**No. 21-2524**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

LYNN STARKEY,

*Plaintiff–Appellant*,

v.

ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC., *et al.*,

*Defendants–Appellees.*

On Appeal from the
United States District Court for the Southern District of Indiana
Case No. 1:19-cv-03153, Hon. Richard L. Young

# BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL

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# APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2524

Short Caption: Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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---

Attorney's Signature: /s/ Bradley Girard Date: 11/3/2021

Attorney's Printed Name: Bradley Girard

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Printed Name: Adrianne M. Spoto

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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n/a

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Attorney's Printed Name: Gabriela Hybel

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## INTERESTS OF THE AMICUS CURIAE[1]

Americans United for Separation of Church and State is a national, nonpartisan organization that for nearly seventy-five years has brought together people of all faiths and the nonreligious who all share the commitment to religious freedom as a shield to protect but never a sword to harm others. To that end, Americans United works to ensure that the constitutional right of religious organizations to choose their religious messages does not become a blanket excuse to discriminate.

Americans United has a particular interest in this case because it represents Michelle Fitzgerald in a related case, *Fitzgerald v. Roncalli High School*, No. 19-cv-4291 (S.D. Ind. 2019). Fitzgerald was Starkey's Co-Director of Guidance at Roncalli and similarly alleges that Roncalli fired her because she is married to a woman. *See* Compl., ECF 1. Although the facts of Fitzgerald's employment are different from Starkey's, Roncalli also contends that Fitzgerald was a minister. *See* Defs.' Statement of Defenses, ECF 72. Americans United thus has an interest in ensuring proper application of the ministerial exception, which guarantees religious organizations' right to choose important messengers of their faith without giving employers a free pass to discriminate against their employees when the constitutional purpose of the exception is not served.

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

## INTRODUCTION

The ministerial exception is a rare departure from the constitutional rule that religious organizations are bound by laws that are neutral with respect to religion and apply generally. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). For employees who play key religious roles, the exception strips them of the protections of foundational civil-rights laws.

Because it is so potent, the exception applies only to "personnel who are essential to the performance" of religious functions, *id.* at 199 (Alito, J., concurring)—in other words, those who play important roles in teaching or preaching the faith. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020). After all, the ministerial exception is meant to protect religious institutions from the government intruding into their development and transmission of religious doctrine, not to shield employers from liability whenever they engage in unlawful discrimination. Any application of the exception must therefore be "tailored to this purpose." *Hosanna-Tabor*, 165 U.S. at 199 (Alito, J., concurring).

In ruling that guidance-counselor Lynn Starkey was a minister, the district court did not adhere to that constitutional mandate. We agree with Starkey that the district court misapplied the summary-judgment standard as well as the ministerial-exception analysis required by the Supreme Court. Here, we separately explain how the court's decision departed dramatically from the constitutional principles underlying the ministerial exception, thus making it all too easy for a broad class of employers entirely to evade civil-rights laws even when there is no constitutionally cogent basis for them to do so.

## ARGUMENT

### I. Deeming Starkey a minister would not serve the ministerial exception's purpose.

**A.** The First Amendment protects against governmental interference in religious organizations' *religious* decisions: Courts, like the political branches, cannot and should not decide "matters of church government" or "those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). Courts therefore cannot determine who is the legitimate head of a congregation, *id.* at 115-16, what a religious doctrine actually means, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976), or whether someone qualifies as a nun, *McCarthy v. Fuller*, 714 F.3d 971, 978 (7th Cir. 2013). But the First Amendment has never been thought to prohibit all applications of neutral laws to religious organizations. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 305-06 (1985) (permitting application of Fair Labor Standards Act to religious employer).

Instead, religious organizations are granted "autonomy with respect to internal management decisions that are *essential* to the institution's central mission." *Morrissey-Berru*, 140 S. Ct. at 2060 (emphasis added). So the government is prohibited from exercising control over a limited subset of those organizations' employees—the ones who perform the ministerial functions of setting church doctrine and preaching and teaching the faith. *Hosanna-Tabor*, 565 U.S. at 188-89. That is because a religious organization could not control its theology or "key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as

the critical process of communicating the faith," if the government were able to dictate or limit its ability to choose its messengers for the faith. *Id.* at 199 (Alito, J., concurring). If government instead had the authority to control who leads worship services, it would have power to dictate the content of those services, thus potentially bending church practices and teachings to its own ends.

Because the ministerial exception must be "tailored to this purpose" of preventing governmental control over religious teachings, *id.*, courts must apply it only when an employee actually "is the 'chief instrument' for a religious organization 'to fulfill its purpose.'" *See Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 978 (7th Cir. 2021) (en banc) (quoting *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972)). It is through ministers—not through other employees—that "a religious organization speak[s] in its own voice and spread[s] its own message." *Id.* Put another way, ministerial employees "lie[] at the heart of a religious organization's work and workplace," *id.* at 981, and "imbue a religious organization with spirituality," *id.* at 979. Other employees do not—even if they share the organization's religious aims and ends.

Carefully defining "minister" for constitutional purposes limits the otherwise enormous costs and harms that the ministerial exception would inflict on employees and society. For the exception prevents those deemed ministers from obtaining redress for discrimination—even when their employers had no religious justification for their actions. *See Hosanna-Tabor*, 565 U.S. at 194-95. Application beyond the category of employees responsible for teaching and preaching the faith would thus grossly

undercut society's "undoubtedly important" interest in preventing employment discrimination. *See id.* at 196.

The Religion Clauses of the First Amendment—the source of the ministerial exception—require the courts to allow a church to control its message even if, for example, that means allowing it to refuse to hire Black ministers without risk of liability—despite the grave social and personal harms that result when employment decisions are made based on race. But while the Constitution may require these severe results for the limited set of employees who "personify [a religious organization's] beliefs," *see id.* at 188, it does *not* require courts to allow discrimination based on race in their hiring of math teachers, janitors, after-school crossing guards, or, as here, guidance counselors who play no significant role in setting or disseminating an institution's religious message.

An overly expansive ministerial exception would, in other words, kneecap anti-discrimination laws, causing real and substantial harm—both dignitary and economic—to those who are discriminated against at work. Employees deemed ministers risk, among other things, losing their very livelihoods. And if those employees do not perform key religious functions, they, and all of society, would suffer those grave injuries without serving any First Amendment aims. That is why courts must "take all relevant circumstances into account" so as "to determine whether each particular position implicate[s] the *fundamental purpose* of the exception." *Morrissey-Berru*, 140 S. Ct. at 2067 (emphasis added).

**B.** It is against this background that the Supreme Court has twice expressly rejected any "rigid formula" for determining whether employees are ministers.

*Hosanna-Tabor*, 565 U.S. at 190; *Morrissey-Berru*, 140 S. Ct. at 2066-67. Although *Hosanna-Tabor*'s fact-intensive, case-by-case approach relied on four main considerations, 565 U.S. at 191-92, *Morrissey-Berru* made clear that the most important consideration is "what an employee does," 140 S. Ct. at 2063-64. The Supreme Court has thus directed courts to scrutinize specific employee responsibilities and functions to determine whether an employee is genuinely responsible for teaching or preaching the faith. *See id.* at 2056-59, 2066-69. Through this careful, fact-bound analysis, courts determine who "is the 'chief instrument' for a religious organization 'to fulfill its purpose.'" *See Demkovich*, 3 F.4th at 978 (quoting *McClure*, 460 F.2d at 559).

Consider *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000 (Mass. 2021), *petition for cert. filed* (U.S. Aug. 1, 2021) (No. 21-145). There, the Massachusetts Supreme Judicial Court flatly rejected an "oversimplif[ied]" test like the one adopted by the district court here, because it was inconsistent with the Supreme Court's mandates in *Hosanna-Tabor* and *Morrissey-Berru*. *See id.* at 1013. The Massachusetts court instead carefully tailored its analysis to the facts as the Supreme Court directed, *id.* at 1013-17, and held that the ministerial exception did not apply to a professor of social work at a Christian liberal-arts college, *id.* at 1017. The court grounded that determination in the exception's purpose: to give religious institutions full latitude to make employment decisions about "'personnel who are *essential* to the performance' of the religious instructions, services, and rituals." *Id.* (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)) (emphasis added). In determining that the professor was not a ministerial employee, the court reviewed the entire record to "understand the nature and extent" of her functions within the college. *Id.* at 1013.

Although the professor was expected to "integrate" faith into her teaching, the court concluded, she was "first and foremost, a professor of social work." *Id.* at 1012. Unlike the teachers in *Hosanna-Tabor* and *Morrissey-Berru*, she did not "teach classes on religion, pray . . . or attend chapel with her students," "nor did she lead students in devotional exercises or lead chapel services." *Id.* And she was "not ordained or commissioned; she was not held out as a minister and did not view herself as a minister; and she was not required to undergo formal religious training." *Id.* at 1017. While acknowledging that a case "need not mirror" *Hosanna-Tabor* and *Morrissey-Berru* for the ministerial exception to apply, the court held that, taken altogether, "the facts [were] materially different" and compelled a different conclusion. *Id.*[2]

This Court should refuse Roncalli's invitation to depart from Supreme Court precedent and split with the Massachusetts Supreme Judicial Court. Instead, it should heed *Morrissey-Berru*'s admonition that any ministerial-exception analysis must turn on the exception's core purpose—protecting a religious organization's right to choose its important messengers of the faith. *See* 140 S. Ct. at 2067.

**C.** Looking at the primary consideration—what Starkey did—her job was a far cry from ministerial. Whereas the teachers in *Hosanna-Tabor* and *Morrissey-Berru* all taught religious doctrine, *Hosanna-Tabor*, 565 U.S. at 192; *Morrissey-Berru*, 140 S. Ct. at 2057, 2059, Starkey was an "academic counselor," ECF 114-2 at 422, with responsibilities "to provide academic, college, and career guidance to students and to

[2] The Illinois Supreme Court's decision in *Rehfield v. Diocese of Joliet*, 2021 IL 12565 (Ill. 2021) is not to the contrary. The Court concluded that a plaintiff was a minister when, in response to the defendant's declaration outlining her ministerial duties, she failed to offer any evidence that she was *not* a minister. *See id.* at ¶ 65.

provide resources and referrals as needed," *id.* at 447. Guidance counselors' core duties included meeting with students to schedule them for classes, helping with college applications and decisions, providing test-preparation tools, administering AP exams, and providing career guidance. *See* ECF 127-3 ¶ 5; ECF 114-2 at 447; *see also* Starkey Br. 23. And while the counselors would meet one-on-one each year with their assigned subset of students, those meetings were "jam-packed" with discussion of scheduling, academics, and college preparation, not prayer or religious instruction. ECF 114-2 at 313-14, 316.[3]

Roncalli also failed to show how Starkey "integrat[ed] religious teachings into her interactions with students." ECF 127-4 ¶ 4. That's because counselors at Roncalli were not actually expected to "assist students with their religious or spiritual needs, or to provide advice or counseling related to the Catholic faith." ECF 127-3 ¶ 16. And Roncalli never told them that they were. *Id.* ¶ 17.

Starkey also did not—and was not expected to—lead students in prayer during her counseling sessions. And though the district court placed substantial weight on the fact that she delivered a morning prayer over the PA system, the evidence shows that it was an insignificant and incidental part of her job: She did it only *twice* in her *21 years* as a counselor at Roncalli. Starkey Br. 41, A4. By contrast, prayer was central to the work of the teachers in *Hosanna-Tabor* and *Morrissey-Berru*: The teacher in *Hosanna-Tabor* led her students in prayer three times each day and guided them

[3] Starkey now works as a guidance counselor at a public high school, with job functions highly similar to those she had at Roncalli, ECF 114-2 at 447-48; Starkey Br. 13, demonstrating even further that she did not occupy a ministerial role as a guidance counselor.

through daily devotional exercises. 565 U.S. at 192. And both teachers in *Morrissey-Berru* would open or close each school day with a prayer, while one also directed and produced her school's annual Passion Play. 140 S. Ct. at 2057, 2059.[4]

That Starkey was in the school's "leadership" does not make her a minister either. Indeed, the Supreme Court has rejected reliance on general descriptors of that ilk. *See Morrissey-Berru*, 140 S. Ct. at 2063-64, 2067 n.26. And for good reason: There are plenty of leadership roles that have nothing to do with the core First Amendment concerns over determining and transmitting the faith. The Director of Information Technology at a religious nonprofit could be in a leadership position. But in no way would that person, in the mine run of cases, play a "key role[]" in developing and transmitting religious teachings. *See id.* at 2060. The examples are legion: Head of Groundskeeping, Director of Facilities, and Director of Plant Operations, to name a few.[5] The Head of Surgery at a religious hospital might sit on an administrative council and make important decisions for the hospital, but to consider her a minister based solely on that would divorce the ministerial exception from its grounding in the First Amendment's prohibition against government's making *religious* decisions.

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[4] As Starkey highlights (at 37), the district court relied heavily on the declaration of one counselor, Angela Maly, who started the year before Starkey was fired. The court ignored evidence from Starkey and other counselors, who made clear that counselors did not pray with their students, nor were they expected to. *See id.* at 37-38.

[5] *See Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (facilities manager); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 58-61 (E.D. Pa. 1991) (director of plant operations); *see also* Ted Booker, *Notre Dame's Landscaping Chief to Retire, Capping Off 35-year Journey*, South Bend Tribune (May 22, 2019), https://perma.cc/SFN9-KQKF (landscaping chief).

To be sure, these positions might ultimately help further a religious organization's mission; and a religious employer might require that all those managerial employees (and the entire staff) conduct themselves at work according to principles of the faith. But if that were enough to make employees ministers for legal purposes, every administrative assistant, bus driver, custodian, and gift-shop clerk would be one. For they each help further the mission of a religious organization in their own way. But a rule that would make them all ministers has no relation either to the purpose of the ministerial exception as outlined by the Court in *Hosanna-Tabor* and *Morrissey-Berru*, or to the holdings in those cases. Ministerial employees are the "chief instrument[s]" for a religious organization "to fulfill its purpose"—its *religious* purpose. *Demkovich*, 3 F.4th at 978 (quoting *McClure*, 460 F.2d at 559). Not everyone who contributes to the organization's day-to-day operations qualifies.

## II. The district court's decision will encourage religious employers to game the system to avoid legal liability.

**A.** Ignoring *Morrissey-Berru*'s command that "[w]hat matters, at bottom, is what an employee *does*," 140 S. Ct. at 2064 (emphasis added), both Roncalli and the district court relied heavily on labels and supposed duties recently added to the school's contracts and ministry descriptions. But as this Court has observed, whether the ministerial exception applies to specific employees, given the particular facts of their employment, is a determination for *legal* purposes. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661-62 (7th Cir. 2018). A religious organization may label all—or none—of its members "ministers." *See Hosanna-Tabor*, 565 U.S. at 202 & nn.3-4 (Alito, J., concurring). But when it comes to apportioning constitutional

rights and duties, and their accompanying legal consequences, deference to those designations makes no sense. An employer's view, though it may bear on the constitutional inquiry, can hardly be the last word. Thus, this Court should be leery of relying on documents or representations labelling a particular employee as a "minister" in the face of evidence that the employee did not actually perform the kinds of "important religious functions," *id.* at 192, that for constitutionally pertinent reasons make one a ministerial employee as a legal matter. *See Morrissey-Berru*, 140 S. Ct. at 2063-64.[6]

Formal documents might reflect an employer's true expectations, if they are backed up by the on-the-ground functions of the employee. But here, Starkey's evidence at least raises questions of material fact that these formal documents did *not* reflect her actual duties: Starkey and other counselors confirmed that they did not pray with students or incorporate religious teachings in their counseling, that they did not understand their jobs to include those duties, and that the school never directed otherwise. ECF 127-3 ¶¶ 16-17; ECF 127-4 ¶ 4. And neither the school's actual expectations nor the counselors' actual duties changed after the new contracts and "ministry description" were introduced. *See* ECF 114-2 at 449; ECF 127-3 ¶ 18;

[6] To accept at face value ministerial designations in handbooks and contracts, as the district court did, implicitly adopts an approach that the Supreme Court has twice rejected: blanket deference to a religious organization's good-faith characterizations of its employees as ministers. *Compare Morrissey-Berru*, 140 S. Ct. at 2063-64, *and Hosanna-Tabor*, 565 U.S. at 190-92, *with Morrissey-Berru*, 140 S. Ct. at 2069-70 (Thomas, J., concurring) (arguing instead for deference to a religious entity's good-faith characterization of its employee), *and Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (same).

Starkey Br. 10-12. If a few lines of text in a handbook or contract could strip all employees of fundamental legal protections—regardless of whether they perform important religious functions—employers would be given carte blanche to engage in odious employment discrimination, without advancing any constitutional interest.

Courts have thus long rejected attempts to broadly label employees as ministers regardless of whether they have meaningful religious duties. They have refused to apply the ministerial exception to secretaries, receptionists, administrative and support staff, technology coordinators, facilities workers, or college professors who don't teach or preach the faith. *See, e.g.*, *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. Unit A July 1981) (rejecting contention by seminary that "all its employees serve a ministerial function," including all "faculty, administrative staff, and support staff").[7]

And Starkey does not merely contest the religious significance of what were otherwise admittedly religious duties. *Cf. Morrissey-Berru*, 140 S. Ct. at 2068 (that doctrinal teachings followed a workbook did not change their religious significance); *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568, 571 (7th Cir. 2019) ("robotic" performance of religious music during mass did not make the music any less important to

[7] *See also, e.g.*, *Smith v. Raleigh Dist. of N.C. Conf. of the United Methodist Church*, 63 F. Supp. 2d 694, 697, 703-07 (E.D.N.C. 1999) (secretary and receptionist); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1365, 1368 (S.D.N.Y. 1975) (typist-receptionist); *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 690-91, 695-97 (W.D. Pa. 2004) (administrative and support staff); *Dias v. Archdiocese of Cincinnati*, No. 11-cv-251, 2013 WL 360355, at *1, *4 (S.D. Ohio Jan. 30, 2013) (computer technology coordinator); *Balt. Hebrew Congregation*, 985 F. Supp. 2d at 711 (facilities worker); *Lukaszewski*, 764 F. Supp. at 58-60 (same); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1143-46 (D. Or. 2017) (college professor).

the service). Rather, Starkey showed what many employees in this country know to be true: formal documents such as contracts, job descriptions, and employee handbooks often do not accurately reflect an employer's actual expectations or an employee's true, on-the-ground job functions. Starkey's job and her employer's expectations were fundamentally nonreligious, both before and after Roncalli added to its formal documents language about employees' supposed ministerial roles.

What is more, *all* teachers and guidance counselors at Roncalli—including those teaching entirely secular subjects—were made subject *post hoc* to ministry contracts and labels. *See* Starkey Br. 10; ECF 127-6 ¶ 9. Accepting these documents as determinative ignores the Supreme Court's directives and risks transforming *every* teacher and guidance counselor at Roncalli into a minister, regardless of the teacher's specific roles and day-to-day responsibilities.[8]

**B.** To rely on formal documents and titles as Roncalli urges would not only fly in the face of the decisions identified above (at 6-7, 12), but it would encourage employers to categorize or designate employees as ministers solely for the sake of avoiding legal liability.

That concern is not hypothetical: Law firms and advocacy groups are expansively advising religiously affiliated employers on how to "squeeze into the cleft" of the ministerial exception so as to avoid any possibility of being subject to Title VII's

[8] Starkey argues that Roncalli's relabeling of all its employees as ministers was merely pretextual. Starkey Br. 14-16 (citing *Sterlinski*, 934 F.3d at 572). As Starkey's brief also highlights (at 33-42), there are at the very least disputes of material fact over whether Starkey's job responsibilities included meaningful religious functions: for example, whether she was expected to pray with students or communicate Catholic doctrine. The district court erroneously resolved these disputes in the movant's favor. So the judgment should be vacated and remanded on that ground.

requirements for *any* of their employees.[9] Far from merely explaining the law, some now advise that "religious institutions should begin to revisit whether their employees *could* be covered under the ministerial exception."[10] In other words, employers are being advised to reclass their employees so as to insulate themselves against employment antidiscrimination laws.

One law firm, for example, advises that religious employers "distribut[e] religious duties to as many staff members as is reasonably appropriate," including "[a]ssigning employees responsibilities in prayer and devotions," so that the employer "can increase the *perception* that employees who have those duties are ministers."[11] The Christian Legal Society recommends "inserting statements of faith or other doctrinal language into employee handbooks," in an attempt to get employees classified as ministers.[12] Alliance Defending Freedom advises that, "for legal purposes," religious employers "should take particular care to highlight responsibilities that involve communicating the faith or other spiritual duties that directly further the religious mission."[13] For example, "if a church receptionist answers the phone, the job description might detail how the receptionist is required to answer basic questions about the

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[9] *See, e.g.*, McGuireWoods, *U.S. Supreme Court Broadens Ministerial Exemption to Employment Discrimination Claims* (July 10, 2020), https://perma.cc/Q3EB-HV6S.

[10] Seyfarth, *US Supreme Court Expands Ministerial Exception for Religious Organizations* (July 9, 2020), https://perma.cc/S4TZ-NZ8F (emphasis added).

[11] Conner & Winters, *Mitigating Risk with the Ministerial Exception* (Mar. 2019), https://perma.cc/5WKN-KBC2 (emphasis added).

[12] Christian Legal Society, *Church Guidance for Same-Sex Issues* 10 (2015), https://perma.cc/DKC2-HPXW.

[13] Alliance Defending Freedom, *Protecting Your Ministry* 13 (2018), https://perma.cc/2KSY-KNCC.

church's faith, provide religious resources, or pray with callers."[14] And First Liberty advises religious schools that for *all* their staff, "each employee's job description and responsibilities should be drafted to emphasize the religious nature of the employee's role as a messenger or teacher of its faith."[15] *See also Demkovich*, 3 F.4th at 995 (Hamilton, J., dissenting) (listing additional examples of groups' encouraging religious employers to re-categorize their employees as ministers).

Consider again *DeWeese-Boyd*, in which the Massachusetts Supreme Judicial Court noted that, at the college in the case, the term "minister" was added to the employee handbook "for legal reasons" to "trigger judicial deference" under the ministerial exception. 163 N.E.3d at 1006. As here, the college in that case changed the job descriptions without consulting the staff. *Id.* at 1006, 1015-16. The court concluded that the language in that formal document did not actually reflect the plaintiff's duties as a professor, so it was inadequate support for the school's argument that she was a minister. *See id.* at 1014.

**C.** If Roncalli's categorization of its employees—and the district court's analysis—were the end of the matter, religious employers across the board would have even greater incentives to label all their employees ministers through formal documents, no matter what those employees actually do. And if that sort of gamesmanship were

[14] *Id.*

[15] First Liberty, *Religious Liberty Protection Kit for Christian Schools* 34, 36 (2016), https://perma.cc/848S-XHUA.

to have real legal effect, the result could be to strip hundreds of thousands of employees, if not more, of fundamental civil-rights protections, without any genuine constitutional justification.

Under Roncalli's rule, "over a hundred thousand secular teachers" could find themselves suddenly barred from vindicating their civil-rights protections. *Morrissey-Berru*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting). And it wouldn't end there: Counsel for Roncalli have previously stated in the Supreme Court that nurses at religiously affiliated hospitals could fall under the exception. *See* Transcript of Oral Argument at 20, *Morrissey-Berru*, 140 S. Ct. 2049 (No. 19-267).[16] And there are hundreds of thousands of nurses who work in religiously affiliated hospitals—not to mention the many thousands more who work in religiously affiliated outpatient care, residential care, nursing homes, and educational services.[17] Add to that the "countless coaches, camp counselors, . . . social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions." *Morrissey-Berru*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting). Most of them could not reasonably be considered ministers under *Hosanna-Tabor* and *Morrissey-Berru*, but a formalistic

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[16] The following exchange occurred:

> JUSTICE KAGAN: A nurse at a Catholic hospital who prays with sick patients and is told otherwise to tend to their religious needs.
>
> MR. RASSBACH: I—I think a nurse doing that kind of counseling and prayer may well fall within the exception.

[17] *See* U.S. Bureau of Lab. Stat., Occupational Outlook Handbook (2020), https://perma.cc/LH3Z-A6E9 (approximately 1.89 million nurses work in hospitals); MergerWatch, *Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report* 4, https://perma.cc/7PRB-86VQ (religious hospitals account for more than one-fifth of all hospital beds).

analysis that relies on an employer's documents over everything else could well pull them in.

To put in concrete terms just what is at stake for those employees, consider one statute to which the ministerial exception applies: the Americans with Disabilities Act. *Cf. Hosanna-Tabor*, 565 U.S. at 179, 190. As of the last census report, more than 25% of Americans (85.3 million) have a disability, and more than 17% (55.2 million) have a "severe disability."[18] "Employment is a critical aspect of social functioning as well as a means for people to develop and exercise independence," yet fewer than 50% of working-age Americans with disabilities are employed.[19] And though "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society," 42 U.S.C. § 12101(a)(1), these numbers reflect the harsh reality that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged . . . economically," *id.* § 12101(a)(6). For that reason, the ADA aims to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities. 42 U.S.C. § 12101(a)(8) (pre-2008 amendments).

The ministerial exception does not consider whether an adverse employment action was taken for religious reasons. Thus, when it applies it allows a broad swath of discrimination, including against those with disabilities. Suppose an administrative assistant at a religious school has diabetes. Under the district court's decision, his

[18] Danielle M. Taylor, U.S. Census Bureau, Americans With Disabilities: 2014, at 2 (2018), https://perma.cc/2T77-U67T.

[19] *Id.* at 13.

employer could avoid the ADA entirely by having him sign a "ministry contract" and perhaps assigning him a few nominal religious duties, such as occasionally reading a prayer over the loudspeaker. If the employer gets tired of accommodating the employee by, say, waiting a few minutes for the employee to regulate his blood sugar, the employer could refuse *any* accommodation, regardless of the lack of any meaningful burden on it. Worse yet, it could just fire the employee, taking away his livelihood (and likely his healthcare too). That is precisely the kind of employment decision that the ADA aims to prevent. But the employee's claims would categorically fail under district court's mistaken view of the ministerial exception.

The ADA is just one of the fundamental antidiscrimination statutes aimed at protecting vulnerable populations to which the ministerial exception applies. Others include the Age Discrimination in Employment Act, *see* 29 U.S.C. § 621 (prohibiting discrimination against workers at least 40 years old because "older workers find themselves disadvantaged in their efforts to retain employment"); as here, Title VII, *see* 42 U.S.C. § 2000e-2 (protecting against discrimination on the basis of race, color, religion, sex, and national origin); and the Fair Labor Standards Act, *see* 29 U.S.C. § 206 (requiring covered employers to pay the federal minimum wage). Allowing employers to strip their employees of these bedrock protections based on a few formal ministerial designations does nothing to further the purpose of the ministerial exception—namely, safeguarding an organization's ability to choose its "chief instrument" to "fulfill its purpose" as a religious entity, *see Demkovich*, 3 F.4th at 978 (quoting *McClure*, 460 F.2d at 559). It would instead be a risk-free way for employers to opt out of the law.

To be clear, we do not assert that religious employers broadly seek to discriminate. Indeed, most litigation over employment discrimination occurs precisely because the parties disagree about whether there was unlawful discrimination, with many factual and legal questions going to whether that was the case. Unmooring the ministerial exception from its purpose would give employers strong incentives to classify all their employees as ministers to preempt any possibility of litigation on, or liability for, the merits of employees' claims. And what rational employer would leave itself open to discrimination claims if it could easily guarantee application of an ironclad defense? Put simply, reliance on formal documents would turn the First Amendment's protection for religious activities into a free pass to discriminate, undermining both the First Amendment and society's commitment to antidiscrimination.

## CONCLUSION

The Court should vacate the grant of summary judgment and remand for further proceedings under the proper legal test.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rule 32, I certify that this brief:

(i) complies with the type-volume limitation of Circuit Rule 29 because it contains 5,150 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Circuit Rule 32(b) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 12 points or larger.

/s/ *Bradley Girard*

**CERTIFICATE OF SERVICE**

I certify that on November 3, 2021, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Bradley Girard*