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.

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND SEVEN OTHER STATES

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QUESTION PRESENTED

Whether the ministerial exception should apply to an employee of a religious institution who performs religious functions, or whose claim would entangle the government in religious questions.

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INTEREST OF *AMICI CURIAE*[1]

The *amici* states become entangled in employment disputes among religious institutions and their employees in two distinct ways: (1) the investigation of employment-discrimination complaints lodged with a state department of civil rights, and (2) the administration and disposition of employment-discrimination lawsuits in a state civil-court system. The *amici* states have no particular interest in how employment disputes between religious organizations and their employees are resolved on the merits, including resolution of the employment action that is the subject of this very case. But the states have a significant interest in this Court's articulation of a clear and expansive standard for determining when the so-called "ministerial exception" applies. Such a standard will avoid unnecessary state entanglement in religious affairs, including potential entanglement in determining whether a particular religious employee is subject to state investigation or judicial review in the first instance.

The *amici* states respectfully request that the Court define the ministerial exception to extend to a religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions.

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[1] No person or entity other than the *amici* made a monetary contribution to this brief's preparation or submission. No counsel for a party authored this brief in whole or in part or made a monetary contribution for its preparation or submission.

SUMMARY OF ARGUMENT

The "ministerial exception" to employment-law litigation is intended to avoid state entanglement with the employment relationship between a religious organization and its religious employees. The question presented in this case, as framed by Petitioner, is "where to draw the line." (Pet'r Br. at 2.) The location of that line is of crucial importance to the *amici* states, whose courts and civil-rights departments are the most likely sources of the entanglement the ministerial exception seeks to avoid. For three reasons, the *amici* states respectfully request that the Court reject the primary-duties test adopted and applied by the Sixth Circuit below.

First, as demonstrated by the facts of this case, the primary-duties test is concerned more with the quantity of time an employee spends on particular duties, rather than on the qualitative nature of those duties. Accordingly, the test will sometimes classify an employee as non-ministerial despite substantial religious functions. Here, for example, Ms. Perich taught religion classes, led worship and prayer, served as a Christian role model, integrated religion into secular subjects, and occupied ecclesiastical office (Pet'r Br. 37–50), yet the Sixth Circuit still concluded that her "primary duties" were secular.

Second, allowing Perich's lawsuit to proceed will require the courts to decide multiple religious questions (Perich's fitness for ministry, the appropriate process for resolving Church-employee disputes, the relative importance to give the Church's teachings against civil litigation, etc.). And that is precisely the

sort of entanglement the ministerial exception is supposed to avoid.

Third, to assess a religious employee's "primary duties," courts must necessarily characterize those duties as sacred or secular, then weigh the relative importance of those duties against one another. E.g., *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 779–80 (6th Cir. 2010) (characterizing Perich's teaching duties as secular and weighing them as more "primary" than her religious duties, notwithstanding her charge to incorporate religion when teaching all secular subjects). And when a state court or civil-rights department is forced to engage in such characterization and weighing, the analysis itself has the risk of unlawful entanglement.

Such religious entanglement is particularly problematic for states, because it cannot be cured by state legislation. Neither state agencies (due to federal funding) nor state courts (due to their duty to adjudicate federal claims) have the ability to ignore or alter *federal* employment mandates.

For all these reasons, the *amici* states respectfully submit that a sound approach would define the ministerial exception broadly to extend to a religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions. This is a workable, objective test, one that will ensure minimum friction between state courts and civil-rights departments on the one hand, and religious institutions and their employees, on the other.

ARGUMENT

I. State agencies and courts should not be in the business of resolving quintessentially religious controversies.

For more than a century, this Court's jurisprudence has wisely steered federal and state courts away from religious disputes. Beginning 140 years ago, in *Watson* v. *Jones*, 80 U.S. 679 (1871), the Court was asked to resolve a dispute between two distinct bodies of the Presbyterian Church regarding ownership of Church property. Declaring that "the civil courts exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them," *id*. at 733, this Court emphasized that religious disputes should be resolved in religious tribunals, not the courts:

> *The right* to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and *to create tribunals for the decisions of controverted questions of faith within the association . . . is unquestioned. . . . 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.*

Id. at 729 (emphasis added).

Many decades later, this Court applied the same principles to a Church employment action. In *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), plaintiff Gonzalez believed that he had a legal right to fulfill a chaplain vacancy in the Roman Catholic Archdiocese of Manila, Philippines. But the Catholic Church concluded that Gonzales was not qualified for the position under Church law. This Court respectfully declined Gonzalez's request that the Court intervene in the Catholic Church's internal affairs:

> Because the appointment 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. In the absence of fraud, collusion, or arbitrariness, 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, because the parties in interest made them so by contract or otherwise.

Id. at 16 (emphasis added). Accord, e.g., *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 113 (1952) (holding, in a non-employment context, that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.") (citation omitted).

In 1979, in *Jones* v. *Wolf*, 443 U.S. 595 (1979), this Court clarified that a religious organization can take affirmative steps to avoid entanglement with civil authorities by specifying where and how religious disputes should be resolved:

> [R]eligious societies can specify . . . what religious body will determine the ownership [of church property] in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

Id. at 603–04.

In the case at hand, the Lutheran Church-Missouri Synod properly created a standard religious procedure of internal dispute resolution for Church personnel altercations, which would allow members of Hosanna-Tabor to decide the doctrinal controversy regarding Perich's employment. Ultimately, it was the members of the Church who resolved the dispute by voting to terminate Perich's contract. This internal procedure, which Perich ignored, cannot be overruled by civil adjudication, because it would be impossible for a civil court to avoid ecclesiastical issues. As an educated, ordained, and instructive "minister" of Hosanna-Tabor, Perich's employment was intimately intertwined with religious doctrine. State courts and administrative agencies are not in a position to second-guess the wisdom or propriety of a Church's religious precepts and practices.

II. The Court should adopt an expansive and straightforward test for lower courts and state agencies to apply when determining if a religious employee falls within the ministerial exception.

The *amici* states desire parameters for the ministerial exception that do not require state courts and agencies to second-guess a religious organization's reasons for taking an employment action with respect to an employee who performs any religious function, or to resolve claims that necessarily require the resolution of religious questions. The primary-duties test that the Sixth Circuit adopted below does not satisfy these criteria. First, the primary-duties test forces the courts or state agencies to make difficult and often controversial determinations about a particular job function's secular or religious nature. Second, the test forces the courts or agencies to weigh the relative importance of the secular duties against the religious duties. That places the courts and agencies in an untenable position, one that is in conflict with the religion clauses of the federal and state constitutions.

The test propounded by Petitioner—whether a religious-organization employee performed religious functions that were important to the mission of the Church (Pet'r Br. at 37–50)—is much better, in that it asks whether a particular religious function was important to the Church. This approach is likely easier and less controversial than one which requires determinations about myriad job functions and artificial comparisons of the time spent on each—as if one minute grading math papers is worth one minute of religious or moral instruction, for example. In other

words, it avoids the requirement of weighing the relative importance of an employee's secular and religious tasks. The issue whether the religious function is important as a threshold question does not require a comparison of that function to a secular task, alleviating the duty to determine the comparative value of one against the other.

But the best ministerial-exception test for the *amici* states would direct the courts and state agencies to shy away from religious inquiry altogether, applying the exception categorically to a religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions. Such a test would protect from state inquiry a decision to hire only celibate clergy, for example, while allowing the state to intervene if a religious institution discriminates against a janitor or groundskeeper based on ethnicity or disability.

Equally important, the *amici* states' broad test would not place the state in the position of having to decide whether a particular job function is primarily religious or secular, or to determine the weight to assign a religious function in the overall mission of the religious organization.[2]

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[2] As Petitioner notes, "under the dominant understanding of the ministerial exception in the courts of appeals, the court need not even identify the church's religious beliefs, let alone balance them." (Pet'r Br. at 25 (citing *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.7 (3d Cir. 2006); *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999); *Young* v. *Northern Ill. Conf.*, 21 F.3d 184, 186 (7th Cir. 1994); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.3d 360, 363 (8th Cir. 1991); and *EEOC* v. *Catholic University*, 83 F.3d 455, 465 (D.C. Cir. 1996)).

In contrast, the Sixth Circuit's primary-duties test invites second-guessing by the courts of the Church's own assessment of the employee's role, as evidenced here when the Sixth Circuit determined that a commissioned minister who led children in devotional practices and led chapel services did not fall within the ministerial exception.

Consider, for example, a Jewish day school that requires its history teachers to explain the history of Israel, ancient and modern, from a Jewish perspective.[3] The school fires a teacher who refuses to discuss Israel in history class, and he files suit, alleging gender discrimination in employment. A court using a primary-duties test might conclude that the ministerial exception does not apply, because in the course of an academic school year, the teacher is required to spend very little time discussing the history of Israel. Yet this is precisely the type of entanglement that state courts and agencies should avoid—analyzing the importance of Israeli history to a Jewish organization relative to the teacher's secular teaching duties. See *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.") (citations omitted). States should not be involved in analyzing religious doctrine. See, e.g., *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (when considering whether to apply the ministerial

[3] As Petitioner notes, this Court has vigilantly protected against entanglement with teachers in religious schools. (Pet'r Br. at 31 (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)). "Perich's claim—involving a commissioned minister who teaches religion—presents an even greater risk of entanglement." (*Id.*)

exception, the "most important" factor is whether the employee "engaged in activities traditionally considered ecclesiastical or religious," including "whether the plaintiff 'attends to the religious needs of the faithful.'") (citation and quotation omitted).

The present dispute is a paradigm example of the type of entanglement that the *amici* states seek to avoid by the crafting of a clear, expansive test for the ministerial exception. Hosanna-Tabor argues that its decision to fire Perich is premised on, among other things, her disruptive behavior and refusal to follow Church doctrine favoring internal dispute resolution. For her part, Perich claims that her termination was motivated by retaliation. The government should not be involved in the business of choosing Church leadership, nor should it dictate who is performing religious functions within a Church.

State courts and agencies should similarly abstain when asked to resolve a claim that would involve resolution of a purely religious question. Consider, for example, *Minker* v. *Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). The plaintiff there, a United Methodist minister, claimed that the Church's Book of Discipline created a binding contract between him and the United Methodist Church, barring the Church from choosing ministerial appointments based on age. *Id.* at 1358–59. Holding that the interpretation of the Book of Discipline was an "inherently ecclesiastical matter," the court explained that "[t]he scope of the Church's purported duty to not discriminate in its ministerial appointments will inevitably require interpretation of provisions in the [Book of] Discipline that are highly subjective,

spiritual, and ecclesiastical in nature." *Id.* at 1359. "We cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions." *Id.* at 1357.

Church employment decisions can likewise involve an impermissible interpretation of Church doctrine. Take a married math teacher at a religious school who inarguably has no formal or informal religious function. It should still be within the school's purview to fire the teacher if he uses Twitter to text lewd photos of himself to young women that he meets over the Internet, contrary to Church teachings about marriage. Allowing the worker to file a claim with a state agency or in a state court would again place a state entity in the untenable position of having to determine the importance and authenticity of the Church's belief.

In sum, it is not enough to avoid religious entanglement for this Court to simply exempt employment claims filed by employees performing a religious function; the Court must also exempt claims that would require a state agency or court to analyze the validity of any religious questions.

CONCLUSION

The Court should define the ministerial exception to extend to any religious-institution employee (1) who performs any religious function, or (2) whose claims would entangle the courts in religious questions.

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