Nos. 19-267 & 19-348

In The Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

ST. JAMES SCHOOL,

Petitioner,

v.

DARRYL BIEL, as Personal Representative of the Estate of Kristen Biel,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE LUTHERAN CHURCH—MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AND QUEENS FEDERATION OF CHURCHES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. A Broad, Deferential Definition of "Minister" under the Ministerial Exception Ensures Religious Equality, Avoids Judicial Entanglement in Religious Questions, and Reflects the Original Meaning of the Religion Clauses 8

A. A Broad, Flexible Definition of "Minister" Ensures Equality Among Diverse Faiths 8

B. Anything Less than a Broad, Deferential Definition of "Minister" Invites Courts to Resolve Questions Concerning Who Will Lead a Religious Organization 10

C. Narrow Definitions of "Minister," Especially Through Requirements of Ministerial Education or Credentials, Were a Chief Evil that Helped Spur Adoption of the First Amendment 12

II. An Employee's Religious Function Should Be the Key Consideration in Defining Who Is a "Minister," and Where Such Religious Function Exists, No Ministerial Credentials, Training, or Title Should Be Required 17

TABLE OF CONTENTS—Continued

Page

A. Religious Function Should Be the Key Consideration in a Ministerial Exception Analysis, Understood with Deference to an Organization's Self-Understanding.... 18

B. Teachers in Religious Schools Can Serve Important Religious Functions, as These Cases Exemplify 19

C. When an Employee Has Important Religious Functions, There Should Be No Further Requirement that the Employee Have a Ministerial "Credential, Training," or Title 22

1. Requiring specific religious training, ordination, or "credentials" for a person to qualify as a minister would produce the same evils the Religion Clauses were meant to prevent..... 22

a. Ministerial training requirements harken back to unconstitutional government credentialing of ministers 23

b. Requiring ministerial training would discriminate against some religions 24

c. Requiring ministerial training would authorize judicial second-guessing of religious decisions.... 25

TABLE OF CONTENTS—Continued

Page

2. Reliance on an employee's formal title for purposes of applying the ministerial exception will create the same evils 26

3. The court of appeals created the same evils in ruling that the teachers here did not hold themselves out as ministers 28

III. These Teachers' Substantial Religious Functions Made Both of Them Ministers Within the Exception 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

American Legion v. American Humanist Ass'n, 139 S. Ct. 2067 (2019) 9

Biel v. St. James School, 911 F.3d 603 (9th Cir. 2018) 22

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 10, 12

Fratello v. Archdiocese of New York, 863 F.3d 190 (2d Cir. 2017) 32

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 17 (2012).....*passim*

Larson v. Valente, 456 U.S. 228 (1982) 8

Lemon v. Kurtzman, 403 U.S. 602 (1971).....19, 20

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).....19, 27

Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).....10

Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) 7

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 10, 11

Sterlinski v. Catholic Bishop of Chicago, 934 F.3d 568 (7th Cir. 2019).....21, 22, 26

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Isaac Backus, "An Appeal to the Public for Religious Liberty" (1773), reprinted in *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-89* (William G. McLoughlin ed. 1968).....14, 15

Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. L. Rev. Colloq. 175 (2011) 15

Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (1968).....15

Friends General Conference, *FAQs about Quakers*, https://www.fgcquaker.org/discover/faqs-about-quakers 24

Thomas S. Kidd & Barry Hankins, *Baptists in America: A History* (2015).....16

Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 *Letters and Other Writings of James Madison: 1769-1793* (1884)..... 15

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 13, 16

William G. McLoughlin, *New England Dissent 1630-1833: The Baptists and the Separation of Church and State* (1971).....13, 14

Jacob C. Meyer, *Church and State in Massachusetts* (1930).....14, 23

Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776 (2008) 30

INTEREST OF THE *AMICI CURIAE*[1]

Amici are religious educational and civil liberties organizations who agree that the principles underlying the First Amendment's ministerial exception are best served by applying the exception to all who perform significant or important religious functions on behalf of their religious organization. All *amici* agree that requiring additional court-approved indicia of ministerial status, such as titles, training, or other credentials, unconstitutionally invites judicial second-guessing of a religious organization's understanding of who may fulfill ministerial functions and discriminates against those faiths that eschew such offices or requirements.

Christian Legal Society is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 law schools. Since 1975, its Center for Law and Religious Freedom has worked to protect religious freedom.

The **American Association of Christian Schools** ("AACS") serves Christian schools and their students through a network of 38 state affiliate organizations and two international organizations. The AACS represents more than 750 schools nationally.

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[1] No counsel for a party or party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners filed a blanket consent with the Clerk, and Respondents' counsel of record provided written consent.

The **Association of Christian Schools International** ("ACSI") is a nonprofit association providing support services to 24,000 Christian schools that educate 5.5 million children in over 100 countries. ACSI serves 2,500 Christian pre-schools, elementary, and secondary schools and 90 post-secondary institutions in the United States.

The **Lutheran Church—Missouri Synod** ("the Synod") is an international Lutheran denomination with more than 6,000 member congregations and 2 million baptized members throughout the United States. In addition to numerous Synodwide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social service providers, K-12 schools, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately organized evangelical associations.

The **Queens Federation of Churches** is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. Over 390 local churches representing every major Christian

denomination and many independent congregations participate in the Federation's ministry.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012), this Court unanimously held that both the Free Exercise and Establishment Clauses "preclud[e] application of [nondiscrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." The Court applied the ministerial exception to dismiss a suit brought by a fourth-grade teacher at a Lutheran elementary school. The exception, the Court said, protects the "important . . . interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

In the two current cases, the Court of Appeals for the Ninth Circuit applied narrow judicial definitions of "minister" to frustrate religious groups' interest in "choosing who will . . . teach their faith" (*id.*). Both cases involve teachers at parish schools who play important roles in communicating the Catholic faith to students. Respondent Agnes Morrissey-Berru, a fifth-grade teacher, had "significant religious responsibilities," as the court of appeals acknowledged. *Our Lady of Guadalupe School v. Morrissey-Berru* (hereinafter "*Our Lady*") Pet. App. 3a. She "committed to incorporate Catholic values and teachings into her curriculum" and also "led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and

directed and produced a performance by her students during the School's Easter celebration every year." *Id.* "Most prominently, she taught daily religion classes," presenting Catholic doctrine, "every year of her employment." Pet'rs' Br. 11 (citing Pet. App. 81a, 90a, 93a).

Kristin Biel, also a fifth-grade teacher, had a similar role. She "taught lessons on the Catholic faith four days a week," "incorporated religious themes and symbols into her overall classroom environment and curriculum," and oversaw students engaging in daily prayers and monthly Masses. *St. James School v. Biel* (hereinafter "*St. James*") Pet. App. 12a, 5a.

Despite these significant religious responsibilities, the Ninth Circuit found that neither teacher was a minister. Instead, the court, first in *St. James* and then in *Our Lady*, focused on the fact that other considerations referenced by this Court in *Hosanna-Tabor*, 585 U.S. at 191-92, were, in its view, absent. Above all, the court of appeals said, the two teachers "did not have any religious credential, training, or ministerial background." *Our Lady* Pet. App. 3a; accord *St. James* Pet. App. 10a. Moreover, in the court's view, the employees' formal title of "Teacher"—"Grade 5 teacher" in Biel's instance—"was secular," not religious, and therefore the schools did not "hold [them] out" as ministers. *St. James* Pet. App. 11a-12a; *Our Lady* Pet. App. 2a. Finally, the court said, neither teacher "h[eld] herself out to the public as a religious leader or minister." *Our Lady* Pet. App. 3a; *St. James* Pet. App. 12a.

In short, under the court's logic, an employee's religious functions, even if significant, are not enough for

the ministerial exception to apply. The employee must also have what the court deems a minister-like title or other "credential, training, or ministerial background."

The Ninth Circuit's approach conflicts with basic principles underlying the Religion Clauses and with the original understanding of the evils the clauses were meant to prevent.

I. A broad, deferential definition of "minister" for purposes of the ministerial exception is necessary for several reasons. It ensures equality among religions with diverse understandings of leadership. It also avoids second-guessing a religious organization's understanding of who should teach the faith.

Moreover, and importantly, a flexible definition adheres to the original meaning of the Religion Clauses. Narrow definitions of "minister," especially in the form of education or credentialing requirements, were present in the founding era in both New England and Virginia: for example, colonial legislatures in both Massachusetts and Connecticut passed laws refusing to recognize ministers who lacked university courses or a degree. Such credentialing requirements were among the sorts of religious freedom violations that the Free Exercise and Establishment Clauses were meant to prevent.

II. Under these principles, an employee's "important religious functions" should be enough to qualify him or her as a "minister" under the ministerial exception. This criterion is flexible enough to protect the diverse views of different religious groups on

who should perform their key religious functions. This Court has recognized that religious-school teachers can perform important religious functions. Both Morrissey-Berru and Biel did so.

By contrast, requiring in addition some form of ministerial "credential," "training," or "title"—as the Ninth Circuit requires—produces the very evils the ministerial exception and the Religion Clauses are meant to prevent. It discriminates against groups that do not rely on such credentials or title for those who teach the faith; in particular, it discriminates against groups that rely on teachers in elementary and secondary schools to "convey[] the tenets of the faith to the next generation." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Moreover, it invites courts to second-guess those groups' decisions about who is qualified to carry out that critical process of communicating the faith.

ARGUMENT

In *Hosanna-Tabor*, the Court unanimously held not only that the ministerial exception is a constitutional mandate, but that Cheryl Perich, a fourth-grade teacher, was a "minister." This Court declined to "adopt a rigid formula" or definitive test for "when an employee qualifies as a minister." 565 U.S. at 190. But its unanimity suggests that Perich's position fell well within the exception's bounds, leaving ample room for other employees who "preach th[e] beliefs, teach th[e] faith, and carry out th[e] mission," *id.* at 196, to qualify

as well. In fact, three Justices concurred specifically to note that the ministerial exception should be applied broadly, not just to teachers similar to formally commissioned teachers in a Lutheran school. *Id.* at 198 (Alito, J., joined by Kagan, J., concurring); *id.* at 197 (Thomas, J., concurring).

The Ninth Circuit, however, assumed that the facts in *Hosanna-Tabor* set the outer bounds of the ministerial exception. The court distinguished teachers like Biel and Morrissey-Berru from those like Perich primarily because the first two lacked a formal religious title or "credentials, training, or ministerial background." *St. James* Pet. App. 10a; accord *Our Lady* Pet. App. 2a-3a.

This approach is fundamentally misguided. An employee's "important religious functions" should be the dominant factor and should suffice to qualify the employee as a minister. Other considerations like title, training, and credentials should not exclude an employee from the category of "minister" when that employee performs important religious functions.[2] This approach is necessary to preserve equality among diverse faiths, preclude judicial second-guessing of

[2] Although "important or significant religious function" should be the dominant consideration and should suffice to make one a minister, the other factors mentioned in *Hosanna-Tabor* are of course not irrelevant. They may be added to an employee's religious function to bolster a finding of minister status, as happened in *Hosanna-Tabor* itself. See 565 U.S. at 191-92. And a member of the ordained clergy is likely to qualify as a minister, with "no need to examine functions in detail." See Pet'rs' Br. 50 (citing *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008)).

ecclesiastical determinations, and adhere to the original understanding of the First Amendment.

I. A Broad, Deferential Definition of "Minister" under the Ministerial Exception Ensures Religious Equality, Avoids Judicial Entanglement in Religious Questions, and Reflects the Original Meaning of the Religion Clauses.

A broad, deferential definition of "minister" is necessary to fulfill the purpose of the ministerial exception: protecting "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196; see *id.* at 199 (Alito, J., concurring) ("religious groups must be free to choose the personnel who are essential to," among other things, "the critical process of communicating the faith"). Such a definition serves not only this core freedom, but two other basic Religion Clause principles: equality among religions and the prohibition on civil courts deciding questions of religious doctrine.

A. A Broad, Flexible Definition of "Minister" Ensures Equality Among Diverse Faiths.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). In the context of the ministerial

exception, this requires substantial deference to a religious organization's own understanding of who qualifies as a minister.

Three concurring Justices in *Hosanna-Tabor* called for a broad definition of "minister" for precisely this reason: a narrow definition favors certain institutional arrangements over others. Indeed, the term "minister" itself has strong Protestant associations. *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). A flexible definition is crucial in the United States, a melting pot of religions. "Because virtually every religion in the world is represented in the population of the United States," broad application of the ministerial exception is necessary to protect minority religions. *Id.*; see also *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part) ("[T]he First Amendment demands" "sensitivity to and respect for this Nation's pluralism[.]") Specifically, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

In his concurrence, Justice Thomas added that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 196. He reasoned that our nation

> includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status. . . . Judicial attempts to fashion a civil definition of "minister" through a bright-line test or

> multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "mainstream" or unpalatable to some.

Id. (citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987)).

The bedrock principle of equality among religions is so fundamental to the First Amendment that it hardly bears repeating. But the Ninth Circuit's approach threatens to undermine this principle in the context of employment suits by ministers. As discussed further in part II *infra*, the court's approach threatens to disadvantage religious groups with employees who perform important religious functions but do not fit a court's concept of ministerial "credentials."

B. Anything Less than a Broad, Deferential Definition of "Minister" Invites Courts to Resolve Questions Concerning Who Will Lead a Religious Organization.

Courts must accept the decisions of ecclesiastical tribunals regarding their own rules and regulations for internal discipline and government. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-25 (1976). Judicial second-guessing of these ecclesiastical decisions is an impermissible substitution of the court's judgment for the church's internal governance. *Id.* at 708; see also *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) ("First Amendment

values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.").

Under these principles, "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185. In *Hosanna-Tabor*, the Court specifically relied on *Milivojevich*, which had forbidden courts to second-guess a church's decision to discipline and defrock one of its bishops. *Milivojevich* held that the decision to fire or discipline a minister was a "quintessentially religious controvers[y]." *Id.* at 720.

But the right to choose ministers "would be hollow . . . if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Accordingly, a broad, flexible definition of "minister" is necessary to avoid resolving essentially religious controversies. "[C]ivil courts are in no position to second-guess [a religious organization's] assessment" that an employee's "religious function . . . made it essential that she abide by [the employer's] doctrine" and decision-making. *Id.* at 206 (Alito, J., concurring).

A judicial definition that second-guesses an organization's understanding of who is a minister also creates a chilling effect. "Uncertainty about whether its ministerial designation will be rejected, and a

corresponding fear of liability, may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring); see also *Amos*, 483 U.S. at 336 ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.").

C. Narrow Definitions of "Minister," Especially Through Requirements of Ministerial Education or Credentials, Were a Chief Evil that Helped Spur Adoption of the First Amendment.

A flexible definition of "minister" is also required by the original meaning and historical background of the Religion Clauses. In *Hosanna-Tabor*, the Court noted that religious establishments involved government appointment and control of ministers: it was "against this background that the First Amendment was adopted." 565 U.S. at 182-83; see also *id.* at 184.

In particular, colonial laws setting educational and other credentials for ministers were among the perceived evils that helped spur the First Amendment's adoption. As such, the public would have understood government "credentialing" of ministers as violations of "free exercise of religion" and as aspects of an "establishment of religion."

The Constitution's religious freedom guarantees arose in significant part from disputes between established

colonial churches and Pietist dissenters, including "New Light" Congregationalists in Connecticut and Baptists in Massachusetts and Virginia. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437-43 (1990) (describing the "[pietistic] evangelical impetus toward religious freedom").

For example, from 1740 to 1754, the "New Light" Congregationalists separated from the "Old Light" establishment, dissatisfied with its "'formality' [and] spiritual dullness." 1 William G. McLoughlin, *New England Dissent 1630-1833: The Baptists and the Separation of Church and State* 351 (1971) (quotation marks in original). The New Lights emphasized that God's Spirit spoke "to men's hearts or souls, to their spiritual emotions, not to their understanding or minds." *Id.* Naturally, this attitude reflected who they chose to teach their faith. The New Lights opposed the formally trained "legal preacher," preferring a "layman who had experienced conversion" personally. *Id*. They loathed the "implication that since only an exceptionally intelligent and well-educated man could fathom the doctrinal mysteries of religion, the laws of nature, and the philosophy of science, salvation was only for the elite, the intelligentsia." *Id.* at 352. They believed that "the learned clergy had lost touch with the spiritual needs of the common man and no longer really served as ministers of God to them." *Id.* Similar views about ministry—locating its foundational authority in a divine call more than in formal learning—arose among the so-called Separate Baptists, who likewise grew as

a result of revivals to become a large dissenting group in both New England and the South. See *id.* at 423-28.

New England colonial legislatures, which reflected the views of the "Old Lights," responded by taking steps to restrict or disfavor informally trained ministers. *Id.* at 363. In 1742, Connecticut passed a law prohibiting "itinerants" from preaching without approval of an established parish. That same year, it also passed legislation "preventing any church or parish from choosing a minister who lacked a college degree" or was not "'educated at some university, college, or publick [sic] academy.'" *Id.* at 363, 472-73 (quotation omitted). The only alternative for a prospective pastor was to have "obtained testimonials" from the majority of "settled ministers of the gospel" in the county where he sought to minister finding him "to be of sufficient learning to qualifie [sic] him for the work of such ministry." *Id.* at 473.

Likewise, Massachusetts passed a law in 1760 preventing legal recognition of a parish minister unless he had "academy or college training, or had obtained testimonials from the majority of the ministers already settled in the county." Jacob C. Meyer, *Church and State in Massachusetts* 51 (1930). The law disqualified uncredentialed ministers, primarily Baptists, from receiving funds that were collected by each town's authorities for support of worship. *Id.* Isaac Backus, a leader among the colony's Baptists, cited the law as an example of how the "blend[ing]" of "civil and ecclesiastical affairs . . . depriv[ed] many of God's people of that liberty of conscience which he has given them." Isaac

Backus, "An Appeal to the Public for Religious Liberty" (1773), reprinted in *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-89*, at 303, 316-17 (William G. McLoughlin ed. 1968). Backus argued that by requiring "each parish to settle a minister" but then disqualifying teachers who lacked the government's preferred training, the law violated the principle that God "gives gifts unto men in a sovereign way as seems good unto him." *Id.* at 317 (italics removed). See also Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 202-03 (1968) (describing a 1650 Massachusetts civil court decision forbidding installation of a parish minister because he was "'lacking in such abilities, learning, and qualifications as are requisite and necessary for an able ministry of the people'") (quotation omitted).

Virginia likewise narrowly defined the "ministers" who enjoyed autonomy, by dictating where ministers were permitted to preach and jailing the (mostly itinerant, non-establishment) unlicensed ministers. Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. L. Rev. Colloq. 175, 183, 188 (2011). James Madison said, impassionedly, that these restrictions reflected a "diabolical, hell-conceived principle of persecution." Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 *Letters and Other Writings of James Madison: 1769-1793*, at 12 (1884).

These disputes helped spur the adoption of the First Amendment. Members of these dissenting religions feared a federal government capable of resurrecting

such legal restrictions on their faiths. Madison owed his 1789 election to Congress to disgruntled Baptists who supported his candidacy in part to address their grievances with the established church in Virginia. McConnell, *supra*, at 1476-77 (attributing Madison's "narrow margin of victory" partly to Baptist support given after he "championed a constitutional provision for religious liberty as a campaign issue"). Likewise, some New England dissenters feared the prospect of a powerful federal government and pushed for greater protection under the new Constitution. John Leland, a Baptist minister in both Massachusetts and Virginia, opined that the original Constitution provided no "Constitutional defence" against religious oppression of the type Baptists had already suffered. Thomas S. Kidd & Barry Hankins, *Baptists in America: A History* 73 (2015).

Madison then made good on his promise to dissenters, introducing what became the Bill of Rights and taking a leading role in securing Congress's approval. He later reported that a Baptist leader assured him the Bill of Rights "'had entirely satisfied the disaffected of his sect.'" McConnell, *supra*, at 1487 (quoting Nov. 20, 1789 letter from Madison to President Washington).

In short, narrow definitions of "minister"—especially laws setting educational and other credentials for ministers—were among the key evils to which the Religion Clauses were a response. Like the founding-era laws, the Ninth Circuit's rulings require that a minister have some sort of "credential, training, or

ministerial background." *Our Lady* Pet. App. 3a; *St. James* Pet. App. 10a. Such a requirement imposes civil authorities' assumption—usually a majoritarian assumption—that certain training or formalities are inherent in the concept of a minister.

The founding-era laws used narrow definitions of "minister" to deny congregations the choice of the preacher or teacher they wished to call (Connecticut), or to deny ministers access to public funds that remained available for those with training the government deemed adequate (Massachusetts). Today the Ninth Circuit uses a narrow definition to deny religious organizations the protection of the ministerial exception, exposing them to employee lawsuits that undermine the organization's ability to choose who will teach the faith. The evil is the same in each case: subjecting religious organizations to a legal burden or disability regarding their chosen leaders based on those leaders' lack of "credentials."

II. An Employee's Religious Function Should Be the Key Consideration in Defining Who Is a "Minister," and Where Such Religious Function Exists, No Ministerial Credentials, Training, or Title Should Be Required.

In the light of the above principles, the definition of "minister" should focus on religious function. Where such function is present, courts should not further require a title, training, ministerial background, or other government-approved credential.

A. Religious Function Should Be the Key Consideration in a Ministerial Exception Analysis, Understood with Deference to an Organization's Self-Understanding.

The ministerial exception should apply to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring). Such employees carry out, among other things, "the critical process of communicating the faith." *Id.* In other words, an employee's important religious functions should suffice to make him or her a "minister"; other features should not be required.

An emphasis on important religious functions serves the core values of denominational equality and judicial abstention from religious controversies. A functional criterion is denominationally neutral because it is flexible enough to accommodate the diverse ways that different religious organizations pursue their faith and mission. As Justice Alito has observed, a definition tied to roles of teaching, leadership, or liturgy "focuses on the objective functions that are important for the autonomy of *any religious group, regardless of its beliefs*." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (emphasis added). Some groups do not utilize formal ministerial titles, training, or other "credentials"—as discussed *infra* pp. 24-25, 27—but all groups must carry out basic religious functions and rely on key personnel, i.e., ministers, to do so.

B. Teachers in Religious Schools Can Serve Important Religious Functions, as These Cases Exemplify.

The important religious functions that are the key to "minister" status include "teach[ing] th[e] faith." *Hosanna-Tabor*, 565 U.S. at 196; *id.* at 200 (Alito, J., concurring) (ministers include those "entrusted with teaching and conveying the tenets of the faith to the next generation"). Teachers in religious schools frequently play that role. In *Hosanna-Tabor*, this Court noted that Perich was charged with "lead[ing] others toward Christian maturity" through her teaching and that she led her students in prayers, brought them to the school worship services, and occasionally planned the liturgy for worship. *Id.* at 192 (bracket in original). As such, she was "a source of religious instruction" and "performed an important role in transmitting the Lutheran faith to the next generation." *Id.*

This Court has recognized the role that religious-school teachers play in the mission of religious schools, including Catholic schools. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979), the Court emphasized the "critical and unique role of the teacher in fulfilling the mission of a church-operated school." See also *id.* (noting "the importance of the teacher's function in a church school"). Those findings remain relevant today. Similarly, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court recognized that the Catholic schools were "'a powerful vehicle for transmitting the Catholic faith to the next generation,'" and "'an integral part of the religious mission of the Catholic

Church'" (*id.* at 615-16 (quotations omitted))—and that teachers were a "'prime factor for the success or failure'" of the school's mission. *Id.* at 618 (quoting schools' handbook).[3]

The teachers in the cases here had such religious roles. The court of appeals acknowledged that Agnes Morrissey-Berru had "significant religious responsibilities as a teacher" (*Our Lady* Pet. App. 3a)—duties strikingly similar to those of Perich:

> She committed to incorporate Catholic values and teachings into her curriculum, as evidenced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year.

Id. The court did not question the importance of Morrissey-Berru's religious functions. It simply held them insufficient because she lacked the credentials the court considered necessary.

Kristin Biel also performed important religious functions in teaching and transmitting the faith. She "taught lessons on the Catholic faith four days a week" and "incorporated religious themes and symbols into her overall classroom environment and curriculum" in

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[3] *Amici* disagree with other aspects of *Lemon*, including its denial of neutral assistance to religious schools among other private schools. But its finding that teachers play an important religious role in Catholic schools was and is correct.

other classes. *St. James* Pet. App. 12a. She also joined and oversaw her students in daily prayers and monthly Masses. *Id.* 5a.

The panel tried to downplay the importance of Biel's religious functions, but in doing so it blatantly imposed its own views of what features qualify as important in teaching a faith. The panel said that "Biel's role . . . was limited to teaching religion classes from a book required by the school and incorporating religious themes into her other lessons." *Id.* 13a. But "incorporating religious themes into . . . lessons" is a clear example of a significant function of "teaching the faith." And plainly, a teacher's faithfulness and competence can be just as crucial when she interprets a prescribed book as when she chooses her own materials. Religions that have authoritative teaching materials do not thereby lose the ability to choose who should teach from and apply those materials.

The panel also noted that Biel did not "orchestrate[] her students' daily prayers"; the "students themselves led the class in prayers." *Id.* 13a. Again, however, this imposed the panel's own conception of proper religious training. A school can easily believe that the teacher's role should be to encourage students' own spiritual initiative, overseeing the students rather than "orchestrat[ing]" them.

The Seventh Circuit, in a recent opinion by Judge Easterbrook, hit the nail on the head in describing the errors in *St. James*. The panel in *St. James*, the Seventh Circuit said, "essentially disregard[ed] what

Biel's employer . . . thought about its own organization and operations" and imposed its own view of "whether the employee served a religious function." *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019) (Easterbrook, J.) (citing *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018)).

C. When an Employee Has Important Religious Functions, There Should Be No Further Requirement that the Employee Have a Ministerial "Credential, Training," or Title.

As already discussed, under the Ninth Circuit's approach in these two cases, an employee's religious functions—even if "significant"—are not enough to make the employee a minister if they are not accompanied by a "ministerial" title, training, ordination, or similar credential. That approach is fundamentally flawed. When an employee performs significant religious functions, a court should not demand credentials to classify the employee as a minister.

1. Requiring specific religious training, ordination, or "credentials" for a person to qualify as a minister would produce the same evils the Religion Clauses were meant to prevent.

First, requiring some sort of minister-related "credential [or] training" will exclude faiths that do not use specific training or credentials to identify or prepare

their ministers. It will thus create the evils identified in part I, including inequality among faiths and excessive government entanglement with, and second-guessing of, ecclesiastical determinations.

a. Ministerial training requirements harken back to unconstitutional government credentialing of ministers.

The Ninth Circuit's objection that a teacher lacks "credentials, training, or ministerial background" recalls—with striking similarity—the colonial New England laws that disqualified ministers who lacked a college degree or "'academy or college training.'" See *supra* pp. 14-15 (quoting, among others, Meyer, *supra*, at 51). Like those laws, the Ninth Circuit's approach imposes the civil authority's assumption that certain training or other credentials are inherent in the concept of a minister. And like those laws, the Ninth Circuit's approach means that organizations whose ministers lack such credentials suffer a legal burden: here, loss of the ministerial exception and consequently exposure to the threat of employment-related litigation by their ministers.

Legally enshrined credentialism in the founding era favored the authorities' conception of a "minister" and disadvantaged religions with conflicting views. The court of appeals' approach adopts a similar limit as its primary justification for denying religious groups the protection of the ministerial exception. The

Religion Clauses were meant to prevent just such government credentialism.

b. Requiring ministerial training would discriminate against some religions.

Requiring ministerial education, training, or other credentials as a criterion for "minister" status would invite discrimination against minority faiths, religions with non-hierarchical polities, and faiths that use schools to teach and sustain their beliefs.

The concurrences in *Hosanna-Tabor* explain how formal requirements discriminate against religions with structures that do not fit the formalities. As Justices Alito and Kagan noted, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy." 565 U.S. at 198. Such criteria would disadvantage faiths that do "not employ the term 'minister,'" that "eschew the concept of formal ordination," or that (like Quakers, for example) "consider the ministry to consist of all or a very large percentage of their members." *Id.* at 202.[4]

The court of appeals' approach also discriminates against religious groups that rely heavily on educators and schools to "transmi[t] the[ir] faith to the next generation" (*Hosanna-Tabor*, 565 U.S. at 192). Requiring

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[4] Friends General Conference, *FAQs about Quakers*, https://www.fgcquaker.org/discover/faqs-about-quakers.

the type of training that a secular court deems suitable for "ministers" is likely to disqualify schoolteachers, even those with important religious functions—as it did in these cases.

Finally, a training requirement could also discriminate against small and minority religious groups. Such groups may lack the resources to provide formal training programs or lack sufficient candidates who have undergone such training. Teachers under these faiths may fail to qualify as ministers under the court of appeals' analysis, even when performing the same religious function as teachers of other faiths with more resources for training.

These groups may be pressured to change their practices in order to avoid civil liability: they may have to spend additional resources on clergy-like training, rely more on ordained persons to teach the faith, or shift their religious teaching away from K-12 school classrooms. They will be pressured to "conform [their] beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

c. Requiring ministerial training would authorize judicial second-guessing of religious decisions.

Requiring ministerial training would also invite courts to resolve questions of religious doctrine (see *supra* pp. 10-12). It would allow courts to "second-guess" a religious organization's assessment that an

employee's "religious function . . . made it essential that she abide by [the employer's] doctrine" and decision-making. *Id.* at 206 (Alito, J., concurring); see also *id.* at 197 (Thomas, J., concurring).

In entrusting important religious functions to employees such as teachers, an organization typically prescribes the training it believes necessary or appropriate for those functions. Yet the court of appeals' approach holds that the employee cannot be a "minister" unless he receives training that the court deems sufficient. Under this approach, courts will necessarily have to decide in future cases just what sort and extent of training is enough to make one a minister. A more entangling inquiry could hardly be imagined. Again, as the Seventh Circuit recently observed, the Ninth Circuit's approach improperly embraces "independent judicial resolution of ecclesiastical issues" and "disregard[s]" what a religious entity believes "about its own organization and operations." *Sterlinski*, 934 F.3d at 571, 570 (Easterbrook, J.).

2. Reliance on an employee's formal title for purposes of applying the ministerial exception will create the same evils.

Under the Ninth Circuit's approach, an employee can also be excluded from "minister" status because the court deems that her job title is not sufficiently minister-like. In *Our Lady*, the panel asserted that "[respondent's] formal title of 'Teacher' was secular."

Our Lady Pet. App. 2a. In *St. James*, the panel majority said that the "teacher" title did not "'conve[y] a religious—as opposed to secular—meaning.'" *St. James* Pet. App. 12a (quotation omitted, brackets adjusted). This analysis violates the Religion Clauses—through discrimination and improper judicial involvement in religious questions—in two distinct ways.

First, a requirement that the employer use certain terminology in job titles directly leads to these violations. The term "minister" itself can produce discrimination among religions: "the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Focusing on an employee's formal title is also bound to create improper judicial second-guessing of a religious group's self-understanding, as this case shows. Contrary to the court of appeals' assertion, there is nothing inherently secular about the title "teacher" or "Grade 5 Teacher." Rather, as this Court has recognized, teachers quite commonly play a "critical and unique role . . . in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501. To qualify for the ministerial exception, religious schools should not have to rechristen their employees with titles more to a secular court's taste as to what is "religious."

Second, the Ninth Circuit's approach compounds its credentialing error by indicating that an employee's title should reflect not primarily her functions but, as much or more, her training and education. Judge Fisher argued, in dissent in *St. James*, that the formal

title "Grade 5 Teacher" should be interpreted in the light of the employer's "expression of [the teacher's] role in the school," which was the religious role of "a *distinctively Catholic* Grade 5 Teacher." *St. James* Pet. App. 26a-27a (Fisher, J., dissenting) (emphasis added). But the majority objected that this analysis "focused on [Biel's] duties at the school—as opposed to her *education*, *qualifications*, and employment arrangement." *Id.* 11a (emphasis added); see *id.* (arguing that Biel's title was non-ministerial because it did not suggest "that she had special expertise in Church doctrine, values, or pedagogy"). And in *Our Lady*, following *St. James*, the panel said the question was whether the "teacher" title reflected "ministerial substance *and training*." *Our Lady* Pet. App. 2a (emphasis added).

In other words, under the court of appeals' approach, the criterion of "job title" does not focus on the functional roles associated with the title; rather, it becomes another way to impose the criterion of acceptable training or credentials. And that criterion, as already discussed, invites the evils of denominational inequality and judicial entanglement. See *supra* pp. 24-26.

3. The court of appeals created the same evils in ruling that the teachers here did not hold themselves out as ministers.

The court of appeals in these cases committed similar errors in applying the criterion of whether the employer or employee "held [the employee] out as a

minister." *Our Lady* Pet. App. 2a-3a; see *Hosanna-Tabor*, 565 U.S. at 191. The criterion of "holding out" can properly focus on employees' religious functions: courts can legitimately require that the employer communicate those functions, that is, hold out its employee as performing them. But the decisions below have misapplied the criterion to require credentials of employees and second-guess the employer's understanding of religious functions.

As an example of the first error, the court in *St. James* ruled that the school did not "hold [Biel] out as a minister by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy." *St. James* Pet. App. 11a. The court required the employer to communicate not the employee's religious function, but rather her "expertise"—that is, her training and credentials. This is simply another way of requiring such credentials; it thus suffers from the flaws with credentialing detailed above.

Beyond that requirement of credentials, the court focused solely on the *employee's* unilateral understanding of her status. See *St. James* Pet. App. 12a ("nothing in the record indicates that Biel considered herself a minister"). That was error, for to rely on the employee's unilateral action of "holding out" invites the court to resolve ecclesiastical disputes in a civil court. In every ministerial-exception case where the definition of "minister" is at issue, the plaintiff claims a different understanding of the term from the organization's understanding and invites the civil court to impose his or her claimed religious understanding on the

organization. In other words, the plaintiff asks the court to engage in the second-guessing—the involvement in ecclesiastical questions—that this Court has said is improper.

III. These Teachers' Substantial Religious Functions Made Both of Them Ministers Within the Exception.

A focus on function does not mean that all employees will qualify as ministers. Under the functional approach proposed by Justices Alito and Kagan and several lower courts, the religious functions should be "substantial," "important," or "significant." See, e.g., *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring); *id.* at 202-04 (citing lower court decisions). Some such test of substantiality is necessary to put boundaries on the ministerial exception. But the courts cannot simply second-guess the organization's understanding of the position's religious significance, since that would reintroduce the evil of government intervention in religious questions. See *supra* pp. 10-12. The proper stance is substantial but not total deference to the organization's self-understanding.

Some courts have held that the employee's "primary duties" must be religious. See, e.g., Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1778-79 (2008). But if that approach means that the employee must devote the majority or a large share of worktime to religious duties, this Court in

Hosanna-Tabor rejected it. Although Cheryl Perich's religious duties had occupied only 45 minutes per workday, the Court said that the issue of minister status "is not one that can be resolved by a stopwatch," and that "[t]he amount of time an employee spends on particular activities," while relevant, "cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations [the Court had discussed]." *Hosanna-Tabor*, 565 U.S. at 193-94.

Avoiding a rigid time-based rule is particularly appropriate as to elementary school teachers like Biel and Morrissey-Berru. Their students may be unable to absorb more than limited portions of distinctively religious instruction, but those portions may still be crucial. If the religious functions are important, then even if the employee spends less than half her time on them, denying the ministerial exception will still bring on the evils the exception was meant to prevent: interference with the religious organization's choice of leaders, inequality among different faiths, and judicial second-guessing of the organization's determination of religious questions.

Nor will all teachers in religious schools qualify as ministers under a functional definition. However, the following activities, at least, indicate minister status: (1) the teacher teaches a class in religion, with some inculcation of religious principles; (2) the teacher is tasked with integrating religion into other subjects taught; or (3) the teacher engages or supervises students in religious observances such as chapel, prayers,

Bible readings, or special religious programs. There should be evidence that the teacher not only is assigned such duties (for example, by a school handbook) but also actually carries out the duties.[5]

Those standards are easily satisfied in these cases. Both Biel and Morrissey-Berru performed all three of the above functions: teaching Catholic faith specifically in a religion class, incorporating religious themes into other classes, and leading or supervising students in prayers and religious liturgy. See *supra* pp. 3-4; *Our Lady* Pet. App. 3a; *St. James* Pet. App. 5a-6a, 12a. They were thus "entrusted with teaching and conveying the tenets of the faith to the next generation"; the schools "must be free to choose the personnel" performing these functions. *Hosanna-Tabor*, 565 U.S. at 200, 199 (Alito, J., concurring).

[5] Although this case does not present the issue, a teacher in a religious school may also have such substantial leadership responsibilities in administration as to qualify as a "minister." The ministerial exception encompasses not only those who "teach th[e] faith" but also those who "guide [the religious institution] on its way." *Hosanna-Tabor*, 565 U.S. at 196. See also *id.* at 199 (Alito, J., concurring) (the exception "should apply to any 'employee' who leads a religious organization" as well as one who "serves as a messenger or teacher of its faith"); *Fratello v. Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017) (applying exception to religious-school principal).

CONCLUSION

The judgments of the court of appeals in both cases should be reversed.

Respectfully submitted.

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