No. 18-

IN THE

Supreme Court of the United States

MARLON PENN,

Petitioner,

v.

NEW YORK METHODIST HOSPITAL,
PETER POULOS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The courts below applied the First Amendment "ministerial exception" to bar

Petitioner Marlon Penn's ("Penn") Title VII suit against his employer New York Methodist Hospital ("NYMH") and Peter Poulos ("Poulos"). Under *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), and Circuit Court precedent, the "ministerial exception" can apply only if: (1) Penn is a "minister" and (2) NYMH is a "religious" institution. This Court has not defined the proper analysis to determine if an employer is a "religious" institution, so the Second Circuit wrongly used a "sliding scale" approach, giving too much weight to Penn's job duties as an ecumenical chaplain, where in 1975, NYMH renounced its affiliation with the United Methodist Church, removed from its Purpose, the provisions which required it to maintain "its Christian genesis and its Church related character" and is now an avowedly secular institution.

Therefore, the questions presented are:

1. Since *Hosanna-Tabor* did not address how to decide if an employer is "religious," should the Court review this case and define the proper analysis in determining the necessary extent or scope of an institution's "religious" activities or character in order for it to invoke the "ministerial exception?"

2. Is the Second Circuit's opinion contrary to *Hosanna-Tabor* and Circuit Court precedent by holding that NYMH's operation of an ecumenical chaplain

department makes it a "religious" hospital, despite its renunciation of its affiliation with the United Methodist Church, its removal of the requirement to maintain "its Christian genesis and its Church related character" from its Purpose and its being avowedly secular overall?

3. Can an avowedly secular hospital, such as NYMH, avoid anti-discrimination laws simply by employing ecumenical chaplains, especially where allowing Penn to sue NYMH in this case does not excessively entangle the courts in any religious issues?

PARTIES TO THIS PROCEEDING

Petitioner Marlon Penn was the Plaintiff-Appellant below.

Respondent New York Methodist Hospital was a Defendant-Appellee below.

Respondent Peter Poulos was a Defendant-Appellee below.

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STATEMENT OF BASIS FOR JURISDICTION

The Second Circuit entered judgment on March 7, 2018 and affirmed the order of the District Court granting the Respondents summary judgment against the Petitioner. The Second Circuit denied the Petition for Panel Rehearing or for Rehearing *En Banc* on May 14, 2018. This Court has jurisdiction to review this Petition for *Certiorari* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. 42 U.S.C. § 2000e-2(a)

(a) Employer practices

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

3. 42 U.S.C. § 2000e-3(a)

(a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual or for a labor organization to discriminate against any member thereof

or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

4. 42 U.S.C. § 1981:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other.

(b) 'Make and enforce contracts defined

For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental

discrimination and impairment under color of state law.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Penn, as an African-American Methodist, sued his employer NYMH in the District Court alleging that it had: (1) refused to promote him based on his race and religion in violation of Title VII and 42 U.S.C. § 1981 and (2) retaliated against him after he filed discrimination charges with the New York City Commission on Human Rights ("CCHR") and the Equal Employment Opportunity Commission ("EEOC"), in violation of Title VII, 42 U.S.C. § 1981 and certain state and city laws.

The District Court granted NYMH's motion for summary judgment and held that the "ministerial exception" barred Penn's employment discrimination claims against NYMH because it is a "religious" institution exempt under the First Amendment from federal and state employment discrimination laws with regards to its employment of Penn as a chaplain.

Therefore, the District Court had federal jurisdiction over the federal constitutional and statutory questions before it under 28 U.S.C. § 1331.

B. Statement of Facts

1. Introduction

On December 12, 2011, Penn filed a Complaint *pro se* in the District Court against NYMH under Title VII

and 42 U.S.C. § 1981 alleging that NYMH engaged in impermissible race and religious discrimination when it denied Penn a promotion. Penn also claimed in the Complaint that, after he filed discrimination charges, NYMH retaliated against him and ultimately terminated his employment.

The District Court granted NYMH's motion for summary judgment on the basis that the "ministerial exception" under the First Amendment, a principle this Court first recognized in *Hosanna–Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), precludes a civil suit against a "religious" institution for unlawful discrimination in its ecclesiastical decisions relating to the employment of a "minister" of its faith (Appendix at 46a-61a). A majority of a Second Circuit panel affirmed this decision (Appendix at 1a-27a), and the panel and the Second Circuit sitting *en banc* denied Penn's petition for a rehearing (Appendix, 62a).

Penn brings this Petition for *Certiorari* to ask the Court to accept review of whether the Second Circuit's application of the "ministerial exception" to this case decides an important question of federal law which this Court has not settled or conflicts with this Court's and the various Courts of Appeals' prior rulings on this issue.

Specifically, it is an open question before this Court as to the required analysis to determine the necessary extent or scope of an institution's "religious" activities or character in order to invoke the "ministerial exception." Given this vacuum, the Second Circuit employed a so-called "sliding scale" approach conflating the issues of whether Penn is a "minister" and NYMH is a "religious" hospital. NYMH, though, has been an admittedly secular

institution for more than 40 years, and the Second Circuit primarily relied on Penn's spiritual duties as a part-time chaplain in applying the exception here.

2. NYMH's Disassociation from the United Methodist Church

In 1881 and as a result of encouragement by Reverend Dr. James Buckley, then a pastor at the Methodist Episcopal Church in Stamford, Connecticut, a successful financier named George Ingraham Seney provided funding for the United Methodist Church to found NYMH on the condition that NYMH be "a GENERAL HOSPITAL, open to Jew and Gentile, Protestant and Catholic, Heathen and Infidel, on the same terms."

As late as 1973, the Restated Certificate of Incorporation of NYMH filed with the New York Department of State provided for a formal relationship between the United Methodist Church and NYMH:

The text of the Restated Certificate of Incorporation for [NYMH] as heretofore and hereby amended reads as follows:

> 2. The purpose of the corporation is to establish, maintain, operate and conduct a hospital, including an infirmary, dispensary or clinic, for the medical and surgical aid, care and treatment of persons in need thereof. The corporation in maintaining its Christian genesis and its Church-related character in the performance of its functions shall nurture a meaningful and effective relationship with The

> United Methodist Church and its participating boards, institutions and congregations.
>
> 6. The said board of trustees shall consist of forty trustees divided into four classes of nine trustees each and in addition, four trustees, *ex-officio*, consisting of the following: the Bishop of New York Area of The United Methodist Church[,] and the President of Guild of Methodist Hospital.

(Emphasis added).

However, in 1975, by the following amendment to its Restated Certificate of Incorporation, NYMH affirmatively severed its relationship with the United Methodist Church and removed the Purpose which required it to maintain "its Christian genesis and its Church related character":

> 3. The certificate of incorporation, as heretofore amended, is further amended: (a) to delete provisions relating to the corporation's relationship with The United Methodist Church and (b) to change the number of trustees from forty to thirty-eight by deleting the requirement that the Bishop of the New York area of The United Methodist Church and the President of the Guild of Methodist Hospital be trustees, *ex-officio*.
>
> 4. The text of the Restated Certificate of Incorporation for [NYMH] as heretofore and hereby amended reads as follows:

> 2. The purpose of the corporation is to establish, maintain, operate and conduct a hospital, including an infirmary, dispensary or clinic, for the medical and surgical aid, care and treatment of persons in need thereof.

(Emphasis added).

After NYMH severed its relationship with the United Methodist Church, it has been operated and held out to the public as a secular institution.

A NYMH publication entitled, "Residency Program in Internal Medicine," published between 2013 and 2014, as well as the "Welcome Letter" published on NYMH's website, each pronounce that NYMH is a "secular" institution.

NYMH's mission statement states that it is "a member of the New York-Presbyterian Healthcare System" and it is "a non-sectarian voluntary institution, which includes an acute care general facility and an extensive array of ambulatory and outpatient sites and services." New York-Presbyterian Healthcare System is a secular institution comprised of wholly-secular entities.

A United Methodist Association Journal article published in October 1994 does state that "[NYMH's] Methodist influence can still be seen in the hospital through the philosophy of equality, individual attention, charity, faith, and hope that is communicated to NYMH employees every day." The article also highlighted NYMH's Methodist archives project, the 24-hour

service provided by the pastoral care department and the memorial plaque in front of NYMH commemorating its "status as the first Methodist hospital in the world." However, the article also specifically states that NYMH is not formally affiliated with the United Methodist Church.

By an e-mail, dated November 13, 2014, the United Methodist Information Service noted that the relationship between NYMH and the United Methodist Church is primarily "historical" in nature. In addition, the United Methodist Association of Health and Welfare Ministries' internet material makes it clear that in order for any unit of the United Methodist Church to maintain a relationship with a health and welfare organization, such as NYMH, the terms of the legal and financial relationship between the church and such an organization must be specifically memorialized in a written "Relationship Statement." There is no evidence that such "Relationship Statement" exists between NYMH and the United Methodist Church.

The Board of Trustees of NYMH has recently been comprised of around 17 individual members, but, at most, only three of them were Methodist ministers, but all three of them, including the chair of the Board, did not represent the church in the Board's affairs.

3. NYMH's Ecumenical Pastoral Care Department

Like most secular hospitals, NYMH has a Clinical Pastoral Education ("CPE") Residency Program as well as a Pastoral Care Department ("the Department") which provides chaplaincy services to NYMH's patients, their families and staff. The Department and the CPE

program at NYMH are accredited and regulated by the Association of Professional Chaplains and the Association of Clinical Pastoral Education, Inc., both of which are secular organizations. *See* www.professionalchaplains.org and www.acpe.edu. The Department and the CPE program are both headed and run by Poulos, who's Greek Orthodox.

The Department's stated mission on NYMH's website is "[t]o see that the needs of the whole person - mind and spirit as well as body - are met, [and] [NYMH] has chaplains available 24 hours a day for spiritual and emotional support for all patients staying at the hospital."

Ordination is not a requirement for employment as a chaplain at NYMH. Rather, the only requirements for a chaplain position at NYMH are a master's degree in divinity or its equivalent and four units of CPE at any accredited CPE training center. Poulos, the Director of the Department, maintained that the chaplains' ministry was "spiritual" and not based on any particular religion. Poulos insisted that chaplains should let patients know that NYMH was not a church but a hospital, and, if any patient wanted more from a chaplain, the patient should contact his or her home minister or congregation.

As Poulos noted in his testimony, most secular hospitals have a pastoral care department. Poulos was unaware of any hospital – whether secular or religious – that did not have a pastoral care department. Indeed, several chaplains employed at NYMH around the same time as Penn were trained or were certified as chaplains at the CPE program at the United States Department of Veteran Affairs, Manhattan Medical Center – an unquestionably secular institution.

In connection with its chaplaincy services, NYMH maintained on its premises a Moslem prayer room, a Jewish prayer room and a Christian chapel. NYMH also employed chaplains of different religious creeds in the Department, including, but not limited to, Moslem, Orthodox Jewish, Catholic, Jehovah's Witness, Methodist and Seventh-Day Adventist.

4. NYMH as an Alleged "Religious" Institution

In support of its motion for summary judgment, NYMH submitted the affidavit of Lyn Hill, NYMH's Vice President of Communications and External Affairs, purporting to authenticate an unexecuted copy of NYMH's alleged bylaws, but Hill testified at her deposition that she had no personal knowledge about the content of the bylaws and she had never read them. Despite repeated requests from Penn, NYMH never produced an executed or authenticated copy of the bylaws.

While expressly refusing to address Penn's objection to admissibility into evidence of an unauthenticated copy of NYMH's bylaws, the Second Circuit panel found that the bylaws continue to require "significant representation from the community and the United Methodist Church" on its Board of Trustees (Appendix at 58a) and the bylaws further require NYMH to select a president "with the advice and counsel of the Bishop of the New York area of the United Methodist Church" and "the Order of Business in the bylaws also mandates that every regular Board meeting begin with prayer" (Appendix at 5a-6a). However, as Judge Droney noted in his dissenting opinion:

> [T]hose provisions [of the bylaws] contradict the 1974 amendment to the Certificate

> of Incorporation, as well as NYMH's admissions that the Methodist ministers on the Board (including the chair) "do[ ] not . . . represent any unit of the United Methodist Church [in their role] on the Hospital Board of Trustees."
>
> (Appendix at 34a footnote 3) (J. Droney dissenting)

Further, although NYMH had long severed its affiliation with the United Methodist Church and deleted from its Purpose the provisions that required it to maintain "its Christian genesis and its Church related character," the Second Circuit panel found that NYMH has retained "significant aspects of its religious heritage" in other ways. At the hospital's employee orientation, Poulos reminds every employee that "patients are human beings who are created in the image of God" (Appendix at 6a). Additionally, the hospital has a "pastor's clinic" for several week-long sessions each year, where it offers free health screenings and educational programming to 10-12 Methodist ministers and their spouses (*Id.*). NYMH also makes a yearly philanthropic appeal to the "Methodist churches in [its] community." (*Id.*).

Judge Droney dissented from the Second Circuit panel's opinion and noted that NYMH holds itself out to the public as a "secular" hospital:

> In materials distributed to candidates for its internal medicine residency program, NYMH self-identifies as a 'secular institution' [App. 340, 347] ('Founded in 1881, New York Methodist

> Hospital is the oldest of the 78 hospitals that were founded by the United Methodist Church. The Hospital, *now a secular institution*, is located in the Park Slope neighborhood of Brooklyn, New York' [Judge's emphasis]. A NYMH webpage directed to residency candidates also states that NYMH is 'now a secular institution' [App. 353] ('New York Methodist Hospital, founded in 1881, is the oldest of the seventy-eight hospitals that were founded by the United Methodist Church. *Now a secular institution*, the Hospital became affiliated with New York–Presbyterian Hospital and the Weill Cornell Medical College in 1993' [Judge's emphasis].

(Appendix at 35a) (J. Droney dissenting) (some emphasis added).

Judge Droney continued in his dissent to point out that NYMH had eschewed an affiliation with the United Methodist Church in most respects and for many years: "There is also no evidence . . . that the Methodist Church retains any influence over any part of the Hospital's [operations]. Nor is there evidence that Methodist religious doctrine guides NYMH or its Department of Pastoral Care's operations." (Appendix at 34a) (J. Droney dissenting).

Judge Droney also noted that NYMH and the Department are not "Methodist" anymore, but rather are ecumenical or nonsectarian:

> In describing its primary objectives, NYMH's mission statement does not refer to the United

> Methodist Church or Methodism. Only one of the six objectives contains any reference to religion, the reference to the pastoral care department. However, the pastoral care department, according to the mission statement, is 'ecumenical,' *i.e.*, not Methodist.
>
> * * *
>
> None of the three full-time chaplains of the Hospital's Department of Pastoral Care are Methodist. Defendant Peter Poulos, its Director, is Greek Orthodox. The second is a rabbi and the third a non-Methodist Protestant. If the Department were in fact Methodist-oriented, one would expect its director to be Methodist, or for at least one of its permanent chaplains to be Methodist.

(Appendix at 36a-37a) (J. Droney dissenting).

5. Penn's Job Duties and NYMH's Employment Discrimination

Penn began his career with NYMH in January 2002 in its CPE program as a chaplain trainee (also referred to as a chaplain resident or student chaplain). Penn completed the CPE program in August 2003, having acquired five units of CPE. NYMH then employed Penn in the position of part-time staff chaplain in the Department until his termination on December 6, 2011.

In 2007, Penn voluntarily sought and was ordained as a Methodist minister. Ordination, though, was not a requirement for employment as a chaplain at NYMH.

Penn was "primarily responsible for ministry" in this role. Penn coordinated the distribution of Bibles, conducted an in-hospital memorial service for an employee who died and "maintained . . . active, on-going pastoral care to staff."

Despite Penn's consistent interest in a promotion, NYMH never offered him a full-time staff chaplain position. In September 2006, NYMH hired Rabbi Spitz as a full-time chaplain without interviewing Penn. In August 2010, NYMH sought another full-time chaplain, this time to replace a Catholic nun. Penn expressed interest in the position, but Poulos initially tried to hire a Catholic and mentioned this to Penn. When Poulos could not find a viable Catholic candidate, he offered the position to an Asian chaplain who was not Catholic.

On September 26, 2010, Penn filed an administrative complaint with the CCHR and the EEOC, alleging that NYMH had failed to promote him because of his race and religion. Penn also alleged that NYMH failed to reasonably accommodate his religious beliefs because it did not allow him to take time off on Sunday mornings to attend church services in Mount Vernon, New York. After exhausting his administrative relief with the EEOC and CCHR, Penn filed his suit in the District Court.

In addition to claiming race discrimination, Penn asserts that, after he filed his administrative complaint, NYMH retaliated against him by issuing unwarranted and unjustified write-ups, disciplinary charges or notices, procured a female co-worker to fabricate a complaint of sexual harassment against Penn and ultimately terminated his employment.

NYMH alleges it based its adverse employment decisions against Penn on other factors, such as: on March 13, 2011, Penn improperly completed a "referral card," which resulted in a patient dying without receiving last rites. On the same day, a woman, whose fetus had died, complained about Penn's counseling because he commented on her partner's race. At an Easter Service in 2011, Penn told a Catholic nurse that she could not receive communion until the following day, although he purportedly knew that she could receive communion at the Catholic church across the street. Finally, in November 2011, a resident chaplain complained to Poulos that Penn allegedly made sexually inappropriate comments to her and hugged her against her will. After this particular incident, NYMH's Human Resources Department initiated an investigation into the complaint and decided to end Penn's employment.

REASONS FOR GRANTING THE PETITION

A. This Court Has Not Defined the Necessary Extent or Scope of an Institution's "Religious" Activities or Character in Order to be Able to Invoke the "Ministerial Exception," and the Second Circuit's Opinion is Contrary to *Hosanna-Tabor* and Circuit Court Precedent.

This case is a matter of exceptional importance because this Court has not discussed nor attempted to define how to determine what constitutes a "religious" institution entitled to the "ministerial exception." Due to this legal void, an avowedly secular institution, such as NYMH, can play fast and loose with how it presents itself to the public, claiming a secular status when it serves its marketing interests, but falling back on its historical, yet

long discontinued, connections to the United Methodist Church when it serves its legal interests. Consequently, although NYMH no longer had the purpose to maintain "its Christian genesis and its Church related character" the Second Circuit held that NYMH is a "religious" institution pursuant to a flawed "sliding scale" analysis contrary to the purposes of the exception as announced in *Hosanna-Tabor*. This Court should reject the Second Circuit's analysis and redefine how a court is to determine if an employer is a "religious" institution entitled to the exception, in accordance with proper constitutional principles.[1]

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1. As Judge Droney noted in his dissent:

The majority does not set forth factors for a court to consider in determining whether an organization qualifies as a "religious institution," as "marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310. In the related Title VII religious exemption context, the Third Circuit has set forth the following factors in determining whether an organization is religious:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

In *Hosanna-Tabor*, this Court first held that "there is a 'ministerial exception,' grounded in the First Amendment that precludes application of [anti-discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188 (emphasis added).

> The members of a religious group put their faith in the hands of their ministers. 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,

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LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007). The Ninth Circuit has held that an entity qualifies for the Title VII religious exemption when, at least, it: "[1] is organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam). If these factors were applied to NYMH, they would weigh against NYMH being considered a "religious institution."

(Appendix at 31a-32a footnote 2) (J. Droney dissenting).

> which prohibits government involvement in such ecclesiastical decisions.

Id. at 188-89 (emphasis added).

Therefore, NYMH can invoke the exception here only if: (1) Penn is a "minister" and (2) NYMH is a "religious" group or institution. This Court in *Hosanna-Tabor* engaged in a painstaking analysis of that plaintiff's duties as a teacher at the defendant's school in determining she was a "minister" – deciding in the affirmative because the congregation issued her a "diploma of vocation" according her the title "Minister of Religion, Commissioned," the teacher's title as "minister" reflected a significant degree of religious training followed by a formal process of commissioning, the teacher held herself out as a "minister" by accepting the formal call to religious service and by claiming a special housing allowance on her taxes, and her job duties reflected a role in conveying the church's message and carrying out its mission. *Id.* at 190-93.

The Court explained that "[t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation without regard to the nature of the religious functions performed and [other considerations stated above]." *Id.* at 194.

However, the Court in *Hosanna-Tabor* left open the issue of what constitutes a "religious" group or institution for the purposes of the exception because the resolution of that issue was unnecessary as the defendant in that case was a Lutheran church which was part of the Lutheran Church–Missouri Synod and operated a

school offering a "Christ-centered education" to students in kindergarten through eighth grade. Given the clear religious characteristics of the employer in that case, the Court instead focused on whether the plaintiff teacher was a "minister" under the exception because she was admittedly performing mostly secular duties as a grade-school teacher. "We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers [the plaintiff], given all the circumstances of her employment." *Id*. at 190 (emphasis added).

In some Circuit Court cases determining if a ministerial exception applies, the emphasis has likewise been on the employee's status as a "minister" because the employer was decidedly a "religious entity." *See, e.g.*, *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir.1989) (the employer was a non-profit religious corporation); *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017) (where a school principal brought an employment discrimination suit against the Catholic Archdiocese of New York, which was in direct control of the school); *Geary v. Visitation of the Blessed Virgin Mary Parish Schoo*l, 7 F.3d 324 (3d Cir. 1993) (the employer was a church-operated school); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (an officer in the Salvation Army was an ordained minister who sued the church for employment discrimination).

Some Circuit Courts have tackled the issue of what constitutes a "religious" group or entity for the purposes of the exception. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc*., 363 F.3d 299 (4th Cir. 2004),

the defendant was a Jewish retirement home which maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws and placed a mezuzah on every resident's doorpost. In holding that the home was entitled to the exception, the court stated that "a religiously affiliated entity is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." *Id.* at 310; *see also Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 562 (6th Cir. 2018). The court in *Shaliehsabou* also stated that "the exception does not apply to the religious employees of secular employers or to the secular employees of religious employers." *Id.* at 307 (emphasis added).

In *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015), the plaintiff worked at InterVarsity Christian Fellowship/USA ("IVCF") as a "spiritual director" involved in providing religious counsel and prayer. She informed IVCF that she was contemplating divorce, at which point IVCF put her on paid—and later unpaid—leave. When her marital situation continued to worsen despite counseling efforts, IVCF terminated her employment. In assessing the applicability of the "ministerial exception" to the plaintiff's claims, the Sixth Circuit recognized that the defendant "was not a church" as in *Hosanna-Tabor*, *supra*, so the court had to "first determine whether IVCF is an organization that can assert the ministerial exception." *Id.* at 833 (emphasis added). Ultimately, the court held that the exception applied because the defendant was an evangelical mission serving students and faculty on college campuses, and it was "undisputed that . . . it was

a Christian organization, whose purpose is to advance the understanding and practice of Christianity." *Id.* at 834.

In the two cases the Second Circuit cited here regarding the applicability of the exception to an employee engaged in pastoral care at a hospital, each of the defendants had clear and continuing religious connections. In *Hollins v. Methodist Healthcare*, 474 F.3d 223 (6th Cir. 2007), the defendant "operated Methodist Hospital in Memphis in accordance with the Social Principles of The United Methodist Church and [was formally] associated with the Conferences of the United Methodist Church, a clearly religious organization." *Id.* at 224.

In *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), the plaintiff was an ordained Episcopal priest, and the pastoral care department required those employed there to be "ordained and endorsed by a religious faith group." *Id.* at 361. The court also held that the hospital was a "religious" institution based on its formal connections to the Episcopal Church:

> The hospital's Board of Directors consists of four church representatives and their unanimously agreed-upon nominees. Its Articles of Association may be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church (U.S.A.) . . . While St. Luke's provides many secular services (and arguably may be primarily a secular institution), in its role as

> Scharon's employer it is without question a religious organization. As mentioned earlier, the job description of the chaplain position at St. Luke's states that a chaplain '[p]rovides a religious ministry of pastoral care, pastoral counseling ... and liturgical services for persons in the hospital.' According to the job description, such work is seventy percent of a chaplain's duties.

929 F.2d at 362.

The courts in *Hollins* and *Scharon* relied on the defendant hospital's formal religious connections and obvious religious characteristics as a whole. Neither hospital in those cases had formally renounced its ties with a church, nor was there any evidence that the hospital held itself out to the public as a secular institution. NYMH has done both.

Here, the Second Circuit asserted it based its findings on the opinions in *Holland* and *Scharon* (Appendix at 18a), but erroneously conflated the compartmentalized ministerial workings of the Department with the entirety of NYMH's secular activities and purpose (Appendix at 19a-21a). The Second Circuit stated: "[T]he district court therefore properly applied the ministerial exception because the Department of Pastoral Care within the NYMH had the 'obvious religious characteristics' of a 'religious group' and employed Mr. Penn as a minister." (Appendix at 21a).

The Department, however, is not the employer of Penn and not a separate entity from NYMH. For instance, Lyn

Hill had to sign off on Penn's termination after NYMH's Human Resources Department investigated a complaint against him (*see* Appendix at 11a). As Judge Droney stated in his dissent:

> Penn and the other members of the Department of Pastoral Care are, at most, 'religious employees of a secular employer' [citing *Shaliehsabou, supra*, 363 F.3d at 307]. The presence of a non-sectarian chaplaincy department cannot transform an otherwise secular hospital into a religious institution for purposes of the ministerial exception. If it could, most hospitals would be exempt from anti-discrimination laws, as most—even clearly secular hospitals—have chaplaincy departments, [citing] Wendy Cage, *et al.*, *The Provision of Hospital Chaplaincy in the United States: A National Overview*, 101 S. Med. J. 626, 628-29 (2008).

(Appendix at 43a-44a) (J. Droney dissenting).

Without guidance from this Court as to how to determine the applicability of the ministerial exception where an avowedly secular institution, such as NYMH, suddenly reverses course and claims to be "religious," the Second Circuit instead endorsed a "sliding scale" approach based on the District Court of Connecticut's opinion in *Musante v. Notre Dame of Easton Church*, No. 301CV2352MRK, 2004 WL 721774 at *6 (D. Conn. Mar. 30, 2004). The Second Circuit explained that this test requires an inquiry "where the nature of the employer and the duties of the employee are both considered in

determining whether the exception applies. [T]he more pervasively religious an institution is, the less religious the employee's role need be in order to risk first amendment infringement." (Appendix at 13a).

In employing this "sliding scale," the Second Circuit, again, focused mostly on Penn's duties in the Department as a minister:

> While NYMH may have shed significant aspects of its religious identity by amending its Certificate of Incorporation, the hospital's Department of Pastoral Care has retained a critical aspect of that religious identity in order to provide religious services to its patients. These services, while not limited to those who are Methodist, are indisputably religious . . .
>
> . . . While Mr. Penn challenges whether the 'obvious religious characteristics' of his work and the NYMH satisfy the legal standard of being a 'religious group,' he does not and cannot dispute that he performed religious services for NYMH's Department of Pastoral Care and, thus, served that department's religious purpose. The district court therefore properly applied the ministerial exception because the Department of Pastoral Care within the NYMH had the 'obvious religious characteristics' of a 'religious group' and employed Mr. Penn as a minister.

(Appendix at 21a).

Employing this "sliding scale" approach in this case caused the Second Circuit to overemphasize Penn's job duties as a chaplain and downplay NYMH's avowedly secular status. Where a hospital employs ecumenical chaplains to offer comfort to patients and their families, but the hospital is decidedly secular in its overall operation, it is misguided for a court to concentrate on the employee's "religious" duties in deciding if his employer is a "religious" entity to which the "ministerial exception" applies. Whether or not an employer is "religious" should be decided as a separate question, especially in a case, such as this, where the Department is only a division or segment of NYMH and is not Penn's employer.

In *Altman v. Sterling Caterers, Inc.*, 879 F. Supp. 2d 1375 (S.D. Fla. 2012), for example, a rabbi worked for a caterer to monitor and certify the kosher food the caterer provided to Jewish clients. The rabbi sued the caterer for violating the Fair Labor Standards Act by not paying him overtime wages. The caterer claimed the "ministerial exception" applied because the rabbi was engaged in clearly religious duties. The court, though, relied on the Fourth Circuit's opinion in *Shaliehsabou, supra*, in holding that the exception could not apply because the employer was a secular entity:

> But the Court need not grapple with the core issue of whether the ministerial exemption applies to FLSA cases. Instead, the Court can decide the competing summary judgment motions by concluding that the ministerial exemption (if it applies at all) is inapposite here because Sterling is a for-profit commercial caterer, not a religious institution.

> Defendants rely upon *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir.2004), where the appellate court relied upon the ministerial exemption to affirm a summary judgment in favor of a predominantly Jewish nursing home in an FLSA action brought by a mashgiach seeking unpaid overtime wages. Although the court there used the primary duties test to determine the scope of the ministerial exemption it found existed under the FLSA, it also limited its holding by adopting several principles which restrict the ministerial exemption: (1) the exemption applies only to employment relationships between religious institutions and their ministers; (2) the exemption does not apply to commercial activities of religious institutions; and (3) the exemption does not apply to the religious employees of secular employers or the secular employees of religious employers.

879 F. Supp. 2d at 1384 (emphasis added).

The Fourth Circuit's analysis in *Shaliehsabou*, as the Southern District of Florida applied it in *Altman*, makes more sense than the so-called "sliding scale approach the Second Circuit adopted from *Musante* and relied upon here. A court should determine whether an employer is secular or religious as an issue separately from the inquiry determining if an employee himself is a minister.

The present context concerning a hospital chaplain demonstrates the importance of separating the "religious" entity and "minister" issues. Most, if not all, hospitals employ chaplains, whether the hospital is secular or

denominational. The application of the ministerial exception in this instance to NYMH would give secular hospitals with a pastoral care department license to discriminate freely in the employment of its chaplains, all the while holding itself out as secular to the public. There are many other contexts in which a secular employer may hire a minister, the rabbi in *Altman* being only one example. NYMH's "religious" versus "secular" bait-and-switch would rightly end if this Court were to define the necessary extent or scope of an institution's "religious" activities or character in order for an employer to invoke the "ministerial exception."

B. NYMH and Any Other Secular Hospital Should Not be Allowed to Avoid Federal Anti-Discrimination Laws Simply by Employing Ecumenical Chaplains, and Penn's Suit Here Would Not Excessively Entangle the Courts in Religious Issues.

The "ministerial exception" prevents entangling the courts in ecclesiastical decisions. For a statute to withstand scrutiny under the Establishment Clause of the First Amendment, "[it first] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ... [and third] the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

"Entanglement may be substantive—where the government is placed in the position of deciding between competing religious views—or procedural—where the state and church are pitted against one another in a protracted legal battle. The salience of this concern depends upon the claim asserted by the plaintiff." *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008).

NYMH is a secular institution and was Penn's employer, not the Department. The ecumenical, nonsectarian, "religious" activities of the Department do not present the same entanglement concerns under *Lemon* as the pastoral care department at the Episcopal hospital in *Scharon*. As Judge Droney stated in his dissent: "[T]he interfaith nature of the department means that it is not run according to the tenets of any particular religion, thereby reducing the likelihood that evaluating the reasons for the termination of an employee, such as Penn, would plunge a court into a maelstrom of church policy, administration, and governance," (citing *Rweyemamu, supra*, 520 F.3d at 209).

CONCLUSION

The Court should grant this Petition and decide the necessary extent or scope of an institution's "religious" activities or character in order for it to invoke the "ministerial exception" and whether an avowedly secular hospital, such as NYMH, meets that test.

Dated: August 2018.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 7, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-474-cv

August Term, 2016

MARLON PENN,

Plaintiff-Appellant,

—v.—

NEW YORK METHODIST HOSPITAL,
PETER POULOS,

Defendants-Appellees.

January 9, 2017, Argued
March 7, 2018, Decided

Appeal from the United States District Court
for the Southern District of New York.
No. 11-cv-9137 — Nelson S. Román, *Judge.*

Before: HALL, DRONEY, *Circuit Judges*, AND BOLDEN, *District Judge.**

* Judge Victor A. Bolden, of the United States District Court for the District of Connecticut, sitting by designation.

Appendix A

Marlon Penn appeals from a January 21, 2016 order of the United States District Court for the Southern District of New York (Román, J.), granting summary judgment for the Defendants. Mr. Penn—a former duty chaplain at New York Methodist Hospital—brought a lawsuit alleging that New York Methodist Hospital and Peter Poulos discriminated against him on the basis of his race and religion, and retaliated against him after he filed charges with the U.S. Equal Employment Opportunity Commission and the New York City Commission on Human Rights. New York Methodist Hospital, because of its history and continuing purpose, through its Department of Pastoral Care, is a "religious group." Mr. Penn's role within the Department of Pastoral Care was to provide religious care to the hospital's patients and religious care only. Therefore, the First Amendment's Religion Clauses warrant the application of the ministerial exception doctrine and the dismissal of this lawsuit. The decision of the district court is **AFFIRMED**.

JUDGE DRONEY dissents in a separate opinion.

BOLDEN, *District Judge*:

In *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017), this Court recently addressed the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012), adopting the "ministerial exception" doctrine and recognizing that the First Amendment protects religious employers from employment discrimination lawsuits brought by their

ministers. This case requires us to address the doctrine once again and determine whether a hospital—only historically connected to the United Methodist Church but still providing religious services through its pastoral care department—can invoke it. We hold that it can.

Between 2004 and 2011, Marlon Penn worked at the New York Methodist Hospital ("NYMH") as a Duty Chaplain. Peter Poulos, as Director of the Pastoral Education Program and the Department of Pastoral Care, supervised Mr. Penn's employment. In November 2011, NYMH and Mr. Poulos terminated Mr. Penn's employment. On December 12, 2011, Mr. Penn filed suit, bringing claims under Title VII of the Civil Rights Act, 42 U.S.C. § 1981, and the anti-discrimination laws of both the State and City of New York. Defendants-Appellees moved for summary judgment, arguing that the Establishment and Free Exercise Clauses of the First Amendment barred Mr. Penn's claims. The district court (Nelson Román, Judge), granted summary judgment. We affirm.

I. BACKGROUND

A. The History of New York Methodist Hospital

Founded in 1881 at the "behest" of a Methodist minister and with financing from a Methodist philanthropist, Joint App'x at 383, the United Methodist Church established NYMH, the first Methodist hospital in the world. Joint App'x at 108-110. In 1975, however, NYMH amended its Certificate of Incorporation to remove all reference to its "Church related character" and "relationship with

The United Methodist Church." Joint App'x at 43. It also deleted from the Certificate of Incorporation the requirement that the Bishop of the New York area United Methodist Church and the President of the Guild of the Methodist Hospital be "trustees ex-officio." Joint App'x at 293, 401. Now, NYMH's Articles of Incorporation do not mention religious activity or a religious mission. Instead, the Articles state that "the purpose of the corporation is to establish, maintain, operate and conduct a hospital including an infirmary, dispensary or clinic for the medical and surgical aid, care and treatment of persons in need thereof." Joint App'x at 292.

NYMH also promotes its secular nature. For example, the "Welcome Letter" from Executive Vice President Stanley Sherbell to new medical residents at NYMH, which is published on the hospital's webpage, calls the hospital a "secular institution." Joint App'x at 353. Additionally, NYMH "downsized" its "Department of Church Relations" about fifteen years ago, according to Lyn Hill, NYMH's Vice President of Communication and External Affairs. Joint App'x at **393**. The record also reveals that NYMH does not have a formal relationship with the United Methodist Association of Health and Welfare Ministries. Joint App'x at 433.

Nevertheless, vestiges of NYMH's religious heritage remain. It has steadfastly kept the word "Methodist" in its name, despite organizational and operational changes. In 1993, for example, NYMH became affiliated with the New York-Presbyterian Health Care system, but continued to call itself a "Methodist" hospital. Joint

App'x at 51. More than twenty years ago, but after the amendment of NYMH's Certificate of Incorporation, the United Methodist Association Journal observed that "the [hospital's] Methodist influence can still be seen in the hospital through the philosophy of equality, individual attention, charity, faith, and hope that is communicated to NYMH employees every day." Joint App'x at 108-10. The article also highlighted the hospital's Methodist archives project, the twenty-four hour service provided by the pastoral care department, and the memorial plaque in front of NYMH commemorating its "status as the first Methodist hospital in the world." *Id.*

In 2006, NYMH produced a booklet commemorating its 125th anniversary and noted "its identity as the mother hospital of Methodism." Joint App'x at 60. The Hospital's current Employee Handbook also emphasizes this history, Joint App'x at 68, and states that its mission is "to provide an active ecumenical program of pastoral care and conduct[] a clinical pastoral program." Joint App'x at 67.

NYMH's by-laws continue to require "significant representation from the community and the United Methodist Church" on its Board of Trustees. Joint App'x at 56; Joint App'x at 84-85. When Mr. Penn filed suit, three of NYMH's seventeen Board members, including the Chairman, were Methodist ministers. Joint App'x at 383. The three ministers did not serve as representatives of the Church on the Board of Trustees, however, and NYMH could not identify how exactly they were appointed. Joint App'x at 351. The by-laws further require NYMH to select a president "with the advice and counsel of the Bishop

of the New York area of the United Methodist Church." Joint App'x at 56. The Order of Business in the by-laws also mandates that every regular Board meeting begin with prayer. Joint App'x at 56, 89.

NYMH has retained significant aspects of its religious heritage in other ways. At the hospital's employee orientation, Chaplain Peter Poulos reminds every employee that "patients are human beings who are created in the image of God." Joint App'x at 52. Additionally, the hospital has a "pastor's clinic" for several week-long sessions each year, where it offers free health screenings and educational programming to ten to twelve Methodist ministers and their spouses. Joint App'x at 383. The hospital also makes a yearly philanthropic appeal to the "Methodist churches in [its] community." *Id.*

B. NYMH's Department of Pastoral Care

This case specifically concerns NYMH's Department of Pastoral Care. The Department of Pastoral Care's mission is to provide an "ecumenical program of pastoral care" to patients and to "see that the needs of the whole person—mind and spirit as well as body—are met." Joint App'x at 356. Appellee Peter Poulos is the director of the Department and also directs its pastoral training program. Joint App'x at 358.

Staff Chaplains at NYMH counsel patients, including those who are making end-of-life decisions, and "facilitate the patient's receiving [of] the rituals and practices of his/her own faith tradition when requested." Joint App'x

at 363. A chaplain in the Department of Pastoral Care is required:

- To minister to patients, their families, and staff in his/her assigned patient units in accordance with the protocols and procedures of the Department of Pastoral Care;

- To facilitate the patient's receiving the rituals and practices of his/her own faith tradition when requested;

- To counsel patients and families, who struggle with how their faith/belief systems influence the way they deal with hospitalization and decisions they may need to make;

- To counsel patients, families and staff as they deal with experiences of significant change, grief and loss;

- To offer prayer, ritual, devotional materials to patients and families when requested; and

- To participate in coordinating and conducting chapel services as requested by the Director (holiday services, employee memorial services, Sunday worship services, etc.).

Joint App'x at 407.[1] According to Vice President Hill, every chaplain is considered "clergy." Joint App'x at 43. Formal ordination is not a requirement for chaplaincy, but a Staff Chaplain must have a Master's Degree in Divinity or equivalent and four units of Clinical Pastoral Education credits at any accredited training center. Joint App'x at 368.

The Department of Pastoral Care seeks to accommodate various faiths. Joint App'x at 80; Joint App'x at 363 (agreeing to the statement "if it is necessary, you can get a chaplain from any religion, even if the hospital does not have such a chaplain on staff"). It maintains religious spaces for non-Methodists and coordinates the "hospital's meeting the different needs of the religious denominations represented in our patient population." Joint App'x at 359.

The Department of Pastoral Care is integrated into NYMH's non-pastoral work. At times, it coordinates religious events for non-pastoral staff. Mr. Poulos stated that he is often asked to say prayers at the opening of "ceremonies, graduations, [and] employee recognition [events]," and that he leads an orientation on Methodism for

1. There are two chaplain roles—Duty Chaplain and Staff Chaplain—in the Department of Pastoral Education at NYMH. According to Defendants, Duty Chaplains "primarily . . . respond[] to pages". Joint App'x at 172. Staff Chaplains, on the other hand, "affirmatively contact new patients on the floor, and take the initiative to make sure all patients in their units are aware of the Department and the services it provides." *Id.* Mr. Penn held the role of both Staff Chaplain and Duty Chaplain at various points. *See* Joint App'x at 252.

new staff. Joint App'x at 362. Additionally, representatives of the Department sit on NYMH's "interdisciplinary committees" for bioethics and "hospice/palliative care," as well as the institutional review board for research projects. Joint App'x at 367.

C. Mr. Penn's Employment at NYMH

Marlon Penn, an African-American Methodist, served as a Chaplain Trainee (or "Resident Chaplain") at NYMH's Clinical Pastoral Education Residency Program from January 2002 to July 2004. Joint App'x at 439. In July 2004, NYMH hired him as a Duty Chaplain. As Mr. Penn readily admits, he was "primarily responsible for ministry" in this role. Joint App'x at 238. He also coordinated the distribution of Bibles, conducted an in-hospital memorial service for an employee who died, and "maintained . . . active, on-going pastoral care to staff." *Id.*

During his tenure at NYMH, Mr. Penn "repeatedly requested" that NYMH promote him to a full-time Staff Chaplain position. Joint App'x at 449. Despite these requests, NYMH never promoted Mr. Penn. In September 2006, NYMH hired Rabbi Spitz as a full-time Staff Chaplain, without interviewing Mr. Penn. In August 2010, the hospital once again sought a full-time chaplain, this time to replace Sister Therese Camardella. *Id.*; Joint App'x at 446. Mr. Penn expressed interest in the position. Mr. Poulos initially tried to replace her with a Catholic and mentioned this to Mr. Penn. When he could not find a viable Catholic candidate, Mr. Poulos offered the position to Joo Hong, who was not Catholic. *Id.*; Joint App'x at 450.

Mr. Poulos stated that he chose Ms. Hong because she "received very positive feedback" from other chaplains and educators. *Id.* Mr. Poulos had also "witnessed her strong counseling skills from first hand observation." *Id.*

Mr. Poulos said that he did not consider Mr. Penn for the Staff Chaplain position for several reasons. One resident had complained to Mr. Poulos that Mr. Penn ended a service with a hymn that was only familiar to a certain group of Christians. Appellee's Br., 13-14. Mr. Poulos and Mr. Penn also disagreed about the importance of "full coverage." *Id.* According to appellees, this was a "philosophical" disagreement, because Mr. Penn felt that "effective ministry to those in pain/crisis is never contingent on . . . time constraints," Joint App'x at 207 (summarizing Mr. Penn's rebuttal statement at the New York Human Rights Commission), and Mr. Poulos disagreed. Nevertheless, during the course of his employment, NYMH also commended Mr. Penn for being "conscientious," "reliable," and "helpful." Joint App'x at 239.

On September 26, 2010, Mr. Penn filed an administrative complaint with the New York City Commission on Human Rights ("CCHR") and the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging that Appellees had failed to promote him because of his race and religion. Joint App'x at 457. He also alleged that Appellees failed to reasonably accommodate his religious beliefs, because they did not allow him to take time off on Sunday mornings to attend church services in Mount Vernon, New York. *Id.* On July 27, 2011, the

CCHR dismissed the complaint, concluding that there was "insufficient evidence to substantiate [Mr. Penn's] allegations of discrimination." Joint App'x at 209. On September 22, 2011, the EEOC sent Plaintiff a notice of right to sue, adopting the findings of the CCHR. *Penn v. N.Y. Methodist Hosp.*, No. 11-cv-9137 (NSR), 2013 U.S. Dist. LEXIS 142109, 2013 WL 5477600, at *2 (S.D.N.Y. Sept. 30, 2013).

After Mr. Penn filed his administrative complaint, Appellees allege, his performance at work began to deteriorate. Appellees pointed to many instances of misconduct. On March 13, 2011, Mr. Penn improperly completed a "referral card," which resulted in a patient dying without receiving last rites. Appellee's Br. at 14 (citing "The Anointing Incident"). On the same day, a woman whose fetus had died complained about Mr. Penn's counseling because he commented on her partner's race. *Id.* at 15 ("The Fetal Demise Incident"). At an Easter Service in 2011, Mr. Penn told a Catholic nurse that she could not receive communion until the following day, although he purportedly knew that she could receive communion across the street. *Id.* at 16 ("The April 11, 2011 Easter Service").

Finally, in November 2011, a Resident Chaplain complained to Mr. Poulos that Mr. Penn made sexually inappropriate comments to her and hugged her against her will. Joint App'x at 484-94. After this incident, NYMH's Human Resources Department initiated an investigation into the complaint and eventually decided to end Mr. Penn's employment. Joint App'x at 505.

D. Procedural History

On December 12, 2011, Mr. Penn filed suit in the United States District Court for the Southern District of New York. In his second amended complaint, he asserted that Appellees: (1) discriminated against him on the basis of his race and religion, in violation of Title VII of the Civil Rights Act of 1964 (against NYMH only), and 42 U.S.C. § 1981 (against both Appellees), and (2) retaliated against him after he filed charges with the EEOC and the Human Rights Commission, in violation of Title VII, § 1981, and various state and city laws. *See Penn*, 2013 U.S. Dist. LEXIS 142109, 2013 WL 5477600, *1-2.

On September 30, 2013, the district court partially granted Appellees' motion to dismiss by: (1) dismissing Plaintiffs claims under 42 U.S.C. § 1981 for discrimination on the basis of his race and religion as against both Appellees; (2) dismissing Mr. Penn's Title VII claim against NYMH with respect to discriminatory actions that occurred before November 12, 2009, as time barred, and (3) dismissing his claim under Title VII for discriminatory termination of employment on the basis of race or religion. *See generally Penn*, 2013 U.S. Dist. LEXIS 142109, 2013 WL 5477600. The court also concluded that "the well-pleaded allegations in the Complaint, accepted as true, show[ed] that [Mr. Penn] was a ministerial employee," but observed that the allegations did not conclusively establish that "NYMH [wa]s a religious institution or religiously-affiliated." 2013 U.S. Dist. LEXIS 142109, [WL] at *6, *9.

On July 8, 2015, Appellees moved for summary judgment, asserting that the ministerial exception barred all of Mr. Penn's remaining claims, and, in the alternative, that no reasonable jury could find for Mr. Penn on his claims of discrimination and retaliation. The district court granted the motion, concluding that the ministerial exception applied. *Penn v. N.Y. Methodist Hosp.*, 158 F. Supp. 3d 177 (S.D.N.Y. 2016). In addressing the issue of "whether NYMH is a 'religious institution' for purposes of the ministerial exception," *Id.* at 182, the court followed the reasoning of another district court decision, *Musante v. Notre Dame of Easton Church*, 3:01-CV-2352 (MRK), 2004 U.S. Dist. LEXIS 5611, 2004 WL 721774, at *6 (D. Conn. Mar. 30, 2004), and concluded that the "ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies." *Id.* (citing *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes.")).

The district court noted that "where an employee's role is extensively religious, a less religious employer may still create entanglement issues." *Penn*, 158 F. Supp. 3d at 182. Since Mr. Penn's role at NYMH was "pervasively religious[,] application of the ministerial exception to a less religious institution [was] warranted." *Id.* The district court further held that NYMH's amendment of its Certificate of Incorporation "sever[ed] all formal ties with the United Methodist Church," but did not "necessarily imply that the Hospital d[id] not maintain any church-

based relationship or have any religious characteristics." *Id.* at 182-83. Indeed, the district court recognized NYMH's "connection with the United Methodist Church," its mission statement which "emphasize[d] an 'ecumenical program of pastoral care,'" and Mr. Penn's own religious identification as a Methodist and deemed these undisputed facts sufficient to warrant the application of the ministerial exception. *Id.* at 184.

This appeal followed.

II. STANDARD OF REVIEW

We review *de novo* a grant of summary judgment under Fed. R. Civ. P. 56, assessing whether the district court properly concluded that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *See Ruggiero v. City of Orange*, 467 F.3d 170, 173 (2d Cir. 2006). While "conclusory statements or mere allegations [are] not sufficient to defeat a summary judgment motion," we are "required to resolve all ambiguities and draw all factual inferences in favor of the nonmovant." *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002); Fed. R. Civ. P. 56(e).

III. DISCUSSION

The purpose of the ministerial exception is to "ensure[] that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' . . .—is the church's alone." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 194-95, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)(quoting *Kedroff v.*

Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119, 73 S. Ct. 143, 97 L. Ed. 120 (1952)); *see also Fratello v. Archdiocese of New York*, 863 F.3d 190, 199 (2d Cir. 2017) (describing the roots of the ministerial exception in the colonial struggle against a "national church"). The ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Hosanna-Tabor*, 565 U.S. at 195 n.4.

As this Court has previously recognized, "[i]t is the relationship between the activities the employee performs for her employer, and the religious activities the employer espouses and practices, that determines" whether the exception applies. *Fratello*, 863 F.3d at 205-06. Additionally, as both the Supreme Court and this Court have acknowledged, there is no "rigid formula for deciding when" the exception applies. *Hosanna-Tabor*, 565 U.S. at 190; *see also Fratello*, 863 F.3d at 204-05 (considering four factors identified in *Hosanna-Tabor* to evaluate whether individual was a minister within the meaning of the exception, but noting the Supreme Court "instructs only as to what we *might* take into account as relevant . . . it neither limits the inquiry to those considerations nor requires their application in every case.").

Applying these principles here and construing all evidence in the light most favorable to Mr. Penn, *see Ruggiero*, 467 F.3d at 173, the district court did not err in applying the ministerial exception doctrine.[2] While a close

2. Appellant also argued that the district court erred by (1) admitting an unauthenticated copy of NYMH's by-laws into evidence,

question, NYMH, because of its history and continuing purpose, through its Department of Pastoral Care, is a "religious group," and since Mr. Penn's role within the Department of Pastoral Care was to provide religious care to the hospital's patients and religious care only, the ministerial exception doctrine should be applied.[3] Once applied, its application warrants this lawsuit's dismissal. Any other conclusion risks violating the First Amendment's Religion Clauses, most specifically the Establishment Clause.

A. The Application of the Ministerial Exception Doctrine

While the *Hosanna-Tabor* decision made clear that the ministerial exception applies to "religious groups" when making employment decisions involving "ministers," *see*

Appellant's Br. at 58; (2) failing to consider caselaw interpreting the Religious Freedom Restoration Act (RFRA) and Title VII's exemption for "religiously affiliated" employers, *id.* at 28; and (3) considering the "sliding scale" test referenced in *Musante*, 2004 U.S. Dist. LEXIS 5611, 2004 WL 721774, at *6, and *Rweyemamu*, 520 F.3d at 208. We do not need to reach these issues. Nor do we need to address Appellee's argument that RFRA separately bars this case.

3. The dissent reaches the opposite conclusion. *See Dissent* at 18-19 ("Because there is insufficient evidence that NYMH's mission is marked by clear or obvious religious characteristic, I conclude that it does not qualify as a religious institution for purposes of the ministerial exception." (citation and internal quotation marks omitted)). Paradoxically, although the NYMH's Department of Pastoral Care indisputably is dedicated to the religious concerns of the hospital's patients by providing and supervising chaplains to address their specific religious needs, the dissent would hold that it is not a "religious group." As discussed below, this outcome is neither required nor recommended by the prevailing law.

Hosanna-Tabor, 565 U.S. at 196 , the Supreme Court did not "adopt a rigid formula for deciding when an employee qualifies as a minister," noting only that "the ministerial exception is not limited to the head of a religious congregation." *Id.* at 190. The Supreme Court also did not explain how to define a "religious group" to determine who could properly invoke the exception. *Id.* at 188 (referencing a "religious group's right to shape its own faith and mission through its appointments"). Nevertheless, consistent with the Supreme Court's guidance in *Hosanna-Tabor* and this Court's recent ruling in *Fratello*, NYMH is a "religious group," at least with respect to its Department of Pastoral Care.

Both before and after *Hosanna Tabor*, other circuits have applied the ministerial exception in cases involving "religiously affiliated entit[ies]," whose "mission[s are] marked by clear or obvious religious characteristics." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (quoting *Shaliehsabou v. Hebrew Home of Greater Wash.*, 363 F.3d 299, 310 (4th Cir. 2004)). In *Shaliehsabou*, the Fourth Circuit allowed a Jewish nursing home to invoke the ministerial exception because its "by-laws define[d] it as a religious and charitable non-profit corporation and declare[d] that its mission was to provide elder care to 'aged of the Jewish faith in accordance with the precepts of Jewish law and customs.'" *Id.* at 310; *see also Conlon*, 777 F.3d at 833-34 ("It is undisputed that InterVarsity Christian Fellowship is a Christian organization, whose purpose is to advance the understanding and practice of Christianity in colleges and universities. It is therefore a 'religious group' under *Hosanna-Tabor*.").

Courts have also allowed hospitals to invoke the ministerial exception doctrine in employment suits from pastoral staff members. *See Hollins v. Methodist Healthcare*, 474 F.3d 223, 226 (6th Cir. 2007) ("We agree with this extension of the rule beyond its application to ordained ministers and hold that it applies to the plaintiff in this case, given the pastoral role she filled at the hospital."), *rev'd in part on other grounds by Hosanna-Tabor*, 565 U.S. at 195 n.4; *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362 (8th Cir. 1991) ("It cannot seriously be claimed that a church-affiliated hospital providing this sort of ministry to its patients is not an institution with substantial religious character . . . . While St. Luke's provides many secular services (and arguably may be primarily a secular institution), in its role as Scharon's employer it is without question a religious organization.") (citations omitted); *see also Shaliehsabou*, 363 F.3d at 310-11 ("Pursuant to [its] mission, the Hebrew Home maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every resident's doorpost. Although we do not have to decide the full reach of the phrase 'religious institution,' we hold that the phrase includes an entity such as the Hebrew Home.").

Mr. Penn argues, however, that NYMH is not a religious institution. He maintains that the hospital is no longer affiliated with the United Methodist Church. Indeed, NYMH took steps to distance itself from its religious heritage. Its by-laws no longer require the hospital to seek permission from the United Methodist Church to make significant business decisions, *see Hollins*

v. Methodist Healthcare, 379 F. Supp. 2d 907, 909 (W.D. Tenn. 2005), nor do they give the United Methodist Church the power to veto any amendment to the hospital's articles of incorporation, *Scharon*, 929 F.2d at 362 (adding that "[t]he hospital's Board of Directors consists of four church representatives and their unanimously agreedupon nominees").

Furthermore, NYMH's Methodist identity does not infuse its performance of its secular duties, making it less clear that its "mission is marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310-11 (observing that the defendant nursing home required staff to comply with religious laws while administering healthcare, hung a mezuzah on each patient's doorway, and stated in its by-laws that its mission was to serve the "aged of Jewish faith"). Except for the several days a year when it offers free pastoral care, NYMH's Methodist affiliation does not pervade its work as a healthcare organization. Mr. Penn also emphasizes that, as the district court acknowledged in its ruling on NYMH's motion to dismiss, "many secular hospitals have chaplains and accredited clinical pastoral education programs." *Penn*, 2013 U.S. Dist. LEXIS 142109, 2013 WL 5477600, *8.

These arguments, however, ignore how the hospital's Department of Pastoral Care operates and how these operations are "marked by clear or obvious religious characteristics." *Conlon*, 777 F.3d at 834. The Department of Pastoral Care required chaplains, like Mr. Penn, to distribute Bibles, perform religious rituals and organize and conduct religious services, including Easter services

and memorial services. While NYMH may have shed significant aspects of its religious identity by amending its Certificate of Incorporation, the hospital's Department of Pastoral Care has retained a critical aspect of that religious identity in order to provide religious services to its patients. These services, while not limited to those who are Methodist, are indisputably religious.[4] Mr. Penn himself acknowledges as much. *See Penn*, 2013 U.S. Dist. LEXIS 142109, 2013 WL 5477600, at *6 (alluding to Mr. Penn's Complaint, in which he states that he coordinated the distribution of Bibles to all patient units, performed

4. The dissent does not argue that the Department of Pastoral Care is not engaged in legitimate religious activities, but instead disregards these religious activities because they are not "Methodist." *See Dissent* at 10-11 (noting, *inter alia*, that its mission statement "is 'ecumenical,' i.e., not Methodist;" its "website does not mention the Methodist faith;" and "[n]one of the three full-time chaplains of the Hospital's Department of Pastoral Care are Methodist;" and expecting "its director to be Methodist, or for at least one of its permanent chaplains to be Methodist . . . ."). As a result, the dissent finds that "NYMH's mission and operations are not 'marked by clear or obvious religious characteristics.'" *Id.* at 11 (quoting *Shaliehsabou*, 363 F.3d at 310). The dissent, however, cites no precedent for the proposition that the Department of Pastoral Care's embrace of religious traditions beyond Methodism disqualifies it from constitutional protection under the Constitution's Religion Clauses, and to inquire whether this ecumenical approach to pastoral care is consistent with Methodism, simply "plunge[s the Court] into a maelstrom of Church policy, administration, and governance," *Rweyemamu*, 520 F.3d at 209 (citation and internal quotation marks omitted), something this Court has expressly prohibited. *See id.* at 209-10; *see also Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 427 (2d Cir. 2002); *Catholic High Sch. Ass'n of the Archdiocese v. Culvert*, 753 F.2d 1161, 1168 (2d Cir. 1985).

an in-hospital memorial service for an employee who died, performed Easter Services and communion and "maintain[ed] an active, on-going Pastoral care to staff").

In its ruling on summary judgment, the district court determined that "the relationship between Plaintiff and NYMH (specifically, the Department of Pastoral Care) was that of a religious employee and a religious institution." *Penn*, 158 F. Supp. 3d at 184 (limiting its decision by noting that it was made "insofar as Plaintiff is a Methodist and was responsible—at least in part—for preaching the Christian faith"). While Mr. Penn challenges whether the "obvious religious characteristics" of his work and the NYMH satisfy the legal standard of being a "religious group," he does not and cannot dispute that he performed religious services for NYMH's Department of Pastoral Care and, thus, served that department's religious purpose. The district court therefore properly applied the ministerial exception because the Department of Pastoral Care within the NYMH had the "obvious religious characteristics" of a "religious group" and employed Mr. Penn as a minister.[5]

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

B. This Application of the Ministerial Exception Doctrine Properly Recognizes the Establishment Clause's Prohibition Against Excessive Entanglement With Religion

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

As this Court has recognized, "*Hosanna-Tabor* made clear that the First Amendment does not tolerate a judicial remedy for any minister claiming employment discrimination against his or her religious group, regardless of the group's asserted reason (if any) for the adverse employment action." *Fratello*, 863 F.3d at 204. This Court explained that "a court is virtually never the place[] to analyze the grounds for a religious group's reasons for selecting its ministers," *id.* at 204 n.26, because a judge is ill-equipped even to assess whether a particular claim is a religious one. It is clear, therefore, that 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," but rather to protect a church's autonomy to "select[] those who will personify its beliefs." *Hosanna-Tabor*, 565

U.S. at 188-89. In other words, rather than focus on the claims at issue in an employment discrimination case, *Hosanna-Tabor* instructs us to review the employee and the employer and assess the religious characteristics of each.

Our inquiry therefore must consider the Establishment Clause, which forbids "an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (citation omitted); *see also Scharon*, 929 F.2d at 362 ("To decide this question, we apply another three-part test set out by the Supreme Court in *Lemon*. . . . Scharon argues that St. Luke's is not a religious institution and that she was a secular employee, not 'clergy.' She therefore claims that the application of Title VII and the ADEA would not require excessive government entanglement with religion. Scharon's assertions, however, are untenable."). While *Hosanna-Tabor* did "leave open the possibility that some employment-discrimination claims by ministers might not be barred if excessive entanglement could be avoided in the particular case," *Fratello*, 863 F.3d at 202, where excessive government entanglement with religion is involved, it follows that employment discrimination claims by ministers must be barred.

Indeed, this Court in *Rweyemamu* clarified the important constitutional issues behind the ministerial exception doctrine. There, a Catholic priest filed suit against the local Bishop and Diocese, alleging employment discrimination in violation of Title VII. The Court observed that a "lay employee's relationship to his employer may

be 'so pervasively religious' that judicial interference in the form of a discrimination inquiry could run afoul of the Constitution." *Rweyemamu*, 520 F.3d at 208 (citing *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993)). In order to prevail on his Title VII claim, the priest had to argue that the Catholic Church's decision to fire him was "not only erroneous, but also pretextual." *Id.* The ministerial exception applied because the Court was neither permitted nor equipped to evaluate Rweyemamu's pretext argument. *Id.*

As the Court noted: "[H]ow are we, as Article III judges, to gainsay the Congregatio Pro Clericis' conclusion that [Rweyemamu] is insufficiently devoted to ministry? How are we to assess the quality of his homilies?" *Id.* at 209; *see Bronx Household of Faith v. Bd. of Educ. of N.Y.C.*, 750 F.3d 184, 199 (2d Cir. 2014) ("[A]t the very least . . . the Establishment Clause prohibits government from appearing to take a position on questions of religious belief.") (citations omitted); *see also Commack*, 294 F.3d at 425 (holding that the challenged kosher fraud laws "excessively entangle government and religion because they . . . take sides in a religious matter [and] require the State to take an official position on religious doctrine.").[6]

This case presents that precise challenge. Any evaluation of Mr. Penn's claims would require the Court to examine whether NYMH's explanation of its failure to

6. Even before *Rweyemamu*, this Court had recognized that courts are prohibited "from inquiring into an asserted religious motive to determine whether it is pretextual." *Culvert*, 753 F.2d at 1168.

promote him, and for his eventual termination, was "not only erroneous, but also pre-textual." *Rweyemamu*, 520 F.3d at 209. As "legitimate non-discriminatory reasons" for their failure to promote Mr. Penn, NYMH argues that Mr. Penn ended a service with a hymn that was only familiar to a certain group of Christians, spent too much time counseling each patient, was insensitive to non-Christian patients, and failed to attend meetings. When Mr. Poulos selected Ms. Hong over Mr. Penn for promotion to Staff Chaplain, Mr. Poulos concluded that Ms. Hong had "strong[er] counseling skills" and was, in short, a better pastor. Joint App'x at 174. To explain its decision to fire Mr. Penn—the decision that he challenges as retaliatory—NYMH claims that Mr. Penn improperly completed a "referral card," which resulted in a patient dying without receiving last rites, inappropriately counseled a couple after a fetal demise, misrepresented the availability of an Easter Service to a Catholic nurse, and triggered complaints about sexual harassment from a Resident Chaplain.

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

Mr. Penn on the appropriate length of pastoral counseling sessions—a "philosophical difference," according to NYMH—and compare Mr. Penn's pastoral skills to Ms. Hong's. Appellee's Br. at 37.

Any of these decisions, all indisputably necessary to the adjudication of Mr. Penn's claims—even if intertwined with some secular concerns—"would plunge [the Court] into a maelstrom of Church policy, administration, and governance," *Rweyemamu*, 520 F. 3d at 209 (citing *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) (internal quotation marks omitted), and risk "government involvement in . . . ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 171.[7] This Court has cautioned

7. The dissent argues that "the interfaith nature of the Department means that it is not run according to the tenets of any particular religion, thereby reducing the likelihood that evaluating the reasons for the termination of an employee such as Penn would 'plunge [a court] into a maelstrom of Church policy, administration, and governance.'" *Dissent* at 18 (quoting *Rweyemamu*, 520 F.3d at 209). In doing so, the dissent glosses over core Establishment Clause issues in two significant ways. First, as discussed above, *see Slip Op.* at 23 n.4, by determining that the NYMH's Department of Pastoral Care's ecumenical approach to pastoral care is inconsistent with Methodism, the dissent has already crossed the permissible constitutional line and begun defining "Church policy, administration, and governance." Second, because the Department of Pastoral Care serves the diverse spiritual needs of its patients, it thus must be cognizant of and sensitive to "Church policy, administration, and governance" of many faith perspectives and not just one. If not, it risks trivializing, if not disrespecting, the genuine religious beliefs of its patients. *See* Joint App'x at 407 (requiring NYMH chaplains "[t]o facilitate the patient's receiving the rituals and practices of his/her own faith traditions when requested"). In other words, "the

that judges are "ill-equipped to assess whether, and to what extent, an employment dispute between a minister and his or her religious group is premised on religious grounds." *Fratello*, 863 F.3d at 203. And, when a court is asked to "take sides in a religious matter," *Commack*, 294 F.3d at 425, the court must dismiss the case. *See Culvert*, 753 F.2d at 1168 (recognizing that "the First Amendment prohibits . . . [the courts] from inquiring into an asserted religious motive to determine whether it is pretextual."). Following these principles, this case must be dismissed.

IV. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

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interfaith nature of the Department" means more entanglement with "Church policy, administration, and governance,"—not less.

Appendix A

DRONEY, *Circuit Judge*, dissenting:

The majority holds that a secular hospital with minimal vestiges of its religious lineage may assert the Religion Clauses of the First Amendment to block claims of racial and religious discrimination by a former employee. I respectfully dissent. The majority has set the bar far too low for employers to claim religious-based immunity from federal anti-discrimination law.

I. The Religion Clauses of the First Amendment and the Ministerial Exception

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. "[T]he Religion Clauses ensure[] that the . . . Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices. The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012). To give force to these protections for religious institutions as employers, the lower federal courts created and applied the "'ministerial exception,' a doctrine that precludes, on First Amendment grounds, employment-discrimination claims by 'ministers' against the religious organizations that employ or formerly employed them." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 192 (2d Cir. 2017). The exception "addresses

a tension between two core values underlying much of our constitutional doctrine and federal law: equal protection and religious liberty." *Id.* at 198. In *Hosanna-Tabor*, the Supreme Court endorsed this doctrine because

> [r]equiring 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.

Hosanna-Tabor, 565 U.S. at 188-89.

In order for a defendant-employer to claim the protections of the ministerial exception, two distinct requirements must be met: (1) the plaintiff must be a minister; and (2) the defendant must be a religious institution. *See Hosanna-Tabor*, 565 U.S at 188-89 (holding that the ministerial exception "precludes application of [civil rights] legislation to claims concerning the employment relationship *between a religious institution*

and its ministers" (emphasis added)); *Fratello*, 863 F.3d at 198 (noting that "[t]he ministerial exception bars employment-discrimination claims brought by *ministers* against the *religious groups* that employ or formerly employed them" (emphasis added)); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) ("In order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee."), *abrogated in part on other grounds by Hosanna-Tabor*, 565 U.S. at 195 n.4. Accordingly, "the [ministerial] exception does not apply to the religious employees of secular employers or to the secular employees of religious employers." *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 307 (4th Cir. 2004).[1]

Because Penn does not challenge that he is a "minister" for the purposes of the ministerial exception, it is only necessary to resolve whether New York Methodist Hospital ("NYMH") qualifies—today—as a "religious institution."

1. Despite the frequent use of the term "minister" in analyzing the ministerial exception, an employee performing certain religious functions need not be an ordained minister to qualify as a "minister" for purposes of the exception. *See, e.g., Fratello*, 863 F.3d at 206-09 (holding that the lay principal of a Catholic school was a "minister" for purposes of the ministerial exception); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177-80 (5th Cir. 2012) (holding that the music director at a Catholic church qualified as such a "minister").

II. The Meaning of "Religious Institution"

It is clearest that an institution is a "religious institution" when it is "a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization," *Hollins*, 474 F.3d at 225, as was the case for the church-operated schools in both *Fratello* and *Hosanna-Tabor*.

Today, the majority joins the Fourth Circuit in holding that "a religiously affiliated entity is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310. While I agree that this approach is consistent with the Supreme Court's guidance in *Hosanna-Tabor*, I disagree with the majority's application of it to the hospital defendant here.[2]

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2. The majority does not set forth factors for a court to consider in determining whether an organization qualifies as a "religious institution," as "marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310. In the related Title VII religious exemption context, the Third Circuit has set forth the following factors in determining whether an organization is religious:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian,

III. NYMH is not a "Religious Institution"

There is no question that in 1881, when the Methodist Hospital of Brooklyn was founded by a Methodist minister and a Methodist benefactor, it was a religiously-affiliated entity subject to the protections of the First Amendment religion clauses. There is also no dispute that it continued to be a religiously-affiliated institution for many years. However, since at least the 1970s, the hospital has shed almost all of its religious character.

The majority acknowledges many of the undisputed facts set forth below, but concludes that they do not show that NYMH is no longer a religious institution.

> (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007). The Ninth Circuit has held that an entity qualifies for the Title VII religious exemption when, at least, it "[1] is organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam). If these factors were applied to NYMH, they would weigh against NYMH being considered a "religious institution."

Appendix A

The evolution of NYMH's Certificate of Incorporation shows that NYMH almost entirely eliminated its ties with the United Methodist Church. The original Certificate of Incorporation is not in the record. However, a 1973 amendment "delete[d] the requirement that each of [four] classes [of trustees] contain a bishop of the Methodist Episcopal Church," although the Bishop of the New York Area of The United Methodist Church and the President of the Guild of Methodist Hospitals remained on the board of trustees *ex officio*. App. 257, 259. The Certificate's statement of purpose then indicated that in addition to performing typical hospital healthcare functions, "[t]he corporation in maintaining its Christian genesis and its Church related character in the performance of its functions shall nurture a meaningful and effective relationship with The United Methodist Church and its participating boards, institutions and congregations." App. 258.

But, in 1974, the Certificate was again amended "to delete provisions relating to the [hospital's] relationship with The United Methodist Church." App. 269. The amendment also removed the Bishop of the New York Area of the United States Methodist Church and the President of the Guild of Methodist Hospitals from the board of trustees, and deleted the language from the 1973 amendment regarding "maintaining its Christian genesis and its Church related character" and "nurturing a meaningful and effective relationship with the United Methodist Church" from its statement of purpose. App. 269-70.

Although the current chair of the Hospital Board is a Methodist minister, only three of its seventeen trustees are Methodist ministers, and NYMH has conceded that they (including the chair) "do[] not . . . represent any unit of the United Methodist Church [in their role] on the Hospital Board of Trustees." App. 351.[3] There is also no evidence in the record that the Methodist Church retains any influence over any part of the Hospital's day-to-day or long-term operations. Nor is there evidence that Methodist religious doctrine guides NYMH or its Department of Pastoral Care's operations.[4]

There is also evidence that NYMH holds itself out to the public as a secular institution. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (considering whether an institution "holds itself out to the

3. The majority cites to provisions of the NYMH by-laws that state that the Board shall "include significant representation from the community and the United Methodist Church" and select its president after consulting with a Methodist bishop. Slip. Op. at 6 (quoting App. 87). However, Penn objects to the consideration of those by-laws because they are unauthenticated. The majority does not resolve that objection. In any event, those provisions contradict the 1974 amendment to the Certificate of Incorporation, as well as NYMH's admissions that the Methodist ministers on the Board (including the chair) "do[] not . . . represent any unit of the United Methodist Church [in their role] on the Hospital Board of Trustees." App. 351.

4. In 1993, NYMH became a member of the New York Presbyterian Healthcare Network, now New York-Presbyterian Healthcare System. There is no evidence that this membership imposed any type of Presbyterian (or Methodist) doctrinal requirements on NYMH, and the defendants do not argue that NYMH is a Presbyterian religious institution.

public as an entity for carrying out [a] religious purpose" as a factor in determining whether the related Title VII religious exemption applies); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (considering "whether [an] entity holds itself out to the public as secular or religious" as a factor in determining whether the Title VII religious exemption applies). In materials distributed to candidates for its internal medicine residency program, NYMH self-identifies as a "secular institution." App. 340, 347 ("Founded in 1881, New York Methodist Hospital is the oldest of the 78 hospitals that were founded by the United Methodist Church. The Hospital, *now a secular institution*, is located in the Park Slope neighborhood of Brooklyn, New York." (emphasis added)). A NYMH webpage directed to residency candidates also states that NYMH is "now a secular institution." App. 353 ("New York Methodist Hospital, founded in 1881, is the oldest of the seventy-eight hospitals that were founded by the United Methodist Church. *Now a secular institution*, the Hospital became affiliated with New York-Presbyterian Hospital and the Weill Cornell Medical College in 1993." (emphasis added)).

In its mission statement, NYMH describes itself as "a *non-sectarian*, voluntary institution . . . [with] an historic relationship with the United Methodist Church." App. 67 (emphasis added).

The mission statement sets forth six "primary objectives:"

- To make services accessible to patients and physicians without regard to age, sex, race, creed, national origin, or disability;

- To provide patients with an environment that assures the continuous enhancement of patient safety;

- To provide an active ecumenical program of pastoral care and to conduct a clinical pastoral education program;

- To offer an environment that is responsive to new and changing technologies and management principles that will stimulate creative solutions for our patients, physicians and employees;

- To assess periodically the healthcare needs of the community and to respond to those these needs with healthcare services, including health education for patients and community residents;

- To work with members of the New York-Presbyterian Healthcare System and other healthcare institutions, physicians and community groups in jointly pursuing the delivery of quality healthcare services, medical education and clinical research.

Id.

In describing its primary objectives, NYMH's mission statement does not refer to the United Methodist Church or Methodism. Only one of the six objectives contains any reference to religion, the reference to the pastoral care department. However, the pastoral care department,

according to the mission statement, is "ecumenical," i.e., not Methodist.

Indeed, the description of the Department of Pastoral Care on NYMH's website does not mention the Methodist faith. The purpose of the Department is, according to NYMH's website, "[t]o see that the needs of the whole person—mind and spirit as well as body—are met." App. 356. The Department is "an essential feature of NYM's holistic approach to healthcare." *Id.* Chaplains at NYMH "can come from any faith tradition," and "will visit all patients on their assigned units regardless of their patients' religious affiliations." *Id.* If patients have faith-specific needs, the Department is "ready to connect patients and their families with the specific rituals and services offered by their particular faith group." *Id.* For example, the Department can "arrange for a Roman Catholic Eucharistic minister to bring communion . . . or . . . to perform an anointing of the sick." *Id.* Three places of worship are available at the hospital: a Christian chapel, a Jewish prayer room, and a Muslim prayer room.

None of the three full-time chaplains of the Hospital's Department of Pastoral Care are Methodist. Defendant Peter Poulos, its Director, is Greek Orthodox. The second is a rabbi, and the third a non-Methodist Protestant. If the Department were in fact Methodist-oriented, one would expect its director to be Methodist, or for at least one of its permanent chaplains to be Methodist.

Finally, the Department runs a Clinical Pastoral Education ("CPE") residency program to train chaplains,

typically training between three and six residents at a time. Between 2008 and 2011, Poulos hired 23 residents into the CPE program. Of those 23, only one was Methodist.

In sum, NYMH's mission and operations are not "marked by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310. While many religious hospitals, schools or other entities could certainly qualify as religious institutions and receive the protections of the ministerial exception, NYMH is no longer such a religious institution.

This case is easily distinguishable from those in other circuits where courts have applied the ministerial exception to bar suits by employees of entities related to religious institutions.

For example, in *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, the Eighth Circuit decided that St. Luke's, "a church-affiliated hospital," was entitled to invoke the ministerial exception in an age and sex discrimination case brought by a former member of the hospital's Department of Pastoral Care. 929 F.2d 360, 361-63 (8th Cir. 1991). St. Luke's Board of Directors "consist[ed] of four church representatives and their unanimously agreed-upon nominees," and "its Articles of Association [could] be amended only with the approval of the Episcopal Diocese of Missouri of the Protestant Episcopal Church in the United States of America and the local Presbytery of the Presbyterian Church." *Id.* at 362. The plaintiff, an ordained Episcopal priest employed as a

chaplain at the hospital, was fired—"with the advice and consent of the Episcopal Bishop"—for "violating several canonical laws." *Id.* at 361.[5]

In *Shaliehsabou*, the Fourth Circuit concluded that a Jewish nursing home—the Hebrew Home of Greater Washington—was a religious institution for the purposes of the ministerial exception to the Fair Labor Standards Act, which it deemed to be "coextensive" with the ministerial exception. 363 F.3d at 306. The nursing home's mission, "according to its By-Laws, [was] to serve aged of the Jewish faith in accordance with the precepts of Jewish law and customs, including the observance of dietary laws." *Id.* at 301 (internal quotation marks omitted). The home maintained a synagogue onsite with twice daily services, each resident's room had Jewish religious items in it, and it maintained an entirely kosher food preparation process. *Id.* The plaintiff—an orthodox Jewish man—supervised the preparation of the kosher food as a mashgiach.[6] *Id.* at 301.

In *Conlon v. Intervarsity Christian Fellowship*, the Sixth Circuit held that "an evangelical campus mission serving students and faculty on college and

5. In *Hollins v. Methodist Healthcare*, cited by the majority as another case where a hospital was allowed to invoke the ministerial exception, the issue of whether the hospital was a religious institution was expressly not before the court; the plaintiff had forfeited the right to argue that the hospital was not. 474 F.3d 223, 226 (6th Cir. 2007).

6. A mashgiach is an inspector who ensures that Jewish dietary laws are followed. *Id.* at 301.

university campuses nationwide" was entitled to invoke the ministerial exception. 777 F.3d 829, 831 (6th Cir. 2015). The group's "vision [was] to see students and faculty transformed, campuses renewed and world changers developed," and its purpose "[was] to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world." *Id.* Additionally, the group "believe[d] in the sanctity of marriage and desire[d] that all married employees honor their marriage vows." *Id.* The plaintiff, a "spiritual director" of the group, had been terminated for contemplating divorce from her husband. *Id.* at 832. Divorce violated the policy of the group requiring all married employees to "honor their marriage vows." *Id.* at 831. The court found dispositive to the "religious organization" inquiry that the group's purpose was, as the court explained it, "to advance the understanding and practice of Christianity in colleges and universities." *Id.* at 834.

In contrast, neither Methodist doctrine nor Methodist Church leadership have a significant role at NYMH. While NYMH may still have some limited religious aspects—for example, Board meetings begin with a prayer and all employees are reminded that "patients are human beings who are created in [the] image of God," App. 51 (alteration in original),—it is not nearly as pervasively religious as entities that other Courts of Appeals have deemed sufficiently religious to warrant application of the ministerial exception.

While NYMH began as a Methodist hospital, it no longer is; it is a modern, secular hospital that serves a diverse group of patients in Brooklyn. Indeed, the majority acknowledges that Methodism does not "infuse [NYMH's] performance of its secular duties" or "pervade its work as a healthcare organization." Slip Op. at 22. Nevertheless, the majority concludes that NYMH is a religious institution by focusing its analysis solely on the Department of Pastoral Care and Penn's role in it, noting that "[Penn] does not and cannot dispute that he performed religious services for [the Department]." Slip Op. at 24.

I conclude that this focus on the work that Penn did, and on the Department of Pastoral Care, rather than on NYMH as a whole, is incorrect. The district court adopted a similar focus, referring to it as the "sliding scale" approach. The district court reasoned that

> [t]he ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies. . . . [T]he more pervasively religious an institution is, the less religious the employee's role need be in order to risk first amendment infringement." On the other hand, where an employee's role is extensively religious, a less religious employer may still create entanglement issues.

Penn v. New York Methodist Hosp., 158 F. Supp. 3d 177, 182 (S.D.N.Y. 2016) (first alteration in original) (quoting

Musante v. Notre Dame of Easton Church, No. CIV.A. 301CV2352, 2004 U.S. Dist. LEXIS 5611, 2004 WL 721774, at *6 (D. Conn. Mar. 30, 2004)). The district court concluded that "[i]n light of Plaintiff's exceedingly ministerial role, application of the ministerial exception to a less religious institution may be warranted." *Id.*

The origin of the "sliding scale" approach appears to be the district court's opinion in *Musante*. In *Musante*, the plaintiff's employer was a Catholic church in the Diocese of Bridgeport. 2004 U.S. Dist. LEXIS 5611, 2004 WL 721774, at *1. As the church was obviously a religious institution, the only question before the district court was whether the plaintiff, a lay person but the "Director of Religious Education . . . and Pastoral Assistant" for the church, was a "minister" for purposes of the ministerial exception. *Id.* It was in the context of answering this question—not determining whether the *employer* was a religious institution—that the district court noted that "the ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies." 2004 U.S. Dist. LEXIS 5611, [WL] at *6. The district court noted that "as employees of religious institutions such as churches and synagogues are likely to be inherently involved in religious activity to a much greater degree than, for example, employees of *religiously affiliated hospitals* or charitable institutions, regardless of the nature of the employees' specific responsibilities." *Id.* (emphasis added).

In support of its application of the sliding scale approach to determining whether NYMH is a religious institution, the district court below also relied on language from our decision in *Rweyemamu v. Cote* indicating that "[t]he more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes." 520 F.3d 198, 208 (2d Cir. 2008). However, this statement does not justify the application of a sliding scale approach to determining whether an institution is religious. *Rweyemamu* used that language in discussing when an employee "is functionally a 'minister'" for purposes of the ministerial exception, not whether the defendant there—the Roman Catholic Diocese of Norwich—is religious. *Id.*

In order for the ministerial exception to apply, two distinct conditions must be met: the plaintiff must be a minister and the defendant must be a religious institution. Indeed, "the exception does not apply to the religious employees of secular employers or to the secular employees of religious employers." *Shaliehsabou*, 363 F.3d at 307. Accordingly, no matter how religious the role of the employee—indeed, even if the employee is in fact a minister performing religious functions—the ministerial exception will not apply unless the employer is a religious institution. While the sliding scale approach may be useful in determining whether an employee is a "minister," it has no application to determining whether an institution is religious.

Penn and the other members of the Department of Pastoral Care are, at most, "religious employees of [a]

secular employer[]." *Id.* The presence of a non-sectarian chaplaincy department cannot transform an otherwise secular hospital into a religious institution for purposes of the ministerial exception. If it could, most hospitals would be exempt from anti-discrimination laws, as most—even clearly secular hospitals—have chaplaincy departments.[7] Wendy Cage, et al., *The Provision of Hospital Chaplaincy in the United States: A National Overview*, 101 S. Med. J. 626, 628-29 (2008). Moreover, the interfaith nature of the Department means that it is not run according to the tenets of any particular religion, thereby reducing the likelihood that evaluating the reasons for the termination of an employee such as Penn would "plunge [a court] into a maelstrom of Church policy, administration, and governance." *Rweyemamu*, 520 F.3d at 209.

Because there is insufficient evidence that NYMH's "mission is marked by clear or obvious religious characteristics," *Shaliehsabou*, 363 F.3d at 310, I conclude

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7. The Department of Pastoral Care is not an entity separate from NYMH and entitled to a separate analysis as to whether it is a religious institution. That Department is one of many at the Hospital. Poulos, its head, did not have the authority to terminate Penn. The investigation regarding whether to terminate Penn was conducted by the Hospital's Human Resources Department. There is no evidence that the Human Resources Department is religious. The ultimate decision to terminate Penn was made by the Hospital's Vice President, Dennis Buchanan, with the recommendation of Kay Moschella, the Director of Employee Relations in the Human Resources Department; Moschella made clear that Poulos did not make the decision to terminate Penn, as it "was not his decision to make." Aff. of Kay Moschella at 6, *Penn v. New York Methodist Hospital*, No. 11-cv-9137 (S.D.N.Y. July 28, 1015), ECF No. 99.

that it does not qualify as a religious institution for purposes of the ministerial exception.[8]

IV. Conclusion

For the reasons stated above, I would vacate the district court's grant of summary judgment on the basis of the ministerial exception, and remand to the district court for further proceedings.

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8. Citing *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006), Appellees argue that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(b), provides an alternate basis for affirming the district court, even though this suit is between private parties. The majority does not reach this argument. While Appellees provide support for their argument that RFRA could bar the suit, they raise no argument regarding why RFRA applies in this particular case. For example, they do not argue that the suit "substantially burden[s] [their] exercise of religion." 42 U.S.C. § 2000bb-1. Accordingly, I would find that Appellees have abandoned any argument that RFRA bars this suit. *See State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir. 2004) ("When a party fails adequately to present arguments in an appellant's brief, we consider those arguments abandoned.").

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 20, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11-cv-9137 (NSR)

MARLON PENN,

Plaintiff,

v.

THE NEW YORK METHODIST HOSPITAL AND PETER POULOS,

Defendants.

January 20, 2016, Decided
January 20, 2016, Filed

OPINION AND ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff, Marlon Penn ("Plaintiff") commenced the instant action against his former employer New York Methodist Hospital ("NYMH" or the "Hospital") and his former supervisor Peter Poulos ("Poulos") (collectively "Defendants"), seeking monetary damages for wrongful termination. In his second amended complaint

("Complaint"), Plaintiff asserted two causes of action against Defendants, one for discrimination and the other based on retaliation. By Opinion and Order, dated September 30, 2013, the Court granted Defendants' motion to dismiss to the limited extent of dismissing Plaintiff's claims pursuant to 42 U.S.C. § 1981 for discrimination on the basis of his race and religion as against both defendants, dismissing Plaintiff's Title VII claim against NYMH with respect to discriminatory actions which occurred prior to November 12, 2009, and dismissing Plaintiff's claim under Title VII for discriminatory termination of employment on the basis of race or religion.

Defendants now move, pursuant to Federal Rule of Civil Procedure 56(a), for summary judgment on the remaining claims. Defendants assert that (a) the "ministerial exception" to discrimination cases bars the claims asserted by this ministerial employee against his religious institution employer, and (b) in the alternative, no reasonable jury could find for Plaintiff on his claims of discrimination and retaliation. For the following reasons, Defendants' motion for summary judgment is granted.

BACKGROUND

In the Complaint, Plaintiff asserts that he is an African-American, a Methodist, an ordained minister, and a Board Certified chaplain. (Compl. ¶¶ 14, 20.) Defendant NYMH, a New York not-for-profit corporation located in Brooklyn, New York, is a member of the New York-Presbyterian Healthcare System and is a non-sectarian, voluntary institution. (*Id.* ¶¶ 15-16.) NYMH has a Pastoral

Care Department which is supervised by Defendant Poulos. (*Id.* ¶ 17.)

Defendants hired Plaintiff as a resident chaplain in January 2002, and then again as a Duty Chaplain in July 2004. (Plaintiff's Statement of Disputed Material Facts Pursuant to Local Civil Rule 56.1(b) ("Pl.'s 56.1"), ECF No. 108, ¶ 19.) As duty chaplain, Plaintiff worked one 24-hour weekend shift each week, from Sunday 9:00 a.m.- Monday 9:00 a.m., interacting with other chaplains for about 30 minutes on Monday mornings. (*Id.* ¶ 21.) From approximately 2004 to 2010, Plaintiff also worked a Wednesday shift. (*Id.* ¶ 22.) Over the years, Plaintiff repeatedly made requests to Poulos for additional hours, additional shifts, or a full-time position but was denied. (*Id.* ¶ 39.)

In his role as chaplain, Plaintiff was "primarily responsible for ministry" to patients and their families, and his responsibilities—among other things—included "distribut[ing] of Bibles to all patient units," "conduct[ing] in-Hospital memorial service[s]," "maintain[ing] an active, on-going Pastoral care to staff," "providing communion to nurses," and "[conducting] Easter services, (Compl. ¶¶ 24, 29(b)—(c)). Throughout his tenure at the Hospital, Plaintiff was commended on several occasions for his excellent work performance. (Pl.'s 56.1, ¶ 28(c).) Plaintiff was awarded letters of approbation for his attendance, and Poulos described Plaintiff as "conscientious and reliable as Chaplain on Duty, functioning well in stressful situations." (*Id.* ¶ 28(b)—(c).)

Appendix B

In 2010, the Catholic Chaplain, Sister Therese Camardella, retired, leaving her position open for a replacement. (*Id.* ¶ 35.) Poulos told Plaintiff that Sister Therese's position was not available to Plaintiff (who is a Methodist) because the position would only be filled by a Catholic chaplain or a nun. (*Id.* ¶ 36(a).) Poulos contends that he attempted to replace Sister Therese with a Catholic chaplain, but when he was unsuccessful, Poulos offered the position to Chaplain Joo Hong, who Defendants believed was the best qualified applicant for the position. (*Id.* ¶¶ 41-42.) Defendants allege that Poulos did not hire Plaintiff because he did not believe Plaintiff to be an acceptable candidate to replace Sister Therese, based on the fact that he could not provide "effective coverage." (*Id.* ¶ 36.) Plaintiff instead contends that this failure to promote decision was based on racial and religious discrimination. (*Id.* ¶ 43.) Poulos never discussed with Plaintiff any alleged work performance issues or inability to provide effective coverage. (*Id.* ¶ 36(e).) Based on the foregoing, on September 16, 2010, Plaintiff filed a discrimination complaint with the New York City Commission on Human Rights ("HRC"), alleging that Defendants discriminated against him on the basis of his race and religion. (*Id.* ¶ 55.) Plaintiff, however, did not succeed on his complaint with the HRC. (*Id.* ¶ 60.)

Prior to Plaintiff's filing of the complaint in September 2010, Poulos did not counsel Plaintiff, reprimand him, write him up, or subject him to any disciplinary action on account of his work performance at any time. (*Id.* ¶ 28(a).) Defendants claim that, after 2010, Plaintiff's work performance began to deteriorate, which eventually

caused Defendants to terminate Plaintiff. (*See id.* ¶¶ 67-115 (detailing issues with Plaintiff's performance).) Specifically, Defendants allege numerous instances of misconduct, including (i) failing to log activities regarding patients, (ii) failing to fill out a priest referral card for a patient, which led to the patient's demise without receiving his last rites, (iii) interacting with an interracial couple who had just suffered a fetal demise in an insensitive and inappropriate manner, (iv) conducting an Easter service for which he was unprepared and in which he was insensitive to Catholic attendees who wished to receive communion, and (v) sexually harassing a fellow chaplain. (*Id.* ¶¶ 67-115.)

Plaintiff, however, believes that all the allegations of poor performance were "trumped up" by Defendants, and the work performance complaints were procured by Poulos in order to create a basis to fire Plaintiff. (*See, e.g., id.* ¶ 72; *see generally id.* ¶¶ 67-115.) Specifically, Plaintiff alleges that on October 7, 2010, Poulos held a meeting with the Hospital's Employee Relations Manager and Director of Employee Relations, and at said meeting it was decided that "[the Employee Relations Manager] will work with Peter Poluos[]" to procure enough data for Plaintiff's discharge. (*Id.* ¶ 64(a).) For example, Plaintiff believes that Poulos encouraged the alleged sexual harassment victim to write an incident report detailing sexually inappropriate conduct and later rewarded the victim "by retaining her to do an 'unusual' third year [clinical pastoral education] Residency and ultimately promot[ing] her from the position of student chaplain ... to the position of Chaplain Manager." (*Id.* ¶ 111.) Thus, Plaintiff believes

the allegations of misconduct are pretextual reasons for his termination.

STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine dispute or issue of material fact by pointing to evidence in the record, "including depositions, documents . . . [and] affidavits or declarations," *id.* 56(c)(1)(A), "which it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party may support an assertion that there is no genuine dispute by "showing . . . that [the] adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B).

Once the moving party has fulfilled its preliminary burden, the onus shifts to the nonmoving party to raise the existence of a genuine dispute of material fact. *Id.* 56(c)(1)(A); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *accord*

Benn v. Kissane, 510 F. App'x 34, 36 (2d Cir. 2013); *Gen. Star Nat'l Ins. Co. v. Universal Fabricators, Inc.*, 585 F.3d 662, 669 (2d Cir. 2009); *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008); *Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005). Courts must "construe the evidence in the light most favorable to the non-moving party and draw[] all reasonable inferences in its favor." *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 720 (2d Cir. 2010) (quoting *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005)). In reviewing the record, "the judge's function is not himself to weigh the evidence and determine the truth of the matter," *Anderson*, 477 U.S. at 249; *see also Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010) ("The function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact."), nor is it to determine a witness's credibility, *Anderson*, 477 U.S. at 249. Rather, "the inquiry performed is the threshold inquiry of determining whether there is the need for a trial." *Id.* at 250.

DISCUSSION

Defendants assert that the "ministerial exception"—grounded in the Religion Clauses of the First Amendment—applies to this case, such that the discrimination and retaliation claims must be dismissed.

The First Amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. AMEND. 1. Recently, the U.S. Supreme Court

recognized the "ministerial exception" in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 132 S. Ct. 694, 702, 181 L. Ed. 2d 650 (2012), where the Court ruled that the First Amendment prohibits the government from interfering with a religious organization's right to hire and fire ministers. As the Court explained:

> 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. at 697. Thus, the Court held that the ministerial exception "bars an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her." *Id.* at 698.

This Court previously examined the ministerial exception as applied in the instant case on the Defendants'

motion to dismiss. The Court held that (1) Plaintiff was a ministerial employee, and (2) the present dispute involves questions that would require the Court to examine Plaintiff's spiritual functions.[1] *See Penn v. New York Methodist Hosp.*, No. 11-CV-9137 NSR, 2013 U.S. Dist. LEXIS 142109, 2013 WL 5477600, at *6 (S.D.N.Y. Sept. 30, 2013). The only question remaining is whether NYMH is a "religious institution" for purposes of the ministerial exception.[2] While examining this question, it is important

1. Though *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) held that "a plaintiff alleging particular wrongs by the church that are wholly non-religious in character is surely not forbidden his day in court," the *Hosana Tabor* Court explained that, in an employment discrimination suit, it is not essential for Defendant to allege a religious reason for the adverse employment decision. Instead, the ministerial exception is broader and encompasses most employment decisions regarding "who will minister to the faithful." *See Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 709 ("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 instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," []—is the church's alone.") (internal citations omitted).

2. Plaintiff claims that, based on a representation made in a pre-motion letter, Defendants are estopped from arguing that NYMH is a religious institution. This argument is without merit. Plaintiff was notified of the argument when Defendants moved to dismiss on the ground that the ministerial exception applied, and thus, the parties conducted discovery as to the issue. Moreover, Plaintiff had notice of the argument in Defendants' moving papers, and the pre-motion letter is not binding on either party. *See In re AutoHop Litig.*, No. 12 Civ. 4155(LTS)(KNF), 2013 U.S. Dist. LEXIS 143492, 2013 WL 5477495, at *12 (S.D.N.Y. Oct. 1, 2013) (rejecting argument that defendant waived Rule 9(b) objection by failing to specify it in pre-

to note that the Court agrees with *Musante v. Notre Dame of Easton Church*, No. CIV.A. 301CV2352MRK, 2004 U.S. Dist. LEXIS 5611, 2004 WL 721774, at *6 (D. Conn. Mar. 30, 2004) that "[t]he ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies." *Musante* held that "[t]he more pervasively religious an institution is, the less religious the employee's role need be in order to risk first amendment infringement." *Id.* On the other hand, where an employee's role is extensively religious, a less religious employer may still create entanglement issues. *See Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes."). This Court has already explained that Plaintiff's role was pervasively religious. Plaintiff was "primarily responsible for ministry to certain NYMH's patients and their families." (*See* Compl. ¶ 28.) In light of Plaintiff's exceedingly ministerial role, application of the ministerial exception to a less religious institution may be warranted.

According to *Hosanna-Tabor*, a religious institution for purposes of the ministerial exception is not limited to traditional churches. *Hosanna-Tabor*, 132 S. Ct. at 706. Though the Second Circuit has not addressed the extent

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motion letter pursuant to the court's individual practices rules as "unavailing"); *JP Morgan Chase Bank, N.A. v. Law Office of Robert Jay Gumenick, P.C.*, No. 08 Civ. 2154(VM), 2011 U.S. Dist. LEXIS 46319, 2011 WL 1796298, at *3 (S.D.N.Y. Apr. 22, 2011) (holding insufficient service not waived by omitting it from pre-motion letter).

to which "religious institution" covers organizations other than traditional churches, other courts have held that—for purposes of the ministerial exception—religiously affiliated schools, hospitals and corporations can qualify as "religious institutions." *See Shukla v. Sharma*, 2009 U.S. Dist. LEXIS 90044, *14-15 (E.D.N.Y. Aug. 14, 2009) (citing *EEOC v. Catholic Univ.*, 83 F.3d 455, 461, 317 U.S. App. D.C. 343 (D.C. Cir. 1996) (church affiliated university); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) (non-profit religious corporation). Courts confronted with the "religious institution" issue tend to examine the extent to which the organization has religious characteristics. For example, in *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, a terminated hospital chaplain brought Title VII and ADEA claims against her former employer, and the court held that the chaplain fell within the ministerial exception because the hospital was acting as "an institution with 'substantial religious character.'" 929 F.2d 360, 362 (8th Cir. 1991) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 616, 91 S. Ct. 2105, 2113, 29 L. Ed. 2d 745 (1971)). Similarly, the Supreme Court—citing the Fourth Circuit—held that a "religiously affiliated entity is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics." *Hosanna-Tabor*, 132 S. Ct. at 706 (quoting *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)). Thus, this Court's task is to determine to what extent NYMH's mission and character incorporate religious attributes.

Plaintiff contends that NYMH lost its religious character and affirmatively severed ties with the church when it amended its Certificate of Incorporation in 1975 and removed all reference to its "Church related character" and "relationship with The United Methodist Church." (*See* Pl.'s Brief, 7.) Though the Court recognizes that this amendment caused NYMH to sever all formal ties with The United Methodist Church, that fact is not dispositive of the inquiry. Severing a *formal* affiliation with the Church does not necessarily imply that the Hospital does not maintain any church-based relationship or have any religious characteristics.[3]

Defendants explain that although NYMH is no longer corporately owned by the Methodist Church, the hospital has always retained a "traditional relationship" with the church. (*See* Defs.' Brief, 16.) This is evidenced by the fact that the Hospital maintained "Methodist" in its title, despite an affirmative name change in 1993 when the Hospital affiliated with the New York Hospital. (*See* Deposition of Lyn Hill, ECF No. 101, Exhibit A, at 25:4-6.) In addition, the Hospital's mission statement explains that the Hospital has a historic relationship with the United Methodist Church and includes the objective of providing an active ecumenical program of pastoral care

3. For the same reason, the Court finds the NYMH statement in the publication titled "Communicating the UM Connection to Employees" that "it is no longer *formally* affiliated with a connectional unit of The United Methodist Church" unpersuasive. ("Communicating the UM Connection to New York Methodist Hospital Employees," UMA Journal, Vol. 1, No. 8 (1994), ECF No. 101, Exhibit E.)

and conducting a clinical pastoral program. (*See* NYMH Employee Handbook, ECF No. 101, Exhibit C, at 6.) The Hospital Bylaws also require the Board to have—at all times—significant representation from the United Methodist Church. (Bylaws, ECF No. 101, Exhibit D, at 4, Art. III, Section 2(c).) Based on the foregoing and additional statements from the record, it is clear to the Court that NYMH continues to maintain a connection to the church and operate the Hospital with religious values. (*See* Deposition of Lyn Hill, NYMH Vice President of Communications and External Affairs, ECF No. 101, Exhibit A, at 24:12-19 ("We continue to have a pastor's clinic which is run several times a year, where Methodist ministers come to the hospital for a week and receive free health screenings and education about the hospital. We have a yearly philanthropic appeal to the Methodist churches in our community"; *Id.* at 26:20-22 ("Every employee when they come to orientation is reminded that the patients are human beings who are created in the image of God"); *Id.* at 26:7-11 ("We have a very rich chaplaincy program. We have a 24/7 chaplaincy program, which not necessarily the case at other hospitals. We have our own clinical pastoral education programs, which is the case at very few hospitals."; "Communicating the UM Connection to New York Methodist Hospital Employees," UMA Journal, Vol. 1, No. 8 (1994), ECF No. 101, Exhibit E (detailing how the hospital maintains its Methodist "connection" through its everyday values, financial support from the Methodist church, etc. and stating that "the Methodist influence lives on").)

Plaintiff urges the Court to ignore these indicia of religious affiliation and to hold that the Hospital is not a religious institution because the "Welcome Letter" on NYMH's website and the publication entitled "Residency Program in Internal Medicine" state that NYMH is now a secular institution. Though NYMH may be primarily a secular institution, with regards to its employment of the Plaintiff, the Hospital was acting as a religious organization. *See Scharon*, 929 F.2d at 362 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 616, 91 S.Ct. 2105, 2113, 29 L.Ed.2d 745 (1971)) ("Importantly for our purposes, St. Luke's was acting as a religious institution as Scharon's employer, and Scharon's position as a Chaplain at St. Luke's was 'clergy.' While St. Luke's provides many secular services (and arguably may be primarily a secular institution), in its role as Scharon's employer it is without question a religious organization. ... It cannot seriously be claimed that a church-affiliated hospital providing this sort of ministry to its patients is not an institution with 'substantial religious character.'"). Plaintiff argues that the Department of Pastoral Care's mission was to provide "spiritual" care, rather than "religious" care, and therefore the institution was not a religious one, even in its employment of Plaintiff. (Pl.'s 56.1, ¶ 14.) First, the Court fails to see a meaningful distinction between spiritual and religious.[4] Second, as outlined above, though NYMH

4. Black's Law Dictionary defines "spiritual" as "[o]f, relating to, or involving ecclesiastical rather than secular matters." SPIRITUAL, Black's Law Dictionary (10th ed. 2014). Webster's Dictionary defines "spiritual" as (1) of or relating to a person's spirit, or (2) of or relating to religion or religious beliefs. *See* http://www.merriam-webster.com/dictionary/spiritual (last visited 1/15/2015).

employs pastors of all faiths, it maintains a connection with the United Methodist Church, and its mission statement emphasizes an "ecumenical program of pastoral care." Therefore, insofar as Plaintiff is a Methodist and was responsible—at least in part—for preaching the Christian faith,[5] the relationship between Plaintiff and NYMH (specifically, the pastoral care department) was that of a religious employee and a religious institution. This case does not present the Court, nor will the Court venture out to decide, whether this holding would apply to a religious institution's employment of a minister, pastor, or chaplain of a different faith.

In light of the foregoing, the Court finds sufficient indicia of religious affiliation to create a First Amendment issue. Therefore, Plaintiff's claims are barred by the Free Exercise Clause and the Establishment Clause of the First Amendment, and the case must be dismissed.

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment is GRANTED, and the Complaint should be dismissed in accordance with this opinion. The clerk is respectfully directed to terminate the motion at ECF No. 93 and close this case.

Dated: January 20, 2016
White Plains, New York

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5. For example, Plaintiff conducted Easter services at the Hospital and distributed Bibles. (Compl. ¶ 24.)

Appendix B

SO ORDERED:

/s/ Nelson S. Román
NELSON S. ROMÁN
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 14, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand eighteen.

Docket No. 16-474

MARLON PENN,

Plaintiff-Appellant,

v.

NEW YORK METHODIST HOSPITAL,
PETER POULOS,

Defendants-Appellees.

ORDER

Appellant, Marlon Penn, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/_____