Supreme Court, U.S.
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No. 10-760

In The
Supreme Court of the United States

MADELINE WEISHUHN,

Petitioner,

v.

CATHOLIC DIOCESE OF LANSING, and
ST. MARY'S CATHOLIC CHURCH,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Should this Court review the Michigan Court of Appeals' holding that Petitioner is a ministerial employee, when the court reached this determination by analyzing Petitioner's duties and functions, in accordance with the holdings of this Court and courts nationwide?

2. Should this Court review the Michigan Court of Appeals' dismissal of Petitioner's state Civil Rights Act and Whistleblowers' Protection Act claims, when the lower court dismissed these claims because Petitioner is a ministerial employee, also in accordance with the holdings of this Court and courts nationwide?

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RESPONDENTS' STATEMENT OF CASE

I. Factual Background

A. Petitioner's Position, Function, and Duties with Respondents

Respondents operate St. Mary Catholic School. Petitioner began teaching at St. Mary School in August 1999. App. at 3a. Petitioner was Catholic and a "contributing member" of the St. Mary parish. Resp. App. at 4, 6. Petitioner testified: "When you work for the Diocese of Lansing [Respondents], you have to have advanced catechist certification, which I do have, and every year when you're done teaching you have to renew that with a religious inservice. So, I've done that through the diocese." Resp. App. at 2.

While working at St. Mary Catholic School, Petitioner "taught mathematics for the fifth through eighth grades and carried out religious responsibilities that included teaching religion for the sixth through eighth grades." App. at 3a. Petitioner "initially taught two mathematics classes and four religion classes each day, but she later taught four mathematics classes and three religion classes each day. In her final year at St. Mary's (2004-2005), she taught four mathematics classes and two religion classes each day." *Id.* Petitioner testified that her religious-education duties entailed teaching sixth-, seventh-, and eighth-grade religion classes. *Id.* Petitioner was responsible for planning Masses for those grades, as well as assisting with student liturgies. *Id.* Petitioner

and the parish priest discussed the subject matter of the Masses. *Id.* Petitioner "prepared her seventh- and eighth-grade students for the sacrament of confirmation, and she developed reconciliation (penance) services twice a year." *Id.* "[Petitioner] agreed that her responsibilities were ministerial in the sense that she provided religious direction for her students" and that "religion was an integral part of the school's curriculum and her lesson plan." App. at 3a-4a.

> In an interview that [Petitioner] gave to THE CATHOLIC TIMES, she explained that her students
>
> "hear me talk about God and religion in math class as much as I do in religion class. I'm not the kind of person who separates religion – it's part of who I am and what I teach. . . . My ultimate goal is to help each student develop into a young Christian person who has a conscience." [App. at 9a.]

The entire time she worked at St. Mary, Petitioner taught religion, including the Catholic doctrine. Resp. App. at 21-27, 32-35. "I would see Fr. Tom [the parish priest] weekly – usually weekly, because I was very involved in the school liturgies." Resp. App. at 4. Petitioner consulted regularly with the parish priest, who advised her of the themes and feast days he wanted emphasized. Resp. App. at 23-27. Petitioner "was to implement with the students what [the parish priest] had expressed to [Petitioner] were his wishes." Resp. App. at 25. "[I]f there would be prayer services that would need to be done, oftentimes I

would be the one to arrange those or organize the service." Resp. App. at 22-23. Petitioner led her students in prayer, including in mathematics class. Resp. App. at 34-35. Petitioner communicated the Word of God and the Catholic Faith in all her classes, including math. Resp. App. at 33-34. Petitioner testified: "I am a Catholic teacher teaching in a Catholic school, and that doesn't change no matter what class I'm in." Resp. App. at 34.

B. Due to Problems with Petitioner's Performance of Her Duties, Respondents Exercised Their Right To Not Renew Petitioner's Employment Contract

The Court of Appeals summarized Respondents' employment decision regarding Petitioner as follows: "After a series of employment-related incidents, none of which involved the subject of religion, St. Mary's terminated [Petitioner's] employment in the spring of 2005." App. at 4a. The referenced "employment-related incidents" highlight the weaknesses of Petitioner's civil rights and whistleblower claims.

The former St. Mary principal, Mr. Dennis Winchester, testified that he received numerous complaints from parents regarding Petitioner. Resp. App. at 41-49. During his tenure, he received 25 to 30 parental complaints regarding Petitioner. Resp. App. at 42. The parents complaining about Petitioner specifically requested that he not put their concerns in writing or speak with Petitioner because they were concerned their criticism would upset Petitioner and

she would take it out on their children. Resp. App. at 45, 60.

The principal found Petitioner's classroom discipline troubling. During the 2004-2005 school year, the principal observed one of Petitioner's students in the hallway with his mouth taped shut. Resp. App. at 50. The principal discovered that Petitioner, in disciplining the student, told the student that he could either go to the principal's office or put tape on his mouth, and the student chose the tape. Resp. App. at 50-54. The principal did not believe Petitioner should have students make these types of decisions. Resp. App. at 54-55. Petitioner did not dispute that the taping incident occurred.

Petitioner failed to inform school administration before making important decisions affecting students and the school. Petitioner was featured in an April 30, 2005 article in THE CATHOLIC TIMES, which included a photograph of several students and Petitioner in the classroom, and quotations from both Petitioner and students. Resp. App. at 67-70. Petitioner never advised the principal of the article. Resp. App. at 40. The principal received complaints from several parents who objected to the article. Resp. App. at 41.

As another example, Petitioner called the police about a student, but did not inform the principal of her actions. Petitioner claimed that a St. Mary student told Petitioner that a bus mate (that attended a public school) confided to her that the bus mate's father had sexually abused her. Resp. App. at 6-8. Petitioner reported the information the student told

the Petitioner to the police. Resp. App. at 9-10. Petitioner did not contact anyone at St. Mary before or after she contacted the police. Resp. App. at 10-15. Petitioner claimed she did not think it was necessary to alert the principal or the St. Mary student that police officers may arrive during the school day to interview the student. Resp. App. at 15-17.

The principal agreed that suspicion of sexual abuse should be reported to the authorities, and that he did not disagree with this course of action. Resp. App. at 60-61. The principal was dissatisfied with Petitioner's failure to notify him of the incident or the possibility that police officers might arrive at the school to interview the student. Resp. App. at 61-63. As principal, he expects all teachers to communicate with him before reporting any situation with a student to the police department. Resp. App. at 61-62. On the day of this incident, the principal was at the school the entire afternoon, but Petitioner never told him about the situation. Resp. App. at 61-62. He learned of the incident only after police officers arrived at the school and interviewed the student. Resp. App. at 62.

Respondents chose not to renew Petitioner's contract because of Petitioner's poor performance and lack of judgment. Resp. App. at 64, 71-72. In his letter to Petitioner, the principal explained the decision and focused on "two principal areas of concern." Resp. App. at 71-72. First, the letter states that the principal had not seen improvement over the complaints he had addressed with Petitioner in previous years

regarding her treatment of students and parents. The letter references the incident where Petitioner directed a student to tape his mouth closed. Second, the letter addresses Petitioner's failure to inform school administration before or even after involving the school and its students with outside agencies, citing the newspaper article and police incident detailed above. Resp. App. at 71-72.

II. Procedural History

Petitioner's complaint against Respondents alleged violations of Michigan's Whistleblowers' Protection Act and Civil Rights Act for retaliatory termination. App. at 1a-2a. Respondents moved for summary disposition, asserting both claims failed on the facts as a matter of law. The trial court granted the motion with respect to the whistleblower claim, but denied the motion with respect to the civil rights claim. Respondents next moved for summary disposition on Petitioner's civil rights claim, arguing that the trial court lacked subject-matter jurisdiction over Petitioner's claim because of the ministerial exception. App. at 2a. The trial court denied Respondents' motion, ruling that there was a question of fact for the jury in terms of whether Petitioner's primary function was spiritual in nature. *Id.* The Michigan Court of Appeals granted Respondents' Application for Leave to Appeal the lower court's denial of their motion.

A. *Weishuhn I*

Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483 (Mich. Ct. App. 2008) ("*Weishuhn I*") vacated the lower court's order, and remanded the case for further proceedings in accordance with its opinion. *Weishuhn I*, 756 N.W.2d at 486. *Weishuhn I* held that the ministerial exception applies in Michigan, and "is a nonstatutory, constitutionally compelled exemption to the application of employment-discrimination and civil rights statutes to religious institutions and their 'ministerial' employees." *Id.* "The ministerial exception has its roots in the Establishment and Free Exercise of Religion clauses of the First Amendment and generally bars inquiry into a religious institution's underlying motivation for a contested employment decision." *Id.* "More specifically, the ministerial exception precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees." *Id.* at 488. *Weishuhn I* held that the trial court erred in denying summary disposition on the grounds that a question of fact might exist for the jury, and remanded the case to the trial court for an analysis and determination of whether Petitioner was a ministerial employee. *Id.* at 486. *Weishuhn I* determined that the ministerial exception to a court's ability to exercise jurisdiction in a case of this nature turns on whether (1) Petitioner's employer is a "religious institution," and (2) Petitioner is a "ministerial employee." *Id.* at 499. The first prong of the test is not at issue here: Respondents are a

religious institution. *Id.* *Weishuhn I* determined the trial court erred by failing to properly analyze whether Petitioner was a ministerial employee. *Id.* at 486. Thus, the trial court was charged to determine on remand whether Petitioner was a ministerial employee. *Id.* at 500. *Weishuhn I* held "rather than focusing on the fact of ordination, the function of an individual's employment position has generally been dispositive of the question whether that position was ministerial" and "the ministerial exception applies when the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Id.* at 490 (internal citations omitted). To fulfill that task, *Weishuhn I* directed the trial court to "focus on the totality of [Petitioner's] duties and responsibilities, her position, and her functions," and provided "a non-exhaustive list of factors" for consideration:

> (1) Whether [Petitioner] had primarily religious duties and responsibilities in the sense that her primary duties consisted of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship;
>
> (2) Whether [Petitioner's] duties had religious significance;
>
> (3) Whether [Petitioner's] position was inherently, primarily, or exclusively religious, whether that position entailed

> proselytizing on behalf of [Respondents], whether that position had a connection to [Respondents'] doctrinal mission, and whether that position was important to [Respondents'] spiritual and pastoral mission; and
>
> (4) Whether [Petitioner's] functions were essentially liturgical, that is, related to worship, and whether those functions were inextricably intertwined with [Respondents'] religious doctrine in the sense that [Petitioner] was intimately involved in the propagation of defendants' doctrine and the observance and conduct of [Respondents'] liturgy by [Respondents'] congregation. [*Id.* at 500; App. at 6a-7a.]

Weishuhn I directed the trial court to dismiss Petitioner's discrimination claim if the trial court determined Petitioner was a ministerial employee, but allow the claim to go forward if the trial court determined she was not a ministerial employee. *Id.* at 500; App. at 7a. Petitioner did not appeal *Weishuhn I*.

B. Trial Court on Remand

On remand the trial court analyzed the complete record in accordance with *Weishuhn I*, determined that Petitioner was a ministerial employee, and granted Respondents' motion for summary disposition based on the ministerial exception. App. 19a-21a, 29a-32a. On the record during the summary disposition hearing,

the trial court applied *Weishuhn I*'s two-pronged inquiry of whether the employer is a religious institution and whether the employee is ministerial. App. at 29a. The trial court recognized that Respondents were a religious institution. *Id.* The court stated *Weishuhn I*'s test for determining whether Petitioner was a ministerial employee: the court "should focus on the totality of [Petitioner's] duties and responsibilities, her position, her functions" and consider the four factors from *Weishuhn I*. App. at 29a-31a. The trial court examined each of the four factors, and concluded all supported the determination that Petitioner was a ministerial employee. *Id.* The trial court made clear that he determined Petitioner was a ministerial employee "after an exhaustive review of the factors" and "based on the affidavits, pleadings, depositions" that were presented to him by the parties. App. at 32a-33a.

C. *Weishuhn II* (The Subject of the Petition)

Petitioner appealed the trial court's 2006 dismissal of her state whistleblower claim, and the trial court's 2008 decision after remand dismissing her state civil rights claim. App. at 2a. *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513 (Mich. Ct. App. 2010) ("*Weishuhn II*") affirmed the trial court's determination that Petitioner was a ministerial employee and the dismissal of her claims. App. at 2a.

First, *Weishuhn II* held that "the trial court did not err by finding that plaintiff was a ministerial employee and that defendants were therefore entitled to summary disposition of plaintiff's [civil rights] claim pursuant to M.C.R. 2.116(C)(4)." App. at 11a. To reach its decision that Petitioner was a ministerial employee, *Weishuhn II* applied the legal test set forth in *Weishuhn I*, by examining the totality of Petitioner's circumstances and analyzing the application of *Weishuhn I*'s four factors to Petitioner's facts. App. at 8a-11a. With regard to the first factor, the court determined that "[a]lthough [Petitioner] was hired in part to teach mathematics, she also taught religion and she was actively involved in religious planning and activities," emphasizing that "[Petitioner] stated that she incorporated her religious teachings into her mathematics lessons." App. at 8a-9a. For the second factor, the court determined that "[Petitioner's] teaching of religion classes and her involvement in planning masses and preparing students for confirmation and reconciliation services clearly have religious significance," and that her "admission that she incorporated her religious teachings into her mathematics classes indicates all aspects of her work had religious significance." App. at 9a. The court analyzed the third factor and held that Petitioner's position was primarily religious because "educating and indoctrinating the children was important to and furthered the purposes of the church" and her "involvement in planning masses and preparing students for confirmation and reconciliation were connected to [Respondents'] doctrinal mission, and these activities

were important to [Respondents'] spiritual and pastoral mission." App. at 10a. Although the court held that the fourth factor "presents a closer question," the court determined that Petitioner "was intimately involved in liturgical planning of worship services, as well as confirmation and reconciliation services" and "her role as a religion teacher involved propagation of [Respondents'] doctrine to students." App. at 10a. Thus, *Weishuhn II* held that "the trial court did not err in determining that consideration of the foregoing factors established that [Petitioner] was a ministerial employee." App. at 10a.

Second, *Weishuhn II* affirmed dismissal of Petitioner's state whistleblower claim, finding that it was "also subject to the ministerial exception." App. at 11a. *Weishuhn II* held that "the rationale for recognizing the existence of the ministerial exception to a claim under [Michigan's Civil Rights Act] seems to apply equally to a claim under [Michigan's Whistleblowers' Protection Act]." App. at 12a. The court recognized that *Archdiocese of Miami, Inc., v. Miñagorri,* 954 So. 2d 640 (Fla. Dist. Ct. App. 2007), *review dismissed* 985 So. 2d 1086 (Fla. 2008), *cert. denied* 129 S.Ct. 936 (2009) held the ministerial exception barred state whistleblower claims. App. at 15a. After reviewing the analysis of several cases construing the breadth of the ministerial exception, the court held that "the general consensus is that the ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution's right to select who will perform

particular spiritual functions" and "the ministerial exception may be applied to [Michigan whistleblower] claims that involve a religious institution and a ministerial employee." App. at 15a-16a.

The Michigan Supreme Court denied Petitioner's application for leave to appeal the *Weishuhn II* decision. *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 507 (Mich. 2010). App. at 52a-53a. Her Petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. This Case Presents No Novel Issue Worthy of Review by this Court.

Petitioner does not contest that most courts have recognized the existence of the ministerial exception, have examined an employee's duties to determine whether the person is a ministerial employee, and have held that a ministerial employee's claims against her religious institution employer are barred. Petition at 4-6.

This Court has many times recognized that the First Amendment has built a "wall of separation" between church and state. In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952), this Court explained that its decisions radiate "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to

decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), this Court pointed out that "[t]he resolution of such charges by the [National Labor Relations] Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." "It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* The recognized right of religious organizations to control their internal affairs includes the right to select their own religious leaders. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-725 (1976); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929).

To further the rights endowed upon churches by the First Amendment, appellate courts nationwide have adopted the ministerial exception. *McClure v. Salvation Army*, 460 F.2d 553, 558-559 (5th Cir. 1972), one of the first cases to apply the ministerial exception, recognized that "the relationship between an organized Church and its ministers is its lifeblood. The minister is the chief instrument by which the Church seeks to fulfill its purpose." Further, "[j]ust as the initial function of selecting a minister is a matter of church administration and government, so are the

functions which accompany such a selection." *Id.* at 559. As put by the court in *McClure*:

> Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. As was said by Justice Clark in *School District of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963), "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent." [*Id.* at 560.]

Since *McClure*, state and federal courts nationwide (including the appellate courts of all twelve federal circuits with jurisdiction over cases that could present the issue) have applied the ministerial exception to dismiss ministerial employees' claims against their religious employers.[1]

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[1] See, e.g., *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 281-287 (5th Cir. 1981), *reh'g denied* 659 F.2d 1075 (5th Cir. 1981), *cert. denied* 456 U.S. 905 (1982) (affirming exclusion of seminary's employment of ministerial employees from Title VII reporting); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167-1171 (4th Cir. 1985), *cert. denied* 478 U.S. 1020 (1986) (affirming dismissal of woman denied a pastoral position's Title VII claims); *Hutchinson v. Thomas*, 789 F.2d 392, 393-395 (6th Cir. 1986), *cert. denied*

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479 U.S. 885 (1986) (affirming dismissal of a minister's challenge to his enforced retirement); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576-1578 (1st Cir. 1989) (affirming dismissal of clergyman's wrongful termination action); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-363 (8th Cir. 1991) (affirming dismissal of priest's Title VII claims due to excessive entanglement); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 460-466 (D.C. Cir. 1996) (affirming dismissal of nun denied tenure's Title VII sex discrimination suit); *Starkman v. Evans*, 198 F.3d 173, 175-177 (5th Cir. 1999), *reh'g denied* 210 F.3d 365 (5th Cir. 2000), *cert. denied* 531 U.S. 814 (2000) (affirming dismissal of choir director's ADA and state claims); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303 (11th Cir. 2000) (dismissing minister's Title VII claim); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800-805 (4th Cir. 2004) (affirming dismissal of music minister director/music teacher's Title VII gender discrimination and retaliation claim); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 702-704 (7th Cir. 2003) (affirming dismissal of communications manager's Title VII claim); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006), *cert. denied* 549 U.S. 881 (2006) (affirming dismissal of music director/organist's ADEA claim); *Petruska v. Gannon University*, 462 F.3d 294, 303-307 (3rd Cir. 2006), *cert. denied* 550 U.S. 903 (2007) (dismissing chaplain's Title VII claim); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-226 (6th Cir. 2007), *cert. denied* 552 U.S. 857 (2007) (affirming dismissal of pastoral resident's ADA claim); *Rweyemamu v. Cote*, 520 F.3d 198, 204-210 (2d Cir. 2008) (affirming dismissal of priest's Title VII and state claims); *Schleicher v. Salvation Army*, 518 F.3d 472, 474-478 (7th Cir. 2008) (affirming dismissal of thrift shop operators' FLSA claims); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243-1246 (10th Cir. 2010) (affirming dismissal of diocese director's Title VII and equal pay claims); *Alcazar v. Corporation of the Catholic Archbishop of Seattle,* 627 F.3d 1288 (9th Cir. 2010) (affirming dismissal of seminarian's state minimum wage claims); *Assemany v. Archdiocese of Detroit,* 434 N.W.2d 233, 236-238 (Mich. Ct. App. 1989) (affirming dismissal of organist's discrimination claim);

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The Michigan Court of Appeals did nothing new by recognizing the applicability of the ministerial exception to Petitioner's claims. Similarly, the Michigan Court of Appeals did nothing new by examining Petitioner's functions, duties, and position to determine whether she was a ministerial employee. *Weishuhn I* held "the ministerial exception applies when the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Weishuhn I*, 756 N.W.2d at 490 (internal citations omitted). *Weishuhn I* instructed the lower court to "focus on the totality of [Petitioner's] duties and responsibilities, her position, and her functions," and provided "a non-exhaustive list of factors" for the trial court to consider when determining if Petitioner was a ministerial employee. *Id.* at 500. The test set forth in *Weishuhn I* and applied to Petitioner's case by the trial court and *Weishuhn II* is not novel.[2]

Gabriel v. Immanuel Evangelical Lutheran Church, Inc., 640 N.E.2d 681, 683-684 (Ill. App. Ct. 1994) (affirming dismissal of teacher's breach of contract claim); *Archdiocese of Miami, Inc., v. Miñagorri,* 954 So. 2d 640, 641-644 (Fla. Dist. Ct. App. 2007), *review dismissed* 985 So. 2d 1086 (Fla. 2008), *cert. denied* 129 S.Ct. 936 (2009) (prohibiting principal's state whistleblower claim).

[2] Petitioner did not appeal *Weishuhn I*. Thus, she did not challenge the test applied or its application to her civil rights claim. The Michigan Court of Appeals in *Weishuhn II* recognized as law of the case *Weishuhn I*'s decision that the ministerial exception applies in Michigan when a plaintiff is a ministerial

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Petitioner admits that *Weishuhn I*'s duties-focused test for classifying plaintiffs as ministerial employees is the most widely-accepted analysis. Petition at 5. In the first case to address the ministerial exception, *McClure*, the plaintiff's status as a minister was not at issue. *McClure*, 460 F.2d at 556. In *Southwestern Baptist Theological Seminary*, however, the court was forced to determine whether plaintiffs were ministerial employees, and held that one need not be ordained to be a minister. 651 F.2d 284. To make its determination that seminary faculty were ministers, the court examined their duties. *Id.* at 283. The duties-focused analysis was more clearly enunciated in *Rayburn*, where the court again agreed that the ministerial exception "does not depend upon ordination but upon the function of the position," citing both *McClure* and *Southwestern Baptist*. *Rayburn*, 772 F.2d at 1168-1169. *Rayburn* then set out the oft-cited "primary duties" test: "[a]s a general rule, if the employee's primary duties consist of teaching, spreading the faith, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" *Id.* at 1169; quoted by *Weishuhn I*, 756 N.W.2d at 490. "This approach necessarily

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employee, as determined by a function and duties analysis, and a ministerial employee's civil rights claims against its religious employer are barred. The *Weishuhn II* court held: "Under the law of the case, we are bound by *Weishuhn* [*I*]," citing *Sinicropi v. Mazurek*, 760 N.W.2d 520, 524-525 (Mich. Ct. App. 2008). App. at 11a.

requires a court to determine whether a position is important to the spiritual and pastoral mission of the church." *Rayburn,* 772 F.2d at 1168-1169.

Relying upon these early ministerial exception decisions, courts nationwide have examined a plaintiff's position, duties, and functions when required to determine whether the plaintiff is a ministerial employee. See, e.g., *Scharon*, 929 F.2d at 362-363 (8th Cir. 1991) (analyzing the plaintiff's position and duties and citing *Rayburn*); *Catholic Univ. of America*, 83 F.3d at 463 (D.C. Cir. 1996) (agreeing that "the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission," citing *Rayburn*); *Alicea-Hernandez*, 320 F.3d at 703-704 (7th Cir. 2003) (holding that the proper test examined the function of a plaintiff's position); *Petruska*, 462 F.3d at 304 n. 6 (3rd Cir. 2006) (quoting *Rayburn* and agreeing "that a focus on the function of an employee's position is the proper one."); *Hollins*, 474 F.3d at 226 (6th Cir. 2007) (quoting and adopting the *Rayburn* analysis); *Skrzypczak*, 611 F.3d at 1243 (10th Cir. 2010) ("Although the doctrine usually comes into play in employment suits between an ordained minister and her church, it extends to any employee who serves in a position that 'is important to the spiritual and pastoral mission of the church,'" quoting *Rayburn* and then examining the plaintiff's

duties.).[3] The Michigan Court of Appeals did nothing new by applying a function and duties analysis in this case.

II. There is No Conflict of Significance Regarding the Application of the Function and Duties Test. To Whatever Extent a Conflict Exists, Review of this Case Will Not Serve to Resolve the Conflict in a Way that Could Provide Clarity and Guidance for Future Cases.

A. No Significant Conflict Exists.

As established, courts uniformly apply the function and duties test in cases such as this. Nonetheless, Petitioner claims that "federal circuit court decisions and state court decisions are in conflict with regard to who qualifies as a ministerial employee." Petition at 11. A review of the federal circuit court

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[3] Some circuits have not explicitly adopted a test because they have only addressed cases where the plaintiff was unquestionably a ministerial employee. See, e.g., *Natal*, 878 F.3d at 1576 (1st Cir. 1989) (plaintiff was a clergyman); *Gellington*, 203 F.3d at 1301 (11th Cir. 2000) (plaintiff was an ordained minister); *Rweyemamu*, 520 F.3d at 209 (2d Cir. 2008) (holding the court need not delineate the boundaries of the exception because it clearly applied; the plaintiff was an ordained priest performing duties determined by Catholic doctrine); *Alcazar*, 627 F.3d 1288 (9th Cir. 2010) ("On rehearing, we need not and do not adopt a general test for determining whether a person is a 'minister' because, on the facts as alleged, [plaintiff] is a minister under any reasonable interpretation of the exception.").

decisions cited above shows that courts have examined a plaintiff's duties and functions when forced to make a ministerial employee determination. What Petitioner seeks to classify as a conflict is not a split amongst the courts as to what legal test to apply; actually, differing outcomes in cases are based on the different facts presented in each case. A "primary duties" test necessarily requires a case-by-case analysis of each plaintiff's employment duties. Because each plaintiff's duties may differ, the outcome of cases will vary based on the facts presented.

For instance, factual differences nullify Petitioner's argument that *Tomic*, 442 F.3d 1036, *Assemany*, 434 N.W.2d 752, and *Roman Catholic Diocese of Raleigh*, 213 F.3d 795, which held that plaintiffs with music-related positions were ministerial employees, conflict with *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. 2007), *cert. denied* 552 U.S. 1179 (2008), which held that an organist was not a ministerial employee. Petition at 11, 13. *Moersen* used the primary duties test. *Moersen*, 925 A.2d at 662-663. The *Moersen* opinion distinguished *Assemany* factually, stating that *Assemany* "does not stand for the general proposition that an organist is covered by the ministerial exception." *Id.* at 674. "[T]he organist in *Assemany*, unlike the respondent, also was the head of the musical branch of the Catholic liturgy in the church, and had a 'leadership role' in the parish." *Id.* *Moersen* also distinguished *Roman Catholic Diocese of Raleigh* factually. Unlike the plaintiff in *Raleigh*, "Moersen was not a 'music minister.' He was not a

'pivotal figure' at the church, did not plan any liturgies himself, and he was not in charge of the church's 'musical life.' He did not teach the choir any music, and he was not listed as Parish Staff." *Id.* at 674. *Moersen* did not specifically address the *Tomic* decision, but factual differences explain the different outcome in *Tomic* as well. Tomic was the music director and organist of a Catholic church, while Moersen was only an organist. *Id.* at 663-664; *Tomic*, 442 F.3d at 1037. Unlike Moersen, Tomic was to "recruit, train, direct, and rehearse the members of the chorus." *Tomic*, 442 F.3d at 1037. These and many other cases reveal that whether a claimant's functions and duties lead to a conclusion that the person is a ministerial employee is dependent on specific facts. That is certainly true here.

In sum, the ministerial exception is rooted in long-standing principles that have been recognized across the nation. When an employee is ministerial, courts have dismissed the ministerial employee's claims against her religious employer without regard for the church's justification for the employment action. No split exists as to the legal test to be employed when evaluating whether a person is a ministerial employee.

B. Review of the Michigan Court of Appeals' Application of the Function and Duties Test to the Unique Facts of this Case Would Not Resolve any Conflict in any Meaningful Way.

Petitioner concedes she seeks review due to the "unique facts of [her] case." Petition at 30.[4] Petitioner asserts that "[t]he Michigan Court of Appeals erred in holding the Plaintiff was a ministerial employee" and "[w]hen these facts are applied to the test enunciated in the first Michigan Court of Appeals' decision in this case, it is clear that the correct conclusion is that the Plaintiff was not a ministerial employee." Petition at 24. Petitioner's assertion that the *Weishuhn II* court erred in applying *Weishuhn I*'s (not appealed) test to her unique factual situation does not present an issue meriting review by this Court. Regardless, the trial court and *Weishuhn II* did not err in concluding Petitioner was a ministerial employee, and their determinations are well-supported by the evidence in this case.

Both the trial court and *Weishuhn II* carefully examined the evidence presented and employed the duties test set forth by *Weishuhn I* in concluding

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[4] Petitioner did not seek Michigan Supreme Court review of *Weishuhn I*, the decision where the Michigan Court of Appeals recognized the ministerial exception and set forth the duties-focused test for classifying ministerial employees. Petitioner only sought review of *Weishuhn II*'s application of the ministerial exception to her factual situation and case.

Petitioner was a ministerial employee. See Respondents' Statement of Case at 6-13. As described in her own words, Petitioner taught religion and Catholic doctrine, planned Masses, helped with student liturgies, prepared her students for Confirmation, developed reconciliation services, helped her students to understand the Word of God, communicated the Word of God and the Catholic faith in all of her classes including math, and led students in prayer. App. at 2a-4a, 8a-10a. Resp. App. at 21-35. Even when Petitioner was teaching a math class, she did not do so for a strictly secular purpose. App. at 8a-10a. Resp. App. at 32-35. She met regularly with the parish priest to reflect the priest's desires in her work. App. at 3a. Resp. App. at 22-25. Petitioner's religious teaching was important to Respondents' spiritual mission, as Petitioner acknowledged in her testimony that she taught Catholic doctrine and helped her students to understand the Word of God. Resp. App. at 26-27. Petitioner claims that the courts improperly "injected into the analysis an evaluation of the Plaintiff's own personal beliefs" as stated in THE CATHOLIC TIMES article. Petition at 22-23. In fact, Petitioner's own statements were appropriately addressed in *Weishuhn II* as evidence that even when Petitioner was teaching mathematics, she was also teaching religion. App. at 9a. The *Weishuhn II* court analyzed the specific, unique facts in Petitioner's case and affirmed the trial court's conclusion that Petitioner was a ministerial employee. App. at 8a-11a.

These facts do not highlight any conflict among the courts. They instead make clear that Petitioner's complaint is that her unique facts have not been rightly applied to the law. Moreover, even Petitioner's analysis of the fact issues is misplaced.

Petitioner asserts that she, a teacher at a Catholic school, should not be found to be a ministerial employee because the teachers in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010) and *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F.Supp. 2d 849 (S.D. Ind. 1998) were not classified as ministerial employees. Petition at 17-18, 25-27. Important factual distinctions between the duties and position of Petitioner, and the position and the duties of the teachers in *Hosanna-Tabor* and *Guinan* eliminate any suggestion of a conflict amongst these cases. Petitioner's quotation from *Guinan* explains one of the key distinctions between Petitioner and those non-ministerial plaintiffs: "Indeed, the secular nature of her [Guinan's] position is underscored by the fact that the Archdiocese did not require teachers at All Saints to be Catholic, and as a matter of fact, some were not." Petition at 26 (quoting *Guinan*, 42 F.Supp. 2d at 852-853). *Hosanna-Tabor* also held that the fact not all teachers were required to be Lutheran "underscored" the secular nature of the plaintiff's position. *Hosanna-Tabor*, 597 F.3d at 780. In contrast to the plaintiffs in *Guinan* and *Hosanna-Tabor*, Petitioner testified that she was required by Respondents to have an advanced catechist certification, which she

has, and to renew that certification annually with a religious inservice, which she has done through the Diocese. Resp. App. at 2. Further, Petitioner failed to present evidence about the personal religious affiliations or practices of her co-workers.

In contrast to Petitioner's assertion of a conflict, precedent supports the determination that a teacher at church-operated private schools may be a ministerial employee, as the trial court and Michigan Court of Appeals held in *Weishuhn II*. This Court has recognized the important position of parochial teachers to religious institutions: "we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501. "Courts have also held that employment decisions by religious bodies regarding lay-teachers in church-run schools whose duties include teaching religion directly or indirectly are protected by the free exercise clause from claims [under federal anti-discrimination laws]." *Assemany*, 434 N.W.2d at 237. "Since the matter of whether to employ plaintiff as a parochial school teacher is an ecclesiastical issue into which a civil court may not inquire, the complaint [for breach of contract] was properly dismissed." *Gabriel*, 640 N.E.2d at 684.

Petitioner also admits that "[m]ost federal circuits and state courts bar Title VII claims and employment claims altogether," but alleges that a conflict arises because "some courts have allowed hostile work environment Title VII claims," citing *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d

940 (9th Cir. 1999), *reh'g denied* 211 F.3d 1331 (2000) and *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), *reh'g denied* 397 F.3d 790 (2005). Petition at 7-8, 14. First, *Bollard* and *Elvig* are outliers that take a position not found outside the Ninth Circuit. Footnote 1 in this Brief lists just a few of the many cases nationwide that have dismissed Title VII claims brought by ministerial employees. Second, the very narrow holdings in *Bollard* and *Elvig* do not assist Petitioner's position. Petitioner's reference to these two Ninth Circuit cases does not present a circuit split or otherwise merit review by this Court. To the contrary, this Court's review of Petitioner's unique case will not provide an appropriate opportunity to remedy any conflict Petitioner puts in issue. Petitioner only appealed *Weishuhn II*'s application of the ministerial exception to her facts and case, and the lower courts' subsequent dismissal of Petitioner's Michigan state law claims. The Michigan Supreme Court declined to hear the arguments Petitioner now presents to this Court about her facts and Michigan state law claims. App. at 52a-53a. Petitioner's argument about her factual situation and her state law claims does not merit this Court's review.

III. The Ministerial Exception Also Bars Whistleblower Actions by Ministerial Employees.

Though its range of application is limited to ministerial employees, the ministerial exception is "robust where it applies." *Roman Catholic Diocese of Raleigh*, 213 F.3d at 800-801. *Weishuhn II* held that

the ministerial exception barred Petitioner's claim based on Michigan's Whistleblowers' Protection Act, recognizing that the policy underpinnings of the exception applied to whistleblower claims as equally as to civil rights claims. App. at 11a-12a.

Weishuhn II held Michigan's civil rights and whistleblower statutes "have as a common purpose the prevention of discrimination in employment on the basis of statutorily recognized factors rooted in public policy." App. at 12a. "Whistleblower statutes are analogous to anti-retaliation provisions of other employment discrimination statutes and the policies underlying these similar statutes warrant parallel treatment." App. at 12a (internal citations omitted). *Weishuhn II* noted that several federal cases have dismissed Title VII retaliation claims on the basis of the ministerial exception, discussing, among others, *Gellington*, 203 F.3d 1299, and *Elvig*, 375 F.3d 951. App. at 12a-15a. *Weishuhn II* discussed *Archdiocese of Miami, Inc., v. Miñagorri*, 954 So. 2d 640 (Fla. Dist. Ct. App. 2007), *review dismissed* 985 So. 2d 1086 (Fla. 2008), *cert. denied* 129 S.Ct. 936 (2009), a case directly on point that barred a Catholic school principal's state whistleblower claim. App. at 15a.

In *Miñagorri*, the plaintiff, then a Catholic school principal, allegedly was assaulted by her immediate supervisor, a priest. The plaintiff alleged that when she complained to the Archdiocese about his behavior, the Archdiocese retaliated by terminating her employment. The plaintiff brought a state law whistleblower claim. *Miñagorri*, 954 So. 2d at 641. The

parties in *Miñagorri* conceded that the plaintiff was a ministerial employee. *Id.* at 642. After discussing cases from across the nation, including many of the same cases cited in *Weishuhn I* and *II*, *Miñagorri* held secular review of a religious institution's employment decision is precluded if the plaintiff is a ministerial employee. *Id.* at 642. "We see no reason why the ministerial exception should not be applied to the instant whistleblower claim." *Id.* at 643. "Moreover, allowing the whistleblower claim to proceed would especially run afoul of the First Amendment because the requested remedy of reinstatement would require the Archdiocese to employ Miñagorri, a concededly ministerial employee." *Id.* at 644. The court found the courts lacked jurisdiction over the whistleblower claim due to the ministerial exception. *Id.* at 641, 644.

Miñagorri supports *Weishuhn II*'s decision that the ministerial exception barred Petitioner's whistleblower claim. Petitioner acknowledges *Miñagorri*, but argues that its holding should be distinguished because unlike the Florida plaintiff, Petitioner was required by law to report child abuse suspicions. Petition at 19. Petitioner's argument only highlights that her appeal merely concerns her own unique factual situation. Her argument could at best only apply to a small subset of Michigan plaintiffs that are ministerial employees and mandatory reporters making whistleblower claims against their religious employers. The Michigan Court of Appeals directly rejected Petitioner's argument that mandatory reporters should be treated differently: "We recognize

that it seems unjust that employees of religious institutions can be fired without recourse for reporting illegal activities, particularly given that members of the clergy, as well as teachers, are mandated reporters. M.C.L. § 722.623(1)(a). However, to conclude otherwise would result in pervasive violations of First Amendment protections." App. at 16a. No doctrinal basis supports carving out Petitioner's claim from those barred by the ministerial exception.

Petitioner argues that her state law whistleblower claim should be allowed to proceed because certain state contract claims have been allowed to continue, citing *Petruska*, 462 F.3d 294. Petition at 15, 32. But *Weishuhn II* specifically rejected this argument as well. App. at 17a-18a. Unlike the inquiry required by resolution of a contract claim, her whistleblower claim would require courts to examine the internal decisions of religious institutions regarding their ministerial employees, an inquiry in direct conflict with the First Amendment and the policy underpinnings of the exception.

An examination of the analysis Michigan courts would employ to evaluate Petitioner's state law whistleblower claim if it were allowed to proceed demonstrates why the ministerial exception bars her claim. Michigan whistleblower claims, like Petitioner's claim, are evaluated using the same "shifting-burden" analysis used in Michigan civil rights retaliatory discharge claims. *Taylor v. Modern Engineering, Inc.*, 653 N.W.2d 625, 628 (Mich. Ct. App. 2002). First, "a plaintiff must establish three elements to make a

prima facie case under § 2 of the WPA" by showing "(1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v. Dowell Schlumberger Inc.*, 572 N.W.2d 210, 212 (Mich. 1998). Once a plaintiff establishes a prima facie case, the burden shifts to defendants "to articulate a 'legitimate, nondiscriminatory reason'" for the adverse employment action "to overcome and dispose of this presumption." *Lytle v. Malady*, 579 N.W.2d 906, 914-915 (Mich. 1998). To accomplish its burden, defendant need only "set forth . . . the reasons for" the adverse employment action "legally sufficient to justify a judgment for the defendant." *Id.* at 915. Once a defendant satisfies its burden, the burden shifts back to the plaintiff, whose case may go on to the jury only upon evidence that "there was a triable issue that the employer's reasons were not true reasons, but were a mere pretext for discrimination." *Id.* See also *Taylor,* 653 N.W.2d at 628-629.

"[I]n the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle,* 579 N.W.2d at 916. Under the "intermediate position" which has been adopted in Michigan, in the absence of evidence that unlawful discrimination was "a determining factor in the

employer's decision," a claim of discrimination should not go to the jury. *Town v. Michigan Bell Telephone Co.*, 568 N.W.2d 64, 68-69 (Mich. 1997). "[T]he evidence must create a material issue of fact on which reasonable minds could conclude that the employer's stated reason is a pretext for discrimination." *Id.* at 69. "[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle,* 579 N.W.2d at 916 (footnote omitted).

These authorities make clear that in Michigan, two levels of proof are often necessary in civil rights and whistleblower cases. Individually or together, those proofs compel an inquiry into the reasons the religious institution terminated a ministerial employee's employment. By having to show a legitimate, non-pretextural reason for the action, the religious employer *must* submit substantively admissible evidence of the reasons for its decision. A plaintiff must then submit substantively admissible evidence to the contrary, and would be entitled to broad discovery to support their claims. M.C.R. 2.302 (allowing for a broad scope of discovery in Michigan). That discovery would entail the exact inquiry into the internal governance and administrative decision making that the ministerial exception expressly forbids. *Rayburn,* 772 F.2d at 1169-1171. *Catholic University of America* held that the controversy over Sister McDonough's qualifications for tenure placed it

in the impermissible position of having "to evaluate . . . competing opinions on religious subjects," and that the EEOC's "prolonged monitoring and investigation" violated the Establishment Clause. *Catholic Univ. of America*, 83 F.3d at 465-467; *Hutchinson*, 789 F.2d at 394-395 (inquiry into employment decision "involves exactly the inquiry that the First Amendment prohibits"); *McClure,* 460 F.2d at 558. A whistleblower claim, no less than a discrimination claim, is barred by the ministerial exception. "Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Natal*, 878 F.2d at 1578.

Petitioner argues that courts should inquire into a church's justification for its employment decisions regarding ministerial employees, and only bar suits pertaining to doctrinally based decisions. Petition at 18. Petitioner's argument ignores the core policies of the ministerial exception. "[G]overnment action may burden the free exercise of religion, in violation of the First Amendment, in two quite different ways: by interfering with a believer's ability to observe the commands or practices of his faith . . . and by encroaching on the ability of a church to manage its internal affairs." *Catholic Univ. of America*, 83 F.3d at 460. The ministerial exception relieves this latter burden of encroachment and excessive entanglement by prohibiting inquiry into the decision making and internal governance of a religious organization's

employment relationship with its ministerial employees.

To avoid impermissible entanglement, the ministerial exception bars suits by ministerial employees against their religious employers regardless of the reason for the employment action. "The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision." *Roman Catholic Diocese of Raleigh*, 213 F.3d at 801. "To the extent that a claim involves the church's selection of clergy – in other words, its choice as to who will perform particular spiritual functions – most of these circuits have held that the exception bars any inquiry into a religious organization's underlying motivation for the contested employment decision." *Petruska*, 462 F.3d at 304 (internal citations omitted). "To rule otherwise would enmesh the court in endless inquiries as to whether each discriminatory act was based in Church doctrine or simply secular animus." *Alicea-Hernandez*, 320 F.3d at 703. "That the University did not assert any religious basis for denying Sister McDonough tenure does not affect our conclusion." *Catholic Univ. of America*, 83 F.3d at 464-465. *Rayburn* held:

> While it is our duty to determine whether the position of associate in pastoral care is important to the spiritual mission of the Seventh-day Adventist Church [whether the employee was a minister], we may not then inquire whether the reason for Rayburn's rejection had some explicit grounding in

> theological belief. . . . In "quintessentially religious" religious matters . . . the free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal context. [*Rayburn*, 772 F.2d at 1169.]

Petitioner's theme that her case, unlike all others, merits court review, fails to explain how the inquiry into Respondents' reasons for the employment action – and particularly into whether the proffered reasons were pretextural – can avoid the First Amendment concerns that all precedents prove exist. Plaintiff's personal factual situation in the context of only Michigan law does not change the policy underpinnings of the ministerial exception that bar a ministerial employee's claims against its religious employer, regardless of the reason for the employment decision. "Application of the exception thus manifests no more than the reality that a constitutional command cannot yield to even the noblest and most exigent of statutory mandates." *Roman Catholic Diocese of Raleigh*, 213 F.3d at 800-801.

CONCLUSION

Respondents Catholic Diocese of Lansing and St. Mary's Catholic Church respectfully ask this Court to deny the petition.

Respectfully submitted,

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