No. 10-553

IN THE

Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHERYL PERICH,

Respondents.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND INTERVARSITY CHRISTIAN FELLOWSHIP/USA IN SUPPORT OF PETITIONER AND URGING REVERSAL

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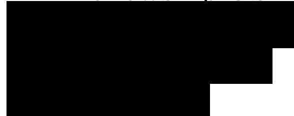

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici.

A top priority for the ACLJ is the defense of religious freedom. The present case touches upon the crucial ability of churches and religious schools to make their own decisions, free of civil court interference, about the staffing of their religious education ministry. The ACLJ submits this brief in support of the petitioner religious school.

InterVarsity Christian Fellowship/USA ("Inter-Varsity") is a Christian campus ministry that establishes and advances witnessing communities of students and faculty. InterVarsity ministers to students and faculty through small group Bible studies, large gatherings on campus, leadership training, thoughtful discipleship, and conferences and events. InterVarsity ministers to 36,675 students annually and employs 987 full-time staff. Without the

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[1] The parties to this case have consented to the filing of this brief. The blanket consent letters of petitioner and of respondent Perich are on file with this Court. A copy of the consent letter on behalf of respondent EEOC is being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ability to hire staff that adhere to the vision, core values, and doctrinal basis of the organization, InterVarsity could not effectively fulfill its mission and would lose its unique identity. The ministerial exception is vital to InterVarsity's religious liberty and free expression, as well as to the religious liberty and free expression of similarly-situated organizations.

SUMMARY OF ARGUMENT

The doctrine of constitutional avoidance, with its associated “clear statement” rule, is an important and established part of this Court’s jurisprudence. Under the doctrine of constitutional avoidance, this Court should decline to read the Americans with Disabilities Act as applying to a church or religious school’s hiring and firing of employees carrying out the church’s religious educational ministry. Whether a similar avoidance doctrine precludes the state statutory claim at issue here as well is a question that should be relegated to the state judiciary.

ARGUMENT

Petitioner contends persuasively that the “ministerial exception” constitutionally bars the present employment discrimination suit from going forward. This amicus brief identifies an alternative route to the same conclusion: the doctrine of constitutional avoidance. As in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court

should construe the Americans with Disabilities Act (ADA) not to apply to a religious institution's ministerial hiring and firing decisions. Having disposed of the sole federal claim in this case, this Court should remand the matter for relinquishment of jurisdiction over the remaining state claim. (The Michigan state courts are then likely to apply the same rule of constitutional avoidance to reject the state statutory claim.)

I. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE MILITATES IN FAVOR OF REJECTING THE ADA CLAIM AS A MATTER OF STATUTORY CONSTRUCTION.

Petitioner is correct that the ministerial exception constitutionally bars the present suit. For similar reasons, this Court should construe the ADA not even to apply to the ministerial employment decisions of religious schools. Taking this interpretive route follows the well-trodden path of construing statutes to avoid serious constitutional questions.

> It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." . . . This approach, we said recently, "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that

> Congress, like this Court, is bound by and swears an oath to uphold the Constitution."

Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 456 (1989) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

This Court took exactly that approach in *NLRB v. Catholic Bishop*. That case, like this one, involved the applicability of a federal statute to teachers in religious schools. 440 U.S. at 491. There, as here, the schools provided both religious and secular instruction. *Id*. at 492 ("special religious instruction" plus "essentially the same . . . curriculum as public secondary schools"); *id*. at 493 ("traditional secular education" with religious orientation, plus "religious training"). There, as here, the schools raised First Amendment objections to government intrusion into the affairs of religious schools. *Id*. at 494, 500.

Invoking the doctrine of constitutional avoidance, *id*. at 500, this Court declared that "it is incumbent on us to determine whether the [federal government's] exercise of its jurisdiction here would give rise to serious constitutional questions." *Id*. at 501. If so, this Court would require a clear statement -- "the affirmative intention of Congress clearly expressed" -- before construing the statute to apply to such circumstances. *Id*. Finding "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act," *id*. at 504, this Court "decline[d] to construe the Act in

a manner that could in turn call upon this court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses," *id.* at 507.[2]

The "clear statement rule" which this Court applied to the NLRA in *Catholic Bishop* applies as well to the ADA. *See Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 138-39 (2005) (plurality of Kennedy, J., joined by Stevens, Souter, & Thomas, JJ.) ("If the clear statement rule restricts some applications of the NLRA . . . it follows that the . . . application is also required under Title III of the ADA"); *id.* at 143 n.1 (Ginsburg, J., joined by Breyer, J., concurring) (agreeing with plurality on this point); *id.* at 149 (Scalia, J., joined by Rehnquist, C.J., & O'Connor, J.) (agreeing that the clear statement rule applies to the ADA). This clear statement rule serves a valuable purpose: "'[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.'" *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011) (quoting *Spector*, 545 U.S. at 139

[2] This Court did not find a sufficiently clear statement in the "[a]dmittedly . . . broad terms" of the NLRA, *id.* at 504, in the legislative adoption of a *different express exemption* to address certain religious concerns, *id.* at 506, in the statutory enumeration of other exceptions *not* including church-operated schools, *id.* at 511 (Brennan, J., dissenting), and in the prior rejection of legislation that would have provided the exception for religious educational organizations, *id.* at 512-13 (Brennan, J., dissenting). In light of these details, it is plain that the ADA likewise contains no "clear statement" that would pass muster under *Catholic Bishop*.

(plurality)).

Here, there can be no dispute that applying the ADA would, at a minimum, raise serious constitutional questions. Petitioner has demonstrated this at length. In addition, the text of the ADA, were it to apply to employees with religious ministerial duties, would invite a nightmare of entanglement with religious questions.

The ADA requires covered employers to make "reasonable accommodations" to disabled individuals "unless . . . the accommodation would impose an undue hardship on the operation of the business or entity." 42 U.S.C. § 12112(a)(5)(A). The ADA defines "undue hardship" as follows:

> (10) Undue hardship.
>
> (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
>
> (B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--
>
> (i) the *nature* and cost *of the accommodation* needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or *the*

> *impact otherwise of such accommodation upon the operation of the facility*;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; *the* number, *type*, and location *of its facilities*; and
>
> (iv) *the type of operation or operations of the covered entity, including the* composition, structure, and *functions of the workforce of such entity*; *the* geographic separateness, *administrative*, or fiscal *relationship of the facility* or facilities in question *to the covered entity*.

42 U.S.C. § 12111(10) (emphases added). Were the ADA to be applied to ministerial employees, the highlighted portions of this definition foreseeably would require, in case after case, an assessment of religious matters. Does the "nature of the accommodation" create a religious hardship (e.g., dispensing with a strict requirement of wheat-based communion hosts or of wine because of a lay minister's gluten intolerance or alcoholism)? How can a secular court assess the "impact" of an accommodation upon "the operation" of a religious school, when part -- perhaps the most significant part -- of the adverse impact is a restraint on, or conflict with, rules of religious doctrine or discipline? *Cf. Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 402 (1st Cir. 1986) (en banc) (opinion of Breyer, J.) (invoking *Catholic Bishop* because, *inter alia,* "philosophical, theological and church-related moral issues would

seem . . . likely to permeate the educational process"). Can a secular court fully evaluate the "type of operation" or "function" of an entity with a religious mission, for purposes of assessing "undue hardship"? Where theology or canonical law governs the "administrative . . . relationship" of a church to a school, can a civil court resolve disputed questions over the scope of that relationship?

This is precisely the kind of constitutionally treacherous terrain the clear statement rule is designed to avoid.

> Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter. In these instances, the absence of a clear congressional statement is, in effect, equivalent to a statutory qualification saying, for example, "Notwithstanding any general language of this statute, this statute shall not apply extraterritorially"; or ". . . this statute shall not abrogate the sovereign immunity of nonconsenting States"; or ". . . this statute does not regulate the internal affairs of foreign-flag vessels."

Spector, 545 U.S. at 139 (plurality). Here, the "internal affairs" are of a church school, not a ship, but the concern is no less valid.

In *Catholic Bishop*, this Court steered clear of the

looming constitutional shoals by construing the NLRA not to apply, "in the absence of a clear expression of Congress' intent," to teachers in church-run schools. *Id.* at 507. Charting the same course here resolves this case, at least as to the federal ADA claim, without the need definitively to resolve the constitutional dimensions of the ministerial exception.

II. THE STATE RETALIATION CLAIM SHOULD BE DISMISSED WITHOUT PREJUDICE TO REFILING IN STATE COURT.

This case involves a state statutory claim as well. While the constitutional avoidance doctrine authorizes this Court conclusively to interpret the federal ADA, the proper scope of Michigan statutes is ultimately a matter for the state courts of Michigan. Hence, while the preceding discussion, *supra* § I, resolves the EEOC's only claim (*viz.*, under the ADA), intervenor respondent Perich's state statutory retaliation claim remains.

There is good reason to believe that the state courts of Michigan would likewise apply the *Catholic Bishop* approach to reject the state statutory claim here. *See*, *e.g.*, *People v. Tombs*, 472 Mich. 446, 456-57, 697 N.W.2d 494, 500 (2005) (applying constitutional avoidance and clear statement rules). In fact, a state appeals court in Michigan has already expressly followed *Catholic Bishop* in rejecting state labor board jurisdiction over religious schools. *Michigan Educ. Ass'n v. MERC Christian Brothers Institute of Michigan*, 267 Mich. App. 660, 706 N.W.2d 423 (2005).

In the end, of course, this question is for the state courts to decide.

Here, once the federal claim is dismissed, the district court may decline to exercise supplemental jurisdiction over the state retaliation claim. 28 U.S.C. § 1367(c)(3). *E.g., Fox v. Vice,* slip op. at 2, No. 10-114 (U.S. June 6, 2011) (noting that after dismissing federal claims on summary judgment, district court declined to exercise supplemental jurisdiction over remaining state-law claims). Another alterative would be for the lower federal courts to certify the question to the Michigan state supreme court. Mich. Ct R. 7.30(B)(1). Or, the federal courts may themselves construe the statute for purposes of this case, albeit without binding the state courts on the question.

Regardless of which approach the lower courts take, the presence of the state claim here is no obstacle to reversal and remand in the case at bar pursuant to *Catholic Bishop*.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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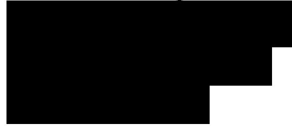

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