Nos. 21-2390, 21-2434

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EVA PALMER,

Plaintiff–Appellant / Cross-Appellee,

v.

LIBERTY UNIVERSITY,

Defendant–Appellee / Cross-Appellant.

On cross-appeal from a final judgment of the
United States District Court for the Western District of Virginia
Case No. 20-cv-31, Hon. Judge Norman K. Moon

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE FOR APPELLANT/CROSS-APPELLEE ON THE MINISTERIAL EXCEPTION

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Signature: /s/ Richard B. Katskee Date: 7/25/2022

Counsel for: Amicus Curiae, Americans United

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TABLE OF CONTENTS

Page(s)

Table of Authorities iii

Interests of *Amicus Curiae* 1

Introduction 2

Argument 3

I. Deeming Palmer a minister would encourage religious employers to game the system without serving the ministerial exception's purpose. 4

II. The Court should reject amici's attempt to introduce constitutional issues that were never before the district court. 22

Conclusion 23

Certificate of Compliance .....

Certificate of Service .....

TABLE OF AUTHORITIES

Cases **Page(s)**

Arakas v. Comm'r, Soc. Sec. Admin.,
983 F.3d 83 (4th Cir. 2020) 22

Casa de Maryland v. U.S. Dep't of Homeland Sec.,
924 F.3d 684 (4th Cir. 2019) 3, 4, 23

Davis v. Balt. Hebrew Congregation,
985 F. Supp. 2d 701 (D. Md. 2013) 14

Demkovich v. St. Andrew the Apostle Par.,
3 F.4th 968 (7th Cir. 2021)..... 6, 8, 11, 17, 21

Dias v. Archdiocese of Cincinnati,
No. 11-cv-251, 2013 WL 360355
(S.D. Ohio Jan. 20, 2013) 14

EEOC v. Sw. Baptist Theological Seminary,
651 F.2d 277 (5th Cir. 1981) 14

Escambia Cty. v. McMillan,
466 U.S. 48 (1984) 4

Fitzgerald v. Roncalli High Sch.,
No. 19-cv-4291 (S.D. Ind. 2019) 1

Gordon Coll. v. DeWeese-Boyd,
No. 21-145 (U.S. 2021) 1

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) 2, 3, 5, 6, 8, 9, 12, 13, 19

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church,
344 U.S. 94 (1952) 4

Lukaszewski v. Nazareth Hosp.,
764 F.3d 57 (7th Cir. 1991) 14

McCarthy v. Fuller,
714 F.3d 971 (7th Cir. 2013) 4

TABLE OF AUTHORITIES—continued

Page(s)

McClure v. Salvation Army,
460 F.2d 553 (5th Cir. 1972) 6, 8, 11, 21

Morrison v. Nat'l Aust. Bank Ltd.,
561 U.S. 247 (2010) 3

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) 2, 5, 8, 9, 11, 13, 15, 18, 19

Patsakis v. Greek Orthodox Archdiocese of Am.,
339 F. Supp. 2d 689 (W.D. Pa. 2004).....14

Richardson v. Nw. Christian Univ.,
242 F. Supp. 3d 1132 (D. Or. 2017) 15

Serbian E. Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 4

Smith v. Raleigh Dist. of N.C. Conf. of the United Methodist Church,
63 F. Supp. 2d 694 (E.D.N.C. 1999) 14

Snyder v. Phelps,
580 F.3d 206 (4th Cir. 2009) 23

Sterlinski v. Cath. Bishop of Chi.,
934 F.3d 568 (7th Cir. 2019) 15

Tony & Susan Alamo Found. v. Sec'y of Lab.,
471 U.S. 290 (1985) 5

Tucker v. Faith Bible Chapel Int'l,
No. 20-1230 (10th Cir. 2020).....1

United States v. Hartshorn,
751 F.3d 1194 (10th Cir. 2014) 12

Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists,
401 F. Supp. 1363 (S.D.N.Y 1975).....14

Statutes, Rules, and Regulations

U.S. Const. amend. I .....*passim*

TABLE OF AUTHORITIES—continued

Page(s)

29 U.S.C. § 206 21

29 U.S.C. § 621 21

42 U.S.C. § 2000e-2 21

42 U.S.C. § 12101 .....19, 20

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Christian Legal Society, *Church Guidance for Same-Sex Issues* (2015), https://perma.cc/DKC2-HPXW 17

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McGuireWoods, *U.S. Supreme Court Broadens Ministerial Exemption to Employment Discrimination Claims* (July 10, 2020), https://perma.cc/Q3EB-HV6S 16

MergerWatch, G*rowth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report*, https://perma.cc/7PRB-86VQ 18

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INTERESTS OF *AMICUS CURIAE*[1]

Americans United for Separation of Church and State is a national, nonpartisan organization that for seventy-five years has brought together people of all faiths and the nonreligious, who share the deep 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 remains secure and is not twisted into a blanket excuse to discriminate.

Americans United has particular expertise in this case because it frequently represents employees of religious institutions who have suffered discrimination at work. *See, e.g.*, *Gordon Coll. v. DeWeese-Boyd*, No. 21-145 (U.S. 2021); *Tucker v. Faith Bible Chapel Int'l*, No. 20-1230 (10th Cir. 2020); *Fitzgerald v. Roncalli High Sch.*, No. 19-cv-4291 (S.D. Ind. 2019). The defendants in these cases often raise the ministerial exception as an affirmative defense, including when it does not and should not apply. Americans United thus has an interest in ensuring application of the ministerial exception that serves—but does not extend beyond—the exception's purpose.

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[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that 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 governmental intrusion into their development and transmission of religious doctrine—not to shield employers from litigation or 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 asking the Court to label Palmer a minister—without first deciding her ADEA claim—the University seeks to evade that constitutional mandate. Here, we explain why an all-encompassing reading of the ministerial exception, like the one advocated by the University and its

amici, would make it all too easy for an entire class of employers to evade civil-rights laws even when there is no constitutionally cogent basis for doing so.

ARGUMENT

As an initial matter, the University urges this Court to address the ministerial exception first, insisting that because it raises constitutional questions it *must* be addressed before the merits. *See* Br. 34. That gets things exactly backwards.

The ministerial exception is "not a jurisdictional bar" but rather "an affirmative defense to an otherwise cognizable claim, . . . because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle [her] to relief,' not whether the court has 'power to hear [the] case." *Hosanna-Tabor*, 565 U.S. at 195 n.4 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010)). And because the defense is a constitutional one, and it is the "well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose the case," this Court should address the ministerial exception only if the University fails on its nonconstitutional affirmative defenses to Palmer's ADEA claim. *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d

684, 706 (4th Cir. 2019) (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984)).

Amicus addresses only the constitutional issue on cross-appeal and takes no position on the merits of Palmer's ADEA claim. But this Court should first determine whether the district court erred in ruling on that statutory claim. If so, the ministerial-exception defense comes into play and the Court should reject the University's broad reading of the exception; if not, the constitutional defense has no bearing, and ruling on it would put the cart before the horse.

I. Deeming Palmer a minister would encourage religious employers to game the system without serving the ministerial exception's purpose.

1. 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 enjoy "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 the relationship between a religious institution and a limited subset of its employees—namely, 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 the messengers of the faith. *Id.* at 199 (Alito, J., concurring). For if government had the authority to control who leads worship services, it would effectively 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

should 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.

The exception is powerful: It 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. Carefully defining "minister" for constitutional purposes is therefore necessary to limit the otherwise enormous costs and harms that the ministerial exception would inflict on employees and society. And application beyond the category of employees responsible for teaching and preaching the faith would grossly undercut society's "undoubtedly important" interest in preventing employment discrimination, while not serving the valid and important constitutional interests of the employer. *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 that means allowing it categorically to refuse, for example, to hire Black ministers, and to do so 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 religious universities to discriminate based on race or other protected characteristics in their hiring of financial-aid advisors, janitors, track-and-field coaches, or, as here, art professors who play no significant role in setting or disseminating the institution's religious message.

An overly expansive ministerial exception would, in other words, kneecap antidiscrimination laws, causing real and substantial harm—both dignitary and economic—to those who suffer discrimination 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).

2. It is against this backdrop that the Supreme Court has twice expressly rejected any "rigid formula" for determining whether employees are ministers. *Id.* at 2066-67; *Hosanna-Tabor*, 565 U.S. at 190. 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 of these 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 not just what an employment agreement or faculty handbook might say, but whether a particular 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).

This Court should refuse the University's invitation to depart from Supreme Court precedent. 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.

3. Looking at the primary consideration—what Palmer 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, Palmer was a Professor of Art, JA 71, and taught classes like "Painting I," "Drawing I," and "Introduction to Design." JA 293-329. Take the syllabus for her "3D Art" class as an example. *See* JA 293-97. Its course objectives include "apply[ing] a variety of media to demonstrate the elements and principles of design in original works of art," "identify[ing] design terminology and design concepts," "construct[ing] three-dimensional artworks using a variety of materials," and other purely nondoctrinal, nontheological, nonreligious goals. JA 293. Each week, Palmer instructed on topics like "elements of design" and "shape and texture." JA 295-96.

At no point does the course syllabus identify any religious objectives, topics, or lessons, nor did the University ever ask her to include such lessons. And although some of Palmer's syllabi stated that students could share prayer requests with her, these statements were made in the context of warning students that Palmer would not be able to assure confidentiality if a student's disclosures suggested a risk that they might harm themselves or others. JA 318. In other words, under the heading "Limits of Confidentiality," the syllabi's reference to prayer informed students that

Palmer might sometimes have to report or act on student-initiated conversations even when the conversations took the form of prayer requests. JA 318.

And Palmer wasn't alone in recognizing herself to be a nonministerial employee: In seeking her replacement, the University did not include any mention whatever of religious or spiritual-guidance duties or functions. JA 285. Rather, Liberty sought, as any secular college's art department might, a professor able to "demonstrate evidence of professional/academic activities and research" and "combine theory with practice in a liberal arts context." JA 285. The sought-after candidate would have training in artistic mediums like animation or motion graphics, not in theology or Christian apologetics. JA 285. Consonant with those requirements, when Palmer arrived at the University, she had a Bachelor's degree in Education, a Master's degree in Fine Arts, and a Master of Fine Arts. JA 1345. Her training and her duties were secular; and indeed, other than vaguely requiring faculty to teach from a religious perspective, the University has little to distinguish Palmer from an art professor at a public (or private, secular) university.

To be sure, even academic professors might ultimately help further a religious university's mission; and a religious employer might require that all professors (and the entire staff) engage with students from a perspective of faith. But if that were enough to make employees ministers for legal

purposes, every administrative assistant, custodian, gift-shop clerk, and maintenance worker would be one. For they each help further the mission of a religious university in their own way. A rule that would make them all ministers has no relation either to the purpose of the ministerial exception as set forth by the Supreme Court in *Hosanna-Tabor* and *Morrissey-Berru*, or to the holdings in those cases, which turned on careful consideration of what the employees actually did. Ministerial employees are the "chief instrument[s]" for a religious organization "to fulfill its purposes"—its *religious* purposes. *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.

4. Ignoring *Morrissey-Berru*'s command that "[w]hat matters, at bottom, is what an employee *does*," 140 S. Ct. at 2064 (emphasis added), the University "extensively cite[d] to its employment handbook and Palmer's employment agreements to argue that Palmer had religious duties," JA 1455 (district-court opinion granting summary judgment to Palmer on ministerial exception). In its opening appellate brief, the University relies on declarations by the Provost, Br. at 43 (citing JA 166 ¶7), and the Dean of the School of Communications and Arts, Br. at 38 (citing JA 37-38 ¶24), to argue that Palmer was expected to integrate the faith into her teaching. But

as it did before the district court, the University "provides scant evidence of her actually integrating theological lessons into her classes," JA 1456.

Instead, the University acknowledges that faculty "are not expressly required to engage in specific religious conduct in the classroom." Br. 8. Palmer's evaluations reflected that. For example, in 2014, when recommending Palmer for a promotion to full professor, the promotion committee encouraged her to "continue the scholarly work she is currently doing" and to "seek out and participate in workshops and other learning opportunities in her discipline." JA 1382. Nowhere did the Committee suggest that she do more to incorporate her faith into her classes—religion wasn't even a factor considered in the committee's analysis. JA 1382-83. And even when opposing her promotion, the Dean made no mention of religion at all as a ground for his decision. JA 1384. In short, the University asks the court to ignore the evidence of what Palmer actually did and was expected to do in favor of the school's made-for-litigation classifications.

To be sure, a religious organization may describe all—or none—of its members as "ministers." *See Hosanna-Tabor*, 565 U.S. at 202 & nn.3-4 (Alito, J., concurring); *see, e.g.*, *United States v. Hartshorn*, 751 F.3d 1194, 1196 n.1, 1199-1202 (10th Cir. 2014). 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, in keeping with the Supreme Court's admonitions, this Court should be leery of relying unduly on a defendant's documents or representations assigning vague religious duties to particular employees, 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 makes one a ministerial employee. *See Morrissey-Berru*, 140 S. Ct. at 2063-64.[2]

Formal documents and *post hoc* declarations might reflect an employer's true expectations if they are backed up by the on-the-ground functions of the employee. But here, Palmer's evidence shows that these did *not* reflect her actual duties: Her core responsibility was to teach art classes on subjects like drawing and sculpture. JA 1448. Though she began classes with a short prayer or psalm, she did not consistently integrate Christianity into her lessons, the University's litigating position notwithstanding. JA 1448. Nor did she bring her students to church services, lead them in Bible

[2] To accept at face value ministerial designations, as the University urges, 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 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).

study, guide them in scripture, or deliver sermons to them. JA 1448. If a few after-the-fact descriptions of vague job expectations could strip all employees of fundamental legal protections—regardless of whether they perform important religious functions to a meaningful degree, or at all—employers would have carte blanche to engage in odious employment discrimination, without advancing any constitutional interest.

Courts have thus long rejected attempts broadly to label employees as ministers regardless of whether they have meaningful religious duties. Rather, the courts have properly refused to apply the ministerial exception to secretaries, receptionists, administrative and support staff, technology coordinators, facilities workers, or college professors who don't teach the faith. *See, e.g.*, *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (rejecting contention by seminary that "all its employees," including all "Faculty, administrative staff, and support staff," "serve a ministerial function").[3]

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[3] *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); *Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (facilities worker); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 58-60 (E.D. Pa.

And Palmer 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 the service). Rather, Palmer showed what many employees in this country know to be true: Formal documents such as employment agreements, faculty handbooks, and *post hoc* rationalizations often do not accurately reflect the employer's actual expectations or the employee's true, on-the-ground job functions. No matter how vociferously the University insists otherwise, Palmer's job was fundamentally nonreligious: She taught her students how to put charcoal to paper and paint to canvass, not how to practice the faith.

5. To apply the ministerial label expansively, as the University urges, would not only fly in the face of the decisions described above, but it would encourage employers to add vague religious language to handbooks and job contracts for the sake of avoiding legal liability.

1991) (same); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1143-46 (D. Or. 2017) (college professor).

That concern is not hypothetical: Law firms and advocacy groups are 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 requirements, for *any* of their employees.[4] 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."[5] In other words, employers are being advised formally 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."[6] The Christian Legal Society recommends "inserting statements of faith or other doctrinal language into employee handbooks," in an attempt to get employees

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

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

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

classified as ministers.[7] 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."[8] 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 church's faith, provide religious resources, or pray with callers."[9] And First Liberty advises religious schools that for *all* staff members, regardless of the actual nature and purpose of their job, "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."[10] *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).

And if that sort of gamesmanship were to have real legal effect, the result could be to strip hundreds of thousands of employees, if not more, of

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

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

[9] *Id.*

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

fundamental civil-rights protections, without any genuine constitutional justification.

Indeed, under the University's rule, more than "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 the petitioner-school in *Morrissey-Berru* (also for amici here) stated during oral argument 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).[11] 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.[12] Add to that the "countless coaches, camp counselors, . . . social-

[11] 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.

[12] *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, G*rowth 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).

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 deemed ministers under *Hosanna-Tabor* and *Morrissey-Berru*, but an analysis that gives too much deference to an employer's documents and descriptions rather than what an employee actually does 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."[13] "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.[14] 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

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

[14] *Id.* at 13.

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)(7).

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 a financial-aid advisor at a religious school has diabetes. Under the University's approach, her employer could avoid the ADA entirely by requiring her to sign a contract stating that she will give financial advice to students through a Christian perspective. If the employer gets tired of accommodating the employee by, say, allowing a few minutes for the employee to test and regulate her blood sugar, the employer could one day refuse *any* accommodation, no matter how trivial (or nonexistent) the burden is on the employer. Worse yet, it could simply fire the employee, taking away her livelihood (and likely her 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 the University's erroneous expansion of the ministerial exception.

And, of course, the ADA is but one of the fundamental antidiscrimination statutes aimed at protecting vulnerable populations.

Others include the Fair Labor Standards Act, *see* 29 U.S.C. § 206 (requiring covered employers to pay the federal minimum wage); Title VII, *see* 42 U.S.C. § 2000e-2 (protecting against discrimination on the basis of race, color, religion, sex, and national origin); and as here, 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"). Allowing employers to strip their employees of these bedrock protections based on vague and inaccurate job descriptions 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 vague duties in formal documents and statements would turn the First Amendment's protection for core religious activities into a free pass to discriminate, undermining both the First Amendment and society's commitment to antidiscrimination.

II. The Court should reject amici's attempt to introduce constitutional issues that were never before the district court.

Seeking to shield religious employers from employment litigation entirely, amici go further still, arguing that the church-autonomy doctrine bars Palmer's lawsuit, and that "the very process of inquiry" into her claims "may impinge on rights guaranteed by the Religion Clauses." Amici Br. of Religious Univs. 25. The Court should reject amici's invitation to go beyond the questions presented in this case and wade into other constitutional issues.

Apart from arguing that Palmer was a minister and hence subject to the ministerial exception, the University did not raise any religious defenses in the district court. And because this Court is one of review, not of first view, it should not address a defense that a party never raised in the district court. *See Arakas v. Comm'r, Soc. Sec. Admin.*, 983 F.3d 83, 105 (4th Cir. 2020). That is doubly so when the defense is raised only by amici and not by

the party itself. *See Snyder v. Phelps*, 580 F.3d 206, 216-17 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011).

What's more, the Court should answer constitutional questions only when necessary. *Casa de Maryland*, 924 F.3d at 706 (quoting *Escambia Cty.*, 466 U.S. at 51). And constitutional questions not raised by the parties, not addressed by the district court, and raised only by amici do not fit the bill.

CONCLUSION

If the Court addresses the ministerial exception, then the judgment of the district court denying the University's motion for summary judgment on the applicability of the ministerial exception should be affirmed.

Respectfully submitted,

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July 25, 2022

CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Rule 29(a)(5) because it contains 4,965 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 Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365, set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on July 25, 2022 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/ *Richard B. Katskee*

Nos. 21-2390, 21-2434

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EVA PALMER,

Plaintiff–Appellant / Cross-Appellee,

v.

LIBERTY UNIVERSITY ,

Defendant–Appellee / Cross-Appellant.

On cross-appeal from the final judgment of the
United States District Court for the Western District of Virginia
Case No. 20-cv-31, Hon. Judge Norman K. Moon

CONSENT MOTION OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANT/CROSS-APPELLEE

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CONSENT MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amicus curiae moves with the consent of the parties for leave to file the attached brief in support of Appellant/Cross-Appellee, urging the Court to affirm the district court's ruling that the ministerial exception does not apply in this case.

Amicus curiae is Americans United for Separation of Church and State, a national, nonpartisan organization that works to ensure that the constitutional right of religious organizations to choose their religious message does not become a blanket excuse to discriminate. *Amicus* frequently litigates the ministerial exception, *see, e.g.*, *Gordon Coll. v. DeWeese-Boyd*, No. 21-145 (U.S. 2021); *Tucker v. Faith Bible Chapel Int'l*, No. 20-1230 (10th Cir. 2020); *Fitzgerald v. Roncalli High Sch.*, No. 19-cv-4291 (S.D. Ind. 2019), and so has expertise that would benefit this Court in considering the issue in this cross-appeal.

Based on our expertise, the proposed *amicus* brief provides an explanation of the constitutional logic underlying the ministerial exception and explains the harms wrought on the general public when the ministerial exception is stretched beyond its constitutionally appropriate scope. The brief then responds, based on the proper understanding of the ministerial exception, to arguments presented by Appellee/Cross-Appellant's *amici*.

Amicus takes no position on Appellant/Cross-Appellee's claim under the Age Discrimination in Employment Act. The attached brief is therefore timely filed seven days after Appellant/Cross-Appellee's brief opposing the ministerial exception.

Counsel for both parties consent to the filing of this brief.

For these reasons, *Amicus* respectfully asks this Court to grant this motion and permit the filing of the attached *amicus* brief.

Dated: July 25, 2022.

Respectfully submitted,

/s/ *Richard B. Katskee*

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(party name)

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