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 ESTATE OF KRISTIN BIEL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION AND AMERICAN MEDICAL WOMEN'S ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Freedom From Religion Foundation (FFRF) is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded nationally in 1978 as a 501(c)(3) nonprofit, FFRF has over 30,000 members, including members in every state and the District of Columbia. FFRF has 23 local and regional chapters across the country, including a chapter in California. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF ends hundreds of state-church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. FFRF, whose motto is "Freedom depends on freethinkers," works to uphold the values of the Enlightenment. As a secular organization that promotes freedom of conscience for those who do not practice religion, FFRF offers a unique viewpoint on erosion of civil rights and preferential treatment of religious organizations by the government.

Amicus curiae American Medical Women's Association (AMWA) is an organization of women physicians,

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[1] Rule 37 statement: Petitioners issued blanket consent to the filing of *amicus* briefs, and Respondents gave consent in writing for the submission of this brief. No party's counsel authored any part of this brief. *Amici* alone funded this brief's preparation and submission.

medical students, and others dedicated to serving as the unique voice for women's health and the advancement of women in medicine. AMWA does this by providing and developing leadership, advocacy, education, expertise, and mentoring.

SUMMARY OF ARGUMENT

This brief seeks to demonstrate why the totality of the circumstances test from *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012), better protects the hard-won rights of American employees than does the function-only test put forth by Petitioners, while doing no harm to the First Amendment rights of religious organizations. While the ministerial exception analysis this Court first adopted in *Hosanna-Tabor* could have done more to protect civil rights of American employees, that case is and should remain the law of the land. Disturbing that decision now would hamstring employees across the nation, throwing into turmoil their civil rights and creating an exception that swallows the rule.

The function-only test is a poor substitute for the more flexible and sensitive *Hosanna-Tabor* analysis—and one that fails in its mission to create a bright-line rule free of subjectivity. No principled line exists between employees who serve important religious functions and those who do not. For this reason, the function-only test would turn a concept designed to prevent government-mandated religious leaders from

a ministerial exception into a ministerial presumption. That is, it would create a constitutional norm that all employees of religious organizations lack the civil rights that shelter their secular counterparts from adverse employment actions on the basis of "race, color, religion, sex, or national origin,"[2] as well as sexual orientation. And the function-only test's fallout would not be confined to teachers in religious schools.

Large swaths of the U.S. workforce would be subject to the drastic and abrupt implosion of civil rights of a function-only regime. Religious hospitals now comprise a large portion of the nation's health care apparatus. The rights and job security of doctors, nurses, and staff at these hospitals hang in the balance. If this Court endorses the function-only test, these medical professionals would be employees today and "ministers" tomorrow, regardless of their religious beliefs or how they or their employers currently view their roles in the hospitals.

This Court has often pondered the contours of the "play in the joints" between the religion clauses. But now it has the chance to decide whether there is any "play in the joints" between the religion clauses and *every other civil right* afforded to our citizenry. The answer must be that religious and civil rights can coexist peacefully—indeed, the *Hosanna-Tabor* test was carefully crafted towards that end. Accordingly, this Court should affirm the holdings of the Ninth Circuit below

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[2] 42 U.S.C. § 2000e-2 (2018).

and leave the settled law of *Hosanna-Tabor* undisturbed.

ARGUMENT

The ministerial exception balances protection of the rights of religious organizations with protection of the rights of employees that are not central to the theological decision-making apparatuses of those organizations. It honors the constitutional principles from which the ministerial exception originates without forcing standard employees to forfeit their legal protections against discrimination.

Because different religious adherents observe their faiths in different ways, this Court adopted a totality of the circumstances test malleable enough to address the many forms taken by religions in this nation. In *Hosanna-Tabor*, this Court looked to "the formal title given [the minister] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed" to determine that a teacher who was also a "commissioned minister" fell under the ministerial exception. 565 U.S. at 191–92. That ruling stressed the importance of avoiding "a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. A ruling that limits courts' analyses solely to whether an employee performs an "important religious function" would be just such a rigid test.

Here, Petitioners invite this Court to adopt the "function-only" test, a purportedly bright-line rule in which performance of any "important religious function" ejects an employee from the law's protective umbra. *See* Pet. Br. at 24 ("When an employee of a religious organization performs important religious functions, that is enough under *Hosanna-Tabor* for the ministerial exception to apply."). This Court should decline that invitation, as it did in *Hosanna-Tabor*, warning that "[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." 565 U.S. at 197. Such an expansion of the ministerial exception would be constitutionally unnecessary and logically incoherent, and it would seriously undermine the civil rights of a vast portion of the American workforce.

I. The existing *Hosanna-Tabor* analysis protects the hard-won civil rights of American workers while the function-only test would not.

a. The function-only test turns the ministerial exception into a ministerial presumption to the detriment of employees' civil rights.

Petitioners suggest that courts should look solely to whether an employee performs any religious function as part of his or her duties to exclude that employee from civil rights protections under the

ministerial exception. Pet. Br. at 24. But there is no bright-line rule that can successfully distinguish between religious and nonreligious functions. Often enough the same job duties can be described in both ways. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring) (equating the line between religious status and religious use to the blurry distinction between acts and omissions). Rather than question whether a particular function is truly important to an organization's religious mission—a thorny, if not altogether impermissible inquiry for a secular court to undertake—courts will defer to the organization's claim that any given function is sufficiently important and religious. Petitioners' proposal would thus grant absolute deference to a religious employer's characterization of its employee's duties, even when those duties have been creatively worded explicitly to pass the function inquiry.

Under the function-only test, a religious organization could effectively deny civil rights protections to any of its employees with only minimal creative characterization of that employee's job duties, thanks to the fuzzy line between religious and nonreligious functions. Consider, for example, a financial officer at a religious organization who keeps the accounting books up-to-date and never interacts with congregants. Surely this employee is not performing a religious function within the meaning of the ministerial exception. But under the function-only test, a court would have to give deference to a religious organization's

characterization of both the employee's job duties and the organization's mission. If it claims that the financial officer directs the flow of tithes and that function is essential to aid the church in accomplishing its mission, a court will either accept that as true or attempt to parse claims concerning how a specific function impacts religious beliefs. Courts traditionally have been loath to undertake such inquiries. Under Petitioners' proposed rule, employees become "ministers" at the whims of their employers and lose the familiar safety of hard-won civil rights protections.

If courts focus solely on the employer's interpretation of whether an employee performs a religious function, they forgo consideration of crucial information. An employee's understanding of his or her own job duties and position within an organization is highly relevant. Respondent "Morrissey-Berru . . . did not hold herself out to the public as a religious leader or minister," *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019), and she "did not feel her position at Our Lady of Guadalupe was 'called' or believe that she was accepting a formal call to ministry." J. App. at 24–25. Petitioner invites this Court to ignore Morrisey-Berru's compelling testimony and narrow its inquiry to the consideration of only the employer's position. Erasing employees from the analysis would not serve the interests of justice, especially when an employer's post-hoc representation of an employee's job duties can be so easily manipulated to achieve the employer's desired legal result.

b. The function-only test is easily gamed and is not a bright line.

The function-only test and the deference it grants to religious organizations can and will be abused. Many religious organizations appear to be quite comfortable classifying otherwise secular employees as ministers when it is financially beneficial or otherwise convenient. In *Rogers v. Salvation Army*, the Salvation Army demoted an employee—against her will—from "addiction counselor" with solely secular responsibilities to "spiritual advisor," proceeded to fire her, and then claimed the ministerial exception when sued for discrimination. No. 14-12656, 2015 WL 2186007, at *1 (E.D. Mich. May 11, 2015). In *Jobe v. Commissioner*, a religious university attempted to claim that its basketball coach was a minister in order to claim the parsonage exemption from income tax for the $6,600 per month the university paid the coach for housing. *See generally* No. 33686-83 (T.C. Mar. 21, 1985).[3]

Many organizations are aware that the ministerial exception can be weaponized, and some go so far as to give legal advice on how best to manipulate employees' job duties to rob them of their civil rights protections. For example, in a recent publication entitled *Protecting Your Ministry From Sexual Orientation Gender Identity Lawsuits*, a fellow *amicus curiae*[4] in this case, Alliance Defending Freedom (ADF), suggested that "[s]hould an employment dispute arise,

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[3] *Available at* https://bit.ly/2TpjdxW.

[4] Brief of the Association of Classical Christian Schools, et al.

Christian organizations can best avail themselves of the First Amendment's protection if they create and faithfully enforce religious employment criteria, for every employee."[5] The publication gives examples of how to infuse religious significance into ordinary secular job functions, recommending, for instance, that "if a church receptionist answers the phone, the job description might detail how the receptionist is required to answer basic questions about the church's faith, provide religious resources, or pray with callers. Consider requiring all employees to participate in devotional or prayer time, or to even lead these on occasion." *Id.* at 12. ADF advises religious organizations to characterize employees' duties to best take advantage of the ministerial exception, regardless of what that employee's primary duties or job expectations might be. The ultimate goal is to evade civil rights laws entirely, by qualifying receptionists and every other employee for the ministerial exception, despite their overwhelmingly secular job duties. ADF is not shy about its expectation that its strategy will be used primarily to target employees based on their sexual orientation and gender identity. The very title of the document proves this. It also contemplates a religious organization terminating "an unmarried, pregnant female employee."[6] And there is no reason a religious organization could not employ

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[5] Alliance Defending Freedom & Ethics and Religious Liberty Commission, *Protecting Your Ministry From Sexual Orientation Gender Identity Lawsuits* 11, https://www.adflegal.org/forms/download-protect-your-ministry (fill out form and click "download the book"), *relevant excerpts available at* ffrf.org/ADFguide.

[6] *Id.* at 12.

ADF's recommendations to discriminate against employees based on other protected statuses, such as race, national origin, disability, or age.

If employees are truly important enough to an organization's religious mission to qualify for the ministerial exception, that organization would not need to creatively manipulate those responsibilities at a lawyer's suggestion. This is not to say that the Constitution mandates close judicial scrutiny over all church actions—it clearly does not. But it points to the need for a ministerial exception that allows courts to consider more than just how an employer chooses to characterize an employee's duties. The function-only test is a line that is neither bright nor difficult to game.

Even proponents of greater deference to religious organizations than that afforded by *Hosanna-Tabor* implicitly recognize the tension at play under a function-only regime. In his concurrence in *Hosanna-Tabor*, Justice Thomas stated that "the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's *good-faith* understanding of who qualifies as its minister." 565 U.S. at 196 (Thomas, J., concurring) (emphasis added). But, as demonstrated above, organizations such as Alliance Defending Freedom advocate for the abuse of that deference, and there is no shortage of religious organizations willing to operate in bad faith for financial gain. Courts need the flexibility to examine the totality of the circumstances to determine whether the ministerial exception should apply in a specific case. Cordoning off a large portion of the

employment sector as immune to civil rights inquiries does not just limit judicial inquiry into the decisions of religious organizations—it goes much further. It assumes good faith acting, thereby creating a *per se* exception to employees' civil rights that should raise red flags given the great number of Americans whose rights would disappear under the function-only test.

Because it is so susceptible to gamesmanship—any employment position can have a religious function added to its job duties—and because courts are reluctant to scrutinize a religious organization's claims about what is central to its religious mission, the function-only test turns the ministerial exception into a ministerial presumption. Organizations are already attempting to end run civil rights laws by gaming the ministerial exception, and there is no reason to think that this practice would stop under the function-only test. This would amount to taking religious organizations' word for it whenever they fire or retaliate against an employee—a "courtesy" granted no one else under the law. When the party to whom a rule applies decides *when* the rule applies, there is no rule.

c. The *Hosanna-Tabor* totality of the circumstances analysis provides greater protection for employees while still respecting religious liberty.

The totality of the circumstances analysis already ensures that religious organizations are free from government intervention in choosing employees central to

their faiths, and each of the four considerations this Court explicitly weighed in *Hosanna-Tabor* serve a distinct function that guides lower courts towards viewing the larger picture when deciding whether to apply the ministerial exception.

An employee's title should not be determinative of the ministerial exception's applicability—and the Ninth Circuit did not hold that it was in these cases—but the title is certainly relevant. When a court looks at an employee's title, it gains insight into the relationship between the organization and the employee, and the importance that organization was willing to confer on that employee publicly. "[T]he fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position." *Id.* at 193. An employee's job title may be particularly relevant when that title and associated job duties are shared by employees working for secular organizations. This indicates that the job position is not unique to the religious organization and that the job duties are more likely to serve practical, secular purposes.

When a court looks to the "substance reflected in that title," *id.* at 192, it assures itself that it does not unfairly favor one religion over another by granting additional protection to those faiths that clearly structure their hierarchies through assignment of titles. In other words, it asks whether a title purporting to advertise the importance of the employee's position in the religious organization describes the level of dedication

the employee has shown to earn it. This advances religious liberty interests by ensuring that courts are not confined to an analysis that fits only a majority religion's hierarchical structure.

When a court looks to the employee's "own use of that title," *id.*, it gauges whether the employee knew that he or she was occupying a position of such importance within the faith. This consideration allows courts to factor in an employee's own understanding of what their job entails. If an employee does not believe themselves to be a minister or a "called" employee, that is compelling evidence that they are not. Similarly, if an employee has the same title and job duties as employees at equivalent nonreligious organizations, they may rightly believe that their employer's religious mission does not alter their job duties.

In each of these instances, a court gains valuable insight necessary to a fair and just decision regarding the application of the ministerial exception, and these considerations are indispensable to the balance between the government's respect for the religious sphere and the fair preservation of employees' dearly held rights.

II. Adoption of the function-only test would immediately jeopardize civil rights protections for over one million health care workers.

If this Court adopts Petitioners' function-only test over *Hosanna-Tabor*'s more holistic approach to the

ministerial exception, over one million health care workers currently employed at religious hospitals around the country will immediately lose their civil rights protections. The health care industry is the nation's largest employer,[7] with approximately six million American jobs in hospitals[8] and an estimated 3.4 million new jobs projected by the Bureau of Labor Statistics "in healthcare and social assistance" by 2028.[9] Fifteen of the top forty health care systems in the United States are faith-based,[10] employing a combined 975,000 people.[11] Approximately 14.5% of all U.S.

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[7] Derek Thompson, *Health Care Just Became the U.S.'s Largest Employer*, THE ATLANTIC (Jan. 9, 2018), https://bit.ly/39urLJu.

[8] *See Effect of Hospital Jobs on Total Jobs in the State Economy Interactive Map*, AM. HOSP. ASS'N, https://www.aha.org/infographics/2018-06-05-effect-hospital-jobs-total-jobs-state-economy-interactive-map (last visited Mar. 5, 2020).

[9] *See* U.S. BUREAU OF LABOR STATISTICS, USDL-19-157, EMPLOYMENT PROJECTIONS – 2018-2028 (Sept. 4, 2019), https://www.bls.gov/news.release/pdf/ecopro.pdf.

[10] *See* Laura Dyrda, *100 of the largest hospitals and health systems in America*, BECKER'S HOSP. REV. (Sept. 12, 2019), https://www.beckershospitalreview.com/largest-hospitals-and-health-systems-in-america-2019.html.

[11] *See id.* (listing Ascension Health (156,000 employees), CommonSpirit Health (175,000 employees), Trinity Health (129,000 employees), Providence St. Joseph Health (119,000 employees), Baylor Scott & White Health (47,000 employees), Bon Secours Mercy Health (60,500 employees), Mercy One (20,000 employees), Christus Health (45,000 employees), Avera Health (18,000 employees), Texas Health Resources (23,000 employees), Baptist (23,000 employees), and SSM Health (40,000)); *see also* ADVENT HEALTH, www.adventhealth.com/ (last visited Mar. 5, 2020) (80,000 employees); MERCY, https://www.mercy.net/newsroom/mercy-quick-facts/ (last visited Mar. 5, 2020) (45,000 employees);

hospitals are Catholic-owned, with an additional 4% of hospitals owned by other religious organizations.[12] Adopting the function-only test would amount to an immediate license to discriminate against all employees at all religious hospitals.

a. All employees at religious hospitals would be subject to the ministerial exception under the function-only test.

All faith-based hospitals qualify as religious institutions for the purposes of the ministerial exception. *See Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (stating that, though hospital offered "many secular services (and arguably may be primarily a secular institution) . . . it is without question a religious organization."). Courts have applied the ministerial exception to discrimination claims raised by hospital chaplains. *See*, *e.g.*, *Penn v. New York Methodist Hosp.*, 884 F.3d 416, 426 (2d Cir. 2018) (applying the ministerial exception to dismiss race discrimination claims brought by hospital chaplain); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007) (applying ministerial exception to bar pastoral resident's discrimination claim); *Scharon*, 929 F.2d at 36 (applying the ministerial exception to discrimination suit by hospital chaplain).

HOSP. SISTERS HEALTH SYS., https://www.hshs.org/About-HSHS (last visited Mar. 5, 2020) (17,300 employees).

[12] Lois Uttley and Christine Khaikin, *Growth of Catholic Hospitals and Health Systems*, MERGER WATCH 3 (2016), *available at* https://bit.ly/2PjOLD0.

And many, if not all, of these institutions have already laid the groundwork to treat their non-chaplain employees as ministers if exercising a religious function becomes the sole relevant inquiry.

Catholic hospitals, which currently employ over 750,000 workers,[13] and represent one out of every six hospital beds in the U.S.,[14] provide the most straightforward example of the immediate impact of adopting a strict, function-only test for the ministerial exception. The doctors, nurses, and support staff that work at these hospitals come from diverse religious and non-religious backgrounds and in most cases, with the exception of hospital chaplains, did not seek out their jobs with the understanding that they would be acting in a ministerial capacity. Instead, the reality is that for large portions of the country any medical professional who wants to serve a specific community has no choice but to work at a Catholic hospital.[15] If this Court ignores the *Hosanna-Tabor* approach and opts for a function-only analysis, there is no doubt that every single health care worker at these Catholic hospitals would

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[13] *U.S. Catholic Healthcare*, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES (2019), www.chausa.org/docs/default-source/default-document-library/cha_2019_miniprofile.pdf.

[14] Uttley, *supra* note 11.

[15] *See* Julia Kaye, et al., *Healthcare Denied*, AM. CIVIL LIBERTIES UNION 24 (2016), *available at* https://bit.ly/2VDn6Ru ("As of March 2016, there are 46 Catholic hospitals designated by the federal government as the 'sole community hospitals' for their geographic region.").

lose their civil rights protections under the ministerial exception.

Catholic hospitals operate with the belief that providing health care services also advances the religious mission of the Catholic Church. The Catholic Health Association of the United States describes Catholic health care as "a ministry of the church continuing Jesus' mission of love and healing,"[16] while the United States Conference of Catholic Bishops states that "Catholic health care extends to the spiritual nature of the person."[17] Though employees at Catholic hospitals do not necessarily share this attitude that health care is inextricably linked to Catholic ministry, that viewpoint is nevertheless reflected in their employment contracts. Catholic health care employees are bound by the "Ethical and Religious Directives for Catholic Health Care Services" (the "Directives"), issued by the U.S. Conference of Catholic Bishops.[18] The

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[16] *A Shared Statement of Identity*, CATHOLIC HEALTH ASS'N OF THE UNITED STATES, https://www.chausa.org/mission/a-shared-statement-of-identity ("As the church's ministry of health care, we commit to . . . [s]erve as a Ministry of the Church[.]").

[17] *Ethical and Religious Directives for Catholic Health Care Services*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS 10 (2018), https://bit.ly/2TfWnZw.

[18] *Id.* at 9, Directive 5 ("Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel."); *id.*, Directive 9 ("Employees of a Catholic health care institution must respect and uphold the religious mission of the institution and adhere to these Directives.").

Directives state that the "professional-patient relationship is never separated . . . from the Catholic identity of the health care institution,"[19] and explicitly include "lay persons" as "pastoral care personnel."[20] Thus, under a function-only test, the Directives would subject these otherwise secular employees to the ministerial exception.

While most employees at Catholic hospitals have entirely secular job duties, the Directives establish that they may be called upon to perform religious functions under certain circumstances. Health care providers are specifically directed to "offer compassionate physical, psychological, *moral, and spiritual care* to those persons who have suffered from the trauma of abortion,"[21] offer "spiritual support as well as accurate medical information" to victims of sexual assault,[22] and "[i]n case of emergency, if a priest or a deacon is not available," they are authorized to perform valid baptisms.[23] When compared to the job duties performed by Respondents Morrisey-Berru and Biel, it is clear that

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[19] *Id.* at 13.

[20] *Id.* at 10, Directive 10 ("A Catholic health care organization should provide pastoral care to minister to the religious and spiritual needs of all those it serves. Pastoral care personnel—clergy, religious, and lay alike—should have appropriate professional preparation, including an understanding of these Directives.").

[21] *Id.* at 19, Directive 46 (emphasis added).

[22] *Id.* at 15, Directive 36.

[23] *Id.* at 11, Directive 17; *id.* at 28–29 (instructions to perform an emergency baptism).

any one of these duties would qualify all health care providers as ministers under Petitioners' view.

Under the function-only test, the nominal religious duties assigned to all health care providers at Catholic hospitals would be enough to place them squarely within the ministerial exception's purview. Respondent Morrissey-Berru was a teacher whose "formal title . . . was secular," who "did not feel her position at Our Lady of Guadalupe was 'called' or believe that she was accepting a formal call to ministry," J. App. 23–24 ¶ 99, who never led "school-wide religious service," *id.* at 78, and never had "input in selecting the hymns" for mass services. *Id*. Yet Petitioners argue that her civil rights do not apply because she took "a single course on the history of the Catholic church," her employment contract stated that she was "committed to incorporate Catholic values and teachings into her curriculum," she "led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year." *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019). Similarly, Petitioners argue that Respondent Biel is a minister because she took "a single half-day conference where topics ranged from the incorporation of religious themes into lesson plans to techniques for teaching art classes," and because she taught a religion curriculum "for about thirty minutes a day, four days a week." *Biel v. St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018). It is no stretch to imagine that a doctor at a hospital bound by

the Directives who leads no religious service, has no input on selection of any religious material, and did not believe she was being hired as a part of a ministry would nevertheless qualify as a minister and be denied civil rights protections under the function-only test. The ministerial exception would defeat her claims because her employer believes that "health care extends to the spiritual nature of the person"[24] and that "professional-patient relationship is never separated . . . from the Catholic identity of the health care institution,"[25] and because she is empowered to perform discrete religious functions, including offering "moral and spiritual care"[26] and performing a valid baptism.[27]

b. Health care providers are not ministers, and, under *Hosanna-Tabor*, they would retain their civil rights protections.

If the totality of the circumstances are considered, as they were in *Hosanna-Tabor*, health care providers would retain their civil rights as secular employees. First, health care providers at religious hospitals, like those who hold equivalent positions at nonreligious hospitals, typically have titles descriptive of their position within the field of health care, such as "doctor," "nurse," or "technician." In contrast, a title like

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[24] Directives, *supra* note 19.

[25] *Id.* at 13.

[26] *Id.* at 19, Directive 46 (to those who have had an abortion); *see also id.* at 15, Directive 36 (to victims of sexual assault).

[27] *Id.* at 11, Directive 17.

"hospital chaplain" describes an employee who performs a religious function and happens to do so in a hospital setting. This obvious and useful distinction is unavailable to courts under a function-only test.

Second, the "substance behind the title[s]" of health care workers holding secular positions clearly demonstrates that such workers should not be subject to the ministerial exception under the *Hosanna-Tabor* analysis. The scientific immersion of medical or nursing school does not come close to a background suggesting a commitment to religious work, and these employees tend not to be ordained, receive theological training, or get parsonage benefits.

Third, when a doctor refers to herself by that moniker, she does not hold herself out to the community as a part of any church. No stretch of the imagination can make it so. This leaves religious function, which, as demonstrated above, can be gamed to turn any employee into one subject to the ministerial exception.

If this Court restricts the purview of judicial inquiry solely to religious function as Petitioners advocate, a health care worker who bears no other resemblance to a minister immediately becomes a minister and loses all civil rights protections with respect to her employment.

CONCLUSION

This Court and this country stand at a fork in the road. One road leads to an unprecedented limitation on the People's ability to democratically legislate civil rights protections. Down this road, "rights" exist only so long as one's religious employer thinks they do. Down this road, courts use the function-only test to turn the ministerial exception into a ministerial presumption, to the detriment of America's workforce.

A second road leads to a nation whose inhabitants know their government provides recourse in the face of invidious reproach or termination based on a person's "race, color, religion, sex, or national origin," regardless of where they work. It leads to a nation where government helps heal society's divisions instead of throwing salt in the wounds of this country's polity, and it does so while demonstrating its respect for religious practice by keeping the ministerial exception in the rightful place under *Hosanna-Tabor*. Only by protecting civil rights from a weaponized version of the religion clauses can this Court ensure that we follow the second road.

If one's civil rights can disappear at the whim of another, they are no longer rights, they will no longer hold our society together, and they will no longer assure people of different backgrounds that they will be treated with dignity in employment.

This Court should affirm the Ninth Circuit's rulings below and leave the totality of the circumstances analysis developed in *Hosanna-Tabor* undisturbed.

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