Nos. 19-267 & 19-348

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES MORRISSEY-BERRU,
Respondents.

ST. JAMES SCHOOL,
Petitioner,

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF NATIONAL WOMEN'S LAW CENTER, THE LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS, AND 68 OTHER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS MORRISSEY-BERRU AND BIEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF THE AMICI CURIAE[1]

Amici are organizations committed to civil rights, including women's rights, that seek to ensure the effective enforcement of our nation's anti-discrimination laws, consistent with the rights of religious employers under the First Amendment. A list of the sixty eight additional amici is provided in the Appendix.

The National Women's Law Center is a nonprofit legal advocacy organization founded in 1972 and is dedicated to the advancement and protection of the legal rights and opportunities of women and girls, and all who suffer from sex discrimination, including sexual harassment. The Center focuses on issues of key importance to women and their families, including economic security, employment, 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.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including those who face discrimination in the workplace. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in

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

Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

STATEMENT

1. Petitioner Our Lady of Guadalupe School hired respondent Agnes Morrissey-Berru to teach sixth grade as a lay teacher. Her job did not require her to be Catholic, and indeed, she was not a practicing Catholic. Resp. Br. 12-13. At the time she was hired, she had no religious training or certification. *Id.* 11. Nor did the school require her to obtain any religious training until 14 years into her tenure, when she took two catechist classes on church history. *Id*. 13; *Our Lady* Pet. App. 84a-85a. Her employment benefits were governed by the "Lay Employees Benefit Guide." Resp. Br. 12. The school gave Ms. Morrissey-Berru no religious title, and the teacher herself did not believe that her job was a religious calling. *Id.* 14-15. She taught her students many subjects, including reading, writing, science, social studies, and religion. *Id*. 13. She led her students in saying a Hail Mary once a day and took her students to weekly masses. *Our Lady* Pet. App. 86a-88a. Her students were required to lead mass periodically, and she helped them prepare, but she did not lead any religious service. Resp. Br. 46. She likewise, once a year, directed her students'

performance of a religious play. *Id*. 45-46. In 2014, the school's new principal refused to renew Ms. Morrissey-Berru's contract. Ms. Morrissey-Berru alleged the decision was founded in age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*., while the school argued the decision related to the budget and her teaching performance. Resp. Br. 14.

Respondent Kristen Biel likewise was hired as a lay teacher. She had no religious training, certification, or title when she was hired to teach at St. James School. *Id*. 7-8. Her job position did not require her to be Catholic, although she was. *Id.* 8-9. Ms. Biel's employment benefits were likewise determined according to the "Lay Employees Benefit Guide." *Id*. 9. Her title, "Grade 5 Teacher," conveyed no religious status. *Id.* 8. Her only religious training at the school was included as part of a single half-day conference that all the teachers attended. *Id*. 9. Like Ms. Morrissey-Berru, Ms. Biel taught a variety of topics, including religion. *Id.* She joined in student-led prayers and took her students to regular mass led by a priest or a nun. *St. James* Pet. App. 5a. In November 2013, "Biel received a positive teaching evaluation" from the principal. *Id.* 6a. The evaluation "also identified some areas for improvement: for instance, Ms. Biel's students had many items on their desks and two students were coloring in the pages of their books." *Id*. Later that school year, Ms. Biel informed the school that she had breast cancer and would need time off for surgery and chemotherapy. *Id*. A few weeks later, St. James informed Ms. Biel that it would not renew her contract, first citing that it wouldn't be fair for the students to have two teachers in one year, and then

later citing alleged inadequacies in "classroom management." *Id*. 6a-7a.

Ms. Biel filed suit, alleging disability discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. Ms. Biel passed away in the summer of 2019 after a five-year fight with breast cancer and her husband, Darryl Biel, is now the plaintiff taking her case forward. Resp. Br. 15 n.5.

2. Petitioners argue that both suits must be dismissed without inquiry into the reasons for these terminations because, they claim, both teachers were "ministers" subject to the "ministerial exception" this Court recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). In that case, this Court held that the First Amendment precludes the government from "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so." *Id*. at 188. It further held that the exception "is not limited to the head of a religious congregation" and applied the doctrine to an employee who had formally accepted a call to religious service and was serving as a teacher. *Id*. at 190-91. The Court declined, however, "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id*. Instead, the Court held that the exception covered the particular religious school teacher in the case before it "given all the circumstances of her employment." *Id*. The Court identified four considerations that, taken together, led it to that conclusion.

First, the church held the teacher "out as a minister, with a role distinct from that of most of its members." *Id*. at 191. For example, the church

"extended her a call," "issued her a 'diploma of vocation,'" and gave "her the title, 'Minister of Religion, Commissioned." *Id*.

Second, the teacher's "title as a minister reflected a significant degree of religious training followed by a formal process of commissioning." *Id*. This included "eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher." *Id*. After completing her training, the teacher "was commissioned as a minister only upon election by the congregation." *Id*.

Third, the teacher "held herself out as a minister of the Church by accepting the formal call to religious service" and by claiming a federal tax deduction available only to those engaged in "the exercise of the ministry." *Id*. at 191-92 (citation omitted).

Fourth, the teacher's "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id*. at 192. She "taught her students religion four days a week, and led them in prayer three times a day." *Id*. She not only took her students to chapel services, but also led those services on occasion, "choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible." *Id*.

In summing up its conclusion, the Court listed all four considerations without giving special weight to any one factor. *See id*.

The principal question in this case is whether the Court should abandon this totality-of-the-circumstances approach and adopt, instead, petitioners' proposed "important religious functions"

test. *See, e.g.*, Petr. Br. i. Under that test, any employee who can be said to perform any "important" religious function will automatically be classified as a "minister" and stripped of the civil rights protections afforded to workers under our laws. *Id.* 3-4.

SUMMARY OF ARGUMENT

The ministerial exception affords religious employers[2] an extraordinary immunity at great cost to their employees and society at large. When appropriately cabined, those costs are justified by the First Amendment's insistence that the government "have no role in filling ecclesiastical offices." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 184 (2012). When extended beyond its constitutional roots, however, the exception exacts a costly toll from employees who are denied rights of the highest order, often without the employer even asserting that complying with the law would burden its First Amendment interests.

Petitioners ask this Court to abandon the totality-of-the-circumstance test it adopted in *Hosanna-Tabor* just eight years ago in favor of an "important religious function" test that will necessarily expand the scope of the exception, even while entangling courts in debates about what functions count as religious and important. The proposed test also invites manipulation, offering religious employers complete immunity from civil rights claims so long as they assign their employees some modicum of religion-

[2] 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.

related responsibility. Indeed, some have already advised religious employers wishing to avoid civil rights claims to require, for example, support staff to take part in some religion-related activities for just this purpose. Additionally, employees are not provided with notice that they are being considered "ministers" by their employers, and therefore stripped of all of their civil rights in the workplace.

This case also arises against the backdrop of persistent efforts by employers to expand not only the universe of employees who count as "ministers" but also the kinds of claims precluded by that classification (including sexual harassment, equal pay, family and medical leave, and wage and hour suits) and the types of employers who seek to claim the exception (including large hospitals and nursing homes). These expansions of the ministerial exception would dramatically increase the number of employees denied civil rights protections.

Women, people of color, older workers, workers with disabilities, lesbian, gay, bisexual, transgender and queer (LGBTQ) workers, immigrant workers, and those with multiple and intertwining identities will be acutely harmed if the Court allows expansive immunity from civil rights protections without the full analysis required by *Hosanna-Tabor*. This Court should retain *Hosanna-Tabor*'s totality-of-the-circumstances test as a check against unwarranted or insincere claims that an employee is somehow a minister because of her occasional religion-related responsibilities. As respondents demonstrate, under the established test, neither qualifies as a minister and both are entitled to pursue their civil rights claims.

ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), this Court recognized a broad immunity for religious employers against claims of civil rights violations by a limited class of employees falling within a "ministerial exception." To fit respondents Biel and Morrissey-Berru within that category, petitioners urge the Court to jettison the totality-of-the-circumstances test this Court adopted in *Hosanna-Tabor* and instead ask only whether respondents performed "important religious functions" as part of their jobs. Petr. Br. 45. This Court should reject that request.

I. The Ministerial Exception Must Be Carefully Cabined To Avoid Unnecessary Infringement On Important Civil Rights.

The ministerial exception provides a far-reaching immunity and thus must be carefully administered and cabined.

A. The Ministerial Exception Departs Substantially From The Way In Which First Amendment Rights Are Ordinarily Analyzed.

The ministerial exception departs markedly from how the Court has long resolved conflicts between the First Amendment's Religion Clauses and generally applicable state and federal laws, including civil rights statutes.

Ordinarily, the First Amendment does not 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). And even in the rare situations in which such exceptions are considered, this Court weighs the burden imposed on First Amendment interests against the countervailing governmental interests advanced by the statute. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Ordinarily, moreover, 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 First Amendment norms. Not only does it provide an exception from generally applicable civil rights laws, it does so without any 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 countervailing interest in avoiding the harm unchecked discrimination imposes on employees and society more broadly. *See id*. at 181-90.

B. The Ministerial Exception Achieves Its Ends At Enormous Cost.

The extraordinary immunity the ministerial exception provides comes at great cost to employees and society at large. As detailed below, women, people of color, older workers, workers with disabilities, LGBTQ workers, immigrant workers, and those with multiple and intertwining identities continue to face employment discrimination at alarming rates, despite the decades of civil rights protections enshrined in our laws. Any curtailing of these protections will severely harm these communities in particular.

Sex Discrimination. Federal, state, and local law prohibit discrimination in employment on the basis of sex. This can include sexual harassment,

discrimination based on whether, how, and with whom to start a family, unequal pay, and how one conceptualizes one's own identity. As detailed herein, expanding the ministerial exception will greatly impede legal protections against sex discrimination. Despite being excluded from serving as ministers in some religions, women overwhelmingly pay the price of the ministerial exception, given that women comprise the vast majority of elementary and secondary teachers.

While the law protects employees against sexual harassment, such incidents are distressingly common in this nation's workplaces.[3] Workers who face sexual harassment are often additionally targeted because of other parts of their identity, including their status as an African American, Latina, Asian American or Pacific Islander, or Native American woman; as a woman with a disability; as a lesbian or transgender woman; or as a man who does not conform to sex stereotypes. In every industry, African American women file sexual harassment charges at a rate higher than their presence in the workforce for that industry, suggesting that they are especially likely to experience sexual harassment.[4]

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[3] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC 8 & n.15 (June 2016), https://bit.ly/2wN7D7e.

[4] Amanda Rossi, Jasmine Tucker, Kayla Patrick, Nat'l Women's Law Ctr., *Out Of The Shadows: An Analysis Of Sexual Harassment Charges Filed By Working Women* 25-26 (Aug. 2018), https://bit.ly/3cJsBUV.

In this context, it is alarming that some employers have persuaded courts that the ministerial exception precludes any civil recourse for employees experiencing sexual harassment. *See, e.g., Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1244-46 (10th Cir. 2010); *Alicea–Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003). Conditioning a teacher's continued employment on submitting to sexual harassment, including assault, or terminating her for complaining about it, inflicts great personal and societal harm. And depriving teachers of any legal protection against such harassment not only deprives these employees a remedy, but inevitably prolongs the abuse and often puts others at risk of similar mistreatment.

Title VII and the Equal Pay Act prohibit discrimination based on unequal pay, and women of color face compounded discrimination in this context as in others.[5] Federal protections against sex discrimination also prohibit discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 2 U.S.C. § 2000e(k). Employees who are pregnant may seek reasonable accommodations under the law so they don't have to choose between a healthy pregnancy and maintaining their paychecks.[6] Federal law also protects employees who need lactation accommodations[7] and prohibits

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[5] *See* Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why, And What To Do* 1 (Sept. 2019), https://bit.ly/2vbqSXA.

[6] *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228-31 (2015); Nat'l Women's Law Ctr., *Pregnancy Accommodations in the States* 1-4 (Sept. 2019), https://bit.ly/2TWTOLo.

[7] *See* 29 U.S.C. § 207(r).

employers from discriminating against employees because they have become pregnant,[8] have used assisted reproductive technology,[9] or have obtained abortion care.[10] Laws also prohibit sex discrimination against individuals connected to their sexual orientation or gender identity, as well as discrimination based on sex stereotypes.[11]

The ministerial exception would deny protections against sex discrimination to LGBTQ people, regardless of whether an employer's First Amendment interest is burdened. For generations, LGBTQ people have experienced widespread discrimination in

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[8] *Int'l Union v. Johnson Controls, Inc*., 499 U.S. 187, 206 (1991).

[9] *See, e.g.*, *Hall v. Nalco Co*., 534 F.3d 644, 648-49 (7th Cir. 2008).

[10] *See, e.g.*, *Doe v. C.A.R.S. Prot. Plus, Inc*., 527 F.3d 358, 364 (3d Cir.), *order clarified*, 543 F.3d 178 (3d Cir. 2008); *Turic v. Holland Hosp., Inc*., 85 F.3d 1211, 1213–14 (6th Cir. 1996) (same); 29 C.F.R. Pt. 1604 App.

[11] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding Title VII's prohibition on sex discrimination applies to discrimination based upon sex stereotypes); *see also Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 623, 628-29 (1986) (allowing state proceeding regarding whether religious school violated anti-discrimination provisions by failing to renew a pregnant employee's contract because of view that mothers should stay at home with young children). While this Court is presently deciding whether to include or exclude LGBTQ workers from our federal protections against sex discrimination, regardless of the outcome of those cases, the ministerial exception would strip teachers of the protections many state and local laws explicitly afford against such discrimination.

employment.[12] This pernicious mistreatment, ranging from crude harassment to termination, continues today, including in the education sector.[13] Lesbian, gay, and bisexual workers report suffering adverse job treatment at rates 50 percent higher than heterosexual workers.[14] And, 30 percent of transgender workers report suffering adverse workplace treatment due to their gender identity and more than 75 percent had taken steps to avoid mistreatment, such as hiding or delaying their gender transition.[15]

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[12] Lillian Faderman, *A Forty-Year War: The Struggle for Workplace Protection* in THE GAY REVOLUTION: THE STORY OF THE STRUGGLE 564-580 (2015); Eric Marcus, MAKING GAY HISTORY: THE HALF CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS (2002); Annette Friskopp & Sharon Silverstein, STRAIGHT JOBS GAY LIVES (1995).

[13] Sandy E. James et al., Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 147-156 (Dec. 2016) ("*U.S. Trans Survey*"), https://bit.ly/39E73a7; Ilan H. Meyer, Williams Inst., UCLA School of Law, *Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US* 1 (April 2019) ("*Experiences of Discrimination among LGB People*"), https://bit.ly/2TMwlw0; 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); *see also* Lambda Legal Testimony for the House Committee on Education and Labor in Support of the Equality Act, H.R. 5, at 5-6 (Apr. 22, 2019), https://bit.ly/39DQLhw.

[14] Meyer, *Experiences of Discrimination among LGB People*, *supra* n.13.

[15] James et al., *U.S. Trans Survey*, *supra* n.13, at 148.

This discrimination has many harmful effects, including disproportionate poverty[16] and related problems, such as homelessness[17] and food insecurity,[18] as well as significant adverse health impacts.[19]

Thus, the ministerial exeption must be carefully cabined so as to not increase the already immense harms of sex discrimination in our nation's workplaces. Additionally, women of color, women with disabilities, older women, LGBTQ women, and immigrant women would also face increased and compounded discrimination if the ministerial exception is not appropriately contained by this Court.

Race Discrimination. Race discrimination in employment also remains painfully prevalent in this country. One-third of all charges filed with the Equal

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[16] James et al., *U.S. Trans Survey*, *supra* n.13, at 144 (finding 29 percent of respondents living in poverty, more than twice the rate for the general U.S. population); Badgett et al., *supra* n.13, at 587-88 (similar).

[17] True Colors Fund & National LGBTQ Task Force, *At the Intersections: A Collaborative Report on LGBTQ Youth Homelessness* (2019), https://bit.ly/3cOx3BV; James et al., *U.S. Trans Survey*, *supra* n.13, at 175-182 (finding 30 percent of respondents had experienced homelessness at some point, and 70 percent of those who had stayed in a shelter during the prior year reported mistreatment due to being transgender).

[18] Taylor N. T. Brown et al., Williams Inst., UCLA School of Law, *Food Insecurity and SNAP Participation in the LGBT Community* 2-3 (July 2016), https://bit.ly/2xsWXLh.

[19] 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.

Employment Opportunity Commission in Fiscal Year 2019, for example, raised race discrimination claims.[20] A 2017 study found that 56 percent of African Americans indicated that they had been discriminated against in applying for jobs, and 57 percent of African Americans indicated that they had been discriminated against when it came to being paid equally or considered for promotion.[21]

Other workers of color including Latinx, Native American, and Asian American workers, also face significant workplace discrimination. For example, more than three in ten Latinos report having experienced workplace discrimination when it comes to applying for jobs (33 percent), or being paid equally or considered for promotion (32 percent).[22] Almost one-third of Native Americans report being discriminated against when it comes to being paid equally or considered for promotion (33 percent) or applying for jobs (31 percent).[23] Further, a quarter or more of Asian

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[20] *See* U.S. Equal Emp't Opportunity Comm'n, *Charge Statistics FY1997 Through FY2019*, https://bit.ly/2W0tdPR (last visited March 9, 2020).

[21] *See* Nat'l Public Radio et al, *Discrimination in America: Experiences and Views of African Americans* 1 (Oct. 2017), https://n.pr/2TS3jve.

[22] *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.

[23] *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. 17, 2017), https://bit.ly/2v67ZoL.

Americans indicate they were discriminated against when it came to applying for jobs (27 percent) or being paid equally or considered for promotion (25 percent).[24] A 2019 study indicates that 26 percent of Latinos and 29 percent of Asian Americans and Pacific Islanders have been treated unfairly in hiring, pay, or promotion.[25]

For people of color, the impact of race discrimination can be severe. Systemic inequality in healthcare and education, the impact of mass incarceration, and discriminatory financial practices, such as redlining, have created a significant racial wealth gap in this country that has resulted in persistent intergenerational poverty for certain communities of color. White Americans had 10 times the median wealth of African Americans in 2016.[26] Thus, when a person of color loses a job, he or she is less likely to have resources and networks to help meet basic needs. Unsurprisingly, then, the stress that results from being unemployed is not experienced equally across races. For example, a study found that losing employment takes a much bigger toll on the

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[24] *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.

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

[26] *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.

mental health of African Americans than whites.[27] The ministerial exception creates the potential for such discrimination and discriminatory effects to take place with impunity.

In the education context, any reduction in the racial diversity of a school's educators can also have far-reaching consequences for students, particularly students of color. Studies have found that students of color with at least one same-race teacher perform better on standardized tests, have better attendance rates, and are suspended less frequently.[28] Despite gains in teacher diversity, teachers of color are still underrepresented in the workforce. A 2011 report estimated that over 40 percent of public schools did not employ even one teacher of color.[29] Nationally, students of color make up 40.7 percent of the public school population, yet African American and Latino teachers represent only 14.6 percent of the teaching workforce.[30] Retention rates for teachers of color are also significantly lower than for white teachers. In

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[27] Randall Akee, *Black Americans Suffer the Most Stress From Job Loss*, REALCLEARMARKETS (Aug. 21 2018), https://bit.ly/39AI2N6.

[28] *See, e.g.*, 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., DP No. 10630, at 2-3 (Mar. 2017), *available at* http://ftp.iza.org/dp10630.pdf.

[29] *See* Michael Hansen & Diana Quintero, *Teachers in the US are even more segregated than students*, BROOKINGS (Aug. 15, 2018), https://brook.gs/3cM3UqH.

[30] Saba Bireda & Robin Chait, Ctr. For Am. Progress, *Increasing Teacher Diversity: Strategies to Improve the Teacher Workforce* 1 (Nov. 2011), https://ampr.gs/335GYOX.

addition, there is evidence that a diverse teacher workforce—by offering new and valuable perspectives—benefits all students, not just students of color.[31] Expanding the ministerial exception could deprive our society of the many educational benefits of having a diverse group of teachers in our schools.

National Origin Discrimination. The ministerial exception also extinguishes workers' protection from national origin discrimination, a result that is particularly harmful for immigrants. In addition to prohibiting outright refusal to hire those born abroad, for example, federal law protects against discrimination and harassment based on an employee's ethnicity.[32] Title VII "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[33] Immigrants can be particularly vulnerable to workplace abuse, including sexual harassment, discrimination based on race, ethnicity, or national origin, wage theft, and retaliation. Yet, as discussed below, petitioners' "important religious functions" test threatens to deprive particularly low-wage immigrant workers of recourse for such abuses, so long as the employer assigns them even minimal tasks that could be viewed as importantly religious. *See infra* 22-23 (cataloging cases in which ministerial

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[31] *See* Melinda D. Anderson, *Why Schools Need More Teachers of Color—for White Students*, THE ATLANTIC (Aug. 6, 2015), https://bit.ly/2xrMm3j.

[32] *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).

[33] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973).

exception has been asserted, sometimes successfully, against claims of receptionists, custodians, and secretaries).

Disability Discrimination. Depriving teachers, such as Ms. Biel, of protection from disability discrimination is extremely harmful as well. Congress enacted the Americans with Disabilities Act (ADA) in response to abundant evidence that discrimination on the basis of disability in employment and other areas had left individuals with disabilities "severely disadvantaged socially, vocationally, economically, and educationally . . . ." 42 U.S.C. § 12101(a)(6). 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," *id*. § 12101(a)(1), remains true whether a teacher with a disability is employed by a public, private secular, or religious school.

The factors affecting employment opportunities for individuals with disabilities are complex,[34] but research makes clear that stigma and discrimination play a role. One study found that employers were less likely to respond to applications from job candidates who disclosed disabilities, even when the candidates had equivalent qualifications.[35] As a result of such

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[34] *See generally* Azza Altiraifi, *Advancing Economic Security for People with Disabilities*, CTR. FOR AM. PROGRESS (July 26, 2019), https://ampr.gs/331ToaA; NAT'L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT (Oct. 2017), https://bit.ly/2vRpwBz.

[35] Mason Ameri et al., *The Disability Employment Puzzle: A Field Study on Employer Hiring Behavior* 2 (Nat'l Bureau of

discrimination, in combination with other structural barriers to employment and economic security, people with disabilities—including women and people of color—typically have lower incomes and face a higher risk of poverty and economic hardship than people without disabilities.[36]

The human toll of disability discrimination is illustrated by the facts as presented by Ms. Biel. She was fired soon after telling her employer she had breast cancer and would require medical leave to undergo chemotherapy. She was denied the financial stability the ADA was intended to provide and instead lost her job and her income. Rather than focusing on treatment and recovery, her trauma was aggravated by the stress of joblessness and all that it entails.

Age Discrimination. Denying employees protection against age discrimination also imposes a great cost. Frequently, when an older worker like Ms. Morrissey-Berru loses a job due to age discrimination, the injury is compounded by the difficulty in finding new work. "Statistics show that older workers have far more difficulty finding new jobs than their younger counterparts." *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 374 n.6 (3d Cir. 1987). For example, the rate of receiving callback interviews is substantially lower for older applicants, especially older female applicants. In administrative assistant and sales jobs alone, female applicants over the age of 60 were called back 47 and

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Econ. Research, Working Paper No. 21560, 2015), https://www.nber.org/papers/w21560; *see also, e.g.,* NAT'L COUNCIL ON DISABILITY, *supra* n.34, at 52-54.

[36] *See generally* NAT'L COUNCIL ON DISABILITY, *supra* n.34, at 21-23.

36 percent less often, respectively, than younger female applicants.[37] Moreover, even when older employees do find work, it is often at a much lower salary. *Blum*, 829 F.2d at 374 n.6.

Retaliation. In *Hosanna-Tabor*, this Court applied the ministerial exception to preclude enforcement of the ADA's anti-retaliation provision. 565 U.S. at 195. Eliminating this protection for employees comes at a great cost for both employees and society at large, and this should also give this Court pause before further expanding the exception's reach.

As this Court has recognized, "[w]ithout protection from retaliation, individuals who witness discrimination would likely not report it" and "the underlying discrimination would go unremedied." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180-81 (2005). Accordingly, Congress has continuously forbidden employers from retaliating against workers who report allegations of civil rights violations. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 43 (2005). Nonetheless, every year the EEOC receives tens of thousands of retaliation charges, more than any other kind of complaint.[38]

The cost of eliminating anti-retaliation rights 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*,

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[37] Edith S. Baker, *Is there age discrimination in hiring?*, U.S. BUREAU OF LABOR STATISTICS (Apr. 2017), https://bit.ly/3cMLO7Y.

[38] *See* U.S. Equal Emp't Opportunity Comm'n, *supra* n.20.

544 U.S. at 180-81 (giving example of teacher reporting principal's sexual harassment of a student). Teachers may be positioned to report suspected child abuse, and must be able to do so without fear of retaliation. However, if every teacher, even those with minimal religion-related job duties, reports suspected abuse at her peril, that important protection for children would be greatly undermined. Yet, as discussed next, that is the position some employers are advancing, consistent with petitioners' proposed "important religious functions" test.

Finally, petitioners' position also calls into question whether the government can protect ministers from being fired for instituting or cooperating with *any* government investigation, including into what may be criminal conduct. *Cf., e.g.*, *Teacher Says She Was Fired for Reporting on Student Abuse*, MICH. LAW. WKLY. (May 3, 2010) (reporting on lawsuit alleging that teacher was fired by school after reporting suspected sexual abuse of students in their homes and foster homes), https://bit.ly/39y2iyZ.

C. Employers Are Continually Pressing To Expand The Ministerial Exception.

While these cases ask what kinds of employees are subject to the ministerial exception, the Court should be aware that this question arises against the backdrop of repeated efforts by employers also to expand both the kinds of employers and the categories of claims covered by the exception. Those efforts highlight the likely costs and consequences of accepting petitioners' proposed expansion of the ministerial exception to additional categories of employees, employers, and claims.

Kinds of Employees. Although the two cases here involve religious school teachers, employers have asserted the exception against secretaries and receptionists,[39] other administrative or support staff,[40] computer technicians,[41] facilities workers,[42] and college professors without any ties to the organization's religious mission.[43] *See also EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. Unit A July 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) (employer asserted ministerial exception against white church "typist-receptionist" allegedly fired for "maintaining a casual social relationship" with an African American man).

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[39] *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) (church receptionist and secretary subject to sexual harassment).

[40] *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).

[41] *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355 at *1, *4 (S.D. Ohio Jan. 30, 2013) (same for "computer technology coordinator").

[42] *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. Penn. 1991) ("Director of Plant Operations" at religiously affiliated hospital).

[43] *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1143-46 (D. Or. 2017) (assistant "professor of exercise science").

Kinds of Claims. Religious employers also regularly argue that "any claim brought by a minister against a church is barred by the ministerial exception." *Demkovich v. St. Andrew the Apostle Parish*, 343 F. Supp. 3d 772, 779 (N.D. Ill. 2018) (addressing religious school's reliance on *Alicea-Hernandez*, 320 F.3d at 703 ("The 'ministerial exception' applies without regard to the type of claims being brought.")).

As discussed, this includes asserting the ministerial exception against claims of sexual harassment. *See supra* 9-14. It also includes other laws governing how employees are treated once they are hired. *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 the overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*)[44]; *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700, 706-07 (S.D. Ohio 1990) (Equal Pay Act claims); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (same); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No.

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[44] *See also* Dep't of Labor, Opinion Letter, FLSA2018-29 at 2-4 (Dec. 21, 2018) (Department of Labor indicating its view that the FLSA does not apply to employees who fall under the ministerial exception).

Civ.A 05-CV-0404, 2005 WL 2455253 at *1, *6-9 (E.D. Penn. Oct. 5, 2005) (Family and Medical Leave Act).

Petitioners identify no limiting principle to preclude expansion of the ministerial exception doctrine to other workplace protections. For example, federal law protects employees from dangerous workplace conditions under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq*., as do innumerable state and local laws. And state law often regulates the qualifications of employees, including teachers, and imposes other obligations that could be said to interfere with a religious school's "authority to select and control who will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 195; *see also* U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009).[45]

Given these efforts by employers to expand the ministerial exception doctrine without bounds, it is all the more critical that this Court cabin the exception and reaffirm that it is limited to hiring and firing decisions.

Kinds of Employers. Courts have likewise confronted efforts to apply the ministerial exception beyond churches and religious schools to a wide range of entities including hospitals,[46] nursing homes,[47]

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[45] *Available at* https://bit.ly/2W03bwc.

[46] *See, 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).

[47] *Shaliehsabou*, 363 F.3d at 309-11.

rehabilitation centers,[48] and publishers[49] on the basis of claimed religious affiliations. The universe of entities that may lay claim to the ministerial exception's immunity is vast and expanding. *See, e.g.*, Christrine Bové, *Should Your Church Start a Business?*, OUTREACH MAGAZINE (July 7, 2019), https://bit.ly/2TAKqhe (describing trend of churches starting business to provide revenue and ministry opportunities, such as coffee shops, bookstores, restaurants, hotels, real estate, retail, media production companies, and more).

Finally, these claims take place in the broader context of courts analyzing whether purely commercial businesses may exempt themselves from civil rights laws on the ground that compliance interferes with the owners' exercise of religion. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566, 581-83 (6th Cir. 2018) (refusing to apply the ministerial exception to a "closely held for-profit corporation that operates three funeral homes in Michigan").

II. The Court Should Reject Petitioners' Attempt To Revise The Test For The Ministerial Exception.

Petitioners seek an expansive application of the ministerial exception, arguing that "where a plaintiff has important religious functions, the ministerial exception applies." Petr. Br. 36. Although they hold

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[48] *Schleicher v. Salvation Army*, 518 F.3d 472, 475-78 (7th Cir. 2008).

[49] *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1277-78 (9th Cir. 1982).

open the possibility that factors other than the employee's religious functions could play a role in some unusual cases, *id*. 2-3, petitioners argue that in the typical case, "the functional analysis will provide the rule of decision," *id*. 3. And in the specific context of religious schools, they insist that the employees' function is determinative. *Id*. 4.

Petitioners then offer a broad, non-exhaustive list of what counts as "important religious functions," *see id*. 41-44, insisting that in the religious school context it includes "at the very least," not only "teaching religion," but also "leading students in prayer, taking students to worship services, occasionally leading those worship services, and leading students in devotional exercises," *id*. 42. Remarkably, petitioners suggest that it makes no difference whether the duties are a significant part of the teacher's job—it is enough that they engage in *any* of these functions for *any* amount of time. *Id.* 42-44. Moreover, no other feature of the teacher's employment—such as whether the school requires that the teacher be a member of the faith, whether the school views the religious component of the job as sufficiently important to warrant religious training, the "formal title given [the teacher] by the Church, the substance reflected in that title, or [the teacher's] own use of that title," *Hosanna-Tabor*, 565 U.S. at 192—is sufficient to exclude a teacher from the exception. *See* Petr. Br. 45.

As respondents explain, that position cannot be reconciled with the Court's decision in *Hosanna-Tabor*. *See* Resp. Br 39-49. It would also threaten to dramatically expand the scope of the exception far beyond its original understanding, even while inviting

manipulation by employers and risking religious entanglements by courts.

A. Petitioners' Position Could Dramatically Expand The Universe Of Employees Who Would Be Denied Their Basic Civil Rights.

All of the *Hosanna-Tabor* factors petitioners urge the Court to sideline—*e.g.*, whether a teacher has a religious title or training—operate to limit the kinds of employees subject to the exception. Getting rid of them, thus, would inevitably expand the number of employees stripped of civil rights protection.

At the same time, petitioners' interpretation of the one factor they would retain—whether the teacher performs an "important religious function"—expands the category of "ministers" beyond recognition. As petitioners' proposed list of "important religious functions" for schoolteachers illustrates, the catalog of responsibilities an employee may occasionally undertake that help advance the religious goals of an organization is vast. It includes, for example, the simple physical act of "taking students to worship services," Petr. Br. 42, something a bus driver could equally be said to do. And petitioners would seemingly avoid any scrutiny of how often a teacher engages in a particular religious function. *See id*.

Moreover, once courts go down the road of giving decisive weight to the "important religious function" factor, the list of what counts as an important religious function will be difficult to contain. For example, in their Statement of the Case, petitioners emphasize that for "faculty and staff at Our Lady, '[m]odeling . . . Catholic religious and moral values [is] considered

[an] essential job dut[y].'" *Id*. 10 (quoting *Our Lady* Pet. App. 55a) (emphasis omitted). Petitioners omit this modeling function in their list of important religious functions in the Argument section of their brief. *See id*. 42. But even if petitioners do not believe that this "essential job duty" is an important religious function, surely other religious groups will claim that it is. *See, e.g.*, *EEOC v. Miss. College*, 626 F.2d 477, 485 (5th Cir. 1980) (rejecting religious university's claim that all its faculty are ministers because they "are expected to serve as exemplars of practicing Christians").

Accordingly, a religious school might claim that *all* of its teachers of *every* topic, as well as most or all of its non-teaching staff, perform important religious functions and therefore are subject to the ministerial exception. *Cf.* Petr. Br. 10 (at Our Lady, modeling Catholic teachings is an obligation of both "faculty and staff"). Such an expansion would come at great cost to the employees at these schools, their families, and their students. For example, petitioners' position would allow a school to fire a math teacher for no reason other than that she has cancer. And their position may well subject a school receptionist or custodian to pervasive sexual or racial harassment by supervisors without any civil rights remedy. This position could even allow a religious school to pay one employee less than another based on sex, race, or national origin. Petitioners cite to nothing in the First Amendment or its history that countenances such results.

B. Petitioners' Test Invites Manipulation And Risks Entangling Courts In Religious Debates Over What Counts As An "Important Religious Function."

Placing near-exclusive weight on whether an employee performs an "important religious function" also invites manipulation by employers and precisely the kind of entanglement with religion the exception was designed to prevent. By contrast, even if the Court viewed an employee's religious function as a key consideration, examination of other formal aspects of the employment relationship provides an important check against manipulation and objective confirmation that a church itself views an employee as a faith leader to which the ministerial exception properly applies.

1. If giving an employee the responsibility to engage in a religious task on occasion is all it takes to insulate the employer from employment discrimination and other workers' rights claims, the Court should expect that many employers will do so. For example, the Alliance Defending Freedom, in conjunction with the Lutheran Church Missouri Synod, has produced a guide for "Congregations, Schools, and Ministries," to help "prepare for the legal intrusions" some may face from civil rights and other lawsuits.[50] This guide advises that when "feasible, a religious organization should assign its employees and/or volunteers duties that involve ministerial,

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[50] *See* Alliance Defending Freedom, *Protecting Your Ministry from Sexual Orientation Gender Identity Lawsuits* (Aug. 2016), https://bit.ly/2U3RhPB.

teaching, or other spiritual qualifications – duties that directly further the religious mission." *Id*. at 17.

This guidance illustrates the ways in which the ministerial exception could be manipulated to strip more and more employees of crucial civil rights protections. And, as noted earlier, religious employers have already tried to invoke the ministerial exception against all manner of employees, including receptionists, secretaries, custodians, and others, on similar grounds. *See supra* 22-23.

At the very least, accepting petitioners' position will have the perverse effect of rendering a constitutional doctrine driven by a concern to avoid judicial interference with the internal management of houses of worship into a force that will itself exert substantial influence over how religious responsibilities are distributed within religious organizations. *Cf.* Petr. Br. 24-25 (agreeing that test should not put "pressure on religious groups" to structure themselves "'with an eye to avoiding litigation'") (quoting *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)). While courts could attempt to prevent manipulation, or reduce its effect, by limiting what counts as a truly "important religious function," that could create its own entanglement problems.

2. The factors the Court considered in *Hosanna-Tabor*, which petitioners attempt to avoid, provide an important, objective check on spurious invocations of the ministerial exception without requiring courts to second-guess the claims of a house of worship or its affiliated school.

For example, the fact that a school calls an employee a "minister," and that the employee undertook religious training and examination to obtain that title, may reflect a church's view that the teacher has the kind of relationship to a church the ministerial exception is intended to protect. *See Hosanna-Tabor*, 565 U.S. at 192-93; *see also. id*. at 197-98 (Thomas, J., concurring) (looking to all the factors to determine whether religious school "sincerely considered [the teacher] a minister").

On the other hand, when a religious employer does not deem an employee's religious function important enough to warrant investment in religious training or certification; when it does not hold the person out to the world as having a special religious role through the person's title, including when they have such titles for others they employ; or when it does not even require that the employee share the institution's faith, these are objective indications that the religious employer itself does not view the employee as having a sufficiently "important religious function" to warrant classifying her as a minister.

Examining all relevant evidence also provides additional assurance that the religious function is real and that its assignment to the employee is a genuine reflection of the religious organization's judgment on how to organize its religious work, rather than a post-hoc justification invented for litigation, or a line thrown into a job description to insulate the employer from civil rights claims. Additionally, requiring some objective indicia that the employer considers the worker a minister provides prospective employees critical notice that taking a lay teaching position means losing basic workplace civil rights protections.

* * *

For the foregoing reasons, the Court should adhere to its existing precedent and reject petitioners' attempts to substantially expand the scope of the ministerial exception to lay teachers. This Court should apply the *Hosanna-Tabor* factors so that women, people of color, older workers, workers with disabilities, LGBTQ workers, immigrant workers, and those with multiple and intertwining protected identities, are afforded critical civil rights protections. For the reasons set forth here and in respondents' brief, under the applicable test, neither of the workers here is a minister and neither should be deprived of her important civil rights protections.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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March 11, 2020

APPENDIX

List of Amici

American Association of People with Disabilities
American Association of University Women
American Federation of Teachers, AFL-CIO
Atlanta Women for Equality
Bazelon Center for Mental Health Law
California Women Lawyers
Center for Constitutional Rights (CCR)
Center for Popular Democracy
Champion Women
Chicago Alliance Against Sexual Exploitation
Clearinghouse on Women's Issues
Coalition of Labor Union Women
Colorado Women's Bar Association
Disability Rights Advocates
Equal Rights Advocates
Equality California
Family Values @ Work
Feminist Majority Foundation
FORGE, Inc.
GLBTQ Legal Advocates & Defenders
GLSEN
Hadassah, The Women's Zionist Organization of America, Inc.

Harvard Law School Gender Violence Program

Human Rights Campaign

Interfaith Alliance

Justice for Migrant Women

KWH Law Center for Social Justice and Change

Lambda Legal Defense and Education Fund, Inc.

Legal Aid at Work

Legal Voice

Movement Advancement Project

NARAL Pro-Choice America

National Asian Pacific American Women's Forum (NAPAWF)

National Association of Social Workers (NASW)

National Association of Women Lawyers

National Center for Lesbian Rights

National Center for Transgender Equality

National Consumers League

National Council of Jewish Women

National Crittenton

National Education Association

National Employment Law Project

National Immigration Law Center

National LGBTQ Task Force

National Organization for Women Foundation

National Partnership for Women & Families

National Women's Political Caucus

National Workrights Institute

New York Lawyers for the Public Interest
Partnership for Working Families
People For the American Way Foundation
Public Justice
QLaw Foundation of Washington
Religious Coalition for Reproductive Choice
SAGE: Advocacy and Services for LGBT Elders
Service Employees International Union (SEIU)
SisterReach
The Afiya Center
The Leadership Conference Education Fund
The Women's Law Center of Maryland
Transformative Justice Coalition
Transgender Law Center
Unitarian Universalist Association
Virginia Sexual and Domestic Violence Action Alliance
Women Employed
Women Lawyers On Guard Inc.
Women's Bar Association of the State of New York
Women's Law Project