No. 10-553

In the Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH & SCHOOL, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the judicially recognized "ministerial exception" to the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*) bars review of the termination of a parochial school teacher who, although formally titled a commissioned minister, teaches primarily secular classes and performs the same job duties as noncommissioned lay teachers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 597 F.3d 769. The opinion of the district court (Pet. App. 31a-53a) is reported at 582 F. Supp. 2d 881. The district court's opinion denying the motion for reconsideration (Pet. App. 54a-61a) is not published in the *Federal Supplement* but is available at 2008 WL 5111861.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2010. A petition for rehearing was denied on June 24, 2010 (Pet. App. 62a-63a). On September 2,

2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 22, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Cheryl Perich filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner dismissed her as a teacher in violation of Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq*). Pet. App. 9a. The EEOC sued petitioner for unlawful retaliation under the ADA, and Perich intervened. *Id.* at 9a-10a. The district court granted summary judgment to petitioner, but the court of appeals vacated and remanded. *Id.* at 10a, 25a.

1. Petitioner, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (LCMS), operates a church and school in Redford, Michigan. Pet. App. 3a. The school serves children in pre-school through the eighth grade. *Ibid*. Petitioner's teachers are classified as "contract" teachers or "called" teachers. *Ibid*. Contract teachers are hired by the school's board for one-year renewable terms of employment, while called teachers are usually hired on an open-ended basis by the voting members of the church congregation, at the recommendation of its Board of Education, Board of Directors, and Board of Elders. *Ibid*. Petitioner employs staff, including teachers, who are not Lutheran, and requires all teachers—called or contract, Lutheran or not—to perform the same job duties. *Id*. at 5a.

A teacher becomes a called teacher by completing a course of study, called a "colloquy," at a Lutheran col-

lege and earning a certificate of admission into the teaching ministry of the LCMS. Pet. App. 3a. Called teachers are often tenured and cannot be summarily dismissed without cause. *Ibid.* Called teachers also may, under certain circumstances, claim a "housing allowance" on their income taxes, which reduces the amount of their taxable income. *Ibid.* Once hired, or "called," by a congregation, the teacher receives the title of "commissioned minister." *Ibid.*

In July 1999, petitioner hired Perich as a contract teacher to teach kindergarten for the 1999-2000 school year. Pet. App. 3a. In February 2000, Perich completed the required colloquy classes and became a called teacher. *Id.* at 3a-4a. Her employment duties remained identical to the ones she performed as a contract teacher. *Id.* at 4a.

Perich taught kindergarten for the next three years, and then fourth grade during the 2003-2004 school year. Pet. App. 4a. As she had done as a contract teacher, Perich taught secular subjects using secular textbooks; she taught math, language arts, social studies, science, gym, art, and music. *Id.* at 4a-5a. Perich also taught computer skills to her fourth-grade class. *Id.* at 4a. Music instruction included secular music theory and instruction in playing the recorder using the same music book as was used in the local public school. *Ibid.* Perich seldom introduced religion in her teaching of secular subjects. *Id.* at 5a (noting that Perich could recall only two instances in which she introduced religion into secular subjects).

In addition to the secular classes, Perich taught a religion class four days a week for 30 minutes and attended a chapel service with her class once a week for 30 minutes. Pet. App. 4a. She led each class in prayer

three times a day for a total of approximately five or six minutes. *Ibid.* During her final year, Perich's fourth-grade class engaged in a devotional activity for five to ten minutes each morning. *Ibid.* In all, activities devoted to religion consumed approximately 45 minutes of the seven-hour school day. *Ibid.* Approximately twice a year, Perich led the chapel service in rotation with other teachers, who all took turns leading chapel services regardless of whether they were called or contract, Lutheran or non-Lutheran. *Id.* at 4a-5a.

Perich was assigned to teach third and fourth grade for the 2004-2005 school year. In June 2004, Perich suddenly became ill and was hospitalized. Pet. App. 5a. By August, Perich's doctors had not yet reached a definitive diagnosis. *Ibid.* The school's principal, Stacey Hoeft, assured Perich that she would "still have a job with us" when she regained her health. *Ibid.* Perich applied for disability benefits and began a disability leave of absence at the beginning of the 2004-2005 school year. *Ibid.*

During her leave, Perich regularly provided Hoeft with updates about her medical condition and progress. Pet. App. 5a. In December 2004, Perich informed Hoeft that she had been diagnosed with narcolepsy and that her neurologist estimated that she would be able to return to work once her medications were adjusted, a process that usually takes about two months. *Id.* at 6a. In January 2005, Perich notified Hoeft "that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication." *Ibid.*

On January 27, 2005, Perich notified Hoeft by email that she would be able to return to work between February 14 and February 28. Pet. App. 6a. Later that day,

Hoeft responded that she was surprised to hear Perich would be able to return so soon and "expressed concern that Perich's condition would jeopardize the safety of the students in her care." *Ibid.* Hoeft also informed Perich that once she was able to return, she would not teach third and fourth grades, because Hoeft had contracted a substitute to teach through the end of the year. *Id.* at 6a-7a.

Three days later, petitioner held its annual congregational "shareholder" meeting. Pet. App. 7a. Hoeft and the school's board told the voting members that it was unlikely that Perich would be physically capable of returning to the classroom that year or the next. *Ibid.* The congregation then adopted the school board's proposal that Perich be asked to "accept a peaceful release agreement" under which she would resign in exchange for the congregation's agreement to pay a portion of her health benefits through December 2005. *Ibid.*

On February 8, 2005, Perich received from her doctor a written release to return to work without restrictions on February 22, 2005. Pet. App. 7a. The next day, school board chairman Scott Salo called Perich to arrange a meeting to discuss her employment. *Ibid.* Perich asked instead to meet with the entire board, and a meeting was convened on February 13, 2005. *Ibid.* At the start of the meeting, Salo presented Perich with the proposal that she resign. *Ibid.* In response, Perich produced her unrestricted medical release, and said that she wanted to return to work on February 22, 2005, particularly because, as of that date, she would no longer be eligible for disability coverage. *Id.* at 7a-8a. The board urged Perich to reconsider and asked that she email her decision by February 21. *Id.* at 8a.

On February 21, Perich sent Hoeft an email confirming her decision not to resign and informing Hoeft that Perich planned to return to work the next day, February 22, 2005. Pet. App. 8a. Perich reported for work the next morning. *Ibid.* Petitioner's employee handbook stated that an employee's "[f]ailure to return to work on the first workday following the expiration of an approved leave of absence may be considered a voluntary termination." *Ibid.* Because Perich had informed petitioner that her doctor had released her to return to work as of February 22, Perich was concerned that her failure to report on that day might be construed as a resignation. *Ibid.*

Hoeft directed Perich to leave the school, and Perich complied once she obtained written confirmation that she had reported to work and was instructed to leave. Pet. App. 8a. The letter, signed by Hoeft and Salo, said that Perich "had provided improper notification of her return to work" and "asked that she continue her leave" while "the congregation * * * develop[ed] a possible plan for her return." *Ibid.* Perich then left the school grounds.

Later that day, Hoeft called Perich at home, informing her that she likely would be fired. Pet. App. 8a. During their conversation, Perich told Hoeft that she had spoken with an attorney and if they were unable to reach a compromise she intended to "assert her legal rights" against discrimination based on disability. *Ibid.* In an email to Hoeft that evening, Perich said that she had seen her doctor the previous day and he had confirmed that she was healthy and ready to return to work. *Ibid.* Following the school board's meeting on the evening of February 22, 2005, Salo sent Perich a letter "describing Perich's conduct as 'regrettable' and indicating

that the Board would review the process of rescinding her call based on her disruptive behavior." *Id.* at 9a.

On March 19, 2005, Salo informed Perich by letter that a congregational meeting was scheduled for April 10, 2005, and that the school board would recommend terminating her employment at that time. Pet. App. 9a. As grounds for termination, the letter cited "Perich's insubordination and disruptive behavior on February 22, 2005" and said that Perich had "'damaged, beyond repair' her working relationship with Hosanna-Tabor by 'threatening to take legal action.'" *Ibid.* At the congregational meeting on April 10, 2005, the congregation voted to rescind Perich's call, and on the next day, Salo informed Perich of her termination. *Ibid.*

2. Perich filed a charge with the EEOC alleging discrimination and retaliation in violation of the ADA. Pet. App. 9a. On September 28, 2007, the EEOC filed suit against petitioner, and Perich later intervened. *Id.* at 9a-10a; see 42 U.S.C. 12117(a) and 2000e-5(f)(1). Both the EEOC and Perich claimed unlawful retaliation under the ADA; Perich also claimed retaliation in violation of Michigan law. *Ibid.*

On cross-motions for summary judgment, the district court granted petitioner's motion, concluding that the ADA retaliation claim was barred by the judicially created "ministerial exception." See Pet. App. 41a, 53a. The court reasoned that Perich was a "ministerial employee" and that adjudication of her retaliation claim "would risk infringing upon Hosanna-Tabor's right to choose its spiritual leaders." *Id.* at 52a, 53a (internal citation, quotation marks, and alteration omitted).

3. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 25a. The court noted that "[t]o determine whether

an employee is ministerial"—and therefore barred by the ministerial exception from litigating employment claims against her religious employer—"this Circuit has instructed courts to look at the function, or 'primary duties' of the employee * * * rather than the fact of ordination." *Id.* at 16a-17a (quoting *Hollins* v. *United Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir.), cert. denied, 552 U.S. 857 (2007)).

The court of appeals noted that "the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception," Pet. App. 17a, and that, "when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church," *id.* at 18a-19a. The court concluded that the district court in this case erred in classifying Perich as a ministerial employee in light of undisputed evidence that: "Perich's employment duties were identical when she was a contract teacher and a called teacher"; "she taught math, language arts, social studies, science, gym, art, and music using secular textbooks" and "seldom introduced religion into secular discussions"; "teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not"; and "activities devoted to religion"—such as religious instruction and prayer—"consumed approximately forty-five minutes of the seven hour school day." *Id.* at 19a-20a. Based on this record, the court found it "clear that Perich's primary function was teaching secular subjects, not 'spreading the faith, church governance, supervision of a reli-

gious order, or supervision or participation in religious ritual and worship.'" *Id.* at 20a (citation omitted).

Judge White concurred. Pet. App. 26a-30a. While she "read the relevant cases as more evenly split than [did] the majority," she agreed that "the ministerial exception does not bar this ADA action." *Id.* at 26a (footnote omitted). She explained that this case differs from other cases in which courts found parochial school teachers to be ministerial employees because "there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying 'ministerial' roles." *Id.* at 29a. Judge White noted that petitioner's "teachers are not required to be called or even Lutheran to teach or to lead daily religious activities," and that "the duties of the contract teachers are the same as the duties of the called teachers." *Ibid.* For that reason, Judge White concluded, "even courts that have found ministerial plaintiffs who have daily schedules that have roughly the same ratio of religious to non-religious activities as Perich would find that the ministerial exception should not apply here." *Id.* at 30a.

ARGUMENT

Petitioner renews its contention that its decision to terminate Perich is rendered judicially unreviewable by the ministerial exception to the ADA. The court of appeal correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The ADA prohibits discrimination and retaliation by "covered entit[ies]" and "person[s]" respectively, including religious institutions and persons employed by religious institutions. See 42 U.S.C. 12112(a) ("covered

entity" may not discriminate on the basis of disability); 42 U.S.C. 12203(a) ("No person shall discriminate against any individual" in retaliation for protected activity.); 42 U.S.C. 12111(2) ("covered entity" includes an "employer"); 42 U.S.C. 12111(7) (cross-referencing 42 U.S.C. 2000e) (definition of "person"). The statute includes certain "[d]efenses" for religious entities, but neither is applicable here. 42 U.S.C. 12113(c) ("Religious entities" may give "preference in employment to individuals of a particular religion" and may "require that all applicants and employees conform to the religious tenets of such organization.").[1]

In addition to the express statutory defenses for religious entities, the courts of appeals have recognized a

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[1] The EEOC's ADA regulations explain:

> Religious organizations are not exempt from title I of the ADA or [these regulations]. A religious [entity] may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenants of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. The religious entity, in other words, is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.

29 C.F.R. Pt. 1630, App.; accord H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 76 (1990) (House Report).

The ADA's legislative history indicates an intent that the ADA's prohibition on discrimination be "interpreted in a manner consistent with title VII * * * as it applies to the employment relationship between a religious organization and those who minister on its behalf." House Report at 75-76; see S. Rep. No. 116, 101st Cong., 1st Sess. 42 (1989) (same). Title VII provides that religious schools may "hire and employ employees of a particular religion," 42 U.S.C. 2000e-2(e)(2), but does not otherwise provide an exemption for religious institutions.

constitutionally rooted "ministerial exception" barring adjudication of certain claims regarding the employment relationship between religious institutions and ministers and other ministerial employees. See, *e.g.*, *McClure* v. *Salvation Army*, 460 F.2d 553, 559, 560 (5th Cir.) ("The minister is the chief instrument by which the church seeks to fulfill its purpose. * * * [A]pplication of the provisions of Title VII to the employment relationship * * * between a church and its minister would result in an encroachment by the State into an area of religious freedom."), cert. denied, 409 U.S. 896 (1972). The ministerial exception does not, however, bar all employment claims against religious institutions. See *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171-1172 (4th Cir. 1985) ("[C]hurches are not—and should not be—above the law. * * * Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."), cert. denied, 478 U.S. 1020 (1986).

2. After conducting a fact-intensive examination of Perich's "function, or 'primary duties'" within the school, the court of appeals in this case concluded that the ministerial exception does not bar review of Perich's allegedly retaliatory termination in violation of the ADA because she was not a ministerial employee. Pet. App. 16a-23a. The court found significant that Perich's duties were "identical" when she was a contract teacher and a called teacher; that, as a general matter, the primary duties of called teachers were "identical" to those of contract teachers; that Perich taught multiple secular subjects using secular textbooks; and that religious instruction comprised a small part of the school day. *Id.* at 19a, 23a; see *id.* at 34a. The fact that Perich led chapel twice a year in rotation with other teachers did not make her

a minister for purposes of the ministerial exception, the court noted, since even non-Lutheran secular teachers performed this role. *Id.* at 19a-20a.

The court's fact-intensive determination that the ministerial exception does not bar claims concerning Perich's termination, given the marked similarity between her duties and those of non-commissioned lay teachers, is correct and does not warrant further review.

3. Petitioner contends that there is a conflict among the courts of appeals about whether applicability of the ministerial exception should be determined by a "'primary duties' test." Pet. 11. As explained below, petitioner did not adequately preserve her challenge to the validity of the "primary duties" test below, so this case does not properly present this question. In any event, despite some variations in courts' articulations of the governing test, there is no conflict that warrants this Court's review. Moreover, every published court of appeals decision has found the exception inapplicable to claims like the one at issue here, concerning a teacher of primarily secular subjects at religious schools. Petitioner offers no persuasive reason to believe that the outcome of this case would be different in any other circuit.

a. As petitioner notes, the Third, Fourth, Sixth, and D.C. Circuits have held that in evaluating an employee's eligibility for the ministerial exception courts should examine whether "her primary duties include 'teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.'" *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 304 n.6 (3d Cir. 2006) (quoting *Rayburn*, 772 F.2d at 1169), cert. denied, 550 U.S. 903 (2007); see *Rayburn*, 772 F.2d at 1169 (4th Cir.); Pet. App. 16a-17a

(6th Cir.); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996).

Although petitioner contends that the Eighth and Tenth Circuits follow a "case-by-case" approach, both courts have also relied on examination of the employee's primary duties. See *Skrzypczak* v. *Roman Catholic Diocese*, 611 F.3d 1238, 1243 (10th Cir. 2010) (discussing employee's "job description, which included a list of her primary duties," and concluding that the plaintiff's position was "'important to the spiritual and pastoral mission of the [Diocese]'") (quoting *Rayburn*, 772 F.2d at 1169) (alteration in original), petition for cert. pending, No. 10-769 (filed Nov. 5, 2010); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (concluding that employee's "position as Chaplain [was] primarily a 'ministerial' position"); see also *Alcazar* v. *Corporation of the Catholic Archbishop*, No. 09-35003, 2010 WL 5029533, at *1 (9th Cir. Dec. 10, 2010) (en banc) (identifying Tenth Circuit as a court that "utilize[s] the 'primary duties' test" and the Eight Circuit as one that "use[s] a version" of it).

b. Petitioner argues that the court of appeals' application of the primary duties test in this case squarely conflicts with decisions of the Second, Fifth, Seventh, and Ninth Circuits, all of which, it contends, have rejected the "primary duties" test in favor of other approaches. That is incorrect.

After the petition was filed in this case, the en banc Ninth Circuit unanimously vacated the portion of the panel decision in *Alcazar* v. *Corporation of the Catholic Archbishop*, 598 F.3d 668 (2010), on which petitioner relies (Pet. 12). See 2010 WL 5029533, at *1. The en banc court declined to "adopt a general test for determining whether a person is a 'minister'" because the

employee at issue (a church seminarian) was "a minister under any reasonable interpretation of the exception." *Ibid.*

Similarly, the Second Circuit has found it unnecessary to adopt a general test on the scope of the ministerial exception. In *Rweyemamu* v. *Cote*, 520 F.3d 198 (2008), that court "agree[d] that courts should consider the 'function' of an employee, rather than his title or the fact of his ordination," but, in dicta, said such an approach could prove "too rigid," depending on "the nature of the dispute." *Id.* at 208.[2] The court found it unnecessary, however, to "attempt to delineate the boundaries of the ministerial exception" because the plaintiff before it (a priest who contended that his bishop "misapplied canon law in denying him a requested promotion," *id.* at 199) "easily f[ell]" within the exception. *Id.* at 209.

Petitioner argues that the Fifth Circuit "ignore[d]" the primary duties test and "appl[ied] a different test." Pet. 12 (citing *Starkman* v. *Evans*, 198 F.3d 173, 176-177 (1999), cert. denied, 531 U.S. 814 (2000)). But in *Starkman*, the court stated that to determine whether the ministerial exception controls, the court will "examine the employment duties and requirements of the plaintiff as well as her actual role at the church" and that the ministerial exception applies to employees "whose *primary functions* serve its spiritual and pastoral mission." 198 F.3d at 175-176 (emphasis added) (citing *Rayburn*, 772 F.2d at 1169, and *Catholic Univ. of Am.*, 83 F.3d at

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[2] In particular, the Second Circuit expressed concern that a "too rigid" application of a functional approach could lead to exclusion of some claims by lay persons that were rooted in religious doctrine from the ministerial exception while at the same time including straightforward tort or contract claims by ordained ministers. *Rweyemamu*, 520 F.3d at 208. Neither circumstance was presented in that case.

461). The Fifth Circuit concluded that a church choirmaster and music director—who was hired based upon religious criteria, planned worship liturgy, coordinated church and worship activities related to the church's music ministry, performed many other religious duties, and ministered to ailing parishioners—was a "spiritual leader" for purposes of the ministerial exception. *Id.* at 176-177. The Fifth Circuit, like the Sixth Circuit in this case, considered whether the plaintiff's primary duties were secular or religious, noting that the plaintiff in an interrogatory "list[ed] twenty-one duties under the category of religious or worship-oriented job duties, compared to only three entries for nonreligous, nonworship-oriented, or secular duties" and also "list[ed] nineteen of the twenty[-]one religious tasks as 'essential,'" while she designates all of her three nonreligious duties as 'non essential.'" *Id.* at 176.[3]

Finally, the Seventh Circuit likewise has held that "[i]n determining whether an employee is considered a minister for the purposes of applying [the ministerial]

[3] Petitioner also contends (Pet. 23-24 & n.3) that the Fifth Circuit applied a "different test" in *Combs* v. *Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (1999), and "cited or discussed the cases applying the primary duties test, but [did not] adopt it." The question before the Fifth Circuit in *Combs* was not whether the plaintiff was a minister, see *id.* at 345 n.1 ("All parties agree that, at least for the purposes of this appeal, the following facts are true: Reverend Combs was a member of the clergy performing traditional clerical functions."), but whether the ministerial exception itself survived this Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). See *Combs*, 173 F.3d at 345 ("The question before us is whether the Free Exercise Clause of the First Amendment deprives a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy.").

exception, we do not look to ordination but instead to the function of the position." *Alicea-Hernandez* v. *Catholic Bishop*, 320 F.3d 698, 703 (2003). In *Alicea-Hernandez*, the court concluded the ministerial exception applied to the Hispanic Communications Manager of the Archdiocese of Chicago whose duties included composing media releases; composing correspondence for the Cardinal; composing articles for Church publications; and translating Church materials into Spanish, among other things, because her "role [as] press secretary is critical in message dissemination, and a church's message * * * is of singular importance." *Id.* at 703-704.

In a subsequent case, the Seventh Circuit considered whether ordained ministers of the Salvation Army who administered an Adult Rehabilitation Center were barred by the ministerial exception from bringing suit under the minimum-wage and overtime provisions of the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (29 U.S.C. 201 *et seq.*). See *Schleicher* v. *Salvation Army*, 518 F.3d 471, 474 (7th Cir. 2008) (Posner, J.). The court concluded that the ministerial exception applied, explaining that the evidence showed that "a Salvation Army Adult Rehabilitation Center is a church, and, like a church, it is administered by church officials." *Id.* at 476. The court rejected plaintiffs' argument that the Adult Rehabilitation Center's operation of thrift shops altered the analysis, noting that "the commercial tail must not be allowed to wag the ecclesiastical body," particularly given the "spiritual dimension" of the commercial activities at issue. *Id.* at 477-478.

Although petitioner describes that analysis as a "totally different approach," Pet. 25, the Seventh Circuit's fact-intensive inquiry into the nature of the position at issue is not materially different from that conducted by

other courts. The court in *Schleicher* found the ministerial exception applicable to "properly ordained ministers" whose jobs comprised "'preaching,' 'leading worship singing,' 'overseeing or leading daily devotions,' 'overseeing or teaching Bible studies' to the residents, 'overseeing or conducting Christian living classes' for them, and teaching 'soldiers classes,' which are classes for prospective Salvation Army ministers." 518 F.3d at 477, 478. Such ministers likely would fall within the ministerial exception under any court's approach.

c. In any event, petitioner fails to demonstrate that this case would have been decided differently in any other circuit. Every published court of appeals decision to address the question (including those from the Second, Fifth, and Ninth Circuits) holds that parochial school faculty who, like Perich, are assigned to teach primarily secular subjects, are not covered by the ministerial exception.[4]

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[4] See *Geary* v. *Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (Catholic elementary school teacher, "notwithstanding [her] apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles"); *DeMarco* v. *Holy Cross High Sch.*, 4 F.3d 166, 172-173 (2d Cir. 1993) (Catholic high school teacher, whose religious duties included leading class in prayers and attending mass); *DeArment* v. *D.L. Harvey*, 932 F.2d 721, 721-722 (8th Cir. 1991) ("'born-again' Christian" class supervisors and monitors who regard teaching as "their personal ministry" and "conduct prayer and counsel" students in "a self-study program that teaches all subjects from a biblical point of view"); *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396-1397 (4th Cir.) (teachers at K-12 school "with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated"), cert. denied, 498 U.S. 846 (1990); *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1 (4th Cir.) (education professor's claims "did not present a significant risk of infringement upon the First Amendment rights of Mount Saint Mary's

Petitioner relies (Pet. 20-22) on the Fourth Circuit's non-precedential ruling in *Clapper* v. *Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (Table), No. 97-2648, 1998 WL 904528 (Dec. 29, 1998), cert. denied, 526 U.S. 1145 (1999), the only federal appellate opinion to hold that the ministerial exception applies to a parochial school teacher. But as the court of appeals in this case explained, petitioner's invocation of the ministerial exception would fail even under the rationale of *Clapper* because "nothing in the record" indicates that petitioner relied on its teachers "to indoctrinate its faithful into its theology" in the way the school at issue in *Clapper* did. Pet. App. 22a. While the teacher in *Clapper* was required to "incorporate the teachings of the Seventh-day Adventist Church whenever possible" into her secular teaching, Perich only "twice in her career * * * introduced the topic of religion during secular discussions." *Id.* at 21a-22a (quoting *Clapper*, 1998 WL 904528, at *7); see *id.* at 29a (White, J., concurring); *id.* at 5a. In addition, unlike in *Clapper*, there was no "predominantly religious yardstick for qualification as a teacher" at Hosanna-Tabor; its "teachers [were] not required to be called or even Lutheran to teach or to

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College"), cert. denied, 484 U.S. 913 (1987); *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1364, 1369-1370 (9th Cir. 1986) (teachers who occupied a "highly specialized role" at Christian school that church considered "a ministry" and "an integral part of the religious mission of the [c]hurch to its children"); *EEOC* v. *Mississippi Coll.*, 626 F.2d 477, 485-486 (5th Cir. 1980) (faculty and staff of Baptist college who were "expected to serve as exemplars of practicing Christians"); see also *Elvig* v. *Presbyterian Church*, 397 F.3d 7990, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc) (ministerial exception would not apply "to a female English teacher at a church-run elementary school").

lead daily religious activities." *Id.* at 29a (White, J., concurring).

Indeed, in an earlier published decision, *Dole* v. *Shenandoah Baptist Church*, 899 F.2d 1389, cert. denied, 498 U.S. 846 (1990), the Fourth Circuit concluded that pay discrimination claims of teachers at a K-12 school "with a full-time curriculum that included instruction in Bible study and in traditional academic subjects into which biblical material had been integrated," were not covered by the ministerial exception. *Id.* at 1396-1397. Similarly, the Fourth Circuit permitted a suit by a lay professor against a religious college, noting that the employment discrimination action "did not present a significant risk of infringement upon the First Amendment rights" of the college. See *Ritter* v. *Mount St. Mary's Coll.*, 814 F.2d 986, 988 n.1, cert. denied, 498 U.S. 846 (1987) .

Petitioner also contends (Pet. 21-23) that the court of appeals' decision "squarely conflicts" with the decision of the Wisconsin Supreme Court in *Coulee Catholic Schools* v. *Labor & Industry Review Commission*, 768 N.W.2d 868, 872 (2009). That is incorrect. The court in *Coulee* agreed with other courts that "it is the function of the position that is primary" when considering whether the ministerial exception is applicable. *Id.* at 881 (citing *Rayburn*, 772 F.2d at 1168-1169). While the Wisconsin Supreme Court criticized a purely "quantitative analysis" of a teacher's duties, it, like other courts, engaged in a "highly fact-specific" examination of the plaintiff's position to determine "how important or closely linked the employee's work is to the fundamental mission of that organization." *Id.* at 883.

The court in *Coulee* made clear that it was "not giving a blanket exception to all religious school teachers"

and stressed that "[f]uture cases along these lines will necessarily be very fact-sensitive." 768 N.W.2d at 891. Critically, *Coulee*'s "heavily fact-dependent" inquiry (*id.* at 887), revealed that the teacher in question "made efforts to integrate Catholicism into all her subjects," both secular and religious. *Id.* at 891. Here, by contrast, Perich did not do so. Pet. App. 5a, 19a, 21a.[5]

4. Petitioner contends (Pet. 25-32) that the court of appeals' decision conflicts with decisions of this Court. That contention is incorrect and does not warrant this Court's review.

As an initial matter, the court of appeals' decision that the ministerial exception does not bar adjudication of the claim of unlawful retaliation against Perich does not involve "state interference in matters of church governance" (Pet. 26) as did *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); and *Serbian Eastern Orthodox* v. *Milivojevich*, 426 U.S. 696 (1979). All those decisions involved essentially ecclesiastical disputes over religious control, doctrines, practices, or property.[6] By

[5] In addition, *Coulee*'s discussion of the federal Constitution was unnecessary to its disposition of the case. The employee there had asserted only a state-law claim, and the court found it barred by the ministerial exception based on Wisconsin's constitution, which has "specific and expansive language" and "provides much broader protections for religious liberty than the First Amendment." 768 N.W.2d at 887; see *id.* at 887 n.28 (noting that court's "holding that the Wisconsin Constitution provides * * * for the ministerial exception's broader application" would stand even if First Amendment were held inapplicable).

[6] *Gonzalez* involved a dispute over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church, a "purely ecclesiastical matter[]." 280 U.S. at 16. *Kedroff*

contrast, this case presents an employment discrimination claim by a teacher at a religious school who taught primarily secular subjects and whose job responsibilities were indistinguishable from those of her non-commissioned lay colleagues.

Nor would adjudication of this case require a court to "decid[e] religious questions," as petitioner argues. Pet. 29. While petitioner's counsel now claims that petitioner dismissed Perich "for doctrinal reasons," *i.e.*, because she failed to utilize "the Synod's dispute resolution process," Pet. 30, "none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution process," Pet. App. 24a. A court would "violate[] no constitutional rights by merely investigating the circumstances of [Perich's] discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Ohio Civil Rights Comm'n* v. *Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986).[7]

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involved a New York statute that put the Russian Orthodox churches of New York under the administration of the Russian Church in America and a subsequent dispute over who controlled the Saint Nicholas Cathedral in New York City, "strictly a matter of ecclesiastical government." 344 U.S. at 115. *Serbian Eastern Orthodox* involved a dispute over a defrocked bishop, the resolution of which "affect[ed] the control of church property in addition to the structure and administration of the American-Canadian Diocese." 426 U.S. at 698, 708-724.

[7] The Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), was concerned that providing collective bargaining rights to parochial school teachers would be highly intrusive and would require constant monitoring touching all aspects of employment. See *id.* at 503 (noting that collective bargaining would permit negotiations over "nearly everything that goes on in the schools" (internal quotation marks and citations omitted)). An employment discrimination action brought by

Nor is it the case, as petitioner suggests, that a court impermissibly decides a religious question when it looks behind a defendant's assertions about "which duties [are] secular and which [are] religious," Pet. 29, by, for example, considering whether the duties in question are also performed by non-commissioned lay personnel. A contrary rule would illogically expand the scope of the ministerial exception, permitting a religious institution to deny all of its employees the protections of the employment discrimination laws simply by characterizing all of their duties as religious. See *Schleicher*, 518 F.3d at 478.

Likewise, the court of appeals' decision in this case creates no conflict with this Court's freedom of association cases. To the contrary, this Court has repeatedly held that prohibiting discrimination is "a state interest[] of the highest order" that generally outweighs any burden on the freedom of association that anti-discrimination laws impose. See *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623-624 (1984) (law requiring Jaycees to admit women did not violate their free exercise rights); *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) (law requiring Rotary to admit women did not violate the First Amendment); *New York State Club Assoc.* v. *City of New York*, 487 U.S. 1 (1988) (upholding the constitutionality of a city ordinance prohibiting discrimination by clubs that have more than 400 members and provide regular meal service).[8] And as

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a teacher of secular subjects presents no similar concerns.

[8] Although this Court has recognized that freedom of expression protects a right to discrimination where the discrimination itself is integral to the expressive activity, see *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 651, 659 (2000); *Hurley* v. *Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 580-581 (1995), petitioner did

this Court has made clear, it is not the case "that all teaching in a sectarian school is religious." *Board of Educ.* v. *Allen*, 392 U.S. 236, 248 (1968). Where, as here, a teacher at a religious school teaches primarily secular subjects and performs duties indistinguishable from her non-commissioned lay colleagues, judicial review of her termination under the ADA creates no conflict with principles of associational freedom.

4. Finally, even if the matters petitioner raises otherwise warranted review, this would not be a suitable vehicle for two independent reasons.

a. Petitioner has waived its claim that the court of appeals erred by determining the applicability of the ministerial exception based on application of a "primary duties" test. Petitioner did not question the validity of that test before the court of appeals issued its decision; instead, petitioner accepted the test and argued that it should prevail under it. See Pet. C.A. Br. 29 ("As a general rule, the ministerial exception will be invoked if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.") (quoting *Hollins* v. *United Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir.), cert. denied, 552 U.S. 857 (2007)). Indeed, petitioner below characterized the Sixth Circuit's decision in *Hollins*—which adopted the primary duties test, see 474 F.3d at

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not tell Perich it was terminating her because discrimination or retaliation was integral to its message or its religious beliefs. Indeed, its policies said just the opposite: "[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." Pet. App. 24a.

226—as a "prudent[]" application of the ministerial exception. Pet. C.A. Br. 28.[9]

b. The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb *et seq.*), prohibits the federal government "as a statutory matter" from "substantially burden[ing] a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzalez* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. 2000bb-1(a)). The statute creates an exception if the government "satisf[ies] the compelling interest test." *Ibid.* The Second Circuit has held that RFRA may provide a defense to certain employment discrimination claims asserted by ministers and that, if preserved, the merits of that defense should be considered before addressing the constitutionally based ministerial exception. See *Hankins* v. *Lyght*, 441 F.3d 96, 102-103 (2006); *Rweyemamu*, 520 F.3d at 202-204 (finding RFRA defense waived); see also *Catholic Univ. of Am.*, 83 F.3d at 467-470 (addressing defendant's RFRA defense as alternative to ministerial exception defense); cf. *Fusari* v. *Steinberg*, 419 U.S. 379, 387 n.13 (1975) (Court is "compelled" to consider "a statutory claim that may be dispositive before considering a difficult constitutional issue"). Petitioner in this case, however, has waived any claim under RFRA, and thus

[9] Petitioner challenged the "primary duties" test for the first time in its rehearing petition, see Pet. for Reh'g iv, but "[i]t has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); *Al-Ghorbani* v. *Holder*, 594 F.3d 546, 547 (6th Cir. 2010) ("[O]ur long-established rule is that this court will not consider arguments raised for the first time in a petition for rehearing.").

has not afforded the courts an opportunity to consider that possible nonconstitutional ground for the relief it seeks. For that reason as well, further review in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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