

# 20-1230-cv

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## United States Court of Appeals

*for the*

## Tenth Circuit



GREGORY TUCKER,

*Plaintiff-Appellee,*

v.

FAITH BIBLE CHAPEL INTERNATIONAL,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO, No. 1:19-cv-01652 (HON. R. BROOKE JACKSON)

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### **BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND 37 OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Women’s Law Center and the 37 other *amici curiae* joining this brief each certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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**INTEREST OF AMICI CURIAE**<sup>1</sup>

*Amici* are organizations committed to ensuring workers maintain their civil rights protections through our nation’s anti-discrimination laws, consistent with First Amendment parameters. *Amici* file this brief in support of Mr. Tucker to highlight the myriad ways that the rights of workers to be free from discrimination and retaliation would be harmed if courts allow certain employers free rein to avoid civil rights laws.

The National Women’s Law Center (“NWLC”) is a nonprofit legal advocacy organization founded in 1972 and dedicated to the advancement and protection of the legal rights and opportunities of women and girls, and all who suffer from sex discrimination. NWLC focuses on issues of key importance to women and their families, including workplace justice, economic security, education, health, and reproductive rights, with particular focus on the needs of low-income women and those who face multiple and intersecting forms of discrimination.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund preparation or submission of this brief, and no other person contributed money intended to fund preparation or submission of this brief. The parties have consented to the filing of this brief.

Together with NWLC, the following *amici* join this brief:

1. American Federation of State, County and Municipal Employees (AFSCME)
2. American Sexual Health Association
3. California Women Lawyers
4. Equal Rights Advocates
5. Equality California
6. Equity Forward
7. DC Coalition Against Domestic Violence
8. Desiree Alliance
9. FORGE, Inc.
10. GLBTQ Legal Advocates & Defenders
11. Human Rights Campaign
12. In Our Own Voice: National Black Women's Reproductive Justice Agenda
13. KWH Law Center for Social Justice and Change
14. LatinoJustice PRLDEF
15. Legal Aid at Work
16. Legal Voice
17. Muslims for Progressive Values
18. NARAL Pro-Choice America
19. National Asian Pacific American Women's Forum
20. National Association of Social Workers (NASW)
21. National Coalition Against Domestic Violence
22. National Organization for Women Foundation
23. New York Lawyers for the Public Interest
24. People For the American Way Foundation
25. Religious Coalition for Reproductive Choice
26. Reproductive Justice Action Collective
27. Service Employees International Union (SEIU)\*
28. SPARK Reproductive Justice NOW!, Inc.
29. Ujima Inc.: The National Center on Violence Against Women in the Black Community
30. Women Employed
31. Women Lawyers On Guard Inc.
32. Women's Bar Association of the District of Columbia
33. Women's Bar Association of the State of New York
34. Women's Institute for Freedom of the Press
35. The Women's Law Center of Maryland
36. Women's Law Project
37. WV FREE

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\* Denotes *amicus curiae* represented solely by NWLC. All other *amici curiae* are represented by Quinn Emanuel Urquhart & Sullivan, LLP and NWLC.

## INTRODUCTION

Gregory Tucker’s case arises as part of a trend in which some religious employers<sup>1</sup> seek to evade antidiscrimination laws, and at a time of increasing awareness of and efforts to address racial injustice. Certain religious employers are attempting to expand which employees are considered “ministers,” the kinds of claims precluded by that classification, and the types of employers who may assert the “ministerial exception” against civil rights claims, including those based on race discrimination and retaliation for opposing racial harassment.

In 2000, Faith Christian Academy (“FCA”)<sup>2</sup> hired Mr. Tucker as a lay science teacher. Appellant Appendix (“Aplt.App.”) 279. Apart from four years when he worked outside of the school, Mr. Tucker taught at FCA continuously until 2018, when he was terminated. *Id.* 31, 279. In 2014, Mr. Tucker accepted the role of Director of Student Life at FCA—this was the title he used, and how others referred

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<sup>1</sup> *Amici* understand the “religious employers” to which the ministerial exception applies to be limited to houses of worship and the entities they operate, such as religious schools.

<sup>2</sup> Named Appellant Faith Bible Chapel International operates FCA. Aplt.App.274. Because Mr. Tucker was employed by and terminated by FCA, *id.* 278-79, *amici* use this label to refer to Appellant herein.

to him. An employment agreement referenced another title (“chaplain”), which was not used by Mr. Tucker or others. *Id.* 99-101, 208-09, 280-81.<sup>3</sup>

In 2016, Mr. Tucker became the target of racial harassment, including hate speech, related to his family having adopted a Black daughter. *Id.* 31. Around the same time, Mr. Tucker also witnessed a range of racist conduct at the school, including white students dressed in KKK hoods, mock “executions” of students of color, students advocating white supremacist and neo-Nazi ideology, and racist bullying of students of color. *Id.* 32-33. Mr. Tucker repeatedly brought these issues to school leaders, who failed to respond. *Id.* 32-34.

In an effort to address the racist climate, Mr. Tucker decided to dedicate one of the regular school assemblies to a panel on race. Before the event, Mr. Tucker received support from his colleagues and students’ parents. *Id.* 34-35. At the event, invited speakers “discussed racism at the school and possible ways for students to be more respectful of one another.” *Id.* 35. Following the event, a small group of parents—including parents of the students who had engaged in racial harassment—complained that the session caused “harm” to their children. *Id.* 36. Some of these

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<sup>3</sup> *Amici*, like the Court, construe all evidence and resolve all factual disputes and reasonable inferences in the light most favorable to Mr. Tucker as the non-moving party. *See Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014).

parents expressed their dislike for criticism of racism. *Id.* 36-38. In response, FCA demoted Mr. Tucker and, in short order, terminated him. *Id.* 36-42.

Mr. Tucker brought suit for retaliation in violation of Title VII of the Civil Rights Act of 1964 because his termination was in response to his opposition to racial harassment. *Id.* 25. Only *after* litigation began did FCA argue that Mr. Tucker was a minister and his retaliatory termination was permitted as a “religious dispute[] between a church and its minister.” *Id.* 84-85; Appellant Br. 11-12. The District Court denied FCA’s motion for summary judgment on the ground that the record did not support the conclusion that Mr. Tucker was a “minister” as a matter of law. Aplt.App.284-85.<sup>4</sup>

A key question in this appeal is whether, in deciding if an employee is covered by the ministerial exception, a court must defer as a matter of law to an employer’s views and labels in formal documents, or, as the Supreme Court recently held, focus on what the employee actually does. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). If FCA prevails, employers would be incentivized to name all employees “ministers,” no matter their actual job duties, to excuse themselves from all workplace civil rights. Women, people of color,

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<sup>4</sup> *Amici* oppose the dismissal of civil rights claims before a plaintiff even has the opportunity to develop a record through discovery. Here, the Court is being asked to dismiss claims entirely—even before there is jurisdiction to do so.

immigrants, older workers, people with disabilities, LGBTQ people, and those who belong to multiple of these groups would be left unprotected from the alarming rates of employment discrimination they face. The Court should reject FCA's invitation to rely on formalistic, easy-to-manipulate, and employer-controlled factors to deny workers critical civil rights.

### **SUMMARY OF ARGUMENT**

There are hundreds of thousands of teachers and staff employed at religious schools across the country. An expansion of the ministerial exception based on form rather than substance puts their workplace protections at risk. Like Mr. Tucker, these employees could lose all rights to be free of workplace discrimination if employers are given the unquestioned power to classify employees as "ministers."

Remarkably, in the District Court, FCA admitted that it considers its *entire workforce* to be ministers. Aplt.App.109 ("To become a teacher or full-time worker at Faith Christian Academy is a calling ... to minister. You are joining this ministry, not as an employee, but as a minister"); *id.* 228 ("each employee"). This position illustrates the stakes of this case and the far-reaching harms that would occur if employers are allowed to unilaterally categorize employees as ministers, without regard to their actual job duties. Such a result would be inconsistent with recent Supreme Court precedent holding that actual job responsibilities guide the ministerial exception analysis.

The District Court observed that FCA’s position that Tucker was a “minister” is “substantially grounded in the wording of documents, most notably the extension agreement that characterized Mr. Tucker as ‘chaplain’ and the handbook which purports to make all teachers and other full-time employees ‘ministers.’” Aplt.App.284. The District Court’s ruling aptly anticipated *Our Lady of Guadalupe*, which declined to defer to employer labels, noting that courts must “look[] behind the titles to what the positions actually entail.” 140 S. Ct. at 2064.

FCA’s heavy reliance on formal documents and titles over actual job responsibilities invites manipulation—if accepted, employers need only label their employees as “ministers” or assign them nominal religious duties on paper in contracts, manuals, or guidebooks in order to avoid civil rights claims. Indeed, organizations that oppose certain anti-discrimination protections are already advising religious employers on how to manipulate the ministerial exception to escape compliance with civil rights laws.

The ministerial exception requires evaluation of “all the circumstances” of employment to determine if one is a “minister.” *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 190 (2012). The functional review dictated by *Hosanna-Tabor* and *Our Lady of Guadalupe* appropriately limits the types of employees subject to the ministerial exception by first accounting for what they actually do, as well as considering titles, training, and how they hold



themselves out. Exempting employers from civil rights laws comes at great cost to employees and society as it licenses serious harms without remedy. When appropriately cabined, those costs are balanced against the First Amendment’s prohibition on state intrusion upon matters “of faith and doctrine,” *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (citation omitted), and assurance that the state has “no role in filling ecclesiastical offices,” *Hosanna-Tabor*, 565 U.S. at 184. But when expanded beyond its purpose, the ministerial exception exacts an unjustified toll on employees and society.

A doctrine designed to protect internal decisions that are “essential to” a religious institution’s “central mission,” *Our Lady of Guadalupe*, 140 S. Ct. at 2060, should not be expanded to preclude claims of racial harassment and unlawful retaliation for opposing racism. Tellingly, FCA never identifies the post-hoc religious disagreement that it invokes in an effort to strip Mr. Tucker of his civil rights, nor does it explain how protecting racial harassment is related to its mission.

Employers across the country have recognized the need to address how issues of racism and bias impact our workplaces, and critical trainings on these subjects are becoming more widespread. Our nation’s civil rights laws protect employees like Mr. Tucker who undertake such programs, and they should not be punished without recourse through a misapplication of the ministerial exception.

## ARGUMENT

The ministerial exception allows some religious employers to avoid compliance with workplace protections for certain employees. In *Hosanna-Tabor*, when recognizing the exception, the Supreme Court provided guidance for determining which employees are “ministers” through a multi-factor analysis, including by considering an employee’s (1) job title, (2) religious training, (3) use of religious title, and (4) performance of vital religious duties on the job. *See* 565 U.S. at 191-92. In *Hosanna-Tabor*, the plaintiff was an ordained minister and “had been entrusted with the responsibility of transmitting the Lutheran faith to the next generation.” *Id.* at 192. More recently, *Our Lady of Guadalupe* held that the ministerial exception analysis should focus on “what an employee does.” 140 S. Ct. at 2064. The record below indicates that whether Mr. Tucker was a “minister” was genuinely disputed by credible evidence such that the Court could not conclude he was a minister as a matter of law.

To fit Mr. Tucker within the ministerial exception, FCA urges the Court to ignore the substance of his responsibilities and requests the unilateral ability to classify all its employees as “ministers” in order to strip them of their rights to seek meaningful redress if they face workplace discrimination. This Court should reject that request.

**I. CONSISTENT WITH SUPREME COURT PRECEDENT, THE MINISTERIAL EXCEPTION MUST BE CAREFULLY CABINED TO AVOID UNDERMINING VITAL CIVIL RIGHTS**

**A. The Ministerial Exception Is a Drastic Departure from the Ordinary Operation of First Amendment Rights**

The ministerial exception departs markedly from how courts have long balanced the First Amendment’s Religion Clauses and generally applicable laws, including civil rights statutes. The First Amendment does not generally allow exceptions based on religious objections to neutral, generally applicable laws. *See Emp’t Div., Dep’t. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879-82 (1990). In the rare situations where such exceptions are considered, courts weigh the burden imposed on First Amendment interests against countervailing governmental interests. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Ordinarily, to “have the protection of the Religion Clauses, the claims must be rooted in religious belief.” *Id.* at 215.

The ministerial exception departs dramatically from these norms. Not only does it provide an exemption from generally applicable civil rights laws, it does so without inquiry into whether the challenged discrimination has a religious basis. *See Hosanna-Tabor*, 565 U.S. at 194-95. At the same time, the doctrine takes no account of the government’s compelling interest in preventing and addressing the harms of discrimination. *See id.* at 181-90. The ministerial exception differs in this way to

protect churches from being required “to accept or retain an unwanted minister, or punishing a church for failing to do so.” *Id.* at 188.

**B. Employers Like FCA Are Attempting to Inappropriately Expand the Ministerial Exception**

This appeal arises against the backdrop of repeated attempts by employers to expand the kinds of *employees* subject to the ministerial exception, the categories of *claims* covered by the exception, and the types of *employers* who may invoke the exemption. Those efforts, taken together, highlight the far-reaching consequences of accepting FCA’s proposed expansion of the ministerial exception.

*Kinds of Employees.* Employers have increased their efforts to assert the ministerial exception to insulate themselves against discrimination claims. Such efforts have been used against claims by secretaries and receptionists,<sup>5</sup> other administrative or support staff,<sup>6</sup> computer technicians,<sup>7</sup> facilities workers,<sup>8</sup> and

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<sup>5</sup> *E.g., Smith v. Raleigh Dist. of N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 697-98, 703-07 (E.D.N.C. 1999) (receptionist and secretary).

<sup>6</sup> *E.g., Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 690, 693-95 (W.D. Pa. 2004) (“registrar” responsible for recordkeeping and processing).

<sup>7</sup> *E.g., Dias v. Archdiocese of Cincinnati*, 2013 WL 360355, at \*1, \*4 (S.D. Ohio Jan. 30, 2013) (“computer technology coordinator”).

<sup>8</sup> *E.g., Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (facilities manager responsible for “maintenance, custodial, and janitorial work”); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 58-61 (E.D. Pa. 1991) (“Director of Plant Operations” at religiously-affiliated hospital).

college professors without any ties to the organization’s religious mission.<sup>9</sup> *See also EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (seminary asserting that “all its employees serve a ministerial function,” including all “faculty, administrative staff, and support staff”); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1365, 1368 (S.D.N.Y. 1975) (ministerial exception asserted against white church “typist-receptionist” fired for “maintaining a casual social relationship” with a Black man). Courts have rightly rejected these attempts over the years, yet there is a renewed effort by religious employers to expand the exemption. Indeed, *amici* supporting FCA do not hide their intention to extend the rights-terminating “minister” status far and wide.<sup>10</sup>

The list of responsibilities an employee may occasionally undertake that incidentally help advance the religious goals of an organization is vast, as illustrated by the duty of “set[ting] an example” under the FCA Teacher Handbook. Aplt.App.109. This position would lead to the extraordinary conclusion that *all* FCA employees—both teachers and non-teachers—are ministers.

***Kinds of Claims.*** Despite the purpose of the ministerial exception as recognized by the Supreme Court—the ability of houses of worship to select their

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<sup>9</sup> *E.g.*, *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1143-46 (D. Or. 2017) (assistant professor of exercise science).

<sup>10</sup> *E.g.*, Br. of *Amici Curiae* Jewish Coalition, at 11 (“priesthood” extends “broadly to laymen” in The Church of Jesus Christ of Latter-Day Saints).

own religious leaders—religious employers regularly argue that *any* claim brought by a minister is barred by the ministerial exception. *See, e.g., Demkovich v. St. Andrew the Apostle Par.*, 973 F.3d 718, 720 (7th Cir. 2020) (“Defendants urge us to bar all statutory hostile environment claims by ministerial employees.”), *reh’g en banc granted* (Dec. 9, 2020). These efforts include asserting the ministerial exception against claims related to wages, overtime, equal pay, and family and medical leave. *See, e.g., Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288, 1292 (9th Cir. 2010) (applying exception to overtime and minimum wage claims of seminarian who was “hired to do maintenance of the church and also assisted with Mass”); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301, 308-09 (4th Cir. 2004) (applying exception to claims of Jewish nursing home employee for violations of Fair Labor Standards Act overtime provisions)<sup>11</sup>; *EEOC v. Tree of Life Christian Schools*, 751 F. Supp. 700, 706-07 (S.D. Ohio 1990) (Equal Pay Act claims); *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (same); *Fassl v. Our Lady of Perpetual Help*

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<sup>11</sup> *See also* Dep’t of Labor, *Opinion Letter, FLSA2021-2*, at 2-3 (Jan. 8, 2021), <https://bit.ly/3slegWp> (indulging assumption that daycare staff and preschool teachers are “ministers” and taking position that if so they would lack FLSA wage protections); Dep’t of Labor, *Opinion Letter, FLSA2018-29*, at 2-4 (Dec. 21, 2018), <https://bit.ly/39toEmy> (taking position that FLSA does not apply to employees who fall under the ministerial exception).

*Roman Catholic Church*, 2005 WL 2455253, at \*1, \*6-9 (E.D. Pa. Oct. 5, 2005) (Family and Medical Leave Act).

FCA identifies no limiting principle to preclude expansion of the ministerial exception to other workplace protections, such as laws that protect employees from dangerous workplace conditions, an acute concern for essential workers during a global pandemic. Given these arguments by employers, it is critical that this Court reject efforts to expand the exemption without bounds.

***Kinds of Employers.*** Employers likewise seek to apply the ministerial exception beyond houses of worship and religious schools to a wide range of entities with marginal religious affiliation including hospitals,<sup>12</sup> nursing homes,<sup>13</sup> rehabilitation centers,<sup>14</sup> and publishers.<sup>15</sup> Thus, the universe of employers seeking to be excused from important civil rights by citing the ministerial exception is both vast and expanding.<sup>16</sup>

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<sup>12</sup> *E.g.*, *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 423-26 (2d Cir. 2018); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007).

<sup>13</sup> *E.g.*, *Shaliehsabou*, 363 F.3d at 309-11.

<sup>14</sup> *E.g.*, *Schleicher v. Salvation Army*, 518 F.3d 472, 475-78 (7th Cir. 2008).

<sup>15</sup> *E.g.*, *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1277-78 (9th Cir. 1982).

<sup>16</sup> *See, e.g.*, Christine Bové, *Should Your Church Start a Business?*, OUTREACH MAG. (July 7, 2019), <https://bit.ly/2TAKqhe> (describing trend of churches starting business to provide revenue and ministry opportunities).

### **C. The Ministerial Exception Achieves Its Ends at Enormous Cost**

The extraordinary power of the ministerial exception comes at great cost to employees and society. Women, people of color, immigrants, older workers, people with disabilities, LGBTQ people, and individuals belonging to multiple marginalized groups face employment discrimination at alarming rates. Curtailing civil rights protections will particularly harm individuals in these groups.

***Race Discrimination.*** Race discrimination remains prevalent in the United States and the country is in the midst of a long-overdue and candid reassessment of racism, including renewed demands for workplace racial justice. Even prior to this intensified awareness of ongoing racial injustice, one-third of all charges filed with the Equal Employment Opportunity Commission (EEOC) in Fiscal Year 2019 raised race discrimination claims.<sup>17</sup> A 2017 study found that 56% of Black workers indicated they had been discriminated against in applying for jobs, and 57% indicated they had been discriminated against in compensation or promotion.<sup>18</sup>

Other workers of color also face significant workplace discrimination. For example, more than three in ten Latinos report having experienced workplace

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<sup>17</sup> See EEOC, *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2019*, <https://bit.ly/2W0tdPR>.

<sup>18</sup> See NAT'L PUBLIC RADIO et al, *Discrimination in America: Experiences and Views of African Americans*, at 1 (Oct. 2017), <https://n.pr/2TS3jve>.



discrimination in hiring (33%), or being paid equally or considered for promotion (32%).<sup>19</sup> Almost one-third of Native Americans report being discriminated against when it comes to being paid equally or considered for promotion (33%) or in hiring (31%).<sup>20</sup> A quarter or more of Asian Americans indicate they were discriminated against in hiring (27%) or being paid equally or considered for promotion (25%).<sup>21</sup> A 2019 study indicates that 26% of Latinos and 29% of Asian Americans and Pacific Islanders have been treated unfairly in hiring, pay, or promotion.<sup>22</sup>

The impact of race discrimination is severe. Systemic inequality in healthcare, education, incarceration, and financial practices have created a significant racial wealth gap resulting in persistent intergenerational poverty for

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<sup>19</sup> See Press Release, T.H. CHAN SCHOOL OF PUBLIC HEALTH, HARVARD UNIVERSITY, *Poll finds one-third of Latinos say they have experienced discrimination in their jobs and when seeking housing* (Nov. 1, 2017), <https://bit.ly/38wWJiY>.

<sup>20</sup> See Press Release, T.H. CHAN SCHOOL OF PUBLIC HEALTH, HARVARD UNIVERSITY, *Poll finds more than one-third of Native Americans report slurs, violence, harassment, and being discriminated against in the workplace* (Nov. 14, 2017), <https://bit.ly/2v67ZoL>.

<sup>21</sup> See Press Release, T.H. CHAN SCHOOL OF PUBLIC HEALTH, HARVARD UNIVERSITY, *Poll finds that at least one quarter of Asian Americans report being personally discriminated against in the workplace and housing* (Dec. 4, 2017), <https://bit.ly/2wKREGM>.

<sup>22</sup> See Anna Brown, *Key findings on Americans' views of race in 2019*, PEW RESEARCH CTR. (Apr. 9, 2019), <https://pewrsr.ch/2TzeE4h>.

certain communities of color.<sup>23</sup> When a worker of color loses a job, they are less likely to have resources to help meet basic needs, a situation made even more dire by the pandemic.<sup>24</sup> Empirical evidence documents the disproportionate toll that loss of employment has on the mental health of Black workers.<sup>25</sup> A boundless ministerial exception allows such harmful effects to flourish with impunity.

Any reduction in the racial diversity of a school's educators can have far-reaching consequences for students, particularly for students of color. Studies have found that students of color with at least one same-race teacher perform better, have better attendance rates, and are suspended less frequently.<sup>26</sup> Despite gains in inclusive hiring, teachers of color are still underrepresented.<sup>27</sup> Expanding the

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<sup>23</sup> See Rakesh Kochhar & Anthony Cilluffo, *How wealth inequality has changed in the U.S. since the Great Recession, by race, ethnicity and income*, PEW RESEARCH CTR. (Nov. 1, 2017), <https://pewrsr.ch/3cJrDI6>.

<sup>24</sup> See Jasmine Tucker & Claire Ewing-Nelson, *One in Six Latinas and One in Five Black, Non-Hispanic Women Don't Have Enough to Eat*, NAT'L WOMEN'S LAW CTR. (Nov. 2020), <https://bit.ly/3iflIDj>.

<sup>25</sup> Randall Akee, *Black Americans Suffer the Most Stress From Job Loss*, REALCLEARMARKETS (Aug. 21, 2018), <https://bit.ly/39AI2N6>.

<sup>26</sup> See David Figlio, *The importance of a diverse teaching force*, BROOKINGS (Nov. 16, 2017), <https://brook.gs/2IADPgK>; Seth Gershenson et al., *The Long-Run Impacts of Same-Race Teachers*, IZA INST. OF LABOR ECONS., at 2-3 (Mar. 2017), <https://bit.ly/35GhBWn>.

<sup>27</sup> See Saba Bireda & Robin Chait, *Increasing Teacher Diversity: Strategies to Improve the Teacher Workforce*, CTR. FOR AM. PROGRESS, at 1 (Nov. 2011), <https://ampr.gs/335GYOX>.

ministerial exception could deprive our society of the many educational benefits of having teachers of color in schools.

The human toll of discrimination is illustrated by the facts of this case, where FCA fired Mr. Tucker for attempting to address racial harassment. Being the target of, witnessing, and learning of repeated racial harassment, then being fired for trying to address racism within the school, subjected Mr. Tucker to “undoubtedly [] the most difficult weeks of [his] life.” Aplt.App.163.

***National Origin Discrimination.*** Federal law protects against discrimination and harassment based on an employee’s ethnicity<sup>28</sup> and “on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.”<sup>29</sup> The ministerial exception also eliminates these protections, a result that is acutely harmful for immigrants, who can be particularly vulnerable to workplace discrimination. FCA’s argument threatens to deprive immigrant workers of recourse for such discrimination, so long as an employer classifies them as ministers solely through formalistic labels and paperwork.

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<sup>28</sup> See, e.g., *Chavez v. New Mexico*, 397 F.3d 826, 831-32 (10th Cir. 2005); *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817-18 (9th Cir. 2002).

<sup>29</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973).

*Sex Discrimination.* Myriad laws prohibit workplace sex discrimination, which can include harassment, unequal pay, and discrimination because of pregnancy, childbirth, or related medical conditions. Expanding the ministerial exception would deny workers these important protections, a particularly trouble development when women are facing the brunt of the current economic crisis.<sup>30</sup> Despite being excluded from serving in leadership roles in some religions, women would overwhelmingly pay the price of an inappropriately expanded ministerial exception, as they comprise the vast majority of elementary and secondary school teachers and care workers.<sup>31</sup>

Sexual harassment remains common in this nation's workplaces, and existing protections against it are threatened by an expansion of the ministerial exception.<sup>32</sup> Workers who face sexual harassment are also often targeted on the basis of other protected classifications such as race, immigration status, or disability. Across industries, Black women file sexual harassment charges at disproportionate rates,

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<sup>30</sup> See, e.g., Claire Ewing-Nelson, *All of the Jobs Lost in December Were Women's Jobs*, NAT'L WOMEN'S LAW CTR. (Jan. 2021), <https://bit.ly/2LxPD8t>.

<sup>31</sup> Dep't of Labor, Bureau of Labor Statistics, Current Population Survey, Household Data, 2019 Annual Averages, *Table 11, Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity*, <https://bit.ly/3oOkT1y>.

<sup>32</sup> See EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), <https://bit.ly/35DIPNA>.

suggesting that they are especially likely to experience sexual harassment.<sup>33</sup> Some religious employers take the position that the ministerial exception precludes *any* civil recourse for employees experiencing sexual or other forms of harassment. *E.g.*, *Demkovich*, 973 F.3d at 720. Conditioning employment on submitting to abuse, or terminating an employee for complaining about it, inflicts great personal and social harm.

Sex discrimination includes discrimination based on sexual orientation or gender identity.<sup>34</sup> LGBTQ people have long experienced widespread employment discrimination, including in the education sector.<sup>35</sup> Lesbian, gay, and bisexual

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<sup>33</sup> Amanda Rossi, Jasmine Tucker, and Kayla Patrick, *Out Of The Shadows: An Analysis Of Sexual Harassment Charges Filed By Working Women*, NAT'L WOMEN'S LAW CTR., at 25-26 (Aug. 2018), <https://bit.ly/3cJsBUV>.

<sup>34</sup> *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1744 (2020) (“When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex.”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (stereotyping as recognized form of sex discrimination).

<sup>35</sup> Lillian Faderman, *A Forty-Year War: The Struggle for Workplace Protection in THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* 564-580 (2015); Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY, at 147-56 (Dec. 2016), <https://bit.ly/39E73a7>; Ilan H. Meyer, *Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US*, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW, at 1 (April 2019), <https://bit.ly/2TMwIw0>; M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI. KENT. L. REV. 559, 560-61 (2009).

workers report suffering adverse job treatment at rates 50% higher than heterosexual workers.<sup>36</sup> And 30% of transgender workers report suffering adverse workplace treatment due to their gender identity.<sup>37</sup> This discrimination has many harmful effects, including poverty,<sup>38</sup> homelessness,<sup>39</sup> and significant adverse health impacts.<sup>40</sup> A recent survey by the UCLA Williams Institute indicates that 98% of transgender individuals who have experienced multiple instances of discrimination or violence in the past year have thought about committing suicide and 51% attempted suicide; as more discriminatory experiences occurred, the prevalence of suicidal thoughts and attempts increased.<sup>41</sup> Given these realities, ensuring civil rights protections for LGBTQ communities, including in the workplace, is crucial.

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<sup>36</sup> Meyer, *Experiences of Discrimination among LGB People*, *supra* n.35.

<sup>37</sup> James et al., *U.S. Trans Survey*, *supra* n.35, at 148.

<sup>38</sup> *Id.* at 144 (finding 29% of respondents living in poverty, more than twice the rate for the general U.S. population); M.V. Lee Badgett et al., *Bias in the Workplace*, *supra* n.35, at 587-88 (similar).

<sup>39</sup> True Colors Fund & National LGBTQ Task Force, *At the Intersections: A Collaborative Resource on LGBTQ Youth Homelessness* (2019), <https://bit.ly/35AnPqM>; James et al., *U.S. Trans Survey*, *supra* n.35, at 175-82.

<sup>40</sup> Institute of Med. of the Nat'l Academies, *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 190-198 (2011), <https://bit.ly/3342rYC>.

<sup>41</sup> Jody L. Herman, Taylor N.T. Brown, & Ann P. Haas, *Suicide Thoughts and Attempts Among Transgender Adults*, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW at 27-28 (Sept. 2019), <https://bit.ly/3qgoJkc>.

***Disability and Age Discrimination.*** Depriving workers of the right to seek recourse following disability and age discrimination is also extremely harmful. Congress’s observation that a person’s “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society,” 42 U.S.C. § 12101(a)(1), remains true whether a person with a disability is employed by a public, private secular, or religious employer. Yet workers with disabilities continue to face stigma and discrimination in employment. When older workers suffer age discrimination, they often experience difficulty in finding new work and are offered lower salaries.<sup>42</sup> Age discrimination disproportionately affects women, minorities, and lower-income workers, who face longer periods of unemployment and more difficulty re-entering the workforce or switching jobs.<sup>43</sup>

**D. Anti-Retaliation Protections Are Essential to Underlying Civil Rights Laws**

Title VII and other civil rights laws prohibit retaliation against an employee for engaging in protected activity, which includes opposing a practice the employee reasonably believes is unlawful under federal anti-discrimination laws. The Supreme Court has recognized that protection from retaliation is crucial to anti-

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<sup>42</sup> EEOC, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)* (June 2018), <https://bit.ly/3bBa1QL>.

<sup>43</sup> See AARP, *The Economic Impact of Age Discrimination* (Jan. 30, 2020), <https://bit.ly/3bHwjAg>.

discrimination laws, as it prevents “an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of [Title VII’s] basic guarantees” to be free from “injury to individuals based on who they are.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

Despite these protections, evidence indicates that retaliation by employers is widespread. *See Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 279 (2009) (citing compilation of empirical studies). Year after year, the EEOC receives tens of thousands of retaliation charges, more than any other kind of complaint.<sup>44</sup> The EEOC reports that retaliation is “the most frequently alleged basis of discrimination in all sectors, including the federal government workforce” and has been “the most frequently alleged basis [of discrimination] since 2008.”<sup>45</sup> Between 2009 and 2015, “retaliation findings comprised between 42% and 53% of all findings of EEO violations.”<sup>46</sup>

Crucially, these rates of retaliation do not include those who are deterred from reporting. “Fear of retaliation is the leading reason why people stay silent instead of

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<sup>44</sup> *See* EEOC, *Charge Statistics*, *supra* n.17.

<sup>45</sup> EEOC, *Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), <https://bit.ly/2LoG7EK>.

<sup>46</sup> *Id.* *See also* Jasmine Tucker and Jennifer Mondino, *Coming Forward: Key Trends and Data from the TIME’S UP Legal Defense Fund*, NAT’L WOMEN’S LAW CTR. & TIME’S UP, at 4 (Oct. 2020), <https://bit.ly/3bFv3gV>.



voicing their concerns about bias and discrimination.” *Crawford.*, 555 U.S. at 279 (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)). Reports of harassment and other forms of discrimination are widely understood to be “very low.” Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 FLA. L. REV. 797, 802 n.8 (2020) (collecting studies). Indeed, an EEOC task force observed that “based on the empirical data, the extent of non-reporting [of harassment on every basis protected under equal employment opportunity laws] is striking.”<sup>47</sup> By insulating employers from retaliation claims, the ministerial exception would discourage employees from raising complaints of discrimination to their employers. *See Brake, Retaliation*, 90 MINN. L. REV. at 37.

In the education context, the cost of eliminating anti-retaliation protections is also borne by students and their families. Shielding teachers from retaliation is essential to protecting students, given that teachers are often better situated to identify violations of children’s rights. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180-81 (2005) (example of teacher reporting principal’s sexual harassment of a student). Here, Mr. Tucker’s work on the assembly was done not only to protect himself, but also to protect FCA students who had been subject to severe racial harassment. If every teacher risks their job when reporting

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<sup>47</sup> EEOC, *Select Task Force*, *supra* n.32.

discrimination because they lack protections against retaliation, laws designed to keep students free from racial and other forms of harassment would be greatly undermined.

Foreclosing retaliation claims through an unwarranted expansion of the ministerial exception would allow employers to retaliate against employees, like Mr. Tucker, who oppose race-based harassment without consequence. Unprotected from retaliation, individuals who witness discrimination would be even less likely to report or otherwise oppose it, meaning “the underlying discrimination would go unremedied.” *Id.* at 181.

## **II. THE COURT SHOULD REJECT FCA’S ATTEMPT TO ELEVATE FORMULAIC, EASY-TO-MANIPULATE FACTORS IN THE MINISTERIAL EXCEPTION ANALYSIS**

FCA argues that all of its employees, including Mr. Tucker, are ministers. Appellant Br. 16. FCA cites to formal materials that apply to all teachers, such as the 60-page, single-spaced Teacher Handbook. *See* Aplt.App.102-62, 421-67; Appellant Br. 4-6, 28-30. FCA also relies heavily on an extension to Mr. Tucker’s employment contract. *E.g.*, Appellant Br. 9, 26-28. But employees are typically unable to modify or challenge the accuracy of the types of material that FCA cites in an effort to categorize Mr. Tucker as a minister despite the fact that the same terms apply to *all* FCA employees regardless of specific job duties.

As the Supreme Court made clear in *Our Lady of Guadalupe*, the question of “what an employee does” cannot be answered by reference to formal documents in disregard of actual job functions. 140 S. Ct. at 2064. Minimizing the importance of actual job responsibilities threatens to elevate form over substance and would grant employers the power to unilaterally classify their entire workforce as ministers, as FCA attempts to do here, stripping them of crucial civil rights. Such an approach threatens to dramatically expand the scope of the exemption far beyond its intended purpose.

Focusing on the substance of the employee’s responsibilities is an important check on spurious invocations of the ministerial exception. Examining all relevant evidence provides a measure of assurance that the religious duties are real and that their assignment to the employee is a genuine reflection of the religious organization’s judgment regarding “personnel who are essential to the performance” of religious functions, *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring), rather than a post-hoc justification invented for litigation. Allowing the question of whether an employee performs vital religious functions to be answered solely by reference to documents that the employer unilaterally controls invites manipulation

and legitimizes religious employers' bad-faith efforts to use the ministerial exception as a sword against all manner of employees.<sup>48</sup>

If giving an employee a formal religious title, a vague mandate to model “good morals,” or instructing them to present a *non-religious* subject “from a Christian perspective” (Aplt.App.506) is sufficient to allow employers to avoid employment discrimination and other workers' rights claims, many employers will do so. For example, the Alliance Defending Freedom and Lutheran Church Missouri Synod have produced a guide for “Congregations, Schools, and Ministries,” to help “prepare for the legal intrusions” of civil rights lawsuits.<sup>49</sup> It advises that “a religious organization should assign its employees and/or volunteers duties that involve ministerial, teaching, or other spiritual qualifications—duties that directly further the religious mission.”<sup>50</sup> To ensure that a hypothetical receptionist loses their civil rights, the guide encourages employers to draft the job description for such an

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<sup>48</sup> FCA's *amici* are clear that they intend for employers to decide which employees lose their civil rights. See, e.g., Br. of *Amici Curiae* Jewish Coalition 15 (arguing that courts should “defer to religious organizations” regarding whether “employees' duties are ‘ministerial’”).

<sup>49</sup> See Alliance Defending Freedom, *Protecting Your Ministry from Sexual Orientation Gender Identity Lawsuits*, at 4 (Aug. 2016), <https://bit.ly/2U3RhPB>.

<sup>50</sup> *Id.* at 17. FCA's position thus would have the perverse effect of transforming a constitutional doctrine intended to protect churches' selection of their own ministers into a guidebook for how to escape liability by reallocating vital religious duties within religious organizations.

employee so that they are “required to answer basic questions about the church’s faith, provide religious resources, or pray with callers.”<sup>51</sup>

Similar advice can be found in materials prepared by Christian Legal Society, advising religious employers to design “[e]mployment documents” to “provide the biblical basis for the religious institutions understanding of the ministerial role the employee performs,” explaining that these “safeguards may be particularly helpful because a ‘ministerial’ position is generally exempt from federal and state anti-discrimination prohibitions.”<sup>52</sup> Such guidance<sup>53</sup> illustrates the ways in which manipulation of the ministerial exception will strip more and more employees—like a receptionist seeking time off based on her disability, a math teacher facing racial and sexual harassment, or a janitor paid less based on her national origin—of crucial civil rights unless courts carefully cabin the exemption.

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<sup>51</sup> *Id.* See also *id.* (“Consider putting forth a statement of expectations that all employees and volunteers participate in devotional or prayer time when offered, or even lead these on occasion on an as-requested basis.”).

<sup>52</sup> See Kim Colby, *Practical Steps that Religious Institutions Should Consider in the Post-Obergefell World*, THE CHRISTIAN LAWYER, Vol. 11, No. 2 at 23 (Dec. 2015), <https://bit.ly/2KX0Tei>.

<sup>53</sup> See also, e.g., First Liberty, *Liberty Institute Religious Liberty Protection Kit for Christian Schools: Guard Your School From Legal Attack* (2016), <https://bit.ly/3ia9WER>.

**CONCLUSION**

The Court should reject FCA’s request to turn the ministerial exception into a mere surface-level inquiry subject to manipulation, without regard to an employee’s actual duties. Inappropriately expanding the ministerial exception harms all workers, and especially those most vulnerable to discrimination, by eliminating critical civil rights protections. Because the record below does not establish as a matter of law that Mr. Tucker is a “minister” and thus stripped of his protections against racial harassment and retaliation for opposing race discrimination, the order of the District Court should be affirmed.

January 19, 2021

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 29(a)(4)(G) and 32(g)(1), I certify that this brief contains 6,450 words, excluding those parts exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), and thus complies with the word limits specified by Fed. R. App. P. 29(a)(5) and 32(a)(7)(b). The brief’s type size and typeface comply with Fed. R. App. P. 32(a)(5) and 32(a)(6).

Pursuant to 10th Cir. R. 25.5, I further certify that all required privacy redactions to this digital submission have been made.

I further certify that the hard copies of this brief to be submitted are exact copies of the version submitted electronically.

I further certify that this digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

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**CERTIFICATE OF SERVICE**

Pursuant to 10th Cir. R. 25.4 and Fed. R. App. P. 25(c), I hereby certify that on January 19, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 19, 2021

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