

No. _____

In the
Supreme Court of the United States

CHRISTIOPHER ORR,

Petitioner,

v.

CHRISTIAN BROTHERS HIGH SCHOOL, INC.;
AND LORCAN BARNES,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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BOSTON, MASSACHUSETTS

QUESTION PRESENTED

After alleging that his immediate supervisor, the President of his Catholic high school, invoked racist stereotypes against Black people and other persons of color, and referred to tuition assistance rejection letters to parents, including parents of color, as “Go Fuck Yourself” letters, former principal Christopher Orr’s Title VII action for discriminatory termination was barred by the lower courts’ application of the ministerial exception. This despite his evidence that he was the first Black principal at the school, did not have Catholic education training when hired, did not teach classes, did not undergo significant religious training, ordination or commissioning, did not have a religiously significant title, participated in but did not lead or plan religious activities and services, was not held out as a school spiritual leader, was ostensibly charged with the responsibility of guiding and supervising all faculty, including faculty teaching secular and religious subjects, but was never evaluated for his supervisory role, and could not change the content of any religious instruction.

The Question for the Court is:

Whether the ministerial exception applies to a lay principal who is not a spiritual leader of his religious high school.

PARTIES TO THE PROCEEDING

Petitioner and Plaintiff-Appellant Below

- Christopher Orr

Respondents and Defendants-Appellees Below

- Christian Brothers High School, Inc.
- Lorcan Barnes, an Individual

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
No. 21-15109

Christopher Orr, *Plaintiff-Appellant*, v. Christian
Brothers High School, Inc., a California Corporation;
Lorcan Barnes, an Individual, *Defendants-Appellees*.

Date of Final Opinion: November 23, 2021

Date of Rehearing Denial: February 2, 2022

United States District Court,
for the Eastern District of California

No. 2:20-cv-00177-JAM-CKD

Orr v. Christian Brothers High School, Inc. et al

Date of Final Order: January 12, 2021

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OPINIONS BELOW

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JURISDICTION

The court of appeals entered judgment on November 23, 2021, and denied a petition for rehearing en banc on February 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

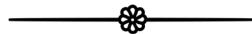
U.S. Const. amend. I, in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [.]

42 U.S.C. § 2000e-2, in relevant part:

Unlawful employment practices. (a) Employer practices—It shall be an unlawful employment practice for an employer—(1) to fail or refuse to

hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin



INTRODUCTION

After generations of racial segregation and public accommodation discrimination, official in some States and unofficial in others, Congress passed Title VII of the Civil Rights Act of 1964. It is a law of general applicability that, among other things, protects applicants and employees from workplace discrimination based on forbidden criteria: race, color, religion, sex, or national origin. This landmark legislation promotes a policy of redress for those harmed by workplace discrimination, a policy that is one of Congress' highest priorities. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 759 (1989).

In 2012, the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* examined what had become known in lower courts as the ministerial exception to Title VII. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012). The ministerial exception arose as a judge-made exception to Title VII's general applicability, and was designed to prevent the government from interfering with the freedom of religious groups to select their own ministers. The Court agreed that it is an exception to generally applicable employment discrimination laws such as Title VII

and the Americans with Disabilities Act (ADA), and is undergirded by the First Amendment Religion Clauses. The Court held that the ministerial exception is not limited to heads of congregations, but applies to anyone who personifies their beliefs.

A unanimous Court held that a terminated 4th grade teacher who alleged disability discrimination under the ADA was a minister. *Id.* at 188. The Court did not prescribe a rigid test to determine the teacher's minister status, but examined all the circumstances of her employment and reasoned that her role was distinct from other members in that she performed an important role in the school's mission of transmitting its particular faith to the next generation. *Id.* at 192. The relevant circumstances included the religious significance of the teacher's title, the education and training behind that title, her use of the title to distinguish herself from others, and the important religious functions she performed.

The *Hosanna-Tabor* concurrence explained that the focus of the ministerial exception determination should be on the function performed by the employee. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). This is so because it protects all religious traditions, including those that do not use titles like "minister" and do not have a tradition of ordination, and it tailors application of the ministerial exception only to those employees who are essential to the performance of key religious activities such as leading a religious organization, conducting worship services, or serving as a messenger or teacher of the faith. *Id.* at 199 (Alito, J., concurring). The concurrence noted the Circuits that looked at function (4th, 5th, D.C., 9th), and called it a "functional consensus" that was not

meant to be upset by the Court’s decision. *Id.* at 203 (Alito, J., concurring).

In 2020, Christopher Orr, the first Black principal at his Catholic high school, filed his Title VII racial discrimination action against the school in district court. While his case was pending, the Court decided *Our Lady of Guadalupe School v. Morrissey-Berru*. The Court re-emphasized that there is no rigid test for determining who is a minister. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2067 (2020). The Court emphasized that if an employee performs a role that is at the very core of the religious organization’s mission, the employee is a minister. *Ibid.* When it comes to religious schools, if that role is vital in educating young people in the tenets of a particular faith, getting them to believe in that faith, and training them to live their lives according to the faith, that role is ministerial, and any claim challenging the termination of that minister is barred. *Ibid.*

However, unlike the unanimous *Hosanna-Tabor* Court, the *Our Lady of Guadalupe School* Court revealed disagreement on whether the ministerial exception should be so broadly applied as to bar employment discrimination claims from teachers with no religious title, no significant religious training or education, and no formal ordination and commissioning. The dissent pointed out that the Court’s emphasis on function expanded the ministerial exception “far beyond its historic narrowness.” *Our Lady of Guadalupe School*, 140 S.Ct. at 2082 (Sotomayor, J., dissenting). It reviewed the origins of the ministerial exception and noted that when the *Hosanna-Tabor* Court adopted it, the Circuit consensus was to apply the exception only to those persons whose spiritual leadership

equaled that of clergy. *Id.* at 2073 (Sotomayor, J., dissenting). The dissent catalogued Circuit cases (2nd, 3rd, 4th, 5th, 9th) in which teachers at religious schools were not ministers because they did not occupy spiritual leadership positions, and stated the *Hosanna-Tabor* decision was not meant to upset this consensus. *Ibid.* (Sotomayor, J., dissenting).

Hosanna-Tabor, although not prescribing a rigid test, did prescribe a holistic approach, that did not emphasize any one factor. *Id.* at 2075 (Sotomayor, J., dissenting). By looking at all relevant considerations including easily discernable markers such as title, training, and public-facing conduct, a religious organization could not categorially disregard generally applicable antidiscrimination laws for nonreligious reasons. *Ibid.* (Sotomayor, J., dissenting). The dissent recognized the grave risk posed by collapsing the *Hosanna-Tabor* analysis into a one-consideration focus on function: that courts would defer too much to a religious employer's explanation of an employee's functional role. *Id.* at 2080 (Sotomayor, J., dissenting).

The real, practical consequence of *Our Lady of Guadalupe School's* focus on function, without an eye towards determining spiritual leadership, is that religious employers will continue to expand the number of roles they consider important, beyond leadership roles, knowing that courts may simply defer to their explanation that a particular role is vital to its religious mission without taking into account other relevant circumstances, including the employee's evidence of his or her actual role.

Christopher Orr's case embodies that risk. Despite his evidence that his principal role did not carry a religious title, that he had no religious training prior

to being hired as principal, that neither he nor his school held him out to be a spiritual leader, that he never taught classes, and that he did not actually play a significant role in educating and forming students in their faith, the lower courts decided he was a minister largely because of the school's explanation of his functional role in connection with its mission. Orr's case is part of a trend warned of by the dissent in the Seventh Circuit *Demkovich* case whereby religious employers continue to cast non-leadership positions as roles essential to their religious mission. See *Demkovich v. St. Andrews the Apostle Parish*, 2021 U.S. App. LEXIS 20410, p. 59-60 (7th Cir. 2021) (Hamilton, J., dissenting). Because this trend continues, and the rights of thousands of religious organization employees in California and in the western United States are implicated, the important question presented here requires immediate review. This petition should be granted.



STATEMENT OF THE CASE

A. Factual background

1. The School and Its Mission

Christopher Orr is the former principal of Christian Brothers High School which is located in Sacramento, California. App.56a. Orr is the first ever African-American man to be principal of the school. App.56a. The school is owned by Christian Brothers High School, Inc., a corporation that is registered as a California non-profit religious corporation. App.38a. It is a private, Catholic co-ed high school that promotes

Lasallian Catholic education values (named after St. John Baptist De La Salle of France). App.39a. According to its Employee Handbook Mission Statement, it is a Lasallian Catholic college preparatory high school that seek to provide a Christ centered community that fosters faith, integrity, global citizenship, leadership and service, thereby preparing students for college and life. App.39a. Elsewhere in the Handbook, its Philosophy states that its ultimate purpose is to help students become full participants in their education, acquire lifelong skills, and develop Christian character. App.40a. Being a Lasallian Catholic school means it pursues Lasallian Education Outcomes (LEOs) for its students. App.41a. These include teaching them how to engage in collaborative work and moral reasoning, honoring the presence of God in themselves and others, understanding the core beliefs, commitments, and practices of Christianity and the Roman Catholic Church, participating positively in a community of faith, and putting faith into action through service and advocacy for others, particularly the poor and vulnerable. App.41a-42a. Christian Brothers is in the Oak Park neighborhood of Sacramento, which has some of the largest concentrations of Black and Hispanic families in Sacramento County. App.57a. When Orr arrived as principal on July 1, 2017, Christian Brothers' Black enrollment was 5% to 6% of the total student population. App. 57a. Black student enrollment overwhelmingly did not reflect the percentage of Black neighbors in the neighborhood. App.57a.

2. Principal Role

According to the school's Handbook, employees are encouraged to fully participate in school religious

activities because the school's core mission is the proclamation and ministry of the Word of God as found in Scriptures and as practiced through the liturgy, the Sacraments, prayer and Lasallian Core principles. App.42a. Prayer is an integral part of every class and the life of the School. App.42a. Employees are required to attend and to participate, as far as they are able, in school liturgies, and they are expected to be able to understand, proclaim, and model the message of the Gospel for students. App.43a.

According to the school's principal job description, the principal is, among other things, appointed by the President and is responsible for the school's daily operation (App.77a), serves on the Leadership Team (App.77a), supervises faculty and staff (App.77a), and shares the responsibility with the President of modeling, articulating, communicating, and implementing the Lasallian Catholic philosophy and mission of the school (App.43a-45a, App.78a-79a). Orr pointed out that when he applied for the job online, the job description did not call the principal job a "ministry." App.57a.

According to the principal job announcement, the principal is the key education leader and is responsible for the school's educational programs in collaboration with the school's Catholic identity, mission and vision (App.45a-46a, App.71a-72a) and is expected to foster, motivate, and oversee the academic and spiritual growth of students. App.71a.

3. Discrimination and Harassment Against Orr

Orr alleged that former school President Lorcan Barnes (Barnes) retaliated against and harassed him

because Orr tried to strengthen community ties between Christian Brothers and the local Black community. Compl. 17, ECF No. 1. One of Orr's goals was to explore new ways for students to serve the local population consistent with their faith, and to address the school's low Black enrollment to better reflect the neighboring Black population. App.65a-66a. Barnes shut him down and told him it was not a good use of his time. App.65a.

Orr realized that Barnes disliked Black people. Barnes invoked coded racist language by telling Orr that he lacked "sophistication" for his job and could not "keep up." App.66a-67a. Barnes terminated an African-American assistant principal whom Orr had hired. App.66a. Barnes criticized Orr's performance, giving him negative performance evaluations and requiring him to fulfill a performance improvement plan. App.67a. The negative performance evaluations were baseless and the performance improvement plan was unjustified. App.67a. Barnes never followed up with Orr about whether Orr was fulfilling the performance improvement plan. App.67a.

Barnes and Orr were on the tuition assistance committee along with other members of Barnes' Leadership Team. During committee meetings, Orr witnessed Barnes cut monetary assistance to Black families, utter racial stereotypes about a Black student's father whom he guessed was "incarcerated," and that the students' mother's "elevator doesn't go to the top floor." App.66a. In another meeting, with Barnes and Orr present, someone stated that a Mexican-American student's mother was probably "undocumented" despite no evidence of citizenship status in front of the committee. App.67a. Barnes did nothing to correct the

stereotype just uttered. App.67a. For families whose tuition assistance request was denied, particularly families of color, Orr witnessed Barnes and other members of the tuition assistance committee place their applications in what they called the “Go Fuck Yourself” or “GFY” pile. App.67a. Barnes and others in tuition committee referred to tuition assistance denial letters sent to families as “GFY” letters. App.67a.

In Spring 2019, the school Board of Trustees solicited online survey responses from school administrators regarding Barnes’ performance. App.67a-68a. Because Orr was concerned that his assessment of Barnes’ performance would subject him to retaliation, Orr contacted the Lasallian District Director of Education Mike Daniels. App.68a. Daniels advised Orr to be candid and to document his concerns in the survey. App.68a. In his survey, Orr wrote that he was experiencing “retaliation” and his work environment was “hostile.” App.68a.

On June 15, 2019, after Orr had submitted his survey, Barnes announced to the Board that it would be Barnes’ final year at the school. App.68a. On July 17, 2019, Orr had a meeting with Barnes, ostensibly to review the performance improvement plan. App.68a. Instead of reviewing the plan, Barnes told Orr that the 2019-2020 school year would be Orr’s final year; it was a two minute meeting. App.68a.

Orr contacted Brother Dan Morgan (Morgan) of the Board to complain about Barnes’ retaliation and discrimination and creation of a hostile work environment. App.68a. Morgan expressed shock because Barnes had not consulted the Board about ending Orr’s employment. App.69a. Morgan then told Orr to

speak with Board Chair Steve Mahaney (Mahaney). App.69a.

Orr spoke to Mahaney and advised him that Barnes was retaliating and discriminating against him and making his work environment hostile. App.69a. Later, Mahaney and Orr spoke again, and Mahaney advised Orr that he had spoken to Barnes about Orr's complaints, that Barnes had authority to terminate Orr, and that an attorney had advised Mahaney that Orr could not sue the school. App.69a. Mahaney told Orr to avoid taking legal action. App.69a. Despite Orr's complaints to Mahaney, the Board did not open an investigation, despite being required to do so by the school's harassment policy. App.69a, App.82a.

On October 11, 2019, Barnes advised Orr that instead of staying until the end of the school year (June 2020), Orr was terminated effective immediately. App.69a. Barnes never told Orr that he was being fired for a religious reason. App.69a. The following day, Barnes sent Orr a package including a severance agreement and an agreement to release claims against Christian Brothers. App.69a-70a. Orr refused to sign the agreement. App.70a.

B. Proceedings Below

1. District Court Proceedings

After his termination Orr filed a racial discrimination charge with the Equal Employment Opportunity Commission on December 17, 2019. Compl. 4, ECF No. 1. After receiving a January 16, 2020 right-to-sue notice, Orr filed his complaint in the district court for the Eastern District of California on January 23, 2020. He brought eight claims against Christian Brothers

High School, Inc., and two claims against Barnes. The claims included the following: employment discrimination under Title VII, 42 U.S.C. 2000e-2, et seq.; retaliation under Title VII, 42 U.S.C. 2000e-3, et seq.; violation of equal rights in employment under 42 U.S.C. § 1981(a) (against Christian Brothers and Barnes); and similar employment claims under California's Fair Employment and Housing Act. Compl. 17, ECF No. 1. On March 16, 2020, the defendants answered and denied all claims and asserted certain affirmative defenses, including the ministerial exception. Ans. 6, ECF No. 8.

On November 2, 2020, the defendants filed a motion for summary judgment arguing that Orr's claims are barred by the ministerial exception. Motion 6, ECF No. 17-1. In response to the motion, Orr admitted to the verbiage of the school's description of the principal's functional role as expressed in the school handbooks and the principal position job announcement. App.38a. Orr argued that his declaration created a material dispute because the duties he actually discharged were different from the school's explanation of the principal role. App.11a-12a. Orr argued that he was not a leader at the school, much less a spiritual leader. Oppos. 6-9, ECF No. 19.

In his declaration opposing the motion, Orr disputed that his role involved important religious duties. He had no religious school training prior to being hired at the school, and he did not undergo a formal process of ordination or commissioning. App.56a. His experience consisted of working as a teacher and administrator at secular schools. App.56a. When he applied for the principal position online it did not

require him to be a Catholic, and it did not describe the job as a ministry. App.56a-57a.

Orr was not a spiritual leader, and did not hold himself out to the school community as one. App.57a-58a, App.62a. The school characterized Barnes, the President and CEO, as a spiritual leader, but did not characterize the principal position as such. App.74a. The school did not hold Orr out as a spiritual leader. App.57a-58a.

Orr did not teach religion classes. App.58a. Indeed, Orr never taught classes at the school. App.58a. He did not change the content or practice of religious studies. App.59a. He did not evaluate faculty for their spirituality in teaching. App.59a. Orr did monitor the support to achieve Lasallian Outcomes, but he did not evaluate faculty for Outcomes effectiveness. App.60a. He did not train faculty/staff for Outcomes effectiveness. App.60a. Perhaps most importantly, Orr was never evaluated by Barnes regarding whether he was making sure the Outcomes were being met. App.60a. Indeed, Barnes never evaluated Orr for his spirituality, ministry, or accomplishment of the school's mission. App.62a. It was Barnes who actually exercised the key educational leadership in things such as academic programs, school ministry programs, faculty hiring, training and development, sports programs, communication outreach programs, and school accreditation. App.61a. Although Orr was on Barnes' Leadership Team, his was only in an advisory capacity to Barnes. App.60a. Orr played a small role in front of the Board of Trustees. App.61a-62a. He was not responsible for making presentations in front of the Board regarding the school's mission progress. App.61a-62a. It was Barnes who made the presentations. App.61a-62a.

Orr's participation in prayer, student retreats and school Mass was minimal. He did not lead, plan, teach at, or choose content for student retreats. App.63a-64a. His attendance at retreats was infrequent and brief. App.63a-64a. He did not lead, plan, give readings, lead songs, or say prayers at school liturgies. App.64a-65a. For example, priests conducted campus Mass, and the person charged with planning and coordinating religious services was the Campus Minister. App.65a. Orr did not usually lead large group prayers. App.63a. For small groups, such as staff and faculty meetings, Orr did lead prayer. App.63a. Orr occasionally read a spiritual thought over the school intercom system, but his participation was incidental to student participation, which comprised the bulk of the intercom readings. App.63a. Furthermore, the intercom readings were chosen and coordinated by the Director of Campus Ministry, not Orr. App.63a.

On January 12, 2021, the district court dismissed Orr's case concluding that the ministerial exception barred all of his claims. App.6a. The court found that Orr performed vital religious duties for the school that were inextricably intertwined with the school's mission and with Orr's role in filling that mission. App.15a-16a. The court relied heavily on the school Handbook, the principal job description, and the principal job announcement. App.9a-10a. The court also relied heavily on Orr's religious activities at the school such as conducting Eucharistic liturgies, administering the sacrament, attending retreats, undergoing required religious education, monitoring faculty to keep up with their religious obligations in class, including class prayer. App.10a. Finally, the court cited Orr's written communications in which he viewed

his role as a spiritual and religious one. App.10a. The court also noted decisions in other jurisdictions that found religious school principals to be ministers. The court found Orr “indistinguishable” from those principals. App.14a-15a. The court relied heavily on *Pardue*. *Pardue v. Center City Consortium Schools*, 875 A.2d 669 (D.C. 2005). The court, following *Pardue*, rejected Orr’s comparison of his secular activities to his religious activities, noting that *Our Lady of Guadalupe* rejected a stopwatch quantitative analysis. App.14a. It followed *Pardue* by rejecting evidence of Orr’s actual duties because Orr made the same unsuccessful argument about looking at actual duties as the *Pardue* plaintiff did. App.14a.

The court suggested Orr’s declaration was a sham affidavit that sought to create a dispute of material fact in contravention of his deposition testimony. App.7a-8a. Ultimately, the court did not rule whether Orr’s declaration was a sham, but ignored it anyway and relied on Orr’s deposition testimony which it called “the primary source of evidence.” App.8a.

2. The Ninth Circuit Memorandum Decision

On January 19, 2021, Orr filed a notice of appeal to the Ninth Circuit Court of Appeals. Orr argued that he did not play a “key role” in the school’s mission. Open. Br. 39, Docket Entry No. 6; *citing Our Lady of Guadalupe*, 140 S.Ct. at 2060. Orr argued that the district court erred in deciding he was a minister because the court should have focused on material, relevant evidence: Orr’s actual duties. Open. Br. 39, Docket Entry No. 6.

In its November 23, 2021 memorandum disposition, the Ninth Circuit examined *Hosanna-Tabor* and

Our Lady of Guadalupe and explained that the Court's core consideration in determining ministerial status is the employee's "role in conveying the Church's message and carrying out its mission." App.2a. When it comes to religious schools, educating students in their faith, inculcating its teachings, and training students to live their faith lie at the very core of the school's mission. App.3a.; *citing Our Lady of Guadalupe*, 140 S.Ct. at 2064.

The Ninth Circuit decided that Orr qualified for application of the ministerial exception because, despite not being a formal minister, he played an important role in religious education and formation of students. App.3a. Orr participated in religious services and activities, he aided the school in developing a faith-based community and inculcating the school's faith-based teachings, he had supervisory authority over religious instruction and programming, and he received religious instruction. App.3a. Looking back at the Supreme Court decisions, the Ninth Circuit determined that there is no principled distinction between teachers and principals for purposes of the exception. App.3a. It affirmed the district court and entered judgment in favor of Christian Brothers High School, Inc. and Lorcan Barnes. App.35a.



REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN ISSUE OF GREAT IMPORTANCE TO CIVIL RIGHTS BECAUSE THE EXPANSION OF THE MINISTERIAL EXCEPTION BEYOND TRADITIONAL SPIRITUAL LEADERSHIP IMPLICATES THE EMPLOYMENT OF THOUSANDS OF RELIGIOUS INSTITUTION EMPLOYEES ACROSS THE COUNTRY.

As the *Our Lady of Guadalupe* dissent recognized, expanding the application of the ministerial exception beyond its historical application to spiritual leaders, particularly in the religious school setting, affects “countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media relations personnel, and many others who work for religious institutions.” *Our Lady of Guadalupe School, supra*, 140 S.Ct. at 2082 (Sotomayor, J., dissenting). In addition, thousands of Catholic teachers risk losing employment law protections. *Ibid.* The dissent noted that the risk of unnecessary expansion was recognized long before by the Circuits that had created the ministerial exception in the first place, and warned of the “potential for abuse.” *Id.* at 2072-73 (Sotomayor, J., dissenting) (quoting *Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363, n. 3 (8th Cir. 1991)). This risk continues today unabated. As the Seventh Circuit dissent in *Demkovich* recognized, there is a trend among religious employers to “expand the reach of the ministerial exception to cover a much broader range of their employees” *Demkovich v. St. Andrew the Apostle Parish*, 2021 U.S. App. LEXIS 20410, p. 59-60 (Hamilton, J., dissenting). In courts,

there is evidence of the “hydraulic pressure” being applied to expand the application of the ministerial exception. *Ibid.* The immediate risk posed to such a broad swath of employees threatens to leave many without basic legal protection in the workplace. *Ibid.*

II. THE MINISTERIAL EXCEPTION WAS NOT MEANT TO BE APPLIED TO EMPLOYEES WHO WERE NOT SPIRITUAL LEADERS.

A. The Circuit Courts Created the Ministerial Exception for Application to Spiritual Leaders.

Before the Court adopted the ministerial exception, the Circuits already had extensive experience in applying it. The Fifth Circuit was the first to announce that First Amendment religious freedom prohibited a court from adjudicating a Title VII action between a church and its minister because ministers are the “lifeblood” of the church acting as the “chief instrument” through whom the church seeks to fulfill its purpose. *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972). Such “prime ecclesiastical” concerns are outside Title VII’s purview. *Id.* at 559. The *McClure* court noted that the officer in question had undergone formal training and a formal commissioning process which led to her officer [minister] status. *Id.* at 557.

The Fourth Circuit called the *McClure* exception to Title VII the “ministerial exception”. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). Although the *Rayburn* court focused on function (“primary duties”), it expressly placed the exception’s use in the context of leadership roles. *Id.* at 1168-69. Burdening a church’s free choice of its “leaders” constitutes an impermissible burden

on First Amendment free exercise rights. *Id.* at 1168. A leader is anyone whose primary duties consists of teaching the faith, spreading the faith, governing a church, supervising a religious order, or supervising or participating in religious ritual and worship. *Id.* at 1169. These clergy-like duties are “important to the spiritual and pastoral mission of the church,” and a person who discharges them is a minister. *Ibid.* The court cautioned that lay ministries in leadership roles do not compare to the specially trained theologians selected by a religious institution to be spiritual leaders. *Id.* at 1168. The court examined the role of a Seventh-Day Adventist associate in pastoral care (an associate in pastoral care is necessarily a woman who has received seminary training but cannot be ordained like men are). *Id.* at 1165. The court held that the associate in pastoral care is a minister because the duties included introducing children to the life of the church, leading small Bible study groups, acting as the counseling liaison between the church and a singles group (thereby applying the church’s messages to problems suffered by the congregation), being authorized to stand on a worship platform, to lead the congregation out during solemn rites, and preaching from the pulpit (thereby bearing the church’s imprimatur of being a “spiritual leader”). *Id.* at 1168. Thus, the focus was on functions of spiritual leadership.

Before *Hosanna-Tabor*, spiritual leadership meant more than just participating in religious activities or being exemplars of practicing faith members. In the area of religious education, the Fifth Circuit explained that faculty members at a “pervasively sectarian” college are not ministers because they are not “intermediaries between a church and its congregation,”

they did not “attend to the religious needs of the faithful,” and did not instruct students in “the whole of religious doctrine.” *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980). Even if the college expected faculty to serve as living exemplars of practicing Christians, that expectation did not transform their employment into a church administration matter of purely ecclesiastical concern. *Ibid.* If a religious school is “wholly sectarian,” such as a seminary that trains seminarians in church leadership and teaches exclusively religious subjects, the administrators of that school may be ministers if they supervise religious faculty (including President of the school and academic deans). *See EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 284-85 (5th Cir. 1981).

B. The Court’s Adoption of the Ministerial Exception.

Against this Circuit backdrop, the Court adopted the ministerial exception to generally applicable employment discrimination laws. The Court’s ministerial exception precedents require lower courts to look at all relevant circumstances such as job title, training, education, a formal commissioning process behind that title, whether the employee is held out as distinct from other employees, and whether the employee discharges vital religious duties. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012). The Court stated that the circumstances must not be viewed in isolation, and are all helpful in determining whether the teacher has an important role in transmitting faith to young people. *Id.* at 192. Although the *Hosanna-Tabor* Court rejected a requirement that an employee perform

exclusively religious functions before the exception applies, it did say that the amount of time an employee spends on particular activities is relevant in determining that employee's status when viewed against other relevant considerations. *Id.* at 194.

One *Hosanna-Tabor* concurrence stated the inquiry should begin and end by asking whether the religious employer has stated a sincerely held belief that its employee is a minister. *Id.* at 196-97. (Thomas, J., concurrence). Another *Hosanna-Tabor* concurrence emphasized that the Circuits that had first applied the ministerial exception did so by focusing on function. *Id.* at 203-04. (Alito, J., concurrence). The Court's adoption of the ministerial exception was not meant to upset this functional consensus. *Ibid.*

C. The Court Expands the Ministerial Exception Beyond What the Circuit Courts Had Originally Intended.

Most recently, the Court had another opportunity to explore the application of the ministerial exception to religious school teachers. In holding that Catholic school teachers who taught all subjects, including religious subjects, prayed every day in class with their students, modelled how to live the faith, and planned and participated in religious services and activities, the Court stated that the teacher's functional role is the weightiest concern. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2067 (2020). If that role is vital in educating young people in the tenets of a particular faith, getting them to believe in that faith, and training them to live their lives according to the faith, that role is ministerial, and

any claim challenging the termination of that minister is barred. *Id.* at 2066.

The majority explained that the relevant circumstances in *Hosanna-Tabor* were not meant to be mechanically applied in every case, like a checklist. *Id.* at 2067. To do so results in analytical distortion by overemphasizing the lack of formal titles or lack of formal religious education. *Ibid.* It was also error to minimize the significance of religious activities and involvement with students' spiritual development. *Id.* at 2068. The majority explained that focusing on function ensures First Amendment protection for all religions, not just those with formal organizational structures. *Id.* at 2064. Furthermore, the Court recognized that because judges cannot expect to know and understand all the diverse faith traditions, the religious employer's explanation of an employee's functional role is important. *Id.* at 2066. The majority rejected an approach whereby the ministerial role is preliminarily determined first by examining title, formal religious education, and the employee's self-description as a minister, and second, if those circumstances suggest a ministerial role, only then should the Court examine function to test the earlier preliminary indication. *Id.* at 2068.

The dissent recognized the substantial risk inherent in focusing on function: the ministerial exception is applied without considering whether the function points to spiritual leadership, thereby becoming unmoored from the historical underpinnings and rationale behind the Circuits' creation of the exception. *Our Lady of Guadalupe School*, 140 S.Ct. at 2076 (Sotomayor, J., dissenting). The dissent explained that the majority came close to recognizing

the lower court consensus regarding spiritual leadership when it described how the teachers were “entrusted most directly’ with ‘educating their students in the faith.” *Ibid.* (Sotomayor, J., dissenting) (*quoting Our Lady of Guadalupe School*, 140 S.Ct. at 2066). The dissent reviewed the Circuit history of the ministerial exception and noted that the consensus approach was to examine relevant factors, such as functional importance, with an eye towards determining whether the employer is a spiritual leader. *Id.* at 2073. Just as the *Hosanna-Tabor* concurrence noted that the unanimous decision was not meant to upset Circuit consensus regarding function (*see Hosanna-Tabor, supra*, 565 U.S. at 204), the *Our Lady of Guadalupe School* dissent noted that *Hosanna-Tabor* was not meant to upset the Circuit consensus regarding spiritual leadership. *See Our Lady of Guadalupe School*, 140 S.Ct. at 2073 (Sotomayor, J., dissenting). Indeed, as the dissent stated, spiritual leadership was central to the *Hosanna-Tabor* decision. *Ibid.* at n. 32. (Sotomayor, J., dissenting). “*Hosanna-Tabor* charted a way to separate leaders who ‘personify’ a church’s ‘beliefs’ or who ‘minister to the faithful’ from individuals who may simply relay religious tenets.” *See Our Lady of Guadalupe School*, 140 S.Ct. at 2075 (Sotomayor, J., dissenting). The *Our Lady of Guadalupe School* majority rejected limiting the ministerial exception to leaders and stated *Hosanna-Tabor* does not stand for that proposition. *Id.* at 2067 n. 26.

The other substantial risk the *Our Lady of Guadalupe School* dissent recognized is that focusing on function means relying heavily on the employer’s explanation of function, and in the course of doing that, the majority credited the non-movant’s version

of the facts. *Our Lady of Guadalupe School*, 140 S.Ct. at 2076 (Sotomayor, J., dissenting). A reviewing judge then risks acting as a “rubber stamp” who credits the employer’s explanation of the employee’s functional role even if the employer is the moving party on summary judgment. *Ibid.* (Sotomayor, J., dissenting). From there, it is only a small leap to credit the employer’s representation that the role is vital to its mission. As an example, the dissent showed how a church’s handbook could transform parishioners and parents into ministers because the church considers them vital to parish life. *Id.* at 2076 n. 35. (Sotomayor, J., dissenting). This risk continues and appears to be accelerating. As the *Demkovich* dissent noted, religious organizations are being urged to expand the reach of the ministerial exception as far as possible. *Demkovich, supra*, 2021 U.S. LEXIS 20410 at p. 59 (Hamilton, J., dissenting). This is consistent with the “hydraulic pressure” seen during litigation when religious employers try to expand the scope of the ministerial exception beyond what seems reasonable. *Ibid.*

D. The District Court in *Orr* Relied on Cases That Applied the Ministerial Exception to Religious School Principals.

Before the Court’s precedents, other courts have had occasion to apply the ministerial exception to religious school principals. The district court in Orr’s case relied on one such case in ruling that Orr is a minister: *Pardue v. Center City Consortium Schools* (875 A.2d 669) (D.C. 2005). The district court ruled that Orr was indistinguishable from the *Pardue* principal who was the chief administrator of a religious school and was, “more than anyone at the school

except the pastor . . . was answerable to the religious authorities for providing, in myriad ways not reducible to a listing of tasks, spiritual leadership in and for the school community.” App.14a-15a. (*quoting Pardue, supra*, 875 A.2d at 677). The district court’s reliance on *Pardue*, after it reviewed *Our Lady of Guadalupe School*, illustrates the risk posed by focusing on function without an eye towards determining spiritual leadership.

In *Pardue*, the District of Columbia Court of Appeals noted evidence that the principal’s express responsibility was “spiritual leadership in and for the school community.” *Pardue, supra*, 875 A.2d at 676. Because the *Pardue* court found the principal had a spiritual leadership role, it found that role was not diminished even by her performing secular duties because her secular duties and her duties providing spiritual leadership were “inextricably intertwined” in the school’s mission and the principal’s role in fulfilling it. *Id.* at 677.

Unlike *Pardue*, Orr was never held out by the school as a spiritual leader. In the Parent Student Handbook, the school called the President the school’s “corporate and spiritual leader” who “carries final responsibility for all aspects of school life.” App.74a. But in the same section of the Handbook, when it had an opportunity to hold out the principal as a school spiritual leader, the school instead referred to the principal as being “in charge of school operations.” App.74a. Of course, in addition to the evidence in the Handbook, Orr showed all the ways in which he was not a spiritual leader such as never planning religious activities and services (App.63a-65a.), never teaching religion classes (App.58a.), never changing

the content or practice of religious studies (App.59), never evaluating faculty for their spirituality in teaching (App.59a), never evaluating the faculty for Lasallian Education Outcomes effectiveness (App.60a), never being evaluated by Barnes regarding Outcomes progress (App.60a), never being evaluated by Barnes for his spirituality, ministry, or accomplishment of the school's mission (App.62a), and never being responsible for making presentations in front of the Board regarding the school's mission progress (App.61a-62a).

Despite this evidence, the district court likened Orr to the *Pardue* principal. App.14a-15a. ("indistinguishable"). The district court was influenced to do so because it applied *Our Lady of Guadalupe School's* expansion of the ministerial exception beyond spiritual leadership. App.9a. ("fairly broad ministerial exception"). Had the district court focused on function with an eye towards determining spiritual leadership, as the *Pardue* court did, then it would have credited Orr's qualitative differences with the *Pardue* principal and found that his role and duties were not inextricably intertwined with his school's mission. Instead, influenced by the *Our Lady of Guadalupe School* majority's rejection of spiritual leadership as the historical underpinnings of the ministerial exception, and its rejection of the idea that leadership was central to *Hosanna-Tabor's* holding, the district court equated Orr with the *Pardue* principal despite overwhelming evidence that Orr did not consider himself a spiritual leader, and neither did the school.

E. This Case Compels Immediate Review by the Court.

As the district court and the Ninth Circuit recognized, *Our Lady of Guadalupe School* expanded the application of the ministerial exception. The district court stated that “the Supreme Court . . . as recently as last year, has really created a fairly broad ministerial exception.” App.9a. The Ninth Circuit reviewed *Our Lady of Guadalupe School* and determined that under the Supreme Court’s formulation, notwithstanding the lack of formal minister status, teachers can be ministers, and in Orr’s case, his role in religious education and formation of students meant there is no “principled distinction” between teachers and principals. App.3a. The risk recognized by the *Our Lady of Guadalupe School* dissent, where the focus on function is not guided by the spiritual leader rationale underpinning the ministerial exception’s historical application, has led to the error in Orr’s case. This error strips Orr unfairly of his right to seek redress for employment discrimination but, as the *Demkovich* dissent recognized (See *Demkovich, supra*, 2021 U.S. LEXIS 20410 at p.59), Orr cannot, and will not, be the last religious organization employee grievously harmed by this expansion. Only this Court can solve the problem.



CONCLUSION

The petition should be granted.

Respectfully submitted,

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