No. 10-553

In The
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL
LUTHERAN CHURCH & SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF *AMICI CURIAE* LAW AND RELIGION PROFESSORS IN SUPPORT OF RESPONDENTS

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BRIEF OF LAW AND RELIGION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

With the joint written consent of the parties filed with the Clerk of the Court, Law and Religion Professors respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

Law and Religion Professors include men and women who teach constitutional law, religious studies, and employment discrimination law, who are concerned that the ministerial exception denies equal opportunity and civil rights to thousands of men and women who work for religious employers. They wish to ensure that the range of scholarly views on the ministerial exception – including those that understand the widespread problem of discrimination and the need for legal protection from discrimination – are before the Court. They do not believe that the Religion Clauses require the ministerial exception, and think it ought to be eliminated. A complete list of *amici* is provided in the Appendix.

[1] Pursuant to Rule 37.3(a) of the Rules of this Court, amici file this brief with the consent of all parties, as they have filed consent letters with the Clerk of this Court. Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than amici and their counsel, made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The ministerial exception deprives religious employees of basic employment protections and is not required by the Religion Clauses.

The ministerial exception has breathtaking consequences for the civil rights of thousands of men and women who work for religious organizations. Any employee (including elementary and secondary school teachers, school principals, university professors, music teachers, choir directors, organists, administrators, secretaries, communications managers and nurses) at any religious employer (mosque, synagogue, church, school, hospital, nursing home, faith-based social service organization, or other non-profit religious organization) is at risk of losing the protection of the employment laws (including the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the Fair Labor Standards Act, the Family & Medical Leave Act, Workers' Compensation laws and state tort and contract law) as long as the employer decides that the employee performs important functions in the religion.

The ministerial exception creates a lawless zone in defiance of *Employment Division v. Smith*'s requirement that the courts not create exemptions from neutral laws of general applicability. As *Smith* warned, such exemptions "make the professed doctrines of religious belief superior to the law of the land, and in effect [] permit every citizen to become

a law unto himself." 494 U.S. at 879. *Smith* would be meaningless unless it applied to religious institutions as well as individuals. Thus the Americans with Disabilities Act, a neutral law of general applicability, can and should be applied to religious organizations.

This Court's church property cases do not require a different result. Any deference to church hierarchy shown in those cases was motivated by a concern that the state would entangle itself in theological or doctrinal disputes. Reliance on that line of cases is also misplaced because it ignores *Jones v. Wolf*, 443 U.S. 595 (1979), the last church property dispute decided by this Court. *Jones* explicitly rejects blanket deference to religious institutions in matters of internal governance. *Jones* further recognized that a deference approach might cause more establishment problems than a neutral principles of law approach.

Hosanna-Tabor illustrates this last point: trying to discern whether Perich is a minister will entangle courts in religious doctrine more than simply adjudicating her retaliation claim. Deciding whether Perich's termination was caused by protected activity, when the school wrote her a letter stating that it intended to fire her because she threatened legal action, does not involve any doctrinal issues.

In contrast, deciding whether Perich's service as a Christian role model for her students is important to the religious mission of the school requires the court to delve into the religious beliefs of the Hosanna-Tabor Evangelical Lutheran Church. Resolving a

theological dispute about the religious role of schoolteachers is precisely the kind of doctrinal issue the courts are incompetent to make, yet the ministerial exception requires such theological analysis in this case.

These consequences can be readily avoided because the Religion Clauses do not require the ministerial exception. The argument that they do ignores *Employment Division v. Smith*'s Free Exercise standard, misinterprets the Establishment Clause, and misunderstands the nature of Perich's retaliation claim.

ARGUMENT

I. THE MINISTERIAL EXCEPTION HAS BREATHTAKING IMPLICATIONS FOR DENYING THE CIVIL RIGHTS OF EMPLOYEES OF RELIGIOUS SCHOOLS AND INSTITUTIONS.

Petitioner's standard, which removes teachers and scores of other employees of religious organizations from the protection of the antidiscrimination, antiretaliation and other employment laws, would be devastating for those employees. A victory for Hosanna-Tabor in these circumstances would be far-reaching in its negative consequences.

A. In defiance of *Employment Division v. Smith*, the lower courts have exempted religious institutions from employment laws and made those institutions a law unto themselves.

In *Smith* this Court warned of the negative consequences if the courts continued to grant constitutional exemptions from neutral laws of general applicability. There would be exemptions "of almost every conceivable kind – ranging from compulsory military service, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races." *Smith*, 494 U.S. at 888-89 [internal citations omitted]. "The First Amendment's protection of religious liberty," this Court concluded, "does not require this." *Id.*

Smith's prediction about exemptions has come true: a broad array of employment laws is not being applied to thousands of religious organizations and their hundreds of thousands of employees – all because of the ministerial exception.

In the name of the ministerial exception, state and federal courts have exempted religious institutions from the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the

Fair Labor Standards Act, the Family & Medical Leave Act, Workers' Compensation laws and state tort and contract law.[2] Thus, despite Congress' clear intent to apply the employment discrimination statutes to religious organizations, the courts have applied the ministerial exception to most of the civil

[2] *See*, *e.g.*, *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choir director's ADA claim dismissed); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (music director could not bring ADEA claim); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (priest could not bring Title VII racial discrimination claim); *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006) (college chaplain could not bring Title VII sex discrimination claim); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Hispanic Communications Manager could not bring Title VII national origin claim); *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (former clergy member could not bring pregnancy discrimination claim); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (director of the Department of Religious Formation could not bring an Equal Pay Act claim); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005) (Director of Music precluded from bringing FMLA suit); *McCants v. Alabama-West Florida Conference of United Methodist Church, Inc.*, 372 F. App'x 39 (11th Cir. 2010) (African American pastor could not bring section 1981 race and retaliation claim); *Ross v. Metropolitan Church of God*, 471 F.Supp. 2d 1306 (N.D. Ga. 2007) (Director of Worship Arts (music director) barred from bringing section 1981 claim); *Malichi v. Archdiocese of Miami*, 945 So. 2d 526 (Fla. Dist. Ct. App. 2006) (priest could not bring state workers' compensation claim); *Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (seminarian could not bring state minimum wage claim); *Friedlander v. Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1714 (U.S. 2010) (rabbi's breach of contract claim dismissed).

rights protection that this country affords to American employees.

Thousands of religious organizations may enjoy exemption from these laws. The United States is the most religiously diverse nation in the world's history, with at least 80 percent of the population self-identifying as religious.[3] The Hartford Institute concludes that there are "roughly 335,000" religious congregations in the United States; about 300,000 of those are Protestant, 22,000 are Catholic and Orthodox, and 12,000 are non-Christian.[4] According to Bureau of the Census estimates, in 2008 government agencies reported that 179,682 religious organizations of all sorts had about 1.7 million paid employees.[5]

In the area of education alone, the United States is home to 22,731 religious elementary and secondary schools employing 314,489 full-time equivalent (FTE) teachers.[6] There are 18,000 teachers in Lutheran

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[3] Barry A. Kosmin and Ariela Keysar, *American Religious Identification Survey 2008*, http://www.americanreligionsurvey-aris.org/reports/highlights.html.

[4] Hartford Institute for Religion Research, *Fast Facts*, http://hirr.hartsem.edu/research/fastfacts/fast_facts.html.

[5] U.S. Census Bureau, Statistics of U.S. Businesses: 2008, http://www.census.gov/epcd/susb/2008/us/US81.HTM.

[6] U.S. Dep't of Education, National Center for Education Statistics, *Characteristics of Private Schools in the United States: Results from the 2009-2010 Private School Universe Survey*, at 7, Table 2, May 26, 2011, http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011339.

Schools across the United States. Brief for Plaintiff-Appellant EEOC at 44, *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, United States Court of Appeals for the Sixth Circuit, Nos. 09-1134 & 09-1135. Roman Catholic elementary and secondary schools employ 151,473 full-time equivalent professional staff, of whom 73.9% are lay women, 22.4% lay men and only 3.7% religious.[7] There are at least 820 Jewish and 203 Islamic K-12 schools.[8] Under Petitioner's standard all those teachers, including, ironically, the lay personnel, could become ministers overnight at the discretion of their employers. The threat extends to universities; there are about 900 religiously-affiliated colleges and universities with 1.7 million students in the United States, including 200 Bible colleges, 111 intentionally-Christ-centered colleges, 38 Lutheran colleges, and 235 Catholic colleges and universities.[9] Several courts have already relied upon the ministerial exception to dismiss lawsuits of university professors without

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[7] National Catholic Education Association, *Catholic School Data: United States Catholic Elementary and Secondary Schools 2010-2011*, http://www.ncea.org/news/AnnualDataReport.asp.

[8] U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey*, http://nces.ed.gov/surveys/pss/privateschoolsearch/.

[9] United States Conference of Catholic Bishops, *The Catholic Church in the United States at a Glance*, (figures through 2009) http://www.usccb.org/comm/catholic-church-statistics.shtml; Council for Christian Colleges and Universities, *About CCCU*, http://www.cccu.org/about; Our Colleges, Lutheran Colleges http://www.lutherancolleges.org/.

review of their academic qualifications or employment records.[10]

The number of individuals affected is not limited to ordained clergy. Already the rule has been applied to teachers, principals, communications managers, administrative personnel, music directors, and musicians.[11] Those denied a day in court include whistleblower

[10] *See, e.g, EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (canon law professor's Title VII sex discrimination case dismissed); *Klouda v. Southwestern Baptist Theological Seminary*, 543 F.Supp. 2d 594 (N.D. Tex. 2008) (seminary professor's breach of contract case dismissed); *Hope Int'l Univ. v. Superior Court*, 119 Cal. App. 4th 719 (2004) (psychologists who were Marriage and Family Therapy professors had marital discrimination case dismissed); *McEnroy v. St. Meinrad School of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999) (seminary professor's breach of contract and tortious interference case dismissed); *Alicea v. New Brunswick Seminary*, 608 A.2d 218 (N.J. 1992) (theology professor's breach of contract claim dismissed); *Jocz v. Labor & Indus. Review Comm'n*, 538 N.W.2d 588 (Wis. Ct. App. 1995) (seminary director of field education's sex discrimination lawsuit dismissed).

[11] *See*, *e.g*., *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (elementary school teacher's ADEA claim dismissed); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choirmaster's ADA claim dismissed); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (music director could not bring ADEA claim); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Hispanic Communications Manager could not bring Title VII national origin claim); *Pardue v. Center City of Consortium Schools*, 875 A.2d 669 (D.C. 2005) (school principal's race and retaliation claim dismissed).

teachers seeking to protect their students[12] and a United Methodist minister who helped his female colleague to draft a sexual harassment complaint.[13] The effect has been especially strong on teachers – elementary and high school teachers, school principals, college and university instructors and professors – whom the courts have turned into ministers, denying them the protection of the disability, age, gender, pregnancy, race, sexual harassment, and breach of contract laws.[14] Petitioner's rule, which would

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[12] *See, e.g.*, *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (Mich. Ct. App. 2008) (elementary school teacher reporting possible sexual abuse).

[13] *See Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000).

[14] *See, e.g., Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (elementary school teacher's ADEA claim dismissed); *Redhead v. Conference of Seventh-Day Adventists*, 566 F.Supp. 2d 125 (E.D.N.Y. 2008) (elementary school teacher's pregnancy discrimination lawsuit dismissed); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F.Supp. 2d 858 (E.D. Wis. 2004) (elementary and middle school teacher's race and religion discrimination claim dismissed); *Dayner v. Archdiocese of Hartford*, No. 18468, 2011 WL 3200322 (Conn. Aug. 2, 2011) (school principal's claims dismissed under ministerial exception); *Pardue v. the Center City of Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (school principal's race and retaliation claim dismissed); *Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, CIV.A. 09-1950, 2009 WL 1668550 (Mass. Super. June 2, 2009) (Hebrew Day School teacher's age discrimination suit dismissed); *Sabatino v. Saint Aloysius Parish*, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (high school principal's breach of contract claim dismissed); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n,* 768 N.W.2d

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essentially allow the religious employer to immunize itself from antidiscrimination laws by designating just about any employee a minister, would further expand this denial of protection.

One irony and injustice in the ministerial rule is that women employees of denominations that do not ordain women suddenly become ministers at the moment they file a lawsuit. Although some Roman Catholic, Muslim and Orthodox Jewish women may not become priests, imams, or rabbis and perform their jobs with full understanding that they cannot be ministers, the courts and churches confer ministerial status upon them just long enough to keep their lawsuits out of court.[15]

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868 (Wis. 2009) (first grade teacher's age discrimination case dismissed).

[15] Cases involving Catholic women deemed ministers for purposes of the ministerial exception include: *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (non-ordained chaplain assured women were eligible for her position); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (Catholic communications director); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010) (Catholic Director of Religious Formation); *Musante v. Notre Dame of Easton Church*, CIV.A. 301CV2352MRK, 2004 WL 721774 (D. Conn. Mar. 30, 2004) (Director of Religious Education); *Pardue v. the Center City of Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (school principal); *Archdiocese of Miami, Inc. v. Minagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007) (school principal); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 796 N.E.2d 286 (Ind. 2003) (Director of Religious Education); *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (Mich. Ct. App. 2008) (elementary school teacher);

(Continued on following page)

Individual American clergy also deserve the protection of the laws that shield their fellow citizens. Petitioner argues that church control over its ministers is absolute while ignoring the troubling consequences of church autonomy for individual members of the clergy. Petitioner's rule automatically removes clergy from legal protection, leaving them subject to sexual harassment, discrimination, and wage and hour violations. Reverend Pamela Combs' pregnancy discrimination case was dismissed under the ministerial exception, for example, even though the United Methodist Church had returned her to lay status in order to end her insurance coverage. *Combs v. Central Texas Annual Conference of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999). Rabbi Leavy and Sister Rosati were terminated for foot surgery and breast cancer, respectively, but could not litigate their disabilities claims. *Leavy v. Congregation Beth Shalom*, 490 F.Supp. 2d 1011 (N.D. Iowa 2007); *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F.Supp. 2d 917 (N.D. Ohio 2002); *see also Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); *Werft v. Desert Sw. Annual Conference of United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Cronin v. S. Indiana Annual Conference*, 1:05 CV 1804 LJM WTL,

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Sabatino v. Saint Aloysius Parish, 672 A.2d 217 (N.J. Super. Ct. App. Div. 1996) (high school principal); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dept. of Workforce Dev.*, 768 N.W.2d 868 (Wis. 2009) (first grade teacher).

2007 WL 2258762 (S.D. Ind. Aug. 3, 2007) (all dismissing disabilities cases because of the ministerial exception).

The sexual harassment, antiretaliation and minimum wage cases demonstrate that male and female seminarians and clergy may require legal protection from their church supervisors and colleagues. The courts are currently divided on applying the ministerial exception in the sexual harassment context. *Compare Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (allowing sexual harassment claim) *with Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1245 (10th Cir. 2010) (rejecting *Elvig*). A Mexican seminarian who moved to Washington State and performed maintenance work as part of his duties was denied the protection of sexual harassment, antiretaliation and state minimum wage laws simply because he was a seminarian. *See Alcazar v. Corporation of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292-93 (9th Cir. 2010). A ruling for Petitioner by this Court would imply that seminarians, clergy and rabbis may be harassed and exploited at work without legal remedy as the courts protect the churches' autonomy from the law rather than the rights of individual employees.

In none of the cited cases did the religious defendants argue that their religious tenets required discrimination, sexual harassment, or other illegal conduct. Some courts have understood this point and demonstrated that the employment laws can be applied to religious employees, including teachers,

without adverse effect on religious freedom.[16] The courts are capable of adjudicating employment cases against religious organizations without need of the ministerial exception.

B. The ministerial exception undermines our country's strong commitment to civil rights for all.

Petitioner emphasizes the need for members of religious organizations to resolve their conflicts internally, without court review, and without regard to neutral laws of general applicability. However "[e]mployment discrimination cases are simply not 'internal' matters." Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391, 408-409 (1987). As Professor Lupu observed in criticizing the ministerial exception three years before *Smith* was decided, the enforcement of antidiscrimination laws not only protects plaintiffs but also serves public and third party interests: "Religious institutions . . . are influential in shaping behavior and moral convictions. The way in which such institutions treat

[16] *See, e.g., DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (high school teacher allowed to sue for age discrimination); *Longo v. Regis Jesuit High Sch.*, 02-CV-001957-PSF-OES, 2006 WL 197336 (D. Colo. Jan. 25, 2006) (ADA claim allowed for high school teacher); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (1992) (computer professors allowed to sue a Catholic university for breach of contract).

women or racial minorities is likely to have significant consequences in other spheres of life. Those who may suffer these consequences thus have a vital interest in the behavior of religious institutions." *Id.* Given these important public interests, "these disputes cannot reasonably be perceived as 'internal.'" *Id*.

The antidiscrimination laws reflect these public interests. Congress has chosen to apply civil rights laws to religious organizations. In passing the landmark Title VII of the Civil Rights Act of 1964, for example, Congress exempted religious organizations from lawsuits for religious discrimination but allowed them to be sued for race, color, sex and national origin discrimination. *Feldstein v. Christian Science Monitor*, 555 F.Supp. 974, 976 (D. Mass. 1983); 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Congress made a similar choice in the Americans With Disabilities Act, 42 U.S.C. §§ 12113(d)(1)-(d)(2), 12203, choosing not to exempt religious organizations from the statute's retaliation provision, and ensuring protection for all the estimated 5,903,000 persons with disabilities in the labor force.[17] Finally, both Congress and this Court have recognized the particular importance of enforcing the antiretaliation provisions of all the civil rights laws. *See, e.g.*, *Thompson v. North American*

[17] Bureau of Labor Statistics, Labor Force Statistics, *Table A-6: Employment Status of the Civilian Population by Sex, Age and Disability Status, Not Seasonally Adjusted*, Feb. 5, 2010, http://www.bls.gov/webapps/legacy/cpsatab6.htm.

Stainless, LP, 131 S. Ct. 863, 868 (2011) ("Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct."); *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

The courts have held that these laws may be applied to religious schools without violating free exercise or establishment principles. For example, religious schools have been ordered to comply with Title VII and the Equal Pay Act even though their religious tenets regard married men as heads of households and require providing them with better health insurance or salaries than married women. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Tree of Life Christian Sch.*, 751 F.Supp. 700 (S.D. Ohio 1990). Religious employers have been required to obey the child labor laws, *see Brock v. Wendell's Woodwork, Inc.*, 867 F.2d 196 (4th Cir. 1989), and the minimum wage laws, *see Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985).

Thus the consequences of upholding the ministerial exception are not only devastating to the thousands of men and women who work for religious organizations, but also detrimental to the broad and fair enforcement of the civil rights statutes. The rule is also unnecessary; neither the Free Exercise Clause nor the Establishment Clause requires it.

II. THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE MINISTERIAL EXCEPTION.

A. *Employment Division v. Smith* held that neutral laws of general applicability like the Americans with Disabilities Act do not violate the Free Exercise Clause.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that so long as a law is neutral and generally applicable, it does not violate the Free Exercise Clause even if it imposes a substantial burden on religion. *Id*. at 879. *Smith* itself upheld a law that prohibited a religious sacrament. *Id*. at 874, 890. Because the Americans with Disabilities Act is unquestionably both neutral and generally applicable, *Smith* should defeat any free exercise justification.

Hosanna-Tabor asserts that *Smith* applies only to individual free exercise claims and not to institutional ones, relying on a single line from *Smith* stating that "the government may not . . . lend its power to one or the other side in controversies over religious authority and dogma." *Id*. at 877. Hosanna-Tabor reads the phrase "religious authority" as a reference to church hierarchy and those who lead the church and then concludes that *Smith* does not apply to cases involving ministers. Thus, Petitioner argues, while a religious individual may not violate a neutral law of general applicability, a religious organization may.

The quoted phrase cannot possibly bear this weight. The Court's language about "lend[ing] its power to one or the other side in controversies over religious authority and dogma" refers to the Establishment Clause constraint against the courts' selecting one side over another when dealing with a theological or doctrinal conflict between religious factions. As discussed below, the sentence alludes to a line of cases dealing with the disposition of church property, where, unlike here, the Court was faced with the actual prospect of resolving doctrinal disputes. Those cases say nothing about how to resolve a conflict between a religious entity and a neutral law of general applicability. *Smith* addresses *that* question simply and directly: The religious entity must bend to the law.

B. The history and text of the Free Exercise Clause do not support the ministerial exception.

Petitioner and their *amici* conclude that religious employers must be exempted from neutral laws of general applicability because of a historical tradition of church autonomy from government interference that is protected by the First Amendment. Yet history does not support this claim.

First, "nothing in the debates or early drafts of the religion clauses gives the slightest support to the concept of corporate free exercise exemptions." Lupu, 67 B.U. L. Rev., at 419; *see also* Marci A. Hamilton,

Religious Institutions, the No-Harm Doctrine, and the Public Good, 2004 B.Y.U. L. Rev. 1099, 1133-34 (2004) (the Constitution requires churches to obey the rule of law). Instead, James Madison feared the power of both state and church; late in life he warned against "the potential abuse of ecclesiastical corporate power." Forrest Church, *So Help Me God: The Founding Fathers and the First Great Battle Over Church and State* 355 (2007). Even Protestant clergy of the revolutionary era supported the First Amendment because they understood that "[p]ower, civil *and ecclesiastical*, has to be deflated, diffused, and properly related in order to keep it from becoming absolute, arbitrary and abused." James H. Smylie, *Protestant Clergy, the First Amendment and the Beginnings of a Constitutional Debate*, *1781-91*, *in* The Religion of the Republic 153 (Elwyn A. Smith, ed., 1971) (emphasis added).

Second, the idea that the Free Exercise Clause offers greater protection to religious institutions than to religious individuals contradicts the commonly recognized idea that liberty of conscience is the fundamental principle underlying the Free Exercise and Establishment Clauses. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002). As the late constitutional scholar Philip Kurland concluded, "[l]imited powers of government were not instituted to expand the realm of power of religious organizations, but rather in favor of freedom of action and thought by the people."

Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 4 (1961).

Interpreting the Free Exercise Clause to protect religious institutions' rights against their members ignores the experience of the earliest Americans. "The American Revolution broke many of the intimate ties that had traditionally linked religion and government, . . . , and turned religion into a voluntary affair, a matter of individual free choice." Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* 576 (2009). Americans of that era broke away from traditional religious organizations and pursued individual liberty. *Id*. at 609-13. They "believed that the individual, not the state *or the church*, should decide matters of faith." Frank Lambert, *The Founding Fathers and the Place of Religion in America* 180 (2003) (emphasis added). Allowing the courts to enforce a rule that automatically favors religious institutions over their members is at odds with this history of liberty of conscience.

In short, it would contradict history to conclude that the Free Exercise Clause requires protecting religious institutions absolutely from neutral laws of general applicability while not protecting religious individuals at all.

C. The church property cases do not establish a broad rule of deference to church hierarchy in matters of internal governance.

Hosanna-Tabor also argues that this Court's decisions in the church property cases support its view that the Free Exercise Clause mandates the ministerial exception. They do not. The church property cases, including those mentioned in *Smith*, do not hold that courts must absolutely defer to the church in matters of internal church governance. Instead, the decisions focus on avoiding entanglement in church doctrine. In addition, the most recent church property case, *Jones v. Wolf*, 443 U.S. 595 (1979), explicitly rejects mandatory deference even in cases involving internal church affairs.

1. The main concern of the church property cases was the fear that courts would decide doctrinal and theological issues.

On the rare occasions when the Court has deferred to church hierarchy, it did so to avoid entangling itself in theological or doctrinal disputes.[18] As

[18] *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979) ("The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. *Most importantly*, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.") (emphasis added). *See also, e.g.*, Frederick

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the Court noted in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968): "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. . . . But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id*. at 449.

In fact, in *Presbyterian Church*, the first church property case cited in *Smith*, the Supreme Court did not actually defer to church hierarchy. Instead, the Court invalidated a Georgia law that required the courts to resolve a property dispute between a general church and breakaway local churches by deciding whether the general church had departed from the religious tenets it held at the time the local churches first affiliated with it. 393 U.S. at 440, 441, 449-50.

Similar entanglement concerns explain the holdings of the two other property cases cited by *Smith*. In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Court opted for deference to the highest church body after rejecting the New York legislature's finding that one faction would better carry out the

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Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 Utah L. Rev. 47, 57; Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 Geo. J. Law & Pub. Pol'y 119, 132 (2009).

church's mission. *Id.* at 106 n.10, 107-09, 117-18. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the Court declined to rule on whether the church properly applied its *own* policies. Notably, the cases do not address whether a court has the competence to rule on whether the church failed to abide by the *state's* laws.

2. *Jones v. Wolf*, the most recent church property case, rejects mandatory deference in cases involving internal church governance.

Petitioner's reliance on the church property cases is further misplaced because it ignores *Jones v. Wolf*, 443 U.S. 595 (1979), the last church property dispute decided by this Court. As the most recent case involving churches rather than individuals, *Jones*'s precedential value cannot be ignored. *Jones* explicitly rejects blanket deference to religious institutions.

Like previous church property disputes, *Jones* involved a schism within a church. A majority of the Vineville church in Macon, Georgia, voted to separate from the Presbyterian Church in the United States. 443 U.S. at 598. Both the majority congregation and the minority that wished to remain affiliated with the Presbyterian Church in the United States claimed the church property as their own. *Id*.

This Court rejected a rule requiring it to defer to the church hierarchy of the Presbyterian Church in the United States: "We cannot agree, however, that

the First Amendment requires . . . a rule of compulsory deference to religious authority in resolving church property disputes, even when no issue of doctrinal controversy is involved." 443 U.S. at 605.

Instead, the Supreme Court endorsed as one option a neutral principles of law approach. *Id*. at 604 ("We therefore hold that a State is constitutionally entitled to adopt a neutral principles of law approach as a means of adjudicating a church property dispute.").[19] In other words, the Court endorsed resolving the church property dispute in the same manner that it would deal with a secular organization. Thus, the Court approved "examin[ing] the deeds to the properties, the state statutes dealing with implied trust, and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church." *Id.* at 600.

The *Jones* Court did recognize that Establishment Clause issues may arise when applying a neutral principles of law approach. *Id.* at 604 ("This is not to say that the application of the neutral-principles approach is wholly free of difficulty."). Nevertheless, the neutral principles of law approach

[19] This neutral principles of law approach was also approved in the first "church autonomy" case cited in *Smith*: "And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

is constitutional "so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id*. at 602. Thus, simply because an Establishment Clause issue may arise in adjudicating a particular type of claim does not mean the court must forever abandon trying to resolve such a claim using neutral principles of law.

Furthermore, the *Jones* Court recognized that a deference approach does not eliminate all Establishment Clause problems. When church structure is ambiguous, determining which unit of church governance has ultimate control might well result in entanglement with church doctrine. 443 U.S. at 605. In that case, it is actually the neutral principles of law approach that can best avoid entanglement because it "obviates the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Id.* at 605.

In sum, neither *Smith* nor the church property cases that preceded it require deference to Hosanna-Tabor in its dealings with Cheryl Perich. Instead, a court may resolve Perich's retaliation claim in the same way it resolves any other retaliation claim. Only if adjudication of this claim entangles the court in theological or doctrinal questions should the courts opt for deference to church authorities. This is especially true where, as *Jones v. Wolf* acknowledges, a deference approach might actually cause more Establishment Clause ills than a neutral principles of law approach.

III. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE THE MINISTERIAL EXCEPTION.

Hosanna-Tabor asserts that resolving discrimination claims would violate the Establishment Clause because adjudicating them would entangle the courts with religion by requiring courts to evaluate a minister's spiritual qualifications or determine whether a minister sufficiently embodies the church and its teachings. Yet, even assuming that some employment discrimination cases could present such issues, not all do and this one certainly does not. On the contrary, applying the ministerial exception to Perich's claim requires the Court to resolve theological disputes. Consequently, the Establishment Clause cannot justify the blanket immunity of the ministerial exception.

A. Resolving Perich's retaliation claim does not require the Court to decide any doctrinal or theological questions.

Hosanna-Tabor incorrectly assumes that adjudicating ministers' antidiscrimination claims will require courts to decide questions beyond their institutional competence. A court may decide Perich's retaliation claim without ever becoming entangled in doctrinal or theological questions. In order to prevail, Perich must prove: (1) she engaged in activity protected by the ADA; (2) she suffered a materially adverse action; and (3) there was a causal link between the protected activity and the adverse action. *See*, *e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009);

Bryson v. Regis Corp., 498 F.3d 561, 577 (6th Cir. 2007). These elements are easily met and do not implicate any religious doctrine.

Perich's protected activity was asserting her legal rights under the ADA, and the adverse action was her termination. As in most retaliation cases, the pivotal question is whether the assertion of her legal rights caused her termination. It is undisputed that Hosanna-Tabor sent Perich a letter stating it was terminating her because she had acted disruptively and threatened to sue. *Hosanna-Tabor*, 597 F.3d at 774. Thus, Perich has direct evidence of retaliation.

Hosanna-Tabor nevertheless argues that there is a religious question because Perich was fired for being insubordinate and spiritually unfit. Petition for Writ of Certiorari of Defendant-Petitioner at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (6th Cir. Mar. 28, 2011) (arguing Perich was fired "because her insubordination and threats of litigation violated Church teaching"). First, the school argues, Perich had been unruly and disruptive when asserting her legal rights, thereby ruining her relationship with the school. *Hosanna-Tabor*, 597 F.3d at 774. Second, instead of trusting the church's mandatory internal dispute resolution process, Perich sued in court.

These arguments lack merit. Terminating an employee for asserting her legal rights is the very definition of retaliation, and is illegal no matter how disruptive, insubordinate, or infuriating the employer

may find it. Next, any contract that purports to waive an employee's right to sue for an ADA violation is void as against public policy. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50-51 (1974) (employees may not by contract prospectively waive their civil rights). That is, a contractual provision stipulating that all discrimination claims will be resolved internally rather than before a neutral third party is unenforceable.

Moreover, Petitioner's argument boils down to this assertion: A religious organization should be able to proclaim ministers spiritually unfit any time that they assert their legal rights or insist that the church follow the law, and for the secular courts to disagree with this assessment violates the Establishment Clause.

Petitioner's argument is incorrect. A court could resolve this retaliation claim without entangling itself in theology or doctrine. A court could analyze whether Hosanna-Tabor's alleged religious motivation was merely a pretext for discrimination. Indeed, in *Ohio Civil Rights Commission v. Dayton*, 477 U.S. 619 (1986), a case that parallels this one, this Court gave its blessing to a pretext analysis. In that case, a Christian school told a pregnant teacher she could not return to school the following year because of its belief that mothers should stay home with their preschool children. *Id.* at 623. When she threatened litigation, the school fired her for violating the mandatory internal dispute resolution provision in her contract, arguing that Christians should not sue other Christians. *Id.* at 622-23. Although the ultimate holding focused on abstention issues, the Court noted

that "[t]he Commission violates no constitutional rights by merely investigating the circumstances of [the schoolteacher's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628.[20]

Alternatively, a court could accept Hosanna-Tabor's argument that it was religious considerations and not pique or financial considerations[21] that motivated Perich's dismissal in this case, and still hold that the church violated the law. This is because Hosanna-Tabor's claim that Perich was spiritually unfit because she threatened legal action does not in fact deny that the termination was retaliatory. Instead, the argument is that the retaliation is religiously required. Nonetheless, it is still an admission of retaliation.

In this scenario, to the extent there is a religious question, it is a free exercise question. The question for a court is not interpreting religious doctrine or tenets, or even ascertaining the school's real motives, but deciding whether a neutral law of general applicability (retaliation is illegal) supersedes a religious obligation (retaliation is religiously required).

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[20] *See also* Caroline Mala Corbin, *Above the Law: The Constitutionality of the Ministerial Exception*, 75 Fordham L. Rev. 1965, 2016-22 (2005) (explaining in detail why pretext analysis does not require courts to become entangled in theological or doctrinal issues).

[21] During Perich's leave, the school hired a replacement for the rest of the year instead of a more limited time frame.

Under *Smith*, as long as the law is neutral and generally applicable, it may substantially burden a religious practice. That Hosanna-Tabor may not be able to follow the dictates of its religion in terminating an employee is no different from a Free Exercise standpoint than the individuals in *Smith* not being able to perform the sacrament their religion requires.

This is not to say that the First Amendment provides no protection for the church-minister relationship. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that the Boy Scouts' freedom of association right to exclude gays as scoutmasters in order to convey an anti-homosexual message trumped state antidiscrimination law. *Id.* at 653-56. Depending on how the Court weighs the state's antidiscrimination goals against the religious institution's free speech rights, the same principle could apply to religious organizations who, for example, limit their clergy positions to men on the grounds that admitting women would undermine their religious messages about the nature of ministry. Thus, if the ministerial exception were eliminated, some protection for clergy hiring decisions remains under freedom of association.[22]

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[22] Any protection provided by the freedom of association would be much narrower than the current ministerial exception. *Dale* protects *expressive* association, allowing the organization to convey its viewpoint. Therefore, if a minister was fired because of her disability (or age or race or sex), and the church employer has no religious tenets requiring dismissal of people due to

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Of course, even before *Smith* (and even after *Dale*) the fact that a law burdened a religious tenet did not guarantee an exemption from that law. Courts have rejected arguments that religious organizations should be exempt from retaliation claims because of their religious beliefs about litigation. *See, e.g.*, *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272, 1280 (9th Cir. 1982) (rejecting Seventh Day Adventists' free exercise claim for religiously required retaliation on the grounds "the government's compelling interest in assuring equal employment opportunities justifies this burden"). To allow religious institutions to retaliate and to accept the school's all-litigious-ministers-are-spiritually-deficient argument means that a church would be able to dismiss as insubordinate and spiritually unfit a minister who was raped by a coworker and brings a sexual assault charge. A church would be able to terminate without interference a minister who threatens to sue after the church breaches its contract and fails to pay the agreed-upon salary. Likewise, a church or religious school or religious hospital would be able to fire as insubordinate and spiritually unfit a minister who reports to civil authorities any wrongdoing, whether it be embezzlement or negligence or the sexual abuse of children. In short, letting a religious organization claim that a minister who insists on compliance with the law is spiritually unfit creates a potentially

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disability (or age or race or sex), then there should be no First Amendment problem letting her resume her post.

limitless loophole that makes each church a "law unto itself." *Cf. Smith*, 494 U.S. at 879.

B. Deciding whether Perich is a minister does entangle the Court in doctrinal and theological disputes and violates the Establishment Clause.

The irony of this case is that while resolving this retaliation suit will not embroil the court in theological or doctrinal disputes, applying the ministerial exception will. Thus, this case presents an example of how a church autonomy/deference approach presents more Establishment Clause problems than a neutral principles of law approach.

To trigger the ministerial exception, the plaintiff in a discrimination suit must be a "ministerial" employee. In determining who counts as a ministerial employee, courts do not simply accept a religious employer's characterization of a position, as it could insist that all its employees were ministers. *See*, *e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (school claimed that all teachers "consider teaching to be their personal ministry").

Instead, courts take a functional approach. In the Sixth Circuit, Perich is a minister if her "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010).

This query necessarily requires the court to determine whether a position is important to the spiritual and pastoral mission of the church. But in order to decide whether Perich's primary teaching duties are important to the spiritual and pastoral mission of the church, the court might have to delve into the religious beliefs of the Evangelical Lutheran Church.

Teaching religion class and leading prayers are clearly religious activities, and would readily qualify as religious duties. Yet these tasks account for only approximately 45 minutes out of Perich's seven-hour work day, or roughly 11% of her time. If those were her only religious duties, then she would not count as a minister under the primary duties test.

However, Hosanna-Tabor argues that, in addition to the time spent performing religious duties, Perich serves as a Christian role model for her students – an activity she performs all day every day. If that is a religiously important function, then she may well qualify as a minister under the primary duties test. But whether serving as a role model is religiously important – not whether it is important in general, but whether it is important to the Hosanna-Tabor Evangelical Lutheran Church's spiritual and pastoral mission – is not a question the courts should answer. Courts should not be in the position of mediating a dispute about what is or is not important to a church's pastoral mission or resolving a theological dispute about the religious role of schoolteachers.

Hosanna-Tabor concedes that the primary duties test invites Establishment Clause problems. Petition for Writ of Certiorari of Defendant-Petitioner at 16, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (6th Cir. Mar. 28, 2011) (agreeing that forcing courts to decide which duties are secular and which are religious leads to religious entanglement). To mitigate these problems, it suggests that the primary duties test should be replaced with a religious duties test, where the question is whether the employee performed any important religious duties. Brief of Defendant-Petitioner at 22, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553 (June 13, 2011). Although this proposed solution expands the ministerial exception, it does not solve the underlying Establishment Clause problems.

To start, unless the courts are willing to categorize as a minister anyone who performs even one religious task, courts still have to draw a quantitative line somewhere. Otherwise a school can make everyone a minister by ensuring that each and every school employee, from the janitor to the bookkeeper to the P.E. teacher, leads a prayer at least once or twice during the school year. As a result, no one who works for a religious school, hospital, nursing home, social service organization or house of worship would have any employment protections.

In any event, changing the threshold amount of religious duties required does not alter the fact

that courts might still have to determine whether a particular duty was religiously important or not. What if Perich taught only secular subjects? What if she were the school nurse? What if instead of a schoolteacher for the Evangelical Lutheran Church she served as its music director? In order to decide whether a music director is a minister, the court would have to rule on the religious significance of music in the Evangelical Lutheran Church. *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 802 (4th Cir. 2000). Deciding whether music is integral to a denomination's worship services or significant enough such that teaching it makes one a minister is exactly the kind of theological decision the courts are incompetent to make, yet they are exactly the kind of decision application of the ministerial exception requires. *See*, *e.g.*, *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the denial of rehearing en banc) ("The very invocation of the ministerial exemption requires us to engage in entanglement with a vengeance.").

CONCLUSION

People who wish to serve their God should not have to choose between their calling and their civil rights. Yet the ministerial exception essentially strips ministers of protection against discrimination based on race, sex, age, and, as here, disability, and leaves them outside the shelter of the Family Medical Leave

Act, the Fair Labor Standards Act, the Equal Pay Act, and a host of other protective employment laws.

This absolute immunity from lawsuits cannot be justified by either the Free Exercise Clause or the Establishment Clause. The Americans with Disabilities Act is a neutral law of general applicability, and therefore does not violate the Free Exercise Clause. To the extent that Perich's case raises Establishment Clause problems, it is deciding whether she is a minister that raises them, not deciding whether the school retaliated against her.

Jones v. Wolf approves a better approach: Apply employment discrimination law to a religious employer in the same way it would be applied to a secular employer. If a theological or doctrinal question comes up, defer to the religious institution on that issue. Notably, accepting the employer's answer to a theological question does not guarantee that the religious employer will prevail. Even if it violates religious tenets to pay ministers the minimum wage, a religious school might still be required to do so. *Cf. Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985). That it may violate religious tenets for ministers to assert their legal rights does not automatically mean a religious employer can, with complete impunity, fire a minister for doing so. That is the holding of *Employment Division v. Smith*:

religion is no longer grounds for exemptions from neutral laws of general applicability.

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