Printed in U.S.A.
Northwestern University Law Review
Vol. 106, No. 2

Colloquy Essays

THE IRONY OF *HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL V. EEOC*[†]

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ABSTRACT—In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a schoolteacher sued her employer for retaliating against her in violation of the American with Disabilities Act (ADA). The success of her ADA claim turned on whether the Supreme Court thought that she was a minister. If she was not a minister, she would have probably won. After all, the school stated in writing that a main reason for her termination was her threatened lawsuit. But because the Supreme Court decided that she was a minister, and that ministers may not sue their religious employers for discrimination under the ministerial exception, she lost.In fact, neither the Free Exercise Clause nor the Establishment Clause necessitated the ministerial exception. Under *Employment Division v. Smith*, neutral laws of general applicability do not violate the Free Exercise Clause, and no one disputes that the ADA is a neutral law of general applicability. In attempting to distinguish *Smith*, the Supreme Court not only created an incoherent free exercise jurisprudence but also ignored *Jones v. Wolf*, which explicitly rejected blanket deference to religious institutions in matters of internal governance. *Jones* further recognized that a deference approach may cause more establishment problems than a neutral principles of law approach. Indeed, the irony of the *Hosanna-Tabor* case is that trying to discern whether the schoolteacher was a minister entangled the Court in religious doctrine more than simply adjudicating her retaliation claim would have.

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[†] This Essay was originally published in the *Northwestern University Law Review Colloquy* on October 31, 2011, 106 NW. U. L. REV. COLLOQUY 96 (2011), http://www.law.northwestern.edu/lawreview/colloquy/2011/22/LRColl2011n22Corbin.

INTRODUCTION

The question presented in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* was whether a schoolteacher should be considered a minister.[1] Although the schoolteacher in this case, Cheryl Perich, began her employment as a lay teacher, she soon became a called teacher with the title "commissioned minister."[2] She taught a religion class four times a week and led her class in daily prayers.[3] During the bulk of her workday, however, Perich taught math, reading, English, social studies, science, gym, art, and music to third and fourth graders.[4]

Perich claimed that the school retaliated against her in violation of the Americans with Disability Act (ADA). During the summer of 2004, Perich became seriously ill.[5] She took disability leave when school started in the fall and was eventually diagnosed with narcolepsy.[6] In January 2005, Perich informed the school principal that her doctor had cleared her to return to work.[7] In response, the principal voiced concerns about the safety of students under Perich's care.[8] The school board then expressed its opinion that Perich would not be physically capable of returning to work and requested that she resign in exchange for assistance with her health insurance.[9] Perich declined the offer.[10] Her doctor released her to return to work on February 22, 2005, effectively ending her disability coverage. When Perich reported for work on February 22, the school did not have a

[1] 131 S. Ct. 1783 (2011) (No. 10-553).

[2] EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010) (internal quotation marks omitted), *rev'd*, 132 S. Ct. 694 (2012).

[3] *Id.*

[4] *Id.* Teaching these subjects occupied all but forty-five minutes of each seven-hour day. *Id.* at 772. In teaching these classes, she used the same textbooks as were used in public schools. *Id.* at 773.

[5] *Id.* at 773.

[6] *Id.* ("Throughout her leave, Perich regularly provided [the principal] with updates about her condition and progress.").

[7] *Id.*

[8] *Id.*

[9] *Id.* at 774.

[10] *Id.*

job for her.[11] Because the school handbook stated that failure to return to work the day after an approved medical leave expires may be considered a voluntary termination, Perich refused to leave school grounds without a letter acknowledging she had appeared for work.[12] After Perich told the principal that she would sue for disability discrimination, she was fired.[13] Correspondence from the school indicated that she lost her job because she was insubordinate and threatened to take legal action.[14] Under the ADA, it is illegal for an employer to retaliate against an employee for bringing or threatening to bring a disability discrimination suit.[15]

The success of Perich's ADA claim turned on whether the Supreme Court thought that she was a minister. If she was not a minister, she would have probably won. After all, the school stated in writing that a main reason for Perich's termination was her threatened lawsuit. But because the Supreme Court decided that she was a minister, and that ministers may not sue their religious employers for discrimination under the ministerial exception, she lost.[16]

Hosanna-Tabor marks the first time the Supreme Court has recognized the ministerial exception. The ministerial exception grants religious organizations immunity from employment discrimination suits by ministers even if the discrimination is not religiously required.[17] Thus, even if the tenets of the Hosanna-Tabor Evangelical Lutheran Church forbid discrimination on the basis of disability—and in fact their *Governing Manual for Lutheran Schools* states that the school will not discriminate on these grounds[18]—ministers cannot sue the school for disability discrimination. The lower courts, which created and uniformly apply the ministerial exception, claimed that the First Amendment's religion clauses require it.[19] The Supreme Court agreed.[20] Interfering with clergy–employment decisions would undermine the church autonomy guaranteed

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 774–75.

[14] *Id.* According to a March 19, 2005 letter from the school board, the school board was going to request that her call be rescinded because of her "insubordinat[e] and disruptive behavior" on the day she reported back to school, and because she had "damaged, beyond repair" her working relationship with the school by "threatening to take legal action." *Id.* at 774 (internal quotation marks omitted).

[15] 42 U.S.C. § 12203(a) (2006).

[16] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 708 (2012).

[17] *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (applying the ministerial exception even though the Salvation Army never claimed the alleged discrimination was religiously mandated).

[18] *Hosanna-Tabor*, 597 F.3d at 782 ("[T]he LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws.").

[19] *See, e.g.*, Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225 (6th Cir. 2007); *McClure*, 460 F.2d at 560.

[20] *Hosanna-Tabor*, 132 S. Ct. at 702.

by the Free Exercise Clause, and adjudicating these suits would lead to entanglement with religious doctrine and therefore violate the Establishment Clause.[21]

The Supreme Court is mistaken. Neither the Free Exercise Clause nor the Establishment Clause required the *Hosanna-Tabor* Court to endorse the ministerial exception. As a neutral law of general applicability, the ADA did not violate the Free Exercise Clause. Furthermore, trying to discern whether Perich was a minister or not created more Establishment Clause problems than simply resolving her retaliation claim would have.

I. FREE EXERCISE CLAUSE JUSTIFICATION

A. Employment Division v. Smith

The lower courts created the ministerial exception before *Employment Division v. Smith*[22] announced a major shift in free exercise jurisprudence. *Smith* held that as long as a law is neutral and generally applicable, it does not violate the Free Exercise Clause even if it imposes a substantial burden on religion.[23] *Smith* itself upheld a law that made a religious sacrament illegal.[24] Because the ADA is both neutral and generally applicable, *Smith* should have defeated any free exercise justification.

The *Hosanna-Tabor* Court summarily dismissed *Smith* in two sentences: "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[25]

But the Court cannot mean to pin the difference on a physical act versus a nonphysical act. It is not altogether clear what that even means. Ritual use of peyote may amount to a physical act, but so does removing someone from her job.

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[21] *See* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1973–81 (2007) (explaining the origins, development, and justifications for ministerial exception).

[22] 494 U.S. 872 (1990).

[23] 494 U.S. at 879, 882–83.

[24] *Id.* at 874 (1990) (recognizing that plaintiffs' use of peyote was a sacrament in their Native American Church); *id.* at 890 (denying plaintiffs an exemption from the Federal Controlled Substance Act that made such sacramental use illegal). It is beyond the scope of this essay to discuss whether *Smith* was correctly decided. Perhaps exemptions that do not impose burdens on others ought to be required under the Free Exercise Clause, although such a claim would have to explain why religious but not equally strong secular moral commitments are protected. *See generally* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007) (arguing that all deep moral commitments should be treated equally). In any case, exemptions for religious employers from antidiscrimination law clearly impose a significant burden on those seeking the protection of those laws.

[25] *Hosanna-Tabor*, 132 S. Ct. at 697.

Instead, the distinction seems to lie with the difference between internal matters and external matters. The first problem with this distinction is that the line between internal and external is far from self-evident. Consuming peyote is an external matter in that it involves breaking a neutral law of general applicability passed in order to promote public health and safety. At the same time, fulfilling a religious sacrament, i.e., taking peyote during a religious ritual, could just as easily be framed as an internal matter, and an internal matter directly related to the church's faith.

The second problem with this distinction is that it results in a free exercise jurisprudence that provides more protection for religious institutions than it does for religious individuals.[26] The combination of *Smith* and *Hosanna-Tabor* means that religious individuals have absolutely no protection from neutral laws of general applicability, even if the laws bar them from participating in a sacrament (the *Smith* rule), while religious institutions may be protected absolutely, even if their acts have no religious basis (the ministerial exception approved by *Hosanna-Tabor*).[27]

The third problem is that protection for "internal church decisions" relies on a misreading of the Court's earlier church property cases. In defending "church autonomy" in matters of internal governance, the Supreme Court pointed to a line of church property cases where the Court deferred to the church hierarchy.[28] From these cases the Court concluded that it should likewise defer to church employers when it comes to employment discrimination suits involving their ministers.[29] A minister, after all, "serves as the church's public representative, its ambassador, and

[26] Individual challenges to neutral laws of general application will never involve "internal church decisions"—only institutional ones will. Reasoning along these lines, the lower courts have argued that *Smith* applies only to individual free exercise claims and not to institutional ones. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–63 (D.C. Cir. 1996). While religious associations, like other associations, serve as mediating institutions between the government and the individual, associational interests are already amply protected by the freedom of expressive association. *See* Corbin, *supra* note 21, at 1987–89.

[27] Either way, the religious individual loses. The religious individual loses under *Smith* because her religious practices need not be accommodated, no matter how deeply felt, so long as the law banning them is neutral and generally applicable. The religious individual—the minister—loses again under the ministerial exception because her religious employer does not have to abide by antidiscrimination law, regardless of whether the discrimination or retaliation is religiously required.

[28] *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

[29] *See, e.g.*, Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 184–88 (2011).

its voice to the faithful."[30] Furthermore, the deference should be absolute, so that in all discrimination cases, the minister loses.

Yet, animating the Court's recognition of church autonomy in these cases was the Establishment Clause concern that the state would entangle itself in theological or doctrinal controversies.[31] The Establishment Clause bars the courts from resolving theological or doctrinal disputes or endorsing one version of religious truth over another.[32] The state is considered incompetent in these religious matters. For example, in *Watson v. Jones*,[33] the Supreme Court rejected the English rule of awarding contested property in church schisms to the faction the court finds represents the "true standard of faith," and instead deferred to church hierarchy on this religious question.[34] Similarly, in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, the Supreme Court invalidated a Georgia law that required the courts to settle a property dispute between a general church and breakaway local churches by deciding whether the general church had departed from the religious tenets it held at the time the local churches first affiliated with it.[35] Entanglement concerns also explain the holdings of the other cases mentioned in *Hosanna-Tabor*.[36]

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[30] Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006); *see also* McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972) ("The minister is the chief instrument by which the church seeks to fulfill its purpose.").

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

[32] Thus, as examples, the state cannot declare that Catholics practice the correct version of Christianity or that the Catholic Mass is properly performed in Latin rather than English.

[33] 80 U.S. (13 Wall.) 679 (1871).

[34] *Id.* at 727.

[35] 393 U.S. 440, 441, 449–50 (1968). In fact, the Supreme Court in *Presbyterian Church* did not actually defer to the church hierarchy. *See id.* at 449–51.

[36] In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Supreme Court declined to rule on whether the church properly applied its *own* policies. 426 U.S. 696, 709 (1976). Notably, the case did not address the issue of the Court's competence to rule on whether the church failed to abide by *state* laws.

In *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, the Supreme Court rejected the New York legislature's finding that one faction would better carry out the church's mission and opted for deference to the highest church body. 344 U.S. 94, 106 n.10, 107–09, 117–18 (1952). The *Hosanna-Tabor* Court quoted *Kedroff* for the proposition that "'[f]reedom to select the clergy, where no improper methods of choice are proven,' is 'part of the free exercise of religion' protected by the First Amendment" without acknowledging the caveat that the Free Exercise Clause would not protect decisions involving "improper methods of choice." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704 (2012) (alteration in original) (quoting *Kedroff*, 344 U.S. at 116). If "arbitrariness" (an improper method, *see Kedroff*, 344 U.S. at 116) encompasses improper discrimination, then this language does not support the absolute immunity of the ministerial exception. Furthermore, the very fact that there are any caveats counsels against absolute immunity.

In addition, reliance on this line of cases is misplaced because it overlooks *Jones v. Wolf*,[37] the last church property dispute decided by the Supreme Court. Despite being the most recent case involving internal church governance, the *Hosanna-Tabor* Court completely ignored it.[38] It had to, since *Jones* explicitly rejected blanket deference to religious institutions.[39]

B. Jones v. Wolf

Like previous church property disputes, *Jones* involved a schism within a church. A majority of the Vineville Church in Macon, Georgia, voted to separate from the Presbyterian Church in the United States (General Church).[40] Both the majority congregation and the minority that wished to remain affiliated with the General Church claimed the church property as their own.[41]

The Supreme Court rejected a rule requiring it to defer to the church hierarchy of the General Church[42]: "We cannot agree, however, that the First Amendment requires . . . a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."[43]

Instead, the Supreme Court endorsed a neutral principles of law approach: "We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute."[44] In other words, the Court endorsed settling the church's property dispute in the same way that it would settle the property dispute of a secular organization. Thus, a court could "examine[] the deeds to the properties, the state statutes dealing with implied trust[], and the Book of Church Order to

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[37] 443 U.S. 595 (1979).

[38] In addition to misreading the church property cases, the claim that *Employment Division v. Smith* applies only to individual and not institutional free exercise claims also overlooks the general shift in religion clause jurisprudence—a shift that *Smith* embodies—towards more equal treatment of religion and nonreligion. *See* Corbin, *supra* note 21, at 1990–96.

[39] Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 293–95 (1994); Ira C. Lupu, *Free Exercise Exemption and Religious and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 407 (1987).

[40] *Jones*, 443 U.S. at 598.

[41] *Id.*

[42] *Id.* at 604–05 ("The dissent . . . would insist as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the 'authoritative resolution of the dispute within the church itself.'").

[43] *Id.* at 605; *accord id.* at 602 ("[T]he First Amendment does not dictate that a State must follow a particular method of resolving church property disputes.").

[44] *Id.* at 604.

determine whether there was any basis for a trust in favor of the general church."[45]

The *Jones* Court understood that Establishment Clause issues may arise under a neutral principles of law approach.[46] Nonetheless, the *Jones* Court approved a neutral principles of law approach so long as "it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[47] Thus, the possibility that Establishment Clause issues may surface under a neutral principles of law approach does not preclude its use. Perhaps that bears repeating: just because an Establishment Clause issue may arise in the adjudication of a particular type of claim does not mean a court must forever abandon trying to resolve such a claim using neutral principles of law.[48]

Furthermore, the *Jones* Court recognized that a deference approach does not eliminate all Establishment Clause problems. When church structure is ambiguous, determining which unit of the church governance has ultimate control might well result in entanglement with church doctrine.[49] In that case, it is actually the neutral principles of law approach that can best avoid entanglement because it "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine."[50]

In short, controlling precedent did not require a rule of deference to the Hosanna-Tabor Evangelical Lutheran Church and School in this internal-governance dispute. The Supreme Court could have resolved this retaliation claim in much the same way courts resolve any other retaliation claim. Only if adjudication of a claim entangles the court in theological or doctrinal questions should the courts opt for deference to church authorities. This conclusion is especially true because, as *Jones* acknowledges, a deference approach might actually cause more Establishment Clause ills than a neutral principles of law approach.

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[45] *Id.* at 600 (citation omitted). In other words, the Court expressly contemplated that the courts would look at religious documents like a church constitution for language of trust. *Id.* at 604.

[46] *See id.* at 604 ("This is not to say that the application of the neutral-principles approach is wholly free of difficulty. . . . If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.").

[47] *Id.* at 602.

[48] *Id.* at 604 ("On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application.").

[49] *See id.* at 605.

[50] *Id.*

II. ESTABLISHMENT CLAUSE JUSTIFICATION

A. Neutral Principles of Law Approach: Resolving the Retaliation Claim

Supporters of the ministerial exception retort that resolving discrimination claims violates the Establishment Clause because their adjudication invariably requires courts to evaluate a minister's spiritual qualifications or determine whether a minister sufficiently embodies the church and its teachings.[51] But even assuming that some employment discrimination cases might present these Establishment Clause problems, not all do. Perich's claim did not. Consequently, the Establishment Clause cannot justify the blanket immunity that the ministerial exception provides.

It is incorrect to assume that adjudicating ministers' antidiscrimination claims will require courts to decide questions beyond their institutional competence. A court could have easily resolved Perich's retaliation claim without becoming entangled with doctrinal or theological questions. In order to win her retaliation suit, Perich would have had to prove that (1) she engaged in activity protected by the ADA, (2) she suffered a materially adverse action, and (3) there was a causal link between the protected activity and the adverse action.[52]

Perich's protected activity was the assertion of her legal rights under the ADA, and the adverse action was her termination. As in most retaliation cases, the pivotal question was whether the assertion of her legal rights caused her termination.[53] It is uncontested that the school sent her a letter stating that the school board intended to fire her because her threatened legal action ruined her working relationship with the school.[54] Thus, unlike

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[51] *See* Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1613; *see also* Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (stating that the court could not "imagine an area of inquiry less suited to a temporal court for decision [than] evaluation of the 'gifts and graces' of a minister" (alteration in original) (quoting Minker v. Balt. Annual Conference United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990)) (internal quotation marks omitted)); Brief for the Petitioner at 14, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012), (No. 10-553), 2011 WL 2414707, at *14 ("The Establishment Clause also prevents the courts from deciding the religious questions that are inevitably involved in employment disputes over ministers.").

[52] *See, e.g.*, Barrett v. Whirlpool Corp., 556 F.3d 502, 516 (6th Cir. 2009); Bryson v. Regis Corp., 498 F.3d 561, 577 (6th Cir. 2007).

[53] Case law is unclear as to whether Perich needs to prove that retaliation was the but-for cause, or merely one cause, of her termination. The Civil Rights Act of 1991 clarified that discrimination need only be a motivating factor for liability under Title VII. Lower courts differ about whether this standard applies to suits under the ADA and other antidiscrimination statutes. *Compare* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) (applying the "but-for" standard to an ADA claim), *with* Martin v. Cal. Dep't of Veterans Affairs, 560 F.3d 1042, 1048 (9th Cir. 2009) (applying the "motivating factor" standard to an ADA claim).

[54] EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 774 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012).

most cases, Perich had direct evidence of retaliation.[55] As the Sixth Circuit concluded, "contrary to Hosanna-Tabor's assertions, Perich's claims would not require the court to analyze any church doctrine."[56]

1. Main Religious Claim Is a Free Exercise Claim.—Hosanna-Tabor nevertheless argued that there was a religious question because Perich was fired for being insubordinate and spiritually unfit.[57] She had been unruly and disruptive when asserting her legal rights, thereby ruining her relationship with the school.[58] And instead of trusting the church's mandatory dispute resolution process, Perich sued in court.[59] Of course, in a secular context, firing someone for asserting her legal rights is the very definition of retaliation and is illegal no matter how disruptive, insubordinate, or infuriating the employer may find it. Moreover, any contract where the employee has waived all rights to bring a discrimination claim against her employer is void as against public policy.[60] That is, a contractual provision stipulating that all discrimination claims will be resolved internally, rather than before a neutral third party, is unenforceable.[61] Does the religious context, however, transform the retaliation question into a religious question, the resolution of which violates the Establishment Clause? Hosanna-Tabor's argument boiled down to this: a religious organization should be able to proclaim ministers spiritually unfit anytime they assert their legal rights or insist that the church follow the law, and for the secular courts to disagree with this assessment violates the Establishment Clause.

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[55] The principal sent Perich a letter stating that due to her disruptive behavior on the day she reported back to work, the board would request her termination. *Id.* The letter also stated that she had "damaged, beyond repair" her working relationship with the school by "threatening to take legal action." *Id.* (internal quotation marks omitted).

[56] *Id.* at 781.

[57] According to the school, Perich was fired "because her insubordination and threats of litigation violated Church teaching." Petition for Writ of Certiorari at 6, *Hosanna-Tabor*, No. 10-533 (Oct. 22, 2011).

[58] *Hosanna-Tabor*, 597 F.3d at 774.

[59] *See id.* at 782.

[60] Employees may not by contract prospectively waive their civil rights:

> [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974).

[61] While employees may agree to bring civil rights claims before a neutral third party arbitrator rather than in court, the agreement is valid only if "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 30 (1991) (alteration in original) (allowing arbitration clauses of civil rights claims on the assumption that the arbitrator will be "[a] conscientious and impartial arbitrator[]" and noting that the applicable arbitration rules "provide protections against biased panels" (quoting Mitsubushi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (internal quotation mark omitted)). It is doubtful that Hosanna-Tabor's "internal dispute resolution" process would qualify as arbitration, much less meet this standard.

Again, a court could avoid all Establishment Clause issues and still decide this retaliation claim. To be sure, the Supreme Court would have violated the Establishment Clause if it had declared what the church's true beliefs were with regard to insubordination among its ministers. But the Court could have assumed that, under tenets of the Missouri Synod—the larger organization of which Hosanna-Tabor is a member church—dissension can compromise a minister's spirituality and even that it was spiritual unfitness and not pique or financial considerations[62] that motivated Perich's dismissal,[63] and still hold that the church violated the law. How? In claiming that Perich was spiritually deficient because she threatened legal action, Hosanna-Tabor did not deny that her attempt to exercise her civil rights resulted in her termination. Instead, the argument was essentially that the retaliation was religiously mandated. Nonetheless, it was still an admission of retaliation.

This defense raises free exercise concerns, not establishment ones. The Court had to decide whether a neutral law of general applicability (retaliation is illegal) superseded a religious obligation (retaliation is religiously required). Under *Employment Division v. Smith*, as long as the law is neutral and generally applicable, it does not matter if it substantially burdens a religious practice.[64]

Of course, even before *Smith*, the fact that a law burdened a religious tenet did not guarantee an exemption from that law.[65] Even a significant burden on a religious practice might be countenanced if the state's interest

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[62] When Perich went on leave, the school hired a replacement for the rest of the year instead of a more limited time frame. As a result, the school could not lay off the replacement if Perich were to return. Thus, it was in its financial interest to terminate Perich.

[63] This is a big assumption, and a court might well decide that the claim is merely pretext for discrimination rather than sincere. This is the same determination courts regularly make in discrimination claims. *See* Corbin, *supra* note 21, at 2016–22 (explaining why pretext analysis does not require courts to become entangled in theological or doctrinal issues). For example, Perich might offer evidence that another commissioned teacher threatened to sue for breach of contract yet did not lose his job.

In *Ohio Civil Rights Commission v. Dayton*, 477 U.S. 619 (1986), a case that parallels this one, the Supreme Court gave its blessing to a pretext analysis. In that case, a born-again Christian school told a pregnant teacher she could not return to school the following year because of its belief that mothers should stay home with their preschool children. *Id.* at 623. When she threatened litigation, the school fired her for violating the mandatory internal dispute resolution provision in her contract, arguing that Christians should not sue other Christians. *Id.* While the ultimate holding focused on abstention issues, the Supreme Court noted that "the Commission violates no constitutional rights by merely investigating the circumstances of [the schoolteacher's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628.

[64] In effect, if it does not violate the Free Exercise Clause for the state to ban a sacrament, as it did in *Smith*, then it does not violate the Free Exercise Clause for the state to regulate those who might administer a sacrament. Although here, of course, Perich was not administering any sacraments, and the issue before the Court was whether she should even be considered a minister.

[65] For example, even if a church's religious tenets required that insubordinate ministers be flogged, courts are not likely to exempt it from criminal assault law.

were compelling, and the means to achieve it narrowly tailored.[66] In approving the ministerial exception and its absolute protection for religious institutions, the Supreme Court barely acknowledged the goals of antidiscrimination law. The *Hosanna-Tabor* Court devoted a single throwaway line at the very end of the opinion to the state's interest: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important."[67] Yet, in granting blanket immunity to Hosanna-Tabor, the Court did not consider, much less balance, any countervailing interests. Surely the right to equal protection and the right to a day in court deserved more.

Furthermore, the Court's acceptance of the school's all-litigious-ministers-are-spiritually-deficient argument suggests that religious employers now have carte blanche to retaliate with impunity. A church may be able to dismiss as insubordinate and spiritually unfit a minister who threatens to sue after the church breaches its contract and fails to pay the agreed-upon salary. A church may also be able to terminate without interference a minister who helps a colleague file a sexual harassment claim. Likewise, a church, religious school, or religious hospital may be able to fire as insubordinate and spiritually unfit a minister who reports any wrongdoing, whether it be discrimination, embezzlement, or the sexual abuse of children.

The *Hosanna-Tabor* Court insists that its holding is limited to terminations stemming from antidiscrimination claims.[68] Even if so limited, it still means that a minister cannot bring, or safely help anyone else bring,[69] a sex, race, age, or disability discrimination suit. Moreover, the Court's reasoning is not so easily confined. If a church has an absolute right to

[66] Courts have held that antidiscrimination laws trump religious views. For example, courts have held that religious schools must comply with Title VII and the Equal Pay Act even though their religious tenets regard married men as heads of households and require providing them with better health insurance or salaries than married women. *See, e.g.*, EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986) (holding that the state could require a school to violate religious tenets and provide health insurance to married women as well as to singles and married men); EEOC v. Tree of Life Christian Schs., 751 F. Supp. 700, 716–17 (S.D. Ohio 1990) (holding that the state could require a school to violate religious tenets and pay married women the same compensation as married men); *see also* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–06 (1985) (holding that the state could force a religious organization to violate its religious beliefs and pay minimum wage as required by the Fair Labor Standards Act).

[67] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 710 (2012).

[68] *Id.* at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit.").

[69] Because *Hosanna-Tabor* involves a minister litigating on her own behalf, it is possible that the ministerial exception will not apply to ministers who help others pursue discrimination claims against their church. *See supra* note 68. *But cf.* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (ministerial exception applied to minister demoted after helping colleague with her sexual harassment claim).

select its ministers, it is not clear why the result would be different if it wished to fire a whistle-blower minister or a minister who brought a breach of contract suit rather than a discrimination suit.[70] In short, letting a religious organization claim that any minister who insists on compliance with the law is spiritually unfit creates a potentially limitless loophole and allows it to be "a law unto itself."[71]

2. Reinstatement Issue.—Although resolving Perich's retaliation claim does not raise Establishment Clause problems, perhaps remedying it does. The Supreme Court frames reinstatement as foisting an "unwanted minister" onto a church and "depriving the church of control over the selection of those who will personify its beliefs."[72] After all, how can a minister be "an effective advocate for [a church's] religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses[?]"[73] Yet reinstatement does not necessarily distort a church's teachings. In fact, reinstatement itself is not inevitable.

As an initial matter, reinstating a previously appointed minister who has won a discrimination suit is not the equivalent of the Crown imposing a random government-selected official onto a church, as the Court described when discussing the historical backdrop of the religion clauses.[74] In addition, some claims, such as Title VII sexual harassment claims and Fair Labor Standard Act wage and hour claims, do not involve reinstatement or require an evaluation of the plaintiff–minister's "gifts and graces." Because these cases are unrelated to the church's selection of its representatives and control of its voice, they should not fall within the purview of the ministerial exception. For just this reason, several lower courts have refused

[70] Furthermore, although the Court explicitly stated it was not ruling on whether the ministerial exception applies to breach of contract or tortious conduct claims brought by ministers, *Hosanna-Tabor*, 132 S. Ct. at 710, the scope of the reservation is unclear. Does it mean that the ministerial exception does not apply to any action arising from a breach of contract/tort claim, including retaliation, so that a church cannot fire a minister for bringing a breach of contract/tort claim, even if its religious tenets bar suits against the church? Or does the ministerial exception only not apply to the underlying breach of contract/tort claim while still foreclosing retaliation claims? If it is just the latter, then ministers still risk retaliatory discharge for reporting wrongdoing by their religious employers. If it is the former, the Court needs to explain why contract or tort law may trump a church's religious beliefs, but not antidiscrimination law.

[71] *Cf.* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990); *see also id.* at 879 (arguing that granting exemptions to neutral laws of general applicability "would be to make the professed doctrines of religious belief superior to the law of the land" and would allow the religious observer "to become a law unto himself").

[72] *Hosanna-Tabor*, 132 S. Ct. at 706.

[73] *Id.* at 713.

[74] *Id.* at 702–03; *see also id.* at 702 (describing, as an example, a letter sent to a church wherein Henry II wrote: "I order you to hold a free election, but forbid you to elect anyone but Richard my clerk" (internal quotation marks omitted)).

to apply the ministerial exemption to sexual harassment cases.[75] The same should hold true for wage and hour claims.[76]

In any event, reinstatement only becomes an option when a minister, chosen and endorsed by a church, has proven that she was terminated because of her disability, race, sex, age, or in retaliation for raising a discrimination claim. In most instances, the minister lost her job not because of her own spiritual shortcomings, but because of the shortcomings of a church decisionmaker.[77] And if a minister was fired because of her disability (or race or sex or age) and her church has no religious tenets requiring dismissal of people due to disability (or race or sex or age), then letting her resume her post does not undermine any religious tenet or message. In other words, a minister who has proven that she lost her position due to discrimination does not present a case where a minister cannot represent her church and its teachings. Indeed, if discrimination distorted the decisionmaking process, then reinstatement would merely correct a church mistake.[78]

It can be argued that Perich's retaliation case is the exception to the rule that reinstatement rarely compromises any religious values because, according to the Missouri Synod, the very act of suing the church contravenes religious doctrine. In unusual cases, where there is no doubt that the minister had violated a religious tenet, a compromise position might be to limit the remedy to damages.[79] In fact, this alternative remedy is already available in secular employment discrimination cases where reinstatement is not feasible.[80]

In addition to damages as an alternative remedy to reinstatement, there may be constitutional protection for the church–clergy relationship, often described as the "lifeblood" of the church. *Boy Scouts of America v. Dale*, which allowed the Boy Scouts to violate antidiscrimination law on the grounds that the presence of a gay scoutmaster would undermine the Boy Scouts' anti-homosexual message,[81] strengthened the First Amendment

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[75] *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999).

[76] *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc. 369 F.3d 797, 805 (4th Cir. 2004) (Luttig, J., dissenting from denial of rehearing en banc) ("[T]he requirement that the Hebrew Home pay employees, like Shaliehsabou, overtime does not require the government—or the court—to question the Hebrew Home's religious beliefs, inquire into the religious nature of the activities that Shaliehsabou performs, or to become involved in any way in the governance or functioning of the institution.").

[77] In a case where a minister has successfully proven discrimination, the fault lies with the discriminatory decisionmaker, not the victim of that discrimination.

[78] Reinstatement might actually benefit the church by restoring to it someone it would have employed but for unsanctioned discrimination. *See* Corbin, *supra* note 21, at 2023.

[79] This alternative remedy should be used sparingly.

[80] *See, e.g.*, Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846–37, 850 (2001). It was also the remedy Perich was actually seeking in the Supreme Court. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012).

[81] 530 U.S. 640, 653–56 (2000).

freedom of association guaranteed by the Free Speech Clause. Like other associations, churches have a free speech interest in selecting those who represent and speak for them. Many of the concerns expressed by both the majority and Justice Alito's concurrence—particularly the worry that reinstatement forces a religious institution to retain a minister whose presence undermines its messages[82]—sound in freedom of association,[83] and religious associations are as protected as any other association. However, unlike the ministerial exception, protection under freedom of association is not absolute. For Hosanna-Tabor's decision to fire Perich to be protected to the same degree as the Boy Scouts' decision in *Dale*, Hosanna-Tabor would have to establish that keeping Perich as a third- and fourth-grade teacher would distort a religious message.[84] Even then, the decision may still be illegal if the Court determines that the antiretaliation law is sufficiently tailored to advance a sufficiently important government interest.[85]

B. Church Deference Approach: Deciding Whether Perich Is a Minister

The irony of *Hosanna-Tabor* is that applying the ministerial exception embroils the Court in theological or doctrinal disputes in a way that simply resolving this retaliation suit does not. The case presents an example of how

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[82] Religions who limit their clergy positions to men may continue the practice on the grounds that admitting women would undermine their religious messages about the nature of ministry or the proper roles of men and women.

[83] *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706 (noting church's need to "shape its own faith and mission through its appointments"). In fact, Justice Alito's concurrence, joined by Justice Kagan, relied heavily on freedom of association principles. *Id.* at 712–13 (Alito, J., concurring). The concurrence argued that freedom of association protection "applies with special force with respect to religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Id.* at 712. However, the concurrence failed to explain why religious groups dedicated to the expression and propagation of ideas deserve greater protection than secular groups dedicated to the expression and propagation of ideas, other than to point to the Free Exercise Clause. Yet it is precisely the scope of the Free Exercise Clause that is at issue. Furthermore, protecting the ideas and expression of religious groups more than those of secular groups raises serious free speech issues. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320 (1991) ("[A] constitutional preference for [religion] cuts at the heart of the central principle of the Free Speech Clause—that every idea is of equal dignity and status in the marketplace of ideas.").

[84] To the extent that establishment issues may come up, they differ from those that arise in applying the ministerial exception. To start, it is much more problematic to encounter an Establishment Clause issue in applying the ministerial exception when the very reason for its existence is to avoid Establishment Clause issues. In addition, the question asked in applying the ministerial exception—does this person perform religiously important duties?—necessarily involves delving into religious doctrine and beliefs. The questions asked in resolving a freedom of association claim—does the religious employer have a religious message and does the presence of a particular employee distort that message—do not involve delving into religious doctrine and beliefs, especially if the court is deferential with regard to the first question.

[85] *Boy Scouts*, 530 U.S. at 657–58 (balancing expressive associational interests against antidiscrimination goals of public accommodation law).

a church autonomy or deference approach presents more Establishment Clause problems than a neutral principles of law approach does.

To trigger the ministerial exception, the plaintiff in a discrimination suit must be deemed a "minister." In determining who counts as a minister, courts cannot simply accept the religious employer's characterization of a position, as it could insist that all of its employees were ministers.[86] Lower courts applying the ministerial exception took a functional approach to the question.[87] Although the Supreme Court declined to enunciate a clear rule,[88] it considered Perich's title, its significance, and whether Perich performed "important religious functions" for her Church.[89]

This query "necessarily requires the court to determine whether a position is important to the spiritual and pastoral mission of the church."[90] This in turn contemplates some examination of the religious beliefs of the religious organization. The very nature of the question—is this person a "minister"?—invites courts to become entangled with theological and doctrinal issues beyond their institutional competence.[91]

Teaching religion class and leading prayers are religious activities and would readily qualify as religious duties. Yet these tasks only accounted for approximately forty-five minutes out of Perich's seven-hour work day—

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[86] *See, e.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th Cir. 1990) (a school claimed that all teachers "consider teaching to be their personal ministry"); EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 283 (5th Cir. 1981) (a seminary claimed that all its employees, including support staff, served a ministerial function).

[87] *See, e.g.*, Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039 (7th Cir. 2006) ("[I]f to avoid having to pay the minimum wage to its janitor a church designated all its employees 'ministers,' the court would treat the designation as a subterfuge.").

[88] *Hosanna-Tabor*, 132 S. Ct. at 707 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

[89] *Id.* at 708 ("In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception."). Justice Alito's concurrence favored a functional analysis: "[C]ourts should focus on the function performed by persons who work for religious bodies." *Id.* at 711 (Alito, J., concurring).

[90] Rayburn v. Gen. Conference of Seventh Day Adventists, 722 F.2d 1164, 1169 (4th Cir. 1985).

[91] Some might argue that all religion clause cases necessarily require a threshold religious-or-secular inquiry in order to determine if the religion clauses even apply. That is not always true. Sometimes the sole question in a free exercise challenge is whether a law is neutral and generally applicable. Indeed, one of the reasons the Supreme Court adopted the *Employment Division v. Smith* rule was to avoid making judgments about religion and religious doctrine. Moreover, the religious-or-secular question is never the only question in other contexts. As a result, the Court can afford to be deferential in those contexts. So, for example, in applying the *Sherbert v. Verner* test to laws that are not neutral and generally applicable, *see* 374 U.S. 398 (1963), courts can assume that the law imposes a substantial burden on a religious practice, yet still uphold the law if it passes strict scrutiny. Likewise, under the Establishment Clause, there are also questions about history, purpose and effect, endorsement or coercion. Because the religious-or-secular question may be dispositive when applying the ministerial exception, courts must closely examine a religious tradition and its beliefs and decide whether someone would be considered a minister within it.

roughly 11% of her time. While the Court held that the Sixth Circuit placed too much emphasis on the amount of time spent on religious activities,[92] unless the Court is willing to categorize anyone who performs even one religious task as a minister, it still has to draw the quantitative line somewhere. Otherwise a school can make everyone a minister by ensuring that each and every school employee, from the janitor to the bookkeeper to the P.E. teacher, leads a prayer at least once or twice during the school year. As a result, virtually no one who works for a religious school, hospital, nursing home, social service organization, or church would have any employment protections.

Perhaps anticipating this issue, the *Hosanna-Tabor* Court also pointed to Perich's title (commissioned minister) and its significance.[93] Courts cannot, however, rely on a title alone because, as Justice Alito's concurrence notes, some religions have no ministers and some consider all their members to be part of their ministry.[94] Accordingly, the *Hosanna-Tabor* Court carefully detailed the requirements for becoming a commissioned minister in the Lutheran Church—Missouri Synod. In particular, the Court stressed that Perich had to take eight college-level courses (which sounds like the equivalent of one year of full-time college), pass exams, and be endorsed by her local Synod district.[95] But does that suffice to make her religiously important and therefore a "minister" within the Missouri Synod? Pastors in the Missouri Synod must complete four years of college study, and four additional years of graduate-level divinity school.[96] Furthermore, pastors are ordained. Ordination is "the historic and apostolic rite by which, through Word and prayer, a man is set apart for service to Christ and His church as a pastor."[97] Notably, the Missouri Synod does not ordain women.[98] The Missouri Synod is emphatic on this point[99]:

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[92] *Hosanna-Tabor*, 132 S. Ct. at 708–09; *see also id.* at 709 ("The issue before us, however, is not one that can be resolved by a stopwatch.").

[93] *Id.* at 707–08.

[94] *Id.* at 713–14 (Alito, J., concurring).

[95] *Id.* at 707.

[96] For example, it takes four years to earn a Masters of Divinity, described as "the normative route to certification for ordained ministry," at Concordia Seminary, *Master of Divinity*, CONCORDIA SEMINARY, http://www.csl.edu/admissions/academics/mdiv (last visited June 1, 2012), and longer if admitted students cannot demonstrate entry-level competence in Old Testament, New Testament, Christian doctrine, and Biblical Greek, *Curriculum*, CONCORDIA SEMINARY, http://www.csl.edu/admissions/academics/mdiv/curriculum (last visited June 1, 2012) (noting that "aquir[ing] these competencies can add as much as one additional year of academic residence"). Concordia Theological Seminary has similar requirements. *See Degree Requirements*, CONCORDIA THEOLOGICAL SEMINARY, http://www.ctsfw.edu/Page.aspx?pid=392 (last visited June 1, 2012).

[97] A.L. Barry, *What About . . . Pastors*, LUTHERAN CHURCH—MISSOURI SYNOD, http://www.lcms.org/Document.fdoc?src=lcm&id=1094 (last visited June 1, 2012).

[98] *See* A.L. Barry, *What About . . . The Ordination of Women to the Pastoral Office*, LUTHERAN CHURCH—MISSOURI SYNOD, http://www.lcms.org/Document.fdoc?src=lcm&id=1099 (last visited June 1, 2012); *see also* Brief of the Lutheran Church—Missouri Synod as Amicus Curiae in Support of

Women cannot administer the Sacraments nor can they preach the Word.[100] The Synod's official position is that "The Lord teaches us through His Word that women are not given the responsibility of serving the church as pastors" and that "the ordination of women is contrary to the Word of God."[101] Both men and women can serve God, but "Men have the divine obligation to be the spiritual leaders of the church. Women are called to be of assistance to men in this capacity."[102]

In passing judgment on the "substance reflected in [Perich's] title,"[103] the Court necessarily addressed theological questions, and perhaps even controversies, that are beyond its competence and authority. Within the Missouri Synod, what is the religious significance of having one year of religious training instead of at least four? What is the religious significance of endorsement compared to ordination? Can any woman's contribution be deemed "ministerial" in a tradition that explicitly reserves church leadership and the title of "Pastor" to men? More importantly, are the courts capable of making these kinds of determinations? In concluding that Perich's title proves her position was important to the religious mission of the Missouri Synod, the Supreme Court made a number of decisions about the beliefs and practices of the Missouri Synod—including how the Synod ought to view a "commissioned minister"—that it really has no business making.

Another possible argument supporting the Court's conclusion is that as a teacher (and commissioned ministers are often teachers),[104] Perich served as a Christian role model for her students and that was an activity she performed all day, every day. If that were a religiously important function, then perhaps she should count as a minister. "According to Perich, using secular textbooks to teach secular subjects is a secular activity; but

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Petitioner at 6, *Hosanna-Tabor*, 132 S. Ct. at 694 (No. 10-553), 2011 WL 2470848, at *6 (explaining that pastoral office is limited to men).

[99] As Leslie C. Griffin points out, another irony of the ministerial exception is that women who cannot be ordained ministers for purposes of church leadership become ministers when they bring civil rights claims: "All these women who could not be ordained by their churches were made ministers by the courts . . . ." Smith *and Women's Equality*, 32 CARDOZO L. REV. 1831, 1850–52 (2011); *see also id.* at 1852 ("Although the Roman Catholic Church would never ordain [plaintiffs] Brazauskas or Petruska within the church, the courts were persuaded by the church hierarchy to confer ministerial status on the two women just long enough to dismiss their lawsuits.").

[100] Brief of the Lutheran Church—Missouri Synod, *supra* note 98, at 4 (explaining the role of pastors).

[101] Barry, *supra* note 98. In support of its official position, the Missouri Synod quotes from the Bible, including 1 *Corinthians* 14:33–34, 37 ("As in all churches of the saints, the women should keep silence in the churches. For they are not permitted to speak, but should be subordinate, even as the law says . . . what I am writing to you is a command of the Lord." (omission in original)) and 1 *Timothy* 2:11–12 ("Let a women learn in silence with all submissiveness. I permit no woman to teach or to have authority over men; she is to keep silent."). *Id.*

[102] *Id.*

[103] *Hosanna-Tabor*, 132 S. Ct. at 708.

[104] Brief of the Lutheran Church—Missouri Synod, *supra* note 98, at 6.

according to the Church, the same activity is religious because all teachers are required to serve as 'fine Christian role models.'"[105] But whether serving as a role model is religiously important—not whether it is important in general, but whether it is important to the Missouri Synod's spiritual and pastoral mission—is not a question courts should answer.[106] In short, courts should not decide what is or is not important to a church's pastoral mission or resolve a theological dispute about the religious role of commissioned ministers or schoolteachers.

The need for courts to resolve theological disputes in applying the ministerial exception is even more stark in other examples. What if Perich only taught secular subjects? Or what if, instead of a schoolteacher for the Evangelical Lutheran Church, she served as its music director? In order to decide whether a music director is a minister, the Court would have to rule on the religious significance of music in the Missouri Synod.[107] Again, applying the ministerial exception would force courts to decide whether music is integral to a denomination's worship services or important enough that teaching it makes someone a minister. Resolving theological disputes about the significance of music to worship is beyond the courts' institutional competence, yet it is exactly the kind of decision that application of the ministerial exception may require.[108]

CONCLUSION

People who wish to serve their God should not have to choose between their calling and their civil rights. Yet, the ministerial exception essentially strips ministers of protection against discrimination based on race,[109] sex,[110] age,[111] and, as here, disability, and potentially leaves them outside the

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[105] Petition for Writ of Certiorari, *supra* note 57, at 16 (citation omitted); *see also* Dias v. Archdiocese of Cincinnati, No. 1:11-cv-00251, 2012 WL 1068165 (Mar. 29, 2012) (rejecting the Catholic Church's claim that a computer instructor at a Catholic school was a minister because she served as a Catholic role model).

[106] *Cf.* Corbin, *supra* note 21, at 2028 (discussing the distinction between deciding whether something is religiously true and evaluating the credibility of religious reasons).

[107] *See* EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 802 (4th Cir. 2000) (holding that "[music] serves a unique function in worship").

[108] One appeals court noted that "[t]he very invocation of the ministerial exemption requires us to engage in entanglement with a vengeance." Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 797 (9th Cir. 2005).

[109] *See, e.g.*, Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (holding that a Hispanic communications manager could not bring a Title VII national origin claim); Ross v. Metro. Church of God, 471 F. Supp. 2d 1306, 1308–12 (N.D. Ga. 2007) (barring a Pastor of Worship Arts—a music director—from bringing a § 1981 claim).

[110] *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006) (holding that a college chaplain could not bring a Title VII sex discrimination claim).

[111] *See, e.g.*, Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (holding that a music director could not bring an ADEA claim).

shelter of the Family Medical Leave Act (FMLA),[112] the Fair Labor Standards Act (FLSA),[113] the Equal Pay Act,[114] and a host of other protective employment laws.[115]

This absolute immunity from lawsuits cannot be justified by either the Free Exercise Clause or the Establishment Clause. The ADA is a neutral law of general applicability and therefore does not violate the Free Exercise Clause, regardless of any religious burden it may impose on the Hosanna-Tabor Evangelical Lutheran Church and School—though it is not at all certain that compliance with the ADA burdens the school.[116] In addition, to the extent that Perich's case raised Establishment Clause problems, it was the Court's deciding whether she is a minister that raised such problems, not deciding whether the school retaliated against her.

Jones v. Wolf had outlined a better approach: apply employment discrimination law to a religious employer in the same way it would be applied to a secular employer. If a theological or doctrinal question arises, defer to the religious institution on that issue. Notably, accepting the employer's answer to a theological question would not guarantee victory for the religious employer. To start, if the religion condemns discrimination, then applying antidiscrimination law does not impose a substantial burden. Furthermore, even if the religion advocates discrimination or retaliation, the government's interest in protecting employees might outweigh the church's. For example, even if it violates religious tenets to pay ministers the minimum wage, a religious school could still be required to obey the law.[117] Consequently, religious tenets barring ministers from asserting their legal rights would not automatically shield religious employers from liability if

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[112] Fassl v. Our Lady of Perpetual Help Roman Catholic Church, No. Civ.A. 05-CV-0404, 2005 WL 2455253, at *2 (E.D. Pa. Oct. 5, 2005) (holding that a director of music was precluded from bringing an FMLA suit).

[113] *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1292 (9th Cir. 2010) (holding that a seminarian who performed maintenance work and assisted with mass could not bring an FLSA claim); Schleicher v. Salvation Army, 518 F.3d 472, 477–78 (7th Cir. 2008) (holding that Salvation Army ministers who ran a rehabilitation center could not bring FLSA claims against their employer for violating minimum wage and overtime requirements); Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299, 307 (4th Cir. 2004) (barring a kosher supervisor of a Jewish nursing home from bringing an FLSA claim).

[114] *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1241 (10th Cir. 2010) (holding that a director of the Department of Religious Formation could not bring an Equal Pay Act claim).

[115] *See, e.g.*, *id.* (holding that a director of the Department of Religious Formation could not bring a Title VII hostile work environment claim); Klouda v. Sw. Baptist Theological Seminary, 543 F. Supp. 2d 594, 612 (N.D. Tex. 2008) (barring a professor from bringing breach of contract, fraud, and promissory estoppel claims).

[116] To the extent that reinstatement might be burdensome as a remedy, damages are available as an alternative.

[117] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–06 (1985) (holding that the state could force a religious organization to violate its religious beliefs and pay the minimum wage as required by the FLSA).

they terminate someone for doing so. On the contrary, *Employment Division v. Smith* held that religion was no longer grounds for exemptions from neutral laws of general applicability. At the same time, the church's interests could prevail if compliance with antidiscrimination law undermines a religious message; in that case, an institution's right to freedom of association might trump antidiscrimination law. Unfortunately, by authorizing the absolute immunity of the ministerial exception, the Supreme Court chose to tip the scales and protect religious institutions instead of religious individuals in every case.