No. 18-245

IN THE

Supreme Court of the United States

MARLON PENN,

Petitioner,

v.

NEW YORK METHODIST HOSPITAL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

A. JONATHAN TRAFIMOW
Counsel of Record
MORITT HOCK & HAMROFF LLP
400 Garden City Plaza, Suite 202
Garden City, New York 11530
(516) 873-2000
jtrafimow@moritthock.com

Counsel for Respondents

283659

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RESTATEMENT OF QUESTION PRESENTED

Respondents New York Methodist Hospital and Peter Poulos respectfully submit that Petitioner's Questions Presented misleadingly frame as questions of law what are actually issues of the application of facts to a settled legal standard. Petitioner expressly concedes that the ministerial exception applies if: "(1) Penn is a 'minister' and (2) NYMH is a 'religious' group or institution," and further concedes that Petitioner is a minister for purposes of this case. Pet. 19; *see also* Pet. App. 9a. The Court of Appeals applied this standard and concluded that NYMH was a religious group or institution. Petitioner disagrees with how the Court of Appeals applied this settled standard to the facts of this case. Accordingly, the Question Presented should be restated as follows:

Whether the Court of Appeals, which properly stated the standard for the ministerial exception set forth in *Hosanna–Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), nonetheless misapplied that standard to the facts of this case?

PARTIES TO THE PROCEEDING

Petitioner is Marlon Penn, the Plaintiff-Appellant below. Respondents are New York Methodist Hospital and Peter Poulos, the Defendants-Appellees below.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

Page

STATUTES

Cited Authorities

Respondents New York Methodist Hospital ("NYMH") and Peter Poulos respectfully request that the Court deny the petition for writ of certiorari filed by Petitioner Marlon Penn.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit Court of Appeals, Pet. App. 1a-45a, is reported at 884 F.3d. 416 (2nd Cir. 2018). The panel and the Court of Appeals *en banc* denied rehearing. Pet. App. 62a-63a. That decision is unreported. The opinion of the district court, Pet. App. 46a-61a, is reported at 158 F.Supp.3d. 177 (S.D.N.Y. 2016).

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 2018, and rehearing was denied on May 14, 2018. The petition for a writ of certiorari in case No. 18-245 was placed on the docket on August 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

INTRODUCTION

The First Amendment to the United States Constitution does not permit a judicial remedy for any minister claiming employment discrimination against his or her religious group, regardless of the group's reason for the adverse employment action. *Hosanna-Tabor*, 565 U.S. at 181; Pet. App. 22a. In this case, Petitioner does not dispute that he was a minister for First Amendment purposes, and the Court of Appeals correctly concluded that NYMH, including the Pastoral Care Department (the

"Department") in which Petitioner worked, was a religious group under the First Amendment.

The Court of Appeals correctly held that NYMH was a religious group. While recognizing that (1) NYMH deleted from its Certificate of Incorporation the requirement that the Bishop of the New York area United Methodist Church and the President of the Guild of the Methodist Hospital be "trustees ex-officio" and removed mention of religious activity or a religious mission; and (2) NYMH promotes a secular motive, the Court of Appeals properly recognized that "[n]evertheless, vestiges of NYMH's religious nature remain." Pet. App. 4a.

These "vestiges" substantially influence operations at NYMH, perhaps most profoundly within the Department where Petitioner worked. NYMH has "steadfastly kept the word 'Methodist' in its name, despite organizational and operational changes." Pet. App. 4a. The by-laws still require "'significant representation from the community and the United Methodist Church' on its Board of Trustees," and "to select a president 'with the advice and counsel of the Bishop of the New York area of the United Methodist Church.'" Pet. App. 5a-6a. After amendment of the Certificate of Incorporation, the United Methodist Association Journal recognized that NYMH's "Methodist influence can still be seen in the hospital through the philosophy of equality, individual attention, charity, faith, and hope that is communicated to NYMH employees every day." Pet. App. 5a; *see also* A-107. NYMH produced a booklet in 2006 commemorating its 125th anniversary and noted "its identity as the mother hospital of Methodism." Pet. App. 5a. Chaplain (and Respondent) Peter Poulos, Director of the Department, reminds every employee

during employee orientation that "patients are human beings who are created in the image of God." Pet. App. 6a. The current Employee Handbook "emphasizes this history… and states that its mission is 'to provide an active ecumenical program of pastoral care and conduct[] a clinical pastoral program.'" Pet. App. 5a.

These "vestiges" particularly influence the Pastoral Care Department and how it fulfills the mission embedded in its name "to provide an 'ecumenical program of pastoral care' to patients and to 'see that the needs of the whole person – mind and spirit as well as body – are met.'" Pet. App. 6a. NYMH Staff Chaplains "counsel patients, including those who are making end-of-life decisions, and 'facilitate the patient's receiving [of] the rituals and practices of his/her own faith tradition when requested.'" Pet. App. 6a. NYMH Staff Chaplains must minister to patients, their families and NYMH staff in their assigned patient units in accordance with Department procedures and facilitate each patient receiving rituals and practices within the patient's own faith tradition, when requested. NYMH Staff Chaplains must counsel patients and families as they struggle with how their faith/belief systems influence their hospitalization experience, decisions they need to make, and how they process significant change, grief and loss. NYMH Staff Chaplains must also offer prayer, ritual and devotional materials to patients and families who request them, and coordinate and conduct chapel services. Pet. App. 7a.

Importantly, the Department is integrated into the larger NYMH community. For example, Chaplain Poulos often is asked to say prayers at the opening of ceremonies, graduations and employee recognition events,

and leads an orientation on Methodism for new staff. Further, Department representatives "sit on NYMH's 'interdisciplinary committee' for bioethics and 'hospice/palliative care,' as well as institutional review board for research projects." Pet. App. 8a-9a.

There is no doubt that Petitioner functioned in a ministerial capacity at NYMH. He worked in the Department as a Duty Chaplain where, Petitioner admits, he was "primarily responsible for ministry." Pet. App. 9a. *See also* Pet. App. 12a, 54a.

STATEMENT OF THE CASE

A. Introduction

Petitioner performed ministerial duties for NYMH as a weekend "Duty Chaplain," and was denied a weekday "Staff Chaplain" position when one became available several years later because Chaplain Poulos concluded there were persons better able to perform the religious functions of the Staff Chaplain position. Petitioner's job performance deteriorated, and his termination followed "numerous instances of misconduct, including (i) failing to log activities regarding patients, (ii) failing to fill out a priest referral card for a patient, which led to the patient's demise without receiving his last rites, (iii) interacting with an interracial couple who had just suffered a fetal demise in an insensitive and inappropriate manner, (iv) conducting an Easter service for which he was unprepared and in which he was insensitive to Catholic attendees who wished to receive communion, and (v) sexually harassing a fellow chaplain." Pet. App. 50a; *see also* Pet. App. 11a.

B. NYMH Hires Petitioner

NYMH hired Petitioner as a Chaplain Trainee to work in in its Clinical Pastoral Education Residency Program in 2002 and then again as a Duty Chaplain in July 2004. Pet. App. 9a, 48a. As a Duty Chaplain, Petitioner "was 'primarily responsible for ministry' to patients and their families, and his responsibilities—among other things—included 'distribut[ing] of Bibles to all patient units,' 'conduct[ing] in-Hospital memorial service[s],' 'maintain[ing] an active, on-going Pastoral care to staff,' 'providing communion to nurses,' and '[conducting] Easter services.'" Pet. App. 48a; *see also* Pet. App. 9a.

C. NYMH Denies Petitioner's Request for a Staff Chaplain Position

In 2010, the Catholic Staff Chaplain retired, leaving her position open for a replacement. Chaplain Poulos did not consider Petitioner for the Staff Chaplain position for several reasons:

> One resident had complained to Mr. Poulos that Mr. Penn ended a service with a hymn that was only familiar to a certain group of Christians. Appellee's Br., 13-14. Mr. Poulos and Mr. Penn also disagreed about the importance of "full coverage." *Id.* According to appellees, this was a "philosophical" disagreement, because Mr. Penn felt that "effective ministry to those in pain/crisis is never contingent on . . . time constraints," Joint App'x at 207 (summarizing Mr. Penn's rebuttal statement at the New York Human Rights Commission), and Mr. Poulos disagreed.

Pet. App. 10a. Following NYMH's decision to hire Chaplain Joo Hong for the position, on September 26, 2010 Petitioner filed an administrative complaint with the New York City Commission on Human Rights ("CCHR") and the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging, *inter alia*, that Respondents had failed to promote him because of his race and religion. Pet. App. 10a. The CCHR dismissed the complaint on July 27, 2011. Pet. App. 10a-11a.

D. Petitioner's Poor Performance and Termination

Numerous instances of misconduct followed Petitioner's filing of the administrative complaint. Two incidents occurred on March 13, 2011. In the first, Petitioner improperly completed a "referral card" which resulted in a patient dying without receiving last rites. Pet. App. 11a. In the second, a patient whose fetus had died complained that Petitioner made insensitive comments about her partner's race. Pet. App. 11a, 50a. On April 11, 2011, Petitioner "told a Catholic nurse that she could not receive communion until the following day, although he purportedly knew that she could receive communion across the street." Pet. App. 11a. In November 2011, a female chaplain complained to Chaplain Poulos that Petitioner "made sexually inappropriate comments to her and hugged her against her will." Pet. App. 11a. NYMH's Human Resources Department investigated the complaint and made the decision to terminate Petitioner's employment. Pet. App. 11a. The decision to terminate was based on the "culmination of events" outlined above. (*Penn v. New York Methodist Hospital, et al.*, 11-cv-09137 (S.D.N.Y., filed Dec. 12, 2011) (NSR)(LMS), Docket Entry No. 99-1 at pp. 96, 102, 106-112.)

E. The Decisions Below

Following the dismissal of his administration Complaint by the CCHR, Petitioner filed suit in the United States District Court for the Southern District of New York, alleging in his Second Amended Complaint that Respondents: (1) discriminated against him on the basis of his race and religion, in violation of Title VII of the Civil Rights Act of 1964 (against NYMH only), and 42 U.S.C. § 1981 (against both Respondents), and (2) retaliated against him after he filed charges with the EEOC and the CCHR, in violation of Title VII, § 1981, and various state and city laws. Pet. App. 12a. On September 13, 2013 the District Court partially granted Respondents' motion to dismiss. Pet. App. 12a. In that ruling, the District Court held that Petitioner was a ministerial employee. Pet. App. 12a. *See also* Pet. App. 30a, 42a, 54a.

Respondents thereafter moved for summary judgment asserting, *inter alia*, the ministerial exception, and the District Court granted the motion on that basis on January 20, 2016. Pet. App., App. B. As the District Court explained, having previously held that Petitioner was a ministerial employee, "[t]he only question remaining is whether NYMH is a "religious institution" for purposes of the ministerial exception." Pet. App. 54a. Applying the undisputed facts of the case to that legal standard, the District Court answered that question in the affirmative. Pet. App. 60a.

The United States Court of Appeals for the Second Circuit affirmed the District Court's Order on March 7, 2018, with Judge Droney dissenting. Pet. App. 1a-45a. The Court of Appeals correctly stated the prevailing

legal standard under this Court's decision in *Hosanna-Tabor*, 565 U.S. at 194-95: "the ministerial exception applies to 'religious groups' when making employment decisions involving 'ministers,'" Pet. App. 16a, and affirmed the District Court's application of that standard. The dissenting judge agreed on the applicable legal standard, explaining: "In order for a defendant-employer to claim the protections of the ministerial exception, two distinct requirements must be met: (1) the plaintiff must be a minister; and (2) the defendant must be a religious institution." Pet. App. 29a (citing *Hosanna-Tabor*, 565 U.S. at 188-89). The dissenting judge, however, disagreed with the Court of Appeals' application of that standard to the facts of this case. Pet. App. 44a-45a ("Because there is insufficient evidence that NYMH's 'mission is marked by clear or obvious religious characteristics,' [internal cit. om.] I conclude that it does not qualify as a religious institution for purposes of the ministerial exception.") The dissenting judge agreed that "Penn does not challenge that he is a 'minister' for the purposes of the ministerial exception," but disagreed with the Court of Appeals' application of the facts of this case to the second element of the *Hosanna-Tabor* standard: whether NYMH is a religious institution. Pet. App. 29a-45a.

Petitioner requested panel rehearing or, in the alternative, rehearing *en banc*, and on May 14, 2018 the Court of Appeals denied that petition. Pet. App. 62a-63a. Petitioner filed the instant petition for a writ of certiorari on July 30, 2018 and the petition was placed on the docket on August 27, 2018.

THE PETITION SHOULD BE DENIED

The Petition should be denied because it fails to meet this Court's standard for review. Petitioner does not allege that the decision below conflicts with the decision of another court of appeals, or a decision of a state court of last resort, or has departed from the accepted and usual course of judicial proceedings. United States Supreme Court Rule 10 ("Rule 10"). Nor does Petitioner dispute that the decision below properly stated the *Hosanna-Tabor* standard. *See* Pet. at 19 ("NYMH can invoke the exception here only if: (1) Penn is a 'minister' and (2) NYMH is a 'religious' group or institution.") Petitioner argues that the decision below erroneously applied that standard. Such a claim is "rarely" the basis for Supreme Court review. Rule 10.

This case is not one of the rare exceptions contemplated by Rule 10. First, contrary to the Petition's assertion, there is sufficient guidance for the lower courts to apply the ministerial exception. Second, Petitioner's argument against the "sliding scale" paradigm is a mere distraction. The "sliding scale" analysis is neither "flawed" nor "contrary to the purposes of the ministerial exception as announced in *Hosanna-Tabor*." Pet. 17. Even if it were, the Court of Appeals expressly stated that it was not reaching the issue of whether the "sliding scale" methodology for analyzing ministerial exception claims was correct, Pet. App. 16a, n.2, and properly applied the *Hosanna-Tabor* standard to the facts of this case. Third, the Court of Appeals correctly recognized that allowing this case to go to trial would excessively entangle the courts in religious issues, in contravention of the First Amendment. For all of these reasons, the Court of Appeals correctly held that the ministerial exception applies to the facts of this case.

A. The Second Circuit Correctly Applied the Ministerial Exception

1. There is Sufficient Guidance on the Ministerial Exception for the Courts to Apply it

The Petition implies that, because *Hosanna-Tabor* was this Court's first case involving the ministerial exception, there is insufficient guidance for the lower courts on how to apply it. *See* Pet. 21. This argument is incorrect. In *Hosanna-Tabor* itself, the Court placed the ministerial exception firmly within its First Amendment jurisprudential tradition. *Id.* at 186 (*citing Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) (the "[f]reedom to select the clergy, where no improper methods of choice are proven," is 'part of the free exercise of religion' [protected by the First Amendment] against state interference."). The Court left no doubt that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor*, 565 U.S. at 181. Thus, the Court's own First Amendment jurisprudence provides ample guidance on the ministerial exception.

In *Hosanna-Tabor*, the Court also noted that "[t]he Courts of Appeals…have had extensive experience with this issue," cited cases from virtually every circuit, and stated its agreement with the lower courts "that there is such a ministerial exception." *Hosanna-Tabor*, 565 U.S. at 188. Many of the decisions cited in *Hosanna-Tabor* provide extensive guidance on what is a religious group, including *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362-363 (8th Cir. 1991), which provides

such guidance under similar factual circumstances, as discussed in further detail below.

2. The Court of Appeals Correctly Concluded that NYMH is a Religious Group

In applying the *Hosanna-Tabor* standard to hold that NYMH is a religious group, the Court of Appeals properly relied both on institutional attributes of NYMH and of the Department. On the institutional level, courts of appeals have repeatedly applied the ministerial exception in cases involving "religiously affiliated entit[ies]," whose "mission[s are] marked by clear or obvious religious characteristics" and, specifically, have "allowed hospitals to invoke the ministerial exception doctrine in employment suits from pastoral staff members." Pet. App. 18a-19a (*citing Hollins v. Methodist Healthcare*, 474 F.3d 223, 226 (6th Cir. 2007); *Scharon*, 929 F.2d at 362 and *Shaliehsabou v. Hebrew Home of Greater Wash.*, 363 F.3d 299, 310-311 (4th Cir. 2004)).

Scharon directly refutes Petitioner's position. The *Scharon* court drew on *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) in support of its conclusion that the hospital-employer before it was a religious institution for purposes of the ministerial exception. *Lemon* had established a standard to make this determination, whether an entity has a "substantial religious character," and the *Scharon* court applied that standard to a hospital with religious character attributes similar to those of NYMH, concluding that the hospital in that case was a religious institution for purposes of the minister's employment discrimination claim. *Scharon*, 929 F.2d at 362-63.

Consistent with *Hosanna-Tabor*'s flexible approach to applying the ministerial exception, the Court of Appeals also considered the Department and Petitioner's role within it, and properly observed that the Department's operations are "marked by clear or obvious religious characteristics." Pet. App. 19a (*quoting Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 834 (6th Cir. 2015)). Importantly, the Court of Appeals found that the Department "has retained a critical aspect of that religious identity in order to provide religious services to its patients." Pet. App. 20a. The Court of Appeals further cited to Petitioner's specific duties within the Department, noting that he coordinated the distribution of Bibles to patients, performed an in-hospital memorial service, performed Easter Services and communion, and provided "on-going Pastoral Care to staff." Pet. App. 20a-21a.

By including the Department and the Petitioner in its analysis, the Court of Appeals followed *Scharon*, which had focused on the employment decision as the proper locus, or at least a relevant factor to consider, in its analysis of the ministerial exception. Pet. App. 18a (*quoting Scharon*, 929 F.2d at 362 ("While St. Luke's provides many secular services (and arguably may be primarily a secular institution), in its role as Scharon's employer it is without question a religious organization."); *see also* Pet App. 59a ("Though NYMH may be primarily a secular organization, with regards to its employment of the Plaintiff, the Hospital was acting as a religious organization.")

In contrast, the dissenting judge's analysis does not permit consideration of the employee's duties or the role of the group within the organization in which the

employee worked in assessing whether the employer is a religious organization. Pet. App. 43a-44a. In this way, the dissenting judge's approach is inconsistent with this Court's admonition against imposing a "rigid formula" in applying the ministerial exception.[1] *Hosanna-Tabor*, 565 U.S. at 190.

3. Petitioner's Criticism of the District Court's Approval of the"Sliding Scale" Analysis is Both Misplaced and Irrelevant

The Court of Appeals correctly noted that the District Court "followed the reasoning of another district court decision, *Musante v. Notre Dame of Easton Church*, 3:01-CV-2352 (MRK), 2004 U.S. Dist. LEXIS 5611, 2004 WL 721774, at *6 (D. Conn. Mar. 30, 2004), and concluded that the 'ministerial exception should be viewed as a sliding

1. The Petition contends, as did the dissenting judge below, that the Title VII standard for defining a religious institution applies to the First Amendment analysis under the ministerial exception. Pet. 17, n.1 (*quoting* Pet. App. 31a-32a). This argument finds no support in the case law as the First Amendment and Title VII standards are different. The Title VII exemption applies to "a religious corporation, association, educational institution, or society." 42 U.S.C. §2000e-1(a). This is not the First Amendment standard. *See Hosanna-Tabor*, 512 U.S. at 189 ("employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances."). This may explain why neither of the cases the Petitioner relies on to set forth the Title VII standard even mentions the ministerial exception. *See* Pet. 17-18, n. 1 (*quoting* Pet. App. 31a-32a) (*citing LeBoon v. Lancaster Jewish Cmnty. Ctr. Ass'n*, 503 F.3d 217, 226 (3rd Cir. 2007) and *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam). Neither *LeBoon* nor *Spencer* address the ministerial exception.

scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies." *Id.* (citing *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes.')." Pet. App. 13a. The Court of Appeals stated that it "did not need to reach" the issue of whether the district court erred in applying the sliding scale approach. Pet. App. 16a, n. 2. The dissenting judge nonetheless criticized application of the sliding scale approach to this case. Pet. App. 43a.

The Court of Appeals expressly declined to endorse or criticize the "sliding scale" paradigm, but also declined to impose a "rigid formula" in its analysis of whether NYMH constitutes a religious group. Pet. App. 17a; *see also* Pet. App. 23a ("*Hosanna-Tabor* instructs us to review the employee and the employer and assess the religious characteristics of each.") The Court of Appeals explained that *Hosanna-Tabor* "instructs only as to what we might take into account as relevant… it neither limits the inquiry to those considerations nor requires their application in every case." Pet. App. 15a (*quoting Fratello v. Archdiocese of N.Y., 863 F.3d 190,* 204-05 (2d Cir. 2017)). *See also Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) ("In this case, at most two of the four *Hosanna-Tabor* factors are present. But even referring to them as 'factors' denotes the kind of formulaic inquiry that the Supreme Court has rejected.") The Court of Appeals simply and appropriately applied the facts of this case to the *Hosanna-Tabor* standard without reaching the question of whether the "sliding scale" approach was the optimal way to apply the flexibility *Hosanna-Tabor*

mandates to the facts of this case. The Petition's criticism of the Court of Appeals on this basis is misplaced.

B. Failure to Apply the Ministerial Exception Would Excessively Entangle the Courts in Religious Issues

Petitioner correctly concedes that the ministerial exception "prevents entangling the courts in ecclesiastical decisions," Pet. 28, but incorrectly contends that the ecumenical activities of the Department dissipate the excessive entanglement concerns in this case. Pet. 28-29. The Court of Appeals properly held that (i) excessive entanglement concerns cannot be so narrowly cabined as the Petition suggests, and (ii) the First Amendment does not distinguish between the sectarian and the ecumenical in determining what activities are religious.

Regarding the first issue, the Court of Appeals correctly held:

> This application of the ministerial exception doctrine, that the NYMH's Department of Pastoral Care is a "religious group," one consistent with the relevant precedent and this case's undisputed facts, properly balances the constitutional consequences of not doing so: the risk of excessive entanglement with "ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-89 (observing that judicial interference with the selection of ministers violates the Establishment Clause, which "prohibits government involvement in . . . ecclesiastical decisions" to protect against the establishment of religion).

Pet App. 22a. In this way, the Court of Appeals explained the Establishment Clause forbids "an excessive government entanglement with religion." Pet App. 22a (*quoting Lemon*, 403 U.S. at 613. Beyond *Hosanna-Tabor* and *Lemon*, concerns with excessive entanglement have deep roots in this Court's First Amendment jurisprudence. *E.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (holding that a New York statute that had the purpose and effect of transferring the administrative control of the Russian Orthodox churches in North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches violated the First Amendment); *School District of Abington Twp. v. Schempp*, 374 U.S. 203, 222, (1970) (explaining how the Establishment Clause and the Free Exercise Clause require government "neutrality" towards religion); *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (holding that the provision of "auxiliary services" -- counseling, testing, psychological services, speech and hearing therapy, and related services -- by non-public schools violate the Establishment Clause because they excessively entangle the state in church-related schools).

This Court's historical concerns with excessive entanglement in the First Amendment context apply fully to the ministerial exception. In *Hosanna-Tabor*, this Court explained that the purpose of the ministerial exception is not "to safeguard a church's decision to fire a minister only when it is made for a religious reason," but rather to protect a church's autonomy to "select[] those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188-89, 194. As the Court of Appeals observed, litigation of ministers' employment discrimination claims would excessively entangle the courts in doctrinal disputes

because, to prevail, an employment discrimination plaintiff must prove that the employer's decision to fire him was pretextual, not merely erroneous. Pet App. 22a. But to make that determination, a court must examine the employer's proffered reasons for the termination decision. Where those reasons arise out of the minister's performance of religious duties, a court cannot assess whether they were legitimate or pretextual without excessive entanglement in church doctrine.[2]

Circuit court decisions cited in *Hosanna-Tabor* and those decided thereafter confirm the centrality of excessive entanglement concerns to the ministerial exception. As the United States Court of Appeals for the Second Circuit framed the issue:

> [H]ow are we, as Article III judges, to gainsay the Congregatio Pro Clericis' conclusion that [Rweyemamu] is insufficiently devoted to ministry? How are we to assess the quality of his homilies?

---

2. Prior to *Hosanna-Tabor*, a handful of lower courts had erroneously held that, at least in some cases, employment discrimination cases could be resolved without excessive entanglement concerns. *E.g., Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1990). "In *Hosanna-Tabor*, however, the Supreme Court made clear that those properly characterized as 'ministers' are flatly barred from bringing employment-discrimination claims against the religious groups that employ or formerly employed them." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 202-03 (2d Cir. 2017). The Petitioner and the dissenting judge misread this expansion of the ministerial exception in *Hosanna-Tabor*, even to some cases where there are no excessive entanglement concerns, as a contraction of the doctrine, even to cases where excessive entanglement concerns are present.

Rweyemamu v. Cote, 520 F.3d 198, 209 (2d Cir. 2008) (cited in *Hosanna-Tabor*, 565 U.S. at 705, n. 2); Pet App. 24a. The *Rweyemamu* court concluded that a trial court's efforts to answer such questions would excessively entangle the courts in religious doctrine. *See also Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) ("[d]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs.")

Similarly, in *Scharon*, *supra*, the court of appeals considered a ministerial employee's claim that "application of Title VII and the ADEA would not require excessive government entanglement with religion," and rejected this position as "untenable." 929 F.2d at 362 (cited in *Hosanna-Tabor*, 565 U.S. at 705, n. 2); Pet App. 23a. Other courts of appeals' decisions cited in *Hosanna-Tabor* confirm the centrality of the excessive entanglement concern. *Natal v. Christian & Missionary Alliance,* 878 F.2d 1575, 1576 (1st Cir. 1989) ("we deem it beyond peradventure that civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice."); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 (3rd Cir. 2006) (dismissing a Catholic university chaplain's discrimination lawsuit "[b]ecause we conclude that a federal court's resolution of a minister's Title VII discrimination or retaliation claim would infringe upon First Amendment protections."); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) ("The exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision."); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) ("In short, we cannot conceive

how the federal judiciary could determine whether an employment decision concerning a minister was based on legitimate or illegitimate grounds without inserting ourselves into a realm where the Constitution forbids us to tread, the internal management of a church."); *Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) ("The fact that enforcement of the Act in a particular case would entangle the court in an ecclesiastical controversy would be a compelling reason to dismiss that case."); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) ("Investigation by a government entity into a church's employment of its clergy would almost always entail excessive government entanglement into the internal management of the church. A church's view on whether an individual is suited for a particular clergy position cannot be replaced by the courts without entangling the government 'in questions of religious doctrine, polity, and practice.'") (cit. om.); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (holding that employment discrimination claim must be dismissed to avoid excessive entanglement with church doctrine).

Circuit court decisions decided subsequent to *Hosanna-Tabor* have also dismissed discrimination claims in substantial part because of excessive entanglement concerns. *Fratello*, 863 F.3d at 202-04 (explaining that *Hosanna-Tabor* resolved the issue of whether ministers may sue their religious employers even when the risk of entanglement is minimal by clearly holding that they may not, while also reaffirming the continuing importance of excessive entanglement concerns); *Askew v. Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 418 (3rd Cir. 2012) (*Hosanna-Tabor* reaffirmed the "bedrock principle[]"

that "Civil courts encroach on the autonomy of religious institutions when they inquire into ecclesiastical law and governance."); *c.f. Whole Woman's Health v. Smith*, 896 F.3d 362, 372 (5th Cir. 2018) ("[O]n what basis is the judiciary institutionally competent to discern which communications merely bear on the 'facts' and which communications interfere with a religious body's free exercise?").

Here, the Court of Appeals properly recognized that Petitioner's claims cannot be adjudicated without excessively entangling the trial court in issues of church doctrine:

> As "legitimate non-discriminatory reasons" for their failure to promote Mr. Penn, NYMH argues that Mr. Penn ended a service with a hymn that was only familiar to a certain group of Christians, spent too much time counseling each patient, was insensitive to non-Christian patients, and failed to attend meetings. When Mr. Poulos selected Ms. Hong over Mr. Penn for promotion to Staff Chaplain, Mr. Poulos concluded that Ms. Hong had "strong[er] counseling skills" and was, in short, a better pastor. Joint App'x at 174. To explain its decision to fire Mr. Penn—the decision that he challenges as retaliatory—NYMH claims that Mr. Penn improperly completed a "referral card," which resulted in a patient dying without receiving last rites, inappropriately counseled a couple after a fetal demise, misrepresented the availability of an Easter Service to a Catholic nurse, and triggered complaints about sexual harassment from a Resident Chaplain.

> Any jury hearing Mr. Penn's employment discrimination and retaliation claims therefore would have to determine how a minister should conduct religious services or provide spiritual support. Jurors would have to measure the importance of a patient's last rites, a chaplain's selection of a particular hymn, and a Catholic's access to Communion. They would need to evaluate whether it was appropriate for the Department of Pastoral Care to seek out a Catholic chaplain or to fire an employee who did not accommodate Catholic nurses. They would have to consider the disagreement between Mr. Poulos and Mr. Penn on the appropriate length of pastoral counseling sessions—a "philosophical difference," according to NYMH—and compare Mr. Penn's pastoral skills to Ms. Hong's.

Pet App. 25a-26a. The Court of Appeals properly recognized that adjudication of these issues, "even if intertwined with some secular concerns — 'would plunge [the Court] into a maelstrom of Church policy, administration, and governance, [intern. cits. om.] and risk 'government involvement in… ecclesiastical decisions.'" Pet App. 26a (*quoting Hosanna-Tabor*, 565 U.S. at 171.)

In response to these excessive entanglement concerns, Petitioner responds only that "[t]he ecumenical, nonsectarian 'religious' activities of the Department do not present the same entanglement concerns under *Lemon* as the pastoral care department at the Episcopal hospital in *Scharon*." Pet. 29. The Petition cites only the single sentence from the dissenting opinion below addressed to the excessive entanglement issue: "[t]he interfaith nature

of the Department means that it is not run according to the tenets of any particular religion, thereby reducing the likelihood that evaluating the reasons for the termination of an employee such as Penn would 'plunge [a court] into a maelstrom of Church policy, administration, and governance.'" Pet. 29 (quoting from Pet. App. 44a).

This argument dangerously conflates the distinct concepts of religious and sectarian, a position that finds no support in First Amendment jurisprudence. As the Court of Appeals observed, "[t]he dissent… cites no precedent for the proposition that the Department of Pastoral Care's embrace of religious traditions beyond Methodism disqualifies it from constitutional protection under the Constitution's Religion Clauses." Pet. App. 20a, n. 4. Further, the Court of Appeals responded to the dissent, "to inquire whether this ecumenical approach to pastoral care is consistent with Methodism, simply 'plunge[s the Court] into a maelstrom of Church policy, administration, and governance,' *Rweyemamu*, 520 F.3d at 209 (citation and internal quotation marks omitted), something this Court has expressly prohibited." Pet. App. 20a, n. 4. Each of these arguments warrants brief elaboration.

First, *Hosanna-Tabor* itself forecloses Petitoner's argument, rejecting the conflation of religion and sectarianism for First Amendment purposes. In *Hosanna-Tabor,* the Court found that the school was a religious organization even though lay teachers were not required to be Lutheran. *Hosanna-Tabor,* 565 U.S. at 177. Long before *Hosanna-Tabor,* First Amendment respect for ecumenicalism was firmly rooted in this Court's jurisprudence. *See Larson v. Valente,* 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment

Clause is that one religious denomination cannot be officially preferred over another."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (the "government must be neutral when it comes to competition between sects."); *School District of Abington Twp.*, 374 U.S. at 225 (1963) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."). *See also Grussgott*, 882 F.3d at 658 ("There is no requirement that an organization exclude members of other faiths in order to be deemed religious.")

Second, as the Court of Appeals recognized, an ecumenical pastoral care department must minister to patients and staffs in many faiths, not just one, raising the possibility of entanglement with the doctrines of several religions. As the Court of Appeals explained, because the Department "serves the diverse spiritual needs of its patients, it thus must be cognizant of and sensitive to 'Church policy, administration, and governance' of many faith perspectives and not just one. If not, it risks trivializing, if not disrespecting, the genuine religious beliefs of its patients." Pet. App. 26a, n. 7. The Petition offers no response to these arguments, and there is none. *See* Pet. App. 16a, n. 3 ("Paradoxically, although the NYMH's Department of Pastoral Care indisputably is dedicated to the religious concerns of the hospital's patients by providing and supervising chaplains to address their specific religious needs, the dissent would hold that it is not a 'religious group.'")

Finally, for purposes of the ministerial exception, the Petition implies that NYMH is not materially distinct from secular hospitals. Pet. 9 ("Like most secular hospitals….").

As the Court of Appeals correctly held, the undisputed record evidence is to the contrary. The Court of Appeals carefully limited its holding to meet this concern:

> Because this Court's ruling is premised on the NYMH having been a religiously-affiliated entity and having retained a sufficient portion of its identity in the specific operation of the Department of Pastoral Care, this Court does not and need not reach the issue of whether hospitals, secular in their origins and with chaplaincies, also could properly invoke the ministerial exception. 'There will be time enough to address the applicability of the exception to other circumstances if and when they arise.' *Hosanna-Tabor*, 565 U.S. at 196; *see also PDK Labs. Inc. v. United States DEA*, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (noting the "cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more…").

Pet. App. 21a, n. 5.[3]

---

3. Because NYMH is a religious entity, this case does not present the issue of whether a private, secular hospital that employs chaplains who function in a ministerial capacity, and is sued under the antidiscrimination statutes in connection with the discharge of such a chaplain, is a religious group for purposes of the ministerial exception. If circumstances exist where such a hospital would not qualify as a religious group, they are surely rare. Respondents have not found a single case where a private hospital that employed a minister was not a religious group for purposes of the ministerial exception. *Compare Carter v.*

For all of these reasons, the Court of Appeals properly applied the ministerial exception recognized in *Hosanna-Tabor* to the facts of this case.

C. The "Questions Presented" by the Petitioner Might Not Need to be Resolved to Decide the Case

The Court of Appeals acted well within its discretion when it decided that it need not "address [Respondent's] argument that the Religious Freedom and Restoration Act ("RFRA") separately bars this case," (Pet. 16a, n.2) because the ministerial exception applies. If this Court granted the Petition and held that the ministerial exception did not apply, it would confront the issue of whether RFRA bars Petitioner's case, an issue the courts below have not ruled on. *Yee v. City of Escondido,* 503 U.S. 519, 535 (1992) (as a prudential matter, "we ordinarily do not consider questions outside those presented in the petition for certiorari.") *quoting* Supreme Court Rule 14.1 ("only the questions set forth in the petition, or fairly included therein, will be considered by the Court.")).

If considered, the Court should hold that RFRA provides an independent basis for affirming the Court of Appeals' decision. "Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S. Ct. 2751, 2760 (2014). RFRA expressly "provide[s] a claim or defense to persons whose religious exercise

---

Broadlawns Medical Ctr., 857 F.2d 448, 455 (8th Cir. 1988) (local county hospital's employment of a minister who did not function in a religious capacity unless specifically asked to do so by a particular patient, but rather provided "wholistic" care, held to be consistent with the First Amendment.)

is substantially burdened by government." 42 U.S.C. § 2000bb-(b)(2). Judicial remedies to religious employers under RFRA are both broader and more flexible than under Title VII of Civil Rights Act of 1964 and Americans with Disabilities Act. *Korte v Sebelius*, 735 F.3d 654 (7th Cir. 2013), *certiorari denied Burwell v. Korte*, 134 S. Ct. 2903 (2014) ("RFRA is structured as a 'sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach.'" (internal cit. om.)) *See also Hankins v. Lyght*, 441 F.3d 96, 111 (2d Cir. 2006) (Sotomayor, J., dissenting), *modified by Hankins v. New York Annual Conference of the United Methodist Church*, 351 F. App'x 489 (2d Cir. 2009) ("RFRA and the First Amendment do not provide identical protections.")

Respondents have maintained throughout this case that RFRA bars this case. First, the United States Court of Appeals for the Second Circuit has held that RFRA applies to private disputes. *Hankins v. Lyght*, 441 F.3d at 104. *But see Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 737 (7th Cir. 2015) ("RFRA does not apply in suits where the government is not a party" (*citing Gen. Conf. Corp. v. McGill*, 617 F.3d 402, 410-11 (6th Cir. 2010) and *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834, 837-43 (9th Cir.1999)). Second, NYMH is a "person" protected by the statute. See *Burwell,* 134 S. Ct. at 2769-2775; *see also Korte v. Sebelius*, 735 F3d at 674-79 (religiously affiliated nonprofit corporation is a "person" under the RFRA).[4] Third, while this Court has

4. Much as Title VII is irrelevant to the First Amendment definition of a religious group for purposes of the ministerial exception, see n. 1 above, it is also irrelevant to the definition of a "person" under RFRA. *See Korte v. Sebelius*, 735 F.3d at 675 ("Never mind that much of this caselaw postdates the enactment of

not ruled on the issue, the Second Circuit has held that RFRA applies to claims by ministers against religious organizations alleging violations of the antidiscrimination statutes. *Hankins v. Lyght*, 441 F.3d at 102-104, 109 (declining to reach the application of RFRA, holding that the ministerial exception of the First Amendment barred plaintiff's discrimination claim). Fourth, the inquiry under RFRA of whether a statute imposes a substantial burden on a person "does not invite the court to determine the centrality of the religious practice to the adherent's faith; RFRA is explicit about that." *Korte v. Sebelius*, 735 F.3d at 683. Fifth, while acknowledging the important role and function of the antidiscrimination laws, no court has held that they meet RFRA's "compelling-interest" standard; "in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation...." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (internal quotation marks and alteration omitted) (*quoted in Korte*, 735 F.3d at 685).

Applying these principles, Petitioner's claim in this case substantially burdens Respondents' exercise of religion for purposes of RFRA. *See* 42 U.S.C. § 2000bb-1. This is so precisely because Petitioner's claim interferes with Respondents' ability to staff the Department with chaplains who do not overtly disagree with the Department's philosophy of how to minister to patients and staff; who conduct religious services appropriately, such that patients and staff receive a meaningful religious experience; and who follow Department guidelines so that patients receive critical religious rituals on a timely

---

RFRA. The more important point is that a handful of lower-court decisions applying an interpretive gloss to Title VII's religious-employer exemption hardly implies that Congress meant to limit RFRA in the same way.")

basis. Pet. App. 10a-11a. Thus, should this Court conclude that the Court of Appeals erred in its application of the ministerial exception, Respondents respectfully submit that RFRA provides broader protection than the First Amendment and bars Petitioner's lawsuit.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Garden City, New York
September 26, 2018

Respectfully submitted,

A. Jonathan Trafimow
Counsel of Record
Moritt Hock & Hamroff LLP
400 Garden City Plaza, Suite 202
Garden City, New York 11530
(516) 873-2000
jtrafimow@moritthock.com

Counsel for Respondents

5. Petitioner waived the argument that Respondents' Bylaws and/or the 1994 UMA Journal article constitute inadmissible hearsay (or are otherwise inadmissible) by not adequately presenting this issue to the District Court for its consideration. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Court of Appeals declined to reach this issue, Pet. App. 15a-16a, n. 2, and, therefore, as a prudential matter, this Court may decline to do so as well. *Yee v. City of Escondido,* 503 U.S. at 535. If the issue is considered, the District Court acted well within its discretion in considering these materials.