No. 10-553

IN THE
Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,
Respondents.

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

Brief of Americans United for Separation of Church and State, American Civil Liberties Union, ACLU of Michigan, National Council of Jewish Women, Sikh Council on Religion and Education, and Unitarian Universalist Association as *Amici Curiae* In Support of Respondents

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Interest of *Amici Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C.[1] Its mission is twofold: (1) to protect the right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in numerous church-state cases, including many cases before this Court.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Michigan is a statewide affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both representing parties and as *amicus curiae*. As an organization that has long been committed to both preserving First Amendment rights and opposing discrimination, the ACLU has a strong interest in the proper resolution of this case.

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[1] Each party has filed a letter with the Clerk of the Court consenting to the filing of amicus briefs. Pursuant to Rule 37.6, neither a party nor its counsel authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles which must be protected and preserved in order to maintain our democratic society." Further, NCJW's Resolutions state that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated."

The Sikh Council on Religion and Education is a faith-based, non-profit organization dedicated to creating awareness of the Sikh religion and the Sikh people in the United States and around the globe and to promoting the values of justice, equality, and brotherhood imbibed in the Sikh religion. It also aims to provide a platform for interfaith dialogue to create a peaceful coexistence of all faiths.

The Unitarian Universalist Association is a religious organization of more than 1,000 congregations in the United States and North America. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. The Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom.

Amici support the use of reasonable accommodations to ease burdens on the practice of religion. Several of the joining *amici* have filed briefs with this Court supporting those seeking religious exemptions in cases such as *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), and *amici* recognize that an appropriately tailored ministerial exception preserves the independence of America's religious communities. As they are with other exemptions, however, *amici* are concerned that the ministerial exemption not be applied more broadly than necessary to protect religious freedom. When used to justify discrimination unconnected to a religious institution's religious beliefs, the ministerial exception undermines anti-discrimination law without a corresponding benefit to religious liberty.

Summary of Argument

The ministerial exception is designed to allow religious bodies to practice their religion and convey their message without government interference. But the exception thwarts society's interest in ending discrimination—without serving the exception's purpose—when applied to shield a religious entity from liability for discrimination or retaliation that is unrelated to religious ideology. As a result, in applying the ministerial exception, courts can and should use their considerable experience in determining whether sincere religious views animated a litigant's conduct. And the Constitution provides no bar to this enterprise.

First, although the ministerial exception serves important religious-liberty interests, it should be applied no more broadly than necessary to address

the constitutional concerns that underlie it. These concerns call for the exception to apply only when the adverse employment action at issue was religiously motivated. Moreover, application of the ministerial exception to immunize employment-related conduct unrelated to religion—merely because the affected employee's duties were primarily religious—would undermine the enforcement of important nondiscrimination laws. The creation of such a regime falls to Congress, not the courts.

Second, just as the ministerial exception should not protect religious entities from liability for conduct that is unrelated to an institution's religious beliefs, the exception should not prevent courts from assessing whether the employer's asserted religious motivation for that conduct was pretextual. Such an inquiry would not, as Petitioner suggests and some lower courts have held, entangle courts in disputes about church doctrine. The pretext inquiry is familiar to American courts, and in most cases requires no analysis of religious doctrine. If and when a pretext inquiry does require improper consideration of religious doctrine, the courts must abstain. That mere possibility, however, does not justify blanket abstention even from cases in which pretext can be divined without entanglement.

Thus, even if the Court were to conclude that Ms. Perich was a ministerial employee, the ministerial exception should protect Petitioner only if the challenged employment decision arose from religious concerns—rather than from secular animus or retaliation. Here, the record contains ample evidence that Ms. Perich's termination was motivated by factors unrelated to Petitioner's religious beliefs, doc-

trine, or mission. *See* Perich Br. 7–15, 34–35; U.S. Br. 5–8. Her lawsuit should proceed.

Argument

I. The Ministerial Exception Does Not Entitle Religious Entities To Discriminate Or Retaliate For Reasons Unrelated To Religion.

The constitutional interests underlying the creation of the ministerial exception center on important religious-liberty concerns: The state cannot force a church to hire or retain key personnel who are unable to perform the church's religious functions in accordance with the church's religious beliefs, teachings, and mission. Likewise, to the extent that disputes arise about whether such an employee's beliefs or conduct comports with church doctrine, the courts should not interfere with the church by resolving ecclesiastical disputes. This deference to religious bodies over matters of doctrine is crucial to ecclesiastical independence and thus to religious liberty.

At the same time, the exception interferes with the application of congressionally enacted statutes that promote a compelling national interest in preventing discrimination on the basis of protected classifications including race, gender, and national origin. As a result, the exception should be no broader than necessary to vindicate its underlying constitutional interests. Those interests—ensuring the free exercise of religion, and preventing courts from entangling themselves with or interpreting religious doctrine—can be satisfied by applying the ministerial exception only when the otherwise illeg-

al acts are motivated by religious concerns. Yet as Petitioner acknowledges, most Courts of Appeals have applied the ministerial exception more broadly—to immunize defendants from suit even when these defendants did not assert that their conduct arose from religious belief. *See, e.g.*, *Rayburn* v. *Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that ministerial exception "protects the act of a decision rather than a motivation behind it").

In so doing, these courts have extended the exception far beyond what is required by the Religion Clauses. They have converted the ministerial exception into a shield for all forms of discrimination and retaliation, regardless of motivation. And they have prevented judicial redress of even the most flagrant racial or sexual harassment, even when motivated by naked animus unrelated to any religious belief.

A. As Petitioner recognizes, the ministerial exception is rooted in concerns about religious liberty. *See* Pet'r Br. 13–14. Religious entities must have the right to hire ministerial employees whose beliefs and conduct are consistent with those entities' beliefs and practices. *See Rweyemamu* v. *Cote*, 520 F.3d 198, 205 (2d Cir. 2008) ("it would surely be unconstitutional under the First Amendment to order the Catholic Church to reinstate, for example, a priest whose employment the Church had terminated on account of his excommunication based on a violation of core Catholic doctrine"). They must be able to control their religious message. *See Natal* v. *Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) ("a religious organization's fate is inextricably bound up with those whom it en-

trusts with the responsibilities of preaching its word and ministering to its adherents"). And they must avoid judicial second-guessing of their scriptural interpretations. *See Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 451 (1969) (courts must avoid "interpreting or weighing church doctrine"). These concerns—and the ministerial exception itself—"derive[] from both the Free Exercise and Establishment Clauses of the First Amendment." *Alcazar* v. *Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1291 (9th Cir. 2010).

Because it serves specific constitutional interests, however, the ministerial exception does not apply to all disputes involving ministerial employees. Ministers can enforce their employment contracts. *See Petruska* v. *Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006) (considering minister's employment claim brought "pursuant to her contract with [the religious institution]"). They can redress injuries caused by a church's tortious acts. *See Rweyemamu*, 520 F.3d at 208 ("[t]he minister struck on the head by a falling gargoyle as he is about to enter the church may have an actionable claim"). And victims of abuse by clergy can sue the churches that employed the abusers. *See Malicki* v. *Doe*, 814 So. 2d 347, 361 (Fla. 2002) ("the Free Exercise Clause is not implicated in this case because [of] the conduct sought to be regulated; that is, the Church Defendants' alleged negligence in hiring and supervision is not rooted in religious belief"). These cases reflect a foundation of our nation's approach to religious liberty: "[C]hurches are not—and should not be—above the law." *Rayburn*, 772 F.2d at 1171.

These decisions also illustrate that litigation over a church's practices does not necessarily interfere with that church's religious beliefs or require courts to interpret its religious doctrine. In the words of then-Justice Rehnquist, these concerns "are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." *Gen. Council on Fin. & Admin. of United Methodist Church* v. *Superior Court*, 439 U.S. 1355, 1373 (1978) (Rehnquist, Circuit Justice).

B. This basic premise should apply with equal force to cases arising under laws prohibiting employment discrimination and retaliation against ministerial employees. When the law prohibits conduct unmotivated by religion, the religious entity suffers no First Amendment harm. For example,

- A Catholic church need not hire a female priest and an Orthodox Jewish congregation need not hire a female Rabbi. But the First Amendment does not permit an otherwise egalitarian church to fire a female Sunday-school teacher (or its leaders to sexually harass her) when the firing resulted from an individual pastor's purely personal belief that women should not work outside the home.

- A religious body can choose to hire only female ministerial employees if its religious beliefs prohibit the participation of men. *See Z Budapest's Manifesto*, Circle of Aradia, http://www.circleofaradia.org/z.htm (last visited Aug. 4, 2011) (member of Dianic Wiccan Religion does not believe in "teaching [its] magic and [its] craft to men");

RCG-I Membership, Re-Formed Congregation of the Goddess, International, http://www.rcgi.org/members/members.asp (last visited Aug. 4, 2011) (religious beliefs limit membership to women). But a congregation equally open to both men and women could not refuse to hire the former due to a supervisor's personal belief that men are untrustworthy.

- A temple need not hire a Frenchman to lead worship services if its teachings exclude Europeans from its ranks. *See Frequently Asked Questions*, The Moorish Science Temple of America, http://www.themoorishsciencetempleofamerica.org/comments_and_faq.html (last visited Aug. 4, 2011) ("Can Europeans join the MSTA? NO!"). But a court need not permit a congregation to discriminate against that same Frenchman when the decision is instead motivated by a deacon's purely personal xenophobia.

- A ministry need not hire an African-American preacher if its religious teachings proclaim the superiority of whites. *See Doctrinal Statement of Beliefs*, Kingdom Identity Ministries, http://www.kingidentity.com/doctrine.htm (last visited Aug. 4, 2011) ("the White, Anglo-Saxon, Germanic and kindred people to be God's true, literal Children of Israel"). But a church that embraces racial equality may not engage in race discrimination simply because a hiring official happens to be a white supremacist.

In sum, "[p]reventing discrimination can have no significant impact upon the exercise of [religious] beliefs [when] the Church proclaims that it does not believe in discriminating." *EEOC* v. *Pac. Press Pub.*

Ass'n, 676 F.2d 1272, 1279 (9th Cir. 1982). This principle should govern application of the ministerial exception.

Limiting the ministerial exception to conduct motivated by religion would echo the Court's approach to balancing the right to expressive association against the state's compelling interest in prohibiting discrimination. *See* U.S. Br. 30–31. To establish that the right of expressive association is truly at stake, an organization seeking a First Amendment-based exemption from an anti-discrimination law must demonstrate that compliance with that law would actually impair the organization's association or message; the biases of individual officers do not control if unrelated to the group's mission or message. Thus, in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), the organization was required to comply with laws prohibiting gender discrimination because it had "failed to demonstrate that [compliance] imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. The Court reached the opposite conclusion in *Boy Scouts* v. *Dale*, 530 U.S. 640 (2000), but only after concluding that the organization's right to expressive association would be impaired if it were required by state law to retain a gay scoutmaster in a leadership position. *See id.* at 650–51.

Of course, courts may not adjudicate "controversies over religious doctrine." *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 449. Thus, so long as the assertion is sincere and not a pretext, a court should not second-guess a religious entity's contention that religious doctrine—rather than secular animus or naked retaliation—

motivated conduct that would otherwise constitute unlawful discrimination or retaliation against a ministerial employee. But when the religious body does not claim that its conduct was motivated by religion, or when such a claim is insincere or pretextual, the Religion Clauses do not excuse that entity from complying with the law.

Petitioner has little basis for its concern that, under this regime, "a judge or jury [will] appoint[] a minister." Pet'r Br. 26. As the United States details, courts have the discretion to forgo reinstatement when it would be inappropriate to require the employer to rehire the plaintiff. *See* U.S. Br. 34–35. Courts exercise this discretion even when plaintiffs prevail against secular, for-profit employers. *See, e.g.*, *Cowan* v. *Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) ("where reinstatement presents so extreme a burden this remedy becomes impossible").[2] In still other cases (like this one), the plaintiff will not even ask to be reinstated. Perich Br. 58 ("Perich no longer seeks reinstatement."). Petitioner's fear of forced reinstatement, then, does not justify barring all claims by ministerial employees.

C. Courts should be especially wary of interpreting the ministerial exception more broadly than re-

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[2] *See also, e.g.*, *McKnight* v. *Gen. Motors Corp.*, 973 F.2d 1366, 1370 (7th Cir. 1992) ("several factors may persuade the district judge after careful consideration in a particular case that the preferred remedy of reinstatement is not possible or is inappropriate"); *Duke* v. *Uniroyal Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991) ("notwithstanding the desirability of reinstatement, intervening historical circumstances can make it impossible or inappropriate").

quired by the Constitution. This judge-made exception interferes with the application of democratically enacted statutes. And these statutes promote the nation's compelling interest in preventing invidious discrimination and retaliation.

In enacting the nation's civil rights laws, Congress took specific steps to accommodate the free exercise rights of religious organizations. For example, both Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1(a), and Title I of the Americans with Disabilities Act, 42 U.S.C. § 12113(d), provide defenses that allow religious organizations to discriminate on the basis of religion, even in hiring individuals for non-ministerial positions. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 329 (1987). Despite what Petitioner says, Pet'r Br. 18, courts have read these statutory exemptions broadly, to enable religious institutions to employ individuals who share their faith and follow their doctrine.[3] But Congress did not give religious institutions blanket immunity. *See* U.S. Br. 15–18.

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[3] *See, e.g.*, *Hall* v. *Baptist Mem'l Health Care Corp*., 215 F.3d 618, 624–25 (6th Cir. 2000) (dismissing religious discrimination claim of woman who was fired for supporting gay rights, contrary to church teachings); *Little* v. *Wuerl,* 929 F.2d 944, 946, 951 (3d Cir. 1991) (rejecting discrimination claim of woman terminated for getting divorced and remarried in violation of Catholic doctrine); *Leavy* v. *Congregation Beth Shalom*, 490 F. Supp. 2d 1011, 1018 (N.D. Iowa 2007) (under ADA, "a religious organization may give preference in employment to members of its own denomination and may require that employees conform to the organization's religious doctrine").

Because the ministerial exception provides an additional, judge-made defense against enforcement of otherwise generally applicable employment laws, it can be justified only by the need to safeguard a constitutional right that the statutory scheme leaves unprotected. That need is fulfilled by a ministerial exception that protects religious organizations from suits by ministerial employees challenging employment decisions that are motivated by religion. There is no basis for a broader rule that immunizes religious organizations from employment decisions that are neither motivated by religion nor authorized by statute. *Cf. Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2537 (2011) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law, . . . the need for such an unusual exercise of law-making by federal courts disappears.") (quotations omitted, alteration in original). This Court long ago rejected the argument that "the First Amendment requires the [government] to adopt a rule of compulsory deference to religious authority . . . even where no issue of doctrinal controversy is involved." *Jones* v. *Wolf*, 443 U.S. 595, 605 (1979).

A broader ministerial exception, which would permit religious entities to discriminate or retaliate for reasons unrelated to religion, would also collide with the Court's admonition in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that courts should not unilaterally craft religious exemptions unless those exemptions are required by the Constitution. As the Court explained in *Smith*, "to say that a [religious] . . . exemption is permitted, or even that it is desirable, is not to say that it is constitutionally

required, and that the appropriate occasions for its creation can be discerned by the courts." *Id.* at 890.

In addition to exceeding the requirements of the Constitution, a broader ministerial exception would obstruct Congress's efforts to prevent and redress pernicious forms of discrimination and retaliation—a goal that "plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. *See also Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination"); *EEOC* v. *Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms."). Indeed, a categorical safe-harbor, even for conduct not motivated by religion, "would seriously undermine the means chosen by Congress to combat discrimination." *Id.* at 489.

The risk of undermining anti-discrimination laws is far from hypothetical. Petitioner asserts, without authority, that "[w]hen an employee performs important religious functions, the proffered [reasons for termination] are nearly always religious." Pet'r Br. 14. In fact, courts have applied the blanket ministerial exception to foreclose judicial inquiry into terminations even when the defendant has not linked its actions to a basis in religion. *See, e.g.*, *Rosati* v. *Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917, 918–19, 922–23 (N.D. Ohio 2002) (dismissing ADA suit brought by nun terminated after diagnosis of breast cancer, without any inquiry into whether discharge was motivated by religion).

Likewise, the blanket exception has prevented redress for the most flagrant forms of harassment,

even when lacking any theological justification. For instance, it has precluded a constructive-discharge claim by an African-American ministerial employee who was told that he "would not be able to work with white pastors" and was called a "Nigger"—even though the defendant, a national Lutheran church, did not assert that this race-based conduct related to the church's mission, beliefs, or message. *See Gomez* v. *Evangelical Lutheran Church in Am.*, No. 1:07CV786, 2008 WL 3202925, at *5 (M.D.N.C. Aug. 7, 2008).

Female employees in ministerial positions have encountered similar obstacles under the blanket exception, which has prevented redress for sexual harassment even where the defendants have asserted no religion-based justification for the harassing conduct. *See, e.g.*, *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 953, 966–69 (9th Cir. 2004) (ministerial exception prevented associate pastor from redressing adverse-employment actions following sexual harassment, and even from inquiring into defendant's motivation for the harassment). When applied to scenarios like these, the exception transcends the protection of religious liberty and instead resembles "a limitless excuse for avoiding all unwanted legal obligations." *Africa* v. *Com. of Pa.*, 662 F.2d 1025, 1030 (3d Cir. 1981) (citation omitted).

II. The Ministerial Exception Permits Courts To Determine Whether An Asserted Religious Justification Is Pretextual.

Just as the ministerial exception should not immunize religious entities from liability for conduct unrelated to religion, the exception must permit courts to determine when a religious justification is

offered as a pretext to mask conduct that resulted from personal animus or naked retaliation. And when the defendant offers a religious reason, the pretext inquiry need not burden religion or force courts to interpret church doctrine.

Rather, the pretext inquiry places courts in a familiar position: Determining whether the asserted religious justification actually prompted the defendant's actions or whether, instead, it is a rationale developed later for use in litigation. *See* U.S. Br. 38 n.9. This type of inquiry is well established and its importance widely accepted. Lest litigants invent sham beliefs to claim religious exemptions, "[s]tates are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." *Frazee* v. *Ill. Dept. of Emp't Sec.*, 489 U.S. 829, 833 (1989). And whenever it offers a religious accommodation, the government "must necessarily inquire whether the claimant's belief is 'religious' and whether it is sincerely held." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 726 (1981).

Despite Petitioner's suggestion, Pet.'s Br. 54, the familiar judicial inquiry into religious sincerity does not become a quagmire in the context of hiring and firing. On the contrary: The government "violates no constitutional rights by merely investigating the circumstances of [an employee's] discharge . . . 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 Sch., Inc.*, 477 U.S. 619, 628 (1986). And courts regularly assess whether an asserted religious motivation is merely a pretext for an act propelled by secular concerns.

First, courts assess sincerity in Title VII claims brought by non-ministerial employees. *See, e.g.*, *Cline* v. *Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (case turns on whether "St. Paul's nonrenewal of [her] contract constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy"); *Ganzy* v. *Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) ("religious motives may not be a mask for sex discrimination in the workplace").

Second, courts inquire into sincerity in Free Exercise cases. Any student of the Religion Clauses knows that "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held'"—and that "[t]his is the threshold question of sincerity which must be resolved in every case." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

Third, courts evaluate sincerity in cases brought under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 et seq. *See Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (church "demonstrated that its sincere exercise of religion was substantially burdened"); *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (prison officials entitled to ascertain sincerity of prisoner's asserted religious belief before granting requested

accommodation).[4] In so doing, courts have had little trouble avoiding entanglement and other affronts to religious freedom.

The sincerity inquiry has not stifled religious freedom because it typically does not require courts to examine doctrine. Instead, courts use a familiar set of tools to evaluate a litigant's credibility:

- In some cases, courts consider whether the litigant failed to invoke the religious justification until after the employee filed suit. *See, e.g.*, *Lawson* v. *Sec'y, Fla. Dept. of Corr.*, No. 10-10619, 2011 WL 2079195, at *3 (11th Cir. May 25, 2011) (prisoner's asserted Judaism was not sincere, as plaintiff "repeatedly ate non-Kosher food, never attended Jewish prayer services, and refused a work proscription for the Sabbath because the proscription would 'mess up his lawsuit'").

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[4] *See also, e.g.*, *Murphy* v. *Mo. Dept. of Corr.*, 506 F.3d 1111, 1115 (8th Cir. 2007) ("it is necessary to show that the existence of a sincerely held tenet or belief . . . [as] a prerequisite to a 'substantially burdened' claim under RLUIPA"); *Salahuddin* v. *Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006) ("The prisoner must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs."); *United States* v. *Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) ("Under the RFRA, a plaintiff must establish. . . [that the challenged] governmental action . . . substantially burden[s], [] a religious belief . . . which belief is sincerely held by the plaintiff."); *Goodall by Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) ("In analyzing a claim under RFRA, we look first at whether a substantial burden has been imposed on the exercise of sincerely-held religious beliefs.").

- In others, contemporaneous documents provide insight into the employer's thinking at the time of the decision. *See, e.g.*, *Cline*, 206 F.3d at 667 (plaintiff's evidence of pretext included performance reviews indicating "that the school continued to view her as sufficiently qualified to teach").
- In yet others, courts examine whether a religious employer "has treated two employees who have committed essentially the same offense differently." *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006).

Courts, then, have both the tools and ability to consider pretext claims without delving into religious doctrine. *See also* U.S. Br. 42.

Nor, as Petitioner suggests, will the process of discovery in pretext cases lead to impermissible intrusion into the church's religious beliefs. As discussed above in Section I.A., religious bodies already litigate a variety of claims. As they have in the past, courts will continue to control discovery in a manner that avoids undue burdens, including undue burdens on religion. *See, e.g.*, *Rweyemamu*, 520 F.3d at 207 ("a case may proceed if it involves a limited inquiry that, combined with the ability of the district court to control discovery, can prevent a wide-ranging intrusion into sensitive religious matters") (quotations omitted).

Courts also have plenty of experience ensuring that discovery does not overwhelm defendants protected by defenses designed, in part, to alleviate litigation burdens at the outset. For instance, when a government official's qualified immunity defense

turns on factual questions that require investigation and discovery, a court "must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El* v. *Britton*, 523 U.S. 574, 597–98 (1998). The same type of management will enable courts to resolve pretext claims without impermissible intrusion into religious bodies' affairs.

It may turn out that there are particular cases in which courts cannot evaluate a claim of pretext without actually parsing church doctrine or requiring unduly burdensome discovery. The solution is for courts to avoid conducting pretext inquiries in those particular cases—and in those cases alone. Even if the Religion Clauses might require courts to refrain from pretext inquiries in a few cases, there is no reason for courts to abstain when the inquiry poses no problem at all. *See* U.S. Br. 48–51. And by evaluating pretext case-by-case and applying federal anti-discrimination law when religious beliefs are not at issue, the courts will "enjoin only the unconstitutional applications of a statute while leaving other applications in force"—and thus avoid "nullify[ing] more of [the] legislature's work than is necessary." *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

Conclusion

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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