No. 23-703 Vide 23-550

In the
Supreme Court of the United States

LIBERTY UNIVERSITY, INC.,
Petitioner,

v.

LAURA BARBOUR BOWES, AS EXECUTOR OF THE ESTATE OF EVA PALMER,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Richard F. Hawkins, III
Counsel of Record
THE HAWKINS LAW FIRM, PC
2222 Monument Avenue
Richmond, VA 23220
(804) 308-3040
rhawkins@thehawkinslawfirmpc.com

Counsel for Respondent

---

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the "ministerial exception," well-recognized as an affirmative defense by this Court for which the proponent of the defense bears the burden of proving its application, should be treated the same as any other affirmative defense for which factual development is required in order for a court to assess its applicability.

2. Whether a career art professor employed by a religious university who during her employment (i) was never been tasked with performing any religious duties, (ii) had never taught theology or religious studies and, instead, had only taught art classes; (iii) did not lead her students in worship or Bible-study; (iv) did not give sermons or tell her students what to believe or no to believe; (v) did not lead her students to or from any worship services or chapel; and (vi) did not hold herself out as a minister was a "minister" for purposes of the First Amendment's "ministerial exception," as adopted and applied in *Our Lady of Guadalupe v. Morrissey-Berru*, ___, U.S., ___, 140 S. Ct. 2014 (2020) and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

TABLE OF CONTENTS

PAGE:

TABLE OF AUTHORITIES

PAGE(S):

CASES:

Constitutional Provisions:

INTRODUCTION

At the heart of this case – both in the primary appeal[1] and in this conditional cross-appeal -- is whether Eva Palmer, a career art professor at Liberty University, Inc. ("Liberty") qualifies as a "minister" under the "ministerial exception" this Court first recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). She is not. As Petitioner explained in her opening Petition and as is confirmed below, Palmer never played a "key" role or held a "certain key" or "certain important" position at Liberty that would somehow transform her status as an art professor into a key and important messenger of the faith. *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049, 2064 (2020). The District Court below decided this issue correctly, and Judge Motz, in her concurring opinion below, explained in detail why the District Court's decision was the right one. Indeed, to adopt Liberty's capacious interpretation of the "ministerial exception" would be a "dramatic broadening of the ministerial exception that would swallow the rule." App. at 46a.

This is an exceptionally important First Amendment issue worthy of this Court's review, especially since Liberty, in its cross petition, wants this Court to adopt a rule of law that would make a religious organization's requirement that its employees "integrate" a Christian lifestyle or worldview into their employment duties dispositive of the "ministerial exception" issue and would, in

---

[1] *Laura Barbour Bowles, as Executor of the Estate of Eva Palmer v. Liberty University*, No. 23-550.

essence, turn *every employee at every religious institution* into a de facto minister. This is a bridge too far and one this Court has never adopted. To the contrary, this Court's ministerial exception cases made clear "that the ministerial exception is just that – *an exception*, applicable only to a subset of a religious entity's employees." App. at 41a (emphasis in original). This Court therefore should grant Liberty's cross-petition on this issue (as well as Petitioner's petition on this same issue and others) and should soundly reject Liberty's position.

As for the other issue raised in Liberty's cross-petition – that the immunity embodied in the "ministerial exception" is an immunity *from suit*, not an ordinary affirmative defense – it is a non-starter. This Court recently rejected review of this exact issue in two separate petitions, and there is no reason for this Court to act otherwise now. This Court should deny the cross-petition as to this second issue.

REASONS FOR DENYING AND GRANTING THE WRIT

I. Liberty's Claim Of A Dispute As To The Application Of The Ministerial Exception As An Immunity From Suit Does Not Warrant Review By This Court.

Since this Court first recognized the "ministerial exception" in 2012, it has never wavered in its statement that the exception "operates as an affirmative defense," and that the party asserting the exception bears the burden of showing that the exception applies. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 195 n.4 (2012). Attempting to call this concept into question, Liberty says that a conflict within the

circuits as to whether the "ministerial exception" is an "immunity from suit" or simply a "defense to liability." The settled law says that it is the latter, and there is no reason to disturb the settled law.

This issue has been recently brought to this Court as an attempt to have the exception qualify as an "immediately appealable final order" for purposes of interlocutory review, and this Court has twice rejected certiorari in such circumstances. *See, e.g., Tucker v. Faith Bible Chapel Int'l.*, 36 F.4th 1021, *rehg. en banc denied*, 53 F.4th 620 (10th 2022), *cert. denied, Faith Bible Chapel Int'l*, 143 S. Ct. 2608, ___ U.S. ___ (June 12, 2023); *Belya v. Kapral*, 45 F.4th 621 (2d Cir. 2022), *rehg. en banc denied*, 59 F.4th 570 (2d. Cir. 2023), *cert. denied*, *Synod of Bishops of the Russian Orthodox Church Outside of Russia v. Beyla*, Mem. Order. (June 12, 2023). There is nothing more compelling about Liberty's arguments here than those made in the other two unsuccessful petitions. This Court therefore should deny certiorari on this issue.

II. Liberty's Assertion That Palmer Is A Minister Because Liberty Requires Its Professors And Employees To Integrate Christianity Into Their Jobs And Perform Their Duties From A Christian Point Of View Deserves Review By This Court And Should Be Soundly Rejected.

As noted in Petitioner's direct appeal, the application of the "ministerial exception" in this case divided the Fourth Circuit panel below. On the one hand, its application would have been dispositive for Judge Richardson. On the other, it would not have been for Senior Judge Motz. Liberty attacks Judge

Motz' reasoning below and – as it did unsuccessfully in the District Court – makes perhaps the most sweeping assertion of the "ministerial exception" imaginable – that is, that the exception should apply where an employee of a religious institution, such as Palmer here, should be deemed a "minister" whenever the religious institution requires her to "integrate" Christianity or Christian principles into their job duties and to otherwise perform her duties with a Christian worldview in mind. Such a rule would essentially gut the "ministerial exception" and turn every employee at a religious institution into a de facto minister. In other words, it would no longer be an exception, it would be the rule. This Court has never gone this far, nor should it.

The best rebuttal to Liberty's arguments on this issue is to restate in large part the compelling and cogent analysis provided on this issue in Judge Motz concurrence. For example, in explaining the *lack* of religious tasks associated with Palmer's role at Liberty, Judge Motz explained:

> Palmer considers herself "a follower of Jesus Christ." Palmer often began her class sessions by "reading one or two verses from the Book of Psalms or Proverbs," albeit "without [further] comment or discussion." She would also "ask for prayer requests" and pray with her students. Palmer did not, however, deliver sermons or lead her students in Bible study. Indeed, as Palmer testified during a deposition, "there's no time in the classroom for teaching the subject of art to teach Bible." Thus, as the district court concluded, the record provides "***scant evidence of [Palmer] actually integrating theological lessons***

> ***into her classes***." *Palmer*, 2021 WL 6201273, at *7. Outside of the classroom, Palmer took advantage of Liberty's many faith offerings. She frequently attended worship services and convocations. ***But Palmer did not take her students to services and convocations or sit with her students if they also happened to be in attendance.***
>
> To summarize, it is undisputed that Palmer herself is deeply religious and, because she worked at a religious university, availed herself of the opportunity to pray with her students and talk openly about her faith in the classroom. But it is also undisputed that Palmer was an art professor, th***at Palmer never taught religion classes, that Liberty did not require Palmer to engage in any specific religious conduct in her capacity as an art professor, that Palmer never considered herself a minister, and that Liberty never held Palmer out as a minister.***

App. at 38a-39a (emphasis added).

Judge Motz also squarely rejected Liberty's position – advanced here in the cross-petition – that the general requirement that a Liberty employee perform his or her job duties with a "Christian worldview" in mind turned that employee into a key messenger of faith for Liberty. She said:

> Furthermore, Palmer was not given instructions on how to implement a Christian worldview into her teaching. Unlike her Our Lady of Guadalupe counterparts, Palmer evidently was accorded significant discretion

> as to whether and to what extent she wished to integrate faith into the classroom. In fact, t***he record indicates that the only religious activities that Palmer engaged in were voluntary. Notably, Palmer did not incorporate a single theological lesson into her course syllabi, but this apparently proved no impediment to Palmer's promotion to "Full Professor," the highest academic rank at Liberty.*** In sum, it is a mistake to conflate Palmer's personal devotion to her faith with whether she was the type of key employee who performed a vital religious function for her employer. Not only does this case not involve a teacher who was charged with teaching religion classes, it also does not involve a teacher who was given any concrete responsibility for integrating faith into her classroom activities.

App. at 45a (emphasis added).

Finally, Judge Motz honed in on perhaps the most fundamental weakness of Liberty's assertion of the "ministerial exception" – that it is not confined to "key" or "important" religious figures at a religious entity and, in essence, has no limiting principle whatsoever. Judge Motz explained:

> . . . Palmer was not a key religious figure or a minister. She was an art professor. Indeed, ***if basic acts like praying with one's students and referencing God in the classroom are enough to transform an art professor into the type of key faith messenger who qualifies for the***

> ***ministerial exception, one can only speculate as to who else might qualify for the exception.*** *See DeWeese-Boyd*, 163 N.E.3d at 1017 (observing 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, "whether they be coaches, food service workers, or transportation providers," would be ministers).
>
> 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 of the ministerial exception so capacious that it entirely erodes vital antidiscrimination protections for scores of workers throughout the United States.

App. at 47a-48a (emphasis added).

Judge Motz's fears of who might qualify as a "minister" under an overly broad interpretation of the "ministerial exception" such as that advocated by Liberty are not academic or speculative. Indeed, less than four months ago, a federal district judge was forced to reject a religious institution's claims that its ***customer service representatives*** were "ministers" who were barred from bringing suit against it because they were expected, but not required, to pray with the entity's donors and they were designated by the entity as persons who carried forward the religious "mission" of the entity. *McMahon v. World Vision, Inc.*, --- F. Supp. 3d ---, 2023 WL 8237111 (W.D. Wash. Nov. 28, 2023).

The district court soundly rejected this position, stating in relevant part:

> Even when considering the facts in the light most favorable to World Vision, under a totality of the circumstances, the customer service representative ***role does not implicate the fundamental purpose of the ministerial exception***. *See Our Lady of Guadalupe*, 140 S. Ct. at 2067. The exception is rooted in constitutional principles respecting autonomy in "matters of church government." *Id.* at 2060 (quoting *Hosanna-Tabor,* 565 U.S. at 186, 132 S. Ct. 694). "[A] component of this autonomy is the selection of the individuals who play ***certain key roles.***" *Id.* Applying the ministerial exception to the principally administrative customer service representative position ***would expand the exception beyond its intended scope, erasing any distinction between roles with mere religious components and those with "key" ministerial responsibilities.*** Id. The undisputed facts demonstrate that Ms. McMahon does not qualify for the ministerial exception. She therefore is entitled to summary judgment on this affirmative defense.

McMahon, 2023 WL 8237111, at 14 (emphasis added). In short, Judge Motz's fears are real and concrete and this Court should act to ensure that the ministerial exception is correctly applied.

Indeed, Liberty's assertion that the "ministerial exception" applies to employees of religious institutions such as Palmer, based on facts such as

acts of prayer and "integration" of Christian principles, is nothing less than giving Liberty categorial deference to decide for itself who is – and is not – a "minister" under the exception. This Court has never given such deference to religious institutions and, instead, has expressly declined to grant it. *See, e.g., Hough v. Roman Catholic Diocese of Erie*, 2014 WL 834473 at*4 (W.D. Pa. Mar. 4, 2014) ("This 'sincere belief' by the employer was not enough for the majority, despite Justice Thomas' urging, and cannot be the sole basis for the application of the ministerial exception by this Court here."). It should not change its mind now.

CONCLUSION

Simply stated, issue two of Liberty's cross-petition and issue four of Petitioner's opening petition ask this Court to decide whether the word "exception" in the "ministerial exception" is actually a real limitation or an illusory use of semantics. If this Court is truly going to tell the citizens of this Republic that an employee of a religious institution transmogrifies into a minister simply because she integrates Christian principles into her daily job duties or engages in acts of prayer while on the job – that is, that such a circumstance means that such an employee forfeits all anti-discrimination rights under state and federal law through her employment at a religious institution – then it should explicitly say so. And if it is ***not*** going to adopt such a broad and sweeping rule of law for the ministerial exception, *as it should*, then it should say that as

well. In either event, Liberty's conditional cross-petition should be granted as to issue two and denied as to issue one.

/s/ Richard F. Hawkins, III
Richard F. Hawkins, III
Counsel of Record
THE HAWKINS LAW FIRM, PC
2222 Monument Avenue
Richmond, VA 23220
(804) 308-3040
hawkins@thehawkinslawfirmpc.com

Counsel for Respondent