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 *AMICUS CURIAE* OF TRINITY BAPTIST CHURCH OF JACKSONVILLE, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Trinity Baptist Church of Jacksonville, Inc.[1] is an independent Baptist Church that, in addition to the Church, operates numerous ministries including a school serving children from ages Kindergarten through 12th Grade, a seminary college, and a rescue mission for men, women, and children. The Church is organized as a charitable religious organization under the United States Code and regulations established by the Internal Revenue Service. Trinity Baptist Church hires employees to serve in various capacities to further its mission as a Christian Church. Each of Trinity Baptist Church's ministries is Christ-centered and Bible-based. All employees and volunteers are required to make a Profession of Faith that governs not just their employment but their lives as Christians.

The issue before the Court will have a direct and lasting effect on Trinity Baptist Church. Under First Amendment principles, Trinity Baptist Church has complete autonomy in its governance and in selecting who will "preach its values, teach its message, and interpret its doctrines both to its own membership

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of the Brief. The parties have consented to the filing of this brief.

and to the world at large." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985). Yet, potential liability for claims brought by such ministers under general employment and civil rights laws such as Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act, as in the case before the Court, dramatically affects Trinity Baptist Church's ability to select and retain such ministers. While Trinity Baptist Church maintains a non-discrimination policy, there are Biblical criteria the Church uses in selecting those who teach its message. The current state of legal jurisprudence regarding judicial inquiry into the employment relationship between ministers and their church, however, leaves churches such as Trinity Baptist Church with little to no guidance on how a court will apply the law in any given circumstance to any given employee. Accordingly, further clarification from this Court is necessary.

Trinity Baptist Church joins Petitioner in seeking reversal of the Sixth Circuit Court of Appeals in this case because for a teacher who is responsible for leading his or her class in prayer, assisting in worship services, and teaching religious doctrine to not be considered a minister undermines the very purpose of school based church ministries. For example, the Mission Statement for Trinity Christian Academy, a ministry of Trinity Baptist Church since 1967, states: "The mission of Trinity Christian Academy is to glorify God by providing students a Christ-centered, Bible-based education, by influencing them

for salvation, by instructing them in values for Godly living, and by providing a program of academic and extra-curricular excellence." Trinity Christian Academy is accredited by the Florida Association of Christian Colleges and Schools and the Southern Association of Colleges and Schools Council on Accreditation and School Improvement. As a result, its curriculum must meet certain academic standards in core subjects such as reading, language arts, mathematics, science, and history, among others. This certification and the teaching of such subjects do not diminish the Christ-centered, Bible-based education offered by the school or the function of the teachers to incorporate by teaching and example Christian principles in the classroom. In short, Trinity Christian Academy teachers are ministers of the church and serve as intermediaries between the church and their students.

Trinity Baptist Church seeks clarification from this Court on the proper standard to be applied when reviewing employment-based claims from individuals who served in a ministerial capacity. A minister is more than a tally of tasks performed during the work day, a job title, or a list of competencies listed on an employment evaluation. For example, a minister is someone who is charged as part of their duties and responsibilities with teaching and sharing the Church's message to the Church's membership and the world. To properly recognize such a minister, a "primary duties" test cannot be rigid or oversimplified while ignoring the purpose or function of the position

in furthering the Church's spiritual mission. Indeed, it is the Church who, in the first instance, is in the best position to determine who serves as a minister on its behalf.

The Court has the opportunity to clarify a large body of law that affects the central functioning of churches and other religious organizations and establish the criteria by which a trial court or federal agency such as the EEOC will evaluate who qualifies as a minister under the ministerial exception. Accordingly, *Amicus Curiae*, Trinity Baptist Church files this brief in support of Petitioner, Hosanna-Tabor Evangelical Lutheran Church and School, seeking reversal of the decision of the Sixth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Free Exercise Clause of the First Amendment provides churches with a right to select its ministers without interference from governmental authorities. Church governance, including the selection of who ministers on behalf of the Church is *per se* a religious matter and beyond the jurisdiction of the courts, even under generally applicable employment law statutes such as the Americans with Disabilities Act.

When the lower appellate court determined that the ministerial exception to Title VII did not apply to Respondent, it utilized a purely quantitative

"primary duties" test. Courts using such a test exhibit a fundamental misunderstanding of what constitutes ministry because they focus exclusively on tasks they classify as either "religious" or "secular" with the "majority" often winning the day in determining who is and is not a "minister." The "primary duties" test ignores the importance of a religious school teacher charged with, among other things, teaching students religious doctrine and leading students in prayer and worship to the spiritual mission of the religious organization. By effectively ignoring the function or purpose of the position as connected to the spiritual mission of the church, the Sixth Circuit excessively entangled itself in a fundamentally religious matter and unduly restricted the Petitioner's free exercise of religion.

The correct analysis focuses on the function or purpose of the position and its relationship to the spiritual and pastoral mission of the church. This analysis focuses on the ultimate issue, whether the position is important to a church's mission. When the essential functions of a teacher's position require the teaching of religious doctrine and leading students in prayer and worship, the teacher is closely connected to the religious mission of the church and, therefore, is a minister under the First Amendment, exempt from the application of employment laws of general applicability.

In addition to a proper "function" analysis, *Amicus* recommends two additional safeguards to protect a church's free exercise rights and avoid excessive

government entanglement with religion. The first is that a church's designation of a position as ministerial or classification of job functions and duties as religiously important should be given deference and accorded a rebuttable presumption. The second is that court decisions on the application of the ministerial exception should be recognized under the collateral order doctrine and subject to an immediate appeal as a final order.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS A CHURCH'S RIGHT TO SELECT THOSE WHO TEACH AND DELIVER ITS MESSAGE TO ITS MEMBERS AND THE WORLD.

The First Amendment provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. The limitations of the First Amendment apply to the courts as well as to Congress. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996) (citing *Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 191 (1960)). In applying these protections and freedoms, this Court has "placed matters of church government and administration beyond the regulation of civil authorities." *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 346 (5th Cir. 1999).

This Court and the courts of appeals have "always safeguarded the 'unquestioned' prerogative of religious organizations to tend to 'the ecclesiastical government of all the individual members, congregations, and officers within the general association.'" *EEOC v. Roman Catholic Diocese, Raleigh*, 213 F.3d 795, 800 (4th Cir. 2000) (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1871)). In protecting a church's right to self governance, this Court "has shown a particular reluctance to interfere with a church's selection of its own clergy." *Catholic Univ. of Am.*, 83 F.3d at 460 (citing *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976)).

In considering matters of church governance concerning the selection of clergy, courts consistently hold that "[a] church must retain unfettered freedom in its choice of ministers because ministers represent the church to the people." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999). "The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." *Rayburn*, 772 F.2d at 1167-68 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The "determination of 'whose voice speaks for the church' is *per se* a religious matter." *Minker v. Baltimore*

Annual Conf., 894 F.2d 1354, 1356 (D.C. Cir. 1990). Accordingly, "selection and termination of clergy is a core matter of ecclesiastical self-governance not subject to interference by a state, . . . [and] the Free Exercise Clause guarantees [a religious organization] the freedom to decide to whom it will entrust ministerial responsibilities." *Pardue v. Ctr. City Consortium Sch. of the Archdiocese of Washington, Inc.*, 875 A.2d 669, 673 (D.C. 2005) (quoting *Heard v. Johnson*, 810 A.2d 871, 882 (D.C. 2002)).

To protect these rights, the "ministerial exception" to statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and various state law claims was developed by the courts. *Roman Catholic Diocese*, 213 F.3d at 800. While not a complete bar to all employment related claims brought against religious organizations, "[t]he ministerial exception . . . operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir. 2006). "Thus, where . . . a claim challenges a religious institution's employment decision, the inquiry is whether the employee is a member of the clergy or serves a ministerial function. If so, secular review is generally precluded." *Archdiocese of Miami, Inc. v. Miñagorri*, 954 So. 2d 640, 642 (Fla. 3d DCA 2007), *rev. dismissed, Miñagorri v. Archdiocese*, 958 So. 2d 1086 (Fla. 2008), *cert. denied*, 129 S.Ct. 936 (2009) (citing *Alicea-Hernandez v. Catholic Bishop of*

Chicago, 320 F.3d 698, 703-04 (7th Cir. 2003)). In applying this exemption, the courts "do not look to ordination but instead to the function of the position." *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703 (7th Cir. 2003) (citing *Young v. The N. Illinois Conf. of United Methodist Church*, 21 F.3d 184, 186 (7th Cir. 1994); *see also Roman Catholic Diocese, Raleigh*, 213 F.3d at 801 ("Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister' "); *Catholic Univ. of Am.*, 83 F.3d at 463 (finding "that the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.").

In avoiding entanglement with church employment decisions concerning its ministers, the courts have stated clearly that they "cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions." *Minker*, 894 F.2d at 1357. "Any involvement by [the court] concerning [a church's] decision on this question constitutes an unprecedented and impermissible entanglement with religious authority." *Powell v. Stafford*, 859 F. Supp. 1343, 1349 (D. Colo. 1994) (citing *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1554-55 (D. Colo. 1994)). Accordingly, "Title VII is not applicable to the employment relationship between a church and its ministers." *Gellington v. Christian Meth. Episc. Church*, 203 F.3d 1299, 1301 (11th Cir. 2000) (citing

McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972); *see also Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208, 1998 WL 904528 (4th Cir. 1998) (finding ministerial exception precluded claim under ADEA); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (and cases cited therein) (finding ministerial exception precluded employment discrimination claims under Title VII, ADA, ADEA, and common law claims brought against religious employers); *Miñagorri,* 954 So. 2d at 643-44 (finding ministerial exception precluded claim under state whistleblower act); *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n.*, 768 N.W.2d 868 (Wis. 2009) (finding ministerial exception precluded state law age discrimination claim).

II. THE "PRIMARY DUTIES" TEST APPLIED BY THE COURT BELOW UNDULY ENCROACHES ON A CHURCH'S FREEDOM TO SELECT ITS MINISTERS AND RESULTS IN INCONSISTENT DECISIONS.

The Sixth Circuit below applied what it dubbed the "primary duties" test. *EEOC v. Hosanna-Tabor Evangelical Lutheran Ch. & Sch.*, 597 F.3d 769, 778-80 (6th Cir. 2010). In doing so, the court focused exclusively on a list of tasks Respondent, Cheryl Perich, performed in teaching the children placed within her care, distinguishing between what *it* considered "religious" and what *it* considered "secular." The court then concluded that because "she

spent the overwhelming majority of her day teaching secular subjects using secular textbooks," or six hours and fifteen minutes out of a seven hour work day, Respondent was not a "minister." *Id*. at 781.

This purely quantitative approach ignored the importance of Respondent's role in "the spiritual and pastoral mission of the church." *Rayburn*, 772 F.2d at 1169. This fundamental error in the Sixth Circuit's analysis highlights the concern this Court has so often raised when courts attempt to distinguish between what is religious and what is secular. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . . ." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). "At some point, factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 496 (1979) (quoting *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1118 (7th Cir. 1977)) (alteration in original).[2]

[2] This necessarily raises the question of the EEOC's initial investigation of a charge of discrimination where the issue of the ministerial question is present. That issue is addressed more fully in Section III.B., *infra*.

Here, the lower court relied exclusively on the amount of time Respondent spent on certain "religious" tasks to the exclusion of whether those tasks were "important to the spiritual and pastoral mission of the church." Indeed, while noting the inherently religious nature of Petitioner, the court concluded that Respondent's religious duties were not "primary" because as a school teacher, Respondent necessarily spent even more time teaching subjects such as math, reading, science, music, gym, and others using what the court termed "secular textbooks." *Hosanna-Tabor*, 597 F.3d at 772-73. It is here where the court erred. The court's reasoning and conclusion ignored the clearly established fact that Respondent was important in teaching the faith to her students, an important part of Petitioner's mission as a religious institution. Indeed, she spent 45 minutes every day instructing students on religious matters. This approach ultimately creates "First Amendment problems" the Court counseled against in *Catholic Bishop of Chicago*, 440 U.S. at 496.

Initially, "[w]hile it may be that the majority of her duties were teaching 'secular' subjects, it does not follow that her 'primary duties' were secular for purposes of determining whether the ministerial exception applies." *Coulee Catholic Sch.*, 768 N.W.2d at 887-88. "[M]erely enumerating the duties of [Respondent's] job description, many under secular-sounding headings . . . tells us little about whether

her 'position is important to the spiritual and pastoral mission of the church.'" *Pardue*, 875 A.2d at 677. It is certainly no surprise that as a teacher, Respondent was expected to perform many tasks, some secular and some religious, in teaching at a fully accredited school. Still, she was a teacher at a religious school and charged with leading students in prayer, teaching them the tenants of the faith, and attending and leading chapel services. Such secular and religious activities "are inextricably intertwined in the school's mission and the [teacher's] role in fulfilling it." *Id*.

This is especially true here where the Respondent's role was instrumental and important to teaching religious doctrine and leading students in prayer and worship. If such essential functions of a religious school teacher's job are insufficient to qualify as a "minister" under this Court's First Amendment jurisprudence, then churches such as Petitioner and *Amicus* are significantly restrained in who they select to teach religious subjects to those children who attend its schools. *Amicus* would be forced to hire separate teachers solely dedicated to the teaching of religious subjects and leading children in prayer to be assured that its selection of those entrusted with that responsibility will not be second-guessed by the court.

In attempting to "wall off" "secular" subjects from "religious" ones, the court below took to its

conclusion and demonstrated the inapplicability of a metaphor that has no basis in the wording or intent of the First Amendment. This Court has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop of Chicago*, 440 U.S. at 501. By necessity, "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Id*. at 504. The conclusion of the court below is based "on the premise that teaching mathematics is secular. However, teaching 'secular' classes is not necessarily 'purely secular' in the context of religious schools." *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513, 518 (Mich. App. 2010) (*Weishuhn II*) (citing *Coulee Catholic Sch.*, 768 N.W.2d at 883-84). From looking at Respondent's duties, it is clear she was an important part in fulfilling the mission of Petitioner in offering a "Christ-centered education" by "reinforcing bible principals [sic] and standards." *Hosanna-Tabor*, 597 F.3d at 772.

Criticisms of the lower court's quantitative approach are numerous. Those criticisms begin by noting that the test is not to tally up the person's day into "secular" versus "religious" tasks, but to determine whether the person is necessary to "perform particular spiritual functions." *See Petruska*, 462 F.3d at 307. In *Coulee Catholic Sch.*, the Wisconsin Supreme Court "reject[ed] a primary duties test that

looks to see if the 'vast majority' of tasks are religious, or whether a majority of the employee's time is spent on quintessentially religious tasks. This narrow view does not . . . sufficiently respect the constitutional imperatives of the free exercise of religion." 768 N.W.2d at 882. The court also noted that a quantitative analysis "also serves to minimize or privatize religion by calling a faith-centered social studies class, for example, 'secular' because it does not involve worship and prayer." *Id.* Under the Sixth Circuit's approach, the state can scrutinize the hiring and firing of ministerial employees "so long as the [employees] are spending (presumably) 49 percent or less of their time or tasks on whatever the court determines to be 'religious' activities. This redounds in an intrusiveness inconsistent with the free exercise of religion." *Id.*

In addition to focusing on the wrong criteria, the test as applied by the court below leads to inherently inconsistent results. *See, e.g.*, Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1789-90 (2008) (and case examples cited therein). Indeed, the ruling before the Court is in direct conflict with findings in *Clapper* and *Coulee Catholic Sch. Compare Miñagorri,* 954 So. 2d at 643-44 (and cases cited therein holding when the ministerial exception was found to be applicable) *with Hosanna-Tabor*, 597 F.3d at 778-79 (and cases cited therein holding when the

ministerial exception was not found to be applicable). As such, under current court decisions, there is no reasonable means for a church to determine who is and is not covered by the ministerial exception.[3] Religious organizations are left guessing which

[3] Given such inconsistent results, even the EEOC in exercising its investigatory responsibilities under Title VII and related statutes is left without guidance on who qualifies as a minister exempt from the application of these statutes. A review of the EEOC Compliance Manual addressing "Religious Discrimination" shows that the Commission provides almost no guidance to its investigators in resolving this issue before subjecting a religious institution to a full-fledged and invasive investigation into the reasons for its employment decision. In its discussion of the ministerial exception, the EEOC instructs its investigators: "The ministerial exception applies only to those employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction." Equal Employment Opportunity Commission, *Directives Tranmittal* No. 915.003, July 22, 2008, at p. 20 (covering Section 12 of the new EEOC Compliance Manual on "Religious Discrimination"). Noticeably absent from the EEOC guidance are the "primary duties" of "teaching, spreading the faith," duties at the very heart of the controversy before this Court. *Compare with Rayburn*, 772 F.2d at 1169. Because the EEOC Compliance Manual gives no other guidance on how an EEOC investigator is to determine which positions are beyond scrutiny, statutorily mandated investigations risk the excessive entanglement this Court found violated the First Amendment in *Catholic Bishop of Chicago*, 440 U.S. at 496. Accordingly, the functions test, rebuttable presumption, and treatment of the "ministerial question" set out in Section III, *infra*, should guide the EEOC's inquiry when faced with such issues raised in relation to a pending charge of discrimination.

activities a court will find "religious" and which a court will find "secular" and then which duties are "primary" and which are "secondary."

> [I]t 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. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987).

Under the lower court's analysis, courts and the EEOC are put into a position to do precisely what the First Amendment precludes them from doing, resolving matters of ecclesiastical concern and church doctrine. *Alicea-Hernandez*, 320 F.3d at 703; *Gellington*, 203 F.3d at 1304. The problem with this should be obvious as the lower court's decision demonstrates why courts are ill-equipped to determine what ministry really is. *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring). That is why the inquiry should focus "on the 'function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese*, *Raleigh*, 213 F.3d at 801.

III. THE COURT SHOULD ADOPT A TEST THAT FOCUSES ON THE FUNCTION OF THE POSITION IN FURTHERING A CHURCH'S SPIRITUAL AND PASTORAL MISSION RATHER THAN ON A "PRIMARY DUTIES" TEST.

A. Test for Determining Who Is a Minister Should Focus on Whether Function of Position Is Important to Church's Spiritual and Pastoral Mission.

In *Rayburn*, the court noted that the key determination is "whether a position is important to the spiritual and pastoral mission of the church." 772 F.2d at 1169. Indeed, the very purpose of the ministerial exception is that it "operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform particular spiritual functions." *Petruska*, 462 F.3d at 307. Accordingly, any proper analysis must "focus[ ] on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese, Raleigh*, 213 F.3d at 801. Ordination, of course, is not the standard. *Id*.; *see also Alicea-Hernandez*, 320 F.3d at 703.

To remain true to the First Amendment's requirement that churches be free from government intrusion into the selection of its ministers, *Catholic Univ. of Am.*, 83 F.3d at 460, *Amicus* recommends the Court look more to the function of the position and its connection to the overall mission of the religious organization rather than to a rote recitation of tasks

and the amount of time each takes to complete. Such a "functional" approach "is a more holistic approach" where "activities such as teaching . . . [and] participation in worship are relevant evidence as to the importance of the position to the spiritual and pastoral mission of a . . . religious organization. The primary concern here is the function of the employee, not only the enumerated tasks themselves." *Coulee Catholic Sch.*, 768 N.W.2d at 882.

> A functional analysis of the ministerial exception involves significantly less intrusion into the affairs of houses of worship and religious organizations. It envisages a more limited role for courts in determining whether activities or positions are religious. A functional analysis avoids reducing the significance of a position to a rote quantitative formula. In short, a functional analysis is truer to the First Amendment's protection of religious freedom.

Id.

Courts that have taken a more "functional" analysis versus a "primary duties" approach have considered two main issues. First, "the employer must be a religious institution," and second, "the employee must have been a ministerial employee." *Hollins*, 474 F.3d at 225; *see also Coulee Catholic Sch.*, 768 N.W.2d at 882-83; *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483, 499 (Mich. App. 2008) (*Weishuhn I*). Here, as acknowledged by the court below, there is no question Petitioner is a religious

institution. *Hosanna-Tabor*, 597 F.3d at 778. This leaves the only issue being the proper analysis for determining who is a ministerial employee.

The second step involves a review of the "position itself and the degree to which it is important and closely linked with [the church's] mission." *Coulee Catholic Sch.*, 768 N.W.2d at 889. To determine how important or closely linked the employee's position is to the mission of the church, a court is not limited to considering only "objective employment indicators such as hiring criteria, the job application, the employment contract, actual job duties, performance evaluations, [but also] the understanding or characterization of a position by the organization." *Id.* at 883. Rather, "quintessentially religious tasks will evince a close link and importance to an organization's religious mission." *Id.* Courts should look to the "total mix of circumstances" and the degree to which the church relies on the employee to carry out its religious purposes. *Clapper*, 1998 WL 904528 at *7. In these cases, "[t]he overriding theme is that the more pervasively religious the institution, the less religious the employee's role need be to risk First Amendment infringement." *Powell*, 859 F. Supp. at 1346.

In considering the function or purpose of a position, courts could utilize an analysis that already exists in employment law; the notion of "essential functions" of a job. *Amicus* contends that if an employee's "essential functions" consist of things such as "teaching, spreading the faith, church governance,

supervision of a religious order, or supervision or participation in religious ritual and worship," then the employee is a "minister" for First Amendment purposes. *Rayburn*, 772 F.2d at 1169. "[E]ssential functions 'are the fundamental job duties of a position that an individual . . . is actually required to perform.'" *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1257 (11th Cir. 2007) (quoting *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000) (per curiam)). Of course, there are many "essential functions" to a religious school teacher's position, but if one or more of the religious duties are important and closely linked with the spiritual mission of the religious organization, the teacher is a "minister" for First Amendment purposes. *Coulee Catholic Sch.*, 768 N.W.2d at 890 (holding, "[t]he state and federal constitutions do not permit the state to interfere with employment decisions regarding teachers . . . who are important and closely linked to the religious mission of" a religious organization).

In evaluating what job functions are "essential" under the Americans with Disabilities Act, courts consider factors such as: "(1) the employer's judgment as to which functions are essential; (2) the written job descriptions of the position; (3) the amount of time spent on the job performing the function; and (4) the consequences of not requiring the individual to perform the function." *Cremeens v. City of Montgomery, Ala.*, No. 10-14695, 2011 WL 2149918, at *2 (11th Cir. May 31, 2011) (citing 29 C.F.R. § 1630.2(n)(3)). Although not dispositive under the ADA, courts "give

substantial weight to the employer's judgment as to what functions of a position are essential." *Id.* This makes sense because under the ADA, Title VII and other employment discrimination statutes, courts have made it clear they do not "sit as super personnel departments" second guessing even a private employer's legitimate employment decision and should certainly not second guess a church's legitimate designation of someone as a minister. *Simmons v. Sykes Enter., Inc.*, No. 09-1558, 2011 WL 2151105, at *3 (10th Cir. June 2, 2011); *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 258 (6th Cir. 2011); *Fischbach v. Dist. of Columbia Dept. of Corr.,* 86 F.3d 1180, 1183 (D.C. Cir. 1996); *Alphin v. Sears, Roebuck & Co.,* 940 F.2d 1497, 1501 (11th Cir. 1991); *Elrod v. Sears, Roebuck & Co.,* 939 F.2d 1466, 1469 (11th Cir. 1991); *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

Other factors considered by courts include: "whether [the employee's] *duties* had religious significance," "whether [the employee's] *position* . . . entailed proselytizing on behalf of defendants," "whether that *position* had a connection to defendants' doctrinal mission," "whether that *position* was important to defendants' spiritual and pastoral mission," "whether [the employee's] *functions* were . . . related to worship," and "whether those *functions* were inextricably intertwined with defendants' religious doctrine in the sense that [the employee] was intimately involved in the propagation of defendants' doctrine and the observance and conduct of

defendants' liturgy by defendants' congregation." *Weishuhn I*, 756 N.W.2d at 500 (emphasis in original). When it comes to teachers at religious schools, this Court has recognized that such schools are often "an integral part of the religious mission of the" religious institution. *Pardue*, 875 A.2d at 675 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615-16 (1971)); *see also Catholic Bishop of Chicago*, 440 U.S. at 501 (recognizing "the critical and unique role of the teacher in fulfilling the mission of a church-operated school"). Accordingly, when an employee's duties and responsibilities are so intertwined with the overall evangelical and teaching mission of the church and include the teaching of religious doctrine and leading students in prayer and worship, that employee is clearly one "whose voice speaks for the church," a "*per se* religious matter." *Minker*, 894 F.2d at 1357.

In this case, Respondent was responsible as part of her school day for leading children in prayer, teaching religion, and attending and even leading worship services. "[A]s a teacher of religion, she was involved in proselytizing on behalf of the church. . . . [E]ducating and indoctrinating the children was important to and furthered the purposes of the church." *Weishuhn II*, 787 N.W.2d at 518. The evidence here is overwhelming that Respondent was a "minister" for First Amendment purposes because "[a]ny one of these functions so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems; when all functions are

combined, the burden of potential interference becomes extraordinary." *Rayburn*, 772 F.2d at 1168. In short, Respondent here "was not simply a public school teacher with an added obligation to teach religion. She was an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Coulee Catholic Sch.*, 768 N.W.2d at 890.

B. Churches Should Be Given Deference in Determining Who Is a Minister with a Rebuttable Presumption Standard.

"The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Based on a long line of precedent from this Court, such matters "are beyond the purview of civil authorities." *Id.* at 559 (and cases cited therein). As the Fourth Circuit noted in *Minker*, "we cannot imagine an area of inquiry less suited to a temporal court for decision; evaluation of the 'gifts and graces' of a minister must be left to ecclesiastical intuitions. This is the view of every court that has been confronted by this genre of dispute." 894 F.2d at 1357. To avoid excessive government entanglement with a religious institution's designation of who serves as a minister, *Amicus* recommends that the Court find that such religious institutions be afforded

sufficient deference when it comes to determining who is and is not a "minister" "important to the spiritual and pastoral mission of the church."

In the context of the Americans with Disabilities Act, an employer's designation of essential job functions is given "substantial weight" even if such a designation is not dispositive of the issue. *Cremeens*, 2011 WL 2149918, at *2 (citing *Holly*, 492 F.3d at 1258). Religious institutions should be afforded no less deference. Indeed, because the issue concerns a matter "of prime ecclesiastical concern" such deference should take the form of a rebuttable presumption. *See Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008) (finding church entitled to rebuttable presumption of ministerial designation under Fair Labor Standards Act).

The justification for a rebuttable presumption for a church's consideration of an employee as a minister is clear from this Court's prior decisions. As Justice Brennan noted in his concurrence in *Amos*:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may

> regard the conduct of certain functions as integral to its mission, a court may disagree. . . . As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

483 U.S. at 343-44 (Brennan, J., concurring). Accordingly, some certainty needs to be built into the jurisprudence to give churches guidance on the scope and application of the ministerial exception and a safeguard to avoid an *ad hoc*, case-by-case analysis of "primary duties" that necessarily creates "an excessive government entanglement with religion."

A rebuttable presumption will limit the entanglement concerns inherent in an EEOC investigation into a charge of discrimination filed by a ministerial employee. *Gellington*, 203 F.3d at 1304 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)); *Catholic Univ. of Am.*, 83 F.3d at 467; *Rayburn*, 772 F.2d at 1171. When coupled with the functions analysis above, a rebuttable presumption further protects against an overreaching governmental investigation by giving religious organizations the benefit of the doubt on who is a minister within an administrative review that is a condition precedent to court involvement. 42 U.S.C. § 2000c-5(b). Given the lack of guidance currently provided to EEOC investigators in how to resolve the ministerial exemption, *supra* note 3, clear

guidance from this Court is necessary to assist the EEOC in addressing a constitutional question that affects the applicability of Title VII to religious organizations. *Gellington*, 203 F.3d at 1301.

The EEOC has broad powers to investigate claims of employment discrimination, including subpoenaing witnesses and documents, 29 C.F.R. § 1601.16(a); requiring a fact-finding conference, 29 C.F.R. § 1601.15(c); requiring employers to maintain documents and submit reports directly to the EEOC, 42 U.S.C. § 2000e-8(c); requiring employers to make documents available for inspection and copying, 42 U.S.C. § 2000e-8(a); bringing a civil action to end unlawful discrimination, 42 U.S.C. § 2000e-5(f)(1); and even seeking preliminary injunctive relief while a charge remains pending. 42 U.S.C. § 2000e-5(f)(2). Religious organizations are entitled to protection from "not only the conclusions that may be reached by the [court or administrative agency] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusion." *Catholic Bishop of Chicago*, 440 U.S. at 502. Before the EEOC unleashes the full weight of its authority, there needs to be a determination of the ministerial exception based on proper criteria. Because the EEOC's dismissal of a charge on the basis of the ministerial exception is fully reviewable by a court, such a presumption in favor of a religious organization at the EEOC stage protects both the religious organization and the employee until a court can review the constitutional issue involved.

See 29 C.F.R. § 1601.18; 29 C.F.R. § 1601.28 (providing for a notice of right to sue and 90 days to file suit even if EEOC determines it lacks jurisdiction over the allegations in the charge).

This does not suggest that the EEOC should completely pass on making such a determination. However, a finding that the ministerial exception does not apply subjects a religious organization to an invasive inquiry into the reasons for its decision, an inquiry prohibited by the First Amendment for ministerial employees. Therefore, a presumption against such an inquiry is even more important at the agency investigation stage because there is little to no recourse for a religious organization to prevent a full investigation when the EEOC finds that an employee is not a minister.[4]

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[4] Because a religious organization is unable to seek injunctive relief from an EEOC investigation into a charge of discrimination by a ministerial employee, *see Catholic Archdiocese of Seattle v. EEOC*, No. C05-1298MJP, 2005 WL 2347094, at *3 (W.D. Wash. Sept. 26, 2005) (dismissing complaint and request for injunctive relief seeking to prohibit EEOC from investigating charge of discrimination against church or issuing a reasonable cause finding based on the church's failure to cooperate in investigation), such safeguards are even more important to retain an appropriate balance between the competing interests of eradicating employment discrimination and the free exercise of religion at the administrative investigation stage. *Rayburn,* 772 F.2d at 1169. A church is left with the options of refusing to cooperate in an investigation and having the EEOC issue a reasonable cause finding that may result in the EEOC initiating suit on behalf of the employee, moving to quash an EEOC subpoena, or waiting until a lawsuit is filed following the

(Continued on following page)

In addition to creating a legal standard that will provide safeguards at the administrative investigation stage, a rebuttable presumption would likewise strike an appropriate balance when the question is before the courts. Having a civil court determine what is and is not "ministerial" creates grave Establishment Clause concerns by having the courts substitute its notion of what is religious and what is secular for that of the church. *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring).

The goal should be to limit the circumstances of when the EEOC and the courts evaluate the basis for a religious organization's employment decision. "[W]e cannot conceive how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church." *Combs*, 173 F.3d at 350. Of course, "the constitutional protection of religious freedom afforded to churches in employment actions involving clergy exists even when such actions are not based on issues of church doctrine or ecclesiastical law." *Gellington,* 203 F.3d at 1303

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issuance of a notice of right to sue. *See Catholic Archdiocese of Seattle*, 2005 WL 2347094, at *1. While this is not the best solution for serious constitutional questions, there are options at the charge level to avoid the EEOC's excessive entanglement in religious matters, especially if the safeguards requested in this Section III are implemented.

(citing *Combs*, 173 F.3d at 350)). While the court determines whether the employee is a "minister," it may not require the church to proffer some religious basis for its action. "This is because '[i]n quintessentially religious matters, the free exercise clause of the First Amendment protects the act of a decision rather than the motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal intent.'" *Clapper*, 1998 WL 904528, at *6 (quoting *Rayburn*, 772 F.2d at 1169). To protect a church's unfettered right to select its ministers, a *per se* religious matter, a rebuttable presumption should be given to a church's designation of an employee as a "minister."

C. The "Ministerial Exception" Question Should Be Resolved First Before Permitting the Litigation to Move Forward.

Finally, when a court or agency is faced with determining the application of the ministerial exception, that issue should be resolved first and any court order denying the exemption's application should be subject to an immediate interlocutory appeal.[5] This Court has recognized several instances where a

[5] For safeguards addressing an EEOC determination at the charge investigation stage, *see supra*, note 4.

"collateral order" should be considered a final order for appellate purposes under 28 U.S.C. § 1291. The Court has applied the collateral order doctrine to issues of immunity and appellate courts regularly review orders on class certification on an interlocutory basis. The rationale for an immediate review of such orders applies with equal force here and procedures already in place would facilitate the resolution of a fundamental constitutional question while safeguarding the protections and limitations of the First Amendment.

Issues of immunity have long been held to qualify for immediate interlocutory review because "immunity is 'an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)); *see also Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) (noting that issues of qualified and absolute immunity along with Eleventh Amendment immunity are subject to interlocutory appeal under collateral order doctrine); *Stewart v. Donges*, 915 F.2d 572, 574-75 (10th Cir. 1990) (finding denial of motion to dismiss indictment on grounds of double jeopardy subject to immediate appeal). This Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Scott*, 550 U.S. at

376 n.2 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

The issue of a religious organization's immunity from suit under employment discrimination statutes based on the ministerial exception falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The issue falls squarely within the collateral order doctrine because it conclusively determines whether the court can decide the case, the issue of immunity is separate from the merits, and "appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755-56 (2d Cir. 1998) (finding immediate appeal on question of sovereign immunity justified because it was "immunity from trial and the attendant burdens of litigation").

Of course, the question of immunity in the context of the ministerial exception may require the trial court to make factual findings outside the four corners of the complaint. *Alicea-Hernandez*, 320 F.3d at 701. Nevertheless, the review of a factual record on

the narrow issue of the application of the ministerial exception does not make the question inappropriate for interlocutory review. Indeed, courts of appeal review highly factual determinations on an interlocutory basis as a matter of course in the area of class certification, a ruling that is often a mix of factual findings and legal conclusions.

"In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011); *see also Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). Indeed, courts have held that the certification process requires the court to make extensive factual findings that are reviewable on appeal. *Sher v. Raytheon Co.*, No. 09-15798, 2011 WL 814379, at *1 (11th Cir. March 9, 2011) (reversing class certification because the trial court failed to "sufficiently evaluat[e] and weigh[ ] conflicting expert testimony presented by the parties at the class certification stage"); *Fener v. Operating Eng'r Constr. Indus. & Misc. Pension Fund (Local 66),* 579 F.3d 401, 406 (5th Cir. 2009) (noting that the court of appeals reviewed "the essentially factual basis of the certification inquiry").

The issue here would be less factually intensive than the class certification question courts of appeals currently review. Indeed, in the case before this

Court, the dispute is not about the essential functions of Respondent's job, but about her position's importance and connection to the spiritual mission of the church, an analysis that results in a legal conclusion reviewable by the appellate courts *de novo*. *See Clapper*, 1998 WL 904528, at *5 ("The existence of subject matter jurisdiction is a legal question, which we review *de novo*"); *Pardue*, 875 A.2d at 674-75 (holding that review of the ultimate conclusion of subject matter jurisdiction is reviewed *de novo* because issue was one of law); *Weishuhn II,* 787 N.W.2d at 517 (reviewing "*de novo* the trial court's decision on the ministerial exception because this issue is a question of law").

In *Coulee Catholic Sch.*, the Wisconsin courts considered the issue of the ministerial exception before the Equal Rights Division of the Wisconsin Department of Workforce Development could hold a hearing on the merits of the plaintiff's claim of employment discrimination. There, the Equal Rights Division, utilizing the same "primary duties" analysis employed by the Sixth Circuit in the case currently before this Court, found that the ministerial exception did not apply. It then ordered an evidentiary hearing on the merits of plaintiff's claim. 768 N.W.2d at 872-76. The school appealed to the Labor and Industry Review Commission which upheld that decision. The school then sought review in the state trial court and a writ of prohibition. Upon review, the

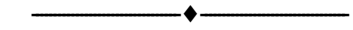
trial court and intermediate appellate courts both upheld the decision that the ministerial exception did not apply. Finally, the Wisconsin Supreme Court reversed. In doing so, it held that the standard of review was *de novo* for the constitutional issues, but that it would not substitute its judgment for that of the agency "as to the weight of the evidence on any disputed finding of fact." *Id.* at 878. It would, however, set aside any findings of fact not supported by the evidence. *Id*.

The standard of review for orders on the ministerial exception would be similar to other cases that come before the appellate courts on interlocutory appeal. Findings of fact would be accepted unless clearly erroneous, but legal conclusions, including the ultimate conclusion of whether the facts support a finding that the employee was a "minister," would be reviewed *de novo*.

Because the issue of immunity from suit is a legal question and subject to evidence beyond the allegations in the complaint, courts should follow the lead of the trial court in *Pardue* and limit discovery to the narrow issue of the exception until that issue is resolved. 875 A.2d at 671, 678 (finding trial court limiting discovery to the "role and position" of plaintiff and limited to interrogatories, document requests, and requests for admission only was reasonable). A trial court's inherent authority to control the scope

of discovery would allow it to address expeditiously and in the least intrusive manner the constitutional question presented which, if the ministerial exception is found to apply, would be dispositive of the case.

While the question before the Court obviously requires a balancing of interests, the fundamental principles found in the religion clauses of the First Amendment are those that must carry the day. "While an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to free exercise of religious beliefs." *Alicea-Hernandez*, 320 F.3d at 703 (quoting *Rayburn*, 772 F.2d at 1169). "Though its range of application is limited to spiritual functions, the ministerial exception to Title VII is robust where it applies. This protection is in keeping with the 'spirit of freedom for religious organizations [and] independence from secular control or manipulation' reflected in the Supreme Court's free exercise jurisprudence." *Roman Catholic Diocese, Raleigh*, 213 F.3d at 801 (quoting *Kedroff*, 344 U.S. at 116).



CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and hold that the Respondent, Cheryl Perich's position fell within the First Amendment's "ministerial exception," which denies the court jurisdiction over Respondents' claim of retaliation under the Americans with Disabilities Act.

Respectfully submitted,

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