Nos. 21-2390 (L), 21-2434

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EVA PALMER,

Plaintiff-Appellant,

v.

LIBERTY UNIVERSITY,

Defendant-Appellee.

On Cross-Appeal from the United States District Court
for the Western District of Virginia, Lynchburg Division

Brief *Amici Curiae* of Pepperdine University, Brigham Young University, The Catholic University of America, and Houston Baptist University in Support of Defendant-Appellee and Reversal

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 21-2390L Caption: Palmer v. Liberty University

Pursuant to FRAP 26.1 and Local Rule 26.1,

Pepperdine University
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Noel J. Francisco Date: May 27, 2022

Counsel for: Pepperdine University

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Signature: /s/ Noel J. Francisco Date: May 27, 2022

Counsel for: Brigham Young University

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Pursuant to FRAP 26.1 and Local Rule 26.1,

The Catholic University of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Noel J. Francisco Date: May 27, 2022

Counsel for: The Catholic University of America

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Houston Baptist University
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Noel J. Francisco Date: May 27, 2022

Counsel for: Houston Baptist University

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INTEREST OF THE *AMICI*[1]

Amici are religious universities and colleges affiliated with different religious traditions. Despite the diversity of their religious beliefs, *Amici* are united in their belief that to carry out their respective missions, religious institutions of higher education must have robust freedom to structure themselves in accordance with their religious beliefs. They therefore respectfully submit this brief to advance the position that the First Amendment—through the ministerial exception and through its broader guarantee of church[2] autonomy—protects religious schools from government interference with their internal operations, including faculty hiring decisions. Interference with the relationship between teachers and professors and their religious educational institutions would entangle courts in the assessment of

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[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

[2] In accordance with Supreme Court practice, the word "church" is used in this brief as shorthand for religious bodies of all different faith traditions.

religious matters and endanger the ability of these unique institutions to carry out their religious missions.

Individual statements of interest follow.

Pepperdine University. Founded in 1937, Pepperdine University is a Christian university that strengthens students for lives of purpose, service, and leadership through the integration of Christian principles with traditional academic fields. Christian values, firmly rooted in Pepperdine's Church of Christ heritage, are at the heart of its academic endeavors.

Brigham Young University (BYU). Founded, guided, and supported by The Church of Jesus Christ of Latter-day Saints since 1875, BYU's mission is to assist individuals in their quest for perfection and eternal life. The common purpose of all education at BYU is to build testimonies of the restored gospel of Jesus Christ, in an environment that is enlightened by living prophets and sustained by those moral virtues which characterize the life and teachings of the Son of God.

Catholic University of America (Catholic). Catholic is a religious institution of higher education located in Washington DC.

Catholic is the national university of the Bishops of the Roman Catholic Church in the United States and is the only pontifical university in the United States. Its three ecclesiastical faculties are subject to direct oversight by the Holy See. Pursuant to its Bylaws, a supermajority of the Fellows of the University, who hold certain reserved powers crucial for governing it, are cardinals and bishops in the Catholic Church. Catholic University is unequivocally "operated primarily for religious purposes and is uniquely operated, supervised, controlled and principally supported by the Catholic Church."

Houston Baptist University. Founded in 1960, the mission of Houston Baptist University is to provide a learning experience that instills in students a passion for academic, spiritual, and professional excellence as a result of its central confession, "Jesus Christ is Lord."

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment shields religious institutions from government interference in the exercise of their beliefs. Among other guarantees, it protects a religious institution's "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The church-autonomy doctrine takes several forms, one of which is the so-called "ministerial exception." The ministerial exception ensures that religious bodies may exercise "control over the selection of those who will personify [their] beliefs," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012), by shielding from judicial review a religious body's employment decisions about those who perform important religious functions. *See id.* at 188-89.

Liberty University's decision not to renew faculty member Eva Palmer's teaching contract is protected by the First Amendment. Palmer falls squarely within the ministerial exception because, like all Liberty faculty members, she was a key actor in Liberty's mission to inculcate Christian faith through education. And at Liberty, where the inculcation

of faith is central to the educational mission, faculty employment decisions are protected not only by the ministerial exception, but also by the doctrine of church autonomy more broadly.

ARGUMENT

I. The First Amendment guarantees robust autonomy to religious institutions in the selection of those who carry out their missions.

A. The doctrine of church autonomy broadly guarantees religious bodies control over both religious functions and internal governance.

The "general principle of church autonomy" guarantees to religious bodies "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 140 S. Ct. at 2061. This doctrine "does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* at 2060. While "a component of this autonomy is the selection of the individuals who play certain key roles," the doctrine is not limited to personnel selection. *Id.*

As the Supreme Court has observed, the doctrine of religious autonomy follows both from a long line of precedent and from the

"background" against which "the First Amendment was adopted." *Hosanna-Tabor*, 565 U.S. at 183; *Our Lady*, 140 S. Ct. at 2061-62; *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1381-84 (1981). For more than a century and a half, the Supreme Court has invoked this doctrine in declining to settle disputes involving the interpretation of religious doctrine, disputes over church property, tortious conduct by church officials, the hiring and firing of church personnel, and even suits involving internal church communications. *See* Laycock, *Towards a General Theory of the Religion Clauses*, at 1394-98. In short, although "a component of this autonomy is the selection of the individuals who play certain key roles," *Our Lady*, 140 S. Ct. at 2060, the church autonomy doctrine is by no means limited to the ministerial exception alone.

The Supreme Court has repeatedly affirmed and applied the "broad principle" of church autonomy, in a variety of contexts. *Id.* at 2061. For example, in *Watson v. Jones*, the Court refused to rule on a dispute over church property, reasoning that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the

highest of these church judicatories . . . legal tribunals must accept such decisions as final, and as binding on them." 80 U.S. 679, 727 (1871). As the Supreme Court later explained, "*Watson* 'radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 107 (1952)).

In *Kedroff*, the Court held that a controversy between Russian Orthodox churches in North America and in Moscow about the use of a cathedral in New York City was "strictly a matter of ecclesiastical government." 344 U.S. at 115. The Court explained that "pass[ing] the control of matters strictly ecclesiastical from one church authority to another"—*i.e.*, from church leadership in Moscow to church leadership in New York, as New York law contemplated—would insert "the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." *Id.* at 119. The Court therefore invalidated New York's law because it "directly prohibit[ed] the free

exercise of an ecclesiastical right, the Church's choice of its hierarchy." *Id.*

And in *Serbian Eastern Orthodox Diocese v. Milivojevich*, a bishop brought suit to dispute procedural defects in his removal from office during the reorganization of a diocese. 426 U.S. 696, 713 (1976). The Supreme Court declined to intervene, holding that "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Id.*

These three decisions demonstrate the breadth of the church autonomy doctrine, of which the ministerial exception is only a subset. In particular, "none [of these three cases] was exclusively concerned with the selection or supervision of clergy." *Our Lady,* 140 S. Ct. at 2061. Instead, these cases recognize the fundamental principle, embodied in the First Amendment, that "churches and other religious institutions" are free "to decide matters of faith and doctrine without government intrusion." *Id.* at 2060 (internal quotation marks and citations omitted).

Along those lines, the doctrine of religious autonomy prohibits courts from entanglement in religious questions. As the Court explained

in *Watson*, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." 80 U.S. at 728. Likewise, "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith" because "[c]ourts are not arbiters of scriptural interpretation." *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981); *see also Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.").

Courts have applied the church autonomy doctrine in employment disputes involving both those formally considered ministers (as discussed in Section I.B. below) and other employees whose continued employment would interfere with the internal governance of the religious institution. For example, the D.C. Circuit held in *Duquesne University of the Holy Spirit v. NRLB*, 947 F.3d 824 (D.C. Cir. 2020), that Duquesne University—a Catholic institution of higher education—could not be ordered under the National Labor Relations Act to bargain with "faculty members or teachers of any sort," because "making determinations about [the school's] religious mission and whether certain faculty members

contribute to that mission" was "no business of the state." *Id.* at 833, 835. It explained: "[C]reating and administering distinctions between religious and secular instruction at religious universities would itself entangle the [NLRB] in religious affairs." *Id.* at 834 (internal quotation marks and citation omitted).

In another case, the Tenth Circuit rejected employment discrimination claims without applying the ministerial exception because the claims were "based solely on communications that are protected by the First Amendment under the broader church autonomy doctrine." *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 n.2 (10th Cir. 2002). As this Court has explained, "[e]mployment decisions" that "relate to how and by whom [churches] spread their message" necessarily "lie . . . beyond judicial competence." *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 804 (4th Cir. 2000).

The "general principle of church autonomy" thus protects religious bodies' "autonomy with respect to internal management decisions that are essential to the institution's central mission," including—but not limited to—"the selection of the individuals who play certain key roles." *Our Lady*, 140 S. Ct. at 2060.

B. The ministerial exception ensures that religious bodies can choose who performs important religious functions.

The Supreme Court has applied one subcategory of the church autonomy doctrine—the ministerial exception—in explaining that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady*, 140 S. Ct. at 2060. Despite its name, the doctrine applies not only to formal ministers, but also to teachers hired to carry out a religious organization's educational mission.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the unanimous Supreme Court acknowledged what this Court and other courts of appeals had recognized for nearly forty years: The First Amendment, through the ministerial exception, protects "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." 565 U.S. at 196; *cf. Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). While the ministerial exception reached the Supreme Court for the first time in *Hosanna-Tabor*, 565 U.S. at 188, the Court made clear that the ministerial exception is deeply rooted in church

autonomy precedents that are both old and broad. *See id.* at 182–87; *see also* Section I.A.

Hosanna-Tabor also made clear that the ministerial exception is not limited to members of the ordained clergy. The Court held that a Lutheran elementary school teacher was a minister for purposes of the exception, emphasizing that "the ministerial exception is not limited to the head of a religious congregation"; it also applies to the "selection of those who will personify its beliefs." *Id.* at 188, 190. Rather than adopt a rigid formula for determining when an employee qualifies as a minister, the Court emphasized the teacher's title, "the substance reflected in that title, her own use of that title, and the important religious functions she performed[.]" *Id.* at 192.

The Court reiterated this flexible and functional approach in *Our Lady*. As the Court explained, "[t]he 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." 140 S. Ct. at 2055. Because the Catholic school teachers involved in that case had been "entrusted most directly with the responsibility of educating

their students in the faith," the ministerial exception applied to them as it did in *Hosanna-Tabor*. *Id.* at 2066.

The Court in *Our Lady* emphasized that its "recognition" of certain factors in *Hosanna-Tabor* "did not mean that [those factors] must be met—or even that they are necessarily important—in all other cases." *Id.* at 2063. For example, because "many religious traditions do not use the title 'minister,' it cannot be a necessary requirement" for triggering the ministerial exception. *Id.* at 2064 (citing *Kedroff*, 344 U.S. 94, 116). Moreover, "[r]equiring the use of the title would constitute impermissible discrimination" by "privileging religious traditions with formal organizational structures." *Id.* Similarly, "the 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." *Id.* But at the same time, "insisting in every case on rigid academic requirements could have a distorting effect," especially because "religious traditions may differ in the degree of formal religious training thought to be needed in order to teach." *Id.*

According to *Our Lady*, "[w]hat matters, at bottom, is what an employee *does*." *Id.* at 2064 (emphasis added). The Court observed that

the teachers in that case were those "entrusted most directly with the responsibility of educating their students in the faith. And . . . they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Id.* at 2066. Moreover, "[e]ducating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught." *Id.* The schools pursued that mission in part by implementing "employment agreements and faculty handbooks [that] specified in no uncertain terms that [teachers] were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility." *Id.* In other words, the schools "expressly saw [the teachers] as playing a vital part in carrying out the mission of the church," a factor the Court credited as "important." *Id.*

Hosanna-Tabor and *Our Lady* establish that the ministerial exception is one expression of the broader protection for church autonomy afforded by the First Amendment. As the Supreme Court has explained, "a component of [the] autonomy" afforded churches and religious organizations "is the selection of the individuals who play certain key roles. The 'ministerial exception' was based on this insight." *Our Lady*,

140 S. Ct. at 2060. A religious institution's "independence on matters of faith and doctrine requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities" because a "wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith." *Id.* (cleaned up). In order to guarantee independence in matters of faith and doctrine, religious institutions must be able to control who performs important roles relating to those matters. The educators involved in *Hosanna-Tabor* and *Our Lady* performed just such roles.

In sum, the First Amendment—through the ministerial exception in particular, and through the doctrine of religious autonomy more generally—protects the ability of religious educational institutions to pass on the faith as part of their educational mission by choosing for themselves who will undertake that task.

II. The district court should have concluded that the First Amendment protects Liberty's faculty employment decisions.

Liberty University's central spiritual mission and Palmer's work to advance that mission place her squarely within the ministerial exception under *Hosanna-Tabor* and *Our Lady*. The district court was wrong to

hold otherwise. And the district court's holding also runs contrary to the principle of church autonomy that protects internal governance decisions at religious institutions of higher education like Liberty.

A. The district court misapplied the ministerial exception.

Applying the factors that the Supreme Court discussed in *Hosanna-Tabor* and *Our Lady*, it is clear that Palmer falls within the ministerial exception.

Liberty's expectations that Palmer contribute to its religious mission point to her ministerial role. *See Our Lady*, 140 S. Ct. at 2064 ("[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."). As in *Our Lady*, Palmer's employment agreement tied her professorial role to Liberty's central religious mission. *See* ECF No. 13-2 at Ex. E ¶ 7 (acknowledging the "unique and distinct character of the Institution as reflected in the statements of purposes, doctrine and professional ethics in the LU Faculty Handbook"). That mission is to "Train Champions for Christ" by "develop[ing] Christ-centered men and women with the values, knowledge, and skills essential for impacting the world." ECF No. 13-2

at 2. According to Liberty's undergraduate catalogue, "[t]he purpose of the Department of Studio & Digital Arts," where Palmer taught, "is to produce visual artists, graphic designers and art educators rooted in a Christ-centered perspective that governs every decision, action and work of art they undertake in the field of visual art." *Id.*, Ex. G at 1. Or, as Palmer herself put it, the Department is "an art degree program with a Biblical worldview." ECF No. 13-2 at 7.

Consistent with its mission, Liberty requires professors to model the Christian faith for students and integrate it into the classroom. *Id.* at 3; *see Our Lady*, 140 S. Ct. at 2056-57 (noting that the defendant schools required teachers to "model and promote" Catholic "faith and morals"). To that end, Liberty evaluates its faculty on their "commitment to Christian principles." ECF No. 13-2 at 5. And it requires that any faculty member seeking a promotion "explain how the faculty member integrates a Biblical worldview into his/her teaching/administrative responsibilities so that Liberty can evaluate and assess their contribution to the University's mission." *Id.* at 7-8.

Palmer received training to fulfill Liberty's mission—training that also points to her status as a minister. Although Palmer had no formal

religious training when she was hired, she later completed coursework toward a Doctor of Ministry degree at Liberty's School of Divinity. *See* ECF No. 13-2 at 7; *cf. Our Lady*, 140 S. Ct. at 2058 (noting the teachers had limited formal religious training). In her own words, Palmer "continue[d] to pursue ministry training opportunities" so that she could "accurately apply Scriptural truth to all areas of life including my passion for art." ECF No. 13-2 at 8. In addition to this coursework, Liberty required Palmer to attend various religious education classes it offers in order to ensure its professors carry out its mission by integrating a biblical worldview into each lesson. *See id.* at 4; *Our Lady*, 140 S. Ct. at 2056 (noting that one of the teachers had attended various religious education courses during her employment).

Most important for the ministerial exception analysis, moreover, is what Palmer actually did as a member of Liberty's faculty. *See Our Lady*, 140 S. Ct. at 2064. The record shows that Palmer fully engaged in Liberty's religious educational mission. In her own words, Palmer explained: "The purpose of Christian education is that the student may know God and do His will." ECF No. 13-2 at 9. She described her teaching methods to that end: "I integrate principles and concepts from Scripture,

make Scripture references, pray with my classes and individuals, and set the example in my own standard of living." *Id.* at 8. She described this as "intentional spiritual preparation" for students, which was the "department theme" during the year in which Palmer sought promotion to full professor. *Id.* at 7. Indeed, Palmer not only *taught* a curriculum reflecting Liberty's biblical worldview—like the teachers' roles in *Our Lady*—but also assisted in *creating* that religiously-inflected curriculum. She played an "integral role" in curriculum development, an effort she believed would enable Liberty to "have a major impact in art and culture both nationally and internationally from a Biblical worldview." *Id.*, Ex. F, at 10.

Students and colleagues alike recognized Palmer's role in Liberty's religious mission. A former student noted that she opened every class with prayer and observed that her "spiritual guidance" advanced Liberty's "ecclesiastical and institutional priorities." *Id.* at 10. In one of the peer reviews conducted each semester to assess "commitment to Christian principles," a colleague similarly observed: "[Palmer's] speech is laced with references to God and comparisons of His work in creation to our work as creative artists, and she opens class with opportunities for

prayer. I find her commitment to Christ refreshingly natural, honest, and transparent." *Id.* at Ex. F, LU_01531.

The district court made a critical error in dismissing Liberty's expectations of Palmer (not to mention these facts about what she actually did) as irrelevant to the ministerial exception. In finding that the ministerial exception did not apply to Palmer, the district court gave no credit to Liberty's expectations of "what Palmer was 'supposed to do'" and insisted that its analysis should be limited to "what Palmer 'did'." Op. at 17. Even on that view, what Palmer actually did—as just explained—places her squarely within the ministerial exception. But more fundamentally, the district court's blind eye toward Liberty's expectations reads *Our Lady* too narrowly. In that case, the Supreme Court emphasized that the teachers were "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Our Lady*, 140 S. Ct. at 2066. The Court expressly relied on the fact that the teachers' "employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that

responsibility." *Id.* Contrary to the district court's reasoning below, an examination of what the teachers were "supposed to do" was a *central point* in the Supreme Court's conclusion in *Our Lady* that both teachers were in fact ministers. Op. at 17.

Liberty faculty, like the teachers in *Our Lady*—and like faculty and teachers at many other religious educational institutions—are key actors in carrying out Liberty's religious mission. Palmer's record shows that Liberty expected her to instruct students in a Biblical worldview through art; and that is what she actually did. On this record, the district court should have found that Palmer falls within the ministerial exception. The district court was wrong to conclude otherwise.

B. The district court's approach separately intrudes on Liberty's autonomy by interfering with its religious operations and governance.

In addition to misapplying the ministerial exception, the district court's approach also intrudes on Liberty's protected autonomy as a religious body by interfering with its operations and governance.

As noted above, the "general principle of church autonomy" protects religious institutions' "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our*

Lady, 140 S. Ct. at 2060. And as the Supreme Court has observed, "[t]he 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." *Id.* at 2055. At a religious educational institution, the selection of faculty to carry out the religious mission thus implicates not just the ministerial exception, but also the religious institution's ability to organize and govern itself as it chooses. Personnel is not just policy—it is also polity.

Allowing Palmer's claims to proceed would interfere with Liberty's religious polity. By design, Liberty's professors play a central role in advancing its religious mission. At Liberty, "Christian teaching and discipline influence all University activities." ECF No. 13-2, Ex. D at LU_00866. Thus, fidelity to the historic Christian faith is a necessary and fundamental commitment of teachers and scholars at Liberty." *Id.* at LU_00867. According to Liberty's faculty handbook, the professors educate students to "follow their chosen vocations as callings to glorify God, and fulfill the Great Commission." *Id.* For institutions like Liberty, in other words, there is a "close connection" between "educating the

young in the faith" and a religious institution's central purpose. *Our Lady*, 140 S. Ct. at 2064–66.

Liberty's faculty employment practices confirm the central role its faculty members play in its religious mission. Because of their central role in realizing Liberty's mission, faculty applicants undergo a "rigorous hiring process" that delves deeply into doctrinal matters. ECF No. 13-2 at 3. A faculty interview committee examines applicants with respect to their "Biblical Worldview (e.g., their religious beliefs, their perspectives about scripture, etc.); Spiritual Disciplines (e.g., how the applicant stays spiritually strong, how they continue to grow as a Christian, etc.); and Teaching Excellence (e.g., their qualifications, research, how they would integrate Christian worldviews into the classroom, etc.)." *Id.* at 3.

Indeed, Liberty embraces a unique institutional structure that sets it apart from secular and even other religious university-level educational institutions. To protect Liberty's mission and purpose, faculty employment agreements last for only one-year terms. With the sole exception of its school of law, there are no "tenured" faculty at Liberty. *Id.* at 5. And the only reason professors at the Liberty School of Law are tenured is that the ABA requires it for accreditation. *Id.* From

the very beginning, Liberty's religious leadership "opposed tenure" for expressly religious reasons: "if a professor strayed from Liberty's mission or doctrinal statement, Liberty could terminate him or her." *Id.* Liberty continues to adhere to this policy today because "fidelity to the historic Christian faith is a necessary and fundamental commitment of teachers and scholars at Liberty." ECF No. 13-2, Ex. D at LU_00866.

Because Liberty's faculty are so critical to its religious mission, faculty employment decisions at Liberty are "internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060. This Court has previously said, in a case arising out of a secular college, that it "review[s] professorial employment decisions with great trepidation" and that federal courts must "operate with reticence and restraint regarding tenure-type decisions." *Jiminez v. Mary Washington College*, 57 F.3d 369, 376-77 (4th Cir. 1995). This reticence and restraint must be multiplied many times over when the employer is a *religious* institution of higher education. To subject faculty hiring decisions at an institution like Liberty to judicial scrutiny would interfere with Liberty's ability to set its own standards for faculty and require faculty to fulfill those standards. It would, in other words, deprive

Liberty of "control over the selection of those who will personify its beliefs" and thus put Liberty's doctrinal and organizational autonomy at risk, in violation of the First Amendment. *Hosanna-Tabor*, 565 U.S. at 188.

Judicial involvement in matters so integral to the religious mission of an educational institution like Liberty—such as faculty employment decisions—would also "risk" precisely the "judicial entanglement in religious issues" against which the Supreme Court and this Court have both long warned. *Our Lady*, 140 S. Ct. at 2069; *see also Rayburn*, 772 F.2d at 1170 ("entanglement is measured by the character and purposes of the institution affected") (cleaned up). Because teachers play a "critical and unique role . . . in fulfilling the mission of a church-operated school," evaluating the terms and conditions of their employment "will necessarily involve inquiry into" the relationship between the employment decision and "the school's religious mission." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-04 (1979). Under these circumstances, "[i]t is not only the conclusions that may be reached by [the government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings

and conclusions." *Id.*; *see also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (applying *Catholic Bishop* to hold that EEOC investigations into church affairs violated the Religion Clauses). Instead, the very act of "creating and administering distinctions between religious and secular instruction at religious universities would itself entangle the [government] in religious affairs." *Duquesne*, 947 F.3d at 834.

Indeed, the very concerns for entanglement that underlie the ministerial exception apply with equal force to a religious university's employment decisions as a matter of church autonomy. As this Court has explained, if a Title VII claim were permitted to proceed against a minister, "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171. Palmer's employment at Liberty fits within the ministerial exception. But even if it did not, her role as a member of Liberty's faculty was so central to Liberty's religious mission that the same concerns would obtain if the case were decided on the basis of interference with church governance alone. Either way, the bottom line is the same: The district court's reasoning prevents Liberty

from exercising "control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. This Court should not countenance such a violation of the First Amendment.

CONCLUSION

The dismissal of Palmer's claims should be affirmed on the basis that allowing Palmer's claims to proceed would violate the First Amendment.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,034 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on May 27, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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