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 FOR THE ESTATE OF KRISTEN BIEL,

Respondent.

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

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1985, the National Employment Lawyers Association (NELA) is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA has a particular interest in the current attempt to broaden the ministerial exception, as any expansion would potentially strip thousands of people of the workplace protections guaranteed by our Nation's laws. NELA and its members, who litigate these issues on behalf of employees, advocate for protecting religious freedom while shielding workers from invidious discrimination in the workplace and ensuring continuity in the application of antidiscrimination laws.

The Employee Rights Advocacy Institute For Law & Policy (The Institute) advances workers' rights through research, thought leadership, and education for policymakers, advocates, and the public. The Institute sheds light on the harmful effects of narrowing protections for workers experiencing discrimination in the workplace. The Institute has an interest in the current attempt to broaden the ministerial exception, as

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[1] All parties have consented to the filing of this brief by blanket consent or letter. No counsel for a party has authored this brief in whole or in part, and no person other than *Amici curiae*, its members, and its counsel have made monetary contributions to the preparation or submission of this brief.

an expansion of this doctrine would also mean an expansion of the population vulnerable to the use of discriminatory practices in an unbalanced weighing of religious freedom and antidiscrimination protections.

The American Association for Justice (AAJ) is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful conduct

AAJ is concerned that the overly-broad application of the "ministerial exception" advocated by Petitioners in these cases will close courthouse doors to numerous employees of religious organizations who seek to vindicate their federally protected rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with the task of preserving religious organizations' First Amendment protections while balancing those rights in a manner that also secures our Nation's goal of prohibiting invidious

workplace discrimination. *Runyon v. McCray*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring) ("The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating [discrimination] in all sectors of society[,]" which is "now an important part of the fabric of the law."). *Amici* respectfully submit this brief in support of Respondents to demonstrate that the totality-of-the-circumstances test, already established by the Court in *Hosanna-Tabor*, is the appropriate balance between these two important protections.

Applying a one-factor test, as proposed by Petitioners, is inconsistent with the Court's decision in *Hosanna-Tabor* and would potentially decimate the antidiscrimination protections for many employees of religious organizations. When the Court created the ministerial exception, it refused to adopt a one-factor test to determine who falls under the exception as a "minister."[2] *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). Rather, it instructed lower courts to examine the totality of the circumstances. The courts have applied this workable standard in a manner that properly balances religious freedom and the right to be free from discrimination.

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[2] *Amici* recognize that "every religion in the world is represented in the population of the United States, [and] it would be a mistake if the term "minister" . . . w[as] viewed as central to the important issue of religious autonomy." *Hosanna-Tabor*, 565 U.S. at 198. However, for clarity "minister" is used throughout this brief as term of art for "religious leaders."

Maintaining an appropriate balance between protecting religious organizations and protecting employees from discrimination is imperative. With over two million employees, religious organizations are equivalent in size and profit to any large corporation in the United States. A one-factor test would encompass employees who are not actually ministers, such as doctors, teachers, janitors, and secretaries, and would strip them of important statutory protections.

Additionally, expanding the ministerial exception is unnecessary because religious organizations already have robust First Amendment protections through established federal law. Federal antidiscrimination laws provide broad exemptions for religious discrimination, which allows religious employers to discriminate based on religion and the tenets of their religion.

Amici urge this Court to reaffirm its previous holding under *Hosanna-Tabor* and continue applying a totality-of-the-circumstances test when analyzing a case in which the ministerial exception may apply. This Court should affirm the Ninth Circuit's ruling which appropriately balanced protections owed to employees and religious organizations.

ARGUMENT

I. *HOSANNA-TABOR* PROPERLY RESPECTED THE CONSTRAINTS IMPOSED BY THE FIRST AMENDMENT IN HOLDING THAT THE MINISTERIAL EXCEPTION SHOULD BE ANALYZED THROUGH A TOTALITY-OF-THE-CIRCUMSTANCES TEST.

Amici respect and understand the importance of our First Amendment freedom of religion. The ministerial exception adopted by the Court is an important protection for religious organizations. However, this protection should not be expanded to allow for further discrimination based upon membership in a protected class. The Court in *Hosanna-Tabor* struck a delicate balance between respecting religious freedoms and protecting against discrimination by refusing to adopt a one-factor test—adopting a totality-of-the-circumstances test instead.

A. The Court refused to adopt a one-factor test and articulated at least four factors that should be considered in a totality-of-the-circumstances test.

In 2012, the Court formally recognized the ministerial exception and refused to adopt a one-factor test. *Hosanna-Tabor*, 565 U.S. at 188. Petitioners urge the Court to overrule *Hosanna-Tabor* and adopt a test that would permit applying the ministerial exception solely upon a religious organization's showing that an

employee performs an important religious function.[3] Petitioners' and its *Amici*'s proposed one-factor test conflicts with *Hosanna-Tabor* and distorts the purpose of the ministerial exception. Not only did the Court decline to adopt a one-factor test, it also refused "to adopt a rigid formula to decide when an employee qualifies as a minister." *Hosanna-Tabor*, 565 U.S. at 191.

In *Hosanna-Tabor*, the Court created a workable totality-of-the-circumstances test to determine whether an employee at a religious organization is a minister. *Id*. at 192. This test examines a minimum of four different factors with no one factor controlling or viewed in isolation: (1) the formal title, (2) substance reflected in that title, (3) use of the title, and (4) important religious functions performed. *Id*. Affirming the totality-of-the-circumstances test ensures that the ministerial exception will not sweep employees into the exception when they are not ministers or religious leaders. The ministerial exception need not be distorted to protect the religious organizations' First Amendment rights because, as discussed in Section III, there are other religious exemptions in the antidiscrimination laws

[3] It is clear Petitioners' and its supporting *Amici*'s briefing urge this Court to adopt a one-factor test. Pet. Br. at 24 ("When an employee of a religious organization performs important religious functions, that is enough under *Hosanna-Tabor* for the ministerial exception to apply."); *Amici* Judicial Watch Inc. Br. at 9 ("Amicus [ ] suggests adopting the language . . . 'courts should focus on the function performed by persons who work for religious bodies.' "); *Amici* National Catholic Educational Association Br. at 16 ("[T]he Court in *Hosanna-Tabor* allowed for the possibility raised here that religious function alone can suffice to show ministerial status.").

that protect religious organizations' First Amendment rights.

In applying the totality-of-the-circumstances test, the Court reasoned that the employee's title alone was insufficient to deem the employee a minister. *Id*. at 193. The Court stated, "[s]uch a title, by itself, does not automatically ensure coverage, [but] the fact an employee has been ordained or commissioned as a minister is surely relevant. . . ." *Id.* Similarly, the Court explained that "[t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status, but the factor cannot be considered in isolation. . . ." *Id.* at 194.

The Court emphasized the need to look beyond one factor by laying out various circumstances in which a one-factor test is insufficient. The Court confirmed the ministerial exception's limited application while giving religious organizations discretion to determine who is a minister by applying the *Hosanna-Tabor* factors. *Id.* Thus, the Court acknowledged the differing opinions among religions as to who is a religious leader.[4] Further, the one-factor test will harm the religious freedoms of non-traditional religious organizations by forcing them to prove that their "minister" serves traditional religious functions akin to mainstream religions, rather than considering the non-traditional religion's own understanding of minister.

[4] *See generally Hosanna-Tabor*, 132 U.S. at 188 (explaining "[t]he ministerial exception is not limited to the head of a religious congregation," and insulates a religious organization's "selection of those who will personify its beliefs").

The totality-of-the-circumstances test created by the Court provides appropriate protections for both religious organizations and their employees.

Under Petitioners' proposed test, a teacher who instructs religion would be a minister, even if the teacher's title reflected *nothing* about a religious function, even if the teacher never held themselves out or believed to be serving a religious function, and even if the teacher *never* performed any other religious duties or trainings. This one-factor test eliminates all the factors the Court considered.

Overruling *Hosanna-Tabor* in favor of Petitioners' one-factor test would not allow the courts to consider all the circumstances of an employee's employment, a position rejected by the Court. *Id.* at 193-94. As Chief Justice Roberts observed at oral argument in *Hosanna-Tabor*, the Pope does not cease being a minister simply because he performs secular duties. Transcript of Oral Argument at 47, *Hosanna-Tabor*, 565 U.S. 171 (2012) (No. 10-553). Likewise, neither does a teacher in a religious school become a minister simply because some of their duties are religious. But, that is the test Petitioners and its *Amici* urge the Court to adopt.

The Court noted that the ministerial exception has been correctly applied by the lower courts for forty years prior to the decision in *Hosanna-Tabor*, and they have continued to do so since 2012. *Hosanna-Tabor*, 565 U.S. at 188. A totality-of-the-circumstances test is consistent with the Court's recognition of the

ministerial exception and its application by federal district and courts of appeals. Indeed, it is consistent with the Equal Employment Opportunity Commission's interpretation of *Hosanna-Tabor* as argued in the Ninth Circuit below. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff/Appellant and for Reversal, Biel v. St. James Sch., 911 F.3d 603 (9th Cir. 2017) (No. 17-55180), 2017 WL 4411748.[5]

In *Hosanna-Tabor*'s detailed analysis, the Court declined to adopt a one-factor test; this Court should similarly reject the Petitioners' request. The totality-of-the-circumstances test created by the Court balances the protections provided to both religious organizations and their employees. The Court should continue to use the workable totality-of-the-circumstances test that the circuit courts have consistently applied.

B. The courts' application of the totality-of-the-circumstances test is workable and consistent across the circuits.

Circuit courts have adhered to *Hosanna-Tabor* by appropriately analyzing *all* the circumstances of

[5] Congress has expressly charged the Equal Employment Opportunity Commission with the authority to enforce employment laws that prohibit discrimination, including the ADA and Title VII. *See* 42 U.S.C. § 12101 *et seq*.; *see also* 42 U.S.C. § 2000e-4, 2000e-5.

the employment and applying the totality-of-the-circumstances test. *See Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) (declining to limit the inquiry in ministerial exception cases to only a three-part test because such a test would be against the totality-of-the-circumstances test); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834-35 (6th Cir. 2015) (recognizing there is no "rigid formula" and considering four factors to determine who is a "minister"); *Puri v. Khalsa*, 844 F.3d 1152, 1159 (9th Cir. 2017) (noting that *Hosanna-Tabor* "expressly declined to adopt any bright line rule" to define the scope of the ministerial exception). Circuit courts are thoughtfully applying the totality-of-the-circumstances test and their analysis honors the ministerial exception's purpose. *Cannata*, 700 F.3d at 169; *Conlon*, 777 F.3d at 834; *Fratello v. Archdiocese of New York*, 863 F.3d 190, 192 (2d Cir. 2017) (stating *Hosanna-Tabor* instructs courts to "assess a broad array of relevant considerations"); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659 (7th Cir. 2018) (emphasizing that the Court expressly declined to use a rigid formula and affirmed the need for a fact-intensive analysis by looking at the four considerations).

There is no reason to curtail this analysis to a one-factor test. Respondents' brief discusses in detail that the Ninth Circuit properly applied the totality-of-the circumstances test. *See* Resp. Br. Pp. 40-49. Likewise, the other circuits properly apply the workable totality-of-the-circumstances test. For example, in *Fratello*, the Second Circuit held a former principal of a Roman

Catholic school was a minister. *Fratello*, 863 F.3d at 192. The court reasoned that although the principal's title was not inherently religious, Fratello held herself out as a spiritual leader of the school and she performed many significant religious functions to advance its religious mission. *Id*. The court rejected the school's argument that all parochial-school principals should be presumed to be ministers within the exception. *Id.* at 206.

The Second Circuit highlighted that a categorical presumption would run afoul of *Hosanna-Tabor*, which deliberately looked to the specific circumstances of the employee's employment. *Id*. at 206 (recognizing while parochial-school principals may typically qualify as a minister, some may perform few religious functions or possibly none at all). Fratello's formal title as "lay principal" differed from *Hosanna-Tabor*'s "called" teacher title, and her title did not suggest that she was in effect a member of the clergy or that she performed religious functions on behalf of the school. *Id*. But "a title," though "surely relevant," is not "by itself" dispositive. *Id.* While considering the substance reflected in the title, the Second Circuit considered how Fratello's conveyed title required a commitment to the teachings of the Church, which favored applying the exception. *Id*. Fratello understood that she would be perceived as a religious leader when applying for an "important leadership role" position and holding herself as a religious leader. *Id.* at 208. Lastly, the court considered if Fratello performed important religious functions by conveying the school's message and carrying out its

mission. *Id*. The totality-of-the-circumstances test properly addressed the particular circumstances of this case.

The Fifth Circuit has similarly demonstrated that the totality-of-the-circumstances test respects religious freedom without allowing one factor to control. The Fifth Circuit held that a former music director at a Catholic Church was a minister. *Cannata*, 700 F.3d at 177. The court reiterated that *Hosanna-Tabor* eschewed a "rigid formula" in favor of an "all-things-considered approach," and courts may not emphasize *any one factor* at the expense of other factors. *Id.* at 176 (emphasis added). Thus, "any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate." *Id*.

"[T]here [was] no genuine dispute that Cannata played an integral role in the celebration of Mass and that by playing the piano during services Cannata furthered the mission of the church and helped convey its message to the congregants." *Id.* at 177. Like other circuits, the Fifth Circuit considered title but did not find it dispositive. *Id.* at 173. The Fifth Circuit noted that *Hosanna-Tabor*'s rejection of a bright-line test seemingly reflects the diversity of religious practice in this country, therefore "it may not be possible to develop a one-size-fits-all approach to the ministerial exception." *Id*. at 176. The court highlighted that, regardless of the amount of time an employee spends on particular religious activities, that factor cannot be considered in isolation. *Id*. at 177. There, the ministerial exception

applied because of the importance of music to Mass and the church's right to determine who will participate in its religious ceremonies. *Id.* at 180. Applying *Hosanna-Tabor*, the Fifth Circuit balanced employee rights and religious freedom.

Other circuits have taken the same approach when determining who is deemed a minister under the ministerial exception. *See Conlon*, 777 F.3d at 835 (reiterating that no factor alone suffices to invoke the ministerial exception); *Grussgott*, 882 F.3d at 661 (expressly rejecting an invitation to use function as the determinative factor and instead finding that "all facts must be taken into account and weighed on a case-by-case basis").[6] Courts are considering *all* the circumstances surrounding the employee's employment to consider if the exception applies while at the same time respecting religious organization's First Amendment right to religious freedom. There is no reason for the Court to reconfigure the totality-of-the-circumstances test because courts have already broadly applied this exception.

[6] If the Seventh Circuit were to use the one-factor test that Petitioners in the present case suggest, Grussgott would not have been a minister, impacting the religious freedom afforded to religious organizations.

II. ADOPTING PETITIONERS' ONE-FACTOR TEST WOULD POTENTIALLY STRIP MILLIONS OF RELIGIOUS ORGANIZATIONS' EMPLOYEES OF THEIR FEDERALLY PROTECTED RIGHTS TO BE FREE FROM INVIDIOUS WORKPLACE DISCRIMINATION.

The battle for equal opportunity and fully eradicating discrimination has been a strenuous, and at times a violent and brutal, undertaking for our country. The overriding purpose of civil rights and antidiscrimination legislation is to make individuals free from discrimination and to allow them to vindicate these essential rights. *See*, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 245 (1964) (citing H.R. No. 124, 88th Cong., 1st Sess., at 14).

This country has fought over a two-hundred-year battle to "preserve and expand the promise of liberty and equality" so that each citizen has an equal opportunity to pursue his or her goals free from discrimination. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Congress has spoken through its legislation on its intent to provide protection to employees from workplace discrimination, and its policy choices should not be unnecessarily limited by the Court. There is no reason for the Court to strip employees of these hard-fought protections by expanding the reach of the ministerial exception because it, along with the other religious exemptions discussed in Section III below, adequately protect religious organizations.

A. Religious organizations employ millions of workers in various sectors of the economy.

Petitioners' one-factor test would strip an overwhelming number of employees of various antidiscrimination and workplace protections. Nearly two million workers are employed by religious organizations in the United States.[7] These religious organizations include educational institutions, home health care services, hospitals, food service providers, gymnasiums, childcare services, and many more. Religious organizations employ a substantial number of workers across numerous sectors of the economy, and these organizations earn an estimated four hundred billion dollars in annual revenues.[8] The annual revenue generated by religious organizations is more than Apple and Microsoft's combined global revenue in a single year.[9]

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[7] Occupational Employment Statistics, *May 2017 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 813100—Religious Organizations*, U.S. Bureau of Labor Statistics (Mar. 30, 2018), http://www.bls.gov/oes/2017/may/naics4_813100.htm.

[8] *See* Brian Grim, *The Socioeconomic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisc. J. of Research and Religion 3 (2016). The study uses data from religiously affiliated educational organizations, congregation finances and activities, faith-based charities, religious media industry, and traditional kosher and halal food revenues to derive its conservative estimate of three hundred seventy-eight billion dollars in the total annual revenue of religious organizations in the United States.

[9] *Id.*

Religious organizations undoubtedly operate in comparable size, profit, and economic influence as non-religious corporations. Differences between technology giants like Apple or Microsoft, for example, and any number of religious organizations are not readily discernible by comparing profitability or widespread economic impact. Both employ workers who perform similar secular functions. The difference between them is the exemptions religious organizations enjoy from laws created to protect workers from discrimination as discussed in Section III.

B. The one-factor test would allow religious organizations to discriminate against most, if not all, of their employees, including: teachers, secretaries, maintenance workers, librarians, and food service workers.

If Petitioners' one-factor test were adopted, it would unduly extend the ministerial exception to those whom lower courts have appropriately found that the exception does not apply. Under Petitioners' test, these employees would have been barred from pursuing their statutory claims under Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).

The federal policy of giving the employees notification is rooted in the idea that every person should be aware of their rights guaranteed by the law. In our Nation's effort to eradicate employment

discrimination, Congress has emphasized the importance of federal laws protecting workers by requiring employers to post notice of federal antidiscrimination laws to ensure that employees have knowledge of their statutory rights to be free from workplace discrimination. *See* 42 U.S.C. § 2000(e)-10. But if the ministerial exception were to be expanded, millions of employees of religious organizations would be surprised to learn that they are ministers and they are stripped of their rights to be free from invidious discrimination at work.[10]

As discussed above, the courts applying the totality-of-the-circumstances test have carefully protected religious organizations' religious freedoms by finding that a wide variety of employees qualify as ministers. Applying this same test, the courts have properly identified teachers in religious schools who do not fall under the ministerial exception and have permitted them to pursue their statutory rights against invidious discrimination. In declining to apply the ministerial exception to these teachers, the lower courts have recognized that doing so would unduly expand the ministerial exception.

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[10] Justice Breyer and Justice Ginsberg similarly expressed concerns that the employee did not have knowledge that she risked discharge for bringing a civil action in lieu of resolving a dispute within the church. Justice Ginsberg expressly stated that "a rule that's going to bind the teachers, then you would expect to find it in the handbook. But the handbook doesn't tell her, if you complain to the E.E.O.C. about discrimination, then you will be fired." *See* Transcript of Oral Argument at 19-21, *Hosanna-Tabor*, 565 U.S. 171 (2012) (No. 10-553).

For example, in *Richardson v. Northwest Christian Univ.*, the court rejected the defendant's claim that an exercise science professor fell under the ministerial exception solely because she was to integrate and grow in her faith throughout her employment. 242 F. Supp. 3d 1132, 1146 (D. Or. 2017). The court noted that "if plaintiff was a minister, it is hard to see how any teacher at a religious school would fall outside the exception." *Id.*

Similarly, the court in *Herx v. Diocese of Fort Wayne-South Bend, Inc.* rejected the defendant's argument to apply the ministerial exception to a junior high language arts teacher based on her supervisory attendance and participation in prayer and religious services with her students. 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014). The court held that labelling Herx as a minister would not only "greatly expand the scope of the ministerial exception" beyond what the Supreme Court intended, but "ultimately would qualify all of the Diocese's teachers as ministers, a position rejected by the *Hosanna-Tabor* Court." *Id.*

Likewise, the court in *Dias v. Archdiocese of Cincinnati* declined to apply the ministerial exception based upon a morals clause in her employment contract to bar a computer technology teacher's Title VII claim. No. 1:11-CV-00251, 2013 WL 360355, *1, *4 (S.D. Ohio Jan. 30, 2013). The court rejected defendant's argument noting that "[d]efendant's attempt to swallow up the ministerial exception by characterizing teachers generally as role models and therefore 'ministers'"

was insufficient to bar her statutory discrimination claims. *Id.* at *10.

Although the cases before the Court involve teachers at religious schools, restricting *Hosanna-Tabor* to a one-factor test urged by Petitioners would impact employees who are not teachers and could apply to virtually all employees of religious organizations. Under Petitioner's one-factor test an employer could easily argue that any function is, in essence, a religious function.[11]

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[11] *See Morgan v. Central Baptist Church of Oak Ridge*, 3:11-CV-124-TAV-CCS, 2013 WL 12043468 *1, *20 (E.D. Tenn. 2013) (declining to extend the Court's holding in *Hosanna-Tabor* to bar a secretary's sexual harassment claims against her employer when the record contained no facts indicated any sort of religious function and her primary duties were entirely secular and clerical in nature); *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (declining to extend the ministerial exception to include a maintenance worker whose primary duties included almost entirely secular duties of maintenance, custodial, and janitorial work and whose only arguably religious duty included constructing a religious symbol pursuant to his employer's instructions and responding, to the best of his knowledge, to the children's inquiries); *Hough v. Roman Catholic Diocese of Erie*, Civil Action No. 12-253, 2014 WL 834473 *1, *3-*4 (W.D. Pa. Mar. 4, 2013) (declining to apply the ministerial exception on the sole basis of the Vicar of Education's testimony that all teachers are considered to be ministers of the Roman Catholic faith); *Barrett v. Fontbonne Acad.*, No. NO-CV2014-751, 2015 WL 9682042, at *1 (Mass. Super. Dec. 16, 2015) (refusing to dismiss a Food Service Director's Title VII claim on the grounds asserted by his employer that all of its employees are "ministers of its mission" arguing that the ministerial exception applied although none of the employee's job duties involved any sort of religious matters); *Goodman v. Archbishop Curley High Sch.*, 149 F. Supp. 3d 577 (D. Md. 2016) (declining to apply the ministerial exception

III. THE COURT'S TOTALITY-OF-THE-CIRCUMSTANCES TEST COMBINED WITH THE RELIGIOUS EXEMPTIONS ALREADY PROVIDED UNDER FEDERAL LAW RESPECT THE FIRST AMENDMENT.

Both federal law and the ministerial exception, as applied by the Court in *Hosanna-Tabor*, already provide the required First Amendment protection for religious organizations. As discussed above, the ministerial exception protects religious organizations from any governmental interference concerning employment decisions of ministers. *Supra* Section I. Additionally, both the ADA and Title VII explicitly provide exemptions for religious organizations and religious education organizations and courts have interpreted these exemptions to provide for religious organizations' right to discriminate for an employee's failure to follow the tenets of the religion. Further, for statutes like the ADEA, where there are no specific statutory exemptions, the Religious Freedom Restoration Act (RFRA) provides another layer of protection for religious employers. Religious employers' First Amendment rights are fully protected; the Court should refuse to stretch the reach of the ministerial exception to an exceedingly wide group of employees.

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to a school librarian when there was absolutely no suggestion in the case that her position included a religious function).

A. Existing federal law already contains broad exemptions for religious employers to discriminate on the basis of religion and based upon non-conformity to the tenets of the religions.

While the specific question before the Court involves ADA and ADEA claims, expanding the ministerial exception would apply to *all* federal employment statutes. Accordingly, it is important to recognize how the exemptions under the ADA and Title VII already protect religious organizations. Adopting Petitioners' one-factor test would unnecessarily expand the reach of the ministerial exception in light of the ample statutory protections afforded to religious organizations protecting their First Amendment rights.

The existing exemptions are broad. According to the Attorney General of the United States, "[t]he ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations."[12] Under the ADA, religious organizations are free to give "preference in employment to individuals of a particular religion to perform work connected with the carrying on by such [institution]." 42 U.S.C. § 12113(d)(1). The ADA further permits religious organizations to "require that all applicants and employees conform to the religious tenets of such organization." 42 U.S.C § 12113(d)(2). The ADA's legislative history shows that

[12] A.G.'s Federal Law Protections for Religious Freedom Mem. (Oct. 6, 2017), p. 12a (citing 28 C.F.R. app. C; 56 Fed. Reg. 35544, 35554 (July 26, 1991)).

its religious exemptions were promulgated to mirror Title VII's exemptions. *See*, *e.g.*, H.R. No. 101-485(II), at 150 (1990) ("With respect to religious entities, the [ADA] adopts the religious preference provision from Title VII."); H.R. No. 101-485(III), at 46 (1990) ("This provision is similar to provisions included in 702 of the Civil Rights Act of 1964, and should be interpreted in a consistent manner."). Because religious organizations are already protected by ADA's explicit exemption, there is no need for the ministerial exception to be expanded.

As discussed, because the ADA's religious exemption was based on Title VII, a close examination of Title VII's religious exemptions is relevant. First, like the ADA, Title VII applies to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). This provision clearly "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987).

The original version of Section 702 of Title VII only exempted organizations' hiring decisions related to performing "religious activities." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 702, 78 Stat. 255. This exemption was expanded by the Equal Employment Opportunity Act in 1972. Equal Employment

Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-4. Congress removed the requirement that an organization's activity must be religious in nature. *Id.* The Court interpreted this amendment as Congress intending to expand the scope of religious exemptions under Section 702. *See Amos*, 483 U.S. at 327 (1987) (establishing that the Title VII exemption equally applies to religious organizations' religious and secular activities; and its decisions on hiring and firing employees). This interpretation broadens Title VII statutory exceptions which makes it unnecessary for this Court to broaden the holding in *Hosanna-Tabor*.

Educational religious organizations are afforded another exemption under Section 703(e)(2) of Title VII. 42 U.S.C. § 2000e-2(e)(2). Section 703(e)(2) applies to educational organizations "owned, supported, controlled or managed, [in whole or substantial part] by a particular religion or particular religious corporation . . . ," or whose curriculum is directed "toward the propagation of a particular religion," and allows religious organizations to hire and employ based upon religion. *Id.*; *see also E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986); *E.E.O.C. v. Kamehameha Schs./Bishop Est.*, 990 F.2d 458, 464 (9th Cir. 1993), as amended on denial of reh'g (May 10, 1993).

Existing federal law also provides exemptions when religious employers take adverse actions against employees for not conforming to the tenets of their religion regardless of ministerial status. *See* 42 U.S.C. § 12113(d)(2); *see also* 42 U.S.C. § 2000e-1(a). The ADA's exemption, as previously discussed, also allows

religious organizations to take adverse action based upon the tenets of their religious beliefs. *See* 42 U.S.C. § 12113(d)(2). Title VII similarly provides exemptions based upon non-conformity to the tenets of the religion. 42 U.S.C. § 2000e-1(a). Courts have consistently applied this exemption.[13] Both the ADA and Title VII provide ample protections for religious organizations for non-conformity to their tenets, and as such the ministerial exception does not need to be expanded to include protections already provided.

Religious organizations can already take adverse action against employees for a myriad of religious

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[13] *See*, *e.g.*, *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. 2006) (affirming the dismissal of a Title VII claim when a Catholic school teacher demonstrated non-conformity by participating in a pro-abortion advertisement); *Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991) (concluding religious organizations have permission to only employ persons whose beliefs and conduct are consistent with the employer's religious tenets); *see Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189 (4th Cir. 2001) (nurse in Catholic facility fired for wearing "modest garb that include[d] long dresses/skirts and a cover for her hair."); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (high-ranking university Professor and administrator asked to resign after informing supervisor she was a minister elsewhere and lesbian); *Garcia v. Salvation Army*, 918 F.3d 997 (9th Cir. 2019) (employee barred from retaliation claim when fired after customer complaints about them leaving church received and terminated after medical leave); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997) (affirming the validity of school's decision to fire Professor of Divinity because "he did not adhere to and sometime[s] questioned the fundamentalist theology advanced by the leadership of the Beeson School of Divinity.").

reasons.[14] The Court need not expand its already-articulated and workable *Hosanna-Tabor* totality-of-the-circumstances test.

B. RFRA provides an additional safeguard that protects religious freedoms.

When a statute does not explicitly provide religious exemptions, such as the ADEA, RFRA exempts religious employers from discrimination claims in certain instances. *See* 42 U.S.C. § 2000bb-1. RFRA imposes a strict scrutiny test on all federal laws. *Id.* It requires laws that burden religion to be the least restrictive means of furthering a compelling governmental interest. *Id.* The U.S. Attorney General, similar to his interpretation of the ADA, has explained that RFRA, "require[s] an exemption . . . for religious organizations from antidiscrimination laws."[15]

RFRA has been applied in the employment context and acts as a religious exemption, like those explicit in the ADA and Title VII. *See Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). In *Hankins*, the Second Circuit held that RFRA is an affirmative defense that may be raised in ADEA claims. *Id.* at 96. In that case, Hankins was an ordained clergy member who was forced into

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[14] There are other specific statutory exemptions, but they do not arise often in the religious context. For example, employers may employ based on religion where it is a "bona fide occupational occupation reasonably necessary to the normal operation of [a] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1).

[15] A.G.'s Federal Law Protections for Religious Freedom Mem. (Oct. 6, 2017).

retirement when he became seventy years old. *Id*. at 99. Hankins brought an ADEA claim, which challenged the applicable mandatory retirement policy. *Id.* at 100. The court concluded "[t]he RFRA is an amendment to the ADEA." *Id.* at 109.

Additionally, RFRA has been interpreted to amend the entire United States Code, covering the ADEA and the ADA. *See Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) ("RFRA is unusual in that it amends the entire United States Code."); *see also* 42 U.S.C. § 2000bb-3(a) ("[RFRA] applies to all Federal law, and the implementation of that law, whether statutory or otherwise. . . ."); Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 Cardozo L. Rev. 507, 526 (1999) (describing RFRA as "an amendment to every federal law and regulation in the land"). Thus, RFRA's protections comprehensively safeguard religious organizations.

Numerous federal laws already provide broad exemptions for religious organizations, which—if combined with a newly expanded ministerial exception—may swallow the discrimination statutes and raise other Constitutional concerns. A scheme in which anyone is a minister goes well beyond any compliance with the First Amendment and provides a "license to discriminate." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982). Expanding the ministerial exception would distort the protections for religious organizations that the First Amendment provides and potentially dismantle workplace protections for large numbers of employees of religious organizations.

Due to the existing protections, antidiscrimination statutes do not present entanglement issues nor inhibit religious organizations' free exercise. Therefore, this Court need not expand the ministerial exception beyond its already articulated, workable bounds.

CONCLUSION

For the aforementioned reasons, this Court should affirm the Ninth Circuit and uphold the totality-of-the-circumstances test articulated in *Hosanna-Tabor*.

Respectfully submitted,

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