No. 24-154

In the
Supreme Court of the United States

CATHOLIC CHARITIES BUREAU, INC., ET AL.,
Petitioners,
v.
WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF PROFESSOR CHRISTOPHER C. LUND AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

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SUMMARY OF ARGUMENT

This is a hard case masquerading as an easy one. If this were a case of statutory interpretation—if this Court were charged, say, with the proper statutory construction of this religious exemption—then *amicus* would counsel this Court to reverse, conclude Catholic Charities is indeed "operated primarily for religious purposes," and award it an exemption. But this case poses a different issue—whether the Wisconsin Supreme Court's misreading of the Wisconsin statute crosses the constitutional line. And that changes things significantly.

The threats to free exercise in this case come from two different directions. On one side there is Scylla. This Court must put constitutional limits on how the boundaries of religious exemptions can be

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[1] Counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amicus* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. This brief is filed in *amicus*'s personal capacity as a scholar. Wayne State University takes no position on the issues in this case.

set—without them, legislatures and courts will draw lines that favor some practices and faiths over others.

Yet on the other side is Charybdis—if this Court makes those limits overly stringent, it will also hurt free exercise. Precisely because religious exemptions are essential, and precisely because every religious exemption must have boundaries, legislatures need flexibility in drafting them and courts need flexibility in construing them. In particular, *amicus* stresses, it is entirely appropriate for religious exemptions to draw distinctions that give greater protection to religious roles and institutions with greater religious power and importance.

At first glance, this sounds troubling and surprising. But it is not troubling. For it is merely the consequence of a free-exercise-protective regime that puts greater distance between government and the things that are "at the core of [a faith's] mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 756 (2020). And it is not surprising either, at least to the initiated. For many existing religious exemptions draw such distinctions. This Court's decisions in *Hosanna-Tabor*, *Our Lady*, and *Catholic Bishop* all do, for one thing. And so too do many federal statutes and the judicial constructions of those statutes. If this Court were to hold that the boundaries of religious exemptions cannot be set in religious terms, it would be a sea change in the law and instantly invalidate a number of federal statutes. But even more than that, it would create powerful incentives for legislatures, agencies and courts either to invalidate, narrow, or not create certain kinds of religious exemptions at all, because they will be unable to put sensible boundaries on them.

Amicus will try to help the Court steer the narrow path between the obstacles on port and starboard. It defends religious exemptions that distinguish among religious roles or institutions, which are necessary for religious exercise to be free. It also suggests a set of constitutional guardrails, which are necessary for free exercise to be equal.

ARGUMENT

I. RELIGIOUS EXEMPTIONS CAN HAVE RELIGIOUS BOUNDARIES.

If there is a single point that *amicus* would push on the Court, it is that religious exemptions can legitimately have boundaries that give greater protection to religious roles and institutions that are at the core of free exercise. The dissent in the court below, of course, rejects this. As the dissent sees it, Catholic Charities cannot constitutionally be excluded from the religious exemption in the Wisconsin statute. For Catholic Charities is religiously motivated and that is all that matters—or can matter constitutionally. *See* Pet.App. 78a (Bradley, J., dissenting) ("It is the underlying religious motivation that makes an activity religious . . . no activities are inherently religious; religious motivation makes an activity religious"). For the government to go further and consider what the organization *does*—and for the government to use that answer to decide whether the organization's activities are religious *enough*—would be unconstitutional. Courts simply "cannot choose which religiously motivated actions are, in their essence, religious." Pet.App. 114a (Bradley, J., dissenting).

This is well-meaning, well-written, and thoughtful, and it seems right at first glance. But it is not right. It is wrong. It is irreconcilable with this Court's decisions in *Hosanna-Tabor*, *Our Lady*, and *Catholic Bishop*. It would hold unconstitutional numerous federal statutes, where Congress drew lines the dissent believes invalid. It would radically transform judicial interpretation of other statutes, mutating them in ways that would serve neither free exercise nor the government's legitimate interests. And, most importantly, it would create powerful incentives for legislatures, agencies and courts to not create new religious exemptions and to narrow or invalidate existing ones.

A. *Hosanna-Tabor*, *Our Lady*, and *Catholic Bishop*

To begin, return to the ministerial exception—to *Hosanna-Tabor* and *Our Lady*. Consider a math teacher at a religious school, who loves her students deeply but who teaches them algebra without ever saying a word to them about God. That math teacher may be deeply religiously motivated—indeed, *amicus* suspects most such math teachers at religious schools are. But no matter how deep her religious motivations, she is not a minister for purposes of the ministerial exception. And neither is the janitor, or the person serving the kids lunch, or the administrative assistant to the vice principal. They all may have sincere and strong religious motivations; they all may see themselves as doing God's work in this world and they all may be right. But they are not "ministers" within *Our Lady*'s meaning.

Why? Doctrinally they are not ministers because they do not meet this Court's test for being a

minister. Kristen Biel and Agnes Morrissey-Berru were ministers because they had "vital religious duties" as teachers, "[e]ducating and forming students in the Catholic faith." *Our Lady*, 591 U.S. at 756. It was not their *motivations*, but the *actions* they engaged in, that made them ministers—"they prayed with their students," "attended Mass with the[ir] students," and "guide[d] their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Id*. at 757; *see also id*. at 753 ("What matters, at bottom, is what an employee *does*.") (emphasis added). If it were true that courts simply "cannot choose which religiously motivated actions are, in their essence, religious," Pet.App. 114a (Bradley, J., dissenting), then the ministerial exception as we know it would not exist. Either no one would be a minister, or everyone religiously motivated would be a minister.

Hosanna-Tabor was premised on an idea—that while it is good to separate church and state in general, government should keep furthest away from the most important aspects of religious life. And precisely to protect those aspects, the Court gave itself the responsibility of drawing a line between the things that are at the "core" of religious life and the things that are not. *See Our Lady*, 591 U.S. at 753–54 ("*Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the *very core* of the mission of a private religious school.") (emphasis added); *id*. at 738 ("The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the

schools rely to do this work lie at the *core* of their mission.") (emphasis added); *id.* at 756 ("[T]hey both performed vital religious duties . . . [e]ducating and forming students in the Catholic faith [that] lay at the *core* of the mission of the schools where they taught.") (emphasis added).

Separation of church and state means the state does not interfere with the church—and, in our pluralistic society, that means any religious faith. But every religious faith has a variety of religious roles and institutions within it, and some of those roles and institutions have more religious power and importance than others. And the more religious power and importance a religious role or institution has, the further the government should stay away from it and the worse it would be if the government fails to keep the necessary distance. This is obvious, isn't it? It would indeed be bad if a federal court tried to reinstate Cheryl Perich, the Lutheran teacher in *Hosanna-Tabor*. But it would be worse, wouldn't it, if a court tried to reinstate the Rosh Yeshiva of a Jewish seminary or the Archbishop of New York?

Before *Hosanna-Tabor*, this Court's leading church-autonomy case was *Catholic Bishop*, which held, for constitutional reasons, that the NLRB lacked jurisdiction over parochial schools. *See N.L.R.B. v. Cath. Bishop of Chicago*, 440 U.S. 490 (1979). *Catholic Bishop* applies to Catholic schools, but it has never applied to Catholic hospitals. *See* Susan J. Stabile, *Blame It on* Catholic Bishop*: The Question of NLRB Jurisdiction over Religious Colleges and Universities*, 39 PEPP. L. REV. 1317, 1342 (2013) ("Catholic hospitals are thus subject to the NLRA and to NLRB jurisdiction just as other hospitals."); Charlotte Garden, *Religious Employers and Labor Law:*

Bargaining in Good Faith?, 96 B.U. L. REV. 109, 120 & n.65 (2016) (same conclusion and providing further citations). The line is not about religious motivation; the Catholic Church has religious reasons for operating both schools and hospitals, just as the people working in both often have religious reasons for doing so. Instead, this line was drawn in fidelity to *Catholic Bishop*, and its recognition of how Catholic teachers and Catholic schools play a special role in the perpetuation of Catholic life—teachers have a "critical and unique role . . . in fulfilling the mission of a [parochial] school," *Catholic Bishop*, 440 U.S. at 501, and the "*raison d'être* of parochial schools is the propagation of a religious faith," *id.* at 503 (citations and quotations omitted). This does not disparage Catholic hospitals or imply their work is secular or unimportant. It merely recognizes that Catholic schools and Catholic hospitals are different, and that Catholic schools are important sites of religious formation in ways that Catholic hospitals are not.

B. Legislative and Executive Practice

This Court's church-autonomy cases create religious exemptions whose boundaries are set in religious terms and that distinguish between religious positions and religious institutions on the basis of their internal importance to the religion in question. So too do religious exemptions created by Congress, administrative agencies, and executive branches.

Return to *Hobby Lobby* and the Affordable Care Act. The Affordable Care Act had two kinds of religious exemptions. The first applied to religious non-profits generally, allowing them to refuse to provide contraceptive coverage and requiring their

issuers and third-party administrators to do so in their place. But the second applied only to "churches, their integrated auxiliaries, conventions or association of churches" and "the exclusively religious activities of any religious order," and it exempted them from the mandate altogether—their employees would not receive prohibited forms of contraception from anyone. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698-99 (2014). This second exception—call it the "church" exception for short—drew a religious line. It applied to some religious institutions but not others—even if they were religiously motivated. And so a number of religious organizations, including Catholic Charities, did not qualify simply because they were not churches. *See Cath. Diocese of Beaumont v. Sebelius*, 10 F.Supp.3d 725, 731 (E.D. Tex. 2014) ("The Diocese meets this definition and is thus exempt from the contraceptive mandate. Catholic Charities is not exempt."); *Roman Cath. Archdiocese of Atlanta v. Sebelius*, No. 1:12-CV-03489-WSD, 2014 WL 1256373, at *30 (N.D. Ga. Mar. 26, 2014) (rejecting the claim that the "religious employer exemption in the Final Rules violates the Establishment Clause because the Government grants an exception to 'houses of worship,' 'integrated auxiliaries,' and 'religious orders,' but does not exempt other religious organizations like . . . Catholic Charities").

To the dissent in the Wisconsin Supreme Court, the church exception is unconstitutional. Catholic Charities does not qualify for the church exception because the government does not see it as religious enough—or religious in the right way. The negative practical implications of this position will be explored

later. But for now, *amicus* wishes to point out some other religious exemptions that are this way.

ERISA's religious exemption only applies to plans "established and maintained . . . by a church or by a convention or association of churches." 29 U.S.C. § 1002. A Baptist hospital might be decidedly Baptist, employing only Baptist chaplains, and acting in other ways consistent with Baptist beliefs. But it is not a "Baptist Church or association of Baptist churches," and therefore it is not entitled to the exemption. *Chronister v. Baptist Health*, 442 F.3d 648, 653 (8th Cir. 2006). Similarly, FUTA's religious exemption applies only to those employed by "a church or convention or association of churches," or employed by an organization "operated primarily for religious purposes" with such a parent. 26 U.S.C. § 3309(b).

Tax law offers a flurry of examples. The church exemption in the Affordable Care Act came originally from an IRC provision exempting "churches, their integrated auxiliaries, conventions or association of churches" and "the exclusively religious activities of any religious order" from having to file annual returns. *Hobby Lobby*, 573 U.S. at 698 (noting that the relevant regulation, 45 C.F.R § 147.131(a), was drafted to mirror 26 U.S.C. § 6033(a)(3)(A)(i) & (iii)). But beyond that, tax law has a striking variety of religious exemptions for all different categories of religious groups—ones for "religious organization[s]," "church[es]," "a church or a convention or association of churches," "church agenc[ies]," "religious sect[s]," "integrated auxiliaries" of churches, "religious order[s]," and "religious and apostolic association[s]." Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 887-88 (1977). And, at least sometimes, Congress

clearly intended these different words to have different meanings. *See, e.g., Found. of Hum. Understanding v. United States*, 614 F.3d 1383, 1388 (Fed. Cir. 2010) ("Congress intended a more restricted definition for a 'church' than for a 'religious organization.").

C. Judicial Practice

Courts also use religious criteria in trying to implement religious exemptions passed by legislatures. Take the religious exemption in Title VII, which exempts "religious corporation[s]" from charges of religious discrimination (and maybe sexual-orientation and gender-identity discrimination). 42 U.S.C. § 2000e-1; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding this exemption from Establishment Clause challenge).

This Court has never had a case on what "religious corporation" means. But the lower courts have all adopted multi-factor tests that essentially seek to discover "whether the 'general picture' of the institution is primarily religious or secular." *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 n.14 (9th Cir. 1988). This is a kitchen-sink approach, where "[a]ll significant religious and secular characteristics [are] weighed to determine whether the corporation's purpose and character are primarily religious." *Id.* at 618. So, for example, the Third Circuit considers the following:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or

> other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007); *see also E.E.O.C. v. Kamehameha Sch./Bishop Est.*, 990 F.2d 458, 463 (9th Cir. 1993) (adopting a similar six-part test).

Again, to the dissent in the Wisconsin Supreme Court, all of these specific factors are constitutional problems—all of them require "courts to make determinations of religiosity on an ad hoc basis." Pet.App. 79a (Bradley, J., dissenting). But this has been the practice of the federal courts in implementing Title VII's exemption for "religious corporation" for decades. And without it, courts would be unable to make any kind of distinction between religious institutions, however sensible. Courts could not differentiate between a Catholic monastery, a Catholic parish, a Catholic school, or a Catholic hospital. Yet there might be good reasons to give more control over personnel to a Catholic parish and not a Catholic hospital. And there might be good reasons to

give more autonomy to a deeply religious school than one which is mostly secularized. *See E.E.O.C. v. Kamehameha Sch./Bishop Est.*, 990 F.2d 458, 463 (9th Cir. 1993) (concluding that the Kamehameha Schools were no longer sufficiently religious to qualify for the Title VII exemption).

D. Practical Consequences

Religious exemptions come in two kinds and it is important to distinguish them. First, and probably more familiar to the Court, are generalized religious exemptions. Congress and about two dozen states have passed Religious Freedom Restoration Acts, and about a dozen other states have interpreted their state constitutions to effectively do the same thing. These RFRAs establish a single general standard for conflicts between religious commitment and legal obligation, using familiar legal concepts like "sincerity," "substantial burden," "compelling governmental interest," and "least restrictive means." *See Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). With these RFRAs, legislatures can address, in a single stroke, all conflicts between religious liberty and governmental obligation, even ones they do not foresee, with a uniform legal standard giving the same protection to all religious faiths.

Second, and probably less familiar to the Court, are targeted religious exemptions. These create no universal standard; instead, they seek to protect religious liberty in a specific legal domain, like within Title VII, Title IX, the ACA, ERISA, FUTA, or the IRC. This Court has itself created some of them—like *Hosanna-Tabor* in employment law and *Catholic*

Bishop in labor law. But far more often they come from legislatures. And there are many of them, in both state and federal law. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445-46 (1992) (estimating 2,000 of them).

Religious exemptions of the first kind are based on a *conflict* model—they mediate clashes between religious commitment and governmental obligation. But religious exemptions of the second kind are usually based on an *autonomy* model, seeking to separate church-and-state in a more general sense. For this reason, targeted religious exemptions are usually voluntary on the government's part. Consider this case and the religious exemptions in the federal FUTA and Wisconsin's FUTA. These exemptions are not required by the Free Exercise Clause or by RFRA or by a state RFRA, and this would be true even if *Employment Division v. Smith* were overruled. For, as far as *amicus* knows, Catholic Charities has no religious objection to paying unemployment tax. So *amicus* doubts Catholic Charities could show a "substantial burden" within the meaning of RFRA, state RFRA, or the Free Exercise Clause even as it existed under *Sherbert/Yoder*. This matters—if this Court widens the religious exemption beyond what Wisconsin will tolerate, Wisconsin could eliminate the whole exemption tomorrow.

The first kind of exemptions (RFRA, state RFRAs, the Free Exercise Clause) aims to resolve conflicts, and the boundary of the exemptions is established by the boundary of the conflicts—that is, exemptions can be properly sought by those, and only those, who experience a conflict between their sincere religious practices and their governmental

obligations. But this is not true for targeted religious exemptions. Targeted religious exemptions must have a boundary set for them. Usually that boundary will be set in advance of any particular conflict by a legislature (or executive official or administrative agency). As discussed earlier, that boundary will sometimes be set—and sometimes *should* be set—in religious terms, not to encroach on religious liberty but to give special protection to the "core" of religious life. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738, 753-54, 756 (2020). Yet because the distinction between the core and the periphery can be hazy, often this means there is no logically compelled place to draw the boundary, which can also shift depending on the religious context and on the strength of the governmental interest behind the law.[2] Moreover, because we are talking about legislatures here, boundaries will be never set by purely Platonic principle anyway, but through a process of political contestation—the relative strength of opposing interest groups, administrative

[2] The first kind of exemptions involves an explicit weighing of interests—"substantial burden" acts as a measure of the religious interest, while "compelling government interest" and "least restrictive means" act as measures of the governmental interest. But the second kind of exemptions weighs interests only implicitly—in the sense that the boundaries of the exemptions reflect how interests have been balanced. *See* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1189 (2014) (noting how *Hosanna-Tabor* can be thought of balancing "categorically rather than case-by-case," and that "[d]ifferent balances between the governmental interest and the religious interest [can be] struck by drawing the line between ministers and non-ministers in different places").

practicalities, legislative inertia, and sheer dumb luck will all have a role.

For all these reasons, this Court must be deferential when legislatures create religious exemptions of this second kind. For if this Court forcibly expands those exemptions, it will have feedback effects. Legislatures may not be willing to exempt the Catholic parish from some requirement if it means having to exempt the Catholic hospital; legislatures will not always exempt Notre Dame if that requires exempting Georgetown too. Legislatures can narrow or repeal exemptions; more likely, they will simply not enact them because there is a strong new argument against them that did not exist before. And courts too have the capacity to push back. Some judges are hostile to religious exemptions, and they will use state Establishment Clauses to invalidate or narrow religious exemptions they find overly broad. *See, e.g., Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021) (reducing, on state Establishment Clause grounds, the broad statutory exemption for religious groups in Washington's employment discrimination laws to be nothing more than the ministerial exception).

II. RELIGIOUS EXEMPTIONS MUST BE DENOMINATIONALLY NEUTRAL.

Yet, of course, religious exemptions cannot discriminate against minority faiths. The Court held so in *Larson v. Valente*, 456 U.S. 228 (1982), which invalidated Minnesota's 50% rule, a statute exempting some (but not all) religious organizations from various reporting and registration requirements. *Id.* at 246 (holding that the 50% rule "grants

denominational preferences of the sort consistently and firmly deprecated in our precedents").

Reading the Wisconsin Supreme Court decision below, one sees some of the dangers the Court feared in *Larson*. In explaining why Catholic Charities was not entitled to a religious exemption, the Wisconsin Supreme Court emphasized that Catholic Charities did not evangelize to those it was helping, did not hire exclusively Catholics, and did not put on worship services or offer religious education. Some of these criteria raise concerns. Take the point about evangelization. Some religions see evangelization as central to their mission; other religions do not evangelize. Giving religious exemptions to evangelizing groups effectively discriminates against those faiths that do not evangelize. This concern about unfairness combines with a concern about incentives: such a kind of regime would pressure faiths that do not evangelize to change their religious ways to gain the exemption.

Hosanna-Tabor offers another example of a religious exemption with a problematic boundary. In their concurrence, Justices Alito and Kagan warned the Court that the boundary of the ministerial exception had to be set with sensitivity to minority faiths—"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," they said, so "it would be a mistake if . . . the concept of ordination were viewed as central" to the question of whether someone was a minister. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 198 (2012) (Alito, J., concurring, joined by Kagan, J.).

They were right. Imagine a hypothetical religious exemption available only to religious organizations with ordained ministers on staff (or ones led by ordained ministers). That religious exemption would be constitutionally defective, for precisely the reasons Justices Alito and Kagan identified.

Even entirely secular criteria that are innocuous in differentiating between secular organizations look altogether different when used to differentiate between religious ones.[3] Legislatures sometimes make distinctions based on a group's size. But a group's size reflects how mainstream it is. So if such distinctions are used to set the boundaries of religious exemptions, government will be treating orthodox faiths differently than unorthodox ones. Similarly, a religious exemption offered to well-established groups will discriminate against new religions, just as a religious exemption available to

[3] It is important to keep in mind that the problematic criterion in *Larson* was entirely secular. Justice White stressed this point in his dissent; he argued that Minnesota's 50% rule was not discriminatory at all, but merely had a disparate impact. *See Larson v. Valente*, 456 U.S. 228, 261 (1982) (White, J., dissenting) ("Some religions will qualify and some will not, but this depends on their source of their contributions, not their brand of religion."). But *Larson* was right not to take this path. For however secular a criterion may be, when it is used to set the boundary of a religious exemption, it is only ever going to apply to religious organizations. That is not disparate impact. And speaking more generally, this demonstrates how there is less difference than one might think between religious exemptions whose boundaries are set in secular terms and religious exemptions whose boundaries are set in religious terms. Both kinds of religious exemptions are legitimate, but courts must still police them both to guard against denominational discrimination.

groups affiliated with larger ones will disfavor independent and nondenominational faiths. *Larson* saw this clearly—Minnesota's 50% rule might look unexceptional at first glance, but it had the effect of favoring "well-established churches that have achieved strong but not total financial support from their members" over "churches which are new and lacking in such a constituency." *Larson*, 456 U.S. 246 n.23.

III. RELIGIOUS EXEMPTIONS NEED CONSTITUTIONAL GUARDRAILS.

Religious exemptions can legitimately have boundaries set in religious terms. Yet whether their boundaries are set in secular or religious terms, religious exemptions can raise troubling risks of denominational discrimination. What is necessary, therefore, are a set of constitutional guardrails to keep legislatures and courts within the constitutional lines. *Amicus* therefore now turns to the task of building them.

Thankfully, this Court has already begun the work. Turn back again to the ministerial exception. In *Hosanna-Tabor*, the Court created a four-part test for deciding whether someone was a minister; one of the factors was whether the employee in question had been given the formal title of "minister." Yet in *Morrissey-Berru*, the Court faced the fact that *Hosanna-Tabor*'s four-factor test might have to be adjusted. Because "many religious traditions do not use the title 'minister,' [that title] cannot be a necessary requirement," as it would "risk privileging religious traditions with formal organizational structures over those that are less formal." *Our Lady*

of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 752 (2020). This is right. But note this Court was not saying that titles are now suddenly irrelevant and should always be ignored. After all, Cheryl Perich's title as a commissioned minister remains a real reason she should fall within the ministerial exception. It is just that, for religions that do not use such titles, that particular factor should not be part of the analysis. The central question is whether the person has "vital religious duties." *Id.* at 756. In some faiths, formal titles will be evidence of vital religious duties; in other faiths, they will not.

To give another example, theological training may matter a lot to some denominations. *See id.* at 753 ("[T]he academic requirements of a position may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith."). But it may not matter at all to others. *See id.* ("[R]eligious traditions may differ in the degree of formal religious training thought to be needed in order to teach."). For the denominations where theological training matters, it should enter into the determination of whether someone is a minister; for the denominations where it doesn't, it shouldn't.

Hosanna-Tabor and *Our Lady* handled this with care, emphasizing there can be no "rigid formula," *Hosanna-Tabor*, 565 U.S. at 190, no "inflexible requirements," *Our Lady*, 591 U.S. at 753. Courts should take "all relevant circumstances into account," *Our Lady*, 591 U.S. at 758, recognizing some criteria will have "far less significance in some cases" and far greater significance in others. *Id.* at 753.

A key guardrail, one running through *Hosanna-Tabor* and *Our Lady*, is that courts take

religious groups as they find them. Courts do not impose their own view about what *should* count as important to a particular religion. Courts follow rather than lead, merely trying to discover what religions *themselves* actually believe to be important. In so doing, courts must always be attuned to the notion that religions can be genuinely different. Indeed, the ministerial exception itself reflects how judges have the intellectual capacity and the open-mindedness for this project. An Ohio court, for instance, applied the ministerial exception to bar the employment claims of a someone who had served as director of a Catholic cemetery, after the real theological importance of the position was presented to the Court. *See Fisher v. Archdiocese of Cincinnati*, 6 N.E.3d 1254, 1257 (Ohio Ct. App. 2014) ("The Archdiocese paid for Fisher to attend a four-year program in Catholic cemetery management at John Carroll University."). And the Ninth Circuit applied the ministerial exception to bar the employment claims of an apprentice at a Zen Buddhist temple, after the Court saw what that position involved. *See Behrend v. San Francisco Zen Ctr., Inc.*, 108 F.4th 765, 770 (9th Cir. 2024) ("He lived and worked full time at the temple as a monk.").

Courts have also been as careful as *Hosanna-Tabor* and *Our Lady* when working with other religious exemptions. Take *LeBoon*—the Third Circuit decision, discussed earlier, about when institutions qualify as "religious corporation[s]" entitled to invoke the religious exemption in Title VII. After laying out its 9-factor test, the Court said this:

> It is apparent from the start that the decision whether an organization is "religious" for

> purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case. For instance, although the absence of a proselytizing effort may be a factor under certain circumstances, it will have no significance with a non-proselytizing religion—or thus with a determination whether a Jewish organization is religious.

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–27 (3d Cir. 2007).

LeBoon here gets it right, for the same reasons *Morrissey-Berru* got it right. Take proselytizing, for instance. Proselytizing is a word that sets teeth on edge and understandably so; religious people almost never use it in describing their own actions, just as religious people almost never use the phrase "pervasively sectarian" to describe their own religious institutions. But proselytizing often just means something like "transmitting the faith," which was one important reason why this Court considered Cheryl Perich a minister. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 192 (2012) ("Perich performed an important role in transmitting the Lutheran faith to the next generation."). So proselytizing *can be* a legitimate criterion, just not *always*. And here the Wisconsin Supreme Court used proselytizing as a factor to be used generally in figuring out how religious an

institution is, with no demonstrated awareness of the fact that some religions do not proselytize—and may have religious reasons for not proselytizing. In so doing, the court below committed a mistake both *Morrissey-Berru* and *LeBoon* avoided.

Having laid out some guardrails for religious exemptions, *amicus* must finally confess to the Court that some religious exemptions are unconstitutional and probably cannot be saved. Title IX, for example, has an exemption for religious schools. But the exemption only extends to religious schools that are "controlled by a religious organization." 20 U.S.C. § 1681(a)(3). If this language is taken seriously, universities affiliated with a religious denomination qualify for the exemption, while independent and non-denominational universities do not. This treats hierarchical religious groups differently than congregational ones, a cardinal sin in the eyes of both our constitutional doctrines and our constitutional history. *Amicus* understands this problem has been "solved" by ignoring the statute's terms and giving the religious exemption to all religious schools. *See* Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. KAN. L. REV. 327, 396 (2016) ("In the forty years since the Title IX regulations became effective, not once has OCR found insufficient control by a religious organization to deny an educational institution's claim to religious exemption."). Maybe this is the best course. *Amicus*, like this Court, would surely hesitate before calling a religious exemption enacted by Congress unconstitutional. *Amicus*'s point is merely that, whatever the guardrails, some religious exemptions will cross the line, and if the Court must enforce the Constitution, it must enforce the Constitution.

CONCLUSION

This Court should reverse the Wisconsin Supreme Court's decision and remand for further proceedings. This Court's opinion should confirm explicitly two principles: (1) that religious exemptions cannot discriminate against particular religious faiths, whether in purpose or effect, and (2) that religious exemptions can give greater protection to religious roles and institutions that are at the core of free exercise. In so doing, this Court should provide constitutional guardrails for religious exemptions, consistent with the last section of this brief, along with an instruction that further elaboration will be necessary but must await future cases.

Respectfully submitted,

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