

Nos. 19-267, 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, PETITIONER

v.

AGNES MORRISSEY-BERRU, RESPONDENT

ST. JAMES SCHOOL, PETITIONER

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ES-
TATE OF KRISTEN, RESPONDENT

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR FRANCISCAN UNIVERSITY OF
STEUBENVILLE AS *AMICUS CURIAE* IN SUPPORT
OF PETITIONERS**

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QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE**

Amicus Franciscan University of Steubenville is a university founded in Ohio in 1946 by friars of the Third Order Regular of St. Francis of Penance. It offers 70 academically excellent and passionately Catholic programs of study that engage its 2,400 on-campus and 600-plus online students. Franciscan University takes to heart the divine call to “rebuild my Church” by educating and forming men and women empowered by the Holy Spirit to transform the Church and the world in Jesus Christ.

Amicus seeks to preserve its constitutional right to direct its own religious teaching and governance free from state interference, as well as the same right for other religious organizations and religious institutions of learning.

SUMMARY OF ARGUMENT

The Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, faced with its first application of the ministerial exception, declined to “adopt a rigid formula for deciding when an employee qualifies as a minister.” 565 U.S. 171, 190 (2012). The decisions below adopted just such a rigid formula, breaking with *Hosanna-Tabor* and the “functional consensus” of lower courts both before and after *Hosanna-Tabor*. *Id.* at 203 (Alito, J., concurring). That decision “create[d] a resemblance-to-Perich test,” un-

* The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has contributed monetarily to the preparation or submission of this brief. See Rule 37.6.

der which an employee “serv[ing] a significant religious function” can never be covered by the ministerial exception absent the presence of additional considerations. No. 19-348 Pet. App. 50a, 53a (R. Nelson, J., dissenting from denial of rehearing en banc).

Under this narrow view of the ministerial exception, the religious functions of Catholic university presidents would be insufficient to qualify them as ministers. Despite their secular titles, Catholic university presidents play a crucial role in preserving the religious identities of their schools—not only by interpreting, applying, and implementing religious principles established by the Roman Catholic Church, but also through the dedication and witness of their lives. Making civil courts the arbiters of their qualifications and performance would jeopardize the ability of Catholic universities to follow Church authority and to preserve their religious identity.

ARGUMENT

I. The ministerial exception does not require a rigid formula that elevates an employee’s formal title over his actual religious functions.

The ministerial exception protects “the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.” *Hosanna-Tabor*, 565 U.S. at 196. No “rigid formula”—and certainly not the unyielding calculus of the courts below—can protect the interests of religious groups given our country’s diverse panoply of religious practices, institutions, and organizations. In particular, the decisions below place undue emphasis on the employee’s title.

Just as a “a title, by itself, does not automatically ensure coverage,” a title does not automatically deny coverage either. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 193 (2012). A ministerial “title is neither necessary nor sufficient.” *Id.* at 202 (Alito, J., concurring).

Lower courts have recognized that a “purely secular title * * * does not rule out the application of the ministerial exception.” *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659 (7th Cir. 2018). Even “plainly secular titles (by themselves)” cannot “prevent application of the ministerial exception” because “the substance of the employees’ responsibilities in their positions is far more important.” *Fratello v. Archdiocese of New York*, 863 F.3d 190, 207 (2d Cir. 2017).

Indeed, requiring a ministerial title cuts against the principles of non-interference underlying the Free Exercise and Establishment Clauses. The freedom to select religious leaders has “federal constitutional protection as a part of the free exercise of religion against state interference.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). “[I]mposing an unwanted minister * * * infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.” *Hosanna-Tabor*, 565 U.S. at 188–189. Moreover, meddling with “control” of religious organizations “violates our rule of separation between church and state.” *Kedroff*, 344 U.S. at 110. “According the state the power to determine which individuals will minister to the faithful * * * violates the Establishment Clause, which prohibits government involvement in

such ecclesiastical decisions.” *Hosanna-Tabor*, 565 U.S. at 188–189.

Troublingly, it would “penalize religious groups for allowing laypersons to participate in their ministries” and incentivize “religious organizations to bar laity from substantial ‘role[s] in conveying the [organization’s] message and carrying out its mission.” *Fratello* 863 F.3d at 207 (quoting *Hosanna-Tabor*, 565 U.S. at 192). What is more, it would “give preference to religious groups that have formal ordination processes over those that do not” and those that confer religious titles upon a wider range of individuals. *Id.* (citing *Hosanna-Tabor*, 565 U.S. at 198, 202 & n.3 (Alito, J., concurring)).

As the cases below illustrate, Catholic school teachers often have different titles than Lutheran school teachers like the employee in *Hosanna-Tabor*. “Minister,’ although commonly used in Protestant denominations, is ‘rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists.” No. 19-348 Pet. App. 56a (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)) (R. Nelson, J., dissenting from denial of rehearing en banc). The focus of the decisions below “on [a Catholic teacher’s] title ‘trivialized how the distinct Catholic mission of integral formation permeated everything Ms. Biel did as a teacher’ and ‘downplays [a Catholic teacher’s] function as a *Catholic* teacher.” *Id.* (quoting Brief for Nat’l Catholic Educ. Ass’n as Amicus Curiae in Support of Rehearing and Rehearing En Banc at 4) (R. Nelson, J., dissenting from denial of rehearing en banc).

In the context of religious schools, the lack of a ministerial title suggests only weakly a non-

ministerial role. This Court has long held that, for many religious schools, “[r]eligious authority necessarily pervades the school system.” *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). To varying degrees, regardless of title, every employee of a religious school performs tasks essential to “conveying the [school’s religious] message and carrying out its mission,” and “transmitting the [religious] faith to the next generation.” *Hosana-Tabor*, 565 U.S. at 192. As with *amicus*, “[t]he religious mission of the school” guides every act taken by school officials. *Catholic Bishop of Chicago*, 440 U.S. at 502. And so the employment “relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school.” *Id.* at 504.

Even if the lack of a ministerial title might suggest that the employee’s duties are secular, that would not necessarily remove the employee from the ministerial exception’s coverage. The ministerial exception is not “limited to those employees who perform exclusively religious functions,” as even “[t]he heads of congregations * * * have a mix of duties, including secular ones.” *Hosanna-Tabor*, 565 U.S. at 193. Indeed, in *Hosanna-Tabor*, the Court determined that the employee was covered by the exception despite “her religious duties consum[ing] only 45 minutes of each workday.” *Id.*

Thus, properly understood, the First Amendment directs courts to “focus on the function performed by persons who work for religious bodies.” *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). By focusing on the employee’s function within the religious institution, the court can determine whether the employee “serves as a messenger or teacher of [the]

faith.” *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

II. A narrowed ministerial exception would jeopardize the ability of Catholic universities to follow church authority and preserve their religious identity.

The Roman Catholic Church has prescribed far-reaching principles and norms with which Catholic universities must comply. University presidents help preserve the religious identities of their schools by interpreting, applying, and implementing these principles and norms. At the same time, however, they do not receive a ministerial title from their employers, do not always need formal training as ministers, and will not always hold themselves out as ministers. Narrowing the ministerial exception so that it excludes university presidents would jeopardize the ability of Catholic universities to preserve their religious identity and create exactly the type of conflict between civil and religious authority that the Religion Clauses aimed to avoid.

A. To preserve its religious identity, a Catholic university must comply with far-reaching principles and norms established by the Roman Catholic Church.

In *Ex Corde Ecclesiae*, Pope John Paul II established principles that define what it means for a university to be Catholic and norms by which Catholic universities must abide. See Pope John Paul II, *Apostolic Constitution on Catholic Universities Ex Corde Ecclesiae (ECE)*, August 15, 1990, AAS 82 (1990). As a matter of Canon Law, “Catholic teaching and discipline are to influence all university activities.” *Id.* Art. 2, § 4. Thus, “[a] Catholic University, as Catholic,

informs and carries out its research, teaching, and all other activities with Catholic ideals, principles, and attitudes.” *Id.* Art. 2, § 2.

As for research, the pursuit of knowledge at a Catholic university “necessarily includes (a) the search for an integration of knowledge, (b) a dialogue between faith and reason, (c) an ethical concern, and (d) a theological perspective.” *Id.* ¶ 15 (emphasis omitted). In the spirit of service to the Church and in the desire to promote cultural progress, a Catholic university grapples with “serious contemporary problems in areas such as the dignity of human life, the promotion of justice for all, the quality of personal and family life, the protection of nature, the search for peace and political stability, a more just sharing in the world’s resources, and a new economic and political order that will better serve the human community at a national and international level.” *Id.* ¶ 32 (emphasis omitted). Whatever question is involved, “a Catholic University is completely dedicated to the research of all aspects of truth in their essential connection with the supreme Truth, who is God.” *Id.* ¶ 4.

The role of a Catholic university embraces not only “the ardent search for truth,” but also “its unselfish transmission to youth and to all those learning to think rigorously, so as to act rightly and serve humanity better.” *Id.* ¶ 2. In this connection, “students are educated in the various disciplines so as to become truly competent in the specific sectors in which they will devote themselves to the service of society and of the Church, but at the same time prepared to give the witness of their faith to the world.” *Id.* ¶ 20. In addition to vocational knowledge, Catholic teaching inculcates an active concern for the “protection and advancement of human dignity” and a “Christian

spirit of service to others for the promotion of social justice” that is “shared by its teachers and developed in its students.” *Id.* ¶¶ 12, 34 (emphasis omitted). In short, Catholic universities are “engaged in instilling the Gospel message of Christ in souls and cultures.” *Id.* ¶ 10; see also *id.* ¶ 11 (noting role of Catholic universities in “the development of Christian culture and human progress”).

This effort extends beyond the classroom to all other activities at the university. Catholic universities give “the members of the university community an opportunity to integrate religious and moral principles with their academic study and non-academic activities, thus integrating faith with life.” *Id.* ¶ 38 (emphasis omitted). This requires institutional “recognition of and adherence to the teaching authority of the Church in matters of faith and morals.” *Id.* ¶ 27. It also requires that the university provide opportunities for members to gather as a community and “give a practical demonstration of its faith in its daily activity, with important moments of reflection and of prayer.” *Id.* ¶ 39 (emphasis omitted). At the core of the university’s multi-faceted work is a consistent method—the “formation of an authentic human community animated by the spirit of Christ.” *Id.* ¶ 21.

B. Catholic university presidents play a crucial role in preserving the religious identities of their schools.

Given the pervasive influence of religion on the work of a Catholic university, it is unsurprising that religious responsibilities extend beyond employees with ministerial titles. Pope John Paul II recognized that laity at a Catholic university “exercise an im-

portant apostolic role.” *Id.* ¶ 25. In describing the role of directors and administrators, the Pope recognized that “the dedication and witness of the non-academic staff are vital for the identity and life of the University.” *Id.* ¶ 24 (emphasis omitted). According to Canon Law, “The responsibility for maintaining and strengthening the Catholic identity of the University rests primarily with the University itself” and “is entrusted principally to university authorities.” *Id.* Art. 4, § 1. Thus, one of the central responsibilities of a Catholic university president is to cultivate the school’s religious identity both programmatically and personally.

In programmatic terms, the president of a Catholic university in America must help the school interpret and apply in a local context both the general norms legislated by *Ex Corde Ecclesiae* and the specific norms legislated by the U.S. Conference of Catholic Bishops. See U.S. Conference of Catholic Bishops, *The Application for Ex Corde Ecclesiae for the United States* (2000). Under Canon Law, Catholic universities must incorporate these norms into their governing documents. *ECE*, at Art. 1, § 3. More importantly, they must implement them in concrete ways. As the head of the university’s administration, a university president must oversee and guide the administration’s mandatory efforts to, among other things, recruit personnel “who are both willing and able to promote [the school’s religious] identity,” “combine academic and professional development with formation in moral and religious principles and the social teachings of the Church,” “contribute to the Church’s work of evangelization,” “promote the pastoral care of all members of the university community,” and “when possible and in accord with Catholic prin-

ciples and doctrine, cooperate with government programmes and the programmes of other national and international Organizations on behalf of justice, development and progress.” *Id.* Art. 4, §§ 1, 5; Art. 5, § 1; Art. 6, § 1; Art. 7, § 2. In short, a Catholic university president needs the understanding and commitment to interpret the principles and norms of Church legislation, determine how they apply in specific contexts, and implement them effectively.

In personal terms, the “dedication and witness” of a Catholic university president’s life are “vital for the identity and life of the University.” *Id.* ¶ 24. Thus, the job description of the president of Franciscan University of Steubenville, for example, begins with the requirement that the president be a faithful pastor to the university community who personifies the institution. This includes praying, discerning the spiritual needs of community members, and sensing the best course spiritually for the community. It also includes nurturing a culture of openness to the Holy Spirit and leading a life of exemplary virtue, service, and devotion to the teachings and practices of the Catholic faith. Through his or her life and work, the president of a Catholic university must apply the teachings of the Church to cultivate the religious identity of the schools they lead.

C. Despite their religious functions, Catholic university presidents would likely fall beyond the scope of a narrowed ministerial exception.

The Ninth Circuit’s interpretation of the ministerial exception affects more than the ability of Catholic elementary schools to decide whether or not to rehire their teachers. It jeopardizes the ability of Catholic

universities to ensure that their presidents have the commitment and the personal qualities needed to preserve their religious identity.

Despite their religious functions and their critical role in conveying the Church's message and implementing its mission, Catholic university presidents generally receive the secular title "president" from their employers. That title may arguably reflect religious training at universities that make such training a requirement for the position. But at other universities it does not. And whether a university president holds himself or herself out as a minister of the Church is a circumstance that will likely vary from case to case but should in no way affect whether the university is free to select its president without fear of government intrusion.

Under the Ninth Circuit's interpretation, Catholic university presidents could fall outside the scope of the ministerial exception because of their secular title. In any case, their religious functions would certainly not satisfy the Ninth Circuit's standard apart from other factors. See No. 19-267 Pet. App. 2a (holding that applicability of the ministerial exception depends not only on an employee's religious functions but also on: "(1) whether the employer held the employee out as a minister by bestowing a formal religious title; (2) whether the employee's title reflected ministerial substance and training; [and] (3) whether the employee held herself out as a minister"); No. 19-348 Pet. App. 9a (holding to the same effect).

But a university that depends on its president to interpret, apply, and implement religious principles legislated by the Church and to cultivate the school's distinctly religious identity both programmatically

and through the dedication and witness of his or her life should be able to apply more than secular criteria to its employment decisions. Civil courts should not entangle themselves in judging the qualifications for such a religious role. This is true because of the religious obligations of the role itself, regardless of how religious civil courts may deem a university president's title, training, or public persona to be. See *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J. concurring) (“Applying the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious group, regardless of its beliefs.”).

A contrary holding would establish an arbitrary and burdensome legal standard for determining when Catholic universities have the right to ensure that employees with important religious functions carry out those functions in accord with their sincerely held religious beliefs. Uncertainty about how courts would apply this standard to the essentially religious question of who qualifies as a minister “may cause a religious group to conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.” See *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J. concurring). Moreover, a rule that invited civil courts to judge the qualifications for a religious role would violate both the Free Exercise Clause, “which protects a religious group’s right to shape its own faith and mission through its appointments,” and the Establishment Clause, “which prohibits government involvement in such ecclesiastical decisions [as ‘which individuals will minister to the faithful’].” *Hosanna-Tabor*, 565 U.S. at 188–89.

Civil courts should not pressure Catholic universities to relegate themselves to a Government-sanctioned set of “religious titles” instead of acknowledging their leaders as university presidents. Civil courts should not pressure Catholic universities to establish a Government-sanctioned set of “religious training” requirements for their presidents instead of choosing candidates with the training they consider most relevant. And civil courts should not pressure Catholic universities to require their presidents to hold themselves out as ministers instead of describing their role in whatever way the universities and presidents see fit in light of their circumstances, preferences, and theology. The Ninth Circuit’s narrow reading of the ministerial exception does just this, resulting in a substantial burden on the sincerely held religious beliefs of Catholic universities, entangling the state in questions of religion, and jeopardizing the ability of Catholic universities to follow Church authority and preserve their religious identity.

CONCLUSION

For *amicus* and religious institutions of higher learning, the right to control who teaches their faith, and who transmits it to the next generation, remains indispensable to the free exercise of religion. That right requires recognition of a robust ministerial exception—one sufficiently broad to encompass Petitioners’ actions in this case.

The decisions below should be reversed.

Respectfully submitted.

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