

No. 21-1416

In The
Supreme Court of the United States

—◆—
CHRISTOPHER ORR,

Petitioner,

v.

CHRISTIAN BROTHERS HIGH SCHOOL, INC.;
and LORCAN BARNES,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

—◆—
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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner was employed as the only Principal of a Lasallian Catholic School where he held many significant religious duties that involved spiritual leadership over the faculty and students. After he was terminated, Petitioner brought discrimination and related claims against the School. The District Court below found that, based on the undisputed evidence, Petitioner was a “minister” under the ministerial exception, so all his employment claims against the School were barred. The Ninth Circuit panel unanimously agreed and upheld the judgment dismissing Petitioner’s claims.

In this Petition, Petitioner argues he was somehow not a religious leader and that the only reason he was found to be a minister was due to this Court’s holding in *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (*Guadalupe*), 140 S.Ct. 2049 (July 8, 2020), even though every court in the United States that had addressed this issue – before *Guadalupe* was ever decided – unanimously held Catholic School principals to be ministers under the exception.

The Question for the Court is:

Whether this Court should overturn its 23-month-old *Guadalupe* decision, even though there have been no legal developments on the issue and there are no conflicts in any state or federal court regarding the interpretation or application of that case.

CORPORATE DISCLOSURE

At all times relevant to this action and resulting appeal, Respondent and Defendant-Appellee below, CHRISTIAN BROTHERS HIGH SCHOOL, INC., (“CBHS”) certifies that it has been a nongovernmental, nonprofit religious corporation organized and existing under the laws of the state of California with its principal place of business in Sacramento, California. CBHS submits the following statement of its corporate interests and affiliations as required by Federal Rules of Appellate Procedure, Rule 29.6:

1. CBHS is not a publicly-held corporation or other publicly-held entity.
2. No publicly held or traded corporation owns 10 percent or more of the stock of CBHS.

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INTRODUCTION

Christopher Orr (“Petitioner,” “Orr” and “Plaintiff-Appellant” below) alleges that he was wrongfully terminated from his position as Principal of Christian Brothers High School, Inc. (“Respondents,” the “School,” “CBHS,” and “Defendant-Appellee” below), a non-profit Catholic high school, because of his race. Petitioner alleges claims against CBHS for Employment Discrimination under Title VII, Retaliation under Title VII, violation of Equal Rights in Employment under 42 U.S.C. Sec. 1981(a), and related state claims. Appellees’ motion for summary judgment was granted as to all of Orr’s claims and the Ninth Circuit sustained the judgment.

Each of Orr’s claims were properly barred by the “ministerial exception” established under the Free Exercise and Establishment Clauses (“Religion Clauses”) of the First Amendment to the United States Constitution. The ministerial exception prohibits a court from second-guessing the reasons for employment and administrative decisions by a religious organization, whether religious, non-religious, valid or pretextual. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 192 (2012). CBHS is a Catholic institution with a substantial religious character and purpose that is a “religious organization” within the meaning of the ministerial exception. Petitioner was employed as the only Principal of the religious school, in a leadership position, whose position and duties were to personify and disseminate its

religious message and, as such, he was a “minister” within the meaning of the First Amendment.

In his Petition for Writ of Certiorari (the “Petition”), Orr asks this Court to overturn its decision in *Our Lady of Guadalupe School*, which was published less than 23 months ago. *Our Lady of Guadalupe Sch. v. Morrissey-Berru* (“*Guadalupe*”), 140 S.Ct. 2049 (July 8, 2020).

Petitioner fails to demonstrate a compelling reason to grant his Petition because he does not present an important question of federal law for the Court to resolve, and Petitioner has not shown a conflict in any state of federal court. Indeed, every court evaluating the Catholic school principal position, before *Guadalupe* was decided, unanimously found them to be ministers under the exception.

In the end, there is no indication that Petitioner’s hypothetical fear can be borne out at all given the well-reasoned and workable framework in *Guadalupe*, which in no way contradicted this Court’s earlier ruling in *Hossana-Tabor* as Petitioner supposes. As demonstrated below, *Guadalupe* does not foreclose the evaluation of the spiritual leadership duties of an employee. It does the opposite by establishing “what the employee actually does” (including any spiritual leadership responsibilities), as the seminal common-sense consideration. There are no grounds to grant certiorari here and this Petition should be denied.



STATEMENT OF CASE

I. Factual Background

A. Petitioner Concedes That Christian Brothers High School is a Religious Organization.

CBHS is a Lasallian, Catholic coeducational college preparatory high school. (App.39a (Undisputed Material Facts “UMF” No. 4).) It is registered as a domestic religious corporation, organized under the Non-profit Religious Corporations Law exclusively for religious purposes and not for the private gain of any person. (App.38a-40a (UMF Nos. 1-4).) CBHS exists to teach the traditions and values of the Catholic Church and the religious tradition of the Brothers of the Christian Schools. (App.39a-40a (UMF Nos. 2 and 6).) As a “Lasallian” Catholic institution, the School’s educational philosophy is rooted in the story of Saint John Baptist de La Salle, the founder of the Brothers of the Christian Schools. (App.40a (UMF No. 6).) The hallmark of a Catholic/Lasallian education is a spirit of faith and zeal centered on the realization of God’s presence in the education process and the active commitment of educators to ensure excellence in education. (*Id.*) Commitment to Christian values is the core upon which CBHS students are taught to model their lives. (*Id.*)

CBHS exists to promote and disseminate Catholic Christian doctrine, values, and tradition through the ministry of religious education. (App.39a-40a, ECF No. 19-1 pp. 2-3 (UMF Nos. 4-6).) According to the

Employee Handbook, which Petitioner testified to have read “the entirety of” (Sep. Statement ECF No. 19-1 p. 3 (UMF No. 3)), the School’s Vision Statement includes that its members are to be inspired by Jesus Christ and the vision and wisdom of St. John Baptist de La Salle, Universal Patron of Teachers, in La Salle’s spirit, and that CBHS was created to enhance a learning community of students and adults who each, in part:

- Represents the best of Lasallian Catholic Education today and in the future, and
- Believes the Presence of God is found within all students and other members of the learning community, and . . .
- Believes that administrators, faculty and staff are ministers of grace as we fulfill our designated roles, and . . .
- Believes in celebrating our Lasallian Catholic identity by inspiring each other to grow in and to demonstrate our love of God and neighbor.

(Sep. Statement ECF No. 19-1 p. 3 (UMF No. 5).)

The School’s Mission Statement calls for a campus environment where students thrive in a Christ-centered community that fosters faith. (App.39a-40a (UMF No. 4).) The Handbook encourages all employees to learn more about the Lasallian charism and incorporate the charism into their personal and professional lives. (Sep. Statement ECF No. 19-1 pp. 5-6 (UMF No. 7).)

B. As the School's Principal, Petitioner Was One of Its Religious Leaders and Petitioner Acknowledged and Understood that His Position Existed to Convey the School's Religious Message.

According to Petitioner's Complaint, he was hired as Principal of CBHS in April 2017, and his employment became effective July 1, 2017. (Compl. ECF No. 1 ¶14.) Petitioner was employed at CBHS as Principal until his termination on October 11, 2019. (*Id.* at ¶ 49.)

The "Principal Position Announcement" (i.e., the job posting) that CBHS posted for the position Petitioner applied for, expressly stated its religious nature. It stated that the CBHS "principal is a key educational leader of the school and is responsible for the school's educational programs in collaboration with the school's Catholic identity, mission and vision. . . . The principal is expected to foster, motivate and oversee the academic and spiritual growth of students. [And that t]he ideal candidate [would] be a knowledgeable and practicing Roman Catholic who sees his/her commitment to **Catholic education as a ministry.**" (App.45a-46a (UMF No. 11 (emphasis supplied)).)

In his application, Petitioner acknowledged his understanding of the religious nature of his position as Principal by writing, in pertinent part, his "firm" belief that a "faith centered education promotes the full development of the child," that he valued the Christian Community he grew up with and who inspired him "to follow the path of leadership through academic

excellence, moral values, Christian responsibility and discipline,” and that he was committed to doing the same as Principal of CBHS. (App.52a-53a (UMF No. 23).)

In his deposition testimony, Petitioner admitted that the following were the essential functions and job duties of his position as Principal at CBHS:

- “fostering an atmosphere of . . . spirituality”;
- to supervise the Vice Principal, Assistant Principal, Director of Campus Ministry;
- “modeling, articulating, communicating, and implementing the Lasallian Catholic philosophy and mission of the school . . . ;
- [t]o inspire the pursuit of instructional excellence; to work closely with the Curriculum Committee, the departments, and co-curricular moderators and coaches in strengthening the . . . spiritual, Christian service, guidance and co-curricular programs . . . ;
- [t]o ensure that the school’s Lasallian Educational Outcomes (LOEs) are being achieved . . . ;
- [t]o regularly evaluate those who are directly responsible to the Principal and to oversee regular evaluations of all personnel indirectly under the Principal’s areas of responsibility . . . ;

- [t]o encourage the involvement of students and staff in the Campus Ministry and Christian Service programs . . . ;
- [t]o lead the administration and faculty in ongoing development and evaluation of activities, programs, services, and policies, including WASC/WCEA [“Western Catholic Educational Association”] accreditation review and implementation . . . ;
- [t]o attract qualified faculty and staff to the school and inspire them to continued excellence, with an emphasis on hiring for Mission . . . ;
- [t]o facilitate the on-going religious and spiritual development of the faculty. . . ; [and]
- [t]o insure regular in-service opportunities for the faculty. . . .”

(App.43a-45a (UMF No. 10).)

Petitioner testified that he agreed to all of these religious duties as Principal of the School. (*Id.*) In line with these responsibilities, as Principal, Petitioner performed many additional religious and ministerial functions for the School, including, *inter alia*, leading student and faculty prayers, reading scriptures, sharing spiritual thoughts, and administering the Catholic holy sacrament at Eucharistic Liturgies. (App.46a-51a (UMF Nos. 12-21).) Petitioner also admitted he oversaw the religious education programs at the School by,

inter alia, supervising and evaluating the School employees who held positions of religious instruction, including the Director of Campus Ministry who was responsible for the teaching and development of students in their practice of faith. (App.49a (UMF No. 17).) He admitted he supervised the Director of Christian Services and oversaw the Department Chair of the Religious Studies Program. (App.49a-51a (UMF Nos. 18 and 20).)

Petitioner testified that he was a baptized and practicing Catholic who regularly attended religious services in his private life and throughout his employment with CBHS. (ECF No. 19-1 p. 13 (UMF No. 26).) As a spiritual leader of the school, Petitioner was to further his own religious education, and the School required him to complete a master's degree program where he learned more about Lasallian Formation and how to better implement Catholic Lasallian values at the School. (App.51a-52a (UMF No. 22).)

II. Procedural History

A. District Court Proceedings

On January 23, 2020, Petitioner filed his complaint in the Eastern District Court of California (the "District Court") with his eight claims alleging, in relevant part, employment discrimination, harassment and retaliation because of his race.¹ (Compl. ECF No.

¹ The Petition includes a lengthy discussion regarding Orr's underlying allegations of harassment, discrimination and retaliation. CBHS denies and refutes all of these allegations. They are

1.) CBHS deposed Petitioner on September 10, 2020. (Orr Decl. ECF No. 17-2 p. 4.) On November 2, 2020, CBHS filed a motion for summary on the grounds, in relevant part, that all Petitioner’s claims were precluded by the ministerial exception. Petitioner filed his opposition on December 29, 2020, and effectively admitted to all 26 of the undisputed material facts (“UMFs”) undergirding CBHS’ ministerial exception argument—including all the facts supporting his designation as a minister under the exception. (Sep. Statement ECF No. 19-1; App.38a-54a.)

The District Court heard the motion via video conference on January 12, 2021 (App.6a-34a), granted the motion for summary judgment as to all of Petitioner’s claims, and entered judgment accordingly on January 12, 2021. (App.35a.) The Court granted the motion on the grounds that Petitioner was a minister under the ministerial exception. (App.6a-34a.)

B. Ninth Circuit Proceedings

Petitioner filed his notice of appeal with the Ninth Circuit on January 19, 2021. (ECF No. 27.) Petitioner filed his Opening Brief on April 28, 2021 (EIN 6), and Defendants filed their Answer Brief on July 1, 2021 (EIN 14). The Ninth Circuit held that the District

also immaterial to this Petition because the courts below have not made any decision on the merits, having properly applied the ministerial exception, so CBHS does not address the underlying allegations in this Opposition.

Court correctly concluded that Petitioner qualified as a minister under the exception because:

Orr played an important role in the religious education and formation of the students at Christian Brothers. Orr participated in religious services and activities, aiding the school in developing a faith-based community and inculcating faith-based teachings. He had supervisory authority over aspects of religious instruction and programming. He also received religious education as part of his role. In the context of the ministerial exception, there is no principled distinction to be drawn between teachers and principals. Thus, under the Supreme Court’s formulation of the ministerial exception, Orr qualified for its application to him. (App.2a-3a.)

The Ninth Circuit’s decision that Petitioner was a minister under the exception was unanimous—there was no dissent. (App.5a.) Orr petitioned for a rehearing *en banc*. The entire Ninth Circuit was advised of Orr’s petition for rehearing *en banc*, but no judge requested a vote on Orr’s petition. (App.37a.)



REASONS FOR DENYING CERTIORARI

I. Petitioner Has Not Demonstrated a Compelling Reason to Grant His Petition for Writ of Certiorari.

Under the Supreme Court’s rules, the Court will grant review only “for compelling reasons.” US

Supreme Court Rule 10. In other words, in seeking Supreme Court review, a party must do more than merely argue that a federal court of appeals “got it wrong.” The Supreme Court Rules list the most fertile grounds to review a case, which include: (1) that the case presents an important question of federal law that should be resolved by the Supreme Court; or (2) that the federal or state courts have issued conflicting decisions on an issue of federal law or constitutional interpretation. US Supreme Court Rule 10(a)-(c). As shown below, none of these conditions are present under Orr’s current Petition for Writ of Certiorari (“Petition”).

II. This Case Does Not Present an Important Question of Federal Law to Resolve.

The gravamen of Orr’s Petition is his novel argument that the practical consequences of *Our Lady of Guadalupe School* is that courts will defer exclusively to the religious institution’s explanation of the position and somehow entirely ignore what the employee actually does, including any spiritual leadership functions, when deciding whether to apply the ministerial exception. This theoretical harm did not occur in this case: (1) Petitioner was admittedly a high-ranking spiritual leader at the School with many significant religious duties; (2) Petitioner has not shown that it has occurred in any other case anywhere in the country as he has not provided a single case demonstrating such harm; and (3) there is no indication that Petitioner’s theory could even hypothetically occur given the well-reasoned and workable framework in *Guadalupe*, with

its holistic focus on what the employee actually does—the employer’s explanation being an important, but not dispositive, factor in the analysis.

A. Overview of the Ministerial Exception

The Free-Exercise Clause of the First Amendment protects a religious institution’s right to shape its own faith and mission through the selection and governance of its ministers. *Hosanna-Tabor*, *supra*, 565 U.S. at 188. The Establishment Clause prohibits government involvement in ecclesiastical decisions, including determining who will minister to the religious organization’s faithful. *Id.* at pp. 188–189. For nearly fifty years, the courts have recognized the existence of the “ministerial exception” grounded in these Religion Clauses. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (“It is not only the conclusions that may be reached by [the state] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions”); *McClure v. Salvation Army*, 460 F.2d 553, 559–560 (5th Cir. 1972); *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017).

In 2012, this Court affirmed the existence of the “ministerial exception” grounded in these Religious Clauses in *Hosanna-Tabor*. *Hosanna-Tabor*, *supra*, 565 U.S. at 188. Therein, the Court affirmed that the ministerial exception precludes civil court intrusion into a religious organization’s selection, administration, evaluation, discipline, and governance of its ministers. *Id.*

As the Supreme Court most recently affirmed in July 2020 in the case of *Guadalupe*, 140 S.Ct. at 2072 (Sotomayor, J., dissenting), in applying the ministerial exception to two lay teachers at Catholic schools:

the ministerial exception . . . categorically bars certain antidiscrimination suits by religious leaders against their religious employers. When it applies, the exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their “ministers,” even when the discrimination is wholly unrelated to the employer’s religious beliefs or practices.

(internal citations omitted, emphasis added.) The Supreme Court held that a “quintessential case” to which the ministerial exception applies involves a religious school’s decision to terminate one of its faculty, just like the case at hand. *Id.* at 2068.

B. The District Court and Ninth Circuit Did Not Err in Applying the Ministerial Exception Because They Relied Entirely on Petitioner’s Own Testimony About His Job Duties and What He Actually Did as the Principal of CBHS—Not Merely His Religious Employer’s Explanation of His Duties.

In *Hosanna-Tabor*, the Supreme Court first identified a non-exclusive list of factors to be considered in

determining whether an employee was a “minister” within the meaning of the First Amendment. These factors included the employee’s title, the substance reflected in that title, his own use of that title, and the important religious functions he performed for the church. *Hosanna-Tabor*, *supra*, 565 U.S. at 192. However, the Supreme Court expressly made clear that, by identifying these factors, it was not adopting any sort of “rigid formula.” *Id.* at 190.

In *Guadalupe*, the Supreme Court confirmed there was no bright-line or “rigid” test to determine whether a particular position is ministerial, and that “a variety of factors may be important.” *Id.* at 2063-64. Most important “is what an employee does. And implicit in [the Court’s] decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” *Id.* at 2064.

Those employees who occupy “leadership” roles within a religious organization are “ministers” within the meaning of the First Amendment. *See Guadalupe*, *supra*, 140 S.Ct. at 2072 (Dissent noting that “the ministerial exception . . . categorically bars certain antidiscrimination suits by religious leaders against their religious employers.” (emphasis added)). Holding oneself out to the public as the leader of a religious school is one of the factors that describes ministerial status. *Id.* As Principal, Petitioner was both a leader and figurehead of an undeniably “religious organization” within the meaning of the First Amendment.

But *Guadalupe* goes on to affirm that even school teachers may be deemed “ministers” when they lead or provide religious instruction or when “they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.” *Id.* at 2066 (emphasis added). Leading by personal example—not just in textbooks, but in “word and deed”—is, thus, one of the most crucial religious functions of the religious mission of a religious school, and as such, it is just as important as any specific title or academic subject matter.

In addition, the *Guadalupe* Court held that the exception applies whether or not the minister is a “practicing member of the religion with which the employer is associated.” *Id.* at p. 2068 (internal quotations omitted).

Because judges cannot be expected to understand or interpret any particular religion or its traditions, *Guadalupe* prudently held that “[a] religious institution’s explanation of the role of such employees in the life of the religion in question is important.” *Id.* at 2066 (emphasis supplied). Indeed, the majority opinion in *Guadalupe* approvingly cited Justice Thomas’ concurrence in *Hosanna-Tabor* that courts should “defer to a religious organization’s good-faith understanding of who qualifies as its minister.” *Id.* at 15.

Guadalupe further instructs that the job descriptions contained in personnel policies, such as the terms of an employee’s contract—which outline the religious values that faculty and administration are supposed to

embody—can be useful in evaluating whether a job is “ministerial.” The Supreme Court relied on the faculty handbooks of the Archdiocese of Los Angeles, noting there that “all faculty” were required to “participate in the Church’s mission” of providing “quality Catholic education to . . . students, educating them in academic areas and in . . . Catholic faith and values.” *Id.*, Sotomayor Dissent at 2077.

1. Petitioner Admitted to All of CBHS’s UMFs That Establish Petitioner as a Minister with Significant Spiritual Leadership Duties.

Petitioner did not factually dispute any of the 26 UMFs which powerfully supported the District Court’s and the Ninth Circuit’s conclusion that Petitioner was a minister.² (ECF No. 19-1, App.38a-54a.) Notably,

² While Petitioner claimed to dispute two of the 26 UMFs (App. 46a-47a, UMF Nos. 12 and 13), he did not offer any facts to create an actual dispute and, as the District Court noted, the two distinctions did not “impact or go to the ministerial exception.” (App.7a-8a, 46a-47a.) For example, UMF 12 is taken directly from Petitioner’s own deposition testimony that, as part of his job, he led prayers over the School’s PA system, and read quotes from the Bible and shared spiritual thoughts with the entire school. (App.46a-47a; Orr’s Depo. ECF No. 17-2, pp. 20-21) Instead of refuting this, Orr merely pointed out that other people did it too. (App.46a-47a.) But the ministerial exception does not require such exclusivity. Similarly, UMF 13 states that “[a]s part of his job as principal at CBHS, Petitioner led prayers at the beginning of faculty meetings.” (*Id.*) Petitioner claimed this was “disputed,” but he actually concedes this is entirely accurate, yet simply added that, in his opinion, he did so infrequently. (*Id.*) As the District Court correctly noted, “the two disputes don’t really impact

Petitioner admitted that the following material facts are all undisputedly true:

- Petitioner was the only Principal at CBHS, a religious school and religious corporation;
- Modeling, articulating, communicating, and implementing the Lasallian Catholic Philosophy and Mission of the School were essential functions of Appellant's job;
- Fostering an atmosphere of spirituality, inspiring and strengthening students and staff in their pursuit of spiritual service, facilitating their on-going religious and spiritual development, and encouraging participation in the Campus Ministry and Christian Service programs were all essential functions of Petitioner's job;
- Attracting and hiring faculty and staff who are dedicated to inspiring and empowering students in a Christ-centered community that fosters faith was an essential function of Petitioner's job;
- Petitioner was responsible to *lead* the administration and faculty in the Western Catholic Educational Association (WCEA) accreditation review and implementation;

or go to the ministerial exception. . . . And so it really is a case that stands or falls on the law at this point." (App.8a.)

- Petitioner supervised and evaluated all the religious instructors at the School and it was Petitioner's job to ensure that no principles contrary to Catholic beliefs were being modeled or advocated;
- As part of his job, Petitioner conducted Eucharistic Liturgies with the students, administered the sacrament to students and faculty, and attended student retreats where he directed students on the core Lasallian principles which included Faith in the Presence of God;
- Petitioner was required to enroll and obtain a master's degree in Catholic Lasallian Studies;
- It was Petitioner's duty to ensure that every teacher was keeping their "Religious Obligations," which included beginning every class with a prayer; and
- Petitioner's job application and communications to the Board of Trustees demonstrate that Petitioner personally viewed his role at CBHS as a spiritual and religious one.

(App.38a-54a; Sep. Statement ECF No. 19-1.) These stipulated facts self-evidently proved that Appellant's role was at the very core of CBHS's religious mission. *Guadalupe, supra*, 140 Ct. at p. 2064. As the District Court correctly found:

There really aren't any disputed facts in this case. The response to defendant's statement of

facts in effect stipulated to every undisputed fact . . . I don't see under those facts, and the Supreme Court cases, how [Petitioner] could argue that he wasn't a minister as that's been defined under the law.

(App.8a, 10a.)

2. Petitioner Mischaracterizes the Undisputed Material Facts In order to Discredit the Courts' Holding Below and Create the Illusion That This Was Simply a Case of Deference to the Employer's Explanation.

Having been unable to create a factual dispute in the underlying proceedings, Petitioner erroneously claims in his Petition that, by admitting that the UMFs were undisputed, he was simply admitting that the defense had accurately quoted the School's description of the principal's functional role as expressed in the school handbooks and the principal job announcement. (Petition at 12.) Petitioner now claims he was simply admitting to the accuracy of the verbiage quoted from the School documents, not that those descriptions contained his actual job duties. (*Id.*) A simple read of the actual UMFs reveals the absurdity of this interpretation.

For example, in UMF 10, Petitioner listed as "undisputed" that "**Plaintiff admits that the essential functions and job duties of his position** as Principal at CBHS were contained in his written job

description, and included, but are not limited to” a host of religious job duties. (App.43a-44a (emphasis added).) In UMF 3, Petitioner admitted that he read the entirety of the employee handbook and that all the religious descriptions and duties therein applied to him. (ECF No. 19-1 p. 2.) He was admitting that those documents listed his *actual* and essential functions and job duties as principal of a Catholic school. The UMFs were not merely asking for Petitioner to do a spellcheck and confirm that CBHS had successfully copied and pasted words from those documents into the separate statement, as Petitioner now claims. As such, Petitioner’s concern that a church’s handbook and explanation of the employee’s position risks acting as a “rubber stamp” for the ministerial exception, does not apply here because it is Petitioner who testified that he held religious duties, not the School.

Assuming *arguendo* that Petitioner was merely admitting to the authentic verbiage of the documents, certiorari would still not be warranted. As this Court held in *Guadalupe*, “[a] religious institution’s explanation of the role of such employees in the life of the religion in question is important.” *Guadalupe, supra*, at 2066. And courts routinely rely on the written materials—such as job descriptions, contracts, offer letters and employment manuals—when determining whether a position is ministerial in nature. *See, e.g., Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 193-94 (2d Cir. 2017) (Catholic school principal’s ministerial job duties taken from the school manual and written job descriptions—before the *Guadalupe* decision).

Petitioner contends that *Guadalupe's* holding, that a religious institution's explanation is "important" to the analysis, somehow means that such explanations are dispositive on their own and would loop in parishioners and parents as ministers simply because they are considered vital to parish life. (Petition at 24.) But this distorts the ruling in *Guadalupe* which in no way requires the employer's explanation of the position to be considered in vacuum, or even that the explanation be trusted if there is reason to doubt it. Indeed, *Guadalupe* demands the opposite as courts are to evaluate all relevant factors, the most important of which is "what an employee [actually] does." *Guadalupe, supra*, 140 S.Ct at 2064. Petitioner's theoretical fear certainly did not manifest here as it was Petitioner himself who testified that the School's explanations included his actual job duties.

The adoption of Petitioner's reasoning—that courts should entirely ignore the religious institution's stated expectation of its ministerial positions in job postings and other written policies—would have dire policy implications. For instance, a religious priest, minister, rabbi or imam who completely abandons all his or her religious duties and performs only secular tasks, could successfully argue (using Petitioner's rubric) that the ministerial exception does not apply to them because all their activities were secular. Petitioner is thus asking this Court to gut the First Amendment by robbing religious institutions of their right to clearly define the roles of their religious leaders without excessive judicial interference. This is

precisely what this Court avoided in *Guadalupe* by properly balancing religious employers' need to appoint and regulate their ministers without overreaching to non-ministerial positions.

Moreover, in this case, much of the evidence of Petitioner's religious roles and responsibilities comes directly from Petitioner's own deposition testimony and is wholly untethered to any of the School's written materials. These include, but are not limited to, the undisputed facts that Petitioner led prayers, read bible verses, and shared spiritual thoughts over the School's public address system (App.46a-47a (UMF No. 12)), led prayers at faculty meetings (App.47a (UMF No. 13)), periodically led the School's Eucharistic Liturgies and administered communion to students (App.48a (UMF No. 15)), was required to obtain his master's degree in Lasallian Studies while employed as principal at CBHS (App.51a-52a (UMF No. 22)), and applied to the School, by a letter he wrote, touting his understanding that he would be overseeing a faith-centered education in a Christian Community and hold Christian responsibilities (App.52a-53a (UMF No. 23)). These admissions by Petitioner were alone sufficient to warrant application of the ministerial exception.

3. The Courts Below Correctly Held That Orr’s Contradictory Declaration Could Not Contravene This Court’s Authority and the Entire Rationale for the Ministerial Exception.

Since Petitioner could not successfully refute his own deposition testimony, he submitted a declaration wherein he strained to highlight the secular elements of his job while downplaying his patently religious duties. He devotes several pages of his Petition citing such secular-sounding duties from his declaration, and pointing out the religious duties of other employees. (Petition at 12-14, 25-16.) But the ministerial exception does not require a certain number of ministerial tasks to be completed on an hourly or even daily basis, or that the majority or even a preponderance of his tasks be religious in nature. Such a stop-watch, quantitative, analysis was expressly rejected in *Guadalupe* for good reason when it refused to adopt a “rigid” test.

The Catholic School principal in *Pardue v. City Consortium Schs. of the Archdiocese of Wash., Inc.* (“*Pardue*”) made the same unsuccessful argument Petitioner now makes: “that most of [her] daily responsibilities were ‘administrative’ and basically no different from those performed by her counterparts in public schools.” 875 A.2d 669, 677 (D.C. June 9, 2005). The court there responded:

[M]erely enumerating the duties in Pardue’s job description, many under secular-sounding headings such as “materials management”

and “office management,” tells us little about whether her “position is important to the spiritual and pastoral mission of the church.” *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 11169 (4th Cir. 1985). Pardue was the chief administrator of an institution both educational and religious. Hence she would certainly be expected to perform numerous duties—secular in appearance—designed to meet public licensing requirements and to maintain the standing of the institution as [a] school. But she was also principal of a Roman Catholic school, and thus she, more than anyone else at the school except the pastor . . . was answerable to the religious authorities for providing, in myriad ways not reducible to a listing of tasks, “spiritual leadership in and for the school community.” As the evidence before the trial court makes clear, these many responsibilities—some predominantly “secular” and some predominantly religious—are inextricably intertwined in the school’s mission and in the principal’s role in fulfilling it.

*Ibid.*³

³ The Catholic principal in *Ginalski* made similarly unsuccessful “attempts to step back from [her] sworn deposition testimony by offering her Affidavit to contend that she was an academic leader and that the chaplain served in the ‘role’ as minister.” *Ginalski v. Diocese of Gary*, No. 2:15-CV-95-PRC, 2016 U.S. Dist. LEXIS 168014, *18-19 (N.D. Ind. Dec. 5, 2016). In applying the ministerial exception, the court reasoned that “[w]hile it is true that there is no evidence of Ginalski’s actual involvement in daily prayer or religious teaching, . . . that fact along with the fact

The District Court correctly found, and the Ninth Circuit upheld the finding, that:

In the same way, the plaintiff asks this Court to untether each of his duties, categorize them as secular or religious, and then weigh them against each other. That is not the applicable standard. It is also an impossible standard to apply, as *Pardue* points out, because plaintiff's religious and secular duties were inextricably intertwined in the School's mission and plaintiff's role in fulfilling it.

(App.15a.)

Petitioner now contends that the Ninth Circuit erred, because unlike *Pardue*, he was never held out by the School as a spiritual leader. (Petition p. 25.) He argues that while the religious employer in *Pardue* expressed that the plaintiff's responsibility as principal "involved leadership in and for the school community" (Petition at 25, citing *Pardue, supra*, 875 A.2d at 676), the Parent Student Handbook at CBHS described the President (not the Principal) as the School's "corporate and spiritual leader" who "carries final responsibility for all aspects of school life." (Petition at 25, citing App.74a.) To make this point, Petitioner ignores his own admission that the Principal Position Announcement specifically expressed that the "principal is a key educational leader of the school and is responsible for the school's educational programs in collaboration

that the school chaplain served in a ministerial role cannot change her earlier acceptance of the Principal Employment Agreement and her deposition testimony." *Id.*

with the school's Catholic identity, mission and vision. . . . The principal is expected to foster, motivate and oversee the academic and spiritual growth of students." (App.45a-46a.) Petitioner's sole attempt to factually distinguish *Pardue* thus fails as they were both held out as spiritual leaders.

Moreover, the President's religious role and duties at CBHS in no way negate the existence of the many ministerial duties Petitioner admittedly also had as Principal. (Sep. Statement ECF No. 19-1.) Indeed, the cases on point demonstrate that religious schools would invariably have many "ministers," including lay teachers, principals and presidents, regardless of whether religious duties were shared, segmented, or overlapped. *See, e.g., Guadalupe, supra*, at p. 2064 (holding a standard that would qualify many teachers at a religious school as "ministers").

Petitioner suggests he must somehow be the apex spiritual leader to be considered a minister under the exception, but there is no authority or reasonable rationale to support this. As illustrated in *Ginalski v. Diocese of Gary*, which involved a Catholic school principal with the same "president/principal model of governance" at CBHS, it was the president who terminated the principal, just like the case at hand. No. 2:15-CV-95-PRC, 2016 U.S. Dist. LEXIS 168014, *5 (N.D. Ind. Dec. 5, 2016). Although the principal was not the top spiritual leader, he was still properly found to be a minister under the ministerial exception.

C. The District Court Did Not Err by Refusing to Fully Credit Petitioner's Declaration Which Conflicted with His Prior Deposition Testimony.

Petitioner claims that the District Court suggested his declaration was a sham affidavit. (Petition at 15.) In fact, the District Court correctly indicated that, while it found merit with CBHS's position that Petitioner's declaration was a sham affidavit to the extent the declaration directly contradicts his own deposition testimony, the District Court would not strike the declaration but found that it did not carry much weight because "someone's deposition testimony is the primary source of evidence." (App.8a.) The Petition is based largely on the facts alleged in his defective declaration. (Petition at 7-11; App.55a-76a.)

A party may not create a material issue of fact to defeat summary judgment by submitting an affidavit that disputes prior sworn testimony of the affiant. This rule is known as the "sham affidavit doctrine." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). This applies whether the previous statement involved a purely "factual" contradiction or a "legal conclusion." *Id.* at 807 (statement claiming "total disability" was a legal conclusion). Petitioner already admitted to the UMFs that were based entirely on his own deposition transcript and which establish the religious nature of his position. To the extent his subsequent declaration expediently attempts to contradict his prior sworn testimony, it is a "sham affidavit."

For example, Petitioner contended in his declaration that the job posting he responded to did not require him to be Catholic⁴ and did not specifically say the job would be a “ministry.” (App.56a-57a at ¶5-6.) Petitioner makes this same representation in this Petition. (Petition p. 8.) But he had already testified that the opposite is true. At his deposition, Petitioner testified that the job announcement specifically stated that “the ideal candidate would be a knowledgeable and practicing Roman Catholic who sees his/her commitment to Catholic education as a *ministry*.” (App.45a-46a (UMF No. 11) (emphasis added); *see also* ECF No. 19-1 p. 3 (UMF No. 5) (Petitioner admits the School’s Vision Statement describes the Principal as a “minister”).)

Petitioner also states in his declaration that he was not required to pursue a religious master’s degree to keep his job. (App.58a, ¶11.) But this too contradicts his deposition testimony that “as part of his job as principal at CBHS, *Orr was required* to attend the Buttimer Leadership Institute for three years while employed at CBHS,” where he was taught about Lasallian Formation and how to implement Lasallian values into education. (App.51a-52a (UMF No. 22 (emphasis added)); ECF No. 17-2 p. 38:1-3 (Petitioner

⁴ Petitioner seems to argue that the job would have to require church membership before the ministerial exception could apply. But the exception applies whether or not the minister is a “practicing member of the religion with which the employer is associated.” (*See Guadalupe, supra*, 140 S.Ct. at 2068.) Moreover, Petitioner admits he was a practicing Catholic at the time so this does not help him anyway. (ECF No. 19-1 (UMF No. 26).)

testified that obtaining the master's degree was part of his "job description" and was a "job duty".)

Petitioner further states in his declaration that he was never held out as a spiritual leader at the School. (App.57a, ¶10.) That characterization contravenes the many UMFs he fully admits to. (*See, e.g.,* § II(D)(1) *supra*; *see also* App.43a (UMF No. 10: "*essential functions and job duties of his position as Principal at CBHS*" include "modeling, articulating, communicating, and implementing the Lasallian Catholic philosophy and mission," to inspire "spiritual, Christian service," ensure students and teachers are praying, and administer communion, among many others).)

Petitioner's declaration was also filled with legal conclusions which are equally subject to the sham affidavit doctrine and cannot be used to contradict Petitioner's deposition testimony. These include but are not limited to Petitioner's statements that, CBHS "did not represent to anyone that I was a spiritual leader or having specialized knowledge of Catholicism" (App.57a ¶ 10); "[m]y primary responsibilities were managerial, but not faith-infused" (App.58a ¶ 12); "I never represented myself to the students or to the public as a minister" (App.62a ¶ 26); and "When I did administer the bread [at Eucharistic liturgies] I did not [hold] myself out as having special religious status or training" (App.65a ¶ 29). In sum, while Petitioner's deposition testimony makes it factually clear that he publicly performed many duties that were, in fact, ministerial in nature (Sep. Statement ECF No. 19-1; App.38a-54a), Petitioner is arguing that he can overcome the

application of the ministerial exception and create a factual dispute simply by submitting a new affidavit that states, in essence, “I was not a minister.”

There are only two criteria for invoking the “sham affidavit” rule: (1) the contradiction must be clear and unambiguous, and (2) contradictory affidavit must actually be a sham, rather than an attempt to explain or clarify earlier testimony. *Yeager v. Bowlin*, 693 F.3d 1076, 1080-81 (9th Cir. 2011). The explanation for the discrepancy by the declarant “must be sufficient to warrant a reasonable juror’s concluding that, assuming the truth of the plaintiff’s good faith belief in, the earlier statement,” such statement is not fatally inconsistent with plaintiff’s present position. *Cleveland, supra*, 526 U.S. at 807.

As shown above, the contradictions and legal conclusions were clear and unambiguous, and did far more than try to clarify Petitioner’s earlier testimony. It attempted to contradict his prior testimony. At the hearing, the District Court gave Petitioner’s Counsel the opportunity to address the discrepancies between Petitioner’s deposition testimony and his affidavit, but he refused to offer any explanation, much less one sufficient to warrant a reasonable juror to conclude that the statements are not fatally inconsistent. (App.7a-8a.)

All this further demonstrates how Petitioner’s request for certiorari is unwarranted. The contradictory and conclusory statements that he was not, in any way, considered a spiritual leader at the School all came from Petitioner’s sham declaration. And to the extent

Petitioner’s request for certiorari pivots on the Lower Courts’ supposed erroneous factual findings regarding Petitioner’s contradictory declaration, this Court has indicated that “a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings, or the misapplication of a properly stated rule of law.” US Supreme Court Rule 10.

III. Petitioner Could Not Point to Any Conflict in the Federal or State Courts That Would Present a Compelling Reason to Grant Certiorari.

A. Petitioner Offered No Example Where A Court Used *Guadalupe’s* Reasoning to Arbitrarily Expand the Ministerial Exception to a Non-Minister, Because There Are None.

As shown above, Petitioner’s hypothetical fear of the repercussive problems arising out of the rationale in *Guadalupe* have not been borne out in his case. Orr’s Petition illustrates how those fears have also not been borne out in any other court. Indeed, there has been uniform tranquility across state and federal appellate courts on the issue of who is considered a minister since this Court’s July 2020 ruling in *Guadalupe*. The Petition cites a single case that has been published since *Guadalupe* was decided—the Seventh Circuit’s decision in *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 974 (7th Cir. 2021). And that case did not involve the only issue raised in the Petition: the

qualifications for a minister under the ministerial exception. The issue on appeal in *Demkovich* was whether the ministerial exception precludes a plaintiff's hostile-work-environment claim, even if it does not challenge a tangible employment action. *Demkovich*, 3 F.4th 974. Petitioner has not raised that issue in his Petition. But even if he had, the Seventh Circuit ruling in *Demkovich* and the Ninth Circuit's ruling below are in harmony in all material ways. Therefore, there is no need, much less a compelling one, for certiorari. Petitioner's heavy reliance on the dissenting opinion in *Demkovich* is moot because neither the facts nor the legal issues in *Demkovich* would be on appeal here.

Petitioner quote-mines the dissenting opinion in *Demkovich* in order to create the illusion of a compelling need for certiorari. Petitioner styles his case as "part of a trend warned of by the dissent in the Seventh Circuit *Demkovich* case whereby religious employers continue to cast non-leadership positions as roles essential to their religious mission." (Petition p. 6.) But the dissent in *Demkovich* conceded that the plaintiff in that case (a music director, choir director and organist at a Catholic Parish) was obviously a minister, and "surely at the core of the ministerial exception." *Demkovich, supra*, 3 F.4th at 995. As such, any discussion by the dissent in *Demkovich* regarding potential "future decisions" that could hypothetically expand the ministerial definition was speculative dicta that did not go to the ruling of that case, much less the ruling of the case at hand. And as for the few cases that the

Demkovich dissent cited as supposed evidence of the trend of alleged ministerial overreach, each and every one of them pre-dated this Court's 2020 *Guadalupe* ruling—in fact, most predated the 2012 ruling in *Hossanna-Tabor*. See, e.g., *Demkovich*, *supra*, 3 F.4th at 995-96 (cases involving an editorial secretary, school librarian, teacher, and facilities manager in cases published from 1982 to 2016⁵). Accordingly, even if a trend to expand the scope of the ministerial exception existed, the *Demkovich* dissent did not link any expansion to the *Guadalupe* decision as Petitioner has tried, but failed, to do. Petitioner's timeline is off.

Petitioner's inability to offer a single concrete example where any court in the land has utilized *Guadalupe* to arbitrarily expand the reach of the ministerial exception to non-ministerial positions, is a tacit admission that Petitioner's claim of a growing trend threatening the rights of thousands of religious organization employees across the country, is wholly unsupported. The imminent "hydraulic pressure," foretold by the dissent in *Guadalupe*, has not come to pass.

⁵ None of these positions are remotely akin to the religious leadership role of a Catholic School Principal.

B. Catholic School Principals Have Unanimously Been Held to be “Ministers” in All Cases Before *Guadalupe* Was Published, Which Further Refutes Petitioner’s Theme that His Case Exemplifies *Guadalupe*’s Supposed Expansion of the Ministerial Exception Beyond the Scope of Spiritual Leadership.

Because principals of religious schools are figureheads and embody the school’s religious values and principles, federal and state courts from around the country have uniformly held that principals of religious Catholic schools are “ministers” within the meaning of ministerial exception. For example, the D.C. Court of Appeals aptly noted in *Pardue, supra*, 875 A.2d at 676, that “[g]iven the pervasive religious mission of the Catholic schools of the Archdiocese, it is not surprising to find that the principal of each school has a significant religious and spiritual role in furthering that mission.” *See also Fratello, supra*, 863 F.3d at p. 192 (Catholic principal was a “minister” so her gender discrimination and retaliation claims were properly dismissed through summary judgment); *Nolen v. Diocese of Birmingham in Ala.*, No. 5:16-cv-00238-AKK, 2017 U.S. Dist. LEXIS 141496, at *9-11 (N.D. Ala. Sep. 1, 2017) (summary judgment dismissing Catholic grammar school principal’s Section 1981(a) claim of retaliation for her efforts to protect Hispanic students and employees from discrimination, because she was a “minister”); *see also Ginalski, supra*, 2016 U.S. Dist. LEXIS 168014, at *23 (“the ministerial role assigned

to and accepted by [the principal] as the head of the Catholic high school were sufficient to find that the plaintiff was a minister for purposes of the exception”); *see also Dayner v. Archdiocese of Hartford*, 301 Conn. 759, 779 (Conn. 2011) (same). The substance reflected in the title of principal of a Catholic school—even when the formal title is “lay principal” and there are no formal religious-education requirements—weighs in favor of applying the ministerial exception. *Fratello*, 863 F.3d at 208.

That every court addressing this same issue has unanimously found Catholic school principals to be ministers under the exception, long before the *Guadalupe* decision, demonstrates that the rationale in *Guadalupe* has not arbitrarily expanded the ministerial exception beyond the traditional spiritual leadership limitations, as Petitioner alleges.

C. Petitioner’s Request for this Court to Overturn Its Ruling in *Guadalupe* is Not Warranted Because its Framework is Workable, Recent, and Well-Reasoned.

The Petition for certiorari is actually a request for this Court to overturn its decision in *Guadalupe*. The relevant factors in deciding whether this Court will adhere to the principle of stare decisis include whether a decision has proven unworkable, the antiquity of the precedent, the reliance interests at stake (reliance on the decision), and whether the decision

was well reasoned. *Montejo v. Louisiana*, 556 U.S. 778, 788 (2009). When revisiting precedent, the Court has also traditionally considered its consistency with related decisions and legal developments since the decision. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1405 (2020). All these factors cut in favor of upholding *Guadalupe* and denying the Petition.

Guadalupe was decided less than 23 months ago. It is the antitheses of antiquated. Much of the Petition is a regurgitation of quotations from the *Guadalupe* dissent, arguments which no court has adopted. The *Guadalupe* decision is also not unworkable and the decision was well-reasoned. As demonstrated above, *Guadalupe* provided clarity and needed functional framework for lower courts to utilize. *Guadalupe's* admonition to, first and foremost, look to what employees actual do when considering whether to apply the ministerial exception, does not require the abandonment of the consideration of spiritual leadership as Petitioner alleges. Indeed, spiritual leadership remains a significant factor courts are to consider under *Hosanna-Tabor* when deciding whether to apply the privilege, just as the Courts below did in the present case—*Guadalupe* did not change that. Petitioner has not provided a single case exemplifying how *Guadalupe's* emphasis on function has in any way expanded the ministerial exception “far beyond its historic narrowness.” Finally, *Guadalupe's* holding that a religious institution’s explanation of the role of its employees is “important” to the ministerial analysis is not only

sensible, it is essential to prevent the gross policy implications addressed in section II(B)(2) *supra*.



CONCLUSION

The Petition should not be granted.

Respectfully submitted,

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