law – but rather whether the First Amendment bars [her] claims." *Petruska*, 462 F.3d at 302. Recognition that assertion of the ministerial exception is appropriately considered as part of an assessment of the sufficiency of a plaintiff's claims, in contrast with the Sixth Circuit's unexplained 12(b)(1) analysis here, heeds this Court's admonition – referring to unexplained 12(b)(1) rulings in other contexts – that "[w]e have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 91 (1998)).

Just as Title VII's numerical threshold (at issue in *Arbaugh*) was not a jurisdictional threshold for plaintiff's claims, but rather "relate[d] to the substantive adequacy of Arbaugh's Title VII claim," *Arbaugh*, 546 U.S. at 504, there is no "ministerial" jurisdictional threshold in the Americans with Disabilities Act or the Michigan Persons with Disabilities Civil Rights Act, the statutes under which Perich claims. Rather, if Perich is a ministerial employee and her retaliation claim would impermissibly encroach on Hosanna-Tabor's First Amendment rights, then she has failed to state a claim, and her complaint should be

dismissed on that basis. That determination does not implicate a federal court's subject matter jurisdiction to adjudicate such claims. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) ("Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case. . . . It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief") (internal quotation marks and citations omitted).

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed and remanded to the District Court with instructions to assess whether Perich is a ministerial employee under the proper test, and whether Perich nevertheless can state and has stated a claim for retaliation.

Respectfully submitted,

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