No. _____

IN THE

Supreme Court of the United States

LIBERTY UNIVERSITY, INC.,

Conditional Cross-Petitioner,

v.

LAURA BARBOUR BOWLES, as Executer of the Estate of Eva Palmer,

Cross-Respondent.

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

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
Counsel of Record
Anita L. Staver
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@LC.org

King F. Tower
Woods Rogers Vandeventer Black, PLC
Wells Fargo Tower
10 South Jefferson Street
P.O. Box 14125
Roanoke, VA 24038
(540)-983-7600

Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

Leah M. Stiegler
Woods Rogers Vandeventer Black, PLC
901 East Byrd St., Ste. 1550
Richmond, VA 23219
(804) 956-2050

Counsel for Conditional Cross-Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

"[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion [and] protects their *autonomy* with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (cleaned up) (emphasis added). When it comes to employment discrimination claims against religious organizations, "the First Amendment has struck the balance for us," and "the ministerial exception *bars such a suit*." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (emphasis added). "Simply put, the ministerial exception was recognized to preserve a church's independent authority in such matters. *Hosanna-Tabor* first endorsed the ministerial exception, and *Our Lady of Guadalupe* confirmed its strength." *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 876 (7th Cir. 2021). The Court's review is necessary yet again to resolve the vitally important First Amendment question surrounding the ministerial exceptions' scope and nature.

The questions presented are:

(1) Whether the First Amendment ministerial exception provides religious organizations with immunity from employment discrimination suits, or merely a defense to liability after being subjected to

the burdens and expense of litigation and judicial entanglement into purely religious matters.

(2) Does the ministerial exception, if not a complete bar to suit for alleged employment discrimination, nevertheless prohibit an employment discrimination suit from a professor who did not primarily teach religious texts but was required to integrate the Christian faith into her teaching and employment duties as a professor at a Christian institution.

PARTIES

Conditional Cross-Petitioner is Liberty University, Inc. Cross-Respondent/Petitioner is Laura Barbour Bowes, Executor for the Estate of Eva Palmer.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14.1(b)(ii) and 29.6, Conditional Cross-Petitioner Liberty University, Inc., is a nonprofit religious educational institution that has no parent corporation and no publicly held company owns 10% or more its stock.

DIRECTLY RELATED PROCEEDINGS

ESTATE OF EVA PALMER V. LIBERTY UNIVERSITY, INC., NO. 21-2434 (4th Cir. July 28, 2023), Order Denying Petition for Rehearing and Rehearing En Banc is reprinted in the Appendix to the Petition for Writ of Certiorari at 111a.

ESTATE OF EVA PALMER V. LIBERTY UNIVERSITY, INC., NO. 21-2434 (4th Cir. July 5, 2023), Opinion Affirming in Part and Vacating in Part is reprinted in the Appendix to the Petition for Writ of Certiorari at 5a.

ESTATE OF EVA PALMER V. LIBERTY UNIVERSITY, INC., NO. 6:20-cv-31 (W.D. Va. Dec. 1, 2021), Memorandum Opinion Denying Liberty University's Motion for Summary Judgment on Ministerial Exception and Granting Palmer's Cross-Motion for Summary

Judgment is reprinted in the Appendix to the Petitioner for Writ of Certiorari at 66a.

ESTATE OF EVA PALMER V. LIBERTY UNIVERSITY, INC., NO. 6:20-cv-31 (W.D. Va. Dec. 10, 2021), Memorandum Opinion Granting Liberty University's Motion for Summary Judgment on Age Discrimination Claim is reprinted in the Appendix to the Petitioner for Writ of Certiorari at 87a.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

OPINIONS AND ORDER BELOW

The Fourth Circuit's opinion and order below, affirming the district court's grant of summary judgment to Liberty University on the age discrimination claim and vacating the district court's ministerial exception decision, is reported at 72 F.4th 52 (4th Cir. 2023) and reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 5a. The district court's memorandum opinion granting summary judgment on the age discrimination claim is not yet published but is available at 2021 WL 5893295 (W.D. Va. Dec. 10, 2021) and reprinted in Pet. App. at 87a. The district court's opinion on the ministerial exception cross-motions for summary judgment is not yet published but is available at 2021 WL 6201273 (W.D. Va. Dec. 1, 2021) and reprinted in Pet. App. at 66a.

JURISDICTION

The Fourth Circuit entered its opinion and judgment, affirming the district court's grant of summary judgment on the age discrimination claim and vacating the decision on the ministerial exception on July 5, 2023. The Fourth Circuit subsequently denied Petitioner's timely petition for rehearing and rehearing en banc on July 28, 2023. Conditional Cross-Petitioners invoke the Court's jurisdiction under 28 U.S.C. §1254(1) and Supreme Court Rule 12.5.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

I. INTRODUCTION.

Though this Court's precedents make clear that it is not within the judicial ken of Article III courts to question the employment decisions of churches and religious organizations concerning those employed in critical religious positions, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), it has yet to place precise parameters on the exact breadth and nature of the ministerial exception. It is now beyond cavil that both the Free Exercise and Establishment Clauses of the First Amendment prohibit intrusion into a religious organization's employment decisions. *Hosanna-Tabor*, 565 U.S. at 188.

Indeed,

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than

> a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id.

Putting the proposed limits on the ministerial exception to rest, the Court noted that "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason." *Id.* at 194. "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—*is the church's alone*." *Id.* at 194-95 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. America*, 344 U.S. 94, 119 (1952)) (emphasis added). Because the First Amendment guarantees judicial limits on the intrusion into the employment decisions of a church or religious institution, *Hosanna-Tabor* held that "the ministerial exception *bars* such a suit." *Id.* at 196 (emphasis added). The reason for that decision is simple: "the First Amendment has struck the balance

for us, and the church must be free to choose those who will guide its way." *Id.* (cleaned up).

The Court's subsequent foray into the ministerial exception further suggested that it should operate as an immunity from suit, rather than a mere defense to liability. Under the ministerial exception, "courts are *bound to stay out of employment disputes* involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (emphasis added). *See also id.* at 2061 (noting that in *Hosanna-Tabor* "we unanimously recognized that the Religion Clauses *foreclose certain employment discrimination claims* brought against religious organizations" (emphasis added)). Simply put, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 2069.

As Justice Thomas opined, "[t]he First Amendment's protection of religious organizations' employment decisions is not limited to members of the clergy or others holding positions akin to that of a 'minister.'" *Id.* at 2069 n.1 (Thomas, J., concurring). "What qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis." *Id.* at 2070.

Yet, despite this Court's explanation of the ministerial exception as a bar to employment discrimination suits against religious organizations, lower courts have still inserted themselves into this First Amendment-prohibited realm. As the Supreme Judicial Court of Massachusetts held, the exception did not apply to a professor that did not teach religious texts but was nevertheless required to integrate the faith into her classroom. *See Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 952 (2022) (Alito, J., Statement Respecting Denial of Certiorari). Justice Alito, joined by Justices Thomas, Kavanaugh, and Barrett, noted that "the state court's understanding of religious education is troubling," and "in an appropriate future case, this Court may be required to resolve this important question of religious liberty." *Id.*

This petition presents that appropriate case and uniquely demonstrates the need for this Court's clarification on whether the ministerial exception provides immunity from suit rather than a mere defense to liability, which is a vitally "important question of federal law that has not been, but should be, settled by this Court." *See* Rule 10(c). The question has created a significant conflict among the Circuits, with some holding the ministerial exception operates as a complete bar to suit—*i.e.,* immunity—and others holding that the ministerial exception is a mere defense to liability. The First Amendment compels the former conclusion, and this Court should provide a definitive answer to this critical First Amendment inquiry.

II. FACTUAL BACKGROUND.

A. Liberty University's Distinctively Christian Founding and Mission.

Liberty University ("Liberty") was founded in 1971 as a distinctively Christian higher education institution located in Lynchburg, Virginia. (Pet. App. 8a.) Liberty is one of the largest Christian universities in the world and aligns with the evangelical tradition. (Appendix to Conditional Cross-Petition, "Cross App.," 2a.) Liberty has students who attend classes in person (also known as "resident students") and students who attend classes virtually. (Pet. App. 8a.) Liberty serves over 13,000 students at its campus in Lynchburg, Virginia and over 90,000 students around the world via its online courses. (*Id.*) Liberty offers more than 300 programs of study, and all courses are taught from a biblical worldview and designed in line with Liberty's mission to develop Christ-centered men and women. (Cross App. 2a.) Undergraduate students are required to take three courses in religion to graduate. (*Id.*)

Liberty's mission is to develop Christ-centered men and women with the values, knowledge, and skills essential for impacting the world. (*Id.*) Liberty refers to this in short as, "Train[ing] Champions for Christ." (*Id.*) This mission supports a two-fold purpose: Liberty trains students to be champions in fulfillment of Liberty's work for Christ; and Liberty trains students so that they can serve as champions for the cause of Christ. (*Id.*) Liberty's Doctrinal Statement codifies Liberty's beliefs about God,

humanity, and the world as a whole and serves as a governing document for all of Liberty's operations. (*Id.*) Liberty further expresses its commitment to providing a Christian worldview through its Philosophy of Education. (*Id.*) Liberty's stated purpose includes, among others, promoting the synthesis of academic knowledge and a Christian worldview to foster the maturing of spiritual, intellectual, social, and physical value-driven behavior. (*Id.*) Commitment to a Biblical worldview and responsible stewardship are two of Liberty University's stated core values. (Cross App. at 2a-3a.) In accordance with Liberty's Statement of Mission and Purpose, the Gospel is at the core of Liberty's existence. (Cross App. at 3a.)

Liberty is named after a verse in the Bible, 2 Corinthians 3:17: "[W]here the spirit of the Lord is, there is liberty," (*id.*) and was originally formed under the auspices of Thomas Road Baptist Church, a Baptist church in Lynchburg, Virginia. (*Id.*) The church is featured on the University Seal and is depicted aflame with the fire of the Gospel, against the background of an open Bible. (*Id.*) Liberty also maintains an Office of Spiritual Development ("OSD"), which puts on and oversees spiritual development activities that relate to Liberty. (*Id.*) For example, convocation is held three times per week, faith-oriented guests are brought in to speak on campus, and faculty and students can be involved in a "shepherding" process to orient new students to the faith. (*Id.*) The Executive Director of the OSD also serves as the Campus Pastor responsible for

overseeing the faith and evangelism for Liberty's students. (*Id.*)

B. Liberty Professors, and All Employees, Are Required to Carry Out Its Mission to Train Champions For Christ.

1. Liberty professors and employees are required to integrate the Christian worldview into their classrooms and work duties.

Faculty at Liberty are not only experts in their substantive field, but they must be experts in Christ. (Cross App. 3a.) Faculty are expected to use their platforms as educators to spread the Christian faith and Gospel to their students. (*Id.*) This is what separates Liberty from any secular university, and it is why many students choose to attend to Liberty. (*Id.*) They seek the opportunity to be spiritually mentored and to learn how to integrate a Christian perspective into their respective disciplines. (Cross App. 3a-4a.) Liberty's faculty must be able to meet this expectation and are given the opportunity to spread the Christian faith and evangelize to a non-Christian student, as there is no requirement for a student to be a Christian to attend to the University. (*Id.* at 4a.)

While students are not required to be Christians to attend Liberty, Liberty explicitly requires every faculty member to be a Christian.

(Cross App. 7a.) Faculty are required to believe that they are called by God to teach at Liberty, and Liberty's faculty easily meet this expectation. (*Id.*) Indeed, most faculty at Liberty seek employment there specifically because of the distinctively Christian founding, worldview, and ability to spread the Gospel to college students in their profession. (*Id.*)

2. Liberty professors and employees are required to exemplify a Christian worldview and lifestyle in their classroom and work.

Liberty explicitly requires its faculty to integrate a Christian worldview into the classroom and expects them to provide a model for students by conducting themselves as followers and believers of Christ consistent with Liberty's Doctrinal Statement. (Cross App. 8a.) Liberty's faculty are expected to do so by sharing their faith and spreading the Gospel. Liberty generally starts all faculty meetings with a prayer. (*Id.*) All faculty are held to the same standards in integrating the Christian worldview and carrying out its mission. (*Id.*)

To ensure that all faculty are willing and able to meet Liberty's expectations, applicants for faculty positions go through a rigorous hiring process. (Cross App. 4a.) Specifically, applicants for faculty positions are screened by a Faculty Interview Committee, which consists of faculty and faculty-management from various schools at Liberty, so the panelists are not limited to the discipline in which the applicant is

applying. (*Id.*) The committees delve into three key areas with applicants: their Biblical Worldview (*e.g.*, their religious beliefs, their perspectives about Scripture, etc.); Spiritual Disciplines (*e.g.*, how the applicant stays spiritually strong, how they continue to grow as a Christian, etc.); and Teaching Excellence (*e.g.*, their qualifications, research, how they would integrate Christian worldviews into the classroom, etc.). (*Id.*) Additionally, after a faculty member is hired, they go through a detailed orientation, which includes faith-based workshops that specifically connect worldview to one's substantive discipline and assists the faculty member in integrating the Christian worldview into the classroom. (Cross App. 4a-5a.)

All faculty go through additional faith-based workshops before every academic semester. (Cross App. 5a.) Throughout the year, faculty also have the ability to work with Liberty's Center for Teaching Excellence ("CTE") to attend lunch-and-learns or engage in other faith-based learning exercises that assist them with better integrating the Christian worldview in the classroom and evangelizing to students. (*Id.*) Liberty's Faculty Handbook lays out Liberty's policies for faculty to follow and incorporates Liberty's Philosophy of Education, Statement of Mission and Purpose, Statement on Worldview, Faculty and the Mission of Liberty University, Ethical Responsibilities of Faculty, and the Doctrinal Statement. (*Id.*) All of these policies reference and set Liberty's expectations that faculty integrate the Christian worldview into the classroom and that

spreading the Gospel is at the center of every faculty member's responsibilities.

3. Liberty professors and employees are required and expected to spread the Christian faith and the Gospel to Liberty's students.

To ensure that faculty are meeting Liberty's expectations to evangelize and spread the Christian faith, faculty are evaluated each semester on how "[t]he instructor exhibited commitment to Christian principles." (Cross App. 6a.) Students rate faculty on this expectation as either "strongly agree," "agree," "neither agree or disagree," "disagree," "strongly disagree." (*Id.*) The ratings are then turned into a numerical calculation for administrators on a scale between one (1) and four (4), with four being the best. (*Id.*) Faculty also must self-reflect each year on how they meet this expectation and what they can do better over the next semester. (*Id.*) The faculty Chairs and Deans of each school also rate and evaluate each faculty member on these principles. (*Id.*) Faculty who fail to meet these expectations are coached and encouraged to undergo further training with CTE and other faith-leaders, and, if necessary, are disciplined up to and including termination. (*Id.*)

Faculty are not expressly required to engage in specifically defined religious conduct or exercises in the classroom, such as praying with students, reading Bible verses, holding devotionals, and attending services with students, so long as the Christian

worldview is incorporated into the classroom. (Cross App. 6a.) Rather, faculty are given substantial authority to carry out Liberty's mission and meet Liberty's expectations such that they exhibit commitment to Christian principles, integrate the Christian worldview into the classroom, and spread the Gospel. (*Id.*) Faculty therefore often engage in religious conduct in the classroom, which, for instance, includes but is not limited to praying with students, sharing their faith with students, reading Bible verses and excerpts to students, mentoring students spiritually, guiding students to Christ in one-on-one settings, holding devotionals, accompanying students to services, and challenging students to progress in their spiritual discipline. (Cross App. 6a-7a.) Liberty's faculty are supposed to be exemplifying Liberty's Christian perspective 100% of time in their work and private lives. (Cross App. 7a.) Moreover, faculty spend a fair amount of time conveying to students how the students can better incorporate Christianity into their substantive disciplines by way of changing how a student thinks to incorporate a Christian worldview. (*Id.*)

III. PROCEDURAL HISTORY.

Petitioner initiated this action in the United States District Court for the Western District of Virginia on March 20, 2020 (Pet. App. 16a), after receiving Liberty's decision that it would not renew her contract for employment. (Pet. App. 15a-16a.) Petitioner raised one claim in her complaint against Liberty, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621, *et seq.*, claiming that

Liberty engaged in unlawful age discrimination by declining to renew the contract of a 79-year-old professor and offering up purported "bogus reasons" for the declination. (*Id.* at 16a.)

After being forced to participate in "extensive discovery proceedings" (*id.*), in July 2021, Liberty moved for summary judgment on the basis that the ministerial exception prohibited the district court from adjudicating its reasons for not renewing Petitioner's employment contract. (*Id.*) Petitioner cross-moved for summary judgment contending that, despite Liberty's employment requirements on professors like Petitioner, the ministerial exception was inapplicable to an art professor. (Pet. App. 17a.) In November 2021, Liberty also moved for summary judgment on the ADEA claim, noting that Petitioner failed to produce evidence of age-based discrimination. (*Id.*) The district court granted Liberty's ADEA motion for summary judgment and denied its motion for summary judgment on the ministerial exception. (*Id.*)

In its relevant ministerial exception order, the district court held that Petitioner "was not a minister within the meaning of the exception." (Pet. App. 67a.) The district court, citing this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, noted that the ministerial exception should operate as an affirmative defense rather than a jurisdictional bar. (*Id.* at 71a (citing 565 U.S. 171, 194 n.4 (2012)).) And, despite noting this Court's declination to adopt the four factors articulated in *Hosanna-Tabor* as a "rigid formula" for determining

the application of the ministerial exception, the court applied those four factors rigidly in its adjudication. (*See id.* at 74a-86a.)

Petitioner appealed the district court's decision on the ADEA claim, and Liberty cross-appealed the ministerial exception order. (Pet. App. 7a-8a.) The Fourth Circuit affirmed the district court's grant of summary judgment to Liberty on the ADEA claim (*id.* at 8a), but declined to reach the merits of the ministerial exception cross-appeal. (*Id.*) Specifically, the Fourth Circuit stated that "pursuant to the constitutional avoidance doctrine," and because it was holding for Liberty on the ADEA claim, "we refrain from resolving whether Palmer was a minister for purposes of the First Amendment's ministerial exception." (*Id.*)

The panel's decision to constitutionally avoid the ministerial exception question was met with stark conflict among two of the Circuit judges. Judge Motz opined that "this is not a case where the ministerial exception would apply," and wrote specially to "avoid any suggestion that this court would hold to the contrary." (Pet. App. 37a (Motz, J., concurring).) In support of her contention, Judge Motz wrote that Petitioner was "an art professor," did not teach "religion classes," was not explicitly required to engage in any specific religious tasks in class, "never considered herself a minister," and that Liberty did not hold her out as a minister. (*Id.* at 39a (cleaned up).) Based on that, Judge Motz stated that "the ministerial exception is just that – an *exception*, applicable only to a subset of a religious entity's

employees" and that this Court's precedents "do not provide a basis to enlarge the ministerial exception" to other employees. (*Id.* at 41a.)

Judge Richardson, hesitantly agreeing with the majority's ADEA holding, stated he would have avoided the issue altogether because Petitioner clearly fell within the ministerial exception, which barred the court's consideration of the merits of Petitioner's claims. (Pet. App. 49a (Richardson, J., concurring) ("I would not even wade into the merits here, since we must grant summary judgment to Liberty for a separate reason: The First Amendment's ministerial exception bars employment claims made by ministers against a religious institution.").) Judge Richardson's basis for stating that application of the constitutional avoidance doctrine was incorrect was because "[t]he Supreme Court has admonished against '*the very process of inquiry*' into a religious institution's faith and governance." (*Id.* (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)) (emphasis added).) His point was well noted: because "Liberty viewed [Petitioner] as a 'messenger of its faith," "the Supreme Court's recent precedent . . . entitles Liberty to *absolute immunity* over its decision to fire her." (*Id.* at 49a-50a (emphasis added).)

Petitioner timely sought rehearing en banc, which was denied by the Fourth Circuit. (Pet. App. 112a.) Petitioner, after requesting and receiving an extension of time to file for a writ of certiorari, No. 23A56, filed her Petition with this Court on November 21, 2023. This Conditional Cross-Petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS OF THE DISTRICT COURT AND THE FOURTH CIRCUIT DEMONSTRATE THE NEED TO ANSWER WHETHER THE FIRST AMENDMENT MINISTERIAL EXCEPTION PROVIDES IMMUNITY OR MERELY A DEFENSE TO RELIGIOUS ORGANIZATIONS.

This Court's precedents are clear that "there is a ministerial exception grounded in the Religion Clauses of the First Amendment," and it protects religious institutions, such as Liberty, from the application of employment discrimination suits. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). What is not as plain, and what the lower courts have struggled to apply with any consistency, is whether that ministerial exception represents an immunity to suit altogether, or whether it is merely a defense to liability that protects the religious institution after being subjected to the significant expense and burden of litigation concerning its ecclesiastical decisions. This Court's decision in *Hosanna-Tabor* noted several times that the ministerial exception is a *bar to suit*—*i.e.*, immunity. 565 U.S. at 181 ("Both Religion Clauses *bar* the government from interfering with the decision of a religious group to fire one of its ministers." (emphasis added)); *id.* at 184 ("By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensures that the new Federal Government—

unlike the English Crown—would have no role in filling ecclesiastical offices . . . The Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."); *id.* at 185 ("[I]t is impermissible for the government to contradict a church's determination of who can act as its ministers.").

This Court has suggested that the First Amendment demands Article III courts abstain from inquiry into the employment decisions of a religious institution: "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone," *Id.* at 195 (cleaned up), even if the justification is not strictly religious. Indeed, when it comes to employment discrimination suits against religious institutions: "*the ministerial exceptions bars such a suit*." *Id.* at 196 (emphasis added).

The decisions by the lower courts in this matter demonstrate that there is an important First Amendment question that has not been, but should be, answered by this Court. Namely, whether the ministerial exception provides the immunity from suit that this Court's precedents suggest—as Judge Richardson concluded below (Pet. App. 49a)—or a mere defense to liability as the district court, the Fourth Circuit, and Judge Motz concluded. (Pet. App. 18a-32a, 71a.) As the Fourth Circuit noted, because the important federal question of whether the

ministerial exception provides immunity from suit rather than a defense to liability has not been definitively determined by this Court, Liberty was required to engage in "extensive discovery proceedings" concerning its decision to terminate an employee indisputably tasked with being a messenger of the faith. (Pet. App. 16a.) The important First Amendment question is whether subjecting Liberty to such discovery is, itself, an intrusion the First Amendment prohibits.

The district court opined that such an intrusion was constitutionally permissible because "[s]ummary judgment is the appropriate stage of the proceedings at which the Court must decide whether the exception applies." (*Id.* at 71a.) The district court cited this Court's precedent in *Hosanna-Tabor*, 565 U.S. at 194 n.4 to suggest that because the ministerial exception is not a jurisdictional bar, summary judgment "will almost invariably be the appropriate mechanism for deciding whether the exception applies." (*Id.* (quoting Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1867 (2018)).) The district court's merits adjudication thoroughly intruded into Liberty's decisions. (*See, e.g.*, Pet. App. 32a n.7 (noting the district court determined that Petitioner could not even get out of the starting gate by making a prima facie case for discrimination under the ADEA, but nevertheless proceeded to subject Liberty's employment decisions to further inquiry by reaching the remaining elements of the requisite *McDonnell Douglas* test for employment discrimination).) The problems with that inquiry and its significant

intrusion into the decisions of a religious institution are evident by the applicable standard: "whether Liberty had articulated a legitimate non-discriminatory reason for the non-renewal decision, and if it had, whether Palmer could show that Liberty's proffered reason was pretextual." (Pet. App. 32a; *see also* Pet. App. 104a-108a.)

The majority opinion from the Fourth Circuit took a slightly different route, but ultimately only exacerbated the impermissible intrusion into Liberty's employment decisions. Highlighting the problems with a failure to appropriately treat the ministerial exception as immunity to suit, the Fourth Circuit ultimately resolved the case on the merits of Petitioner's ADEA claims, necessitating inquiry into Liberty's motivations. (Pet. App. 18a-32a.) The Fourth Circuit did not compound the error of the district court by subjecting Liberty to all aspects of the *McDonnell Douglas* framework for employment discrimination claims, but nevertheless subjected Liberty to intense review of its employment-based decisions. The Fourth Circuit began its analysis by noting the intrusion into Liberty's religious decisions: "we will first assess whether Palmer has produced direct evidence of age discrimination to pursue her ADEA claim in federal court. Because she has not, we will then assess whether Palmer has produced circumstantial evidence of age-based discrimination." (Pet. App. at 23a-24a.) Thus, Liberty was subjected to probing inquiries in discovery, a merits determination, and a thorough review on appeal—coupled with the significant expense and burden of

such extensive litigation—in a matter from which it should have been constitutionally immune.

Judge Richardson took a very different perspective of this Court's precedent, noting that the ministerial exception "*bars employment claims* made by ministers against religious institutions." (Pet. App. 49a (emphasis added).) Relying on this Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), Judge Richardson demonstrated that the First Amendment prohibits "the very process of inquiry" into Liberty's employment decisions. (Pet. App. 49a.) Indeed, as Judge Richardson noted, "adjudicating the merits of Palmer's claim would force us to make that inquiry" into a religious institution's decisions about employment. (*Id.*) "Before biting into that apple, we should determine whether the First Amendment protects Liberty" from that very inquiry. (*Id.*) Judge Richarson's answer: "It plainly does. The First Amendment's ministerial exception bars Palmer's suit." (*Id.*)

Pushing the analysis one step further, Judge Richardson noted that the ministerial exception "entitles Liberty to *absolute immunity* over its decisions to fire" its employees. (*Id.* at 50a (emphasis added).) And his reason for concluding that the ministerial exception operates as immunity from suit rather than a defense to liability is because "[s]werving around that issue" in the beginning of litigation "veers [the court] too close to the very interests that the First Amendment protects, and risks entangling us in inherently religious questions." (*Id.* at 50a-51a.)

> Once a court decides that the ministerial exception applies, its inquiry ends. The employer need not show that it had a religious reason for firing the minister . . . Instead, the employer may fire the minister for *any* reason—including one that, on its face, has no connection to religion and would otherwise be illegal.

(*Id.* at 52a (cleaned up).)

"Not only is there no *need* to inquire into a church's motives . . . that inquiry itself may offend the First Amendment." (*Id.* at 53a.) Simply put, the ministerial exception has been understood by some "to protect a religious institution not only from ultimate liability, but also from judicial *inquiry* itself." (*Id.* at 54a.) This is because the inquiry itself "encompasses more than just digging through a religious institution's employment files and deposing its leaders. In my view . . . the mere act of *questioning* the institution's motives—even if the court ultimately decides that those motives are pure—cheapens its authority over ecclesiastical affairs." (*Id.* at 55a (cleaned up).)

Judge Motz, by contrast, concluded that not only could the court adjudicate the merits of Petitioner's claims, but that the ministerial exception would not apply to Petitioner because she did not teach theology or hold herself out as a minister. (Pet. App. 37a.) Judge Motz's expansive view of the court's

authority to inquire into Liberty's employment decisions went much further than the district court or the majority opinion because Judge Motz perceived purportedly pernicious effects of the ministerial exception. Judge Motz opined that the "ministerial exception effectively 'gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law," (*id.* at 46a (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting)), and that "the ministerial exception condones animus." (*Id.*) But, despite her troubling view on the ministerial exception, Judge Motz highlighted the need for the Court to answer the important federal question presented here:

> An employee does not shed her right to be free from workplace discrimination simply because she believes in God, prays at work, and is employed by a religious entity. *Absent clear guidance from the Supreme Court*, I cannot agree with a view that the ministerial exception is so capacious that it entirely erodes vital antidiscrimination protections for scores of workers throughout the United States.

(*Id.* at 48a (emphasis added). The decisions below highlight and crystallize the need for this Court to answer the vitally important First Amendment question as to whether the ministerial exception provides immunity from suit or a mere defense to liability.

II. THERE IS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE MINISTERIAL EXCEPTION PROVIDES IMMUNITY FROM SUIT OR MERELY A DEFENSE TO LIABILITY.

A. The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, and Several Judges from the Second and Tenth Circuits, Have Concluded That The Ministerial Exception Operates As Immunity From Suit, Rather Than A Defense To Liability.

"Though most defenses protect only against liability, *the ministerial exception protects a religious body from the suit itself*." *Tucker v. Faith Bible Chapel Int'l,* 53 F.4th 620, 625 (10th Cir. 2022) (Bacharach, J. dissenting) (emphasis added). Decisions from the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits all agree that the ministerial exception must be viewed as providing immunity from suit because of the First Amendment's prohibitions into ecclesiastical decisions.

The First Circuit has held that it is "beyond peradventure that civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice." *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989). When presented with an employment dispute between a minister and a religious nonprofit

organization, the First Circuit noted that such a "dispute which underlies plaintiffs' complaint treads on this forbidden terrain." *Id.* at 1577. In noting the religious institution's immunity from the minister's suit, the court held that such a suit "would require judicial intrusion into rules, policies, and decisions which are unmistakably of ecclesiastical cognizance. They are, therefore, not the federal court's concern." *Id.* "By its very nature, the inquiry which [plaintiff] would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. *It is an inquiry barred by the Free Exercise Clause*." *Id.* at 1578 (emphasis added).

The D.C. Circuit has held that "the EEOC's attempt to enforce Title VII would both burden Catholic University's right of free exercise and excessively entangle the Government in religion." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996). The reason for this is simple: "the EEOC's two-year investigation of Sister McDonough's claim, together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement with judgements that fell within the exclusive province" of the religious institution itself. *Id.* "The suit and the extended investigation that preceded it has caused significant diversion of the Department's time and resources [and] the prospect of future investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in the ecclesiastical faculties will be filled." *Id.* "Having once been deposed, interrogated, and haled into court," religious entities would be

forced to make employment decisions "with an eye to avoiding litigation or bureaucratic entanglement." *Id.* The D.C. Circuit held the Religion Clauses of the First Amendment bar that kind of inquiry and burden on a religious organization. *Id.* at 470 ("we find that the EEOC's and Sister McDonough's claims are barred by the Free Exercise and the Establishment Clause of the First Amendment").

In direct conflict with the precise inquiry the lower courts engaged in below (*see* Pet. App. 23a-32a; 97a-109a), the Third Circuit held that "parsing the precise reasons for [a minister's] termination is akin to determining whether a church's proffered religious-based reasons for discharging a church leader is a mere pretext," which is "an inquiry the Supreme Court has explicitly said is forbidden by the First Amendment's ministerial exception." *Lee v. Sixth Mount Zion Church of Pittsburgh*, 903 F.3d 113, 121 (3d Cir. 2018). It held that the church was immune from such inquiry. *Id.*

The Fourth Circuit, prior to the instant case, concluded that application of Title VII to disputes between a religious institution and its religious employees is prohibited, and that the religious institution is immune from such inquiries. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). There, the Fourth Circuit held: "*Any attempt* by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights." *Id.* at 1168 (emphasis added). Because intrusion into the employment decisions of religious institutions would violate the

First Amendment, the Fourth Circuit held that "the Constitution requires that civil authorities *decline to review*" such employment decisions. *Id.* at 1172 (emphasis added).

The Fifth Circuit, too, has emphatically noted that Article III courts are prohibited from the very inquiry into a religious institution that a Title VII claim requires. *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974). There, in a claim brought by a pastor against his church, the Fifth Circuit held that "the law is clear: civil courts are *barred* by the First Amendment from determining ecclesiastical questions," and matters touching upon the relationship between "an organized church and its ministers" "must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 493 (emphasis added). Indeed, "the church is a sanctuary, if one exists anywhere, *immune from the rule or subjection to the authority of the civil courts*; either state or federal; by virtue of the First Amendment." *Id.* (emphasis added). "[C]ivil courts are not an appropriate forum for review of internal ecclesiastical decisions." *Id.* at 494. *See also McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (holding that "[a]pplication of the provisions of Title VII to the employment relationship between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment").

The Sixth Circuit has also concluded that the ministerial exception is so fundamental to the

Constitution's guarantees that it imposes a "structural limitation" on Article III courts, such that it reflects an immunity from suit, rather than a defense to liability. *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses, a limitation that can never be waived."). Indeed, citing this Court's decision in *Hosanna-Tabor*, the Sixth Circuit held that the "'Religion Clauss *bar* the government from interfering' with a religious organization's decision as to who will serve as ministers." *Id.* (quoting 565 U.S. at 181). Because of that bar, the ministerial exception should operate as an immunity. "This constitutional protection is not only a personal one; it is a structural one that *categorically prohibits* federal and state governments from becoming involved in religious leadership disputes." *Id.* (emphasis added).

The en banc Seventh Circuit's decision in *Demkovich v. St. Andrew the Apostle Parish, Calumet City* similarly recognized the ministerial exception as a bar to suit, rather than a defense to liability. 3 F.4th 968 (7th Cir. 2021) (en banc). "The ministerial exception, grounded in the First Amendment's Religion Clauses, protects religious organizations from employment discrimination suits brought by their ministers." *Id.* at 972-73. The court noted that this Court's precedent "teaches that avoidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance." *Id.* at 975. The court held that the "ministerial exception covers the entire employment

relationship, including hiring, firing, and supervising in between," *id.* at 976-77, and that the courts "cannot lose sight of the harms—civil intrusion and excessive entanglement—that the ministerial exception prevents." *Id.* at 977. "Adjudicating [a minister's employment dispute] would not only undercut a religious organization's constitutionally protected relationship with its ministers, but also cause civil intrusion into, and excessive entanglement with, the religious sphere." *Id.* at 977-78. Thus, *any* "*judicial involvement*" in an employment dispute between a religious organization and its minister impermissibly "threaten[s] the independence of religious organizations 'in a way that the First Amendment does not allow.'" *Id.* at 978 (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2069) (emphasis added).

Explaining why the ministerial exception should be treated as immunity rather than a mere defense to liability, the Seventh Circuit held that "[a] religious organization should not be forced to choose between proffering a religious justification or risking legal liability . . . the ministerial exception affords religious organizations protection from that choice." *Id.* at 982. Indeed, much like here, the religious institution in *Demkovich* faced significant proceedings in the trial court. *Compare id.* (two motions to dismiss, two subsequent decisions and orders, the beginnings of discovery, an interlocutory appeal, a panel opinion, and en banc rehearing), *with* (Pet. App. 16a (noting Liberty was subject to "extensive discovery proceedings," an appeal, a request for en banc hearing, and requested review herein).) Treating the ministerial exception as

immunity prevents substantial "worry about a protracted legal process pitting church and state as adversaries." *Demkovich*, 3 F.4th at 982 (quoting *Rayburn*, 772 F.2d at 1171). Though "some *threshold* inquiry" may be appropriate, the "very process of inquiry in weighing the competing interests" between the First Amendment and employment discrimination statutes "may impinge on rights guaranteed by the Religion Clauses." *Id.* at 983. "When these interests conflict, as here, the ministerial exception must prevail," and the employment claims barred. *Id.* at 983.

The Eighth Circuit has held that the ministerial exception provides immunity from suit. *Scharon v. St. Luke Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991). "Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and *cannot be reviewed by civil courts*." *Id.* at 363 (second emphasis added). "[W]e believe that the Free Exercise Clause of the First Amendment also prohibits the courts from deciding cases such as this one," between a religious institution and its employees. *Id.*

Judge Bacharach, dissenting from a denial of rehearing in *Tucker v. Faith Bible Chapel International*, likewise opined that the ministerial exception is more akin to immunity than a traditional defense to liability. 53 F.4th 620, 625 (10th Cir. 2022) (Bacharach, J., dissenting). "Though most defenses protect only against liability, *the ministerial exception protects a religious body from the suit itself*." *Id.* (emphasis added). "Without that protection, religious

bodies will inevitably incur protracted litigation over matters of religion." *Id.* Judge Bacharach based his opinion that the ministerial exception is more akin to immunity from suit rather than a defense to liability on this Court's *Hosanna-Table* decision. *See id.* ("Given the structural role of the ministerial exception, the Supreme Court held that the 'ministerial exception *bars* . . . *a suit*' over the religious body's decision to fire the plaintiff." (quoting 565 U.S. at 196). His dissent highlighted the Circuit conflict: "Despite the Supreme Court's characterization of the ministerial exception as a bar to the *suit* itself, the panel majority interprets the ministerial exception as a mere defense against *liability*." *Id.*

Judge Park, joined by four other judges of the Second Circuit, has also expressed the view that the ministerial exception operates as immunity to suit. *See Belya v. Kapral*, 59 F.4th 570 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc). There, the panel had refused to permit an interlocutory appeal over a denial of the ministerial exception defense because it believed that such a claim could be adequately reviewed after final judgment. *See Belya v. Kapral*, 45 F.4th 621 (2d Cir. 2022). Judge Park, joined by his four colleagues, noted that such a decision "leaves the church defendants subject to litigation, including discovery and possibly trial, on matters relating to church governance." 59 F.4th at 573 (Park, J., dissenting). He further insisted that the panel's decision would "reduce the doctrine to a defense against liability only." *Id.* In Judge Park's view, "the First Amendment provides more protection

to religious institutions than that" limited view of the ministerial exception. *Id.* at 573-74. His reasoning was simple: the ministerial exception "protects religious institutions *from the litigation process itself* over religious matters," and provides religious institutions with a "right not to face the other burdens of litigation." *Id.* at 577 (emphasis added).

Judge Park noted that "the First Amendment prohibits the very inquiry" that federal courts are required to undertake in a ministerial exception or church autonomy case, and "the harm from judicial interference in church governance will be complete" if the matter moves beyond the dismissal stage. *Id.* at 578. Comparing the ministerial exception to qualified immunity cases, Judge Park noted that "both are rooted in foundational constitutional interests," implicate "structural constitutional protections," and "*are protections against the burdens of litigation itself*," *i.e.*, "an entitlement not to stand trial or face the other burdens of litigations, conditioned on resolution of the essentially legal question whether the doctrine applies." *Id.* at 579 (emphasis added) (cleaned up). "[S]ubjecting churches to litigation and trial over matters of church governance itself infringes their First Amendment rights." *Id.* As such, the ministerial exception should be treated as "an immunity from suit rather than a mere defense to liability." *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

B. The Second And Tenth Circuits, Along With The District Court and Judge Motz In The Fourth Circuit Below, Have Concluded That The Ministerial Exception Operates As A Defense From Liability, But Not Immunity From Suit.

Like Judge Motz's concurrence and Judge Moon's denial of summary judgment below in the district court, the Second and Tenth Circuits have held that the ministerial exception is a mere defense to liability rather than an immunity from suit. *See Belya v. Kapral*, 45 F.4th 621 (2d Cir. 2022); *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021 (10th Cir. 2022).

In *Belya*, a religious institution—the Russian Orthodox Church Outside Russia—moved to dismiss allegations of defamation from a former minister based on the church autonomy and ministerial exception doctrines. 45 F.4th at 625. The district court denied that motion, and the church then moved to limit discovery in the matter to whether the ministerial exception applied and to make a determination of that issue before permitting broad discovery and litigation on the merits. *Id.* The district court denied that motion as well, and the church attempted an interlocutory appeal of both decisions. *Id.* The Second Circuit framed the question as whether "simply having a religious association on one side of the 'v'" automatically requires dismissal, and held that it did not. *Id.* at 630. Its reasoning was that refusing to adjudicate a case involving the ministerial

exception at the motion to dismiss stage did "not bar any defenses," "did not rule on the merits of the church autonomy defense," and still "permit[s] Defendants to continue asserting the defense." *Id.* at 631. In other words, the ministerial exception—though important and constitutionally required in *some* instances—is merely a defense that can be adjudicated upon discovery and a trial on the merits.

"It is possible that at some stage Defendants' church autonomy defenses will require limiting the scope of [the minister's] suit, or the extent of discovery, or even dismissal of the suit in its entirety," *id.*, but according to the Second Circuit that does not require it to "prematurely jump into the fray" and permits Article III courts to subject churches and religious institutions to the burdens of discovery and a trial on the merits. *Id.* In direct conflict with the circuits discussed *supra*, the Second Circuit held that "[t]he church autonomy doctrine provides religious associations neither an immunity from discovery nor an immunity from trial on secular matters. Instead . . . the First Amendment serves more as an *ordinary defense to liability*." *Id.* at 633 (cleaned up) (emphasis added).

In *Tucker*, the Tenth Circuit held that the nature of the ministerial exception necessarily means that there will be cases "where the district court will be unable to resolve that threshold question at the motion-to-dismiss or summary-judgment stage of litigation" and "the jury will have to resolve the factual disputes and decide whether an employee qualifies as a minister." 36 F.4th at 1031 n.4. There,

as Liberty did here, the religious institution argued that the ministerial exception "protects religious employers not just from liability based on its minister's employment discrimination claims, but also from the burden of litigating such claims." *Id.* at 1036. The Tenth Circuit plainly rejected that approach. *Id.* ("We reject that argument because Faith Christian is incorrect that the ministerial exception immunizes a religious employer from suit on employment discrimination claims." (emphasis original).) Further, the Tenth Circuit concluded that "*the ministerial exception protects religious employers from liability, but nothing there suggests a further protection from the burdens of litigation itself*." *Id.* at 1037 (emphasis added). In direct conflict with the other circuits discussed *supra*, the Tenth Circuit held that "requiring a religious employer to incur litigation costs to defend claims asserted against it by an employee under a generally applicable employment discrimination statute does not punish a religious employer," but merely reflects "the costs of living and doing business in a civilized and highly regulated society." *Id.* at 1037 n.11 (emphasis original).

The Second Circuit's decision in *Belya* and the Tenth Circuit's decision in *Tucker* represent direct and irreconcilable conflicts with the decisions of the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits on a vitally important question that has not been, but should be, addressed by this Court. The Court should grant the Cross-Petition and resolve the conflict.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS ON A VITALLY IMPORTANT QUESTION OF WHETHER THE MINISTERIAL EXCEPTION APPLIES TO PROFESSORS WHO ARE REQUIRED TO TEACH THE FAITH IN GENERAL EVEN IF THEY ARE NOT TEACHERS OF THEOLOGY.

As Justice Alito stated, in an opinion joined by Justices Thomas, Kavanaugh, and Barrett, "[t]he Supreme Judicial Court of Massachusetts held that this ministerial exception did not apply to a professor at a religious college who did not teach religion or religious texts, but who was still expected to integrate her Christian faith into her teaching and scholarship." *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 952 (2022) (Alito, J., Statement Respecting Denial of Certiorari). Justice Alito's noted that "in an appropriate future case, this Court may be required to resolve this important question of religious liberty." *Id.* Liberty's conditional cross-petition presents that appropriate vehicle to address this important question.

Judge Motz's concurrence below and the district court before that held that the ministerial exception was inapplicable to Petitioner because she did not teach religious texts and did not hold herself out as a minister. (Pet. App. 39a-48a, 79a.) And the district court explicitly relied upon *Gordon College* to reach its decision that Petitioner's requirement to

integrate the faith into her teaching was insufficient to warrant application of the ministerial exception. (Pet. App. 81a-86a.) The district court even went so far as to note that "[t]he similarities between Palmer's case and *DeWeese-Boyd* are substantial." (*Id.* at 84a.) Specifically, and in direct contrast to what Justice Alito described as an "understanding of religious education [that] is troubling," *Gordon Coll.*, 142 S. Ct. at 952 (Alito, J.), the district court held that application of the ministerial exception to "a teacher's mere obligation to integrate a Christian worldview into her curriculum" would represent "a significant expansion of the conception of the ministerial exception." (Pet. App. 85a.)

Judge Motz, for her part, likewise relied on *Gordon College*'s "troubling" understanding of religious education to suggest that the ministerial exception did not apply to Petitioner. (Pet. App. 46a.) Judge Motz, like the district court, said it would be "a dramatic broadening of the ministerial exception that would swallow the rule." (*Id.* (citing *Gordon Coll.*, 163 N.E.3d 1000, 1017 (Mass. 2021), *cert. denied* 142 S. Ct. 952 (2022)).) Like the Massachusetts tribunal before her, Judge Motz opined that "if integrating faith into daily life and work at a religious college were all that was required for the exception to apply, all of the school's employees . . . would be ministers." (Pet. App. 47a-48a.)

These decisions directly conflict with this Court's precedents. This Court's decision in *Our Lady of Guadalupe School v. Morrissey-Berru* began by noting that the question was whether the ministerial

exception applied to instructors required to incorporate the faith in their work. 140 S. Ct. 2049, 2055 (2020) ("These cases require us to decide whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing students their students in the faith.")

> The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way the First Amendment does not tolerate.

Id.

As the Court noted, "implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, *inculcating its teachings*, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* at 2064 (emphasis added).

A simple comparison between this Court's decision in *Our Lady of Guadalupe* and the lower

courts' treatment of Liberty's requirements here and the decision in *Gordon College* reveals the direct and irreconcilable conflict and the need for this Court's intervention. This Court held that the ministerial exception was plainly applicable to the teachers in *Our Lady of Guadalupe* because the "employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out the mission and that their work would be evaluated to ensure that they were fulfilling that responsibility." *Id.* at 2066.

Liberty's faculty handbook and employment agreements, just as in *Our Lady of Guadalupe*, 140 S. Ct. at 2066, require Petitioner to incorporate a Christian worldview into the classroom and to train students in the faith, through her art classes. (Pet. App. 82a ("Liberty extensively cites to its employment handbook and Palmer's employment agreements to argue that Palmer had religious duties; Liberty argues that the handbook and agreements signify that Palmer had a duty to integrate Christian ministry into her art lessons.") Further, just as in *Our Lady of Guadalupe*, 140 S. Ct. at 2066, Liberty evaluates its professors based on how well they are performing those tasks. (*See* Pet. App. 59a ("Every year, Liberty enforced these expectations by evaluating its faculty—including Palmer—on their 'Integration of Biblical Worldview,'" into the classroom).) In direct conflict with this Court's precedents, the district court said this was irrelevant to establish application of the ministerial exception. (Pet. App. 82a ("Liberty cannot point to its voluminous policies about faculty responsibilities as evidence that Palmer undertook

ministerial functions.").) It thus held that the ministerial exception was inapplicable. Judge Motz reached the same conclusion in her concurrence below. (Pet. App. 41a (noting that Liberty "expected Palmer to conform her classes to its religious message, and *to help it spread that message*" but concluding that was not sufficient to render the ministerial exception applicable to her (emphasis added)).)

This is virtually identical to what the Supreme Judicial Court of Massachusetts held in *Gordon College*. There, the court held that the employee's "responsibility to integrate the Christian faith into her teaching, scholarship, and advising was different in kind, and not degree, from the religious instruction and guidance at issue in *Our Lady of Guadalupe*." 163 N.E.3d at 1013. It noted that "some of the language employed in *Our Lady of Guadalupe* may be read more broadly, in a way that would include every educator at a religious institution," but held that applying this Court's precedent to apply to professors who are required to integrate the Christian faith into their teaching *as a method of teaching the faith* would "provide a significant expansion of the ministerial exception well beyond individuals who play certain key roles in a religious institution." *Id.* at 53-54.

The lower courts' decisions here and the Supreme Judicial Court of Massachusetts's decision in *Gordon College* cannot be reconciled with this Court's precedents. This Court should grant the conditional cross-petition and resolve the conflict.

CONCLUSION

Because there is a substantial conflict among the Circuits concerning the appropriate nature of the ministerial exception, and because the lower court's decision in this case cannot be reconciled with this Court's precedents on a question of exceptional First Amendment importance, this Court should grant the conditional cross-petition and resolve the conflict.

Mathew D. Staver
Counsel of Record
Anita L. Staver
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C.
20002
(202) 289-1776
court@LC.org

Horatio G. Mihet
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

King F. Tower
Woods Rogers
Vandeventer Black,
PLC
Wells Fargo Tower
10 South Jefferson St.
P.O. Box 14125
Roanoke, VA 24038
(540)-983-7600

Leah M. Stiegler
Woods Rogers
Vandeventer Black,
PLC
901 East Byrd St., Ste.
1550
Richmond, VA 23219
(804) 956-2050

Counsel for
Conditional Cross-
Petitioners