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 *AMICI CURIAE* THE CHRISTIAN AND MISSIONARY ALLIANCE, CHERRY HILLS COMMUNITY CHURCH, CHRISTIAN CARE MINISTRY, CRISTA MINISTRIES, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, FELLOWSHIP OF CHRISTIAN ATHLETES, MISSIONS DOOR, MOUNT HERMON ASSOCIATION, ORCHARD ALLIANCE, PINE COVE, POINT LOMA NAZARENE UNIVERSITY, THE CATHOLIC DIOCESE OF COLORADO SPRINGS, THE CROWELL TRUST, THE NAVIGATORS, TRANS WORLD RADIO, AND TYNDALE HOUSE MINISTRIES IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

*Amici* constitute a diverse group of religious organizations and collectively they conduct many different types of activities including social services, health care sharing, secondary and higher education, camping, publishing, financial services and Christian evangelism, discipleship, foreign missions, congregational care, and Bible teaching.

*Amici* conduct all of their activities as an exercise of their Christian beliefs and in furtherance of their respective Christian missions. In addition, and importantly, *amici* are guided by their beliefs to carry out their activities as associations of like-minded believers, and doing so is an expression of those beliefs. Indeed, the experience of community within such religious associations often inspires and energizes their service to others. Moreover, the shared religious beliefs among those carrying out *amici*'s activities also ensure that these activities are conducted in a manner that distinctly expresses and exercises the organization's religious convictions.

Just as *amici* hold a variety of distinct beliefs within the broader framework of Christianity, they also take different approaches to exercising and

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[1] The parties have provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

expressing their beliefs. *Amici* apply different labels to their employee positions, require different qualifications and assign different duties. But notwithstanding these differences, *amici* all require certain employees to define or transmit to others the distinct religious convictions of their respective organizations. These employees bear the responsibility to determine the activities and policies that will best exercise and express their respective organization's beliefs (which they also define). Therefore, the selection by *amici* of such employees lies at the heart of their religious exercise and expression.

The decision in this case could have significant implications for the foundational religious liberty interest *amici* share in selecting certain employees without governmental interference. As a result, *amici* are respectfully submitting this brief to explain why constitutional principles of religious deference and neutrality extend the "ministerial exception" to positions that define, exercise or express the religious beliefs of an organization. These same principles also prohibit courts from measuring the religiosity of job functions.

Additional information about each of the *amici* is as follows:

**The Christian and Missionary Alliance** is a church denomination and missionary organization with over 400,000 members in more than 2,000 churches in all 50 states. In addition, there are over 800 missionaries in approximately 60 nations supported by the organization. Based in Colorado Springs,

the organization also sponsors a number of educational institutions and retirement centers around the country.

**Christian Care Ministry** ("CCM") is a nonprofit organization that helps Christians share their lives, faith, talents and resources. Among other programs, CCM operates Medi-Share, which is a health care sharing ministry with approximately 400,000 members who share each other's eligible medical bills and, most importantly, encourage and lift one another up in prayer.

**Cherry Hills Community Church** ("CHCC") is a vibrant church of everyday people who come together in many ways – in exploring and learning about faith, in raising kids and strengthening marriages, and in discovering the fullness of life God desires for each of us. CHCC also operates a Christian school providing education for students from preschool through middle school.

**CRISTA Ministries** ("CRISTA") was founded in 1948 and its corporate offices are in Seattle. CRISTA's mission is to love God by serving people – meeting practical and spiritual needs – so that those it serves will be built up in love, united in faith and maturing in Christ. CRISTA has 2 senior living facilities (over 600 residents), 3 broadcasting stations, 2 K-12 Christian schools, a school for at-risk teens, 2 camps, a veterinary mission and an international relief organization operating as World Concern. World Concern works with communities in some of the most neglected areas of the world, including Myanmar and Chad.

**Evangelical Council for Financial Accountability** ("ECFA") provides accreditation to leading Christian nonprofit organizations that faithfully demonstrate compliance with established standards for financial accountability, fundraising and board governance. ECFA members include Christian ministries, denominations, churches, educational institutions and other tax-exempt 501(c)(3) organizations. ECFA member organizations collectively represent over $29 billion in annual revenue.

**Fellowship of Christian Athletes** ("FCA") is a Christian organization that has been challenging coaches and athletes on the professional, college, high school, junior high and youth levels to use the powerful medium of athletics to impact the world for Jesus Christ since 1954. FCA's mission is to present to coaches and athletes, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving Him in their relationships and in the fellowship of the church.

**Missions Door** is a Christian organization that assists local churches and Christ-followers to evangelize, disciple and plant churches among the unreached people of our world. Since its founding in 1948, Missions Door has developed ministries in Latin America, Africa and Asia, as well as ministry among immigrants in the United States. Missions Door has established a culturally diverse ministry team in pursuit of the organization's goal of bringing new followers of Jesus who join together in communities of faith.

**Mount Hermon Association** lovingly creates experiences where guests can encounter Jesus and leave refreshed, renewed and transformed by the Love of God at its two locations in California. Since its founding in 1906, Mount Hermon has been a welcoming place where people from all walks of life can put aside distractions and focus on what is most important: their relationships with one another and with God.

**Orchard Alliance** is a robust financial stewardship ministry that provides churches, individuals, families, and other like-minded organizations with a wide range of products and services. With a mission to equip God's stewards for greater Kingdom impact, the organization helps Christians develop the best plan of stewardship when making cash or non-cash gifts to their church or other ministries and facilitates these gifts using tools like charitable gift annuities, donor advised funds, trusts, endowments, and much more. Orchard Alliance also provides church financing, church project advisement, savings, and investment products.

**Pine Cove** is a Christian ministry organization that offers Christian camping programs and facilities year round in Texas and other states. Pine Cove serves children, youth, and families each summer, and provides outdoor education, retreats and conferences in other seasons, accommodating over 20,000 visitors each year. Pine Cove employs over 160 full-time and part-time resident staff, and over 1,500 college-age staff work at the camps every summer.

**Point Loma Nazarene University** ("PLNU") is a Christian liberal arts college based near San Diego and founded in 1902 as a Bible college by the Church of the Nazarene. PLNU serves more than 3,500 students in more than 60 undergraduate areas of study and graduate programs. PLNU offers many ministry opportunities, including chapel, community and discipleship ministries, international and worship ministries.

**Trans World Radio** ("TWR") is a global media outreach that engages millions in 160 countries with biblical truth. Based in Cary, North Carolina, TWR ministries speak fluently in more than 200 languages and dialects. Together with international partners, local churches and other ministries, TWR provides relevant programming, discipleship resources and dedicated workers to spread hope to individuals and communities around the globe.

**The Catholic Diocese of Colorado Springs** covers ten counties and approximately 15,500 square miles in central Colorado. The Diocese serves more than 176,000 Catholics in 39 parishes and missions. The Diocese also provides education for more than 9,000 students.

**The Crowell Trust** (the "Trust") supports the teaching and active extension of the doctrines of Evangelical Christianity through approved grants to qualified organizations. Since its founding in 1927 by Henry Parsons Crowell and Susan Coleman Crowell, the Trust continues to fulfill its ministry purposes through

the issuance of grants to qualified Evangelical organizations.

**The Navigators** is an international, Christian ministry established in 1933. The Navigators are characterized by an eagerness to introduce Jesus to those who don't know Him, a passion to see those who do know Jesus deepen their relationship with Him, and a commitment to training Jesus' followers to continue this nurturing process among the people they know. Based in Colorado Springs, the Navigators' staff family – over 4,600 strong – includes over 70 nationalities.

**Tyndale House Ministries** operates a publishing ministry that was founded in 1962 by Dr. Kenneth N. Taylor as a means of publishing The Living Bible. Tyndale publishes Christian fiction, nonfiction, children's books, and other resources, including Bibles in the New Living Translation (NLT). Tyndale products include many New York Times best sellers, including the popular Left Behind fiction series by Tim LaHaye and Jerry B. Jenkins.

## SUMMARY OF ARGUMENT

The question in this case is whether an employee that carries out "important religious functions" can bring a discrimination claim against her religious employer. To answer this question, the first part of this brief argues that the "ministerial exception" adopted by this Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) should

extend to all positions that contribute to defining, exercising or expressing the employer's religious beliefs. The brief also discusses by way of examples the diverse types of activities in which religious organizations engage and the foundational role various types of positions play in the religious exercise and expression of all types of religious organizations.

The second part of this brief explains why this Court should avoid characterizing the "ministerial exception" as an "important religious functions" test. Such a formulation invites courts to inquire into the religiosity of various positions, an inquiry that leads to excessive entanglement with religion and religious favoritism. Instead, courts should defer to the *bona fide* representations of religious organizations regarding the functions of their employees that define, exercise or express their religious beliefs and mission.

### 1. Constitutional principles of religious deference and neutrality dictate a "ministerial exception" that applies to all positions that define, exercise or express an organization's religious character or mission.

Many churches and other religious organizations are defined by the common religious commitment of some or all of their members and employees. As Justice Brennan wrote in this Court's leading case upholding religious hiring rights: "determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission

should conduct them, is . . . a means by which a religious community defines itself." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). By associating with fellow believers in carrying out their activities, religious organizations both exercise and express their religious beliefs.

A religious organization's ability to define itself and to exercise and express its beliefs depends primarily upon its unfettered right to select those employees responsible for such functions. It is these employees who make the critical determinations referred to above by Justice Brennan. Because the selection of these employees is central to each organization's religious exercise and expression, the "ministerial exception" should apply to all such employees.

Moreover, the fact that an organization has conferred a ministry leadership title on a particular position (or the individual holding the position) may create a presumption that the position is subject to the exception. But no particular title can be required: depending upon how an organization defines, exercises or expresses its beliefs, the exception can apply as much to school teachers, Bible study leaders, missionaries, worship team members, administrators, program directors, presidents, and counselors, for example, as it does to ministers, rabbis, priests, gurus, imams, and vicars.

**2. Formulating the "ministerial exception" as an "important religious functions" test invites a religiosity inquiry that violates constitutional principles of religious deference and neutrality, and narrows the exception.**

Principles of religious deference and neutrality prohibit courts from applying the exception only to those positions that they determine, based on their own standards, to be sufficiently religious. Government officials have no competence or authority to measure the religiosity of an organization's activities based on some litmus test of perceived religious content, and using such a test invariably favors orthodox religious activities over less conventional religious activities.

If not properly interpreted, the "important religious functions" formulation will reinforce the flawed premise that an activity is not religious if it is "secular." This premise trivializes the religious convictions which underlie the commitment of many religious organizations to provide educational and/or social services. For instance, the Bible teaches that true religion consists of taking care of widows and orphans (it does not mandate "incorporating religion" into such care). That a secular organization might embrace a similar mission for nonreligious reasons does not diminish the religious significance of this Biblical mandate to a religious organization. A "ministerial exception" that excludes positions engaged in, for instance, educational or social service activities would require religious organizations which believe they are called to provide

such services to sacrifice their religious liberty in order to fulfill their religious duties.

Finally, a court may consider whether the organization has made false or materially inconsistent representations regarding how the functions of a position define, exercise or express the organization's religious beliefs. But to the extent the religious character of duties are relevant, such character must be based on the organization's purpose for the duties and not on the court's subjective measure of their apparent religious qualities.

*Amici* respectfully request this Court to affirm that the "ministerial exception" applies to all positions that define, exercise or express an organization's religious beliefs. In addition, the determination of such positions must turn not on a court's view of whether the "functions" are sufficiently religious, but rather on whether the organization's representations regarding the functions of the position are *bona fide*.

## ARGUMENT

### I. Constitutional principles of religious deference and neutrality dictate a "ministerial exception" that applies to all positions that define, exercise or express an organization's religious character or mission.

#### A. These principles protect both activities and association as forms of religious exercise and expression.

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other religious organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. *Amici* and other religious organizations view their respective activities, whether serving the poor or elderly or marginalized, or providing education, or offering distinctly religious worship or evangelism, both as service to God and as an expression of religious faith. As explained by Justice Brennan in *Amos*: "Churches often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster. . . ." 483 U.S. at 344 (Brennan, J., concurring).

In addition, for *amici* and other organizations, the carrying out of certain activities in service to God and to society, and the associating with fellow believers, are intertwined. Indeed, the latter often energizes the former. To this end, religious organizations may adopt religious requirements for some or all of their workers.

Such religious associational policies help these organizations ensure that their activities, some of which may be similar to those of secular organizations, maintain their distinctive religious character. The point is not just that services are being provided, but that services are being provided by religious followers as an expression and exercise of their religious beliefs.

In the *Amos* case, Justice Brennan also described more fully the associational aspect of religious exercise. He observed that:

> religious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations. . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

*Id*. at 341-43 (1987) (Brennan, J., concurring) (internal quotation omitted).

Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972), this Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly

influence. This concept of life aloof from the world and its values is central to their faith." This Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world. . . .'" *Id*. at 216.

Different religious organizations, even those of the same general faith, will reach different conclusions regarding the extent of associational requirements of their faith. Perhaps not many religious organizations believe the requirements apply as broadly as do the Amish. But the important point is that in each case this determination is based on religious beliefs as interpreted and applied by the religious organization, and is therefore religious exercise.

Moreover, the full exercise and, separately, expression of religion comes not just from conducting such activities, but from conducting them as an association of like-minded believers. That associations may have an expressive component entitled to protection has long been recognized by this Court. In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), this Court held that:

> . . . collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, . . . implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide

> variety of political, social, economic, educational, religious, and cultural ends.

*See also Boy Scouts of America v. Dale*, 530 U.S. 640, 649, 655 (2000).

In a recent religious liberty case before this Court, Justice Kennedy described the foundation of this country's commitment to religious liberty as follows:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

*Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2785 (2014) (Kennedy, J., concurring). This constitutional freedom or religious autonomy necessarily extends from individuals to faith communities, and it protects the unfettered right of such communities to select those individuals who define or carry out the religious beliefs and exercise of the community.

### B. The "ministerial exception" extends to employees who perform functions that define, exercise or express the religious character or mission of their employers.

In *Hosanna-Tabor*, this Court held that courts cannot adjudicate employment discrimination claims against religious employers brought by certain of their employees. *Hosanna-Tabor*, 565 U.S. at 188. This Court noted that the Free Exercise clause "protects a religious group's right to shape its own faith and mission through its appointments" and that employment nondiscrimination laws "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.*

This Court did not, however, define the scope of employees to whom this exception applies. Instead, this Court merely concluded that the exception applied to the employee in the case because, among other things, she was a commissioned minister and her position included "important religious functions." *Id.* at 192. Justices Alito and Kagan in a concurring opinion asserted that the exception should not be limited to ministers but instead should apply to "any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id.* at 199 (Alito, J., concurring).

What distinguishes these positions is not their formal title, or the specific job training required, but

rather the role they play in defining, exercising or expressing the religious beliefs of the organization. Moreover, these positions may focus either on the organizational or associational aspects of religious exercise and expression, or on specific activities, or both. More specifically, these types of positions may perform one or more of the following functions:

- Organizational leadership, which may include the responsibility to determine how the religious organization exercises its beliefs by associating as a faith community (e.g., by defining the faith-based standards for employees and other members of the faith community). Employees with organizational leadership functions may also (or separately) be responsible for overseeing some or all of the activities and finances of the organization. In addition, such employees may have authority to define the organization's religious beliefs. Employees fulfilling these functions may serve in management positions or as directors of the organization's various programs and activities.

- Conducting other ministry activities that exercise or express the organization's beliefs or that carry out the mission of the organization. Employees responsible for conducting such activities are the hands and feet, and often the public face, of the organization. The scope of their activities is as broad as, and indeed broader than, the range of activities carried out by *amici*. Such functions could include, among many others, teaching at any level

> (including on "secular" subjects), leading studies of religious texts such as the Bible, theological research and training, preaching, producing devotional or other materials reflecting religious beliefs, leading worship in a congregational service, serving the poor and needy, providing health care, conducting liturgical or sacerdotal services, providing pastoral care or spiritual counseling, financial stewardship and discipleship.

Employees performing any of these functions bear the responsibility of determining or carrying out activities and associational policies that exercise or express the religious beliefs of their respective organizations. For these reasons, a religious organization's selection of its employees who contribute to defining, exercising or expressing its religious beliefs lies at the heart of its religious expression and exercise.

The positions that carry out these functions will vary widely among different religious employers, both in terms of position titles and in terms of specific duties. Therefore, in applying the exception doctrine, courts should focus not on titles or training but on the substantive role that the employee fills in defining, exercising or expressing the beliefs of the religious employer.

## II. Formulating the "ministerial exception" as an "important religious functions" test invites a religiosity inquiry that violates constitutional principles of religious deference and neutrality, and narrows the exception.

The foregoing roles or functions to which the "ministerial exception" applies could reasonably be characterized as "important religious functions." But *amici* note that the wording of this formulation could have the effect of replacing the intended focus on how the functions contribute to an organization's religious exercise with a focus on the religiosity of the functions. Such a shift in focus would undermine the purpose of the "ministerial exception" and lead into a constitutional quagmire.

### A. Courts cannot measure the religiosity of various job duties.

This Court has repeatedly held that government officials have no competence or Constitutional authority to interpret or apply religious beliefs, or to determine based on their own standards the religious significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id.* at 132. This Court noted that the requirement would place religious schools "in the position of trying to disprove any

religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added).

Ten years later, this Court upheld a statutory religious exemption that applied to all activities of a religious organization, not just its *religious activities*. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). This Court noted that "Congress' purpose in extending the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Id*. at 336. Further, this Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.*

Religious deference applies not just to distinctions between religious and secular activities, but also to different types of religious activities. In *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), this Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." This Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* Indeed, "[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words

and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).

These same principles apply to the religious character of an organization. The Court of Appeals for the D.C. Circuit struck down a "substantial religious character" test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider "such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* (quotation omitted). The court held that the "very process of inquiry" into the " 'religious mission' of the University," as well as "the Board's conclusions have implicated [ ] First Amendment concerns. . . ." *Id*. at 1341 (*citing NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979)). The court concluded that the test was fatally flawed because it "boil[ed] down to '[I]s [an institution] sufficiently religious?' " *Id.* at 1343.

Similarly, the Tenth Circuit Court of Appeals in 2008 struck down a Colorado statutory distinction

between "pervasively sectarian" and other religious schools. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The Tenth Circuit observed that the statutory test criteria required "intrusive governmental judgments regarding matters of religious belief and practice." *Id.* at 1256. The court concluded the test criteria were inconsistent with this Court's decisions precluding states from distinguishing among religious activity "on the basis of intrusive judgments regarding contested questions of religious beliefs or practice." *Id.* at 1261; *see also id.* at 1263 (the "First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes.").[2]

As recognized in these cases, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the*

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[2] *See also Grand County Board of Commissioners v. Colorado Property Tax Administrator*, 401 P.3d 561, 567 (Colo. Ct. App. January 14, 2016) (noting that "[i]t is not our place to undertake an examination of Christian doctrine to determine whether hiking is 'overtly Christian' enough to count as a religious activity.")

*Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

### B. Courts cannot favor traditional religious positions.

Courts have held that religiosity tests result not only in prohibited entanglement, but also in religious favoritism. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in the *Widmar* case discussed above. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. *Id.* at 69. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. The Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

*Id.* at 69-70.

In *Colorado Christian University*, the Tenth Circuit held that "[b]y giving scholarship money to students who attend sectarian – but not 'pervasively' sectarian – universities, Colorado necessarily and explicitly discriminates among religious institutions, extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by governmental officials." 534 F.3d at 1258. The court further noted that "the discrimination is expressly based on *the degree of religiosity* of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board." *Id.* at 1259 (emphasis added).

Similarly, the court in *University of Great Falls* held that:

> To limit the . . . exemption to religious institutions with hard-nosed proselytizing, that limit their enrollment to members of their religion, and have no academic freedom, as essentially proposed by the Board in its brief, is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

278 F.3d at 1346; *see also Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S.Ct. 694, 711 (2012) (Thomas, J., concurring) ("[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging

those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or unpalatable to some."); *id.* at 712 (Alito J., concurring) ("[b]ecause virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.").

Because of the many different types of religious organizations, it is not difficult to see how classifying employee positions based on a court's view of religious characteristics leads to favoritism. For instance, suppose a religious institution expresses its religious value of caring for the needy by providing meals and shelter, and that the theological tradition of this institution emphasizes "teaching by example" over preaching. For such an organization, religious exercise may consist primarily of providing meals and shelter. However, because courts are not competent to interpret the institution's doctrine, they cannot conclude based on this doctrine that the activities reflect religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the activities are not religious. But this conclusion favors one religious tradition regarding how to serve and teach over another.

Further, a "ministerial exception" limited to activities that a court perceives to be sufficiently religious creates incentives for organizations to include more distinctly religious content in the duties of their employees. In the preceding example, the organization

would be well advised to add distinctly religious duties such as prayer and Bible teaching to the employee's position. Doing so would strengthen the argument that the position qualifies for the "ministerial exception" under a religiosity test, even though the position would, ironically, be less faithful to the organization's religious tradition.

In short, a religiosity test which requires government officials to determine whether an activity or job duty is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such a test will inevitably produce arbitrary and discriminatory results.

### C. Courts cannot exclude functions merely because they are similar to secular or commercial activities.

The religiosity test rests on a premise that would effectively secularize a vast array of religious activity. Under this test, six of the Ten Commandments (honor your parents and do not murder, steal, lie, covet or commit adultery – Exodus 20:2-17) may no longer be considered religious because they have been widely embraced by society. Similarly, religious organizations formed to fulfill these particular Commandments may not be deemed to be religious. The same result may apply to religious humanitarian organizations, soup kitchens, hospitals, and educational institutions. Indeed, applying this position, Mother Theresa's activities

to serve the poor out of obedience to God may not qualify as a religious activity.

The Third Circuit in *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217 (3d Cir. 2007), rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

The court in *University of Great Falls* also rejected this premise, affirming that a litany of "secular" characteristics of the University:

> . . . says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes*. That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious. . . . If the University is ecumenical and open-minded, that does not make it any less religious, nor NLRB interference any less a potential infringement of religious liberty.

278 F.3d at 1346 (emphasis added).

More recently, this Court unanimously held that a teacher qualified as a minister even though her primary duties consisted of teaching secular subjects. In rejecting the federal government's argument that the religious exemption at issue in the case should be limited to employees engaged in "exclusively religious functions," the Court observed:

> Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

*Hosanna-Tabor*, 132 S.Ct. 694, 708-09. Similarly, this Court has held that a for-profit corporation may exercise religion through commercial activities. *Hobby Lobby*, 134 S.Ct. at 2771. In *Hobby Lobby*, this Court held that the company exercises religion because its "statement of purpose proclaims that the company is committed to . . . Honoring the Lord in all we do by operating . . . in a manner consistent with Biblical principles." *Id.*

These cases affirm that the purposes and activities of a religious organization are no less religious merely because others may embrace similar purposes or conduct similar activities for nonreligious reasons. The same applies for the duties of employees of such organizations. To hold otherwise would mean that those religious organizations which are called to serve tangible human needs would be required to sacrifice their

religious character in order to fulfill their calling. Such a result trivializes religious liberty.

### D. Courts can inquire into whether the organization's representations regarding a position's role in the organization's religious exercise are *bona fide*.

The question for "ministerial exception" purposes should not be whether a position is "sufficiently religious" as measured by a court's assessment of the religious significance of the position's duties, or whether it aligns with a particular model of ministry leadership. The question instead should be whether the organization's representations regarding the role of the position in the organization's religious exercise or expression are *bona fide*.

To determine whether a position includes functions to define, exercise or express religious beliefs, government officials cannot (and need not) independently weigh the religious significance of various duties of the position. But they can independently determine whether an organization's asserted functions for the position are merely a sham, or whether there is at least a plausible connection between the position's duties and the organization's religious exercise.

In *U.S. v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual's asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. Similarly, in

*Hobby Lobby*, this Court noted that, under the applicable exemption, "a corporation's pre-textual assertion of a religious belief in order to obtain an exemption for financial reasons would fail." *Burwell v. Hobby Lobby*, 134 S.Ct. at 2751, 2774 n.28 (2014). This Court observed that Congress was confident of the ability of the federal courts to weed out insincere claims. *Id.* at 2774; *see also Hosanna-Tabor*, 132 S.Ct. at 711 (Thomas, J., concurring) (concluding that the plaintiff should be treated as a minister because the evidence demonstrated that the church sincerely considered her a minister).

As these cases suggest, although the First Amendment limits governmental inquiry regarding religious matters, it does not preclude government officials from determining whether an organization is making false statements regarding its religious beliefs. Accordingly, government officials can examine an organization's activities, but only for the limited purpose of verifying that its representations are *bona fide* and sincerely held.[3]

For example, the court in *University of Great Falls* held that the religious character of an organization may be determined by confirming that the organization holds itself out to the public as a religious

[3] To the extent specific duties or activities are relevant to a *bona fide* inquiry, it should be clear that the religious character of a duty turns on the purpose for which the duty is performed. *See*, *e.g.*, *Widmar v. Vincent*, 454 U.S. at 271 n.9 (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).

organization. 278 F.3d at 1344. Similarly, government officials could inquire into whether an organization has consistently asserted a *bona fide* role for the position in its religious exercise, or whether it is opportunistically asserting such a role merely to claim the "ministerial exception."

## CONCLUSION

For the reasons set forth above, *amici* respectfully request this Court to hold that the "ministerial exception" applies to any position that contributes to the definition, exercise or expression of the religious beliefs of a religious employer. In addition, this Court should avoid a formulation of the "ministerial exception" that invites courts to inquire into the religiosity of various job functions. On this basis, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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