No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS

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

BRIEF FOR THE EVANGELICAL COVENANT CHURCH, EVANGELICAL LUTHERAN CHURCH IN AMERICA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INC., GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, REV. GRADYE PARSONS, STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AND SALVATION ARMY NATIONAL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

These *Amici* will address the following question:

Whether the unanimous holdings of twelve Courts of Appeal, both before and after *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that religious institutions have the right to hire, fire, direct, and discipline employees who perform religious functions, without second-guessing by secular authorities, is properly grounded in the First Amendment Religion Clauses.

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INTERESTS OF *AMICI CURIAE*[*]

Amici, religious denominations and institutions described more fully in the attached Appendix, file this brief to address the constitutional basis for the ministerial exception. Respondents have not explicitly questioned the existence or legitimacy of the ministerial exception, but only its scope and reach. Similarly, the lower courts are unanimous in recognizing the exception, although there has been some disagreement regarding its precise reach. But some academics have questioned the exception, and *Amici* anticipate that *amici* in support of Respondents will argue that the ministerial exception lacks support in this Court's recent Free Exercise Clause cases, especially *Smith*. *Amici* intend here to explain why that is not so. Moreover, *Amici* believe an analysis of the historical and doctrinal foundations for the ministerial exception will assist the Court in defining its reach as well as affirming its legitimacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every federal Court of Appeals to address the question has concluded that the First Amendment Religion Clauses entail a "ministerial exception" that precludes governmental intervention into the selection of clergy and other religiously significant employees. *See* Pet. Br. 17 n.10. Some of these decisions were rendered before this Court's decision in *Em-*

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *Amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *Amici*, has contributed monetarily to the preparation or submission of this brief.

ployment Division v. *Smith*, 494 U.S. 87 (1990), and some were rendered after that decision. No Court of Appeals has concluded that *Smith* in any way undercuts the ministerial exception.

The issue of church-state separation posed by the ministerial exception cases arises most frequently in the context of antidiscrimination laws, but it can arise also under labor law, unemployment compensation, contracts, wrongful discharge laws, and any other laws under which secular courts or agencies have occasion to question the basis for a religious institution's act of hiring, firing, disciplining, or controlling its religious employees. In each context, the question is whether governmental intervention threatens the essential separation between church and state that is embodied in the Religion Clauses.

The ability of churches — by which we mean religious institutions of all faiths — to determine their own doctrines and modes of worship, their own structures and systems of authority, and their own personnel, free from government interference, lies at the very core of this Nation's decision to foreswear any national establishment of religion and to guarantee the free exercise of religion to all faiths and denominations. Most important, government cannot interfere with "[f]reedom to select the clergy." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). "'[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.'" *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 711 (1976) (quoting *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929)). This principle inheres in the separation of church and state. The state may no more control the church — its doctrines,

structures, and personnel — than the church may control the state. *See Sch. Dist. of Abington Twp., Pa.* v. *Schempp*, 374 U.S. 203, 227 (1963) (Douglas, J., concurring). A religious institution can speak and act only through its appointed representatives and officers: its ministers and religious employees. It must have the freedom to choose who they are and to evaluate their performance under its own criteria.

The projection of nondiscrimination norms, originally crafted for application to the public institutions of government and commerce, onto religious societies generates two important types of church-state conflict. First, some of those nondiscrimination norms are flatly inconsistent with long-standing ecclesiastical and theological practices of a sacred nature. The most prominent example is the limitation of clergy in the Eastern Orthodox, Roman Catholic, Orthodox Jewish, Islamic, and some Protestant faiths to men. Other religious groups have requirements based on age, ethnicity, marital status, sexual practice, renunciation of rights to property (including minimum wages), familial lineage, or other factors that would rightly be regarded as invidious for employment decisions in the public and commercial spheres. Some churches, such as the autocephalous churches of Eastern Orthodoxy, are tied to particular nationalities; others, wishing to communicate effectively to particular ethnic communities, will deliberately seek out ministers and workers who share a community's ethnic character. Even the fundamental category of "religion" is sometimes partly a matter of ethnicity, as the examples of Judaism and some Native American religions illustrate. If there were no ministerial exception, all these faiths would be at legal risk.

Second, even when ecclesiastical requirements

and nondiscrimination laws are entirely in agreement, civil enforcement transfers power over employment decisions from the church to the state. Whenever a member of a protected class who has suffered an adverse employment action files a charge of discrimination, the question quickly becomes whether the church's reasons for its action were pretextual. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973). Where, as is always the case when the ministerial exception applies, the employee's responsibilities are religious in nature, the reasons for the employment action necessarily will involve religious considerations: namely, whether the employee was carrying out the mission of the church in accordance with the church's standards. That is not a proper subject for governmental inquiry. "Federal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional trespass on the most spiritually intimate grounds of a religious community's existence." *Hankins* v. *Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (Sotomayor, J., dissenting) (citation, alteration, and quotation marks omitted).

The right of churches to choose their own clergy long antedates the compelling interest test for burdens on religious exercise, which this Court repudiated in *Smith*. *See* 494 U.S. at 887. Indeed, it is as old as the Republic.

James Madison wrote long ago that the "Civil Magistrate is [not] a competent Judge of Religious truth." *Memorial and Remonstrance Against Religious Assessments* ¶ 5 (1785), *in Church and State in the Modern Age* 59, 61 (Maclear ed., 1995). If the separation of church and state means anything, it means that secular courts and agencies have no com-

petence to second-guess a church's evaluation of a religious worker's performance of a religious mission. Religious organizations must be "free to select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (quotation marks omitted). This principle was expressly recognized and affirmed in *Smith*, and it is nowise diminished by this Court's recent cases.

ARGUMENT

I. The First Amendment Ended The Prior Authority Of Government To Intervene In The Selection And Discipline Of Clergy.

The Framers of the United States Constitution had decades of experience with government control over the qualifications, selection, discipline, and dismissal of clergy. Whatever else it meant to forbid an "establishment of religion" and instead to guarantee the "free exercise thereof," these phrases unequivocally meant that the new republican government would cease to have power to control the practice of religion by controlling the selection and discipline of clergy. These matters, central to their separate and independent existence, would be left to religious societies themselves.

A. The Prior Regime Of Established Religion

1. The Church Of England

The very essence of the "church by law established" in the United Kingdom and in colonial America prior to Independence — as reflected in the Supremacy Act and the Uniformity Acts — was the government's control over the selection and oversight of

ministers. The Act of Supremacy, originally passed in 1534, made the English monarch the supreme head of the Church of England with authority to "repress and extirp all errors, heresies and other enormities and abuses." Supremacy Act, 1534, 26 Hen. 8, c.1 (Eng.). As the head of the Church of England, the monarch stepped into the shoes of the Roman Catholic pontiff, assuming his authority to name the high officials of the Church. *See id.*; *see also* Act Restraynyng the Payment of Annates, 1534, 25 Hen. 8, c.20 (Eng.); William Blackstone, 1 *Commentaries* *376-383. The various Acts of Uniformity, which were periodically reenacted in slightly different forms, controlled religion in the kingdom by limiting service as a minister to persons who formally assented to the Thirty-Nine Articles of Faith (also enacted by Parliament) and agreed to follow the form of worship set forth in the Book of Common Prayer.[1] Any minister refusing to swear an oath of unfeigned assent to the Book and everything therein would "(ipso facto) be deprived of all his Spiritual Promotions." Act of Uniformity, 1662, 14 Car. 2, c.4 (Eng.). Government domination of religious practice was completed by enactment of additional Penal Law that prohibited unlicensed religious meetings and gatherings.[2]

Hobbes explained why. Thomas Hobbes, *Levia-*

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[1] *See* Act of Uniformity, 1662, 14 Car. 2, c.4 (Eng.); Act of Uniformity, 1559, 1 Eliz., c.2 (Eng.); First Act of Uniformity, 1549, 2 & 3 Edw. 6, c.1 (Eng.); *see also* G.R. Elton, *The Tudor Constitution: Documents and Commentary* 344-345, 397, 402-403 (2d ed. 1995).

[2] *See* Five-Mile Act, 1665, 17 Car. 2, c.2 (Eng.); Conventicles Act, 1664, 16 Car. 2, c.4 (Eng.); Act Against Papists, 1593, 35 Eliz., c.2 (Eng.).

than, ch. 42 (1651) (MacPherson ed., 1968) ("Of Power Ecclesiasticall"). "[M]en's actions are derived from the opinions they have of the Good, or Evill, which from those actions redound unto themselves," including eternal ones, and the sovereign necessarily must have power to control the public teaching of religion to ensure "the conservation of Peace among their Subjects." *Id*. at 567-568. Kings are the "Supreme Pastors of their people, and have power to ordain what Pastors they please, to teach * * * the People committed to their charge." *Id*. at 568. One of the tenets to which all clergy had to subscribe was the belief in the authority of the King or Queen in all matters spiritual and temporal. *See* Book of Common Prayer, Article of Religion 37 (1662) (Baskerville ed., 1762).

The system thus combined establishment and control of the official church with prohibition of the free exercise of religion by any other. In addition, the bishops of the Church sat (and voted) in the House of Lords. Through the Test and Corporation Acts,[3] civil and military offices, including the right to practice law or teach at Cambridge or Oxford, were limited to communicant members of the established church. Thus, the Crown maintained control over the church, and adherence to the church was a prerequisite to holding public office.

The idea of "toleration," as embodied in the Act of Toleration of 1689, was to broaden the range of permissible clergy to allow Presbyterians, Baptists, Independents, and other Trinitarian Protestants to

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[3] Second Test Act, 1678, 30 Car. 2, c.1 (Eng.); First Test Act, 1673, 25 Car. 2, c.2 (Eng.); Corporation Act, 1661, 13 Car. 2, c.1 (Eng.).

serve as ministers, even though they did not subscribe to the entire doctrine and forms of worship of the Church of England. Toleration Act, 1689, 1 W. & M., c.18 (Eng.). The government still maintained control, and no one could be a minister without government sanction. Toleration of Roman Catholicism, Unitarianism, and Judaism would wait another 150 years. *See* Ursula Henriques, *Religious Toleration in England: 1787-1833*, at 137, 188, 209 (1961).

2. The Anglican Colonies In America

On this side of the Atlantic, in colonies with established churches, the government similarly exercised ecclesiastical authority by controlling the selection, duties, and discipline of the clergy. In the colonies with the established Church of England — the five southern colonies from Maryland to Georgia, plus metropolitan New York — royal governors effectively controlled who would serve in the colony's pulpits. *See* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 1 (1994); Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 117, 330-333 (1902). Men wishing to serve as Anglican ministers also had to travel to the court of the Bishop of London and there swear an oath of allegiance to the Crown. *See id.* at 332; *see also* Nancy L. Rhoden, *Revolutionary Anglicanism: The Colonial Church of England Clergy During the American Revolution* 14 (1999). Virginia's First Charter required that all ministers would "provide that the Word and Science of God be preached, planted, and used * * * according to the rites and doctrine of the Church of England." Cobb, *supra*, at 74-75. Its Second Charter required an oath of supremacy specifically recognizing the monarch as head of the church. *Id.* And, as in England, the Virginia government extensively re-

gulated the conduct and discipline of clergy and other church leaders, empowering the governor to "suspend and silence" ministers' preaching without government approval. *See* William Waller Hening, 2 *The Statutes at Large; Being a Collection of All the Laws in Virginia* 46 (1823); *see also* H.J. Eckenrode, *Separation of Church and State in Virginia* 13 (1910). This model prevailed throughout the South, with variations.

Under canon law, Anglican ministers could be removed only by the relevant bishop (himself appointed by the Crown). Because there was no bishop in America, this function devolved upon the royal governor, which meant that both licensing and discipline of clergy was under gubernatorial control. When appointment of an Anglican bishop was suggested for America — Jonathan Swift's name was prominently mentioned as a candidate — Americans both in the Church of England and in the dissenting churches rebelled, thinking (with reason) that this would augur centralized control of the clergy, and with it a step toward uniformity in the practice of religion, to the detriment of dissenters. Cobb, *supra*, at 463-470; Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 126-129 (1986). As John Adams wrote, the proposal "excited * * * a general and just apprehension that Bishops, and Dioceses, and Churches, and Priests, and Tythes were to be imposed upon us by Parliament. * * * [A]nd if Parliament could tax us, they could install the Church of England, with all its Creeds, Articles, Tests, Ceremonies, and Tithes, and prohibit all other Churches as Conventicles and Schism-shops." Cobb, *supra*, at 470 (quoting Adams). The Virginia House of Burgesses passed a resolution

declaring the request for an English bishop a "pernicious project." *Journals of the House of Burgesses of Virginia 1770-1772*, at xxxi-xxxii (Kennedy ed., 1906).

As in the Mother Country, toleration arrived in Virginia, slowly, in the form of gubernatorial licensure of clergy from outside the Church of England, first Presbyterians and later a few others. Baptists refused as a matter of principle to seek licenses from the state, believing the call to ministry to be a wholly spiritual matter in which the government could not properly be involved. *See* Curry, *supra*, at 102; Eckenrode, *supra*, at 37-39; Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia 1765-1775*, 31 Wm. & M. Q. 345, 366-367 (1974) (noting that in 1771, the Separate Baptists moved to deny fellowship to any minister who applied to the government for a license); George M. Brydon, 2 *Virginia's Mother Church* 181-182, 186-187 (1952). As a result, traveling Baptist preachers were jailed in Virginia for preaching without a license, even on the eve of the Revolution. James Madison's first known writing on the subject of religious liberty, a letter written in 1774 to his school friend William Bradford, noted:

> There are at this time in the adjacent county not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So

> I must beg you to pity me, and pray for liberty of conscience to all.

Letter from James Madison to William Bradford (Jan. 24, 1774), *in* 1 *Letters and Other Writings of James Madison, 1769-1793*, at 10-13 (Lippincott ed., 1865).

3. New England

Establishment of a different sort — localized, more democratic, non-royal, dissenting — prevailed in the New England colonies of Connecticut, Massachusetts, New Hampshire, and Vermont prior to Independence. There also, control over selection of clergy was a centerpiece of the system. In the heyday of the New England Way in the 17th Century, the freeholders of each town had authority to choose the minister for the town church. Although in theory a minister of any denomination might be selected, the overwhelmingly Congregationalist (or "Puritan") character of the populace guaranteed a Congregationalist minister. *See* Jacob C. Meyer, *Church and State in Massachusetts from 1740 to 1833*, at 10-11 (1930); Curry, *supra*, at 89, 108. When that homogeneity began to break down — for example, in 1693 the town of Swansea voted to install a Baptist minister — the colonial legislature took various steps to ensure ministerial orthodoxy. For a period, cases of church-town conflict were referred to councils made up of neighboring churches, which virtually guaranteed Puritan orthodoxy, as dissenters might predominate in a town but were unlikely to predominate in a wider area. *See* Meyer, *supra*, at 11. Later, county courts were empowered to determine which minister would receive public support. *Id.* at 12. As a final expedient, the General Court — the colony's elected central gov-

ernment — reserved the power to appoint "learned and orthodox" ministers when towns failed to do so. *Id.* at 12. Only after Unitarian ministers began to win election in large numbers in the towns around Boston, in the 1830s, was this system abandoned and each church given the freedom to choose its own minister in accordance with its own doctrine and ecclesiology. *See* Cobb, *supra*, at 514-515.

Non-Congregationalist dissenters protested these arrangements because they gave the force of the state to the majority's religious judgment. As expressed by the Baptists of Ashfield, Massachusetts in a 1768 petition to the General Court: "if we may not settle and support a minister agreeable to our own consciences, where is liberty of conscience?" Stanley Grenz, *Isaac Backus — Puritan and Baptist* 172 (1983) (citations and quotation marks omitted).

In addition, the Massachusetts colonial legislature passed laws governing the training and qualifications of ministers, to ensure an "able, learned, and orthodox" ministry. Curry, *supra*, at 82 (quoting Massachusetts law). To combat the rise of itinerant preaching during the Great Awakening, which tended toward antinomianism and undermined the authority of local church leaders and ministers, some of the Puritan colonies enacted laws prohibiting preaching by anyone other than the "settled minister" of the town, unless he received permission from that minister. *Id.* at 96-97; *see also* William G. McLoughlin, 1 *New England Dissent, 1630-1833: The Baptists and the Separation of Church and State* 363 (1971). These laws generated controversy because they implied that the government had jurisdiction to control the preaching of the word of God. In a preview of disestablishmentarian sentiment that would come to the fore decades

later, many supporters of the Awakening denounced this exertion of government power over the church. In the best known and most oft-cited of these tracts, the Rev. Elisha Williams, a former rector of Yale College, argued that a law prohibiting uninvited ministers from preaching outside their own parishes was a violation of the "rightful dominion" of Christ, and no more legitimate than if "the king of France [should] take it into his head to prescribe laws to the subjects of the king of Great Britain." Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), *in* 1 *Political Sermons of the American Founding Era, 1730-1805*, at 68 (Sandoz ed., 2d ed. 1998). The legislature's attempt to regulate who could perform the ministerial function was an "unjust usurp'd authority." *Id.*

B. Disestablishment And Free Exercise

1. State Constitutional Developments

With the Revolution came almost immediate disestablishment of the Church of England in the revolting colonies. The Church's doctrinal commitment to the supremacy and authority of the royal monarch rendered the Church of England unpalatable in revolutionary America. Unsurprisingly, Anglican ministers, who had all taken oaths of loyalty to the Crown, were among the most active proponents of the Loyalist cause in America. *See* Rhoden, *supra*, at 6-7, 65, 67-78, 82-87. The establishment had been premised on the belief that state-selected clergy would inculcate belief in submission to the authority of the sovereign. It worked. The vast majority of Church of England ministers supported the Crown in opposition to the Revolution, while ministers selected by their own congregations almost uniformly adopted the op-

posite stance. *Id.*

In the newly independent and republican states, constitution drafters grappled with (among many other questions) the issue of church and state. Every state with a bill of rights or its functional equivalent — eleven in total — guaranteed the free exercise of religion. The possibility of establishment generated more controversy. Some states, such as Pennsylvania, Rhode Island, and Delaware, never had any establishment, and did not seriously consider creating one. *See* Curry, *supra*, at 159-161. Four New England states (but not Rhode Island) decided to continue a version of the localized New England Way, but with broader provisions allowing dissenting Protestants to opt out of the obligation to support the town majority church in favor of supporting their own. *See id.* at 162-192. Other states, among them New Jersey, Maryland, Virginia, South Carolina, and Georgia, debated creation of some form of what might be called a multiple establishment, in which residents were required to support, and perhaps to attend, a church, but were permitted to choose which one. Virginia famously debated such a proposal, championed by Patrick Henry, but rejected it after a determined campaign of opposition led by James Madison and supported by the absent Thomas Jefferson. Maryland and Georgia adopted such a system, but never put it into effect. *See id.* at 134-158.

Significantly, opposition to the multiple establishment system was based not only on its coerced support for religion, but also on the government control it would entail over the clergy and the church, which would have the additional effect of corrupting religion itself. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. &

Mary L. Rev. 1831 (2009). The founding generation considered this unacceptable. *See, e.g.*, Declaration of the Virginia Association of Baptists (Dec. 25, 1776), *in* 1 *The Papers of Thomas Jefferson* 660-661 (Boyd ed., 1950) (reasoning that if "the State provides a Support for Preachers of the Gospel," the State would gain the right to "judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach") (emphasis in original); Koppelman, *supra*, at 1848-1893.

The selection of clergy was front and center during these state constitutional debates, as is most evident in the states that maintained an established church at the Founding and subsequently disestablished it. As part of the legal specification of what disestablishment meant, each of these States amended its constitution to declare, in various words, that "religious societies" enjoyed the "exclusive right" of selecting ministers and religious teachers. Me. Const. of 1820, art. I, § 3 ("[A]ll religious societies * * * shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."); *see* N.H. Const. of 1784, pt. I, art. VI ("religious societies, shall at all times, have the exclusive right of electing their own public teachers"); Conn. Const. of 1818, art. VII, § 1 ("each and every [religious] society or denomination" has the "power and authority to support and maintain the ministers or teachers of their respective denominations"); Mass. Const. of 1780, amend. XI (1833) ("the several religious societies of this commonwealth * * * shall ever have the right to elect their pastors or religious teachers"). Freedom to select ministers was seen as an essential element of disestablishment.

Similarly, the Constitution of South Carolina,

which contained a unique form of limited establishment, *see* Curry, *supra*, at 210, also provided that "the people of this State may forever enjoy the right of electing their own pastors or clergy," S.C. Const. of 1778, art. XXXVIII. In one state, Maryland, long accustomed to establishment, the legislature proposed to create public officers to ordain clergy for the Anglican Church, but this proposal was defeated. *See* Curry, *supra*, at 154. No state in early America deviated from this pattern: where there was an establishment of religion, meaning compelled financial support, either governmental bodies or the political electorate controlled selection of clergy, but non-established churches enjoyed freedom to select clergy independently of the state.

2. The Framing Of The First Amendment

Three States — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom among their proposed amendments to the federal Constitution, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Madison then, at the first session of Congress, proposed the First Amendment.

The First Amendment's Religion Clauses are precisely structured to guarantee against both sides of the establishment coin, at least at the federal level. The federal government would have no authority to pass laws equivalent to the Supremacy or Uniformity Acts, or to compel attendance or support for a church, thus depriving this new and distant government of the Hobbesian power to create an official church with

doctrines and personnel under state control.[4] By the same token, all religious societies would be free to exercise their religious faith in accordance with their own doctrines, forms of worship, and ecclesiastical structure.

Although the debates in the First Congress over what would be the Establishment Clause are sparse, we know that the core of the idea was to prevent government control over church affairs through an American version of the Uniformity Acts. Indeed, the Senate, which evidently had a narrower conception of religious liberty than the House, proposed an alternative that would have done little more. It read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion * * * ." S. Journal, 1st Cong., 1st Sess. 129 (Sept. 9, 1789). The "establishment" of "articles of faith" and "modes of worship" concisely describes the Acts of Uniformity, which, as explained above, preconditioned the license to be a minister on his oath to support the Thirty-Nine Articles of Faith and the Book of Common Prayer. We would have no such thing in America. Instead, all churches would enjoy the "free exercise" of religion, meaning, at a minimum, the authority to control their own criteria for selection of clergy, doctrines, and liturgy. The House of Representatives insisted on a broader formulation, which is best read to preclude mandatory attendance

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[4] We do not claim, of course, that the only purpose of the Establishment Clause was to prevent erection of a formally established church. But that was obviously its central and most important effect. Moreover, the freedoms of speech, press, and particularly assembly provided additional guarantees of freedom for both religious and nonreligious societies, but those provisions are beyond the scope of this brief.

and support as well, and perhaps other interference with religious freedom, *id.* at 150-152 (Sept. 25, 1789), but there can be little doubt that the uncontroversial core of the Amendment, shared by both Houses, was essentially a liberation of the church, all churches, from the kind of governmental control that had been exercised under the prior regime.

It would be a mistake, therefore, to view the two Religion Clauses as isolated provisions, one prohibiting support or "advancement" of religion, *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), and one prohibiting laws specifically directed against religion, *Smith*, 494 U.S. at 874. Rather, the separation of church and state reflected in the conjunction of the two clauses is as much a powerful protection of the independence of religious societies from the state as it is a guarantee against the abuse by those societies of governmental power to advance their causes. As Thomas Jefferson explained, "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." Letter from Thomas Jefferson to Reverend Samuel Miller (Jan. 23, 1808), *in* Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* 153 (2002).

Not surprisingly, therefore, when the issue of government involvement in clergy selection first surfaced at the federal level, Secretary of State James Madison, after consulting with President Jefferson, declared in ringing terms that "the selection of ecclesiastical individuals" is entrusted entirely to the churches. Letter from James Madison to Bishop John Carroll (Nov. 20, 1806), *in* 20 *The Records of the American Catholic Historical Society* (Mar. 1909).

After completion of the Louisiana Purchase, Roman Catholic Bishop John Carroll, in imitation of European practice, consulted the Secretary of State about who to appoint to direct the church's affairs in the new territory. Madison responded that the appointment of church "functionaries" was "entirely ecclesiastical," and that he would adhere to "the scrupulous policy of the Constitution in guarding against a political interference in religious affairs." *Id.* It bears notice that Madison used the broad language of "functionaries" and "religious individuals" instead of the narrower language of clergy, bishop, or minister.

C. Early Common Law Cases

These principles of church-state separation often found expression in common law cases during the antebellum period. In *German Reformed Church* v. *Seibert*, 3 Pa. 282 (1846), for example, the Pennsylvania Supreme Court confronted the question whether a civil court could countermand a church's excommunication of a member. The court said no: Ecclesiastical tribunals "are the best judges of what constitutes an offence against the word of God and the discipline of the church," and "civil courts, if they should be so unwise as to attempt to supervise [ecclesiastical] judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt." *Id.* at 291; *see also Wardens of Church of St. Louis* v. *Blanc*, 8 Rob. (La.) 51, 84-85 (La. 1844); *Harmon v. Dreher*, 17 S.C. Eq. 87, *18 (S.C. Ct. App. Eq. 1843); *Shannon v. Frost*, 2 B. Mon. 253, 258 (Ky. Ct. App. 1842). As the Supreme Court of Judicature of New Jersey reasoned, "if the civil power prescribed rights of membership at all, it would naturally accommodate them to such doctrine, discipline and government as were most comfortable

to its own faith; which is the very groundwork of a religious establishment." *State* v. *Crowell*, 9 N.J.L. 390, 418-419 (1828); *see also* R.H. Tyler, *American Ecclesiastical Law* § 101 (1866) ("All questions relating to the faith and practice of the church and its members, belong to the church judicatories themselves.").

D. The Religion Clauses During The Post-Civil War Era

Reconstruction saw further debate about the scope of the Religion Clauses and the ability of religious groups to define their own membership and select their own leaders. Significantly, during the period of post-Civil War constitutional change, Americans and their representatives debated the scope of constitutional protections, including the Religion Clauses, and, in 1868, adopted the Fourteenth Amendment, by which the First Amendment is applied to the States. Legislative debates and judicial opinions from this era indicate that 19th Century Americans believed that the Religion Clauses protected a church's choice of minister. Though separated by time from the adoption of the First Amendment, such post-Civil War "understanding of the origins and continuing significance of the Amendment is instructive." *District of Columbia* v. *Heller*, 554 U.S. 570, 614 (2008).

1. Post-Civil War Legislative Debates

Immediately after adoption of the Fourteenth Amendment, Congress debated an issue very closely on point: whether generally applicable civil rights legislation could be applied to churches in such a way as to limit their right to discriminate with respect to members. An early version of what became the Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335-337

(1875),[5] extended the prohibitions of the Act to "church institutions" in common with railroads, inns, theaters, schools, and most other public conveyances and meeting places. Cong. Globe, 41st Cong., 2d Sess. 3434 (May 13, 1870) (Sen. Sumner). This is much like the application of Title VII or the ADA to Hosanna-Tabor. After a number of Senators objected on First Amendment grounds, churches were excised from coverage. *See* Cong. Globe, 42d Cong., 2d Sess. 899 (Feb. 8, 1872).

Senator Frederick Frelinghuysen of New Jersey — later floor leader in support of the Civil Rights Act — argued that the Act's application to the inner workings of churches was "an infringement of the Constitution." *Id.* at 896 (Feb. 8, 1872). He raised a series of hypothetical applications of the provision, which would be equally applicable to Title VII in the absence of a ministerial exception:

> Now, the Japanese, in California, see proper to make nationality, we will suppose, a part of their religion, and to exclude all who do not belong to their people from their worship; or, the Huguenots of South Carolina might form a religious society, and one of their regulations be that no one should be a member unless a descendant of the Huguenots; or, the Scotch Presbyterians might declare that none shall be connected with

[5] The public accommodation provisions of the Civil Rights Act of 1875, which applied to private conduct, were invalidated in the *Civil Rights Cases*, 109 U.S. 3 (1883), as beyond the scope of the enforcement power granted to Congress by section 5 of the Fourteenth Amendment.

> their church unless producing a certificate from the church at home; or, the Africans might form a church making emancipation an essential to membership.

Id. at 847 (Feb. 6, 1872). The Act's "equal rights" mandate in such instances, he said, would impose "a restriction upon the perfect freedom of religious worship" by denying a church the "liberty to exclude those who do not meet the requirements stated." *Id.*

Other supporters of the Act likewise objected to the provision on constitutional grounds. Senator Matthew Carpenter of Wisconsin explained that the Act's application to churches was "in violation of the spirit of the Constitution in that it disregards the opinions and the motives of those who framed the Constitution, and is in conflict with what they believed they had secured." *Id.* at 759 (Feb. 1, 1872). Citing the debates in the Constitutional Convention and the Federalist Papers, Carpenter argued that "they who framed the Constitution of the United States intended to, and thought they had, carefully excluded the whole subject of religion from Federal control or interference." *Id.* He claimed, moreover, that the Religion Clauses were not directed solely "against the establishment of a particular faith to the prejudice or exclusion of others," but also barred certain laws that apply "equally upon all and compel[] all to observe its precepts." *Id.* Similarly, Senator Oliver Morton of Indiana argued that "[p]eople have a right to say how they will worship, what they will worship, and with whom they will worship; and, if they have a right to say how they will worship, and with whom they will worship, then under the Consti-

tution of the United States you cannot pass this provision with regard to churches." *Id.* at 898 (Feb. 8, 1872); *see also id.* app. at 5 (Jan. 25, 1872) (Sen. Lot Morrill) (citing Free Exercise Clause and arguing that provision "invade[s] the church"). Still other Senators objected to the provision on religious liberty grounds without explicitly invoking the Constitution. *See id.* at 897 (Feb. 8, 1872) (Sen. Anthony) ("I will not vote to put the first law upon the statute-book of the United States that interferes with religion * * * I would not * * * punish men for shutting the doors of their churches against any persons whom for any reason whatever they do not want to come into them; nor would I compel them to open or close their doors."); *id.* at 897-898 (Sen. Corbett) (similar).[6]

That is not to say that these Senators believed that the First Amendment generally exempted religious individuals from compliance with neutral and generally applicable statutes. Quite the contrary, Senator Frelinghuysen readily accepted that the Religion Clauses "do not mean that Congress shall pass no law regulating a man's opinions or feelings" and "do not mean that Congress shall pass no law regulating man's external conduct." *Id.* at 847 (Feb. 6, 1872). Instead, "the Constitution provides that Congress *shall pass no law prohibiting the free exercise of worship*." *Id.* (emphasis added); *see also id.* ("The 'exercise of religion' means worship. It can mean nothing else."). A religious institution's ability to define

[6] To be sure, some Senators, including Senator Sumner, argued that application of the Act to churches did not violate the Constitution, *see, e.g.*, *id.* at 823-826 (Feb. 5, 1872); *id.* at 843 (Feb. 6, 1872) (Sen. Sherman). Their views, however, did not prevail, and even Senator Sherman ultimately voted to drop the reference to churches. *See id.* at 897 (Feb. 8, 1872).

the members of a congregation was an integral part of this "free exercise of worship." Evidently, the Congress that enforced the Fourteenth Amendment regarded the issue confronted by this Court in *Smith* as entirely distinct from the question of the freedom of churches to select members and leadership.

2. Post-Civil War Cases

Contemporaneously with the debate over the application of the Civil Rights Act to churches, this Court considered in *Watson* v. *Jones*, 80 U.S. 679 (1872), whether civil courts could properly determine who, within a church structure, was its proper leadership. The case arose out of a dispute between two bodies of a Presbyterian Church in Louisville, Kentucky over the subject of slavery. *See id.* at 681. The General Assembly of the Presbyterian Church formally recognized the anti-slavery faction, at which point members of the pro-slavery faction claimed that the General Assembly had abandoned its settled doctrine in determining that they did not represent the local church.

Echoing the state common-law cases from the preceding decades, this Court rejected the argument. The Court reasoned that, in the context of internal church disputes, "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727. Although *Watson* was a diversity case that did not expressly call for the application of the Religion Clauses, the Court based its reasoning on a "broad and sound view of the relations

of church and state under our system of laws." *Id.* The Court explained that it was "unquestioned" that voluntary religious associations possessed the "right" "to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association." *Id.* at 728-729. Civil courts thus had no role in second-guessing the internal decisions of religious associations. To the contrary, "[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Id.* at 729. Accordingly, ecclesiastical determinations internal to the church "should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." *Id.*; *see also id.* at 730-731 ("'The judgments * * * of religious associations, bearing on their own members, are not examinable here.'") (quoting *Harmon*). Such ecclesiastical determinations include matters concerning "church discipline * * * or the conformity of the members of the church to the standard of morals required of them." *Id.* at 733.

A few years after *Watson*, the Court held in *Reynolds* v. *United States*, 98 U.S. 145 (1878), that an individual could not, on account of his professed religious beliefs, claim an "except[ion]" under the Religion Clauses from a congressional statute prohibiting polygamy. *Id.* at 166. In reaching this conclusion, *Reynolds* did not mention *Watson*, and nothing indicates that the *Reynolds* Court was overruling the

principle that it had announced in *Watson* only six years earlier. *Reynolds* thus suggests that the post-Civil War Court viewed the principle (announced in *Reynolds*) that a person generally may not "excuse his practices contrary [to the law] because of his religious beliefs," 98 U.S. at 166, as consistent with the principle (announced in *Watson*) that voluntary religious associations had a "right" to "create tribunals for the decision of controverted questions of faith within the association," 80 U.S. at 728-729. Instead of viewing these two principles as mutually contradictory, the post-Civil War Supreme Court evidently saw them as compatible strands in the tapestry of American religious liberty.

II. Consistent With The Original Understanding Of The Religion Clauses, This Court's Precedents Establish That Government May Not Interfere With The Right Of Religious Groups To Select Persons Who Perform Religious Functions.

This Court's jurisprudence has long recognized that government cannot interfere with core internal spiritual and ecclesiastical affairs of religious groups. In a series of cases, this Court has recognized "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; *see also EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). Such freedom necessarily includes the authority to select ministers free from government interference. Just as government cannot select a church's religious message, neither can it pick the messenger by which the church delivers that mes-

sage.

Nothing in *Smith* disturbs this historically grounded doctrine. Indeed, in *Smith*, this Court recognized the continuing power of these cases, reasoning that "[t]he government may not * * * lend its power to one side or the other side in controversies over religious authority or dogma." 494 U.S. at 877 (citing, among other cases, *Kedroff*). *Smith* says nothing suggesting that these well-settled precedents were overturned, nor contradicting the original understanding of the Religion Clauses.

Abandonment of the "ministerial exception" by this Court would threaten the religious liberty of all Americans. The government would be free not only to apply antidiscrimination laws to religious institutions, but to impose other forms of ministerial licensing. Nothing, for example, would prevent the government from requiring religious teachers to meet certain professional qualifications, such as training in modern counseling techniques or in professional ethics, so long as those requirements were imposed on a neutral basis. *See, e.g.*, *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627 (Tex. 2007).

Worse still, abandonment of the doctrine threatens to entangle courts in determining the sincerity of a church's religious views. In rejecting a balancing approach to the Free Exercise Clause in *Smith*, this Court explained that such an approach would "suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice * * * suffices to permit us to confer an exemption." 494 U.S. at 889 n.5. That is precisely the problem that abandonment of the minis-

terial exception would create. In the absence of a ministerial exception, courts would be plunged into inquiries over whether a church's religious rationales for discharging a minister were sufficiently consistent and logical to pass muster under the demanding standards of antidiscrimination-law understandings of pretext. Those inquiries are no less intrusive than the inquiries this Court sought to avoid in *Smith*.

A. This Court Has Recognized That Federal Courts Lack Competence To Second-Guess A Religious Group's Selection Of Persons Who Perform Religious Functions.

As the Court held in 1872, it is "unquestioned" that voluntary religious associations have the "right" "to create tribunals for the decision of controverted questions of faith within the association." *Watson*, 80 U.S. at 728-729. That principle, as *Watson* recognized, stems from a "broad and sound view of the relations of church and state under our system of laws." *Id.* at 727. Indeed, this Court has subsequently observed that *Watson*, though technically a federal diversity case, "radiates * * * a spirit of freedom for religious organizations" grounded in the Religion Clauses. *Kedroff*, 344 U.S. at 116.

That freedom is nowhere more important than in the selection of clergy. Thus, in *Kedroff*, this Court recognized that the Religion Clauses protect a church's "[f]reedom to select the clergy." *Id.* *Kedroff* itself concerned which branch of the Russian Orthodox Church could occupy a piece of property. *See id.* at 95. But the case's reasoning turned most fundamentally on "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.

Similarly, in *Gonzalez*, the Court refused to require a Roman Catholic Archbishop to appoint the petitioner to a remunerative benefice to which he was otherwise entitled under the terms of a bequest. The Court held that "[b]ecause the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." 280 U.S. at 16. On such matters, appropriate church authorities may make decisions that, "although affecting civil rights, are accepted in litigation before the secular courts as conclusive." *Id.*

And in *Serbian*, the Court affirmed the "general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." 426 U.S. at 713. *Serbian* arose out of the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church's suspension and removal of Milivojevich as Bishop of the American-Canadian Diocese of the Church. *See id.* at 698. Milivojevich claimed that the Church's actions were procedurally and substantively defective under general principles of Illinois common law. *See id.*

Serbian could have been viewed as requiring only the application of neutral rules of contract interpretation. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (explaining that cases like *Serbian*, in which "government must make decisions about matters of religious doctrine and religious law," "often arise in the application of otherwise neutral property

or contract principles to religious institutions"). But the Court did not see things that way. The Religion Clauses prohibited "the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity." *Serbian*, 426 U.S. at 698. And its order reinstating a defrocked bishop had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." *Id.* at 720.

In a different context, this Court has emphasized that "training for religious professions and training for secular professions are not fungible" under the Religion Clauses, because "[t]raining someone to lead a congregation is an essentially religious endeavor." *Locke* v. *Davey*, 540 U.S. 712, 721 (2004). That principle, we presume, must apply in a symmetrical fashion to ministerial *selection*. If it justifies denial of financial support under otherwise neutral laws, it must similarly justify exemption from intrusion by the state. Separation is a two-way street.

Smith recognizes and reaffirms the holdings of the church autonomy cases, explaining that "[t]he government may not * * * lend its power to one or the other side in controversies over religious *authority* or dogma." 494 U.S. at 878 (citing *Kedroff* and *Serbian*) (emphasis added). The issue in *Smith* was very different: Whether individuals have a Free Exercise right to exemption from neutral and generally applicable laws because of a conflict between their individual conscience and the requirements of the law. In holding that such a right was not subject to a balancing test applied by federal courts on a case-by-case basis, *Smith* did nothing to upset historically

(and doctrinally) grounded guarantees of church-state institutional separation, such as the ministerial exception.

B. Permitting Courts To Second-Guess The Selection — Or Termination — Of Ministers Will Seriously And Unconstitutionally Entangle Courts In The Affairs Of Religious Organizations.

The Court's precedents caution against government involving itself in disputes where "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian*, 426 U.S. at 709. "First Amendment values are plainly jeopardized when * * * litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies * * * the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). Thus, the Establishment Clause prohibits the government from "involv[ing] itself too deeply in [a religious] institution's affairs." *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989).

The risk of entanglement is heightened in the context of disputes over the selection, evaluation, and discipline of religiously significant employees. These are, as Madison said, an "entirely ecclesiastical" matter. *See supra* pp.18-19. When a court inquires into a church's decision that a religious employee is not

properly serving its religious mission, "[i]t is not only the conclusions that may be reached * * * which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979). *Catholic Bishop* employed the technique of constitutional avoidance to hold that the National Labor Relations Act, a neutral law of general applicability, does not apply to teachers in a Catholic School. In doing so, the Court recognized that determining whether a religious school had engaged in an unfair labor practice "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.*; *see also Amos*, 483 U.S. at 336 ("it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious").

Unconstitutional entanglement is inevitable in employment disputes involving ministers. When a member of a protected class brings an antidiscrimination lawsuit against a church, the church will respond by raising reasons for the discharge, which necessarily will have a religious dimension: namely, whether the minister had carried out the mission of the church in accordance with the church's standards. The entire inquiry before the Court would then become whether the church's religious reasons for its action were pretextual. *See McDonnell Douglas*, 411 U.S. at 804-805. A judge or jury would then be called upon to determine the sincerity of the church's religious reasons for discharging a particular minister. *See, e.g.*, *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1040 (7th Cir. 2006). Typically, in the secular

context, pretext is shown with such factors as the use of subjective criteria, inconsistencies in treatment of different cases, departures from the employer's stated criteria or procedure, and the like. *See, e.g.*, *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 242 n.6, 245-246 (6th Cir. 2005). In the religious context, none of these lines of inquiry are permissible. *See Thomas* v. *Review Bd.*, 450 U.S. 707, 714 (1980) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Serbian*, 426 U.S. at 713-714 (secular courts may not second-guess whether church bodies have properly followed their own procedures).

The possibilities are endless, and the consequences for religious institutions dramatic. Would, for example, a court determine that the Catholic Church's limitation of clergy to men qualifies as a bona fide occupational qualification? Or that a priest is needed for carrying out a particular function in a religious mission? Would a jury determine that a Lutheran institution had a sincere belief in its religious doctrine that employment disputes must be resolved within the church, rather than through recourse to the civil courts? If a disabled person were passed over for the job of youth pastor, would a jury be asked to evaluate the sincerity of the Elder Board's testimony that the chosen candidate had a more compelling testimony of faith in Jesus Christ?

Indeed, the practicalities of an employment dispute more closely resemble the case-by-case inquiry in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), than the "across-the-board criminal prohibition of a particular form of conduct" in *Smith*. 494 U.S. at 884 (distinguishing, and not overruling, *Sherbert*). In *Sherbert*,

the availability of unemployment compensation came down to whether the employee's refusal of work on her Sabbath was "good cause" — requiring "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. If the nondiscrimination laws were applied without a ministerial exception, the outcome would depend on an "individualized governmental assessment" of the church's reasons for its employment decision. In *Sherbert*, as here, the relevant statute was formally neutral and generally applicable, but because the "eligibility criteria invite consideration of the particular circumstances," *id.*, the Court invalidated the law as applied to religiously observant individuals — a conclusion reaffirmed in *Smith*. *Id.* The same result should obtain here.

Disputes over who should fill religiously significant offices within religious institutions are precisely the kinds of subjects that the Religion Clauses place beyond the scope of governmental inquiry. Such matters are fundamentally internal to the operations of the church and are constitutive of its identity. And that is why "[f]ederal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional trespass on the most spiritually intimate grounds of a religious community's existence." *Hankins*, 441 F.3d at 117 (Sotomayor, J., dissenting) (citation, alteration, and quotation marks omitted).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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JUNE 20, 2011

APPENDIX

The Evangelical Covenant Church is a denomination of evangelical Christian churches, with congregations throughout the United States. It has 832 churches in ten regions with an average attendance of 198,000. It grants clergy credentials to 2,300 ministers. It sponsors schools, hospitals, children's homes, retirement communities, shelters, and social services in the United States and in foreign countries. It has an interest in retaining its freedom and power to decide for itself matters of church governance, minister selection, as well as faith affirmations, belief, and actions.

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The denomination has 65 geographical judicatories, known as synods, and a churchwide office located in Chicago, Illinois. The ELCA encompasses approximately 10,000 member congregations, which in turn have some 4.5 million individual members nationwide. The fundamental governing document of the ELCA, which is known as the *Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America*, proclaims that these three expressions of the church — congregations, synods, and churchwide organization — share responsibility for God's mission in the world. In order to carry out that mission, the individuals who lead the church are called upon to recognize their accountability to God, to the whole Church on Earth, to each other, and to the organization of this church in which they have been asked to serve. Their participation in God's mission on behalf of this church requires that they: "Proclaim God's saving

Gospel of justification by grace for Christ's sake through faith alone, according to the apostolic witness in the Holy Scripture, preserving and transmitting the Gospel faithfully to future generations." *Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America*, 4.02.a (April 2011).

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 65,000 congregations with more than 16 million members worldwide. In the United States, the Adventist Church has more than 5,000 congregations with more than one million members. The church employs over 4,100 ministers in the United States to carry out its mission in all fifty states. The Seventh-day Adventist Church has a strong interest in maintaining the freedom to determine who will minister to its members in the United States.

The General Council on Finance and Administration of The United Methodist Church, Inc., ("GCFA") is an Illinois corporation having its primary place of business in Nashville, Tennessee. GCFA is the financial and administrative arm of The United Methodist Church. GCFA is also charged with protecting the legal interests and rights of The United Methodist Church. The United Methodist Church is a religious denomination with approximately twelve million members worldwide. Through its various agencies, it performs mission work in over 150 countries. The United Methodist Church is one of the largest religious denominations in the United States. It has approximately 33,000 local churches and nearly eight million members in the United States.

The General Synod of the United Church of Christ is the representative body of the national setting of the United Church of Christ ("UCC") and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by the General Synod as described in the bylaws of the UCC, and of ex officio delegates. The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of approximately 1.2 million.

Rev. Gradye Parsons, as Stated Clerk of the General Assembly, is the senior ecclesiastical officer of the **Presbyterian Church (U.S.A.)** ("PCUSA"). The PCUSA is a national Christian denomination with nearly 2,077,000 members in more than 10,650 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the Constitution of the Presbyterian Church (U.S.A.) and policies of the General Assembly of the PCUSA regarding the Free Exercise Clause of the First Amendment. The religious liberty and church autonomy guarantees of this clause are foundational to our understanding of the relationship between the church and state. The General Assembly does not

claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The Salvation Army is an international religious and charitable organization with its headquarters in London, England. The Salvation Army is a branch of the universal Christian Church, its own religious denomination. The *amicus* in this action is The Salvation Army National Corporation, a non-profit religious corporation organized under the laws of the State of New Jersey. The Salvation Army National Corporation is the corporate instrumentality of The Salvation Army National Headquarters, which is responsible for coordinating national policies of the four independent Territories of The Salvation Army in the United States. The Salvation Army joins this *amicus* brief because of its concern with the constitutional implications that would be presented if courts were permitted to consider issues involving the fundamentally ecclesiastical relationship between a church and its clergy in conflict with *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).