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 NAACP LEGAL DEFENSE FUND, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS ADVOCATES, BAZELON CENTER FOR MENTAL HEALTH LAW, AND THE NATIONAL COUNCIL ON INDEPENDENT LIVING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici are civil rights groups committed to the effective enforcement of our nation's civil rights laws, consistent with the important rights of individuals and religious institutions protected by the First Amendment.

For seven decades, the NAACP Legal Defense & Educational Fund (LDF) has represented parties in litigation before the Supreme Court involving matters of racial discrimination. As a party or as amicus curiae, LDF has participated in federal civil rights litigation in numerous cases, including *Bob Jones University v. United States* (as amici curiae), 461 U.S. 574 (1983), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). LDF has an interest in the vigorous enforcement of the nation's civil rights laws as a means of effectuating the equality principles established by the Constitution.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by

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[1] The parties have consented to the filing of this brief. No counsel for a party has 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. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other disadvantaged populations.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right and remedying discrimination and exploitation. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before the Court.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities through several means, including by challenging discriminatory employment practices in the courts.

Disability Rights Advocates (DRA) is a non-profit public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment and housing. DRA's clients, staff and board of directors include people with various types of disabilities. Based in Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities.

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, education and training, the Center promotes the rights of individuals with mental disabilities to participate equally in society, including in the workplace. Much of our work involves efforts to remedy disability-based discrimination through enforcement of the Americans with Disabilities Act and other civil rights laws.

The National Council on Independent Living (NCIL) is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for,

people with disabilities to further their full integration and participation in society.

SUMMARY OF ARGUMENT

Civil Rights enforcement and religious freedom are compatible, and any judicially crafted rule that would presume the contrary is inconsistent with the Constitution's promise of Equal Protection, and with the rich history of ensuring that promise in which many religious denominations have actively participated.

Petitioner does not dispute that neither the Americans with Disabilities Act (ADA) nor any other civil rights statute categorically exempts parochial school teachers from their protections. Instead, petitioner invokes the "ministerial exception" developed by the lower courts to enforce the restrictions of the First Amendment. Applying that categorical exception to parochial school teachers would be appropriate only if the First Amendment categorically prohibits protecting such teachers from retaliation and discrimination. It does not.

1. Treating parochial school teachers as "ministers" excluded from the protection of anti-discrimination statutes whenever their employers deem them to have "important religious duties," as petitioner requests, *see* Petr. Br. 19, prohibits far more applications of civil rights statutes than the First Amendment itself.

Civil rights laws, many designed specifically to enforce constitutional rights, are neutral toward religion and generally applicable. Ordinarily, such generally applicable laws are constitutional so long as they rationally serve a legitimate governmental

interest, even if they burden the exercise of First Amendment rights. But even if greater scrutiny were appropriate, petitioner would be required to show at the very least that application of a particular statutory requirement to its employment decisions imposed a significant burden on its First Amendment rights. In most cases, parochial schools cannot make that showing because the discrimination prohibited by civil rights laws is not required (and often is prohibited) by the schools' own religious teachings. And even if a school could show a First Amendment burden, civil rights statutes advance compelling governmental interests that justify prohibiting discriminatory treatment of teachers employed by religious organizations.

This is particularly true of anti-retaliation provisions. Effective enforcement of the nation's laws requires assistance from ordinary citizens in reporting violations, cooperating in investigations, and testifying in trials and administrative proceedings. The expansive ministerial exception petitioner proposes would undermine the basic operations of our justice system, allowing parochial schools to openly fire teachers not only for opposing violations of their own rights, but also for advocating the rights of others (including those, like secretaries and janitors, whom petitioner acknowledges fall outside any ministerial exception); for truthfully responding to the questions of government investigators; or even complying with a subpoena to testify in court. The logic of the exception petitioner advances would even preclude enforcement of state laws that require teachers to report evidence of child abuse to authorities, subjecting them to retaliation by

their employers for going outside the school or the church to resolve what the employer may consider to be an internal problem.

Petitioner claims that such laws conflict with a Lutheran teaching that congregants should never sue each other or the Church. But this is a religious interest that simply cannot be accommodated by a constitution establishing a system of government. The First Amendment presupposes a functional system of law enforcement and adjudication. Neither can exist if religious entities are allowed to opt out of the secular legal system.

2. Nor does subjecting parochial schools to neutral, generally applicable civil rights laws inevitably entangle courts in religious matters in violation of the Establishment Clause. A court need not evaluate the validity of religious doctrine to determine whether a teacher was fired for complaining to the Equal Employment Opportunity Commission (EEOC). To the extent that some remedies may pose special entanglement risks, or certain religious positions may be particularly prone to Establishment Clause problems, those risks are appropriately addressed in as-applied challenges.

Rejecting petitioner's broad and unprecedented categorical exception does not leave religious institutions without protection. In recognition of First Amendment considerations, Congress has repeatedly made legislative accommodations for religious institutions and employers, enacting numerous special exemptions for them in a wide range of statutes. Where necessary, further expansion of those exemptions can be pursued through the political process. Moreover, religious

employers, like any other litigant, may attempt to show that their First Amendment rights are violated by the application of a civil rights statute on the facts of a particular case. But they are not entitled to avoid liability for violations of fundamental civil rights even when complying with the law imposes no legally cognizable burden on their First Amendment interests.

ARGUMENT

I. The First Amendment Does Not Require Congress To Categorically Exempt Parochial School Teachers From The Protection Of Anti-Retaliation Laws.

Although petitioner invokes the so-called "ministerial exception," the facts of this case present only the question whether Congress may constitutionally prohibit retaliation against parochial school teachers. Even if there were a constitutional basis for a categorical exception for members of the clergy, there would be no cause to extend that exception to this case unless petitioner could show that applying civil rights statutes to parochial school teachers like respondent will always violate the First Amendment.

Petitioner cannot make that showing. Civil rights statutes in general, and anti-retaliation provisions in particular, advance compelling governmental interests and frequently impose no significant burden on First Amendment rights. While the Constitution may preclude some applications of some civil rights requirements to some positions in some religious institutions, such claims

are appropriately considered through as-applied challenges based on the particular facts of each case.

A. A Categorical Exception For Parochial School Teachers With Religious Duties Would Be Appropriate Only If The ADA Could Never Constitutionally Apply To Such Teachers.

1. The Americans with Disabilities Act and other civil rights statutes do not implicate the Constitution's unyielding protection of religious belief. Nor do these laws regulate the content of religious doctrine; attempt to resolve questions "'of faith, or of ecclesiastical rule, custom or law'"; or direct religious institutions to bestow religious authority upon particular individuals. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 113 (1952) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871)). Instead, civil rights statutes regulate conduct, in this case the commercial conduct of employing teachers who typically instruct students of many faiths – Lutherans, non-Lutherans, and even students whose families are "'unchurched,'" Perich Br. 4 (citation omitted) – in the course of performing an educational service that is constitutionally subject to significant governmental regulation, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

In doing so, the statutes do not discriminate against any particular religion, or against religious employers in general. They are neutral, generally applicable laws that may, in some applications, impose an incidental burden on the religious practices of some institutions.

2. This Court has long judged the constitutionality of such statutes by comparing the burden imposed on First Amendment interests against the countervailing governmental interests advanced by the statute.[2] "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985). Thus, "[t]he preliminary inquiry in determining the existence of a constitutionally required exemption is whether" the challenged law "interferes with the free exercise rights" of those seeking the exemption. *United States v. Lee*, 455 U.S. 252, 256-57 (1982).[3]

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[2] *See*, *e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000) (in assessing freedom of association claim, "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (weighing infringement on right to association against "the State's compelling interest in eliminating discrimination against women"); *Roberts v. United States Jaycees*, 468 U.S. 609, 622-29 (1984) (same); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (applying balancing test to Free Exercise claim to exemption from compulsory education law); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (same for claim to exemption from military draft).

[3] Likewise, a prerequisite to any successful freedom of association claim is proof that the challenged law burdens associational rights. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) ("To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth

Showing that interference is necessary, but not sufficient. "The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). The court must also consider the government's countervailing interest. *See id.*

In most instances, a neutral, generally applicable statute that imposes a substantial burden on religious practice need only bear a rational relationship to a legitimate governmental interest. *See Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990). But even when greater scrutiny is required, a burden on First Amendment rights is still a necessary prerequisite. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 206, 215-17 (1972). And even under strict scrutiny, a court must sustain the statute if it is narrowly tailored to serving a compelling governmental interest. *See, e.g.*, *Lee*, 455 U.S. at 257 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (same); *Roberts v. United States Jaycees*, 468 U.S.

Amendments."); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (rejecting freedom of association challenge to civil rights statute because the law "[did] not affect 'in any significant way' the ability of individuals to form associations that [would] advocate public or private viewpoints") (citation omitted).

609, 623 (1984) (same for expressive association claims).

3. Viewed in light of this constitutional tradition, the exception petitioner seeks is extraordinary. Petitioner insists that all it must show is that its employee has religious responsibilities the school deems "important," Petr. Br. 19 – it need not prove that applying the statute to that employee imposes any burden on religious practice, nor is the government permitted to defend the statute's application by showing that it is appropriately tailored to a compelling governmental interest.

That *some* applications of a statute might not survive constitutional scrutiny does not justify a categorical, irrebuttable presumption that *every* application is unconstitutional. To the contrary, this Court has consistently eschewed such categorical rules, asking instead whether a law imposes an unconstitutional burden on the First Amendment rights of particular parties in particular cases. *See, e.g.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-49 (1987); *Roberts*, 468 U.S. at 620, 627; *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944). In fact, amici are aware of no other comparable instance in which the Court has created, as a matter of

constitutional law, a defense that prophylactically extends further than the Constitution itself.[4]

Accordingly, a categorical exception for parochial school teachers would only be appropriate if petitioner could show that every application of the defense prevents an unconstitutional application of the statute. This, petitioner cannot do.

B. Providing Anti-Retaliation Protection To Parochial School Teachers Will Rarely Violate The First Amendment.

Petitioner does not dispute that the ADA's anti-retaliation provision would pass muster under the rational basis test of *Smith*. Instead, it insists that *Smith* is distinguishable and that its right to retaliate against its employees is entitled to greater constitutional protection than *Smith* affords. Petr. Br. 23-26. The Court need not resolve that contention because under any standard of review, anti-retaliation provisions have abundant constitutional applications to parochial school teachers. Such laws serve a governmental interest of surpassing importance while rarely imposing any cognizable burden on First Amendment interests.

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[4] Petitioner does not claim that the ADA is unconstitutionally overbroad on its face, nor could it. Even if the First Amendment precludes the ADA's application to some subset of workers employed by religious organizations, petitioner cannot show that the statute as a whole — which applies to employees of every sort, the vast majority of whom are employed in entirely secular professions — is "substantially overbroad." *New York State Club Ass'n*, 487 U.S. at 14 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

1. The Government Has A Compelling Interest In Preventing Retaliation Against Those Who Assist In The Enforcement Of The Law.

Anti-retaliation provisions are important components of the enforcement regimes of a broad range of state and federal statutes that may legitimately apply to religious institutions. *See*, *e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 29 U.S.C. § 2615(a)(2) (Family and Medical Leave Act); 38 U.S.C. § 4311(b) (Uniformed Services Employment and Reemployment Rights Act); 29 U.S.C. § 1140 (Employee Retirement Income Security Act); 42 U.S.C. § 7622(a) (Clean Air Act); 33 U.S.C. § 1367(a) (Clean Water Act); 42 U.S.C. § 9610(a) (Comprehensive Environmental Response, Compensation, and Liability Act); 29 U.S.C. §§ 206(d), 215(a)(3) (Equal Pay Act); 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act); *see also*, *e.g.*, N.Y. LAB. LAW § 740(2)(a) (prohibiting retaliation against employees for reporting any violation of law that poses a "substantial and specific danger to the public health or safety"); TEXAS PENAL CODE ANN. § 36.06(a)(1) (prohibiting retaliation against those who report crime or act as witness); ARIZ. REV. STAT. § 21-236(B) (prohibiting retaliation against employees for performing jury service); FLA. STAT. ANN. § 440.205 (protecting employees who file workers' compensation claims); UTAH CODE ANN. § 53A-11a-202(1) (prohibiting retaliation against school employees who report bullying or harassment of students at school); N.Y. VEH. & TRAF. LAW § 375-

a(2) (prohibiting adverse action against bus drivers who refuse to operate vehicle with faulty brakes or steering); CAL. HEALTH & SAFETY CODE § 1432(a) (prohibiting retaliation against nursing home employees who report suspected violations of health and safety codes); CONN. GEN. STAT. § 17a-101e(a) (prohibiting retaliation against employees who report suspected child abuse).[5]

1. Petitioner nonetheless claims that the First Amendment precludes application of anti-retaliation provisions to a parochial school's treatment of any employee with important religious functions. *See* Petr. Br. 19. The breadth of that claim is remarkable. Under petitioner's constitutional theory, the First Amendment entitles it to fire a parochial teacher for:

- Filing a charge of discrimination with the EEOC (a right implicating the employee's First Amendment right to petition the government for redress of grievances);

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[5] These provisions are ubiquitous in part because employer retaliation is a pervasive problem and a serious impediment to the enforcement of our nation's laws. For example, one study found that among women complaining of sex discrimination, "over 40% of the respondents cited one or more instances of retaliation." Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983); *see also* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (finding that sixty-two percent of state employees surveyed stated that they suffered retaliation after reporting harassment).

- Objecting to discrimination against other employees, even those plainly outside the protection of any ministerial exception (*e.g.*, a janitor, *see* Petr. Br. 2);
- Cooperating with government investigations, including investigations regarding discrimination against other employees or students, workplace safety violations, or even crimes committed at the school;[6] or
- Testifying in administrative proceedings or hearings in court, even under government subpoena, and even in a proceeding against someone other than the school (*e.g.*, divorce proceedings involving the parents of a student or a civil suit between church members).

Nor would the exception be limited to cases in which the retaliation took the form of termination. It would presumably include, for example, cases in which an employee who filed an EEOC complaint was subjected to pervasive abuse and harassment, or even physical assault, in the hopes of persuading the teacher to quit. *Cf., e.g.*, *Richmond-Hopes* v. *City of Cleveland*, No. 97-3595, 1998 WL 808222, at *1 (6th

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[6] *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171-72 (2005) (physical education teacher allegedly fired from coaching position for complaining that unequal treatment of girls' basketball team violated Title IX of the Education Amendments of 1972); *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1275 (9th Cir. 1982) (employee of religious publishing company alleged retaliation for "participating in proceedings involving . . . discrimination [claim] brought by a co-worker").

Cir. Nov. 16, 1998) (per curiam) (supervisor allegedly told female complainant's male coworkers that "he wouldn't hold it against any of them if 'something happened on the job' to her," and that "'payback is a bitch'"); *Pereira* v. *Schlage Elecs.*, 902 F. Supp. 1095, 1099 (N.D. Cal. 1995) (employer allegedly took no action after learning that plaintiff's co-workers had responded to her sex discrimination complaints by threatening to kill her and her family, burn down her house, and kidnap her and leave her in a bad neighborhood "so people can rape and kill" her).

At the same time, there is no basis for limiting a ministerial exception to cases in which an employee is fired for opposing her employer's allegedly unlawful conduct. The defense would apply equally to a case in which a teacher was fired for reporting to the police unlawful conduct of a student's parent, or the illegal activities of a significant school donor. *Cf., e.g.*, *Teacher Says She Was Fired for Reporting on Student Abuse*, MICH. LAW. WKLY., May 3, 2010 (reporting on lawsuit alleging that teacher was fired by school after reporting suspected sexual abuse of students in their homes and foster homes).

Nor is there any principled basis for restricting the proposed ministerial exception to anti-retaliation provisions in civil rights statutes or, as this case illustrates, to cases brought by private litigants. Indeed, petitioner's rationale would equally require providing immunity to criminal prosecution for witness tampering, should the school threaten to fire a teacher if she reports a violation of the law or appears as a witness in court. *Cf., e.g.*, Stephen Hunt, *Ex-assistant principal enters pleas in child-slapping case*, SALT LAKE TRIB., June 28, 2010

(assistant principal pleaded guilty to witness tampering in child abuse case for allegedly warning teacher not to report incident).[7] If anything, the possibility of criminal prosecution would impose a greater burden on a school's interest in terminating unwanted employees.

2. At the same time, the government's interest in preventing retaliation against those who report unlawful conduct or cooperate in enforcement proceedings is paramount.

It is every citizen's "right and his duty to communicate to the executive officers any information which he has of the commission of an offense against [the] laws" of this country. *In re Quarles*, 158 U.S. 532, 535 (1895). And "it is the duty of th[e] government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing." *Id*. at 536. Anti-retaliation provisions fulfill that responsibility while also ensuring the effective enforcement of the nation's most important laws.

This Court thus has recognized that "[r]eporting incidents of discrimination is integral to" the enforcement of civil rights laws. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005). The government necessarily relies on those with first-hand knowledge to bring violations to enforcement agencies' attention. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("Title VII

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[7] *Available at* http://www.sltrib.com/sltrib/home/49843167-76/cabanillas-district-case-pleas.html.csp.

depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011) (the Fair Labor Standards Act "relies for enforcement . . . upon information and complaints received from employees seeking to vindicate rights claimed to have been denied") (citation and internal quotation marks omitted). Thus, Congress created the EEOC charge process to alert the government to potential violations of employment discrimination laws, knowing that the EEOC would otherwise lack the resources to monitor compliance with statutes applying to millions of employees across the country.

"Without protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied." *Jackson*, 544 U.S. at 180-81. "[F]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 852 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)). Employees are especially vulnerable to coercion by their employers, upon whom the livelihood of their families depends. Consequently, "if retaliation were not prohibited, [the statutory] enforcement scheme would unravel." *Jackson*, 544 U.S. at 180.

Teachers often play a particularly important role in enforcing the rights of others who may be less able to protect themselves. *See Jackson*, 544 U.S. at 181 (noting that physical education teacher was better positioned to effectively oppose the unequal

treatment of female athletes than the young students themselves). For instance, most states require teachers to report evidence of child abuse, given their special relationship with students. *See* U.S. DEP'T HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, MANDATORY REPORTS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS (2010).[8] Many states also expressly protect mandatory reporters from retaliation by their employers. *See, e.g.*, CONN. GEN. STAT. § 17a-101e(a); 325 ILL. COMP. STAT. 5/9.1; OKLA. STAT. tit. 10A, § 1-2-101(b)(4); MASS. GEN. LAWS ch. 119, § 51A(h).[9] Applying a ministerial exception to parochial school teachers would be devastating to states' undeniably compelling interest in protecting children from abuse.[10]

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[8] *Available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm.

[9] States apply the same protection to employees of nursing homes and similar facilities, which are often church-affiliated and therefore presumably entitled to invoke petitioner's ministerial exception. *See, e.g.*, N.M. STAT. ANN. § 30-47-9(E); CAL. GOV'T CODE § 12940(g); R.I. GEN. LAWS §§ 23-17.8-4(a), 40.1-27-6; MASS. GEN. LAWS ch. 19C, § 11; N.Y. PUB. HEALTH LAW § 2803-d(8).

[10] *Cf., e.g.*, *Dayner v. Archdiocese of Hartford*, 301 Conn. 759 (2011) (applying ministerial exception to preclude claim by parochial school principal that she was fired after (1) confronting her supervisor with students' allegations that he had used sexually explicit language in front of eighth grade students and then (2) refusing the supervisor's order to report the students who accused him to the department of children and families); Pet. for Cert. at *16 n.2, *Weishun v. Catholic Diocese*, No. 10-760 (U.S.), 2010 WL 5043331 (parochial school teacher

No system for investigating or adjudicating violations of the law can function if interested parties are permitted to pressure complainants or witnesses to refuse to cooperate. Accordingly, any burden on parochial schools' First Amendment interests in retaliating against their teachers is more than outweighed by the countervailing needs of law enforcement.

2. Enforcement Of Anti-Retaliation Provisions Will Rarely Create A Cognizable Burden On The Exercise Of First Amendment Rights.

In fact, in most cases, the burden anti-retaliation laws impose on First Amendment rights is limited.

1. Anti-retaliation laws ordinarily have no effect on religious criteria for hiring. The protection usually applies, as in this case, to individuals whom the school has already determined meet the essential qualifications for the job. Thus, rather than limiting a school's choices regarding *whom* or *what kind of person* to employ, an anti-retaliation provision regulates the school's treatment of that person as an employee. The school cannot prohibit the worker from reporting violations of the law to the authorities or, what is effectively the same thing, fire her if she does.

Limiting a school's authority over its employees' conduct in this way is an inevitable consequence of subjecting the school to any neutral, generally

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allegedly fired for "reporting suspected sexual abuse of a student").

applicable law. For example, environmental laws may preclude a school from pouring certain chemicals from the science lab into the city sewer system. Such laws necessarily limit the school's power over its employees – the school cannot order a teacher to do what the law forbids. But that limitation on the school's authority does not violate any First Amendment right. *See Smith*, 494 U.S. at 889 (citing environmental protection laws as example of permissible neutral, generally applicable law). Prohibiting the school from firing an employee for reporting an environmental violation is simply the other side of the same coin. If a state can prohibit a school from using peyote in its religious services, *see id.* at 891, then surely it can prohibit a school from firing a teacher for reporting it. To be sure, the legal regime may impose a burden on the exercise of religion. But the religious burden arises from the underlying prohibition on peyote use, a restriction the Constitution permits. The anti-retaliation proscription simply prevents the school from evading enforcement of a legitimate law.

2. Petitioner nonetheless claims that it has a particular religious objection to anti-retaliation laws. The Lutheran Church, petitioner argues, "has long taught that fellow believers generally should not sue one another in secular courts . . . ." Petr. Br. 54. The ADA's anti-retaliation provision, petitioner claims, unconstitutionally burdens the school's ability to put that teaching into practice by firing teachers who resort to civil litigation. This argument is unavailing.

Initially, it bears noting that the ministerial exception petitioner proposes is poorly tailored to the

school's asserted religious interest. Petitioner does not claim that the Church prohibits litigation only when brought by ministers and teachers with important religious duties. *See* Petr. Br. 54 (explaining that all "lawsuits between believers [are] scandalous"). Why the First Amendment would not also bar suits by church members who are custodians, secretaries, and teachers with no religious duties, petitioner does not say.

But petitioner's argument suffers from an even more fundamental defect. The Court need not question petitioner's description of its religious beliefs, or decide whether those beliefs were the true reason behind its actions, because there are some religious beliefs that a constitution establishing a system of government cannot accommodate, and this is one of them. For example, the First Amendment presupposes a government that is able to "maintain[] a sound tax system, free from myriad exceptions flowing from a wide variety of religious beliefs." *Hernandez v. Comm'r*, 490 U.S. 680, 699-700 (1989) (citation and internal quotation marks omitted). The First Amendment likewise presupposes the government's authority to ensure a fair and effective legal system. Just as the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief," *Lee*, 455 U.S. at 260, the legal system could not operate if religious entities were permitted to opt-out of it, or prevent their employees from participating in it, because of a religious opposition to secular dispute resolution. Accordingly, a burden on a church's

religious belief that it should not be sued is simply not a burden the First Amendment can recognize.[11]

II. Applying Other Civil Rights Protections To Parochial School Teachers Does Not Ordinarily Violate The First Amendment.

This case involves only the application of an anti-retaliation measure to a parochial school. But applying a ministerial exception to parochial school teachers is no more appropriate when other civil rights provisions are invoked.

A. Applying Civil Rights Statutes To Parochial School Teachers Will Infrequently Impose Any Significant First Amendment Burden.

While religious teachings may occasionally require actions that civil rights statutes otherwise prohibit, such conflict is far from universal, or even common, and does not arise in this case.

1. Some religions require that certain positions be held by individuals of a particular sex, race, or other immutable characteristic. There is no doubt that when applied to prohibit discrimination required

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[11] Even if the petitioner's asserted religious basis for opposing litigation rendered the ADA's anti-retaliation provision unconstitutional in this case, petitioner does not argue that its belief is so prevalent as to render the anti-retaliation provision unconstitutional in all applications. Again, the fact that some religious employers may have colorable First Amendment objections to some applications of a statute does not justify the blanket immunity petitioner seeks.

by religious doctrine, civil rights statutes may significantly burden First Amendment rights.

But petitioner does not claim (much less demonstrate) that such conflict arises in every religious institution with respect to every position to which petitioner would extend the ministerial exception. To the contrary, a great many religious institutions in this country advocate the principles of equality and fair treatment embodied in the nation's civil rights laws. *See*, *e.g.*, AMERICAN LUTHERAN CHURCH, EQUALITY OF OPPORTUNITY – A CIVIL RIGHT (1966).[12] While it is understandable that some religious employers may prefer not to be sued when a worker alleges that the institution has fallen short of its ideals in practice, few can claim that civil rights mandates run afoul of their religious teachings or otherwise burden First Amendment rights.

In this case, for example, petitioner presumably has no religious objection to hiring women to teach in

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[12] *Available at* http://www.elca.org/What-We-Believe/Social-Issues/Journal-of-Lutheran-Ethics/Portfolios/Predecessor-Church-Body-Documents/American-Lutheran-Church/Equality-of-Opportunity-A-Civil-Right-A-Statement-of-The-American-Lutheran-Church-1966.aspx. *See also* Perich Br. 5-6 (quoting Lutheran Church's employment resource manual); Micah D. Greenstein & Howard Greenstein, *"Then and Now": Southern Rabbis and Civil Rights*, *in* THE QUIET VOICES: SOUTHERN RABBIS AND BLACK CIVIL RIGHTS, 1880S TO 1990S 325 (Bauman K. Mark & Berkeley Kalin, eds., 1997) (discussing the contribution of rabbis to the Civil Rights Movement); C. ERIC LINCOLN, THE BLACK CHURCH SINCE FRAZIER 108-122 (1974) (discussing role of black clergy in the origins of the Civil Rights Movement).

its schools, given that it hired respondent. Accordingly, it cannot claim that applying Title VII's prohibition on sex discrimination to its hiring decisions at the school requires it to violate any religious tenet.

Nor does petitioner claim that it has any religious grounds for refusing to hire or retain individuals with disabilities. Instead, its complaints are entirely secular and common among small employers and private schools – it objects to the administrative inconvenience of having to reinstate a teacher in the middle of a semester, worries that her disability may create a safety risk, and perhaps doubts whether she can perform her job given her condition. Petr. Br. 8-9.[13] But "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause . . . ." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief."). Financial, administrative, and other secular burdens imposed by neutral, generally applicable laws do not implicate the First Amendment simply because they fall upon religious as well as non-religious organizations. *See*,

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[13] Congress designed the ADA to take account of such operational concerns. *See*, *e.g.*, 42 U.S.C. § 12112(b)(5)(A) (employers need not provide accommodations that "impose an undue hardship"); *id*. § 12113(b) (providing defense when an employee poses "a direct threat to the health or safety of other individuals in the workplace"); *id*. § 12111(8) (plaintiff employee must be able to perform "the essential functions of the employment position" with or without accommodations).

e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money [a ministry] has to spend on its religious activities, any such burden is not constitutionally significant."); *Alamo Found.*, 471 U.S. at 303-06 (application of the Fair Labor Standards Act's recordkeeping and wage and hour requirements to religious employer does not violate Establishment or Free Exercise Clauses); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (a First Amendment violation does not arise simply because a neutral law "operates so as to make the practice of [one's] religious beliefs more expensive").

2. While restrictions on discrimination in certain limited circumstances may interfere with a religious institution's doctrinally compelled criteria for employment in some small subset of religiously significant positions, civil rights statutes also contain other requirements that, like anti-retaliation provisions, regulate the treatment of the employees the institution has decided meet its essential religious qualifications. Those requirements are particularly unlikely to impose any significant burden on religion.

For example, once a parochial school chooses to hire a woman as a teacher, the Equal Pay Act prohibits it from paying her less than her male counterparts for the same work. *See* 29 U.S.C. § 206(d)(1). And if the school hires a male teacher, it may not deny him the leave guaranteed to all covered employees by the Family and Medical Leave Act to care for a sick child. *See* 29 U.S.C. § 2612(a)(1)(C). The ADA likewise imposes a range of obligations

upon employers once they hire an individual with a disability. The employer may be required to modify its physical facilities or make reasonable accommodations to its practices and policies. *See* 42 U.S.C. § 12111(9). And it may not segregate employees with disabilities, *id.* § 12112(b)(1), or pay them less because of their conditions, *id*. § 12112(a).

Even in the rare instance in which a parochial school's religious beliefs compel an employment action prohibited by a civil rights statute, the school may still raise an as-applied challenge to the statute's application. There is no constitutional reason to give religious schools free rein to engage in discrimination that has no connection with freedoms the First Amendment was enacted to protect.

B. The Government Has A Compelling Interest In The Elimination Of Employment Discrimination.

Even if civil rights laws pervasively imposed significant burdens on religious practice, that would not justify a categorical exemption for parochial schools. This Court previously has sustained civil rights statutes from First Amendment challenges even when applying strict scrutiny, given governments' "compelling interest in eliminating discrimination . . . ." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (sex discrimination); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (racial discrimination in education).

There is no basis for a different result here. Congress enacted the ADA in response to abundant

evidence that discrimination on the basis of disability in employment and other areas had left individuals with disabilities "severely disadvantaged socially, vocationally, economically, and educationally . . . ." 42 U.S.C. § 12101(a)(6). Congress's observation that a person's "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society," *id*. § 12101(a)(1), remains true whether a teacher with a disability is employed by a public, private secular, or parochial school. And its interest in promoting the economic self-sufficiency and integration of people with disabilities is at least as compelling as other interests this Court has found sufficient to justify burdening religious practices. *See, e.g.*, *Braunfeld*, 366 U.S. at 607-08 (state has a compelling interest in establishing a uniform day of rest).

III. Enforcement Of Otherwise Constitutional Civil Rights Requirements To Religious Entities Ordinarily Does Not Risk Excessive Entanglement With Religion.

Petitioner likewise has not shown that every application of a civil rights law, much less every application of the ADA's anti-retaliation provision, will result in excessive government entanglement with religion in violation of the Establishment Clause. If anything, the ministerial exception petitioner proposes creates the greater entanglement risk.

1. Unconstitutional government entanglement with religion does not arise simply because a religious institution is subjected to neutral, generally applicable laws. To the contrary, neutrality toward

religion is the "touchstone" of the Establishment Clause. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005). And applying neutral laws to religious institutions necessarily involves some degree of government interaction. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 394-95 (1990).

Petitioner nonetheless argues that the degree of entanglement required to enforce the ADA's anti-retaliation provision is excessive.

First, petitioner argues that reinstating an unlawfully terminated employee violates the Establishment Clause by requiring a church to accept an unwanted employee in a position of religious responsibility. Petr. Br. 50-54. But as this case illustrates, reinstatement is not always requested; here it is no longer at issue. And when it is, courts can evaluate whether that particular remedy is appropriate in light of the First Amendment interests implicated in the particular litigation.[14] The fact that constitutional problems may be raised in some cases with respect to one form of relief is no reason to adopt a categorical exemption from any liability at all.

Second, petitioner complains that allowing a money damages remedy could "have enormous

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[14] In doing so, the court could consider that a request for reinstatement to a religious office would raise substantially more serious First Amendment concerns than a request for reinstatement to a secular position with some religious responsibilities. *See* U.S. Br. 33 (noting possibility of reinstating a parochial school teacher to a non-called teaching position).

deterrent effect" on a religious employer's decision whether to terminate its employees. Petr. Br. 51. But if Congress has the authority to prohibit a school from firing a teacher for testifying in an EEOC proceeding, as it surely does, the fact that a damages remedy indirectly encourages compliance with that valid law is hardly a constitutional defect.

Third, petitioner argues that a court cannot decide a retaliation claim without overturning a religious decision. Petr. Br. 52-54. While it may be that some parochial schools will sometimes claim that a particular employment decision was undertaken for religious reasons, that defense is not inevitable. A school might, for example, simply argue that the accommodation requested under the ADA was unreasonable, or that the teacher was fired for being tardy or underperforming.[15] In such cases, there is no risk that evaluating that claim will entangle courts in religious matters. In addition, even when a school insists that it did not terminate an employee because she filed an EEOC charge, but rather because it found her religiously unfit for her position, a court "violates no constitutional rights by merely investigating the circumstances of [an employee's] discharge . . . if only to ascertain whether

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[15] Petitioner asserts that a religious employer's "proffered legitimate reasons" for firing a teacher performing important religious functions "are nearly always religious," but it cites no evidence for this factual claim (other than a case that makes the same unsupported assertion). Petr. Br. 29. It would be surprising if parochial schools – unlike their secular counterparts – never had to let teachers go for non-religious reasons.

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).

In any event, even if the Court perceived a special problem in resolving claims of subjective pretext, not all civil rights claims depend on an evaluation of the employer's motives. A school violates the Equal Pay Act if it pays women teachers less than men for the same work, regardless of its motivation. *See* 29 U.S.C. § 206(d); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) (noting that the Equal Pay Act "does not require . . . proof of intentional discrimination"). Failure to make physical facilities accessible may violate the ADA, regardless of whether the school acts with discriminatory animus. *See* 42 U.S.C. § 12111(9). And Title VII prohibits policies that facially discriminate on the basis of sex, regardless of the employer's rationale. *Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). In cases asserting violations of these and similar provisions, courts need only ascertain the objective facts regarding the employee's treatment. *See Jimmy Swaggart Ministries*, 493 U.S. at 396 (no excessive entanglement where adjudication "involves only a secular determination").

To be sure, even when motive is not at issue, a school may claim that it has a religious objection to compliance with the law. And that as-applied challenge entails some investigation into whether a statute imposes a burden on religious practices. However, the delicacy of that inquiry has not led this

Court to abandon the requirement, implicit in the text of the First Amendment itself, that those who challenge a neutral law must show a burden on religious, rather than secular, interests. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (establishing First Amendment test under which courts must determine whether a plaintiff "terminated his work because of an honest conviction that such work was forbidden by his religion"). Nor has it led the Court to adopt broadly prophylactic exceptions for religious institutions. To the contrary, if anything, the Court has taken the opposite approach, avoiding the need to examine the sincerity of religious beliefs by declining to recognize any broad religious exemption from neutral, generally applicable laws. *See Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

2. At the same time, applying a categorical exception to employees with "important religious functions," Petr. Br. 19, poses entanglement problems of its own.

This Court has warned that significant entanglement risks arise when applying an exception for religious organizations requires "the Government to distinguish between 'secular' and 'religious'" aspects of a religious entity's activities. *Hernandez v. Comm'r*, 490 U.S. 680, 697 (1989); *see also Jimmy Swaggart Ministries*, 493 U.S. at 396-97 (noting that "[i]ronically, appellant's theory, under which government may not tax 'religious core' activities but may tax 'nonreligious' activities, would require government to do precisely what appellant asserts the Religion Clauses prohibit: 'determine which expenditures are religious and which are secular'")

(citation omitted); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (noting approvingly a Court of Appeals' observation that "the uniform application of [a] rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief") (emphasis in original) (citation omitted); *cf. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (noting the Establishment Clause virtues of a statutory exemption that does not require courts to distinguish between religious and secular activities).

Petitioner's ministerial exception requires courts to determine not only whether an employee's duties are secular or religious, but also whether the religious aspects of the job are "important." Petr. Br. 19. That qualitative judgment is "'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez*, 490 U.S. at 680 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)).

IV. Congress Can Be Relied Upon To Make Appropriate Accommodations In Civil Rights Statutes For Religious Institutions.

A court-created, categorical exception for parochial school teachers is not necessary to protect the interests of religious organizations. The Establishment Clause permits legislatures to accommodate religious groups more liberally than the Free Exercise Clause requires. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 707-08 (1994). And legislatures have been and "can be expected to be solicitous" of religious

organizations' interests. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

Congress has taken seriously concerns about the potential burden and disruption of applying civil rights laws to religious employers. The ADA itself allows religious institutions to "giv[e] preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [employer] of its activities." 42 U.S.C. § 12113(d)(1). Moreover, the statute further provides that "a religious organization may require that all applicants and employees conform to the religious tenets of such organization." *Id*. § 12113(d)(2).

Title VII likewise allows religious organizations to employ only "individuals of a particular religion to perform [certain] work . . . ." 42 U.S.C. § 2000e-1(a); *see also id.* at § 2000e-2(e). Congress has also accommodated religious entities seeking to participate in federal funding programs. *See* 42 U.S.C. § 300x-65(d); 42 U.S.C. § 9858l(a)(1)(B).

These provisions are part of a broader pattern of legislative accommodation of religious institutions. *See*, *e.g.*, 10 U.S.C. § 983(c)(2) (exempting schools with a "longstanding policy of pacifism based on historical religious affiliation" from ban on federal funding for educational institutions that bar the Reserve Officer Training Corps from campus); 20 U.S.C. §§ 1681(a)(3), 1687 (excluding "an educational institution which is controlled by a religious organization" from Title IX's proscription against sex discrimination in federally funded educational institutions "if the application of this subsection would not be consistent with the religious tenets of such organization"); 29 U.S.C. § 1003(b)(2) (excluding

certain "church plan[s]" from requirements of the Employee Retirement Income Security Act); 42 U.S.C. § 3607(a) (providing a partial exemption from the Fair Housing Act for certain religious landlords); 18 U.S.C. § 2339A(b)(1) (excluding provision of "religious materials" from the definition of "material[ly] support[ing]" terrorists).

Some religious employers would no doubt prefer greater protection than the political branches have provided to them. And in some cases, those protections will fall short of what the First Amendment requires. But this Court need not categorically exclude parochial school teachers like respondent from the reach of civil rights legislation in order to protect the legitimate constitutional rights of religious institutions.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

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