

Nos. 19-267 & 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, PETITIONER

v.

AGNES MORRISSEY-BERRU

ST. JAMES SCHOOL, PETITIONER

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF KRISTEN BIEL

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF OF *AMICI CURIAE*
COUNCIL FOR CHRISTIAN COLLEGES AND
UNIVERSITIES AND FORTY INDIVIDUAL
RELIGIOUS COLLEGES AND UNIVERSITIES
SUPPORTING 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 *AMICI*¹

The decisions under review here pose an existential threat to the continued vitality of American religious higher education. Since before the Founding, religious colleges and universities have played a crucial role in educating the next generation of believing citizens and leaders. And until the decisions at issue here, those institutions reasonably believed their religion-based judgments about whom they will employ to help them further that critical mission were protected by the “ministerial exception” recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). That is because, although teachers of what others might call “secular” subjects at religious colleges and universities usually are not formally called or ordained as ministers, they and other teachers at those institutions often serve a spiritual function similar to the teacher in *Hosanna-Tabor*.

Indeed, in a typical religious college, all courses—including the typically theological and those rooted in other academic disciplines—are infused by faith, and thus must be taught by academics who hold to the institution’s faith as well as the academic rigor of their discipline. That is the distinctive promise a typical religious college makes to students and their families—that all instruction will be shaped by the school’s particular theological understandings. Thus, the math course and the English literature course, the art history course and the engineering course, will be taught and studied through a lens of faith. Faith, then, is not

¹ No one other than *amici*, their members and counsel authored any part of this brief or made a contribution to fund it. Counsel for the parties have consented to its filing.

to be an additive to the educational experience, but the oxygen that gives it life.

To deliver on that promise, all (or at least most) instructors must be able to teach their courses and mentor students through an integration of faith with learning. The Ninth Circuit's decisions, however, cast substantial doubt on whether the exception recognized in *Hosanna-Tabor* protects *any* religious institution's decisions about the employment of teachers who are not formally called or ordained as ministers. Accordingly, those decisions are of great concern to *Amici*, who represent a wide swath of religious higher education.

Specifically, *Amici* include the Council for Christian Colleges and Universities ("CCCU"), which represents some 140 faith-based institutions across the United States. *Amici* also include 40 individual religious college and universities from around the country. Believing in the importance of integrating faith into all aspects of learning, *Amici* strive to provide faith-infused, high-quality education to their students. They do so based on a religious belief that, through such an education, their students will be better prepared to succeed in their professions while they live out their faith. Like the petitioners here, *Amici* cannot achieve those sacred missions without the ability to choose for themselves, and choose how to manage, those who will "transmit[] the * * * faith to the next generation." *Id.* at 192.

Amici thus have a powerful interest in ensuring that the exception continues to protect their right to act without government coercion in employing teachers and administrators who are fully aligned with their institutions' religious missions.

STATEMENT

Our Lady of Guadalupe School and St. James School are private Catholic schools in the Los Angeles area. Respondents Agnes Morrissey-Berru and Kristen Biel were fifth-grade teachers at those schools, where they also played a role in religious education.

Morrissey-Berru, for example, taught Catholic doctrine through “prayer, worship, and the reading of Scripture.” OL.Pet.8 (citing OL.App.45a-51a). And Biel taught religion classes four times each week. StJ.App.32a. For performance-related reasons, both schools eventually declined to renew the teachers’ contracts. Biel, who was undergoing treatment for breast cancer, alleged that the decision violated the Americans with Disabilities Act, while Morrissey-Berru claimed the decision violated the Age Discrimination in Employment Act. StJ.App.4a, OL.App.1a.

In each case, the district court found that the *Hosanna-Tabor* exception applied because of the significant religious functions that Morrissey-Berru and Biel performed and granted summary judgment. On appeal, the Ninth Circuit effectively limited *Hosanna-Tabor* to its facts. It reversed both decisions after holding—in disregard of the religious functions the teachers exercised—that *Hosanna-Tabor*’s “ministerial exception” did not apply.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor*, the Chief Justice wrote for a unanimous Court that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor*, 565 U.S. at 181. The Ninth Circuit refused to apply this rule to claims asserted by teachers at religious institutions who taught both religious and secular courses but were not called or ordained ministers.

I. Such a narrow reading of *Hosanna-Tabor* poses a major threat to religious colleges and universities, which exist both to provide an excellent secular education and to ensure the continuity of the faith. If the ministerial exception does not apply to teachers like respondents Morrissey-Berru and Biel—despite their responsibility for teaching the Catholic faith—it likely would not apply to teachers employed by *Amici*, many of whom have no official ordination or formal title of “minister.” Yet those teachers—even if assigned to nominally secular courses—are usually tasked with teaching those courses through a spiritual lens. Accordingly, those teachers serve no less vital a role in furthering *Amici*’s religious aims than a pastor, rabbi or priest. Indeed, teachers in religious colleges are typically evaluated in significant part on their commitment to furthering religious aims.

If *Amici* are unable to decide for themselves who will transmit their faith to the next generation, their ability to further their religious goals—their very *raison d’être*—will be seriously compromised. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979).

Any such weakening of religious higher education would be an enormous loss. As Congress has recog-

nized, religious colleges offer students superior opportunities to integrate community service into their educations, to enjoy the physical and emotional safety that generally prevail in communities united by a common religious ethic, and to learn in an atmosphere of greater philosophical and political diversity than is offered in most non-religious institutions. Accordingly, the mere existence of religious colleges and universities adds valuable diversity to higher education in general. See, *e.g.*, 154 Cong. Rec. H7658-03 (2008); 20 U.S.C. 1011a(a)(2). Without the ability to ensure mission alignment, religious higher education institutions would not be able to provide the unique benefits they now provide.

The decisions below would deprive religious colleges of this ability by requiring an employee to have achieved formal religious status through training or an ecclesiastical title before the *Hosanna-Tabor* exception can apply. But that incorrectly assumes that transmission of religious viewpoints and faith through education happens only through those instructors meeting a formulaic test for ministers, and inappropriately forces the variety of religious approaches to education into a singular model of formal ministry exemplified by the particular Protestant church in *Hosanna-Tabor*.

This is detrimental to people and institutions of all faiths. Requiring other faiths to act like the Protestant church in *Hosanna-Tabor* just to exercise their constitutional rights impermissibly pressures them to tailor their practices to the practices of another religious body. This requirement alone violates the First Amendment's free exercise and establishment clauses.

II. To prevent further harm to religious higher education, this Court should adopt the functional approach embraced by Justices Alito and Kagan in *Hosanna-Tabor*. As explained in detail by petitioners, the purpose of the exception is to ensure that “strictly ecclesiastical” matters such as the question of “who will minister to the faithful” are left to the religious institution alone. *Hosanna-Tabor*, 565 U.S. at 195. The functional approach is far more responsive to the First Amendment concerns underlying the exception than the Ninth Circuit’s formal approach, which asks only whether a religious organization’s employee is a called and/or ordained minister. Teachers and other employees can also play a vital role in propagating the faith, and focusing only on the formal matters addressed by the Ninth Circuit would raise serious entanglement and religious-discrimination concerns.

Indeed, as Justice Thomas noted in *Hosanna-Tabor*, “[t]he question whether an employee is a minister is itself religious in nature, and the answer will vary widely.” *Id.* at 197 (Thomas, J., concurring). The functional approach—which leaves religious bodies wide discretion in defining their religious missions and determining how best to ensure that their employees align with those missions—would solve this problem as well.

ARGUMENT

I. Religious Colleges And Universities, Which Benefit Society In Numerous Ways, Would Suffer Serious Harm Under The Ninth Circuit’s Misinterpretation Of *Hosanna-Tabor*.

The United States is home to hundreds of religious colleges and universities representing the beliefs of hundreds of different religions and sects.² Largely because of their religious character, these institutions serve important societal purposes. Yet the Ninth Circuit’s narrow misinterpretation of *Hosanna-Tabor* severely limits such institutions’ ability to decide who will further their faith, thereby curtailing their ability to provide the unique benefits they offer the Nation.

A. Religious colleges and universities bring unique benefits—including much-needed diversity—to American higher education.

Beyond academic excellence competitive with secular schools, religious colleges and universities offer students advantages that often are not as readily available in secular institutions. These include not only the opportunity to study academic disciplines through the standpoint of faith, but also the opportunity to naturally integrate community service into higher education; greater physical safety; and a broader diversity of philosophical and political perspectives among professors and students.

1. As noted earlier, the promise a religious college or university makes to students and their families is

² See National Center for Education Statistics, *College Navigator*, <https://nces.ed.gov/collegenavigator/?s=all&ra=99> (last visited Feb. 8, 2020) (“Religious Affiliation” dropdown menu).

the opportunity to study academic disciplines of interest to the student through the lens of faith. For Christian colleges, for example, faith, learning, life and work all come under “the Lordship of Jesus Christ,” as famously discussed by statesman, journalist and theologian Abraham Kuyper.³ Religious colleges from other faith traditions also strive for a similar integration of faith and learning.⁴ And for religious students and families, that integration is immensely valuable.

Religious colleges and universities also offer additional benefits.

2. In the Higher Education Opportunity Act of 2008, Congress itself recognized one of those—helping students integrate community service into their educational pursuits. Pub. L. No. 110-315 (2008). That is one reason why, among other things, that Act requires accrediting bodies to “respect[] the * * * religious missions” of such institutions. 154 Cong. Rec. H7668 (2008). Noting that “[t]he time to recognize and encourage an increased commitment to public service is now,” the House Report on this Act specifically mentioned, as a reason for congressional protection, the increasing number of students at religious colleges who serve religious missions or perform other kinds of service. 154 Cong. Rec. H7661 (2008). These observations reflect that community service is one important way in which those colleges contribute to society.

³ *Abraham Kuyper: A Centennial Reader* 488 (James D. Bratt ed., 1998).

⁴ Yeshiva University, *About*, <https://www.yu.edu/about> (last visited Feb. 10, 2020).

It is no accident that religious colleges foster community service. Students and professors in these institutions are typically encouraged by their foundational religious texts, traditions, and teachings to take care of the foreigner, the poor, and the needy.⁵ And they are consequently more likely to embrace the challenging principle that the value of one's life is measured not primarily by what one achieves in a secular occupation, but by how well one serves others.⁶

Thus, for instance, a sociology major in a Jewish college might find inspiration in the Book of Exodus to study and address the plight of refugees from war-torn lands.⁷ Or the Quran might lead a student in a Muslim school to investigate the factors influencing immigration, then look for opportunities to serve local immigrants.⁸ Or a student at a Catholic law school might be

⁵ See, *e.g.*, Deuteronomy 10:18-19 (“Love the sojourner, therefore; for you were sojourners in the land of Egypt.”); Matthew 25:40 (KJV) (“Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.”); Quran 16:90 (Sahih International) (“Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression.”); Mosiah 2:17 (from the Book of Mormon) (“[W]hen ye are in the service of your fellow beings ye are only in the service of your God.”).

⁶ See, *e.g.*, Luke 12:15 (“[A] man's life consisteth not in the abundance of things which he possesseth”).

⁷ See, *e.g.*, Exodus 22:20, https://www.chabad.org/library/bible_cdo/aid/9883/jewish/Chapter-22.htm (“And you shall not mistreat a stranger, nor shall you oppress him, for you were strangers in the land of Egypt.”).

⁸ See, *e.g.*, Quran 17:26 (“Give * * * to the needy and the wayfarers.”).

moved by the New Testament to provide *pro bono* assistance to unwed mothers or foster children.⁹

Indeed, studies show that students at religious colleges tend to spend more of their time in community service than students at secular colleges, public or private.¹⁰

Students at such colleges also frequently pause their formal educations for domestic or overseas public service.¹¹ This is by design: Institutional policies and accommodations provide deferment options to encourage such service without detrimentally affecting the student's education.¹² It is also common for students who don't serve traditional (evangelizing) missions to

⁹ See, e.g., Matthew 25:35-40; James 1:27.

¹⁰ See CCCU, *The Case for Christian Higher Education* 8-10 (2018), https://www.cccu.org/wp-content/uploads/2018/08/2018-Case-for-CHE_WEB_pages.pdf; Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service Among College Students*, 44 Rev. Religious Res. 285, 289-291 (2003) (religious college students were far more likely to engage in volunteer activity).

¹¹ Stephen Thomas Beers, *Faith Development of Christian College Students Engaged in a One-Month Study Abroad Mission Trip* (1999) (unpublished Ph.D. dissertation, Ball State University; see Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4NS Christian Educ. J 123 (2000); Tad Welch, *BYU sees dramatic jump in number of returned missionaries*, Deseret News (Apr. 4, 2016, 9:40 AM), <https://www.deseret.com/2016/4/4/20585929/byu-sees-dramatic-jump-in-number-of-retained-missionaries#0>.

¹² See La Sierra University, *Center for Outreach & Mission Service*, <https://lasierra.edu/missions/> (last visited Feb. 8, 2020); Office of Campus Ministries, *Andrews University Missions*, <https://www.andrews.edu/cm/missions/> (last visited Feb. 3, 2020); Brigham Young University, *Missionary Deferments*, <https://enrollment.byu.edu/missionaries> (last visited Feb. 8, 2020).

serve as humanitarian volunteers in foreign countries while studying abroad.¹³ All such humanitarian work not only benefits the religious groups of which the students are a part, but also reduces cultural divides between nations and religions. That too benefits both students and the world community.

3. Religious colleges and universities also provide increased physical safety for learning and academic inquiry. For instance, in a recent study of campus safety, Regent University, Summit University and Brigham Young University—all private, religious institutions—were named the safest in the nation.¹⁴ Indeed, of the top twenty-five safest universities, eighteen (or 72 percent) are religious.¹⁵ And colleges classified as “most religious” consistently report much lower rates of sexual assault than the national average.¹⁶

¹³ See R. Michael Paige, Gerald W. Fry, Elizabeth M. Stallman, Jasmina Josic, and Jae-Eun Jon, *Study Abroad for Global Engagement: The Long Term Impact of Mobility Experiences*, 20 *Intercultural Educ.* 529 (2009); Princeton Review, *The Gap Year Experience: A Life-Changing Opportunity*, <http://www.princetonreview.com/study-abroad/college-abroad/gap-year> (last visited Feb. 8, 2020).

¹⁴ Tanya Loudenback, *The 25 safest college campuses in America*, *Business Insider* (Jan. 12, 2016), <http://www.businessinsider.com/safest-college-campuses-in-america-2016-1>.

¹⁵ *Id.*; see also Niche, *Safest College Campuses*, <https://colleges.niche.com/rankings/safest-colleges/> (last visited Feb. 8, 2020) (same).

¹⁶ EDSmart, *College Sexual Assault Statistics of Top Ranked Schools 2015*, <http://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#stats> (last visited Feb. 8, 2020).

Accordingly, for students and parents concerned about physical safety, religious colleges and universities are an attractive option.¹⁷ And the mere existence of such options in the higher education market helps ensure that other institutions place greater emphasis on student safety.

4. Religious colleges also contribute substantially to the diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society. From the Islamic command to “[b]e in the world as if you were a stranger or traveler” to Jesus’ command that his disciples be “a light to the world,”¹⁸ people of faith are encouraged to transcend the cultures in which they live. Throughout the Nation’s history, this

¹⁷ Indeed, though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, e.g., Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sep. 2, 2012), <http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html>.

¹⁸ See also Sahih al-Bukhari 6416, <https://sunnah.com/bukhari/81/5> (“Be in this world as if you were a stranger or a traveler.”); Avi Lazerson, *Holiness and Judaism*, Jewish Magazine (Jan. 2001), <http://www.jewishmag.com/39mag/holy/holy.htm> (directing Jews to “liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences”); Matthew 5:14-15 (Christians are to be a “light” to the world); David Peterson, *Worship and Ethics in Romans 12*, 44 Tyndale Bull. 271, 282 (1993), http://www.tyndalehouse.com/TynBul/Library/TynBull_1993_44_2_04_Peterson_WorshipIn-Rom12.pdf (directing Christians to “yield to the power of God and his norms, rather than to the influence of this age and its norms.”); Chris Wright, *What Difference Does Religion Make?* 14 (2002) (instructing Buddhists that the “way to end unhappiness and suffering is to stop clinging to things [of the world]”).

effort to live differently has suffused numerous religious schools—compelling them, for example, to help lead the fight against slavery.¹⁹ Thus, it should come as no surprise that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

Indeed, the most comprehensive study addressing the political leanings of university faculties to date confirms that religious colleges and universities have value in part because they attract professors and students from across the political spectrum. It found that at non-religious, public universities, 65.7 percent of faculty across disciplines self-identify as either “liberal” or “far left,” while only 7.8 percent identify as “conservative” or “far right.”²⁰ By contrast, in non-Catholic religious colleges,²¹ only 42.6 percent identify as “liberal” or “far left” while 25.9 percent of professors

¹⁹ Yale, Slavery & Abolition, *The Story of Yale Abolitionists*, <http://www.yaleslavery.org/Abolitionists/abolit.html> (last visited Feb. 8, 2020); see also Bertram Wyatt-Brown, *American Abolitionism and Religion*, Divining America: National Humanities Center, <http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/amabrel.htm> (last visited Feb. 8, 2020) (religious involvement in the fight against slavery).

²⁰ Ellen B. Stolzenberg, et al., Higher Education Research Institute at UCLA, *Undergraduate Teaching Faculty: The HERI Survey, 2016-2017*, at 38 (2019), <https://heri.ucla.edu/monographs/HERI-FAC2017-monograph.pdf>.

²¹ The study does not explicitly provide a category for non-Catholic religious *universities*. *Ibid.* *Amici* have no reason to believe that the ideologies of professors at non-Catholic religious *universities* differ in any meaningful respect from those at non-Catholic religious *colleges*.

identify as “conservative” or “far right”²²—nearly four times the percentage of faculty at non-religious institutions.

As a result, religious colleges are more likely than others to provide students extensive exposure to divergent political views. And that includes not only the more “conservative” views that, for whatever reason, are largely missing in many secular institutions, but also more progressive views, leavened by religious perspectives.²³

The diversity that religious colleges add has long been understood and valued by Congress. As it said in the Higher Education Opportunity Act, “[i]t is the sense of Congress that * * * the diversity of institutions and educational missions is one of the key strengths of American higher education.” 20 U.S.C. 1011a(a)(2). Consistent with that view, the provision further urged that “individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals.” *Id.*

In short, Congress has recognized that viewpoint diversity *among* educational institutions is valuable in higher education as a whole. Moreover, as explained below, each of these unique benefits of religious higher

²² *Id.* at 38. Professors in Catholic colleges more closely align with national ideological averages, with 57.5 percent identifying as “liberal” or “far left” and 13.5 percent identifying as “conservative” or “far right.” *Ibid.*

²³ CCCU, *The Case for Christian Higher Education*, *supra*, at 12 (67% of CCCU students report that their courses “often” or “very often” address topics such as religion).

education would be imperiled by the Ninth Circuit's overly narrow view of *Hosanna-Tabor*.

B. In religious colleges and universities, teachers of all academic subjects play a central role in accomplishing religious missions and are typically hired and evaluated on that basis.

Regardless of the subjects they teach, teachers at religious colleges and universities are often expected to embody and further the faith. At the heart of such missions is the goal to teach students how to live their faith on a daily basis, and thus, “[w]hen it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters.” *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Accordingly, at most religious colleges, all teachers of all academic disciplines are critical to the schools’ religious missions because they show and teach students how to integrate their religious beliefs into every aspect of their lives. This centrality to religious missions is typically reflected in religious colleges’ mission statements, faculty handbooks and similar guidance, and in their hiring and evaluation processes.

1. For example, Pepperdine University explains its approach to education as “cutting edge, original scholarship and classroom teaching” developed and delivered “within a framework of Christian beliefs and values.”²⁴ It recognizes that “Christian colleges and Christian universities provide an added advantage: the integration of Christian principles *with* traditional academic fields.”²⁵

Many other schools’ mission statements likewise call for using the classroom to encourage lifelong participation and loyalty to the faith.²⁶ To fulfill their religious missions, these schools work to ensure that the classroom experience is fully aligned with their values and purposes.

That is true, for example, at The Catholic University of America, whose “teaching * * * should be faithfully Catholic, conformed in all things to the creed of the Church and the decisions of the Holy See.”²⁷ It is also true at Yeshiva University, whose curriculum is “[r]ooted in Jewish thought and tradition,” and at Calvin University, which requires even administrators to

²⁴ Pepperdine University, *Spiritual Life*, <https://www.pepperdine.edu/spiritual-life/christian-university> (last visited Feb. 8, 2020).

²⁵ *Id.* (emphasis added).

²⁶ *E.g.*, Geneva College, *Mission, Vision, Values*, <https://www.geneva.edu/about-geneva/identity/mission-doctrine>; Anderson University, *Mission & Vision*, <https://anderson.edu/about/mission-vision/> (last visited Feb. 8, 2020); Biola University, *Mission, Vision and Values*, <https://www.biola.edu/about/mission> (last visited Feb. 6, 2020); Life Pacific University, *Mission*, <https://www.lifepacific.edu/about-life-pacific> (last visited Feb. 8, 2020).

²⁷ The Catholic University of America, *Faithfully Catholic*, <https://www.catholic.edu/about-us/faithfully-catholic/index.html> (last visited Feb. 8, 2020).

promote Christian education generally and Calvin’s religious mission specifically.²⁸

These schools recognize that this tailoring of educational experience to religious aims is only possible through the faithful commitment of faculty and staff. For example, the official document describing the educational aims of Brigham Young University (BYU) states that “[b]oth those who teach in the classroom and those who direct activities outside the classroom are responsible for contributing to this complete educational vision”²⁹—that is, a combination of academic and spiritual development. And at Wheaton College all employees—not just teachers—are to focus on the “integration of faith and learning with every aspect of personal and common life.”³⁰ The mission statements

²⁸ Yeshiva University, *About*, <http://www.yu.edu/about> (last visited Feb. 8, 2020); Calvin University, *Handbook for Teaching Faculty* 16-17 (Oct. 2019), <https://calvin.edu/contentAsset/raw-data/225e6a56-bd6a-49a6-b7c9-a0992dc57399/fullTextPdf>.

²⁹ BYU, *Aims*, <https://aims.byu.edu> (last visited Feb. 8, 2020). See also Malone University, *Mission, Foundational Principles, and Doctrinal Statements*, <https://www.malone.edu/about/mission-foundational-principles-doctrinal-statement/> (last visited Feb. 6, 2020); MidAmerica Nazarene University, *Working at MNU*, <https://www.mnu.edu/resources/employment> (last visited Feb. 8, 2020); University of Northwestern–St. Paul, *Declaration of Christian Community*, <https://unwsp.edu/about-us/christian-values/declaration-of-christian-community> (last visited Feb. 6, 2020).

³⁰ Wheaton College, *Employee Handbook 2*, <https://www.wheaton.edu/media/human-resources/Employee-Handbook-1-3-18.pdf>.

of most other religious colleges reflect a similar focus on the religious functions of their faculty.³¹

2. Because religious colleges rely so heavily on their teachers, many have expressly religious hiring requirements. For example, Geneva College, a Christian school, seeks to “inspire students to integrate faith in Christ into all aspects of life in the real world, and to serve faithfully within their callings for Christ and Country.”³² Accordingly, Geneva requires job applicants to profess a “Christian Commitment.”³³ To that end, Geneva recently sought a biology teacher who would “understand and support the College’s Foundations for Christian Education by expressing an evangelical Christian profession of faith and demonstrate the ability to *integrate* a Christian perspective in their work.”³⁴

³¹ *E.g.*, Geneva College, *Foundational Concepts of Christian Education*, https://www.geneva.edu/about-geneva/foundational_concepts; Northwest Christian University, *Mission & Vision*, <https://www.nwcu.edu/about/mission-vision/>; University of Northwestern–St. Paul, *Mission Statement*, <https://unwsp.edu/about-us/christian-values/mission-and-vision>.

³² Geneva College, *Mission, Vision, Values*, <https://www.geneva.edu/about-geneva/identity/mission-doctrine> (last visited Jan. 18, 2020).

³³ Geneva College, *Employment*, <https://www.geneva.edu/employment/index> (last visited Jan. 18, 2020).

³⁴ Geneva College, *Tenure Track Position in the Department of Biology*, https://recruiting.myapps.paychex.com/appone/Main-InfoReq.asp?R_ID=2775668 (last visited Jan. 18, 2020) (emphasis added).

Many other religious colleges likewise require job applicants to sign specific statements of faith.³⁵ The need for faith statements underscores the reality that at religious colleges, those teachers who are expected to teach and embody the faith—which at many institutions includes *all* teachers—play an essential role in furthering the school’s religious missions.

3. The importance of the religious experience at these institutions is often reflected in student evaluations, which are used to determine “who is retained and who is promoted.”³⁶ For example, Liberty University’s assessment form asks what it and its teachers can change to “more efficiently and effectively train *champions* for Christ[.]”³⁷ Likewise, Azusa Pacific University “students evaluate the efforts of all full time,

³⁵ See, e.g., Wheaton College, *Job Seekers*, <https://www.wheaton.edu/about-wheaton/offices-and-services/human-resources/job-seekers/> (last visited Jan. 18, 2020); Pillar College, *Job Opportunities*, <https://pillar.edu/about-pillar/job-opportunities/#1573235959151-28ba68e2-eae8> (last visited Feb. 8, 2020) (social studies teacher); Huntington University, *Statement of Faith*, <https://www.huntington.edu/about/statement-of-faith> (all faculty); BYU, *University Policies: Church Educational System Honor Code*, <https://policy.byu.edu/view/index.php?p=26> (last visited Feb. 8, 2020); Biola University, *Employment Opportunities*, <https://biola.csod.com/ats/careersite/search.aspx?site=1&c=biola> (last visited Feb. 8, 2020).

³⁶ BYU, *Student Ratings of the Education Experience Questionnaire*, <https://studentratings.byu.edu/info/StudentRatingsForm.html> (last visited Feb. 8, 2020).

³⁷ Liberty University, *Assessment Day (A-Day)*, <http://www.liberty.edu/administration/institutionaleffectiveness/index.cfm?PID=22897> (last visited Feb. 8, 2020) (emphasis added).

part time, and adjunct faculty regarding faith integration in that course.”³⁸ The same is also true at BYU, where students end every semester by addressing how the classroom experience was “Spiritually Strengthening.”³⁹ Many other religious colleges and universities include comparable religious criteria in their student rating systems.⁴⁰

At the supervisory level, such institutions also regularly evaluate faculty using religious criteria based on religious beliefs.⁴¹ For example, Oklahoma Baptist University predicates promotions on “[e]ffective teaching,” which includes the “ability to relate one’s subject

³⁸ Azusa Pacific University, *Faith Integration Faculty Guidebook* 44, <https://www.apu.edu/faithintegration/resources/guidebook/>.

³⁹ Alan L. Wilkins, Jane Birch, Chris Riley, and Thomas Ferrin, *What Students Don’t Like: Distinguishing the Least from the Most Successful Professors at Intellectually and Spiritually Strengthening* 13-14 (2013), <https://faithandlearning.byu.edu/sites/default/files/What%20Students%20Dont%20Like-%20Distinguishing%20the%20Least%20from%20the%20Most%20Successful%20Professors%20at%20Intellectually%20and%20Spiritually%20Strengthening.pdf>.

⁴⁰ Student Rating of Instruction, *in* Lee University, *Faculty Handbook & Constitution 2019-2020*, <https://www.leeuniversity.edu/uploadedFiles/Content/publications/FacultyHandbook.pdf> (including multiple religious criteria); Lincoln Christian University, *The Factbook* 29, <https://lincolnchristian.edu/wp-content/uploads/2019/10/2019-LCU-Factbook.pdf> (last visited Feb. 8, 2020).

⁴¹ Mississippi College, *Assessment of Student Learning*, https://www.messiah.edu/info/21763/assessment_of_student_learning (last visited Feb. 8, 2020); see also MidAmerica Nazarene University, *Faculty Handbook*, https://www.mnu.edu/sites/default/files/uploads/about/disclosures/20170809-2017-2018_MNU_Faculty_Handbook.pdf (last visited Feb. 8, 2020).

matter to issues of faith and/or ethical standards relative to the students' Christian, social, and vocational development."⁴² And faculty members at Azusa Pacific University "who are seeking an extended contract and/or promotion" are subjected to "several faith integration assessments that are required and evaluated through a peer review process."⁴³ Teachers at Lee University rate themselves—on a scale of one to five—on how they (1) "[s]upport * * * the spiritual life of the campus by regular chapel attendance" and (2) "[d]emonstrate[e] * * * exemplary character and Christian role model for students and colleagues."⁴⁴ That report then becomes "part of [the employee's] permanent evaluation portfolio and [is] used in evaluating [him or her] for retention, promotion and tenure."⁴⁵ These examples underscore how a college's religious mission can permeate all aspects of faculty employment and oversight.

As explained below, all these mechanisms by which religious colleges and universities strive to align their teaching with their religious missions are at serious risk under the Ninth Circuit's misinterpretation of *Hosanna-Tabor*. Instead, the exception recognized there should apply to any employee who, in the institution's

⁴² Oklahoma Baptist University, *Faculty Handbook*, 38, <https://www.okbu.edu/documents/handbooks/faculty-handbook.pdf>.

⁴³ Azusa Pacific University, *Faith Integration Faculty Guidebook*, *supra*, at 44.

⁴⁴ Department Chair Professional Activities Report, *in* Lee University, *Faculty Handbook & Constitution 2019-2020*, <https://www.leeuniversity.edu/uploadedFiles/Content/publications/FacultyHandbook.pdf>.

⁴⁵ *Id.*

considered judgment, performs an important religious function.

C. The Ninth Circuit’s interpretation would permit civil courts to interfere with the rights of religious colleges to choose who will further their religious aims, and to discriminate on religious grounds.

If adopted by this Court, the Ninth Circuit’s misinterpretation of *Hosanna-Tabor* would impair the ability of religious colleges and universities to pursue their religious missions by interfering with their right to choose who will further their faiths. And it would do so in an impermissibly discriminatory manner.

1. One need look no further than district court decisions applying approaches similar to the Ninth Circuit’s here to understand the adverse impact of that court’s narrow reading of *Hosanna-Tabor*. For example, in *Richardson v. Northwest Christian University*, the district court declined to apply the exception to a claim involving a professor of exercise science.⁴⁶ The court relied in part on the fact that the teacher’s title was secular, even though “[s]he was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith.” 242 F.Supp.3d at 1145 The court also recognized that the professor was required to “provide a solid model of ethical leadership” and “contribute to the integration of faith and learning.” *Id.* at 1139. Yet, in holding that the exception did not apply, the court “rejected * * * a broad reading of *Hosanna-Tabor*.” *Id.* at 1146. The court thereby diluted Northwest Christian’s ability to “hire[]

⁴⁶ *Richardson v. Northwest Christian Univ.*, 242 F.Supp.3d 1132, 1145-1146 (D. Or. 2017).

only Christian faculty and expressly require[] those faculty to integrate their Christian faith into their jobs, including their instruction to students.” *Id.*

Other religious colleges have received similar treatment in the courts since the Ninth Circuit’s decision.⁴⁷ These decisions confirm that that court’s interpretation of *Hosanna-Tabor* would permit civil courts to interfere routinely with the ability of religious colleges to align their teaching with their religious aims.

2. *Northwest Christian* and similar decisions also illustrate a related problem that was noted in the Alito-Kagan concurrence in *Hosanna-Tabor*: the danger that an overly formalistic application of the exception will end up discriminating against those religions that do not employ titles such as “minister,” or do so less extensively than other religious groups.⁴⁸ Such formalism should not control First Amendment analysis: As Shakespeare put it in *Romeo and Juliet*, “a rose [b]y any other name would smell as sweet.”⁴⁹

For example, in a Catholic college, an exercise instructor like the one in *Northwest Christian* could well have had an official religious title such as nun, brother, or even priest. But largely because the exercise instructor in that case lacked such a title, the court rejected the institution’s ministerial-exception defense.

⁴⁷ See *Garrick v. Moody Bible Inst.*, 2019 WL 4674570 (N.D. Ill. 2019) (unpublished); *Bonadona v. Louisiana Coll.*, 2018 WL 4353979 (W.D. La., 2019) (unpublished).

⁴⁸ See *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

⁴⁹ William Shakespeare, *Romeo and Juliet*, ed. Stephen Greenblatt et al. The Norton Shakespeare. New York: W.W. Norton & Company Inc., 2.2.47-48 (1997).

In sum, if the exception is to have any continuing vitality—and if it is to avoid being applied in a discriminatory manner—it must apply outside of situations that strictly mirror the teacher in *Hosanna-Tabor*.

II. The Court Should Adopt The Deferential Religious-Function Approach Proposed by Justices Alito and Kagan in *Hosanna-Tabor*.

The solution to these problems—for religious colleges and all religious schools—is to adopt the deferential “functional approach.”

A. *Hosanna-Tabor* did not create a formalistic test for determining whether a religious organization’s employee falls within that doctrine’s protection.

In *Hosanna-Tabor*, the Chief Justice wrote for a unanimous Court that “[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor*, 565 U.S. at 181. As petitioners explain in detail (at 27-33), this holding was firmly grounded in First Amendment decisions recognizing that the Religion Clauses afford religious organizations the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* at 186 (citation omitted). Accordingly, the “purpose of the 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.” *Id.* at 194-195 (internal citations and punctuations omitted).

The Court expressly declined to “adopt a rigid formula” for determining whether an employee is a minister. *Hosanna-Tabor*, 565 U.S. at 190. Instead, the

majority identified four “considerations” to guide its decision in that case, namely: (1) the employee’s “formal title,” (2) “the substance reflected in that title,” (3) her “use of th[e] title,” and (4) “the important religious functions she performed.” *Id.* at 192. Recognizing explicitly that these four “considerations” were not dispositive, the Court noted that there would “be time enough to address the applicability of the exception to other circumstances if and when they arise.” *Id.* at 196.

In their concurring opinion, Justices Alito and Kagan emphasized that, while the “ministerial exception gives concrete protection” to religious organizations, the “Constitution leaves it to the collective conscience of *each religious group*,” and not to the courts, “to determine * * * who is qualified to serve as a teacher or messenger of its faith.” *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring) (emphasis added) (quotations omitted). Furthermore, these Justices concluded, “it would be a mistake if the term ‘minister’ or the concept of ordination” were dispositive of whether a religious organization was protected by the exception. *Id.* at 198. Rather than focus on a person’s “ordination status or formal title,” *id.* at 202, Justices Alito and Kagan suggested that application of the exception focus solely “on the *function* performed by persons who work for religious bodies.” *Id.* at 198 (emphasis added).

Justice Thomas’ concurring opinion similarly cautioned against “[j]udicial attempts to fashion a civil definition of ‘minister.’” *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Like Justices Alito and Kagan, Justice Thomas suggested that a “bright-line test or multifactor analysis” would “disadvantage” some religious organizations, or else pressure religious “beliefs and practices regarding ‘ministers’ to [comply with] the prevailing secular understanding.” *Ibid.*

Indeed, as Justice Alito noted, the terms “minister” and “ordination”—as well as the very concept of formal religious titles—are foreign to “most faiths.” *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring). For example, in Islam, “every Muslim can perform the religious rites, so there is no class or profession of ordained clergy.”⁵⁰ Furthermore, many religions “emphasize[] congregational participation,” resulting in a lack of *any* “professional clergy” and a lay membership that “provide[s] all sermons, music, class instruction, and so forth.”⁵¹ Indeed, many faiths bestow some form of “ministerial” responsibilities in all or a most of their members. *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring).

By contrast, the Ninth Circuit’s analysis seems to ignore that the First Amendment protects not only Protestants, but members of all religious faiths. See, e.g., *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018) (the pluralistic Jewish faith); *El-Farra v. Sayyed*, 226 S.W.3d 792, 795-796 (Ark. 2006) (the Muslim faith); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (the Seventh-day Adventist faith); *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017) (the Sikh faith). Courts should not override religious groups’ determinations about how important a religious function is, or how best to carry out that function. While a religious title such as “minister” can be *probative* of a religious function, a title alone is not necessary to justify an exception. Accordingly, most courts around the country have correctly recognized that the exception is not

⁵⁰ 10 Encyclopedia of Religion 6858 (2d ed. 2005).

⁵¹ See, e.g., Patrick Q. Mason, *Mormonism*, in Oxford Research Encyclopedia of Religion (2015).

properly constrained to “ministers,” as that term is ordinarily understood.⁵²

Rather than requiring religious organizations to satisfy a test focused on titles, the Court should adopt the deferential functional approach. As petitioners explain (at 36–41), such an approach will properly recognize the broad differences among faiths and allow each to determine what is an important religious function and how best to carry it out. Because the question of “whether an employee is a minister is itself religious in nature,” only this functional approach, with broad deference to the affected religious institution, will properly respect the rights of religious organizations such as *Amici. Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

B. Especially in higher education, teachers serve a vital religious purpose without having either a ministerial title or formal training.

The imprecision of religious labels is even more acute in religious higher education than in the context of religious worship. Especially in that setting, employees can serve vital religious purposes without for-

⁵² See, e.g., *Yin v. Columbia Int’l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (faculty member); *Penn v. New York Methodist Hospital*, 884 F.3d 416 (2d Cir. 2018), *cert. denied*, 139 S.Ct. 424 (2018) (chaplain); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040-1041 (7th Cir. 2006) (organist); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299, 309-311 (4th Cir. 2004) (kosher supervisor); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 704 (7th Cir. 2003) (press secretary); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 803-804 (4th Cir. 2000) (music director).

mal titles or training. Accordingly, the functional approach is especially important in the higher education setting.

1. This is illustrated by a recent California decision involving Jewish preschool teachers. The court emphasized that, although the teachers “play an important role * * * in transmitting Jewish religion and practice to the next generation,” they were “not given religious titles.” *Su v. Stephen S. Wise Temple*, 32 Cal. App. 5th 1159, 1167–1168 (2019), *reh’g denied* (Apr. 2, 2019), *review denied* (June 19, 2019), *cert. dismissed*, 140 S.Ct. 341 (2019). Accordingly, and despite evidence that the employees were teaching “Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services,” the court ultimately determined that, “while the teachers may play an important role in the life of the Temple, they are not its ministers.” *Ibid.* And on that ground, the court rejected the school’s defense under *Hosanna-Tabor*.

The court’s holding is disturbing—it represents the very type of judicial reasoning that threatens not only religious schools and organizations, but also the transmission of religious belief itself. As the former Chief Rabbi of the U.K. Jonathan Sacks recently observed, not only is Jewish education *essential* to Judaism, but without it, the Jewish people will essentially be forced into *de facto* assimilation by majoritarian religious thought.⁵³ Empirical research confirms at least some of the Chief Rabbi’s fear: According to one study, Jewish school attendance is highly predictive of whether Jewish children will continue to adhere to and practice

⁵³ See Jonathan Sacks, *Will We Have Jewish Grandchildren?: Jewish Continuity and How to Achieve It* (1994).

tenets of the Jewish faith into adulthood.⁵⁴ By disrupting Jewish schools, governments and courts also disrupt future Jewish belief.

There is no reason to think that such findings are unique to the Jewish faith.⁵⁵ And in light of the “rapid pace” at which religiosity generally is declining in the United States,⁵⁶ the imposition of hierarchal paradigms on religions that reject them is especially troubling. Furthermore, if religious teachers are viewed as *secular* employees for lack of formal credentials or titles that only Protestant denominations provide—which is what the Ninth Circuit seems to think *Hosanna-Tabor* requires—the exception will apply to Lutheran schools, which make more use of traditional religious titles, more often than it would to other religious schools, which do not. Such an approach would give Lutheran schools a tremendous advantage over non-Lutheran religious colleges and universities, where more than two million students attend each

⁵⁴ See Fern Chertok et al., *What Difference Does Day School Make? The Impact of Day School: A Comparative Analysis of Jewish College Students* (2007).

⁵⁵ See, e.g., Michael Donahue and V. Bailey Gillespie, *Valuegenesis 2: North American Division of Seventh-day Adventists Valuegenesis Survey Frequencies: Grades 6 to 12 Grade Specific Frequencies* (2001) (same for Seventh-day Adventist schools).

⁵⁶ Pew Research Center, *In U.S., Decline of Christianity Continues at Rapid Pace* (Oct. 17, 2019), <https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/>.

year.⁵⁷ Such a government-mandated advantage is itself contrary to the Establishment Clause. See, e.g., *Larson v. Valente*, 456 U.S. 228, 244 (1982).

2. Not only do religious employees often perform religious functions without formal titles, but titles are poor predictors of whether a person performs religious functions. This is especially true in higher education.

First, religious organizations generally do not draw clear distinctions between the religious and nonreligious roles of their employees, much less reflect such differences in each title. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 71 (2011). Indeed, in the religious higher education setting, someone with the title of “professor” in any subject often has a clear responsibility to embody and transmit the faith to the next generation—even though she would not have such a responsibility if she were teaching at a non-religious institution. See *supra* Section I.B.

Second, courts cannot properly inquire into a title’s religious significance: “What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring). Not only is such an inquiry difficult, but it is arguably unconstitutional. See, e.g., *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (“The prospect of church and state litigating in court about what

⁵⁷ See Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society*, 12 *Interdisc. J. Res. on Religion* 2, 5 (2016).

does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.”). For that reason, it would be inappropriate for a court to attempt to determine, for example, whether the title “professor” has a different, more religious meaning in a religious college than it would in a non-religious college.

The difficulty of relying on titles is apparent from a story told by Justice Robert Jackson and recently recounted by the Chief Justice.⁵⁸ In that story, three stone masons working on a project are each asked what they are doing. The first claims to be merely earning a living, the second says he is constructing a wall, and the third proclaims he is building a magnificent cathedral. These masons might well have called themselves different titles based on their paradigms. But whatever they call themselves, as Shakespeare would say, a rose remains a rose. And while words and titles are abstract, malleable, and subject to interpretation, functions like “transmitting the faith to the next generation” are concrete, unchangeable, and readily observed or studied.

In short, in religious higher education as in religious primary and secondary schools, it makes no sense to require that teachers and other employees with a role in “transmitting the faith” also have a formal title that denotes that role. Such employees should be covered by the exemption recognized in *Hosanna-Tabor* regardless of titles.

⁵⁸ See Hon. John G. Roberts, Jr., *Thirty-First Annual Pepperdine University School of Law Dinner: Keynote Address*, 37 Pepp. L. Rev. 1, 5-6 (2009).

C. The exception should apply to any employee who serves a religious function, without regard to the time she spends performing that function and with ample deference to the religious organization.

Reliance upon titles and formal training would also lead to excessive entanglement and other First Amendment problems. In his dissent from the Ninth Circuit’s denial of en-banc review, Judge Nelson emphasized that “requiring a religious group to adopt a formal title or hold out its ministers in a specific way is the very encroachment into religious *autonomy* the Free Exercise Clause prohibits.” *Biel v. St. James Sch.*, 926 F.3d 1238, 1245 (9th Cir. 2019) (R. Nelson, J., dissenting) (emphasis added). For that reason, “such a demand for ecclesiastical titles inherently violates the Establishment Clause.” *Ibid.*

As explained at length in petitioners’ brief (at 27-35), religious autonomy is a well-established constitutional right of religious institutions. Indeed, “a long line of Supreme Court cases * * * affirm the fundamental right of churches to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) (citation omitted). And “[a] religious body’s control over [ministers] is an essential component of its freedom to speak in its own voice.” *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). If the application of the exception were to depend too heavily on titles, many religious institutions—and especially religious colleges—would suffer an unconstitutional incursion into their autonomy.

Moreover, if courts were allowed to deem only some titles or procedures for investing teaching authority as religious, they would violate “[t]he clearest command of the Establishment Clause[:] that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). Unless this Court corrects the Ninth Circuit’s error, the message to all educational institutions like petitioners—and all institutions of religious higher education—will be clear: choose the Lutheran title, adopt the Lutheran process of formal investiture of authority, or expect no protection under the ministerial-exception doctrine.

Indeed, perhaps because of this unconstitutional interpretation of *Hosanna-Tabor* in the lower courts, 2018 marked the first year in almost a decade that litigation over clergy firings was one of the most common reasons for claims against religious organizations.⁵⁹ This trend will likely be reversed only if this Court adopts the Alito-Kagan deferential functional approach.

In adopting that approach, the Court should also reject any reliance on the time an employee spends performing a religious function. Consider once more Justice Jackson’s masons. While they demonstrate the folly of relying on title, they also demonstrate the wisdom of *Hosanna-Tabor*’s recognition that the applicability of First Amendment protections cannot “be resolved by a stopwatch.” *Hosanna-Tabor*, 565 U.S. at 194. No one could seriously dispute that each mason in the parable was acting as a mason. Their status turned on the function they performed, not on the time they

⁵⁹ See *The Top 5 Reasons Churches Went to Court in 2018*, Church Law & Tax Report (2019).

spent performing it. So too here: The time spent performing religious functions is irrelevant. If an employee’s “role include[s] an unmistakable religious dimension,” the exception should apply. *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1060-1061 (E.D. Wis. 2017), *aff’d*, 882 F.3d 655 (7th Cir. 2018).

For all these reasons, this Court should allow religious organizations to determine for themselves which employees serve vital religious functions—especially functions like being “a teacher or messenger of [the] faith,” *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring)—without regard to title or time spent in specific religious activities. While “perhaps difficult for a person not intimately familiar with the religion to understand,” each religion is entitled to decide its own governance, along lines that “are perfectly sensible—and perhaps even necessary—in the eyes of the faithful.” *Fratello v. Archdiocese of New York*, 863 F.3d 190, 203 (2d Cir. 2017).

CONCLUSION

The Ninth Circuit’s narrow reading of *Hosanna-Tabor* is impossible to square with the purposes of the exception recognized in that bedrock decision. Only by adopting the functional approach will the exception serve its vital purpose of protecting religious organizations like *Amici*. The Ninth Circuit’s holding threatens these institutions’ continued vitality and, hence, the many benefits they bring to American higher education and society.

For all these reasons, and those explained by petitioners, the decision below should be reversed.

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Respectfully submitted,

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February 10, 2020

APPENDIX

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**LIST OF AMICI
(with links to their mission statements)**

Associations

Council for Christian Colleges and Universities
<https://www.cccu.org/institutions/>.

Individual Universities and Colleges

Anderson University, Anderson, IN
<https://anderson.edu/about/mission-vision>

Bethel University, St. Paul, MN
<https://www.bethel.edu/about/mission-vision>

Biola University, La Mirada, CA
<https://www.biola.edu/about/mission>

Brigham Young University, Provo, UT
<https://catalog.byu.edu/about-byu/mission-of-byu>

Brigham Young University-Idaho, Rexburg, ID
<http://www.byui.edu/about/mission-statement>

Brigham Young University-Hawaii, Laie, HI
<https://about.byuh.edu/about-byuh/mission-and-vision>

College of the Ozarks, Point Lookout, MO
<https://www.cofo.edu/Page/About-C-of-O/Mission-Vision-Goals.64.html>

Criswell College, Dallas, TX
<https://www.criswell.edu/about/mission-goals>

Dallas Baptist University, Dallas, TX
<https://www.dbu.edu/about#mission-vision>

Emmanuel College, Franklin Spring, GA
<https://ec.edu/statement-of-faith>

Evangel University, Springfield, MO
<https://www.evangel.edu/about/university-overview/quick-facts>

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Fresno Pacific University, Fresno, CA

<https://www.fresno.edu/about/our-mission>

Grace College and Seminary, Winona Lake, IN

<https://www.grace.edu/about/grace-college/our-mission>

Houghton College, Houghton, NY

<https://www.houghton.edu/about/college-profile>

Houston Baptist University, Houston, TX

<https://hbu.edu/university-catalog/general-information/#visionmissionpurpose>

Indiana Wesleyan University, Marion, IN

<https://www.indwes.edu/about/mission-and-commitments>

Liberty University, Lynchburg, VA

<http://www.liberty.edu/index.cfm?PID=6899>

LDS Business College, Salt Lake City, UT

<https://www.ldsbc.edu/about>

Lipscomb University, Nashville, TN

<https://www.lipscomb.edu/about/lipscombs-story/mission>

Loma Linda University, Loma Linda, CA

<https://home.llu.edu/about-llu/mission-and-values>

Lubbock Christian University, Lubbock, TX

<https://lcu.edu/resources/student-handbook/lcu-mission-and-values>

Malone University, Canton, OH

<https://www.malone.edu/about/mission-foundational-principles-doctrinal-statement>

MidAmerica Nazarene University, Olathe, KS

<https://www.mnu.edu/about/strategic-plan/mission-vision-values>

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Mississippi College, Clinton, MS
<https://www.mc.edu/about/mission>

Montreat College, Montreat, NC
<https://www.montreat.edu/about/mission>

Mount Vernon Nazarene University, Mt. Vernon, OH
<https://www.mvnu.edu/howeare/mission>

Oklahoma Christian University, Oklahoma City, OK
<https://www.oc.edu/about/history/oc-covenant>

Oklahoma Wesleyan University, Bartlesville, OK
<https://www.okwu.edu/about/#mission>

Olivet Nazarene University, Bourbonnais, IL
https://www.olivet.edu/sites/default/files/pdf/Statement_of_Mission_Faith_and_Lifestyle.pdf

Oral Roberts University, Tulsa, OK
<https://oru.edu/news/oru-general-info-media-kit.php>

Regent University, Virginia Beach, VA
https://www.regent.edu/acad/schcom/our_story/mission.cfm

Samford University, Birmingham, AL
<https://www.samford.edu/about/mission>

Southeastern University, Lakeland, FL
<https://www.seu.edu/about-southeastern-university/what-we-believe>

Southern Wesleyan University, Central, SC
<https://www.swu.edu/about/who-we-are>

Southern Virginia University, Buena Vista, VA
<https://svu.edu/about/milestones>

Tabor College, Hillsboro, KS
<https://tabor.edu/about/mission-vision-values>

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Trinity International University, Deerfield, IL
<https://catalog.tiu.edu/university/mission-statement>

Union University, Jackson, TN
<https://www.uu.edu/about/what-we-believe.cfm>

University of Northwestern – St. Paul, St. Paul, MN
<https://unwsp.edu/about-us/christian-values/mission-and-vision>

Warner Pacific University, Portland, OR
<https://www.warnerpacific.edu/about/mission>