No. 10-553

In The Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the anti-retaliation prohibition of the Americans with Disabilities Act (ADA) may be constitutionally applied to a religious association's retaliatory firing of a teacher of secular subjects in a commercially operated school, where the teacher also performs religious functions and is designated a commissioned minister.

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INTEREST OF AMICUS CURIAE[1]

People For the American Way Foundation is a nationwide, non-profit, non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists across the country. PFAWF is firmly committed to the principles of religious liberty and freedom of conscience protected by the Constitution and has frequently represented parties and filed amicus curiae briefs in cases involving the Establishment and the Free Exercise Clauses of the First Amendment. The resolution of this case is of extreme interest to our organization and its members.

[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Parties have provided written consent, on file with the Court, to the filing of briefs in support of either, or neither party.

ARGUMENT

I. COURTS MUST BE ABLE TO DETERMINE WHETHER A RELIGIOUS JUSTIFICATION FOR AN EMPLOYMENT DECISION IS SIMPLY PRETEXT FOR A SECULAR DISCRIMINATORY PURPOSE

As originally created, the ministerial exception was a narrow exception to federal prohibitions against employment discrimination, intended to prohibit judicial review into substantive ecclesiastical matters involving a church and its minister. *See generally McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (establishing ministerial exception). But forty years of jurisprudence has resulted in religious organizations receiving seemingly absolute deference in contested employment decisions that involve neither substantive ecclesiastical matters nor ministers. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (applying the ministerial exception to bar a complaint against sex discrimination despite evidence of discrimination); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (Hispanic Communications Manager's claim of discrimination based on national origin). Because this high degree of deference given to religious organizations goes far beyond constitutional requirements, it: (1) allows religious employers to abuse the exception through the use of pretext and (2) strips employees of the opportunity to seek recourse for employment decisions based on criteria that Congress clearly intended to prohibit.

To rectify this unjustified expansion, this Court should limit the application of the ministerial

exception in situations where a plaintiff, who performs predominantly secular functions, can bring forth evidence that the religious justification was pretextual. Permitting courts to examine claims of pretext in limited situations would allow employees an opportunity to adjudicate statutorily-guaranteed rights, yet provide religious employers with an appropriate level of deference mandated by the First Amendment.

A. The ministerial exception is easily susceptible to abuse

Circuit courts use various tests to determine an employee's ministerial classification, resulting in a muddled answer as to when an employee should be deemed a minister. *See Petition for Writ of Certiorari*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, (No. 10-553) (discussing the various approaches to the ministerial exception). The prevailing trend is to classify employees based entirely on the religious institution's beliefs as to whether the employee is performing ministerial functions. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238 (10th Cir. 2010) (holding that worker whose principal duties included purely administrative tasks was a minister because the church considered some of the worker's duties as involving responsibilities that furthered the core of the Diocese's spiritual mission); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004) (deferring to a Jewish organization's characterization of the religious role of an employee); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000) (holding that a music teacher at a Catholic cathedral was a "minister" because the position was

"important to the spiritual and pastoral mission of the church.").

However, a test that relies entirely on the employer's classification effectively relieves a religious employer of legal liability and is easily susceptible to abuse, as religious employers can simply classify all of their employees as ministerial. This situation is particularly problematic where, as in this case, the educational duties of certain ministers and non-ministers bear strong similarities, and where the religious beliefs of the institution forbid access to the secular courts. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.,* 597 F.3d 769, 772 (6th Cir. 2010). For when religious doctrine precludes the possibility of civil suit, complete deference to a religious employer's classification eliminates any legal recourse for employees who perform predominantly secular functions and are fired for a secular discriminatory purpose. Even if an employment regime is a sham, and the ministerial classification of employees a deception, a litigant would have no practical chance to prove this if courts are required to simply yield to the ministerial classification of the religious institution. *See Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) (discussing a rebuttable presumption of valid employment classifications by religious employers without considering a religious belief system that bars access to the courts).

Thus, subjective, highly deferential employment classification tests permit religious *pretext* to become a shield for unlawful employment decisions, something that Congress clearly intended to prohibit. *Franks v. Bowman Transp. Co.*, 424 U.S. 747,

763 (1976) ("We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.").

B. Permitting limited judicial inquiry into an employer's alleged use of pretext will not create excessive entanglement between government and religion

Though restrictive of a court's authority to dictate religious doctrine, the limits imposed by the Establishment Clause are not absolute. Where courts can evaluate a legal claim without resolving a theological question, threats of excessive entanglement cease to exist. A proximate cause analysis that hinges on whether religious pretext is present does not engage religious doctrine, and therefore does not cause entanglement between government and religion.

1. *The Establishment Clause does not create an impenetrable shield against government intervention*

As this Court has notably held, the Establishment Clause of the First Amendment forbids "excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Circuit courts have subsequently divided the notion of government entanglement into two differing categories: procedural and substantive. *Petruska*,

462 F.3d at 311. Procedural entanglement occurs where there is pervasive monitoring of religious organizations, but has become virtually obsolete since this Court has permitted extensive interaction between government and religious bodies. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that unannounced monthly visits by public supervisors to parochial schools did not amount to excessive entanglement); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding social service grants to religious organizations, even though the programs and material were subject to state reviews and the grantees were subject to periodic visits). In contrast, the Establishment Clause's ban against substantive entanglement prohibits the government from endorsing or dictating religious doctrine by deciding between competing religious views, and thus prevents courts from substituting their judgment for that of a religious institution. *Petruska*, 462 F.3d at 311. However, the ban against substantive entanglement has been improperly expanded to encompass more than its original purpose of prohibiting the government from answering religious questions and resolving doctrinal disputes.

Substantive entanglement originally barred the government from resolving religious questions and disputes so as to not risk interference with a church's core, spiritual functions. *Skrzypczak*, 611 F.3d at 1245. However, courts have transformed substantive entanglement into a seemingly impenetrable shield against which a church's religiously motivated and non-religiously motivated employment actions are equally protected from government intervention.

For example, when a church communications director filed claims of gender and race discrimination based on unequal treatment she received from the church, even though the treatment received was unrelated to her ability to communicate on behalf of the church, the case was dismissed because the court considered her position as ministerial. After designating her as a minister, the court refused to evaluate all claims, even those unrelated to her job performance, and held it is "not our role to determine whether the Church had a secular or religious reason for the alleged mistreatment . . . ." *Alicea-Hernandez*, 320 F.3d at 703; *see also Skrzypczak*, 611 F.3d at 1245 (citing *Alicea-Hernandez*, 320 F.3d at 703) (disallowing discrimination claims brought by an administrative worker, who had been employed ten years and received consistently positive performance reviews, because she performed some duties related to the church's spiritual function); *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (holding that a school teacher at a church-operated school could not bring discrimination claims unrelated to his teaching performance because examining the validity of the claims would cause excessive entanglement).

Thus, the ban against substantive entanglement, as it is presently interpreted, has often allowed churches to implement otherwise prohibited employment decisions by simply claiming that the decision is tied to some element of its religion. Employees wronged by such decisions are then prohibited from even attempting to adjudicate the matter and showing the pretextual reasons that led to their termination, solely because the church

invoked its religious affiliation in the course of its decision.

2. *Applying the McDonnell Douglas framework to evaluate allegedly pretextual decisions of religious employers does not create impermissible entanglement*

Allowing courts to evaluate the rationale for a contested employment decision through a proximate cause analysis would enable the courts to ferret out religious pretext without forcing courts to become impermissibly entangled in religious doctrine.

For nearly forty years, courts have successfully utilized the burden-shifting framework from *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), to analyze employment discrimination involving non-religious employers. *See also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[The *McDonnell Douglas* framework] is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."). While the burden-shifting framework was originally created to analyze Title VII cases, it remains instructive in cases involving religious employers where courts are asked to examine pretext without substituting their own judgment for that of the employer.

Importantly, when applying the *McDonnell Douglas* framework, courts do not make judgments on the underlying employer policy, such as the *validity* of the tardiness policy, but rather, make judgments on the common sense *believability* of the

employer's proffered reasons, such as whether inconsistencies in the employer's reasoning raise an inference of pretext. *See, e.g.*, *Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1108–09 (3d Cir. 1997) ("To discredit the employer's proffered reason . . . . [P]laintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence."). Similarly, applying the *McDonnell Douglas* framework to religious employers would not create judicial judgments on the substance or validity of a religious employer's doctrine, but rather, on the believability of the employer's proffered reason in light of the available evidence.

Under the *McDonnell Douglas* framework, the burden of persuasion remains at all times on the employee. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The framework first requires employees to establish a prima facie case of discrimination before a court considers the issue of pretext. *Id.* at 802. A plaintiff's prima facie case does not constitute a factual finding of discrimination, but merely serves as proof of employer actions from which a court may infer discriminatory animus. *Furnco*, 438 U.S. at 580. If successfully shown, an employer is then responsible only for having to articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802. This by no means requires that the employer prove the absence of discriminatory motive, *Board of Trustee of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978), but simply instructs them to present anything as rebuttal to the inference drawn from the

prima facie case. *See McDonnell Douglas*, 411 U.S. at 802. The inquiry then concludes with the affected employee being given "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons . . . were in fact a coverup . . . ." *Id.* at 805.

Application of a *McDonnell Douglas*-like framework to review a religious employment dispute where religious pretext may be a factor would not enter into the realm of substantive entanglement. This Court has held that "routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring and close administrative contact between secular and religious bodies does not of itself violate the [Establishment Clause's] nonentanglement command." *Hernandez v. Comm'r*, 490 U.S. 680, 696–97 (1989) (citations omitted). Permitting an employee to rebut through the use of evidence a church's stated rationale on the grounds of religious pretext raises the sole question of whether the plaintiff was terminated for the actual religious justification asserted by the employer, or because of a secular discriminatory motive. *See DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170–71 (2d Cir. 1993) (holding that a parochial-school teacher's ADEA claim could be adjudicated without fears of entanglement so long as the employee's claim is distinguishable from the religious reason the school provided). A court's answer to such an inquiry would necessarily be confined to an employee's direct or circumstantial evidence of pretext, and would not require examination of the religious doctrine of the employer. Therefore, such a limited scope of inquiry would not constitute an extensive or continuous

judicial intrusion into the functions of religious institutions, nor would the wisdom or reasonableness of the church's doctrine be evaluated.

C. The Free Exercise Clause does not bar judicial review of religious pretext

This Court has recognized that churches generally have the right to govern themselves autonomously and free from judicial reach. *McClure*, 460 F.2d at 559–60 (discussing line of church autonomy cases); *see also Serb. E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (applying the church autonomy principles in a church personnel dispute). Based on this Court's church autonomy cases, the Fifth Circuit constructed the ministerial exception. *McClure*, 460 F.2d at 560. In analyzing the ministerial exception, however, it remains vital to note that these church autonomy cases did not mandate absolute deference to religious organizations. Rather, such precedent only permitted deference when a resolution would impose the court's judgment over the church's on matters of church governance, religious faith, or doctrine, not with regard to *all* employment decisions by a religious organization. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *But see Bouldin v. Alexander*, 82 U.S. 131 (1872) (resolving an internal church dispute and overturning a church election). Thus, the right to church autonomy is not a bar to judicial review of religious pretext where a resolution would not require the court to resolve church doctrine.

The idea of church autonomy first emerged in *Watson v. Jones*, 80 U.S. 679 (1872), and was

subsequently rooted in constitutional principles. In *Watson*, this Court declined to resolve a property dispute—the use of the church's building—between two fighting sects of the church. Although the decision in *Watson* was based on the federal common law principle of implied consent and not on constitutional right, this Court explained that churches had the autonomy to govern themselves and courts should generally avoid religious controversies. *Watson*, 80 U.S. at 725. In *Kedroff*, this Court explicitly held that the church autonomy doctrine first articulated in *Watson* was in fact based in the Constitution. 344 U.S. at 116 (stating that *Watson*'s principles "have federal constitutional protection as a part of the free exercise of religion against state interference."). The articulated constitutional right extended to the right of religious organizations to "decide for themselves, free from state interference, *matters of church government* as well as those of *faith and doctrine*," *id*. at 116 (emphasis added), and provided the basis for the ministerial exception later utilized in *McClure*.

The original church autonomy cases dealt exclusively with church property disputes. Two subsequent cases have applied the church autonomy principles from *Watson* to disputes involving church personnel, but neither case expanded the constitutional right articulated in *Kedroff*. *Gonzalez v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929); *Serbian East Orthodox Diocese,* 426 U.S. 696; *see also NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (doubting the constitutionality of imposing secular law on a church, but ultimately refusing to resolve the constitutional issue). In *Gonzalez*, the plaintiff sued to become a Catholic chaplain. The

Archbishop had objected because the Catholic Church required that chaplains attend seminary school, which the plaintiff had not. In *Serbian East Orthodox Diocese*, the plaintiff sued after he was removed from his position as presiding Bishop, and the Court was asked to resolve who was the true bishop of the church. By refusing to hear each of these cases, this Court declined to replace religious doctrine with secular law. Thus *Gonzalez* and *Serbian East Orthodox Diocese* stand only for the proposition that churches cannot be sued for their application or interpretation of their own ecclesiastical laws. *See Gonzalez*, 280 U.S. at 7–8; *Serbian East Orthodox Diocese*, 426 U.S. at 719.

Though this Court refused to resolve church doctrine in each of these cases, this Court has not gone so far as to mandate complete deference to religious organizations simply because an employment dispute involves a church. Instead, the church autonomy cases only protect the right of a church to decide matters of faith and doctrine without judicial interference. *McClure*'s holding was consistent with the church autonomy cases because in *McClure*, the Fifth Circuit's application of Title VII would have essentially replaced religious doctrine with secular law. 460 F.2d at 560 ("[A]pplication of the provisions of Title VII to the employment relationship . . . would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."). However, in cases where the dispute includes violations of personal rights and not matters of faith or doctrine, nothing in the church autonomy cases require complete deference. *See, e.g.*, *Watson*, 80 U.S. at 728 ("In this country the full and

free right to entartain [sic] any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."). This notion also extends to encompass cases where a church is engaged in conduct such as fraud or collusion. *Gonzalez*, 280 U.S. at 16 ("In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.").

Thus, because the ministerial exception can only be as broad as mandated by the Constitution, and the constitutional right to church autonomy does not require complete deference in employment disputes involving a church, the ministerial exception does not preclude judicial inquiry regarding a religious justification for an employment decision. This is particularly true when an employee has demonstrated that the justification provided is unsupportable. In such situations, judicial inquiry is not only permitted, but critical. Where the employment claims fall outside the scope of a church's doctrine and within areas of established employment law, the ministerial exception ceases to protect religious employers and instead, hinders the injured employee's ability to exercise congressionally-granted rights.

D. Appropriate deference will be given to the subjective judgments of religious employers even if courts are allowed to inquire into pretext

Enabling courts to examine evidence of religious pretext would protect employees of religious institutions from discriminatory employment practices without hindering or subverting a church's selection of its ministers. Circuit courts have shown, much like their ability to examine pretext, that they are more than capable of giving appropriate deference to subjective employment decisions and not substituting their judgment for that of employers. *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 455 n.7 (2d Cir. 1999) (holding that an employer has the sole right to set its own criteria for promotion and evaluate a candidate's fitness for promotion under them); *Bina v. Providence Coll.*, 39 F.3d 21, 26 (1st Cir. 1994) (upholding that a court cannot substitute its own views of tenure qualifications for those of properly instituted authorities); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 548 (3d Cir. 1980) (stating that subjective matters pertaining to educational promotions should be evaluated by education professionals and not judges). Circuit courts have shown such deference in both teacher tenure cases, where a lack of subjective and scholarly judgment pertaining to professional appointments caused courts to "operate with reticence and restraint," *Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995), and law firm partnership disputes, where a lack of objective criteria to measure particular skills considered by a firm in promotions caused courts to decline to review firm partner-

track decisions, *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992).

Considering this history of consistent deference to employers, courts can be trusted to exhibit no less than the same level of deference to religious employers. Moreover, enabling a court to objectively evaluate the evidentiary chain of causation in an employment decision does not threaten church autonomy and actually involves less entanglement than is involved in the Primary Duties Test,[2] where a court is asked to evaluate the spiritual role of an individual within a particular faith community. *See Alicea-Hernandez*, 320 F.3d 698 (holding that the responsibilities of a Hispanic Communications Manager within a church's Hispanic community were ministerial); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (holding that a church choirmaster's participation in religious rituals qualified her as a minister).

Courts will not entangle themselves with religion, nor infringe on a church's free exercise of religion, if they limit their analysis to objective evidence, wholly distinct from any examination of a church's theology. The objective evidence corroborating the rationale for the employment decision, and not a court's evaluation or judgment of the underlying substance of the employer's reasoning, will

[2] The Primary Duties Test applies the ministerial exception where "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 . . . ." *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

determine the court's decision to side with the employee or abstain from ruling.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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