No. 10-553

IN THE
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT CHERYL PERICH

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QUESTION PRESENTED

Whether the anti-retaliation prohibition of the Americans with Disabilities Act (ADA) may be constitutionally applied to a religious association's retaliatory firing of a teacher of secular subjects in a commercially operated school, where the teacher also performs religious functions and is designated a commissioned minister.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336 (codified at 42 U.S.C. § 12101 *et seq.*), "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability." *Id.* (preamble). The ADA's principal employment-discrimination provision states: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to … hiring, advancement, or discharge of employees … and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). That provision echoes the similar antidiscrimination rule in Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin." *Id.* § 2000e-2(a).

The ADA's antidiscrimination rule, like the Title VII rule, is enforced by both the EEOC and the Department of Justice (DOJ). As under Title VII, a person may initiate civil proceedings against her employer by filing a charge with the EEOC. 42 U.S.C. § 12117(a) (incorporating Section 2000e-5). If the EEOC determines that there is reasonable cause to believe the charge but proves unable to secure compliance through informal methods, it may bring a civil action in court. *Id.* § 2000e-5(f). The aggrieved person has the right to intervene in any action brought on her behalf by the EEOC, and may herself bring an action if the EEOC fails to act. *Id.*

The district courts possess broad remedial authority under the ADA, including the authority to

"enjoin the respondent from engaging in [an] unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay … or any other equitable relief as the court deems appropriate," *id.* § 2000e-5(g)(1) (incorporated by Section 12117(a)), including front pay, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853-54 (2001).

2. Congress granted religious organizations certain exceptions from the ADA's antidiscrimination provision. First, Congress established that the ADA's basic employment discrimination provisions "shall not prohibit a religious [organization] from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities." 42 U.S.C. § 12113(d)(1). That "co-religionist" exception resembles religion-related provisions in Title VII. S*ee id.* §§ 2000e-1(a), 2000e-2(e).

Congress also included in the ADA a separate exception for religious organizations *not* included in Title VII. That provision establishes that, for purposes of the ADA's antidiscrimination prohibition, "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." *Id.* § 12113(d)(2).

3. As a complement to its antidiscrimination mandate, the ADA broadly prohibits employer retaliation: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, as-

sisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). The EEOC and DOJ have the same authority to enforce the retaliation provision as the antidiscrimination provision, and district courts possess the same remedial authority. *Id.* § 12203(c). Importantly, however, the co-religionist and religious-tenets exceptions to the ADA's antidiscrimination provision do not apply to the retaliation provision. *See id.* § 12113(d)(1)-(d)(2) (exceptions apply to "this subchapter"); *id.* § 12203 (retaliation provision, enacted in separate subchapter).

B. Factual Background

1. a. Hosanna-Tabor Evangelical Lutheran Church and School is an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS). Hosanna-Tabor operated a church and school in Redford, Michigan. Pet. App. 3a. The Hosanna-Tabor school taught students in kindergarten through eighth grade. J.A. 62.[1]

During the 2004-05 school year, Hosanna-Tabor was one of over 2,500 schools affiliated with the LCMS. Lutheran School Statistics, at 1.[2] Roughly 80% of the funding for LCMS schools came from tuition charged to the students. The average annual tuition was over $2,000 for elementary school students and approximately $5,500 for high school students. *Id.* at 2.

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[1] The school has since merged with another institution and no longer exists as a separate entity.

[2] *Available at* http://classic.lcms.org/graphics/assets/media/DCS/04-05SchlStats.pdf.

LCMS schools like Hosanna-Tabor's offer services to the general public, serving substantial numbers of non-Lutheran children. Of the more than 288,000 students enrolled in LCMS schools in 2004-05, some 35% were non-Lutheran, and 16% were "unchurched." *Id.*

LCMS schools employed approximately 18,000 teachers in 2004-05. *Id.* at 4; J.A. 102. Depending on their education level, elementary school teachers' annual salaries ranged from approximately $26,000 to $44,000. Lutheran School Statistics, at 4.

b. The Hosanna-Tabor school employed "contract" teachers and "called" teachers. J.A. 62. Contract teachers were chosen by the school board for one-year, renewable terms. Pet. App. 3a; J.A. 120. "Called" teachers were normally hired on an open-ended basis by the voting members of the church congregation. Pet. App. 3a.

A teacher becomes eligible for a "call"—an offer of employment made "after prayerful[] consider[ation]" by the congregation, Pet. Br. (PB) 6—after completing a "colloquy" course of study at a Lutheran university. Pet. App. 3a. The teacher's name is then placed on a list accessible to the schools affiliated with the Synod. *Id.* Once a teacher receives her first "call" from a congregation, the president of the district of the calling congregation bestows a commission upon the teacher in a religious ceremony, and the teacher becomes a "commissioned minister." LCMS Bylaws § 2.10.3.[3] "Commissioned ministers" are distinct from "ordained ministers," "who serve in

[3] *Available at* www.lcms.org/Document.fdoc?src=lcm&id=928.

the office of public ministry (also known as the pastoral office) and have the power to preach the Word and administer the Sacraments." Brief of LCMS as *Amicus Curiae*, at 4. "Commissioned ministers," in contrast, "act as auxiliaries of the pastoral office, performing certain important functions of that office (though ordinarily not the administration of the Sacraments or the preaching of the Word)." *Id.*

Hosanna-Tabor—like the LCMS generally—did not require its teachers to be called, or to be Lutheran. J.A. 222. In 2004-05, two-thirds of the teachers in LCMS schools were "non-rostered," i.e., ineligible to be called. Lutheran School Statistics, at 4. Approximately 3,800 of the 18,000 teachers in LCMS schools were unaffiliated with any LCMS congregation. *Id.* Hosanna-Tabor did not require even its called teachers to be members of the church. J.A. 222. The school's non-Lutheran teachers (and contract teachers) had the same duties, and performed the same functions, as called teachers. Pet. App. 5a.

Called teachers normally receive tenure and may be dismissed only for cause. Pet. App. 3a. Dismissal is accomplished by rescinding the call, which is understood by Hosanna-Tabor and Synod officials as being "fired." J.A. 78, 106. When a school dismisses a called teacher by rescinding her call, the teacher may retain eligibility to receive a call from other schools within the LCMS, and need not lose her synodical status as a commissioned minister. *See* J.A. 107.

c. LCMS employment policy, as set forth in published documents, expresses "full agreement with

the intent of" the antidiscrimination laws, including with respect to discrimination on the basis of disability. Personnel Manual Prototype, § 2.200 (June 2003).[4] The LCMS set forth certain principles concerning the treatment of disabled employees in its Employment Resource Manual:

> There are many rules and regulations in the ADA. Churches need to understand the legal restrictions about discriminating against disabled individuals. Even when these rules are not technically applicable to a church, as a Christian organization the church should not discriminate against persons with disabilities and should, where reasonably possible without undue hardship, take the lead in making reasonable accommodations for disabled workers.

LCMS Employment Resource Manual at 6.[5]

2. In 1999, Hosanna-Tabor hired respondent Cheryl Perich as a contract, i.e., non-called, elementary school teacher. J.A. 112. In 2000, after Perich completed her colloquy, the school hired her as a called teacher. J.A. 113. Perich taught kindergarten until the end of the 2002-03 school year, and taught fourth grade during the 2003-04 year. J.A. 222.

As both a called and contract teacher, Perich was responsible for "the instruction of students in secular

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[4] *Available at* http://www.mns.lcms.org/LinkClick.aspx?fileticket=lMILvY-QnBA%3D&tabid=99&mid=469.

[5] *Available at* http://classic.lcms.org/graphics/assets/media/LCMS/EmploymentResourceManual2003.pdf.

subjects": "Math, Language Arts, Social Studies, Science, Gym, Art and Music." J.A. 222. She taught those subjects five days a week. J.A. 223. Perich used no religious books when teaching Math, Language Arts, Social Studies, or Science, and used "the same music book as was used in the local public school" when teaching music. J.A. 223.

In addition to her teaching of secular subjects, Perich taught a Religion class four days per week. Hosanna-Tabor did not require that the Religion class be taught by a Lutheran, by a called teacher, or by a teacher who had completed a colloquy. The teacher who taught fourth grade before Perich (and who taught Religion) was neither a Lutheran nor a called teacher. J.A. 223. Perich also attended chapel services with her students once a week, and led two to three services per year. Again, Hosanna-Tabor did not require the person leading the service to be either Lutheran or called. J.A. 224. Additionally, Perich's class read or listened to a devotional excerpt each morning, and Perich participated in a prayer with her students in the morning, at lunch, and at the end of the day. J.A. 224.

3. In June 2004, Perich was hospitalized after becoming ill during a Hosanna-Tabor golfing event. J.A. 113. By August, Perich's doctors had not definitively diagnosed her, and Stacey Hoeft—Hosanna-Tabor's principal—told Perich that she should take disability leave and that her job would be waiting for her when she returned. J.A. 160. Perich went on disability leave at the start of the 2004-05 school year. At that point, she received 100% of her pay while on leave.

In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy, and that her doctor had begun the treatment process. The doctor told her she would be able to return to work in two to three months. J.A. 113, 163-64. One month later, Hoeft informed Perich that the school had "asked Mrs. Elizabeth Gavrun to substitute for you during your disability." J.A. 165.

On January 18, 2005, Perich again emailed Hoeft to inform her that her doctor was making progress in her treatments. J.A. 169. Hoeft responded the next day, saying that she was "so glad to hear that you have such a remarkable doctor." Hoeft also explained that the Board of Directors of the school had met the previous night and adopted a new disability policy under which Perich would no longer be carried by the church's disability insurance. Hoeft asked Perich about her plans for the following year, so that the school could "start the Call process if we have to." Hoeft concluded by asking: "Are you ever going to be allowed to drive again? I know nothing about narcolepsy. Any good websites you can recommend?" J.A. 167-68. Perich responded that most information about narcolepsy on the internet was outdated, but that she could send Hoeft materials she had received from her doctor. J.A. 166.

On January 21, Hoeft sent Perich another email thanking Perich "for all the info," because she had "no knowledge about [Perich's] condition. That's why I was wondering what your intentions were for coming back in the fall." "I don't want to mislead our new teacher," Hoeft explained. Hoeft also stated that Jim Pranschke, the church president, would amend the employment handbook to provide that

anyone who has a disability extending for longer than six months would be encouraged to resign their call "so the church and school will be able to fill the position responsibly." "We don't want to take your Call away, it's better for everyone if the employee would resign themselves obviously." J.A. 170.

4. At some point during this period, Hoeft called Superintendent Bruce Braun and stated, "we're really considering terminating Cheryl." Braun responded, "That's not my area of expertise, someone with a disability. You need to get an attorney who deals with labor issues, because that's not my area." J.A. 103. Hoeft later confirmed to Braun that they had indeed consulted with a lawyer. J.A. 105.

On January 27, 2005, Perich notified Hoeft that her medication was working, and that her doctor told her she could return to work between February 14 and 28. J.A. 172. "Wow!" Hoeft responded, "I am surprised to hear that you will be able to return so soon."[6] She asked: "How often are you 'passing out'? I know that it's not really passing out—how do you term it now?" Hoeft also stated that she "wonder[s] how you're not permitted to drive yet you can be responsible for the safety of a classroom of children. You can see why I'd be concerned." J.A. 173.

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[6] Hosanna-Tabor states that "Perich continued to offer revised estimates for her possible return." PB9. That is incorrect. In December 2004, she told Hoeft that her doctor would allow her to return to work within 2-3 months. J.A. 113, 163-64. That range was fully consistent with the February 14-28 range she provided to Hoeft on January 27, and with the eventual February 22 date her doctor settled upon. J.A. 113-14, 190.

On January 30, Hosanna-Tabor held a meeting of the congregation. There, unbeknownst to Perich, the congregation heard two "options" concerning Perich. Under the first, Perich would be responsible for paying her own health insurance premiums beginning in March 2005. Under the second, Hosanna-Tabor would pay a portion of Perich's medical premiums through December 2005, but only if Perich requested a "peaceful release from her call," i.e., resigned. J.A. 178, 186. Although Perich had told Hoeft three days earlier that her doctor had approved her return to work within the next several weeks, the presentation of the second option to the congregation stated that "[o]ur school administrator and the School Board feels it is very unlikely Ms. Perich will be physically capable to return to the classroom this year or next year." J.A. 186. The congregation supported the second option. Pet. App. 7a.

On February 9, Scott Salo, the chair of the school board, contacted Perich to arrange a meeting. Perich told him she preferred to meet with the entire school board, because she had "heard that Hosanna-Tabor wanted [her] to resign and because Stacey Hoeft had expressed doubts about [her] ability to return to work even though [her] doctor told [her] that [she] would be able to" do so. J.A. 113.

Perich attended a school board meeting on February 13. At the beginning of the meeting, Salo asked her to resign in exchange for paying for her medical insurance. Perich refused, and presented the board with a verification from her doctor saying she could return to work February 22. J.A. 113-14,

190.[7] One of the board members commented at the meeting that he "wouldn't drive if I were you, not even if the doctor says you can." J.A. 114. Another said that "I have a medical background and I know that you have to be without symptoms for at least three months before you can be sure that the medicine is working well enough that you won't have symptoms." J.A. 84, 114. The same person said that Perich might pass out and scare the children. J.A. 84, 193-94. None of the board members asked for additional information from Perich's physician. The school board did not change its position about seeking Perich's resignation and asked her to make a decision by February 21. Pet. App. 8a.

5. On the evening of February 21, Perich emailed Hoeft and said that she had "decided not to ask for a peaceful release" from her call. J.A. 199. The Hosanna-Tabor employee handbook stated that "Failure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination." J.A. 203. Perich was concerned that, if she did not return to work, she would be terminated under that policy. She therefore advised Hoeft that she would return to work the next day (as authorized by her doctor). J.A. 199.

On February 22, Hoeft met Perich when she arrived for work and told her she could not stay. Hoeft stated, "I'm not the only person that doesn't want you here. Parents have told me that they would be uncomfortable with you in the building." J.A. 115.

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[7] Contrary to Hosanna-Tabor's brief, there were no "recent reports of severe symptoms." PB9.

Perich refused to leave without some written verification that she had complied with the employee handbook by returning to work promptly after a leave of absence. Perich left upon receiving a letter from Hoeft and Salo stating, "Due to your improper notification to return to work, we are asking that you continue your leave on Tuesday, February 22, 2005 in order to allow the congregation a chance to develop a plan for your possible return." J.A. 230.

That afternoon, Hoeft and Perich spoke on the phone. Perich explained that she was attempting to work out her employment situation with the school board, but that she was consulting with an attorney and would file a disability discrimination suit if she could not otherwise resolve the problem. J.A. 115, 152. Hoeft later claimed in her deposition that the LCMS internal dispute resolution program was on her mind during this conversation, but Hoeft made no mention to Perich of any such concern. J.A. 152; *compare* PB10.

Hoeft informed the school board that Perich was contemplating a lawsuit. J.A. 154. That evening, Salo sent Perich a letter stating:

> Your actions of 2/22/05 are regrettable to say the least. By emailing Mrs. Hoeft at her work email at 9:03 pm on 2/21/05 it is clear that your intent was not to return to work, but rather to create upheaval in our school. You had already been informed at our meeting on 2/13/05 that there was no position for you …. Your behavior demonstrates your total lack of concern for the minis-

> try of Hosanna-Tabor Lutheran School. We are therefore reviewing the process of rescinding your call.

J.A. 229. The letter contained no mention of any requirement to use any internal dispute resolution process.

On March 19, Salo sent Perich a follow-up letter explaining that the congregation was to meet on April 10 to decide whether to rescind Perich's call. The letter stated that the board was taking this action "due to insubordination and disruptive behavior on Tuesday, February 22, 2005. We are also requesting this because we feel that you have damaged, beyond repair, the working relationship you had with the Administration and School Board by threatening to take legal action against Hosanna-Tabor Lutheran Church and School." J.A. 55. Nevertheless, the letter stated that, if Perich would agree by April 8, 2005, to resign voluntarily, the school would continue to pay her medical insurance through the end of the year and promote her name to other Lutheran schools. J.A. 56. The letter again made no mention of any requirement to use any internal dispute resolution process.

Two days later, on March 21, Perich's counsel sent Hosanna-Tabor's counsel a letter explaining that, while the school's actions violated federal and state employment discrimination law, Perich sought an amicable solution. J.A. 205-10. On April 11, Salo and Pranschke sent Perich a letter notifying her that the congregation had voted to rescind her call, and requesting that she retrieve her personal items and return her keys. J.A. 38.

After her termination from her teaching position at Hosanna-Tabor, Perich remained on the LCMS roster of teachers eligible for called positions at other schools within the Synod. J.A. 107. Indeed, Hoeft strongly recommended Perich to other congregations, and Braun—acting as District Executive—stated his understanding that her health "concern is erased with new medication." J.A. 54. Accordingly, it appears that LCMS continued to consider her a "commissioned minister." *See* LCMS Bylaws § 2.11.2 (addressing circumstances in which commissioned minister remains on LCMS roster of those eligible to be called). She remained on the roster as a commissioned minister until 2010, when she decided not to renew her application. *See* http://classic.lcms.org/pages/wPage.asp?ContentID=773&IssueID=44 (May 2010 LCMS notice of Perich's removal from the Ministers of Religion-Commissioned roster).

C. Proceedings Below

1. Perich filed a charge with the EEOC on May 17, 2005, alleging that Hosanna-Tabor had violated her rights under the ADA. Pet. App. 9a. The EEOC filed a complaint against Hosanna-Tabor in the district court on September 28, 2007. J.A. 14-18. The complaint alleged that Hosanna-Tabor had violated the ADA's retaliation provision by, among other things, "terminating Perich's employment in retaliation for threatening to file an ADA lawsuit." J.A. 16. Perich moved to intervene on March 11, 2008, and filed her own complaint on April 10, which added a retaliation claim under Michigan's Persons with Disabilities Civil Rights Act. Pet. App. 67a-74a. Perich sought monetary and injunctive relief, and also sought reinstatement. Pet. App. 73a-74a. The

request for reinstatement to her teaching position has no continuing relevance, however, as Perich no longer seeks that relief (and the complaint from the outset did not seek reinstitution of her religious status as "called").

On October 23, 2008, the parties moved for summary judgment. Hosanna-Tabor argued to the district court—for the first time—that it had a theological reason for terminating Perich: that she threatened to assert her legal rights to the EEOC and the courts, rather than use the church's internal dispute resolution process to resolve her statutory claims. Pet. App. 24a. Perich explained in an affidavit that she "was not aware of the resolution policy until 2008, years after [her] 2005 termination." J.A. 228.

2. The district court granted Hosanna-Tabor summary judgment on the ground that Perich fell within a so-called "ministerial exception" to the anti-discrimination laws. The court understood that exception to preclude application of the ADA if "the employer [is] a religious institution and the employee [is] a ministerial employee." Pet. App. 41a-42a (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). The court found that Perich was a "ministerial employee" because Hosanna-Tabor considered her to be a "commissioned minister," and a contrary conclusion would "infring[e] upon [Hosanna-Tabor's] right to choose its spiritual leaders." Pet. App. 52a (quotation omitted; second alteration in original).

3. The court of appeals vacated the judgment and remanded the case to the district court to decide the merits of the retaliation claim. Pet. App. 25a. The

court explained that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the [ministerial] exception." Pet. App. 17a. Rather, teachers have been found to be within the exception when they have "taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church." Pet. App. 18a-19a.

Here, the court explained, the "record supports the finding that Perich's employment duties were identical when she was a contract teacher and a called teacher and that she taught math, language arts, social studies, science, gym, art, and music using secular textbooks." Pet. App. 19a. After reviewing Perich's religious functions, the court concluded that her "primary function was teaching secular subjects, not 'spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" Pet. App. 20a (quoting *Hollins*, 474 F.3d at 226).

Moreover, the court explained that adjudicating Perich's claim would not require secular courts to adjudicate church doctrine. The court observed that "Hosanna-Tabor has attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution." Pet. App. 24a. But even as reframed, the court would only have to decide "whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under

the ADA, and whether Hosanna Tabor violated the ADA in its treatment of Perich." Pet. App. 24a. Accordingly, the court held that the "ministerial exception" would not bar application of the ADA.

SUMMARY OF ARGUMENT

Hosanna-Tabor fired Cheryl Perich from her teaching position in retaliation for her assertion of rights under the ADA. That action constitutes a paradigmatic violation of the ADA's anti-retaliation prohibition. Hosanna-Tabor contends that it is immune from the normal operation of that prohibition under a so-called "ministerial exception," which (it believes) allows a religious organization to fire with impunity any employee whom it considers to perform important religious functions—even if she also performs important secular functions, and even if she does so as part of a commercial enterprise.

Hosanna-Tabor asks the wrong question, and arrives at the wrong answer. The question is not whether Hosanna-Tabor is protected by a categorical "ministerial exception" nowhere found in the ADA. The question instead is whether the anti-retaliation prohibition is unconstitutional as applied to the circumstances of this case—*viz.*, to a religious association's retaliatory dismissal of a teacher of secular subjects in a commercially operated school. The answer is no. Contrary to Hosanna-Tabor's argument, neither the Free Exercise Clause, the Establishment Clause, nor the First Amendment right of expressive association gave it any entitlement to fire Perich in retaliation for her invocation of her right to be free from invidious discrimination.

First, with respect to the right of expressive association, a *secular* private school would have no expressive-association right to discharge a teacher in retaliation for her assertion of rights under the anti-discrimination statutes, even if the school possesses a sincere belief that disputes should be resolved internally rather than in civil courts. While such an institution would have a First Amendment interest in selecting its teachers, and while it might use its teachers to inculcate its core beliefs, the government would have an overriding interest in assuring access to commercial opportunities free from discrimination and retaliation and in providing access to courts to enforce those protections. The government interest would be particularly strong because private schools act as a substitute for compulsory public education.

The expressive-association analysis is no different for a religious school. Hosanna-Tabor elected to run a commercial institution that taught the secular curriculum as a substitute for compulsory public education. As with a non-religious private school, Hosanna-Tabor's associational interest in selecting its teachers is subject to the government's compelling interest in protecting teachers of secular subjects in a commercially operated school from discrimination and retaliation, and in affording access to courts to enforce those protections. Religious or not, an expressive association cannot render itself immune from civil suits against it by invoking a belief—however sincerely held—in the virtues of internal dispute resolution. Moreover, because Hosanna-Tabor has no religious objection to the employment of disabled individuals, its interest in foreclosing civil court resolution of the non-ecclesiastical, under-

lying dispute is significantly diminished, whereas the government's corresponding interest in assuring the resolution of civil claims in civil courts is strengthened.

None of this is to say that religious associations could never assert a successful expressive-association defense to the application of the antidiscrimination laws. This Court has established that an expressive association need not retain an individual in a leadership position when doing so would significantly undermine a central associational message and no compelling government interest would require it. There thus should be no worry that Title VII could require a church to ordain a priest to lead the congregation in contravention of a central tenet of its faith. The church's ability to convey its doctrinal views might be significantly impaired in such a situation, and the government interest would be diminished because the circumstances would not involve the performance of important secular functions in a commercial arena.

Hosanna-Tabor claims a far more sweeping immunity, however. In its view, a religious organization is entitled to violate the antidiscrimination laws for *any* employee whom it views to perform an important religious function, even if she also performs important secular functions in a commercial setting, and even if the basis for the firing is entirely unconnected to any religious belief. That expansive rule would leave hundreds of thousands of teachers without the protection from discrimination and retaliation that Congress intended to afford them. It would also reach beyond teachers to encompass administrative staff, as well as employees of social-services

organizations affiliated with religious institutions. And, critically, it would leave those employees wholly unprotected against retaliatory dismissals for, *inter alia*, asserting their right to minimum pay, unearthing health or safety violations, or, as in a case currently before the Court, reporting sexual abuse of a student. Nothing in the right of free association—or, indeed, in any right under the Religion Clauses—grants religious organizations such a sweeping exemption from neutral and generally applicable antidiscrimination laws.

The Free Exercise Clause provides no greater support for Hosanna-Tabor's expansive approach. The general rule under that Clause—applied to individuals and institutions alike—holds that neutral, generally applicable laws like the ADA are fully enforceable and need not give way to religious exercise. A religious organization thus has no constitutional entitlement to become a law unto itself. The Court instead has left it to Congress to accommodate religious exercise through enactment of legislative exceptions from antidiscrimination laws, and Congress has been equal to the task. The Court has recognized a limited exception to the rule allowing enforcement of neutral laws according to which civil courts may not take sides in a religious dispute. But Perich does not ask any court to take sides in a religious dispute—she does not here contest Hosanna-Tabor's asserted religious belief that disputes should be decided internally rather than in civil court. She instead seeks a determination that her firing violated the ADA's neutral, generally applicable retaliation provision, a determination requiring no judicial inquiry into the merits of any religious doctrine.

The Establishment Clause likewise afforded Hosanna-Tabor no entitlement to fire Perich in retaliation for asserting her right to be free from discrimination. Hosanna-Tabor is correct that one of the principal purposes of the Clause was to prevent government appointment of clergy. But the application of neutral, generally applicable laws barring discrimination hardly constitutes government appointment of an employee—it instead leaves institutions free to appoint any employee as long as they refrain from illicit discrimination or retaliation. Nor does the application of the ADA's retaliation provision to religious organizations inherently result in excessive entanglement. Rules neutral toward religion generally pose no Establishment Clause concerns, and the Court has ratified regimes—such as ongoing monitoring of religious institutions—involving significantly greater intrusions than the application of the antidiscrimination laws in discrete cases. Even if adjudication of *particular* cases might raise Establishment Clause concerns, that does not justify an across-the-board rule denying all employees viewed to perform important religious functions the protections of the neutral antidiscrimination laws.

Finally, the First Amendment does not bar any remedy in this case. Perich no longer seeks reinstatement, but even if she did, reinstatement to a teaching position with the same responsibilities and benefits would be available to her. And even if reinstatement were not available, monetary relief in the form of back- and front-pay would be. Such relief is not precluded when reinstatement is inappropriate, as is demonstrated by the common-law rule preventing specific performance of employment contracts—

but nonetheless requiring the payment of damages—on the rationale that employers should not be forced to accept unwanted employees. There is no merit to Hosanna-Tabor's claim that the mere threat of monetary damages would unduly impinge on its freedom to select ministers. Hosanna-Tabor need only refrain from violating the neutral antidiscrimination laws insofar as those laws may be constitutionally applied to it, just as any non-religious employer must do.

ARGUMENT

Hosanna-Tabor terminated Cheryl Perich's employment in violation of the ADA's anti-retaliation prohibition and Michigan's parallel law. Nothing in the First Amendment gave the school a blanket entitlement to fire Perich in retaliation for expressing an intention to exercise her right to file a discrimination claim.

I. This Case Squarely Implicates The Government's Compelling Interest In Eradicating Invidious Discrimination In Employment

A. The Employment Discrimination Laws Serve The Compelling Interest Of Eradicating Invidious Discrimination In The Workplace

1. The federal and state governments possess a "compelling interest in combating invidious discrimination." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) (quotation omitted); *e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United*

States Jaycees, 468 U.S. 609, 623 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). Congress accordingly enacted a series of employment discrimination statutes—including Title VII and the ADA—the "central statutory purposes" of which are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994) (quotation omitted). Of particular salience, those federal statutes and their state law counterparts advance the "profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring).

2. The federal employment discrimination statutes aim to achieve their purpose by prohibiting discrimination on the basis of particular characteristics, and by providing remedies to deter future violations and compensate for past violations. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357-58 (1995); 42 U.S.C. §§ 2000e-5(g)(1), 12117(a). In addition, each major employment discrimination statute prohibits retaliation against employees who exercise their primary statutory rights. *E.g.*, 42 U.S.C. § 2000e-3(a) (Title VII); *id.* § 12203(a) (ADA).

Those retaliation provisions are critically important: their "primary purpose" is "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The prohibition against discrimination on the basis of status would be a hollow promise—and would have no chance of "eradicating discrimination throughout the economy," *Landgraf*, 511 U.S. at 254—if an employer could simply fire any employee

who asserts her right to be free of discrimination. Consequently, even when an antidiscrimination statute contains no express bar against retaliation, this Court has frequently construed the law to include an anti-retaliation prohibition. *E.g.*, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

3. In enacting the major employment discrimination statutes, Congress carefully considered the rights of religious organizations to worship freely and to control their membership. Thus, Congress established a "co-religionist" exception to Title VII's prohibition against discrimination, which generally permits religious organizations to discriminate in favor of adherents. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(e). Congress enacted a parallel exception in the ADA. 42 U.S.C. § 12113(d)(1). The ADA also includes an additional provision—not included in Title VII—establishing that "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C. § 12113(d)(2). Notably, however, Congress elected to apply those exceptions only to the substantive prohibition against disability discrimination, but *not* to the prohibition against retaliation. *See supra* at 3.

B. Perich's Claim Falls Squarely Within The ADA's Prohibition Against Retaliation

Hosanna-Tabor's actions violated the ADA. From the day Perich informed Hoeft that her doctor had brought her narcolepsy under control, Hoeft and others resisted her return to work based on mis-

guided apprehensions about her disability, even though her doctor had granted her full medical clearance to return to the classroom. *See supra* at 9-11. Throughout this period, the school repeatedly pushed Perich to resign, even after Perich explained that her doctor had cleared her to return to work. Pet. App. 8; J.A. 113-14, 178, 186. Then, after Perich stated that she would assert her legal rights under the ADA, the school fired her *explicitly* because she had "threaten[ed] to take legal action." J.A. 55-56.

This is a textbook case of retaliation in violation of the ADA and of the parallel provision under Michigan law, Mich. Comp. Laws § 37.1602(a). The terms of the ADA squarely foreclose this type of employer conduct, and the government has a compelling interest in eradicating it. Hosanna-Tabor argues, however, that the First Amendment shields it from liability for retaliating against Perich's exercise of her rights. For the reasons explained below, nothing in the First Amendment precludes application of the ADA's retaliation provision to this case.

II. The First Amendment Does Not Prevent Application Of Neutral, Generally Applicable Antidiscrimination Laws In The Circumstances Of This Case

Hosanna-Tabor correctly disclaims any argument that the ADA is unconstitutional in all its applications to a religious association. PB2, 19. The sole question presented therefore is whether the ADA is unconstitutional as applied in the circumstances of this case. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied."). In particular, the question is whether the ADA's retaliation provision—a neutral law of general application—is unconstitutional as applied to a religious association's retaliatory firing of a teacher of secular subjects in a commercially operated school.

The answer is no. Hosanna-Tabor invokes three potential sources of protection under the First Amendment in support of its broad claim of immunity from the ADA's retaliation provision: the Free Exercise Clause, the Establishment Clause, and the First Amendment right of expressive association. None affords the immunity Hosanna-Tabor seeks. Because the right to expressive association substantially informs the constitutional analysis under the Religion Clauses, we begin there.

It bears emphasis at the threshold, however, that Hosanna-Tabor starts in the wrong place in assuming the existence of a "ministerial exception" and proceeding to examine its scope. The ADA, like other employment discrimination laws, contains no "ministerial exception." While Hosanna-Tabor argues that every court of appeals has recognized some form of "ministerial exception," PB16-17, every published federal court of appeals opinion to consider the issue has refused to apply any "ministerial exception" to teachers of secular subjects in religious schools.[8] Reference to an ostensible "ministerial ex-

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[8] *See Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (Catholic elementary school teacher, "notwithstanding [her] apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles"); *DeMarco v. Holy Cross High Sch.*, 4

ception" does not advance the resolution of the question at issue—whether the ADA is unconstitutional as applied to the circumstances of this case.

Nor does that analysis hinge on whether the teaching of secular subjects is a teacher's "primary" duty. PB38-39. The Court may assume that a teacher in Perich's position performs important religious functions (whether as a called or uncalled teacher). But it is also undisputed that her teaching of secular subjects constituted an important secular function, and that she was to perform that secular function for all students—whether Lutheran or non-Lutheran—who purchased those services from the school. In such a case, the teacher may invoke the protections of the neutral and generally applicable antidiscrimination laws when subjected to discrimination or retaliation at the hands of her employer,

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F.3d 166, 172-73 (2d Cir. 1993) (Catholic school teacher whose duties included leading prayer and attending mass); *DeArment v. D.L. Harvey*, 932 F.2d 721, 721-22 (8th Cir. 1991) ("born-again Christian" class supervisors who regard teaching as "their personal ministry" and "conduct prayer and counsel" students in "a self-study program that teaches all subjects from a biblical point of view"); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396-97 (4th Cir. 1990) (teachers with a curriculum that included "instruction in Bible study and in traditional academic subjects into which biblical material had been integrated"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364, 1369-70 (9th Cir. 1986) (teachers occupying a "highly specialized role" at Christian school that church considered "a ministry" and "an integral part of the religious mission of the [c]hurch to its children"); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485-86 (5th Cir. 1980) (faculty and staff of Baptist college who were "expected to serve as exemplars of practicing Christians").

no less than can a teacher subjected to the same mistreatment by a non-religious employer.

A. Right Of Expressive Association

The expressive-association inquiry turns on whether the retention of a person protected under the antidiscrimination laws would burden "in a significant way" a central associational message, and if so, whether the burden is "overridden" by "compelling state interests." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Under that framework, a *secular* private school would have no immunity from application of the ADA's anti-retaliation protections in the case of a teacher of secular subjects at a commercially operated school. There is no basis for granting a religious school any greater protection for purposes of the right of expressive association.

1. ***A secular private school has no expressive-association right to retaliate against a teacher for asserting ADA protections.***

a. The First Amendment recognizes a right to associate to operate private schools. *See Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976). And private educational institutions possess a First Amendment interest in selecting teachers of their choice to carry out their mission and philosophy. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 195-99 (1990). But that First Amendment interest confers no entitlement to select teachers free from the constraints of neutral and generally applicable antidiscrimination laws. Even assuming the application of those laws incidentally affects a private school's exercise of First Amendment freedoms in connection with its selection of

teachers, the government's compelling interest in ensuring equal economic opportunity for teachers would take precedence. *See id.* at 198-202. Indeed, this Court has long recognized "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

The government interest in regulating private schools is especially strong because those schools provide a substitute for the compulsory public education otherwise furnished by the state. In Michigan, for example, all school-age children must attend public school, unless they attend a private school "which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located," or if they are home-schooled in accordance with state law. Mich. Comp. Laws § 380.1561. The "courses of study" in private schools, "and the qualifications of the teachers in those schools [must] be of the same standards as provided by the general school laws of [the] state." *Id.* § 388.551. Teachers in private schools must obtain the same certificate required of public school teachers, or must satisfy a separate certification requirement by demonstrating a 10-year history of teaching. *Id.* § 388.553. State law also imposes curricular requirements equally applicable to public and nonpublic schools. *See id.* § 380.116.

There is no constitutional immunity from such laws. On the contrary, "a substantial body of case law has confirmed the power of the States to insist

that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, *employ teachers of specified training*, and cover prescribed subjects of instruction." *Bd. of Educ. v. Allen*, 392 U.S. 236, 245-46 (1968) (emphasis added). Private schools are likewise subject to antidiscrimination laws when employing teachers.

b. The analysis would not change if a secular private school asked its teachers to infuse the school's core moral philosophies into the teaching of the basic academic curriculum—e.g., reading, writing, arithmetic. The government would possess the same overriding interest in protecting those who teach the basic academic curriculum in commercially operated schools against discrimination and retaliation, as well as in ensuring access to courts to enforce those protections.

Nor would it matter if a secular private school held a sincere moral belief paralleling the one asserted by Hosanna-Tabor in this case—*viz.*, that disputes between teachers and the association should be resolved internally, rather than in court. In enforcing nondiscrimination mandates that themselves serve interests of the highest order, Congress has a compelling interest in affording access to a neutral judicial forum for adjudication of the claim—e.g., to decide whether a condition constitutes a disability under the ADA or whether the employer satisfied the duty to make a reasonable accommodation—rather than entrusting resolution of the claim to the very body accused of the discrimination. Indeed, if private associations could render themselves immune from retaliation actions by invoking a belief in

the virtues of internal dispute resolution, it would be impossible to "[m]aintain[] unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. While a private association may certainly express the view that disputes must be resolved internally, that association has no First Amendment right to establish itself as the exclusive arbiter of claims against it.

Accordingly, while a private school has a First Amendment interest in promoting its beliefs through its teachers—including potentially a morally grounded belief favoring internal resolution of disputes—the institution has no constitutional entitlement to avoid judicial enforcement of neutral prohibitions against discrimination and retaliation. *See, e.g.*, *Runyon*, 427 U.S. at 176.

2. *A religious school such as Hosanna-Tabor possesses no greater rights of expressive association than a secular school.*

a. For purposes of the right of expressive association, a religious association operating a school has precisely the same interest as a secular association in selecting teachers of its choice to spread its message: as this Court explained in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), there is "no logical difference in kind between the invocation of Christianity by [a religious organization] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id.* at 111; *see Roberts*, 468 U.S. at 622 (equating an "individual's freedom to speak, to worship, and to petition the government for the redress

of grievances" for purposes of the right "to engage in group effort toward those ends").

The government interest in protecting teachers against discrimination and retaliation likewise does not vary with whether a private school is operated by a religious association or a secular association. In either case, the government has an overriding interest in protecting teachers' nondiscriminatory access to employment opportunities, and their access to court to vindicate that protection.

In addition, religious private schools, no less than secular private schools, provide a substitute for compulsory public education. Mich. Comp. Laws §§ 380.1561, 388.553. This Court has held that "the state has power to impose" "secular educational requirements" on "religious" schools. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (citing *Pierce*, 286 U.S. 510). And "if the State must satisfy its interest in secular education through the instrument of [religious] private schools, it has a proper interest in the manner in which those schools perform their secular educational function." *Allen*, 392 U.S. at 246-47. The state has a strong interest in assuring that teachers who serve that important secular function can do so free from discrimination. As with non-religious associations, moreover, the government's interests remain undiminished in the case of a religious school that asks its teachers to inject its moral philosophy into their teaching of core subjects. And as with non-religious associations, a religious belief that disputes should be resolved internally rather than in court does not allow a religious association to immunize itself from civil suit.

b. Hosanna-Tabor could have no expressive-association defense to Perich's retaliation claim. Whatever may be the result in other contexts, Hosanna-Tabor elected to run a commercially operated school—one open to adherents and non-adherents alike for a fee. And Perich taught secular subjects that the school was by law required to teach given its status as a substitute for compulsory public education. Perich therefore performed important secular functions in a commercial setting. The school's expressive-association interests, if any, do not trump the neutral antidiscrimination and anti-retaliation rules in that context, and the government has an overriding interest in protecting teachers like Perich from discrimination and retaliation.

That is particularly the case because Hosanna-Tabor has no religious conviction conflicting with the ADA's bar against discrimination based upon disability. The LCMS's stated view is that it "should not discriminate against persons with disabilities." *See supra* at 6. When the underlying claim of discrimination in no way bears on the church's religious message or dogma, Congress's interest in assuring the resolution of civil disputes in civil courts is especially strong. Conversely, the church's interest in internal resolution of the (admittedly non-ecclesiastical) dispute about whether it violated the ADA is diminished.

Additionally, to prevail on an expressive-association claim, an association must demonstrate that application of the antidiscrimination laws "would significantly burden" its ability to communicate its message. *Dale*, 530 U.S. at 653. Here, however, the LCMS's asserted belief in the necessity of

internal resolution of disputes is not absolute: the LCMS expressly exempts property and contract claims. Pet. App. 80a. The fact that Hosanna-Tabor allows members (and clergy) to file property and contract suits against it in civil court leaves it poorly positioned to claim any significant burden on its message from civil court adjudication of non-ecclesiastical questions under the ADA—such as whether a condition qualifies as a disability under the statute and whether the school has provided a reasonable accommodation.

Relatedly, Perich's intention to file an ADA suit, while assertedly in conflict with Hosanna-Tabor's and the LCMS's views, did not even compel the loss of Perich's synodical status within the LCMS. Although relieved of her call by her congregation, Perich remained on the LCMS roster of teachers eligible to be called. J.A. 107. Indeed, Hoeft and Braun supported her placement on the LCMS roster and strongly recommended her to "LCMS calling bodies," giving her a high rating as a "Christian Educator"—i.e., "Better than … [f]ully satisfactory and consistent performance" and "occasional Exceptional performance." J.A. 54. Moreover, the loss of her call did not relieve Perich of her LCMS status as a commissioned minister. Hosanna-Tabor officials would not have given her strong reviews, and the LCMS would not have kept Perich on its roll of teachers eligible for a call or continued to consider her a commissioned minister, if her presence significantly undermined the church's message about dispute resolution.

Finally, Hosanna-Tabor not once mentioned to Perich that its reasons for her termination had any

religious basis until after this litigation commenced. *Compare Dale*, 530 U.S. at 645 (explaining that Boy Scouts immediately informed Dale in response to his inquiry that they revoked his membership because the Boy Scouts "specifically forbid membership to homosexuals"). If Perich's presence in the organization substantially undermined the church's religious message, one would have expected the church to say so.

3. ***Religious associations, like non-religious associations, may have an expressive-association right to disregard antidiscrimination laws in certain contexts.***

While neither secular nor religious associations have an expressive-association defense to the ADA's application in the circumstances of this case, that is not to say that such associations could *never* assert an expressive-association defense to the application of the antidiscrimination laws. This Court has established that expressive associations need not comply with antidiscrimination laws when doing so would require retaining an individual whose presence in a leadership position would significantly undermine a central expressive message of the association, absent an overriding state interest. *Dale*, 530 U.S. at 647-61; *see also id.* at 702 (Souter, J., dissenting).

Religious associations may have a right to select the leaders of their congregations in analogous circumstances. Contrary to Hosanna-Tabor's argument, therefore, there should be no concern (PB18) that Title VII could prevent the Catholic Church or

an Orthodox Jewish congregation from ordaining an all-male priesthood or rabbinate. Even assuming Title VII would otherwise apply in that context,[9] those organizations would possess an expressive-association right to refrain from selecting leaders whose presence would significantly undercut their ability to convey to their congregations a central message of their faith—e.g., a belief that males alone have a distinct religious status making them uniquely fit to serve in the priesthood or rabbinate as leaders of the congregation. *See id.* at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."). Moreover, the state's interest in applying the antidiscrimination laws is weakened in such circumstances—where, unlike here, the subject of discrimination is not engaged in commerce or in the performance of important secular functions.

But once a religious association elects to establish a commercial operation—particularly a school teaching a core secular curriculum to the general public for a fee—its associational interests as to employees participating in such a venture are diminished, and the government's interests in enforcing the antidiscrimination laws are enhanced. Indeed, this Court has specifically contrasted "religious *schools*," on the one hand, with "churches or other *purely religious institutions*," on the other, with the latter receiving significantly greater constitutional protection from

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[9] A court would need to conclude, for instance, that a church's gender criterion fails to qualify as a bona fide occupational qualification. *See* 42 U.S.C. § 2000e-2(e).

antidiscrimination laws. *Bob Jones Univ.*, 461 U.S. at 604 n.29 (second emphasis added).

A church operating a private school is thus nothing like a political party. PB33-34. A political party presumably is subject to the antidiscrimination laws when selecting its leaders, but even if it were not, a party that elected to establish a school would have no blanket entitlement to fire its math teachers based on their race, sex, or disability. Religious organizations that extend their operations beyond worship and spreading the faith into the secular, commercial realm must abide by neutral rules that apply to all such enterprises, *see Allen*, 392 U.S. at 245-47, including antidiscrimination laws.

4. ***Hosanna-Tabor's claim of immunity is unduly expansive and would severely undercut the antidiscrimination laws.***

According to Hosanna-Tabor, the right of expressive association supports giving it absolute immunity from the antidiscrimination laws for any employee who "perform[s] important religious functions." PB2, 50. And when assessing an employee's functions and their "importance to the Church's mission," Hosanna-Tabor argues, religious organizations should be accorded deference. PB48. Hosanna-Tabor's position thus is that a religious association can act with impunity against any teacher of secular subjects, so long as the teacher also performs "important religious functions" as defined by the association itself. For the reasons explained, Hosanna-Tabor's broad claim of immunity finds no support in

the right of expressive association, which by nature calls for a case-specific inquiry.

Moreover, Hosanna-Tabor's expansive "ministerial exception," if accepted by the Court, would have profound—and profoundly adverse—consequences for the operation of the antidiscrimination laws. Under Hosanna-Tabor's rule, *any* teacher in a religious school could be fired based on *any* prohibited ground: race, sex, national origin, disability, or age. Neither Congress nor the states would be able to protect from discrimination a female math teacher denied a position based on a belief that women lack proficiency in math, or an African-American passed over for hire to teach English on the belief that African-Americans speak poor English. Hosanna-Tabor's approach would expose a great many employees engaged in commercial enterprises to the potential of invidious discrimination. The sweep of that approach, and the severity of its implications, counsel strongly against accepting it under the right of expressive association (or, indeed, under the Free Exercise or Establishment Clauses, *see infra* 42-58).

a. Under Hosanna-Tabor's rule, religious schools could discriminate against any teacher on any protected ground, regardless of whether the discrimination stems from a religious belief. That approach would leave vast numbers of teachers without the protection against discrimination that Congress intended to afford. There are approximately 18,000 teachers in Lutheran Schools across the country. J.A. 102. And the United States' 6,980 Catholic schools employ over 151,473 professional staff, more

than 95% of which are laity.[10] In all, there are 22,731 religious elementary and secondary schools in the United States, which employ 314,489 full time equivalent teachers. U.S. Dep't of Education, Characteristics of Private Schools in the United States: Results From the 2009–10 Private School Universe Survey, at 7 (Table 2).[11] Unless those employees happen to perform no religious functions—or only religious functions that their church deems unimportant—they would all be left without protection from discrimination based on race, sex, and disability, contrary to Congress's intent.

b. The implications of Hosanna-Tabor's approach are particularly troubling in the context of retaliation claims. Hosanna-Tabor does not argue that the Lutheran faith requires discrimination on the basis of disability; on the contrary, the LCMS forbids discrimination on the basis of disability. Yet Hosanna-Tabor claims immunity from suits asserting disability-discrimination, on the ground that all disputes—even secular disputes involving no ecclesiastical questions—must be resolved internally by ecclesiastical authorities.

If that theory were accepted, religious organizations would be able to retaliate against their employees for asserting rights to minimum pay under the Fair Labor Standard Act, 29 U.S.C. § 215(a)(3), even though the organization is otherwise fully subject to that law. *See Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985) (religious organizations subject to FLSA). Religious organiza-

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[10] *See* http://www.ncea.org/news/annualdatareport.asp.

[11] *Available at* http://nces.ed.gov/pubs2011/2011339.pdf.

tions could retaliate at will against employees who complain about hazardous conditions at a school in violation of OSHA. 29 U.S.C. § 660(c). And religious organizations would be immune from myriad federal and state whistleblower laws, including laws that outlaw retaliation against insiders who report serious crimes.

A currently pending petition for certiorari in this Court demonstrates the reality of that possibility. In *Weishuhn v. Catholic Diocese*, No. 10-760 (U.S.), a Catholic school teacher hired to teach both math and religion (Pet. for Cert. 9) was fired, she alleges, in part for reporting sexual abuse of a student to the Michigan government. She alleged a violation of the Michigan Whistleblowers Protection Act, Mich. Comp. Laws § 15.361 *et seq.* (Pet. for Cert. 16 n.2). The Michigan court of appeals found that the teacher had no recourse under the Whistleblowers Protection Act because the school was protected by the "ministerial exception." *Weishuhn v. Catholic Diocese*, 787 N.W.2d 513, 517, 519-22 (Mich. Ct. App. 2010). The court "recognize[d] that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities," but nonetheless determined that applying the Whistleblower Protection Act to the school would violate the First Amendment. *Id.*

Hosanna-Tabor's rule would compel the same result. But the state plainly has an overriding interest in protecting employees of religious institutions who report serious crimes or other violations of law to civil authorities. The First Amendment should not be read to impede the operation of those laws against religious organizations.

c. Hosanna-Tabor's approach would not be limited to teachers, or even employees at schools. Religions have varying views concerning which of their functions are religious in nature. "For some denominations, there is simply no line that can be drawn between religious and nonreligious functions. Everything that goes on within the organization is suffused with religious significance." Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U. L. Rev. 1633, 1697.

For example, the Southwestern Baptist Theological Seminary considered its administrative and support staff part of the ministry. *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284-85 (5th Cir. 1981). That was consistent with the views of certain evangelical Protestants, for whom "all church members who use their gifts to serve the religious mission of the church play a ministerial role." Brady, *supra*, at 1693. As another example, "in the Catholic Church's social mission, those who feed and counsel the needy also proclaim the Church's message just as much as do preachers from the pulpit." *Id.* at 1694 (citing ecclesiastical sources). "Thus, while the operations of Catholic social services organizations may appear to be essentially secular, they are, in fact, suffused with religious significance." *Id.* at 1697.

Hosanna-Tabor's rule would exempt from the antidiscrimination laws any position a religious organization deems religiously important, whether a teacher of secular subjects at a school, an employee at a school more generally, or an employee in a church-affiliated social-services organization. There

is no basis in free-association doctrine for such a sweeping exclusion from generally applicable, neutral antidiscrimination laws. Secular private associations are subject to those laws. Religious associations should have no greater immunity, either for purposes of the right of expressive association, or, as explained directly below, the Religion Clauses.

B. Free Exercise Clause

The ADA and other employment discrimination statutes are neutral rules that apply generally to religious and non-religious organizations alike, except to the extent Congress has expressly enacted exemptions for religious organizations. The Free Exercise Clause does not require the broad categorical carve-out from those laws sought by Hosanna-Tabor.

1. *The enforcement of neutral laws of general applicability raises no Free Exercise Clause concern.*

a. The Free Exercise Clause prohibits laws that target or aim to suppress religious activity. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But the Free Exercise Clause poses no bar to the application of a "valid and neutral law of general applicability on the ground that the law" incidentally burdens religious practice. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990).

The rule allowing enforcement of neutral laws of general applicability applies to religious organizations no less than individuals. Indeed, this Court held in *Jones v. Wolf*, 443 U.S. 595 (1979), that it does not "'inhibit' the free exercise of religion" to ap-

ply to a religious organization "neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Id.* at 606 (emphasis added); *see City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring) ("[S]hall it be the determination of this Court, or rather of the people, whether … church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people."). The ADA—like every relevant antidiscrimination statute—is a neutral rule of general applicability. The ADA's application in this case thus raises no Free Exercise Clause concern.

As this Court has explained, allowing an objection to the application of a neutral law of general applicability under the Free Exercise Clause would unduly impinge on the "government's ability to enforce generally applicable prohibitions of socially harmful conduct," *Smith*, 494 U.S. at 885, including invidious discrimination, *see Bob Jones Univ.*, 461 U.S. at 604. And recognition of any "private right to ignore generally applicable laws" based on one's religious beliefs would enable an individual "to become a law unto himself." *Smith*, 494 U.S. at 885-86 (quotation omitted). Any such entitlement would "contradict[] both constitutional tradition and common sense." *Id.* at 885.

b. While the Free Exercise Clause affords no protection against application of a neutral, generally applicable law to religious conduct, the legislature can supply that protection by enacting religious exemptions from general laws. As this Court has explained, a "society that believes in the native protec-

tion accorded to religious belief can be expected to be solicitous of that value in its legislation." *Id.* at 890.

Accordingly, Congress enacted the "co-religionist" exceptions to Title VII and the ADA to accommodate religious exercise, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e), 12113(d)(1), and it further enacted a "religious tenets" exemption to the ADA's antidiscrimination prohibition, *id.* § 12113(d)(2). Congress has also established more general protections for the practice of religion in, for example, the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141.[12] But Congress has nowhere established the broad "ministerial exception" Hosanna-Tabor seeks here.

2. ***This case does not require a court to take sides in a religious dispute.***

a. While the Free Exercise Clause permits the application of neutral laws to religious conduct, it does not permit a court to enforce a neutral rule so as to take sides in a religious dispute. *Smith*, 494 U.S. at 877 ("The government may not … lend its power to one or the other side in controversies over religious authority or dogma."); *Jones*, 443 U.S. at 602 (First Amendment prevents "resolution of issues of religious doctrine," and "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization"). That concern is not in issue here.

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[12] *See also*, *e.g.*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274; 20 U.S.C. § 1681(a)(3) (exempting religious organizations from provision of Title IX); 42 U.S.C. § 3607(a) (exempting religious organizations from provision of Fair Housing Act).

Perich asserts only that she was wrongly terminated from her teaching responsibilities in retaliation for asserting her right to sue for disability discrimination. Resolution of that question does not require the court to resolve a Lutheran doctrinal dispute. The civil court need not consider whether Lutheran doctrine in fact requires called teachers to follow the Synod's internal dispute resolution procedures. It can take the church's assertions about Lutheran doctrine as a given, but nevertheless determine that Perich's termination violated the ADA's retaliation provision—a neutral law of general applicability that does not give way to religious conviction, no matter how sincere or important. *Smith*, 494 U.S. at 879.

Nor does it matter that Perich was a called teacher or commissioned minister. The fact remains that she taught secular subjects in a commercial setting. And the question whether Hosanna-Tabor retaliated against her for threatening to assert her rights under the ADA is a secular question for a secular court, not an ecclesiastical question for an ecclesiastical court. Indeed, called and uncalled teachers had "identical" duties. Pet. App. 4a; *see supra* at 5-7. The question in this case thus is the same as would have been presented if Hosanna-Tabor had fired an uncalled teacher of the same secular subjects in the same commercial setting in retaliation for her exercise of ADA rights.

b. Hosanna-Tabor argues that several cases concerning church property disputes—and particularly *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1975)—dictate a much

broader zone of protection from neutral rules of general applicability, ostensibly encompassing the "right of a church to select the personnel who perform important religious functions." PB25-26. Those cases stand for no such broad proposition. They stand only for the narrow rule, already stated, that civil courts may not take sides in a religious dispute.

Kedroff held unconstitutional a New York law—neither neutral nor generally applicable—declaring the Russian Orthodox Church in America (and not the historical Church centered in Moscow) as the true Church, with resulting control of St. Nicholas Cathedral in New York. That statute was based on a legislative finding that the Moscow church "was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government." 344 U.S. at 106 n.10. This Court explained that the "controversy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America." *Id.* at 115. The First Amendment provides religious organizations "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

Serbian involved a similar dispute, this time brought by an American-based bishop of the Serbian Orthodox Church who objected to his removal by his Serbian superiors and to the Mother Church's decision to reorganize its North American administration. He sought to retain control over church assets and "to have himself declared the true Diocesan

Bishop" of the Church. 426 U.S. at 707. The Illinois Supreme Court found in his favor, based on its "interpretation of the Church's constitution and penal code," and on its view that the Mother Church acted "beyond the scope of [its] authority to effectuate such changes without Diocesan approval." *Id.* at 708. This Court again declined to resolve the internal church dispute, explaining that "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 709-10; *accord Watson v. Jones*, 80 U.S. 726, 727 (1871) (in dispute between two recently separated churches, holding that civil authorities must accept "as final" the decisions of "church judicatories" on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law").

Although a church has substantial discretion to choose its leadership and to "select the personnel who perform important religious functions," PB 25-26, *Kedroff*, *Serbian*, and similar cases do not remotely establish any entitlement to make those decisions without regard to the antidiscrimination laws. Rather, they merely establish the rule, reaffirmed in *Smith* and *Jones*, that civil courts may not take sides in a religious dispute. Perich does not ask any court to do so here, and the Free Exercise Clause poses no impediment to a court's enforcement of the ADA's neutral, generally applicable retaliation provision against Hosanna-Tabor in this case.

c. To the extent the church property cases can be read to support any broader proposition, it is that religious associations possess the *same* First Amendment rights as non-religious associations. *See, e.g.*,

Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17 (1929) ("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…. *Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established by clubs and civil associations*." (emphasis added)); *Watson*, 80 U.S. at 714 ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.").

In this respect, the Free Exercise Clause may "reinforce" the protection of the right of expressive association. *Smith*, 494 U.S. at 882. But even if that understanding would, for instance, result in recognition of a right to select priests and rabbis on the basis of gender, it would not support Hosanna-Tabor's expansive notion that it can act without constraint against teachers of secular subjects in a commercially operated school. That expansion would allow a religious association "'to become a law unto [it]self.'" *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

d. Even if the church property cases stood for the broader proposition Hosanna-Tabor asserts—*viz.*, that even neutral rules must give way to an absolute "right of religious organizations to control their internal affairs," PB15—that would still not grant religious associations the right to discharge teachers of secular subjects at commercially operated schools.

After all, the Justices who disagreed with the majority's approach in *Smith* still believed that a state's significant interference with religious exercise could be overridden by a compelling government interest. *See* 494 U.S. at 894 (O'Connor, J., concurring in judgment). And that remains true even of laws that *target* religious exercise. *See Lukumi Babalu Aye*, 508 U.S. at 531-32. The church property cases are not to the contrary: it is difficult, for instance, to see any significant state interest, much less a compelling one, in determining which branch of the Russian Orthodox Church will control a New York cathedral.

In contrast to those cases, the government has a compelling interest in protecting teachers of secular subjects at commercially operated schools from discrimination and retaliation. Indeed, those interests are particularly compelling in light of the adverse consequences of adopting Hosanna-Tabor's favored rule. *See supra* at 37-42. And the antidiscrimination laws—which typically include robust protections for religious organizations—are plainly narrowly tailored to serve the government's interest.

C. Establishment Clause

The Establishment Clause affords Hosanna-Tabor no categorical entitlement to fire a teacher in retaliation for invoking her rights under the antidiscrimination laws. "A central lesson of [this Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). The antidiscrimination laws are perfectly "neutral toward religion," *id.* at 840,

except that Congress has carved out special *benefits* for religious organizations (such as the co-religionist exception and the ADA's religious-tenets exception) not granted to secular institutions. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding co-religionist exception against Establishment Clause challenge). Nothing on the face of the anti-discrimination laws thus remotely suggests a violation of the Establishment Clause, much less as applied to a teacher of secular subjects in a commercially operated school. And nothing in the Establishment Clause compels accepting the profoundly adverse consequences wrought by Hosanna-Tabor's proposed rule. *See supra* at 37-42.

1. ***Application of the ADA in this case does not amount to state appointment of clergy.***

In arguing that the Establishment Clause grants it a broad license to fire any employee performing an important religious function, Hosanna-Tabor invokes colonial and early state history, when clergy were routinely appointed by politicians or popular vote. PB26-28. Hosanna-Tabor is no doubt correct that "government-appointed ministers were one of the quintessential features of the established church." PB26. But that concern has no bearing on the application of neutral antidiscrimination statutes to employees (like school teachers) who perform significant secular functions in a commercial institution.

The historical evil Hosanna-Tabor describes was the state's power literally to appoint the clergy and to choose who would lead a particular congregation.

PB26-28. A court's application of a neutral law to the question whether a church employee, like a school teacher, suffered an adverse employment action for discriminatory reasons hardly amounts to "government appointment of ministers," PB28, any more than the ordinary application of Title VII amounts to "government appointment" of every employee of every covered employer in the Nation. *See Univ. of Pa.*, 493 U.S. at 198 (EEOC "is not providing criteria that petitioner *must* use in selecting teachers," "[n]or is it preventing [petitioner] from using any criteria it may wish to use, except those—including race, sex, and national origin—that are proscribed under Title VII").

As Hosanna-Tabor's historical analysis demonstrates, moreover, the concern animating the Establishment Clause involved state installation of clergy as leaders of congregations. PB26-28. This case, by contrast, concerns the application of the antidiscrimination laws to church employees operating in commerce and performing important secular functions. Hosanna-Tabor makes no effort to argue that the Establishment Clause was historically concerned with preventing application of neutral rules of general applicability in that situation.

2. ***Application of the ADA in this case presents no entanglement problem.***

a. In Hosanna-Tabor's view, most employment disputes between a church and an employee performing an important religious function "involve inherently religious questions," and "[r]esolving the dispute over the proffered religious reasons would

require the courts to resolve a theological dispute." PB29 (quotation omitted). That is incorrect.

Hosanna-Tabor's rule would encompass any employee viewed by the church to perform important religious functions, regardless of whether she also performs important secular functions. As to such employees, there is no reason to believe that resolution of employment disputes invariably would involve the need to resolve religious questions; they may just as easily raise questions such as whether a math teacher is an effective instructor of geometry. Application of the antidiscrimination laws in those circumstances serves only to assure that one of the reasons for an adverse employment action is not, for instance, that the teacher is disabled. Unless the gravamen of the suit is that a proffered religious justification does not in fact represent an accurate understanding of religious doctrine, courts would have no need to resolve a religious dispute when adjudicating discrimination claims. *See supra* at 44-45.

Nor does LCMS's designation of Perich as a "called" teacher or "commissioned minister" create an Establishment Clause problem where one otherwise would not exist. "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." *Dole*, 899 F.2d at 1396 n.13 (quoting *Sw. Baptist*, 651 F.2d at 283). Religious designations such as "called" or "commissioned" therefore may be insulated from civil scrutiny when made for "religious purposes," *id.*, and Perich does not seek reinstatement of any such religious designation (or reinstatement at all). But such

designations do not control an employee's "extra-religious legal status" under the antidiscrimination laws. *Id.* They thus afford no blanket entitlement to retaliate against the assertion of rights by persons performing important secular functions in a commercial setting.

Finally, insofar as adjudication of a discrimination claim on occasion may risk entangling civil courts in religious questions, that is hardly a reason for a categorical bar. Indeed, "[n]ot all entanglements … have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and … [e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (quotations omitted). This Court has permitted significantly greater—and ongoing—state interference with religious institutions than would arise from the application of the antidiscrimination laws in discrete cases. *See id.* at 211-12 (approving a monthly unannounced visit to religious school teachers' classrooms by a publicly employed field supervisor examining the use of federal grant money); *Bowen v. Kendrick*, 487 U.S. 589, 616-17 (1988) (approving similar ongoing monitoring scheme). Indeed, this Court has long recognized the state's authority to exercise significant regulatory authority over religious schools, including over teacher qualifications. *See supra* at 29-30, 32. Application of the antidiscrimination laws to religious schools should pose no greater concern.

b. Hosanna-Tabor contends that entanglement concerns can become particularly acute when a civil court examines whether a religious organization's proffered reason for an employment action is pretex-

tual. PB29-30, 54-59. Even if true, that contention would have no application in this case, because Perich's retaliation claim does not depend on a showing that Hosanna-Tabor's justification for firing her was pretextual. Rather, the church admits that it fired her in retaliation for suggesting that she would pursue civil antidiscrimination remedies. J.A. 55.

In any event, even in cases involving no such concession by a religious organization that it acted on the basis of a statutorily prohibited criterion, determining the actual reason for the organization's action would not invariably run afoul of the Establishment Clause. In Hosanna-Tabor's view, a civil court in undertaking a pretext analysis would necessarily be called upon to determine whether the "substantive decision was motivated by the Church's religious beliefs." PB57. But asking whether a religious belief *motivated* the decision is distinct from asking whether the church actually *has* the belief. Only the latter question raises serious entanglement concerns, because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

To be sure, a pretext analysis *in certain cases* might raise entanglement concerns. For example, suppose a pastor is dismissed on the stated ground of ineffectiveness in delivering sermons, and he seeks to prove that the decision in fact turned on his race. The Religion Clauses would prevent him from attempting to show that his sermons in fact *were* effective in spreading the Gospel. That is an inherently religious determination outside the ken of a civil

court. But the Establishment Clause would not prevent the plaintiff from introducing evidence showing, for example, that his superiors repeatedly made racially discriminatory remarks. Such a case would not necessarily require engaging the merits of any religious question. Thus, the fact that the Establishment Clause may prevent the application of the antidiscrimination laws in *some* pretext cases does not remotely suggest that it should prevent their application in *all* cases concerning employees who perform important religious functions.

Indeed, this Court has already ratified pretext analysis in a case involving the discharge of a teacher from a religious school. In *Ohio Civil Rights Commission v. Dayton Christian Schools*, the reason given for the discharge was—as here—failure to use an internal dispute resolution program. 477 U.S. 619, 623 (1986). The Ohio Civil Rights Commission "determined that there was probable cause to believe that Dayton had discriminated against [the teacher] based on her sex and had retaliated against her for attempting to assert her rights." *Id.* at 624. The school argued that "the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights" under the Religion Clauses. *Id.* at 628. This Court rejected that argument, holding that "however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of [the teacher's] discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge*." *Id.* (emphasis added).

c. Hosanna-Tabor contends that the very "process of investigating" antidiscrimination claims will lead to civil courts' impermissible entanglement in religious matters. PB31. That argument proves far too much. If merely subjecting churches to standard legal process such as discovery and cross-examination violates the Establishment Clause, no legal action against any religious institution would ever be constitutional. That is not the law. *See, e.g.*, *Jones*, 443 U.S. at 606; *Watson*, 80 U.S. at 722-26. And the district courts possess ample leeway to manage discovery so as to avoid excessive entanglement in any particular case.

Indeed, it is Hosanna-Tabor's favored rule—which requires courts to decide whether an employee performs important religious functions—that poses a more substantial risk of entangling civil courts in religious questions. That test "necessarily requires the court to determine whether a position is important to the spiritual and pastoral mission of the church." *Rayburn v. Gen. Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). To be sure, Hosanna-Tabor believes religious institutions should receive deference on that issue, but it agrees that "deference is not abdication." PB49. When a legal test turns on whether an individual performs "important religious functions," it is inevitable that a court would have to decide which functions are of particular religious significance to a church.

d. Finally, Hosanna-Tabor errs in relying on this Court's decision in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). That case presented the question whether the National Labor Relations Act's grant of

jurisdiction to the NLRB over church-operated schools violated the Religion Clauses. The Court avoided deciding that question by holding that the Act does not grant the NLRB such jurisdiction in the first place. *Id.* at 507.

Because the Court did not reach the constitutional question presented in *Catholic Bishop*, the decision does not establish the proposition that NLRB jurisdiction over religious schools would create excessive entanglement, much less that application of the antidiscrimination laws would do so. Moreover, the degree of entanglement inherent in extending NLRB jurisdiction over religious schools—including the Board's continuing authority to determine and adjudicate "unfair labor practices," and the requirement that the church engage in collective bargaining with teachers, 29 U.S.C. § 158(a), (d)—is far more substantial than would be raised by applying the antidiscrimination laws to religious schools in individual cases. As this Court explained, NLRB jurisdiction over church-school teachers would reach "nearly everything that goes on in the schools." 440 U.S. at 503 (quotation omitted). Not so with the antidiscrimination laws, which are concerned solely with whether adverse employment actions are made on the basis of a protected status.

At any rate, the law on excessive entanglement has changed considerably since *Catholic Bishop*, which relied heavily on the earlier opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* 440 U.S. at 501. Decisions since then have sanctioned substantial government monitoring of religious institutions, *see supra* at 53, and have established as a "central lesson" that "neutrality towards religion" is a princi-

pal consideration in Establishment Clause challenges, *Rosenberger*, 515 U.S. at 839. The antidiscrimination laws are neutral towards religion, and their application to religious institutions in the same manner as to secular institutions does not violate the Establishment Clause.

III. The First Amendment Poses No Remedial Bar In This Case

Hosanna-Tabor argues that the Establishment Clause forecloses one of the principal remedies afforded to successful civil rights plaintiffs—reinstatement, or its monetary equivalent, 42 U.S.C. §§ 2000e-5(g)(1), 12117(a); *see* PB26. Because Perich no longer seeks reinstatement, this case presents no occasion for addressing whether she could be reinstated consistent with the Establishment Clause. But the Clause would pose no bar to Perich's reinstatement in any event, and certainly does not prevent an award of money damages.

1. Perich no longer seeks reinstatement. But even if she did, she, like any ADA plaintiff, would be entitled to seek all remedies affecting her employment status, including reinstatement to her position as a school teacher with the same responsibilities and employment benefits. *See Landgraf*, 511 U.S. at 254 (antidiscrimination laws seek to make "persons whole for injuries suffered through past discrimination" (quotation omitted)).

Hosanna-Tabor's concern about "government-appointed clergy" (PB51) is not implicated here. As explained, the historical concern about "government-appointed clergy" involved the government actually ordaining heads of congregations, not applying neu-

tral rules of general applicability to the selection of teachers in a commercial setting. *See supra* at 50-51. Nothing in the history of the Establishment Clause prevents reinstatement of (or money damages to) a teacher such as Perich when her employer violates neutral, generally applicable laws.

2. a. Even if reinstatement would implicate the First Amendment on the facts of this case, that would be no reason to bar other relief, including back pay and front pay (subject to a mitigation requirement, *e.g.*, 42 U.S.C. § 2000e-5(g)), compensatory damages, and attorneys fees. In the context of employment contracts, it has long been the law that "[a] promise to render personal service will not be specifically enforced," but can be enforced through money damages. There is a longstanding distinction between awarding specific performance and damages. Restatement (Second) of Contracts § 367 (1981); *see* Corbin on Contracts § 1204 (2006).

This rule is based, in part, "upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone." Restatement (Second) of Contracts § 367 cmt. a. Accordingly, just as courts for centuries have avoided a reinstatement remedy because it would be "undesirable" after "disputes have arisen and confidence and loyalty are gone," courts can award money damages in lieu of reinstatement when it would be inappropriate to "impose an unwanted" employee on the association. PB37.

Indeed, federal courts already fashion equitable remedies in applying the antidiscrimination laws. Those laws empower courts to "order such affirma-

tive action *as may be appropriate*, which *may include*, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or *any other equitable relief as the court deems appropriate*." 42 U.S.C. § 2000e-5(g)(1) (emphases added). Courts routinely grant front pay in lieu of reinstatement in "cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers." *Pollard*, 532 U.S. at 846; *see, e.g.*, *EEOC v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000); *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998). Front pay thus is fully available in situations where a reinstatement remedy would result in a plaintiff "unwanted" by her employer—whether her employer is a private company or a church.

b. Hosanna-Tabor errs in suggesting that awarding back pay and front pay is impermissible because it embodies a judgment that the discharged employee "should have been a minister." PB51. An award of back pay and front pay instead stems from the recognition that the church violated the antidiscrimination laws. While application of those laws in particular circumstances could make it inappropriate to order reinstatement, there is no basis for avoiding an award of back pay or front pay.

Hosanna-Tabor also contends that the mere threat of monetary liability would unduly inhibit its ability to select its ministers because it "would have to be exceedingly cautious about rescinding a call." PB51. Again, however, Hosanna-Tabor would only need to be exceedingly cautious about violating the

antidiscrimination laws where, as here, those laws are constitutional as applied.

3. Finally, and at the very least, even if front pay were unavailable as a monetary substitute for reinstatement, there would still be no categorical bar against a civil court's adjudicating Perich's retaliation claim. Perich also seeks back pay, compensatory damages, and attorneys fees, J.A. 17-18; Pet. App. 73-74a, which are not substitutes for reinstatement.

* * * * *

No one questions Hosanna-Tabor's belief that Cheryl Perich performed important religious functions in her job. But it is similarly beyond question that she performed important secular functions in a commercial setting, and the government has a strong interest in assuring that she and others in her position can do so free of invidious discrimination. Perich asks the federal courts to vindicate her rights under neutral, generally applicable antidiscrimination laws to be free of unlawful retaliation. The First Amendment poses no obstacle to resolution of that claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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