No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* IN THIS CASE[1]

The American Association of Christian Schools (AACS) is one of the leading organizations of Christian schools in the United States. Founded in 1972 and now in operation for almost 40 years, the AACS serves over 100,000 students and 10,000 teachers in more than 800 member schools through a network of 36 state affiliate organizations. The general purpose and objectives of AACS are to aid in promoting, establishing, advancing, and developing Christian schools and Christian education in America. The AACS has historically been a voice for Christian education in the federal legislative and judicial arenas. Today that purpose is carried on with even greater vigor. Protecting member schools from government entanglement, as well as promoting religious freedom, Christian education, and family values are the driving principles in directing AACS's federal efforts.

SUMMARY OF ARGUMENT

The Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution[2] significantly limit governmental

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof….").

interference into the daily operations of religious organizations. This Court has been particularly careful to ensure that those limits extend to the employer-employee relationship between religious organizations and teachers. Regardless of the specific subjects taught, this Court has acknowledged the critical and unique role that all teachers play in advancing the mission of the religious organization, where those teachers are expected to incorporate the tenets and doctrine of the religious organization into their conduct, both in and out of the classroom, as an example to their students.

This case presents no reason for departure from these principles. Petitioner made its hiring and retention decisions with respect to Respondent Perich wholly upon religious grounds. It communicated its decisions and religious bases therefore clearly to Respondent Perich. Petitioner had earlier always been clear in its communications to Respondent Perich of an expectation that she would incorporate Petitioner's religious tenets and teachings into her classroom teaching and into the way she conducted herself as an example to her students. A review of Petitioner's hiring and retention decisions will unnecessarily and unconstitutionally involve governmental interference into Petitioner's daily operations and should not be permitted, just as it should not be permitted in any instance where a religious school has made hiring and retention decisions based upon religious grounds with respect to a teacher, where the expectation of all interested parties (the school/religious organization, the teacher, the parents) has been that the teacher has a responsibility to adopt the religious organization's tenets and doctrine, and incorporate

those same tenets and doctrine into his or her conduct.

ARGUMENT

I. THE CONSTITUTION LIMITS GOVERNMENT INTRUSION INTO THE DAILY OPERATIONS OF RELIGIOUS ORGANIZATIONS. THIS COURT HAS SPECIFICALLY APPLIED THAT LIMITATION TO RELIGIOUS SCHOOLS AND TEACHERS.

For one hundred and forty years, this Court has recognized the right of religious organizations to control their internal affairs. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-29 (1878). In its decision, the *Watson* Court took great care to distinguish its conclusions, based on American principles of religious expression, from the contrary holdings that would ensue from the Chancery Courts in England, which took the view that the decisions of religious organizations were all subject to review by the State's Courts. It is important to remember the eloquently stated words of *Watson*:

> In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights is conceded to all . . . . The right to organize voluntary religious organizations to assist in the expression and dissemination of any

> religious doctrine, and 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, is unquestioned. *All who unite themselves to such a body do so within 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 anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Id. at 728-29 (emphasis added). The Court wisely and humbly stated that any appeal to the "ordinary judicial tribunals" of a decision made by the religious organization based upon ecclesiastical law and religious faith "would be an appeal from the more learned tribunal in the law which should decide the case to one which is less so." *Id.* at 729. In so ruling, the *Watson* Court relied on the strength of both the Free Exercise Clause and the Establishment Clause of the First Amendment.

In accordance with general principles, this Court has determined that these religious organizations are presumptively exempt from the application of federal statutes. In *National Labor Relations Board v. Catholic Bishop*, 440 U.S. 490 (1979), the Court was asked to determine whether the National Labor Relations Act, 29 U.S.C. § 158, applied to religious schools, in the context of steps taken by lay teachers employed by religious schools to form labor unions pursuant to the Act. The Court concluded that the NLRA did not apply to religious schools, regardless of the specific classroom assignments of the teachers employed by those schools. *Id.* at 506. In reaching its conclusion, the Court formulated and conducted a two-part inquiry: (a) whether the application of the statute in question "present[s] a significant risk that the First Amendment will be infringed; *id.* at 502, and if so, (b) whether there was a "clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the [statute in question]." *Id.* at 504.

In answering the first question affirmatively, the Court looked back to its prior holding relating to whether government aid could constitutionally be provided to parochial schools to subsidize teachers' salaries. The Court stated that it had "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school" and that what was said of the schools in *Lemon v. Kurtzmen*, 403 U.S. 602, 617 (1971) ("Religious authority necessarily pervades the school systems"), continued to be true of those religious schools over which the NLRB sought to exercise jurisdiction. 440 U.S. at 501. Importantly, the *Catholic Bishop* Court recalled three additional holdings from its *Lemon* opinion:

1. "[P]arochial schools involve substantial religious activity and purpose." 440 U.S. at 503 (quoting *Lemon*, 403 U.S. at 616).

2. "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.*

3. "[T]he admitted and obvious fact [is] that the *raison d'être* of parochial schools is the propagation of a religious faith." 440 U.S. at 503 (quoting *Lemon*, 403 U.S. at 628 (Douglas, J., concurring)).

The Court concluded that: "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." 440 U.S. at 504.

What the *Lemon* Court recognized in determining that there are First Amendment issues in the providing of public aid to teachers at a church-operated school and what the *Catholic Bishop* Court recognized in determining that there are First Amendment issues in the government exerting mandatory collective bargaining and an unfair labor practices regime to teachers at a church-operated school applies equally here. Because of the unique role played by a teacher in a religious school (especially where expectations that the teacher will

incorporate the particular tenets and teachings of the faith into his or her teaching are articulated), there can be no escaping the fact that there are First Amendment ramifications of governmental interference into that employment relationship.

The aid program at issue in *Lemon* attempted to avoid those ramifications by excluding religion class teachers from the proposed subsidies – the Court found that it made no difference, as aid to teachers of non-religion classes still raised a First Amendment issue. The NLRB attempted to escape it by limiting their unionization efforts to lay teachers – the *Catholic Bishop* Court found that lay teachers played a "critical and unique role…in fulfilling the mission of a church-operated school," that mission (or *raison d'être*) being "the propagation of a religious faith." It seems illogical to think that there are any lesser First Amendment concerns when it comes to the federal government injecting itself into the hiring and retention decisions exercised by a religious organization as to teachers, lay or otherwise, who are so critical and unique to the fulfillment of this religious mission.

This is exactly the holding in the case of *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). The *Little* case involved an attempt to have the court review a decision by a religious organization to not rehire an elementary school teacher. The organization chose not to rehire on the basis of the teacher's entering into a canonically invalid marriage. The district court entered summary judgment for the school, and the Third Circuit affirmed.

Noting that "[t]he Supreme Court has stressed that constitutional issues should be avoided whenever possible," *id.* at 946, the court first analyzed whether the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, to Little's claim would raise substantial constitutional questions. The Third Circuit held that if it were to review the employer's decision, it would be forced to determine what the official teachings and doctrine of the church were and whether Little had rejected them. *Id.* at 948. The court further held that any judicial analysis of the claim would necessitate the excessive entanglement of the court with the church. Specifically,

> [T]he inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.
>
> . . .
>
> In short, interpreting Title VII's prohibition of religious discrimination to apply to the Parish's decision would raise serious constitutional questions under both the free exercise and the establishment clauses. Accordingly, we

> will only do so if Congress clearly intended that result.

Id. at 949.

The same principles are applicable here. In this case, even taking Respondent's assertion as true that she was terminated because of her threat to initiate litigation against her employer (the Church), adjudication of her retaliation claim would require an analysis of the Church's beliefs and practices regarding conflict resolution, and then determining whether Respondent violated those beliefs and practices. As stated by the *Little* court, "the process of review itself might be excessive entanglement," *id.,* regardless of the outcome of the review. *See also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (holding the Establishment Clause bars "trolling through . . . an institution's religious beliefs"); *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1261-66 (10th Cir. 2008) (requiring government to make a searching inquiry into the religious doctrine of a Christian university to determine whether it should be excluded from a scholarship program is unconstitutional). The same constitutional concerns would exist in any instance involving the hiring and retention practices of a religious school, with respect to teachers who were expected to incorporate the tenets and teachings of the religious organization into the way they conducted themselves in the classroom, who were expected to adhere to the tenets and teachings of the religious organization in the way they conducted themselves in and out of the classroom, and who were informed of these expectations at the outset of each school year.

Accordingly, the second prong of the *Catholic Bishop* analysis must be addressed – is there a clear expression of Congress that teachers in religious schools should be covered by the statute in question? In this regard, Title VII (the statute reviewed by the *Little* court) and the Americans with Disabilities Act (ADA) (the statute at issue in the instant case) contain virtually identical religious exemptions. *See* 42 U.S.C. § 2000e-1(a); 42 U.S.C. § 12113(d)(1). As noted by the *Little* court, these "exemptions reflect a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of these organizations to be free from government intervention." 929 F.2d at 951. The same exemption exists within the ADA, and the same outcome should follow.

The *Catholic Bishop* analysis clearly results in a finding that asking the secular courts to apply the cited provisions of the ADA to this situation presents a significant risk that the First Amendment will be infringed, and that significant risk exists regardless of whether Respondent is classified as a lay teacher, a called teacher, or a commissioned teacher, given this Court's prior holdings as to the unique and significant role played by all teachers in fulfilling the mission of the religious organization.

II. COURTS MUST GIVE SUBSTANTIAL DEFERENCE TO RELIGIOUS ORGANIZATIONS' UNDERSTANDING OF THEIR EMPLOYEES' FUNCTION

In the employment context, lower courts have uniformly applied a "ministerial exception" to further

address the constitutional concerns identified by this Court, namely the evidence of excessive entanglement and the promotion of the free exercise of religion. This "ministerial exception" is known by other names. *See, e.g.*, *Klouda v. Southwestern Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008) ("ecclesiastical abstention doctrine"). Regardless of what the test is called, its protections are not, and should not be, restricted to ordained ministers. *See, e.g., Catholic Diocese of Peoria*, 442 F.3d 1036, 1040-41 (7th Cir. 2006) (applying exception to organist/music director); *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 704 (7th Cir. 2003) (press secretary); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 803-04 (4th Cir. 2000) (director of music ministries).

In *Lemon* and *Catholic Bishop,* this Court expressly found that that all teachers at religious schools play a critical and unique role in the fulfillment of the religious organization's mission. Accordingly, regardless of the name given to the test used, it is absolutely necessary that any application of the test accord significant deference to this fact and begin from a presumption that the teacher's role qualifies for the exception, precluding governmental interference into the employment relationship.

What is especially obvious is that the "primary duties" test as adopted and applied by the Sixth Circuit in this case cannot be the proper test for application of the "ministerial exception" if this Court's positions regarding Free Exercise and Establishment Clause issues are as they were when deciding *Lemon* and *Catholic Bishop*. The Sixth Circuit stated that "[a]s a general rule, an employee

is considered a minister if 'the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.'" *EEOC v. Hosanna-Tabor Evangelical Lutheran Church*, 597 F.3d 769, 778 (6th Cir. 2010) (quoting *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007)). The court further stated the importance of looking at the function of the plaintiff's employment position, 597 F.3d at 778, as well as whether a position is important to the spiritual and pastoral mission of the church. *Id.*

Having said all the right words, the Sixth Circuit then seemed to ignore their own instructions, instead adopting an analysis that performed only a superficial examination of the job functions, showed a complete misperception of the role that religious schools generally ask their teachers to perform, and ultimately deferred to a method no more sophisticated than a stopwatch to determine the outcome of this extremely important constitutional issue. In the process, the Sixth Circuit (a) relegated religious school teachers to a far less important role than that recognized by this Court in *Lemon* and *Catholic Bishop*, (b) managed to separate and parse out the duties of a teacher in a way that this Court in *Lemon* and *Catholic Bishop* suggested could not be done with respect to teachers given their unique and critical role, (c) embarked upon a process of review rightly recognized by the *Little* Court as excessive entanglement, and (d) attempted to do what the *Watson* Court said 140 years ago should not be done, namely letting a less able tribunal determine matters of ecclesiastical significance.

Respondent Perich was expected to integrate her faith into every aspect of her teaching. The trial court found that "Hosanna-Tabor's website indicates that it provides a 'Christ-centered education' that helps parents by 'reinforcing biblical principals [sic] and standards.' Hosanna-Tabor also characterizes its staff members as 'fine Christian role models who integrate their faith into all subjects.'" 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008). The Hosanna-Tabor Lutheran Church Employee Handbook in effect during the 2004-05 school year states:

> We consider you [the teacher] to be a gift from God and look forward to working with you as a member of our ministry team. . . . As an employee of Hosanna-Tabor Lutheran Church, you represent this ministry in both your work and private life. Our hope is that you would always be sensitive to how others may see you as you live out your daily life. We encourage you to strive toward living a life that is an example to others of your relationship with God and your belief in the Church's Mission Statement.

Hosanna-Tabor Lutheran Church Employee Handbook, ¶ 1.100.

The Hosanna-Tabor Lutheran School Policy Manual for the same year states:

CURRICULUM

> In keeping with the purpose and aims of Hosanna-Tabor Lutheran School, the curriculum is centered on the Word of God and Christian living. The child has the benefit of hearing God's Word taught daily. We teach the Word of God and Christian living, not as a separate subject only, but rather let it permeate all teaching so that the student may develop a truly complete Christian philosophy of life.

Policy Manual, p. 11. While the Church did not require all teachers to be called or Lutheran, it did require all teachers to have a "relationship with God" and to believe "in the Church's Mission Statement." Moreover, regardless of denominational affiliation, the Church required all teachers to "permeate all teaching" with "the Word of God and Christian living." The concurring opinion in the decision below stated that the Church "did not envision its teachers as religious leaders." 597 F.3d at 784. The Church, however, unambiguously required all of its teachers to be religious leaders, or to occupy "ministerial" roles, and any contrary conclusion again confirms why it is that secular courts are singularly not qualified to determine what comprises "ministerial" roles when attempting to do so from a sectarian perspective.

The Hosanna-Tabor School, like so many religious schools, sought to distinguish itself from secular schools. It existed as a place where God's Word could be taught, and where the tenets of Christianity and

the Lutheran Church could be reinforced and incorporated into the instruction being given to those children whose parents chose to make the financial sacrifice to enroll them at Hosanna-Tabor. Hosanna-Tabor, like all AACS schools, incorporated Christian beliefs into every subject taught. The Bible is incorporated into science, social studies, English Composition, and even math classes. And, at the very heart of this instruction are the teachers. It is the teachers who have the primary contact with the students; it is the teachers who interact with the students every minute of the school day; it is the religious school teacher who, more than any person other than the parents, can serve as a primary conduit for imparting Christian theology into the hearts and minds of the students.

This is the analysis of function performed by this Court in reaching the conclusions it did in *Lemon* and *Catholic Bishop* regarding the sacrosanct role of religious school teachers. Instead of following an individual teacher around with a stopwatch and counting the number of times a word of Scripture was spoken, the proper analysis focuses on the overall function of the position, as measured by the expectations of all interested persons (including the employer, the teacher, and the parents/students).

The unifying element for AACS schools is that all schools operate according to guidelines based on Scriptural principles. As faith-based schools, these principles guide their decisions regarding policies, curriculum, and management structure. These principles also provide the basis for the requirements for the Christian school employees. Naturally, it is important that employees of Christian schools share

the same faith, passion, and commitment to the guiding Scriptural principles which the school is founded upon in order for the school to function well and provide the best, seamless education for the students. This commitment to Biblical principles permits AACS schools to establish a safe and positive environment, and also allows parents the opportunity to ensure their children are given an excellent academic education according to their faith and in advancement of that faith. Indeed, the religious freedom that allows faith-based schools to operate and make management decisions according to their religious conviction and mission is vital to the success of these schools.

This perspective was totally absent from the Sixth Circuit's analysis of Respondent Perich's role as a teacher at Hosanna-Tabor, notwithstanding the fact that this perspective was communicated clearly to Respondent Perich at the time of her hiring, throughout her tenure at the school, and as a basis for the school's decision regarding her non-retention. It also was the perspective under which the employer Church was operating, under which parents making financial sacrifices to ensure that their children were able to attend Hosanna-Tabor were operating, and even under which Respondent Perich and most likely all other teachers at Hosanna-Tabor who also made financial sacrifices in deciding to be a part of a religious school faculty were also operating. Its absence from the analysis renders faulty the Sixth Circuit's holding, and it should be reversed.

When that perspective is properly included and considered, the "ministerial exception" will apply to all teachers employed by an entity recognized as a

religious organization, where there is evidence in hiring documents (*e.g.,* hiring letter, Teacher Handbook, employment contract, or other writing) that the teachers are expected to incorporate tenets and teaching of the religious organization into their assigned classroom subjects, and expected to otherwise conduct themselves in accordance with those tenets and teaching. It most definitely includes Respondent Perich.

CONCLUSION

Amicus American Association of Christian Schools respectfully requests that this Court reverse the judgment of the Sixth Circuit, and reinstate the judgment of the District Court.

Respectfully submitted,

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