No. 22-741

IN THE
Supreme Court of the United States

FAITH BIBLE CHAPEL INTERNATIONAL,

Petitioner,

v.

GREGORY TUCKER,

Respondent.

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

BRIEF OF *AMICI CURIAE* BRIGHAM YOUNG UNIVERSITY, SOUTHERN VIRGINIA UNIVERSITY, AND AMERICAN HERITAGE SCHOOLS, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Brigham Young University (BYU) is a religious institution of higher education in Provo, Utah, with more than 34,000 daytime students. BYU was founded and is guided and supported by The Church of Jesus Christ of Latter-day Saints. BYU's mission is to assist individuals in their quest for perfection and eternal life. The common purpose of all education at BYU is to build testimonies of the restored gospel of Jesus Christ, in an environment enlightened by living prophets and sustained by those moral virtues which characterize the life and teachings of the Son of God.

Amicus Southern Virginia University (SVU) is a private nonprofit university in Buena Vista, Virginia, that aims to gather people of faith and other like-minded individuals in a spiritually rich educational environment. SVU strives to provide intellectual, character, and spiritual growth to its students by remaining aligned with the principles and values of The Church of Jesus Christ of Latter-day Saints.

Amicus American Heritage Schools, Inc. (AHS) is a private nonprofit religious educational institution, serving approximately 1,600 K–12 students at campuses in American Fork and Salt Lake City, Utah, and thousands more in a global online program. AHS's mission is to assist parents worldwide in developing

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. All parties were given timely notice of the intent to file this brief.

the hearts, minds, and bodies of students to realize their divine potential, with a focus on Christian character, transformational scholarship, and responsible liberty. AHS establishes and encourages an environment oriented toward The Church of Jesus Christ of Latter-day Saints, where principles are taught in light of the Church's teachings about the restored gospel, and faith in Jesus Christ is felt and demonstrated by each child and adult.

Amici regularly employ administrators and faculty whose responsibilities directly bear on the schools' religious missions. Accordingly, these schools are keenly interested in the proper scope and application of the First Amendment's "ministerial exception." Moreover, *amici*, as religious institutions of primary, secondary, and higher education connected to a Christian faith with distinct beliefs and governance structures, are uniquely positioned to explain the challenges such institutions will face should the ministerial exception be misapplied or artificially restrained.

SUMMARY OF ARGUMENT

The First Amendment reserves to religious organizations "the right … to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Embodying one aspect of that right, the "ministerial exception" leaves with these organizations the exclusive ability to "control … the selection of those who will personify [their] beliefs," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012), and requires courts "to stay out of employment disputes involving those holding certain important positions" within these organizations, *Our Lady*, 140 S. Ct. at 2060. This core constitutional protection applies with particular force for religious schools, where "religious education and formation of students is the very reason for the[ir] existence." *Id.* at 2055. When these organizations "entrust[]" teachers and administrators "with the responsibility of educating and forming students in the faith," those employment decisions are protected by the ministerial exception. *See id.* at 2069.

In the present case, the ministerial exception's application was clear. The undisputed evidence showed Respondent Gregory Tucker's responsibilities fell within the heart of the exception: he performed vital religious duties as a chaplain and teacher at Faith Christian Academy in forming and educating students in the Christian faith. These duties included attending to the spiritual wellbeing of students, planning chapels, leading students in prayer, teaching classes in the Bible department, and infusing Christian messages into all his work.

But the lower courts missed the mark, committing three errors that erode the constitutional protections safeguarded by the ministerial exception. First, the lower courts discounted the undisputed descriptions of Tucker's position set forth in Tucker's employment agreement and Faith Christian's teacher handbook. By dismissing such documents, the courts rejected a fundamental embodiment of a religious organization's right to self-governance, hampering that right as a result. Second, the lower courts allowed Tucker's attempted secular recharacterization of his religious roles to create a dispute of fact where none exists. This practice injects judges and juries into religious questions reserved by the Constitution to the organizations themselves. Third, the lower courts emphasized religious duties Tucker lacked, not those he was expected to fulfill. Yet comparing employees against a narrow definition of a traditional "minister" dilutes protections for religious schools whose employees do not fit this unduly restrictive mold.

With Petitioner, *amici* urge this Court to resolve the deep split over the first question presented for review. But this case never should have survived summary judgment. If this straightforward case of a religious teacher and chaplain at a religious school can be muddled to the point where a jury trial is required, *amici* and similar religious schools will find it increasingly difficult to carry out their missions of providing a religiously informed education in a faith-filled environment. To prevent the perpetuation of these errors and to preserve core constitutional rights, this Court should also resolve the second question presented.

ARGUMENT

I. The Ministerial Exception Provides Critical Protection To Schools With Religious Missions.

The ministerial exception is not limited to employees traditionally viewed as "ministers." *See Our Lady*, 140 S. Ct. at 2060. This Court has refused to limit the exception in that way because doing so "would risk privileging" one religion and "impermissibl[y] discriminati[ng]" against others. *See id.* at 2064. This is critical in the religious education context because "educating young people in their faith, inculcating its teachings, and training them to live their faith are the responsibilities that lie at the very core of the mission of a private religious school." *Id.*

For these reasons, the ministerial exception requires courts to ask broadly whether an employee's "particular position implicate[s]" duties that are "essential to the [religious] institution's central mission." *Id.* at 2060, 2067. If a school employee has "responsibilities that lie at the very core of the [school's] mission"—such as "educating and forming students in the [religious] faith" or "guid[ing] students, by word and deed, toward the goal of living their lives in accordance with the faith"—then the employee is covered by the ministerial exception. *Id.* at 2064–66.

In answering this question, courts must first identify an institution's religious mission and the duties or responsibilities essential to it. This inquiry

looks to the religious organization itself, which retains the sole right to determine its mission and any doctrines, practices, or positions that are essential to furthering it. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (recognizing "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."); *Our Lady*, 140 S. Ct. at 2060 ("State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."). Thus, a religious organization's ability to set the metes and bounds of its own mission is foundational to the ministerial exception, and the First Amendment requires courts to respect that autonomy.

For many religious schools, "'religious education' includes much more than instruction in explicitly religious doctrine or theology." *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 954 (2022) (Alito, J., statement respecting denial of certiorari). Their missions focus on creating faith-filled atmospheres, and that holistic approach to education impacts their instruction, hiring, codes of conduct, and administration. As a result, performance in what some consider partially "secular" positions carries deep religious impact at these schools. *See Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) (explaining the "religious-secular distinction" is "not self-evident," and that a

religious institution "may regard the conduct of certain functions as integral to its mission"); *see also Hosanna-Tabor*, 565 U.S. at 184 (recognizing that even "[t]he heads of congregations … often have a mix of duties, including secular ones").

Amici are but three examples of educational institutions with sincere religious missions that encompass more than simply teaching theology. Their faculty and administrators perform "vital religious duties" and are therefore subject to the ministerial exception.

BYU's mission "is to assist individuals in their quest for perfection and eternal life,"[2] by providing an "education [that is] spiritually strengthening, intellectually enlarging, and character building, leading to lifelong learning and service."[3] Faculty must commit to BYU's mission through "intentionality in building faith in Jesus Christ and testimony of His restored gospel among members of the BYU community" and a "commitment to seek and be led by the Holy Ghost in all aspects of university assignments."[4] Even when faculty are not

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[2] BYU, *Mission Statement* (1981), https://aims.byu.edu/byu-mission-statement (accessed Mar. 8, 2023).

[3] BYU, *About*, https://www.byu.edu/about (accessed Mar. 7, 2023).

[4] BYU, *Mission Alignment Standards*, https://aims.byu.edu/mission-alignment-standards (accessed Mar. 8, 2023); *see also* The Doctrine and Covenants of The Church of Jesus Christ of Latter-day Saints § 88:118 (2013) (directing learning "by study and also by faith").

"categorically teaching religion," they are to "keep [the] subject matter bathed in the light and color of the restored gospel."[5] As Brigham Young charged the university's founder a century ago, faculty "ought not to teach even the alphabet or the multiplication tables without the Spirit of God."[6]

BYU's mission also extends beyond academics by creating a "setting where a commitment to excellence is expected and the full realization of human potential is pursued."[7] The university requires its faculty, administrators, and students to abide by its Honor Code, which includes a commitment "to conduct their lives in accordance with the principles of the gospel of Jesus Christ."[8] All employees must maintain "conduct consistent with qualifying for temple privileges," a worthiness standard within The Church of Jesus Christ of Latter-day Saints.[9] Thus, BYU strives to create an "environment enlightened by living prophets and sustained by those moral virtues which

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[5] Spencer W. Kimball, Education for Eternity, BYU Speeches (Sep. 12, 1967).

[6] Reinhard Maeser, Karl G. Maeser: A Biography by His Son 79 (1928).

[7] BYU, *Mission Statement*, *supra.*

[8] BYU, *Church Educational System Honor Code*, https://policy.byu.edu/view/church-educational-system-honor-code (accessed Mar. 8, 2023).

[9] BYU, *Personnel Conduct Policy*, https://policy.byu.edu/view/personnel-conduct-policy (accessed Mar. 8, 2023).

characterize the life and teachings of the Son of God."[10]

Operations at SVU reflect a similar dynamic. While the university is not sponsored or endorsed by a church, SVU's mission is to create an educational atmosphere aligned with the "principles and values" of The Church of Jesus Christ of Latter-day Saints.[11] SVU similarly aims to create a "campus environment that builds faith and promotes spiritual growth."[12] Accordingly, every student who attends SVU commits to a Code of Conduct that "is founded on the Restored Gospel of Jesus Christ."[13] Students and faculty alike can face formal discipline for acting contrary to the teachings or directives of SVU's aligned faith.[14]

AHS is also driven by a religious mission that affects all aspects of its administration. The school exists to "provide an education in an atmosphere consistent with the ideals and principles of The Church of Jesus Christ of Latter-day Saints."[15] AHS

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[10] BYU, *About*, *supra.*

[11] SVU, *About*, https://svu.edu/about/ (accessed Mar. 7, 2023).

[12] SVU, *Aligned with The Church of Jesus Christ of Latter-day Saints*, https://svu.edu/church-alignment/ (accessed Mar. 7, 2023).

[13] SVU, *Code of Conduct, Dress Code, & Honor Pledge*, https://svu.edu/campus-life/code-of-conduct/ (accessed Mar. 8, 2023) (cleaned up).

[14] *See id.*

[15] AHS, Honor Code (2021–2022).

aims to develop students' "hearts, minds, and bodies" by, among other things, "being useful in the hands of the Lord in building the kingdom of God on the earth" and "conducting themselves in all areas of life as Christians."[16] "All activities, teaching, governance, and administration are to be accomplished … in harmony with the restored gospel of Jesus Christ."[17] Teachers gather daily to sing hymns, pray, and share religious messages before classroom instruction, and all subjects are grounded in religious understandings of truth, history, and divine providence.[18] AHS also requires faculty, staff, and students to abide by an Honor Code derived from the two great commandments to love God and neighbor.[19] In short, "[m]oral and religious education is incorporated daily in every class and every subject,"[20] with those employed by AHS responsible for these efforts.

Of course, schools affiliated or aligned with The Church of Jesus Christ of Latter-day Saints are far from the only institutions whose educational aims are inextricably tied to their religious missions. As this Court has recognized, "[r]eligious education is vital" to a "wide array of faith traditions." *Our Lady*, 140 S. Ct. at 2064–65. These include, among others, "the

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[16] AHS, *Vision & Mission Statement*, https://af.americanheritageschool.org/mission-statement/ (accessed Mar. 6, 2023).

[17] *Id.*

[18] AHS, *Our Method*, https://af.americanheritageschool.org/our-method/ (accessed Mar. 6, 2023).

[19] AHS, Honor Code, *supra.*

[20] AHS, *Our Method*, *supra.*

Catholic tradition," "Protestant churches," "Judaism," "Islam," and "Seventh-day Adventists." *Id.* at 2065–66.

Given these schools' religious missions, faculty, administrators, and other key employees will often have duties and expectations that are "essential to the [schools'] central mission[s]," *id.* at 2060, despite not looking like typical "ministers." Nonetheless, employment decisions involving these positions are protected by the ministerial exception.

For example, an English language instructor may not teach courses in theology or biblical studies, but her work in preparing students to use English in missionary service can implicate a school's religious mission. *E.g.*, *Yin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803, 815, 817 (D.S.C. 2018). Likewise, a private school principal responsible for overseeing the school's religious mission may not have needed theological training, but his personal conduct could disqualify him from holding that "important position of trust." *See Our Lady*, 140 S. Ct. at 2063; *see also, e.g.*, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206 (2d Cir. 2017). Similarly, a university administrator tasked with reviewing code of conduct violations may seldom pray with students or staff, but her decision to not enforce certain policies, or violate them herself, could directly bear on her fitness to further the school's mission. *See Our Lady*, 140 S. Ct. at 2056–57, 2066 (acknowledging the requirement that employees not engage in "conduct that brings discredit upon the School or the Roman Catholic Church"). These employees may not bear the more familiar hallmarks of a "minister," but their roles and responsibilities

have no less bearing on these schools' religious missions. *See, e.g.*, *Markowski v. BYU*, 575 F. Supp. 3d 1377, 1379, 1380 (D. Utah 2022) (applying the ministerial exception to a BYU employee who taught missionaries how to use social media for proselyting).

As with any constitutional right, there is pressure to develop legal doctrines around the views of a societal majority—matters such as what constitutes religious education or who is a "minister" are no different. But adopting an artificially narrow view on these points would be "troubling," *see Gordon Coll.*, 142 S. Ct. at 954 (Alito, J., statement respecting denial of certiorari), and antithetical to the religiously pluralistic society the Framers intended to protect, *see* 1 Annals of Cong. 730–31 (1789) (James Madison explaining the Establishment Clause was designed to prevent "compel[ing] others to conform" to a national religion). As *amici* explain below, the lower courts' decision in the present case misapplied the ministerial exception and introduced errors that could threaten the rights of religious schools who, like *amici*, are constitutionally protected in the pursuit of their religious missions.

II. The Lower Courts Disregarded This Court's Precedent By Not Applying The Ministerial Exception.

On the undisputed facts in the record, Tucker's termination fell within the ministerial exception. As both a teacher and chaplain, Tucker's role was central to Faith Christian's aims of "educating young people in their faith, inculcating [Christian] teachings, and training them to live their faith." *See Our Lady*, 140

S. Ct. at 2064; *see also* Pet. App. 83a (Bacharach, J., dissenting). The lower courts therefore should have determined that his claims are barred as a matter of law. *See Hosanna-Tabor*, 565 U.S. at 181; *see also Conlon v. InterVarsity Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015) (holding that "whether the exception attaches at all is a pure question of law").

As explained in its teacher handbook, Faith Christian's mission is to "provid[e] a biblically integrated education" and to "guide[] students to discover and develop their unique spiritual, mental, creative and physical gifts, so that they may glorify God and serve others through the power of the Holy Spirit." Pet. App. 158a. In that environment, "[a]ll subjects will be taught from a Biblical perspective, emphasizing that all truth is God's truth and that Jesus Christ is the ultimate source of wisdom." Pet. App. 159a. All staff must uphold key teachings, such as "[t]he Bible is the inspired, inerrant Word of God"; "God is triune, three distinct persons, yet one God"; and "Jesus, who is true God and true man, is the only way of salvation." Pet. App. 163a.

As a teacher at Faith Christian, Tucker played a vital role in advancing the school's mission. The school's teacher handbook makes clear that becoming a teacher at Faith Christian "is a calling from the Lord Jesus Christ to minister … to [Faith Christian's] students and families." Pet. App. 165a. Teachers are expected to uphold the school's Statement of Faith, "[l]ive in a vital relationship with God," and "communicate with Him through prayer and the Scriptures." Pet. App. 170a. All teachers must also be "committed to the integration of biblical truth within

each academic and extra-curricular discipline." Pet. App. 165a. Tucker testified that he understood these obligations are "a core value" for the school's mission. Pet. App. 228a. Tucker was responsible for following these directives, teaching classes—such as "Christian Leadership"—from an explicitly "Christian perspective." Pet. App. 233a.

The school also monitored compliance with these standards. Tucker's teaching evaluation looked at his attendance at morning devotions, his use of "Biblical principles related to course material," his ability to follow Biblical teachings in resolving disputes, and his commitment to "creat[ing] and work[ing] toward the accomplishment of [personal] spiritual goals during the year." Pet. App. 212a–214a.

When Tucker agreed to serve as Faith Christian's "chaplain," the school confirmed the religious significance of his responsibilities in light of its mission. The school emphasized "the necessity that the hand of the Lord be upon [Tucker] and that [he] exhibit the gift necessary to perform" that role. Pet. App. 152a. As part of his employment contract, Tucker "expressed [his] belief that [he] has this gift and that God has called [him] to minister this gift" at Faith Christian. Pet. App. 152a. As Tucker explained to his classes, his responsibilities as "Chaplain" included "[f]ocus[ing] on the physical, relational, and spiritual wellbeing of [Faith Christian's] students." Pet. App. 218a. His employment contract further specified that Tucker was responsible for reviewing the high school Bible curriculum, coordinating annual surveys related to "spiritual growth," and maintaining "an awareness of the spiritual pulse" at the school to

"promote the most positive spiritual growth climate possible." Pet. App. 216a–217a. He was required to "have a passionate relationship with Jesus Christ," Pet. App. 217a, to "attend a Christian, Bible believing church regularly," to "have daily devotion times for prayer and Bible study," and to "abide by and be subject to the scriptural and other principles and policies" set forth in Faith Christian's handbooks. Pet. App. 154a.

Tucker's responsibilities as chaplain included organizing weekly chapels and monthly chapel breakout groups. As Tucker explained in an email to Faith Christian's faculty, the chapel breakout groups were aimed at "giv[ing] students an opportunity to have Biblically grounded, honest, open, and broad conversations about spiritual topics." Pet. App. 252a. Tucker would provide discussion questions and relevant media for group leaders to utilize during these monthly chapel breakouts on topics such as modern day idolatry and becoming like Christ. Pet. App. 237a–238a, 242a. Similarly, Faith Christian's teacher handbook describes the weekly chapels as "a time for staff and students alike to hear from the Lord and to draw together spiritually." Pet. App. 188a. Tucker also explained that "the majority" of these chapels included worship and prayers, which Tucker would sometimes lead. Pet. App. 234a. Indeed, the event at the heart of Tucker's termination—the "Race and Faith" chapel—involved, as Tucker put it, "MUCH thought and prayer" and his own interpretations of the Bible. Pet. App. 192a–193a.

In short, both as a Bible department teacher and as the school's chaplain, Tucker was unquestionably

"entrust[ed] … with the responsibility of educating [and forming] students in the faith." *Our Lady*, 140 S. Ct. at 2066. That trust was especially clear in Tucker's employment contract and the teacher handbook—"important" evidence that Faith Christian "expressly saw [Tucker] as playing a vital part in carrying out the mission of the church." *See id.* at 2066. Given these undisputed facts, Tucker's claims should not have survived summary judgment—the ministerial exception "bar[red] such a suit." *Hosanna-Tabor*, 565 U.S. at 196.

This conclusion only becomes clearer when considering other factors identified in *Hosanna-Tabor* and other cases. While satisfying these factors is not necessary for the ministerial exception to apply, *see Hosanna-Tabor*, 565 U.S. at 190 (refusing to adopt a "rigid formula"), the factors all point in one direction.

As with the teacher in *Hosanna-Tabor*, both Tucker and his employer held Tucker out as a minister. *See* 565 U.S. at 191. Tucker's chaplaincy contract required him to certify that "God has called [him] to minister." Pet. App. 152a. In his classes, Tucker introduced himself as the school's "chaplain" responsible for the "spiritual wellbeing" of the students, Pet. App. 218a, a point Tucker confirmed in his deposition, Pet. App. 233a; *see also InterVarsity Christian Fellowship*, 777 F.3d at 834–35 (use of title that "conveys a religious … meaning" can indicate ministerial status).

Tucker likewise had a "significant degree of religious training." *Hosanna-Tabor*, 565 U.S. at 191. His application for a teaching position touted his

"extensive work in ministry," including his participation in various Christian ministries during college, his prior employment at religious schools, his "Christian philosophy of education," and his degree with a minor in religious studies. Pet. App. 271a–272a; *see also Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659–60 (7th Cir. 2018) (ministerial exception was supported by teacher's touting of experience in teaching religion).

With or without these additional factors, there is no genuine dispute as to whether Tucker was a "minister." As Judge Bacharach pointed out in his dissent from the denial of rehearing en banc, Tucker admitted to the Tenth Circuit that his responsibilities included: organizing religiously oriented chapel services; providing spiritual guidance and counseling; endorsing Christianity; integrating a Christian worldview in his teaching; maintaining a passionate relationship with Jesus Christ; and assisting students in developing their relationships with Jesus Christ. Pet. App. 135a. So when the school's leadership lost faith in Tucker, the "courts [we]re bound to stay out" of that decision. *See Our Lady*, 140 S. Ct. at 2060.

III. The Lower Courts' Errors, If Left To Stand, Will Erode The Foundational Rights Undergirding The Ministerial Exception.

The Free Exercise Clause and Establishment Clause work in tandem to ensure that religious organizations like Faith Christian and *amici* are free to determine matters of faith and internal governance without governmental intrusion. "[T]he Free Exercise Clause … protects a religious group's right to shape

its own faith and mission through its appointments," and "the Establishment Clause … prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188–89. These complementary rights of self-determination and freedom from governmental entanglement are safeguarded, at least in the employment context, by the ministerial exception.

The lower courts committed at least three errors that unconstitutionally infringe on these important rights. Granting review is necessary to preserve these rights and ensure that their protections remain in force.

A. By Disregarding A Religious Institution's Definition Of An Employee's Role, The Lower Courts' Decisions Undermine Religious Autonomy.

When Faith Christian presented Tucker's employment agreement and its teacher handbook as evidence of Tucker's vital religious duties, the district court found the documents to be merely "relevant," Pet. App. 111a, and the Tenth Circuit dismissed the documents as "primarily self-serving," Pet. App. 54a n.21. This approach not only contradicts this Court's instruction in *Our Lady*, but it threatens to undermine the right to self-governance protected by the ministerial exception.

In *Our Lady*, this Court emphasized the petitioner schools' "definition and explanation of [the plaintiffs'] roles" as particularly "important." 140 S. Ct. at 2066. This was because "judges cannot be expected to have

a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition" given the pluralistic nature of our society. *Id.* This Court went on to primarily rely on the "employment agreements and faculty handbooks [that] specified in no uncertain terms that [the employees] were expected to help the schools carry out" their religious missions. This "abundant record evidence" demonstrated that the employees "performed vital religious duties" and that the religious schools "expressly saw [the employees] as playing a vital part in carrying out the mission of the church." *Id.*

Instead of considering the terms of Tucker's employment agreement and Faith Christian's teacher handbook as important, undisputed facts as in *Our Lady*, the lower courts essentially disregarded these documents. *See* Pet. App. 54a n.21, 111a.

Apart from contradicting precedent, the lower courts' practice, if left unchecked, will inhibit religious organizations' constitutionally protected autonomy. An organization can define or explain an employee's importance to the organization's religious mission in many ways. One of the clearest and most objective is through formal documents like bylaws, policy manuals, mission statements, and employment agreements. *See Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 941 (7th Cir. 2022) (focusing ministerial exception analysis on "the religious duties [an employee] was hired and entrusted to do"). These documents serve as an outward manifestation of an organization's internal governance and doctrine. Yet the Tenth Circuit

disregarded these documents from Faith Christian as "self-serving." Pet. App. 54a n.21. By dismissing these important documents, courts send a message to religious institutions, like Faith Christian and *amici*, that the Constitution's right to define a religious mission and pursue it through employment decisions is little more than a paper promise. If given the weight they deserve, such documents delineating the religious importance of an employee's position will often obviate the need for courts to inquire further. *See, e.g.*, *Markowski*, 575 F. Supp. 3d at 1382 (finding, despite plaintiff's attempts to dispute her role as a religious teacher, that there was "no genuine issue of material fact as to whether [she] taught religious doctrine as part of her job").

B. By Crediting Secular Recharacterizations Of Religious Duties, The Lower Courts' Decisions Lead To Judicial Entanglement With Religion.

In addition to disregarding Faith Christian's formal definition of Tucker's role, the lower courts credited Tucker's attempts to refashion his admittedly religious duties in secular terms. Tucker never denied he taught a course on "Christian Leadership," Pet. App. 218a; he simply described his class as being about "Leadership," Pet. App. 284a. Similarly, Tucker did not dispute his responsibility to organize weekly chapel meetings that were designed for students and faculty to "hear from the Lord and draw together spiritually," Pet. App. 188a; he simply downgraded those chapels to mere "assemblies or symposiums," Pet. App. 108a. Tucker did not contest his responsibility "to provide opportunities for spiritual

growth" through "chapels, retreats, outreach projects and student mentoring," Pet. App. 218a; but he recast that responsibility as "find[ing] service and mentoring opportunities" and "promot[ing] a positive student environment," Pet. App. 108a.

Tucker's retelling was effective: the district court denied summary judgment, and the Tenth Circuit panel majority treated this recharacterization as "the actual facts and circumstances of his employment." Pet. 54a n.21 (cleaned up). But allowing an employee to cloak religious activities in secular terminology would circumvent the ministerial exception, further diminishing religious institutions' right to self-determination and entangling judges and juries in religious questions.

Such disputes between these organizations and their employees necessarily implicate religious questions. Whether an employee's duties further an institution's religious mission turns on determining which roles and responsibilities are religious and which are not. But these questions belong to religious institutions, not former employees turned litigants who have every incentive to muddy the ministerial exception analysis. *See Hosanna-Tabor*, 565 U.S. at 195 ("[T]he authority to select and control who will minister to the faithful [is] strictly ecclesiastical[.]" (cleaned up)); *see also Our Lady*, 140 S. Ct. at 2068–69 (refusing to allow courts to "delve into sensitive question[s]" and "risk judicial entanglement in religious issues").

Moreover, judges and juries are ill-equipped to decide matters of religion. James Madison, the

architect of the Religion Clauses, vehemently opposed the "arrogant pretension" that "the Civil Magistrate is a competent Judge of Religious Truth"; instead, "[t]he Religion … of every man must be left to the conviction and conscience of every man … and such only as he believes to be acceptable to him." Memorial and Remonstrance Against Religious Assessments (1785), *in* 5 The Founders' Constitution 82–84 (Kurland & Lerner eds., 1987). Concordantly, this Court has explained that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task," and its "resolution … is not to turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Our nation is simply too diverse for judges to accurately "understand[] and appreciat[e] the role played by every person who performs a particular role in every religious tradition." *Our Lady*, 140 S. Ct. at 2066.

This limitation is not merely prudential. "Deciding such questions," rather than allowing a religious institution to define its own mission and roles, "would risk judicial entanglement in religious issues," *id.* at 2069, a practice squarely prohibited by the Establishment Clause, *see Hosanna-Tabor*, 565 U.S. at 184; *see also* Stephanie H. Barclay, *Untangling Entanglement*, 97 Wash. U. L. Rev. 1701, 1721 (2020) ("[T]he use of entanglement analysis at least in [the ministerial exception] context would find rich support in historical sources.").

Yet the lower courts' methods did just that. Crediting an employee's secular portrayal of his duties despite objective evidence of their religious

significance could require judges and juries to interpret church doctrines to decide whether an employee's role was, in fact, religious. The Constitution, however, places that decision in the hands of religious institutions. *See Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450–51 (1969) (forbidding courts from "interpret[ing] … particular church doctrines and the importance of those doctrines to the religion" as "[s]uch review … inject[s] the civil courts into substantive ecclesiastical matters"); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment[.]"). Thus, this Court has recognized in other contexts involving religious questions that the courts' "narrow function … is to determine whether [a belief] reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (cleaned up).

This entanglement will also yield adverse consequences outside the litigation context. Without this Court's intervention, religious groups will experience the "significant burden" of having to predict, "on pain of substantial liability, … which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 336. "[W]ary of … judicial review of their decisions," religious groups will make employment decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral

needs" of their community. *Rayburn v. General Conf. of Seventh-Day Adventists*, 722 F.2d 1164, 1171 (4th Cir. 1985); Pet. App. 62a (Bacharach, J., dissenting) (same). Such unconstitutional pressures cannot be left to stand.

C. By Focusing On Ministerial Duties An Employee Lacks, The Lower Courts' Decisions Marginalize Religious Organizations That Define "Ministers" Differently.

The lower courts also failed to implement this Court's directive that "[w]hat matters, at bottom, is what an employee does." *Our Lady*, 140 S. Ct. at 2064. Instead, the lower courts credited Tucker's description of what he did *not* do. As the district court described it, Tucker did not frequently interact with ordained pastors; he was not required to explicitly teach theology; he could not advance one specific Christian perspective over another; he had no specific theological training; and he did not qualify for a ministerial tax deduction. Pet. App. 105a–109a. The Tenth Circuit simply accepted the district court's "expl[anation] of the evidence" presented by Tucker as "the actual facts and circumstances of his employment." Pet. App. 54a n.21 (cleaned up). This misplaced focus runs contrary to this Court's instruction and marginalizes religious groups that delegate ministerial functions "essential to [their] central mission" to a diverse group of lay members and workers. *See Our Lady*, 140 S. Ct. at 2060.

As noted above, this Court has refused to artificially limit the ministerial exception with a

narrow understanding of "minister." Requiring specific titles, educational experience, or duties analogous to Protestant ministers "would constitute impermissible discrimination" and "would risk privileging religious traditions with formal organizational structures over those that are less formal." *Id.* at 2064. While sufficient, the traditional hallmarks of a Protestant minister are not "necessary to trigger the [ministerial] exception." *Id.* at 2067. Courts instead must focus on "what an employee does" and whether those duties are "a vital part in carrying out the mission" of a religious organization. *Id.* at 2064, 2065.

But focusing on what an employee does *not* do hobbles the protections to which faith groups with different beliefs and governance structures are constitutionally entitled. At worst, this practice creates a *de facto* set of necessary factors for qualification as a "minister"—an unconstitutionally rigid approach this Court has repeatedly eschewed. At best, it tips the procedural scales in favor of religious employers whose "ministers" fit a more familiar model, making a trial on this question more likely for groups whose "ministers" fall outside that mold. Just as this Court rejected attempts to make the ministerial exception a "stopwatch" exercise by tallying up secular versus religious duties, *see Hosanna-Tabor*, 565 U.S. at 194, courts must focus on the religious duties employees *do* have, not those they lack. The lower courts' disregard of this Court's admonitions on this subject is disconcerting, particularly for institutions like *amici*, who are not themselves churches and whose internal governance,

beliefs, and practices sometimes diverge from those of their religious neighbors.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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