Nos. 19-267, 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL, PETITIONER,

v.

AGNES MORRISSEY-BERRU, RESPONDENT.

ST. JAMES SCHOOL, PETITIONER,

v.

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

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ASSOCIATION OF CLASSICAL CHRISTIAN SCHOOLS, ET AL. AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Association of Classical Christian Schools is a Christian organization that represents about 300 schools,[2] comprising about 40,000 students.[3] The teachers and other employees at these schools teach students both religious and secular subjects in the light of a Christian worldview, "grounded in the Old and New Testament Scriptures."[4] They further strive to shape their students' virtues and reason to be in line with God's will, so that these students will worship and glorify God.[5]

The Cardinal Newman Society is a Catholic organization that promotes and defends faithful

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[1] Counsel for the parties have consented to this brief. Under Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Ass'n of Classical Christian Schools, *The Mission of the ACCS*, https://classicalchristian.org/the-mission-of-the-accs/?v=a44707111a05 (all websites last visited Feb. 9, 2020).

[3] Ass'n of Classical Christian Schs., *Membership Handbook* 4, *available at* https://classicalchristian.org/wp-content/uploads/2016/12/G-Membership-Handbook-Join-With-Us-12.28.16.pdf?v=a44707111a05.

[4] *Id.* at 7, 10.

[5] *Id.*

Catholic education at Catholic schools.[6] Among other things, the Society recognizes and sponsors working groups of faithful Catholic schools and colleges,[7] and works for "the success of Catholic educators who are committed to faithful Catholic education" by teaching with "Catholic ideals, principles, and attitudes."[8]

William Jessup University is a Christian university with about 1,700 students and 200 faculty members.[9] Its teachers integrate faith and academia to prepare their students to serve as Christian leaders in both the Church and society.[10]

The Association for Biblical Higher Education is a Christian organization that represents more than 200 affiliated institutions, comprising over 50,000

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[6] Cardinal Newman Soc'y, *Newman Society, About*, https://newmansociety.org/about/.

[7] *See* Cardinal Newman Soc'y, *Newman Guide*, https://newmansociety.org/the-newman-guide/recommended-colleges/; Cardinal Newman Soc'y, *Honor Roll*, https://newmansociety.org/catholic-ed-honor-roll/.

[8] *See* Cardinal Newman Soc'y, *Newman Society, About*, https://newmansociety.org/about/ (citations omitted).

[9] William Jessup Univ., *Staying Christ-Centered in the Center of it All*, http://jessup.edu/.

[10] William Jessup Univ., *Mission, Vision, Statement of Faith*, http://jessup.edu/about/mission.

students in the United States and Canada.[11] Its affiliated institutions employ teachers and other employees who engage students in biblical, transformational, experiential, and missional higher education.[12]

INTRODUCTION AND SUMMARY OF ARGUMENT

Through the First Amendment's Religion Clauses, the Founding Generation ensured "that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices," "appointing ministers," or "interfering with the freedom of religious groups to select their own." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184 (2012). Even before this Court's decision in *Hosanna-Tabor*, the courts of appeals had "uniformly recognized" that the Religion Clauses contain a "ministerial exception" that "preclude[d]" certain "claims concerning the employment relationship between a religious institution and its ministers," consistent with the Founding Generation's understanding of these Clauses. *See id.* at 188.

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[11] Ass'n for Biblical Higher Educ., *About ABHE*, https://www.abhe.org/about-abhe/.

[12] *Id.*

In *Hosanna-Tabor*, this Court reaffirmed this "ministerial exception," holding that the Religion Clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181. While the Court unanimously agreed on the existence of the exception and its application to the minister at issue in the case, the Justices of this Court wrote three different opinions explaining their views on the proper test for which employees are "ministers." The Chief Justice's opinion for the Court provided four relevant "considerations," including the employee's "important religious functions [ ] performed for" the religious organization. *Id.* at 190–92. Justice Thomas concluded that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196–97 (Thomas, J., concurring). Finally, Justice Alito, joined by Justice Kagan, explained that courts should "focus" on the "objective functions" of employees to determine whether they are "ministers." *Id.* at 198–99, 200 (Alito, J., concurring).

Amici respectfully submit that this Court should now articulate a definitive test for the applicability of the ministerial exception. *Amici* propose the following three-component test for this Court's consideration: (1) a "minister" is an employee who performs "religious" functions"; (2) the functions that the minister actually performed should be proven with evidence from the religious organization such as written organizational bylaws, position descriptions,

and other such competent evidence; and (3) the court should determine which functions are, in fact, "religious" by deferring to the religious organization's own good-faith understanding of its own religion.

Each component of *Amici*'s proposed test addresses core concerns identified by the Justices of this Court in *Hosanna-Tabor*. Focusing on an employee's "performance of [ ] functions," *id.* at 199–200, 205–06 (Alito, J., concurring), limits the government's involvement in the religious organization's "internal governance" decisions by reducing the avenues of relevant inquiry, *id.* at 188, 194–95 (majority op.); *see id.* at 197 (Thomas, J., concurring). Reliance on evidence from the religious organization like written organizational bylaws and position descriptions, as well as other competent evidence, to identify an employee's functions avoids the "grave problems" of "calling witnesses to testify" in civil courts on religious matters. *Id.* at 205–06 (Alito, J., concurring); *id.* at 197 (Thomas, J., concurring); *see id.* at 194–95 (majority op.). And deferring to the organization's "good-faith understanding" as to which functions are religious recognizes that such questions are themselves "religious in nature," outside the competency of the civil courts. *Id.* at 196–97 (Thomas, J., concurring); *see id.* at 205–06 (Alito, J., concurring); *id.* at 194–95 (majority op.).

Adopting this proposed test would respect the diversity of this Nation's religious organizations, as

exemplified by *Amici*. *Amici* include religious schools and universities that operate under shared principles like requiring assent to a statement of faith, expecting teachers and employees to engage students fully in their faith, and approaching all subjects from a religious perspective. Adopting the proposed test would respect the choices that *Amici* have made, just as it would respect with equal measure the decisions that the full range of differently focused religious organizations make.

ARGUMENT

I. The Ministerial Exception Should Apply Where Documentary And Other Competent Evidence Establishes That The Employee Performs Religious Functions, As Defined In Good Faith By The Organization

Amici propose a three-component test for determining when the ministerial exception applies. As explained below, this test will serve the Religion Clauses' interests that the Justices of this Court expressed in *Hosanna-Tabor*. *Amici*'s test is not intended to classify every employee of a religious organization as a "minister." Rather, *Amici* designed their proposed test to fairly and neutrally ascertain which employees the religious organization has chosen to "personify its beliefs" and "minister to the faithful," and which were chosen after "mere employment decision[s]." *Id.* at 188–89.

A. Whether An Employee Is A "Minister" Should Focus Predominantly On The Function Performed By That Employee

The first component of *Amici*'s proposed test requires a court to define a "minister" by focusing predominantly on the employee's religious functions, allowing the court to conclude that an employee is a minister if religious functions are performed, without need to resort to further inquiry.

The "functions" of an employee are the "activities" that the employee "perform[s]" as part of his job. *See id.* at 199 (Alito, J., concurring). They are the employee's "job duties" that the minister assumes for the religious organization. *Id.* at 192 (majority op.). When considering whether an employee performs religious functions, the simultaneous presence of secular functions should not affect the analysis. *Id.* at 204 (Alito, J., concurring). This is because "the constitutional protection of religious [ministers] is not somehow diminished when they take on secular functions in addition to their religious ones." *Id.* (Alito, J., concurring).

Focusing on the employee's functions advances the Religion Clauses' core goals that each of the three *Hosanna-Tabor* opinions discussed.

Placing predominant focus on an employee's job functions reduces government entanglement with religion and respects the autonomy of religious

organizations. *Id.* at 188–89, 194–96 (majority op.); *id.* at 197 (Thomas, J., concurring); *id.* at 200, 205–06 (Alito, J., concurring); *see generally Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 670 (1970). If a court determines that the minister performs religious functions, there is no need for additional government inquiry into other "considerations," such as the employee's "formal title," "the substance reflected in that title," the employee's "own use of that title," or any other facet of the religious organization's internal operations. *Hosanna-Tabor*, 565 U.S. at 192. This minimizes the number of avenues of government intrusion into a religious organization's affairs, reducing government interference with religion. *See generally Coulee Catholic Sch. v. Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 882 (Wis. 2009).

Relatedly, focusing on employee functions is a workable rule, alleviating friction between government and religion that results from litigating over "a church's decision to fire a minister." *Hosanna-Tabor*, 565 U.S. at 194–95. While "[d]ifferent religions will have different views," employees who are "ministers" will generally perform religious functions like "serv[ing] in positions of leadership"; "perform[ing]" important roles in "worship services," "religious ceremonies," and "rituals"; and "teaching and conveying the tenets of the faith to the next generation." *Id.* at 200 (Alito, J., concurring). Ministers also often "minister to the faithful," *id.* at 189 (majority op.), by leading missionary work and performing acts of charity. These functions allow a

court to end its analysis without need for a probing inquiry into other "considerations." *Accord infra* Part I.C. (discussing the proper approach to determining which functions are "religious").

The teacher in *Hosanna-Tabor* was a "minister," due to her functions, because she "taught her students religion"; "led them in prayer" and "devotional exercises"; "took her students to a school-wide chapel service" regularly, which she led "twice a year"; and, more broadly, "transmitt[ed] the Lutheran faith to the next generation." 565 U.S. at 192. Circuit decisions provide more examples, such as serving as a Catholic school principal, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 193 (2d Cir. 2017); "t[eaching] students about prayer, Torah portions, and Jewish holidays," *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018) (per curiam); playing instruments at Mass, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012); and "prepar[ing] students for the ministry of Jesus Christ," *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 611 (Ky. 2014); *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463–64 (D.C. Cir. 1996) (teaching "canon law").

This functions-focus approach is also neutral among religions, a concern that both Justice Thomas, *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring), and Justice Alito, *id.* at 198 (Alito, J., concurring), discussed. "[W]e are a cosmopolitan nation made up of people of almost every conceivable

religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The Religion Clauses protect and foster this religious pluralism. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Placing predominant emphasis on religious functions furthers neutrality. "[A]ny religious group, regardless of its beliefs," will rely on the same "general categor[ies] of employees" to be their "ministers"—which categories are defined by the employees' "functions." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (citations omitted). Thus, "practically all religious groups" will employ "ministers" who "serve in positions of leadership"; "perform important functions in worship services," "ceremonies," and "rituals"; and "teach[ ] and convey[ ] the tenets of the faith to the next generation." *Id.* (Alito, J., concurring).

Consider the perils of relying just on potentially nonfunctional considerations like the employee's title. The "term 'minister' is commonly used by many Protestant denominations . . . but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists." *Id.* at 198 (Alito, J., concurring). And "the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions." *Id.* at 198 (Alito, J., concurring). So while some religious organizations may use titles that are so indicative of "minister" status that no further inquiry is necessary, resort to "objective functions" makes the ministerial exception available to "any religious group," avoiding

the risk latent in other approaches of excluding certain religious sects. *Id.* at 200 (Alito, J., concurring).

B. An Employee's Functions Should Be Defined By Competent Evidence Such As Written Bylaws And Position Descriptions

The second component of *Amici*'s proposed test requires that a court considering which functions a religious organization has, in fact, assigned to an employee place decisive weight on evidence from the religious organization like its organizational bylaws, position descriptions, or other competent evidence. Thus, to determine the functions that the organization expects the "category" of employee to fulfill, *id.* at 200 (Alito, J., concurring), a court should look to the kinds of evidence from the religious organization, not to less-certain, possibly self-serving evidence like the terminated minister's testimony, *see id.* (Alito, J., concurring) ("objective functions" to decide status as a "minister").[13]

Examples of the types of competent evidence that a religious organization could present to prove its case in this context abound. The district court in *Hosanna-Tabor*, for instance, looked at statements in the religious organization's "Constitution and By-laws,"

[13] This focus on competent evidence would not, of course, preclude a court from granting a motion to dismiss based on the pleadings where appropriate.

as well as published statements about the organization's mission on its website. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 884–85, 891 (E.D. Mich. 2008), *vacated*, 597 F.3d 769 (6th Cir. 2010), *rev'd*, 565 U.S. 171. The courts of appeals have focused upon other categories of similar evidence in this sphere, such as the religious organization's written policies, job descriptions, school manuals, and so on. *See, e.g.*, *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 569 (7th Cir. 2019) (Easterbrook, J.) ("*Sing to the Lord: Music in Divine Worship*, an 87-page document"); *Fratello*, 863 F.3d at 193, 195, 208–09 (school's "Administrative Manual" and "Job Summary and Qualifications"); *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 831 (6th Cir. 2015) (employment policies published on "website" and organization's "Purpose Statement and Doctrinal Basis"); *Cannata*, 700 F.3d at 177 & n.5, 178 ("materials prepared by the United States Conference of Catholic Bishops"); *Kirby*, 426 S.W.3d at 602 ("Faculty Handbook" and other materials required for "accreditation standards"); *see also Catholic Univ. of Am.*, 83 F.3d at 463–64 (looking to the "Canonical Statutes . . . of The Catholic University of America," the "Faculty Handbook," and the "Code of Canon Law" (emphasis omitted)).

This component of *Amici*'s test similarly furthers the interests identified in *Hosanna-Tabor*'s three opinions under the Religion Clauses.

Granting pride of place to evidence like organizational bylaws, position descriptions, or other competent evidence to establish functions performed by the employee minimizes entanglement and promotes religious autonomy. *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring); *id.* at 188–89, 194–95 (majority op.); *id.* at 197 (Thomas, J., concurring). It is not only a court's resolution of a dispute over a minister's firing that "impinge[s]" on a religious organization's rights, "but also the very *process* of inquiry leading to" the court's "findings and conclusions." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 & n.10 (1979) (emphasis added). So, if a court's "process" to determine which employees are ministers is overly intrusive, focusing on disputed testimony by the former minister about what functions he recalls performing, this would harm religious autonomy, even if the court ultimately held that the ministerial exception applied. *See id.*

Amici's test minimizes these process burdens on religious organizations. A court should only resort to evidence like employee testimony when the religious organization's bylaws, position descriptions, or other competent evidence fail to settle whether the organization actually assigned the functions to an employee. Presentation of that evidence, much of which will be standard "paperwork," is a minimal "intrusi[on]" into the religious organization's "religious affairs." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 306 (1985). And while there may be disputes over what specific evidence is

relevant to a specific employee's functions, those disputes would be resolvable under the normal rules governing litigation generally. *See* StJ.App. 5a n.1 (discussing dispute over what materials imposed binding job duties on the employee).

This approach is neutral among religions. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring); *id.* at 198 (Alito, J., concurring). Virtually any religious organization would be able to create and procure the kinds of competent evidence of functions endorsed by *Amici*'s test. *See supra* pp. 11–13. By reducing the need for courts to address concerns like witness credibility, reliance on this kind of certain evidence avoids the "risk" latent in other approaches of "disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring); *see id.* at 206 (Alito, J., concurring) ("popular familiarity with a religious doctrine cannot be the determinative factor").

C. The Organization's Good-Faith Understanding About Which Employee Functions Are Religious Should Control

The third component of *Amici*'s proposed test requires the court to defer to the religious organization's good-faith understanding of which employee functions are, in fact, religious. A court called to decide whether an employee's functions are

"religious" under the ministerial exception should look only to what the organization genuinely "believes" these "key functions" are. *Id.* at 199 (Alito, J., concurring). If the court concludes that a religious organization's assertion that a function is religious "is honest," *Sterlinski* 934 F.3d at 571, that would be "final" and "binding," *Hosanna-Tabor*, 565 U.S. at 185–86 (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)). That is, the court must leave undisturbed any good-faith "ecclesiastical . . . decisions" of whether a function is religious. *Id.* at 185–87 (discussing *Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696 (1976)). And deference is owed without any inquiry into whether the organization's "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

Deciding if an organization genuinely believes that a function is "religious" should be akin to determining whether a person's religious beliefs are "sincerely" held. *Hobby Lobby*, 573 U.S. at 725 (citing *Thomas*, 450 U.S. at 716); *accord Conlon*, 777 F.3d at 833–35 (asking first whether an organization has a religious "mission" before considering whether to apply the ministerial exception). Since "[o]nly beliefs rooted in religion are protected" by the Religion Clauses, a "narrow," "delicate" inquiry into sincerity

is appropriate. *Thomas*, 450 U.S. at 713–14, 716. Deference is not owed to "fraud[ulent]," "collusi[ve]," or "bad faith" claims that certain functions are religious. *Milivojevich*, 426 U.S. at 713; *accord Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 447 (1969) ("[T]here might be some circumstances in which marginal civil court review . . . would be appropriate.").

Deferring to an organization's good-faith understanding of which employee functions it considers religious flows directly from the deference owed to its understanding of its own religious mission under *Hosanna-Tabor*. For a religious organization to "carry out" its mission, it must have ministers who perform religious functions. *Hosanna-Tabor*, 565 U.S. at 196; *see id.* at 204 (Alito, J., concurring). Thus, the organization must have the autonomy to define the latter if, as *Hosanna-Tabor* makes clear, it has the autonomy to define the former. *See id.* at 206 (Alito, J., concurring). Otherwise, the "civil courts" could "second-guess" the religious organization's "assessment" of its mission simply by holding that certain functions essential to that mission are not religious themselves. *Id.* (Alito, J., concurring).

Notably, the requirement that a religious organization have a *good-faith* understanding that a function is religious differs from *Hosanna-Tabor*'s prohibition on inquiring into whether a religious organization's reason for firing a minister is

"pretextual." *Id.* at 194 (majority op.). A court cannot "probe [into] the *real reason* for [a minister's] firing," since that would "make a judgment about church doctrine." *Id.* at 205 (Alito, J., concurring); *see id.* at 194 (majority op.); *accord Milivojevich*, 426 U.S. at 713 (prohibiting inquiry into whether a religious organization's decision was "arbitrary"). A court may, however, respectfully consider whether a religious organization honestly "believes," *see Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring), or has a "good-faith understanding," *id.* at 196 (Thomas, J., concurring), that an employee function is religious, sufficient to bring the employee within the ministerial exception's protection, *accord supra* pp. 15–16 (discussing sincerity inquiry).

This component of *Amici*'s proposed test comports with the other concerns identified in *Hosanna-Tabor*'s three opinions and with the Religion Clauses.

Deferring to the religious organization's good-faith understanding of which functions are religious reduces entanglement and increases autonomy. *Hosanna-Tabor*, 565 U.S. at 188–89, 194–95; *id.* at 197 (Thomas, J., concurring); *id.* at 200, 205–06 (Alito, J., concurring); *see generally Walz*, 397 U.S. at 669–70. Deference means no further "litigati[on] in court" about whether a function "does or does not have religious meaning," which often "touches the very core" of the First Amendment's concern with entanglement. *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977); *accord Thomas*, 450 U.S. at 715

("[The religious believer] drew a line, and it is not for us to say that the line he drew was an unreasonable one."). This rule of deference is a recognition that the "appointment [of a minister] is a canonical act," with the "church authorities [ ] determin[ing] what the essential qualifications of a [minister] are and whether the candidate possesses them." *Milivojevich*, 426 U.S. at 711 (citations omitted).

This Court has often recognized the inevitable entanglement that results from courts attempting the "separation" of "religious" functions from the "purely secular." *Catholic Bishop of Chi.*, 440 U.S. at 501. This inquiry causes "entanglement" with the organization's "religious mission," since the government would ultimately be called to determine whether certain "challenged actions" were "mandated by [the organization's] religious creeds" or bore a "relationship to [its] religious mission." *Id.* at 502. This imposes a "significant burden" on religious organizations, since a judge might "not understand [the religious organization's] religious tenets and sense of mission," which could ultimately "affect the way an organization carried out what it understood to be its religious mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335–36 (1987). A "case-by-case determination" of religious and secular activities in this way would "chill [ ] religious expression," *id.* at 344–45 (Brennan, J., concurring in the judgment), and it would mandate courts impermissibly "trolling through a person's or institution's religious beliefs,"

Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality op.). Therefore, "deference" to a religious organization's own judgments about the religious nature of its activities is appropriate. *Amos*, at 342–44 (Brennan, J., concurring in the judgment).

This good-faith approach to deciding which functions are, in fact, religious, is neutral among religions. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring); *id.* at 198 (Alito, J., concurring); *see generally Larson*, 456 U.S. at 244. A court must afford equal deference to every religious group's good-faith understanding of which employee functions are religious, regardless of the organization's religious beliefs, consistent with the neutrality principle.

Finally, the good-faith approach sidesteps concerns about inquiring into whether a function is central to the religious organization. *See Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring). The organization's good-faith understanding of the religious nature of its employee's functions triggers a court's deference, no matter how central those functions are to the organization's religious mission. There is no provision for "a civil factfinder" to judge "the importance and priority of the religious doctrine in question . . . [or] how important that belief is to the church's overall mission" before deference is due. *Id.* at 206 (Alito, J., concurring).

* * *

Applying *Amici*'s proposed test to the facts here confirms that Respondents, Catholic school teachers formerly employed by Petitioners, qualify as ministers. Both performed religious functions, *see supra* Part I.A., like regularly teaching religion classes, including devotional classes, Opening Br. 11–12, 18; modeling and practicing their Catholic faith with their students, Opening Br. 12–13, 18; and engaging in other religious activities, like directing a play of the Passion of the Christ, Opening Br. 13; *see* Opening Br. 18–19. Petitioners established those functions by reference to competent documentary evidence, *see supra* Part I.B., like written mission statements, teacher contracts, and other written policies, *e.g.*, Opening Br. 9–10, 16–17 (citing OLG.App. 32a, 43a, 55a, and StJ.App. 19a, 97a). And no one disputes that Petitioners have a good-faith understanding that the functions just described are, in fact, religious. *See supra* Part I.C.

II. This Approach Would Respect The Religious Diversity Represented By *Amici*

Amici represent religious schools and universities that have diverse Christian-faith traditions and that operate differently than other schools affiliated with religious organizations that this Court's previous decisions have at times considered. The above-described proposed test, *supra* Part I, would respect the diversity of religious organizations within the

United States, including *Amici*, by focusing predominantly on the employee's functions, as shown with competent evidence, while deferring to the religious organization's good-faith understanding of which functions are religious.

A. Previous decisions of this Court have considered religious schools from diverse religious and faith traditions. In *Tilton v. Richardson*, 403 U.S. 672 (1971), this Court considered "four institutions of higher learning" "governed by Catholic religious organizations." *Id.* at 685–86. Despite their "admittedly religious" ties, these universities' "predominant higher education mission [was] to provide their students with a secular education." *Id.* at 687. Thus, these universities "made no attempt" to "proselytize" to their "students," and "religion" did not "permeate th[is] area of secular education." *Id.* In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), in contrast, the religious school catered to "practitioners of a strict form of Judaism" and provided students with a "limited exposure to secular subjects." *Id.* at 690–91. "[M]ost boys . . . received a thorough grounding in the Torah," and "most girls" received "a curriculum designed to prepare [them] for their roles as wives and mothers." *Id.* at 691. And the religious school in *Hosanna-Tabor* offered to students a "Christ centered education" with "called" teachers; taught many "secular" subjects, besides "a religion class four days a week"; and provided daily "prayer and devotional exercises" and "weekly school-wide chapel service[s]."

Hosanna-Tabor, 565 U.S. at 177–78, 193; *compare Tilton*, 403 U.S. at 685–86; *Grumet*, 512 U.S. at 691. The "religious duties" of a teacher "consumed only 45 minutes of each workday," with "the rest of [the] day [ ] devoted to teaching secular subjects." *Hosanna-Tabor*, 565 U.S. at 193.

B. *Amici* represent Christian schools and universities of diverse faith traditions that nonetheless share three general features: requiring an assent to a statement of faith, expecting teachers and employees to engage students fully in their faith, and approaching all subjects from a religious perspective. These three features together generally distinguish *Amici* from other religious schools that this Court has at times considered, discussed immediately above.

Assent To A Statement Of Faith. Recognizing that a "religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses," *id.* at 201 (Alito, J., concurring), *Amici* generally require an assent to a statement of faith from their member schools, teachers, and employees, committing them to "conform" themselves to the faith.[14] *Amici* generally

[14] Ass'n for Biblical Higher Educ., *Constitution* 2 (Feb. 2018), *available at* https://www.abhe.org/wp-content/uploads/2018/03/2018.ABHE-Constitution-Bylaws.pdf (requiring its member schools to "conform to the Association's *Tenets of Faith*"); *see also* Ass'n of Classical Christian Schs., *Statement of Faith*,

expect "commit[ment]" from their teachers to "the teachings, practice and defense of the[ ] truths" of "our Lord Jesus Christ."[15] And they believe that "[a] good teacher is first a Christian, then a scholar, then a teacher."[16]

Engaging Students In Their Faith. Amici expect their teachers and members actively to engage their students on matters of faith, forming them in their various religious traditions. So *Amici* strive to "prepare[ ]" their students *both* "for professional life

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https://classicalchristian.org/statement-of-faith/?v=a44707111a05 ("We welcome members who hold to traditional, conservative Christian orthodoxy and our statement of faith . . . ."); Cardinal Newman Soc'y, *Principles of Catholic Identity in Education* 4, *available at* https://newmansociety.org/wp-content/uploads/Principles-Overview_Final.pdf (encouraging "[t]eachers and leaders of the educational community" to be "practicing Catholics who can understand and accept the teachings of the Catholic Church and the moral demands of the Gospel" (citations omitted)); William Jessup Univ., *Community Covenant* 1, *available at* http://my.jessup.edu/employee-resources/wp-content/uploads/sites/9/2014/06/WJU-Community-Covenant-and-Chapters-Jan2015.pdf (requiring the "*William Jessup University* community" to observe "the Great Commandments: Love God and love your neighbor as yourself").

[15] William Jessup Univ., *Mission, Vision, Statement of Faith*, http://jessup.edu/about/mission.

[16] Ass'n of Classical Christian Schs., *Membership Handbook* 14, *available at* https://classicalchristian.org/wp-content/uploads/2016/12/G-Membership-Handbook-Join-With-Us-12.28.16.pdf?v=a44707111a05.

. . . and society" *and*, perhaps unlike some other religiously affiliated schools, for their "responsibilities and duties" in "the Church."[17] This means that *Amici* seek to "prepare" their students to "[a]rticulate the relevance of Jesus Christ, His teachings, and a Biblical worldview to their personal and professional lives."[18] And *Amici* strive to "engag[e] in dialogue" about religious and moral issues with their students.[19] Such an approach may be different than "conventional" schools—and perhaps may even "sound[ ] strange" or "foreign" to

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[17] Cardinal Newman Soc'y, *Principles of Catholic Identity in Education* 7, *available at* https://newmansociety.org/wp-content/uploads/Principles-Overview_Final.pdf (seeking to "impart[ ]" in students "a Christian vision of the world, of life, of culture, and of history" (citations omitted)); *see also* Ass'n of Classical Christian Schs., *The Mission of the ACCS*, https://classicalchristian.org/the-mission-of-the-accs/?v=a44707111a05 (seeking to "immerse [students] in a Christian view of all things," and its "ultimate mission is the cultivation of students as worshipers"); Ass'n for Biblical Higher Educ., *About ABHE*, https://www.abhe.org/about-abhe/ (noting that it "engage[s] students in biblical, transformational, experiential, and missional higher education"); William Jessup Univ., *Mission, Vision, Statement of Faith*, http://jessup.edu/about/mission/ ("desir[ing] that its graduates will exemplify . . . integration of their faith" with "their professional competence").

[18] William Jessup Univ., *Mission, Vision, Statement of Faith*, http://jessup.edu/about/mission/.

[19] William Jessup Univ., *Community Covenant* 4–5, *available at* http://my.jessup.edu/employee-resources/wp-content/uploads/sites/9/2014/06/WJU-Community-Covenant-and-Chapters-Jan2015.pdf.

some.[20] But, in *Amici*'s view, this form of education "prepare[s]" students "to work . . . for the common good of society," as they "evangeliz[e] [the] culture."[21]

Approaching All Subjects From A Religious Perspective. The schools affiliated with *Amici* often teach every subject from a religious perspective, not just theology classes. *See generally Catholic Bishop of Chic.*, 440 U.S. at 501 (discussing the possibility that "religious doctrine will become intertwined with secular instruction" at religious schools (citation omitted)). In *Amici*'s schools, "every facet of history, science, math, philosophy, art, and other subjects is integrated around the truth of the Christian worldview."[22] They focus "on the integration of faith and academia" and "weave" together "wisdom, knowledge, and thought" for students' "purposeful contribution to God's creation."[23] This Court has

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[20] Ass'n of Classical Christian Schs., *What is CCE?*, https://classicalchristian.org/what-is-cce/?v=a44707111a05; *see Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) (cautioning courts not to overlook religious organizations with views "outside of the 'mainstream'"); *id.* at 206 (Alito, J., concurring) (similar).

[21] Cardinal Newman Soc'y, *Principles of Catholic Identity in Education* 7, *available at* https://newmansociety.org/wp-content/uploads/Principles-Overview_Final.pdf.

[22] Ass'n of Classical Christian Schs., *What is CCE?*, https://classicalchristian.org/what-is-cce/?v=a44707111a05.

[23] William Jessup Univ., *Academics*, http://jessup.edu/academics/.

noted that a religious school offering "secular subjects" like "mathematics, physics, chemistry, and English literature" does not undermine the "religious mission" of the school. *Catholic Bishop of Chi.*, 440 U.S. at 496 (citations omitted).

C. *Amici*'s proposed test accommodates the realities of *Amici*'s religious exercise here.

By focusing on the religious functions of an employee, *supra* Part I.A., the first component of *Amici*'s test would enable *Amici* to show that an employee is a minister based on his functions of assenting to their statement of faith, committing to engage students in the faith, and teaching all subjects from a religious perspective. This approach means that *Amici* would not be penalized in litigation for not also choosing to bestow religious-sounding titles on each of their employees, *see* StJ.App. 11a–12a (concluding that *Biel* Respondent's title of "Grade 5 Teacher" did not convey a religious meaning), despite the potential absence of such practices from their faith traditions, *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) (discussing difficulties from relying on the title of "minister").

Next, under the second component of the proposed test, *supra* Part I.B., generally affording determinative weight to evidence like written organizational bylaws, position descriptions, and similar competent evidence would allow *Amici* to rely on documentation like the sources cited above, *supra*

pp. 22–25 nn. 14–23, reducing the burden of any litigation involving the ministerial exception in which *Amici* may be involved.

Consider if a terminated minister challenged with subjective testimony the existence of a religious function that *Amici* demonstrated with evidence like its bylaws and position descriptions. That terminated minister may seek to undermine *Amici*'s claim that religious functions were part of his employment by testifying that, for example, few employees actually assented to the statement of faith, that employees rarely engaged students in the faith, and that approaching all subjects from a religious perspective was uncommon. *Compare Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring). To rebut that testimony, *Amici* would likely elicit testimony from its other ministers, explaining that these religious practices often occurred at their schools, contrary to the terminated minister's testimony. Those other ministers' testimony may assert that they assented to the statement of faith, catalogue instances when they engaged students in the faith, and quantify the number of hours spent approaching "secular" subjects from a faith perspective. A civil court's "mere adjudication" of that evidentiary dispute "would pose grave problems for religious autonomy," even if the court ruled in *Amici*'s favor. *Id.* That is, even assuming *Amici* mounted a strong defense against such subjective testimony, "a civil factfinder" would still sit "in ultimate judgment of what the accused [*Amici*] really believe[ ]"—whether a minster truly

assented, whether students were truly engaged, and whether the perspective on a subject was truly religious. *Id.* That would "dangerously undermine the religious autonomy" of *Amici* that the ministerial exception is designed to respect. *Id.*

Finally, with the third component of *Amici*'s test, *supra* Part I.C., a court deferring to *Amici*'s good-faith understanding of which functions are religious would avoid the risk that the court may misclassify *Amici*'s ministers due to a lack of "popular familiarity with [their] religious doctrine[s]." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring); *accord id.* at 197 (Thomas, J., concurring).

Amici occupy a unique space among religious schools. Unlike in *Tilton*, *Amici* here represent religious schools and universities that *do* have the mission to provide a religious education for their students, rather than "a secular education." *Compare Tilton*, 403 U.S. at 685–87, *with supra* pp. 22–26. Yet without deference to *Amici*'s views, a court familiar with schools like those in *Tilton* may be inclined to conclude that, for example, *Amici*'s statement of faith merely affiliates the school as a whole with a creed, not that it bestows a religious function on *Amici*'s teachers. *See generally Tilton*, 403 U.S. at 686–87.

Amici are also unlike the school in *Grumet*, since they do not "limit[ ] exposure to secular subjects," 512 U.S. at 691, but also teach "history, science, math,

philosophy, art, and other subjects."[24] Yet *Amici* incorporate their religious views into their presentation of these so-called "secular" subjects, meaning that, in *Amici*'s view, they become religious activities—apparently unlike the school in *Hosanna-Tabor*. *Compare Hosanna-Tabor*, 565 U.S. at 193. The deference under the third component of *Amici*'s proposed test avoids the risk that a court—unfamiliar with *Amici*'s religious beliefs and perhaps simply analogizing to the schools in *Grumet* and *Hosanna-Tabor*—would misclassify a minister's functions as nonreligious, which would erroneously deny the ministerial exception. *See id.* at 206 (Alito, J., concurring); *id.* at 197 (Thomas, J., concurring).

CONCLUSION

This Court should reverse the judgments below.

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[24] *E.g.*, Ass'n of Classical Christian Schs., *What is CCE?*, https://classicalchristian.org/what-is-cce/?v=a44707111a05.

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