Nos. 19-267 & 19-348

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

v.

AGNES MORRISSEY-BERRU,

ST. JAMES SCHOOL,

v.

DARRYL BIEL,

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

BRIEF *AMICI CURIAE* OF PROFESSORS DOUGLAS LAYCOCK, MICHAEL W. MCCONNELL, NATHAN S. CHAPMAN, ELIZABETH A. CLARK, ROBERT F. COCHRAN, JR., TERESA COLLETT, CARL H. ESBECK, RICHARD W. GARNETT, PAUL HORWITZ, CHRISTOPHER C. LUND, MICHAEL P. MORELAND, MICHAEL PAULSEN, ROBERT J. PUSHAW, DAVID SKEEL, AND EUGENE VOLOKH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

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

STATEMENT

In the decisions below, the Ninth Circuit adopted an unduly narrow understanding of the ministerial exception, refusing to apply it to employees who teach religion at Roman Catholic Schools. The court did so despite the undisputed evidence that: (1) Catholic education is fundamental to the religious mission of the Catholic Church; (2) the teachers played a role in this mission by regularly instructing their students in Catholic doctrine; and (3) they not only were required to incorporate Catholic teaching into all subjects, but also were evaluated on their ability to do so.

Nevertheless, the Ninth Circuit held that the ministerial exception did not apply to the teachers, Kristen Biel and Agnes Morrissey-Berru, because each of their positions purportedly satisfied only one of the four factors from *Hosanna-Tabor*, 565 U.S. 171. There was no dispute that they had significant religious responsibilities. But in the Ninth Circuit's view, their formal title was not sufficiently religious, their religious training and credentials were inadequate, and they did not do enough to "hold themselves out to the public" as "ministers" to qualify for the ministerial exception. As shown below, the Ninth Circuit's view effectively confines the exception to the specific facts of *Hosanna-Tabor*, and is shorn from the purpose of religious autonomy that the exception embodies.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor*, this Court affirmed that the ministerial exception protects the autonomy of religious organizations to select those who perform significant religious functions, including religion

teachers and others who help transmit the faith. Both history and precedent show that the First Amendment forbids the government from "interfer[ing] with the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. And to protect the right of religious autonomy, religious organizations must have the freedom to "control…the selection of those who will personify [their] beliefs" or "teach their faith." *Id.* at 188, 196. The ministerial exception embodies this principle by prohibiting the government from imposing sanctions on religious organizations for the hiring and firing—that is, "select[ion] and control"—of key religious personnel, including religion teachers. *Id.* at 195.

In the decisions below, the Ninth Circuit misconstrued the ministerial exception in two ways. First, it misread *Hosanna-Tabor* as adopting a set of mechanical requirements that must be satisfied in every case for the ministerial exception to apply. Second, it failed to recognize that the core purpose of protecting religious autonomy requires applying the exception to all employees who have significant religious responsibilities, including teaching religion.

The Ninth Circuit's rulings contradict both this Court's precedent and the history underpinning the ministerial exception. Unless this Court overturns those rulings, they will invite judicial intrusion into religious affairs and create confusion regarding the autonomy of religious bodies to choose those who perform significant religious functions.

ARGUMENT

I. Religious Organizations Have Autonomy To Select Those With Significant Religious Responsibilities

As this Court held in *Hosanna-Tabor*, the ministerial exception protects the right of religious organizations to select those who will occupy positions of significant religious responsibility, including those who teach religion. This doctrine has deep roots in our constitutional tradition of religious autonomy. To govern themselves, religious bodies must have the freedom to appoint and remove key personnel who will shape their faith communities. First Amendment jurisprudence expresses this principle by precluding lawsuits that would invite courts to second-guess whether a church has a "valid" reason for hiring or firing a religion teacher.

A. The Ministerial Exception Is Firmly Grounded In The History Of Religious Autonomy

The principle that the government may not interfere with internal church affairs "has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg *et al.*, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011). In particular, "[t]he freedom to select religious leaders was a landmark in the development of limited government in the West." *Id.* at 180. That freedom resulted from a long and bloody history of conflict between secular and religious authorities.

1. Antiquity

In ancient Rome, "religion was an affair of the community as a whole," and "[n]o form of social life was wholly secular." Robert Louis Wilken, Liberty in the Things of God: the Christian Origins of Religious Freedom 7 (Yale Univ. Press 2019). The coins used for currency throughout the Roman Empire, for example, depicted the image of the emperor on one side and liturgical instruments used for offerings and sacrifices on the other. *Id.* Religion was simply "part of the fabric" of Roman life. *Id.* at 8.

The idea of an institutional distinction between Church and State emerged in the second century, during the persecution of Christians in Rome and Carthage. Tertullian, an early Christian apologist, was "the first in the history of Western civilization to use the phrase 'freedom of religion.'" *Id.* at 11; *see* Tertullian, The Apology of Tertullian for the Christians (T. Herbert Bindley trans., 1890). This phrase referred "to the freedom of the community of Christians to have its own protected space and follow its distinctive way of life," which included the rights "to assemble for worship, to organize, [and] to choose leaders." Wilken*, supra*, at 12–13.

Early Christians recognized a "dual loyalty" to the Church and the State by which they would "obey the 'magistrates, princes and powers'" on certain matters, while recognizing a separate sphere of authority on matters of religion. *Id.* at 15–16. Secular leaders gradually came to recognize this distinction as well. In the early fourth century, Emperors Constantine and Licinius issued the Edict of Milan, which granted "to the Christians and to all others full authority to observe that religion which each preferred....freely

and openly, without…molestation." University of Pennsylvania. Dept. of History: Translations and Reprints from the Original Sources of European History (Philadelphia, University of Pennsylvania Press, vol. 4, 28–30). This freedom referred "not simply [to] individuals but [to] the…Church, the body (*corpus*) of Christians." Wilken, *supra*, at 23. The recognition of institutional autonomy was "no less novel than the general policy on freedom in religious matters, for it suggests that the emperors sensed...that a new form of religion existed in their midst, having its own corporate life independent of the state." *Id.*

At the end of the fifth century, tensions mounted between secular and religious authorities when the Roman Emperor Anastasius opposed the Council of Chalcedon, a major gathering of Christian Bishops. *Id.* at 34. In response, Pope Gelasius I "took the unprecedented step of writing a letter directly to the emperor instructing him on the limits of his authority in religious matters." *Id.* While Anastasius was "permitted honorably to rule over human kind," Gelasius reminded him that, "in things divine," the Emperor must "bow [his] head humbly before the leaders of the clergy." J. H. Robinson, Readings in European History 72–73 (Boston: Ginn, 1905). Gelasius's letter "would shape Christian thinking on the relation between civil and ecclesiastical jurisdiction throughout the Middle Ages and into the sixteenth century." Wilken, *supra*, at 34–35. The distinction between a religious power, "charged with leading people to salvation," and a secular power, "maintaining order and providing conditions for the

Church to carry out its mission," later came to be called "the doctrine of the two swords." *Id.* at 35.

2. The Middle Ages

In Medieval Europe, "[c]onflict between the two swords" of Church and State "was inescapable." *Id.* This conflict resulted in the "Papal Revolution." In 1059, Pope Nicholas II "for the first time forbade lay investiture..., thereby taking the power to appoint the pope away from the emperor." Harold J. Berman, Law and Revolution: the Formation of the Western Legal Tradition 520 (Harvard Univ. Press 1983). Sixteen years later, in the Investiture Controversy, Pope Gregory VII challenged the authority of kings to invest bishops with the symbols of their office, *id.*, on the ground that "lay investiture threatened the freedom of the Church and inverted the right ordering of Church and society." Wilken, *supra*, at 36. He thus acted "to strip the king of spiritual authority and reduce him to the status of a layman." *Id.* The Popes' efforts reaffirmed the principle that, while the king governed secular affairs, the church was to govern itself. This distinction "would be infused with new life during the Reformation." *Id.* at 36–37.

In the years that followed, Europe continued to endure a series of "conflict[s] over the government's intervention in [religious] decisionmaking." Berg, *supra*, at 179. Neither secular nor religious authorities, however, were "wholly victorious." Berman, *supra*, at 520. Instead, the persistent conflict between them gradually led to a "'duality' of jurisdictions that 'profoundly influenced the development of Western constitutionalism.'" Berg, *supra*, at 180 (citation omitted). The inability of either side to achieve complete victory "established [the]

'principle that royal jurisdiction was not unlimited,'" and that "'it was not for the secular authority alone to decide where its boundaries should be fixed.'" *Id.* (citation omitted).

3. Tudor and Stuart England

In England, perhaps the most famous conflict between secular and religious authorities occurred when Pope Clement VII refused to annul the marriage of King Henry VIII. In response, Henry removed the Church of England from the Pope's authority and directed the English clergy to acknowledge the king as the "sole protector and supreme head" of the English Church. Wilken, *supra*, at 120–21. In 1534, Parliament adopted the Act of Succession, which declared Henry's marriage "void and annulled" and required the king's subjects to renounce allegiance to any "foreign authority or potentate." *Id.* at 122. When Henry's lord chancellor, Thomas More, and the bishop of Rochester, John Fisher, refused to abjure allegiance to Rome, they were both executed. *Id.* at 123.

Nevertheless, by the late sixteenth century, "the language of two realms, one spiritual, the other political, had become commonplace," and Catholics in England used this language to defend the Roman Church from persecution. *Id.* at 127. Protestant separatists also invoked this language as they struggled to resist the Crown's impositions. Although the separatists recognized the king's "power and authority" to make ordinances and laws, *id.* at 139, they argued that the king and the bishops were "not to intermeddle with one another's authority, office and functions," *id.* at 142. Well-versed in the texts of Christian antiquity, the separatists recognized that "[t]he plea for liberty of conscience is no new doctrine."

Tracts on Liberty of Conscience and Persecution: 1614–1661 11 (Edward Bean Underhill ed., 1813–1901). In fact, John Robinson, leader of the group that would sail on the Mayflower to Plymouth, cited Tertullian in support of the separatist cause. *See* John Robinson, The Works of John Robinson: Essays, or Observations Divine and Moral (Robert Ashton ed., 1851).

Despite the pleas for religious liberty from Catholics and dissident Protestants alike, the Crown remained intimately involved in religious governance. From the time of Queen Elizabeth I, the Crown "maintained control of ecclesiastical affairs" by ordaining the clergy, issuing licenses to preach, and overseeing the schools. Wilken, *supra*, at 158. And after James I took the throne in 1603, he proclaimed it "the chiefest of all kingly duties…to settle the affairs of religion." Documents Illustrative of English Church History 513 (Henry Gee & William John Hardy eds., 1896).

4. Religious Civil War

While the Crown maintained its grip on religious authority, religious controversy continued to roil seventeenth-century England. A leading source of religious strife involved clashes between Episcopal and Presbyterian views of "church polity"—the church's internal governance structure. Brief for International Mission Board of the Southern Baptist Convention et al. as Amici Curiae Supporting Petitioner at 27, *Hosanna-Tabor*, No. 10-553, 2011 WL 2470840 (June 20, 2011). "Episcopal polity, associated with the Roman Catholic and Anglican churches, called for placing ecclesiastical authority principally in bishops." *Id.* "In contrast, Presbyterian polity,

inspired by the Reformation and associated with the Puritans and many Protestant churches, called for governance by assemblies of elders—*i.e.*, 'presbyters.'" *Id.*

When the Puritans asked James I to relieve them of the burden of the episcopacy, he refused, declaring that he was opposed to a Presbyterian form of church government. Wilken, *supra*, at 136. He then attempted to impose episcopal polity on Presbyterian Scotland, which sparked opposition from Parliament. Felix Makower, *The Constitutional History and Constitution of the Church of England* 71 (1895). The conflict came to a head in 1640, when James's successor, Charles I, dissolved Parliament and required all clergy to swear an oath upholding the episcopacy. *Id.* at 75–76. The Scots then invaded England, Parliament executed the king's chief minister, and years of civil war ensued. *Id.* at 77–79; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1412 (2004).

5. From Locke to the Colonies

The worst of England's religious struggles were resolved by the Act of Toleration in the wake of what the victors called the Glorious Revolution of 1688. *See* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 355 & n.59 (1984). Writing to justify and secure the fruits of that Revolution, John Locke penned his influential *A Letter Concerning Toleration*, advocating church-state separation as the only path toward peace. According to Locke, "it is utterly necessary that we draw a precise boundary-line between (1) the affairs of civil

government and (2) the affairs of religion." John Locke, *Toleration* 3 (1690) (Jonathan Bennett ed. 2010), *available at* http://www.earlymoderntexts.com/assets/pdfs/locke1689b.pdf. Otherwise, there will be "no end to the controversies arising between those who have...a concern for men's souls and those who have...a care for the commonwealth." *Id.*

Locke insisted that religious institutions must be free to control their membership and internal affairs. A church is a "free society" of people "who voluntarily come together to worship God in a way that they think is acceptable to Him and effective in saving their souls." *Id.* at 5. "[S]ince the members of this society...join[] it freely and without coercion,...it follows that the right of making its laws must belong to the society itself." *Id.* This right of self-governance includes the society's authority to select its members—and to disassociate from anyone who declines to follow its rules. *Id.* A church's power of excommunication—"the power to remove any of its members who break its rules"—is thus fundamental and immutable, as "the society would collapse" if its members could "break [its laws] with impunity." *Id.* at 7.

Ideas similar to Locke's found expression in the American colonies. In *The Bloudy Tenet of Persecution for Cause of Conscience*, theologian Roger Williams made a two-part case for non-interference with religious affairs. "First, it was best for the state because conformity in religious matters was impossible due to its personal nature, and state attempts to compel conformity would lead only to repression and civil discord." Esbeck, *Establishment Clause Limits*, *supra*, at 357–58. Second, it "was best

for religion because it sealed the church from co-optation by the state and left it free to pursue its mission, however perceived." *Id.* at 358. These ideas spread throughout the colonies during the First Great Awakening of 1720–1750. *Id.* at 357. "The leaders of the movement insisted that the Church should be exalted as a spiritual and not a political institution." *Id.* at 358 (internal quotation marks omitted).

After the American states gained independence, the Congress of the Confederation strongly endorsed the principle of non-interference in internal church governance. In the early 1780s, the French minister to the United States petitioned Congress to approve a Catholic Bishop for America. Carl H. Esbeck, *Religion During the American Revolution and the Early Republic*, in 1 *Law and Religion, An Overview* 57, 72–73 (Silvio Ferrari & Rinaldo Cristofori, eds. 2013). In response, Congress passed a resolution directing Benjamin Franklin (then-ambassador to France) to notify the Vatican's representative that "the subject of [this] application...being purely spiritual[]...is without the jurisdiction and powers of Congress." *Id.*

B. The Constitution Embraced The Historical View Of Religious Autonomy

The Lockean view of religious autonomy was part of the background political philosophy of American supporters of disestablishment. Indeed, "[m]ost members of the Founding Generation embraced John Locke's theory of religious toleration." Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1464 (2013).

"It was against this background that the First Amendment was adopted." *Hosanna-Tabor*, 565 U.S.

at 183. "Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church." *Id.* "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government...would have no role in filling ecclesiastical offices." *Id.* at 184 (citation omitted).

"This understanding of the Religion Clauses was reflected in two events involving James Madison, the leading architect of the religion clauses of the First Amendment." *Id.* (internal quotation marks omitted). *First*, after the Louisiana Purchase, John Carroll—the first Roman Catholic Bishop in the United States—asked Secretary of State Madison for advice on who should be appointed to head the Catholic Church in New Orleans. Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J. L. & Pub. Pol'y 821, 830 (2012). Madison responded that the "selection of [religious] functionaries...is entirely ecclesiastical," and thus the government should not be involved. Letter from James Madison to John Carroll (Nov. 20, 1806), in 20 *The Records of the American Catholic Historical Society of Philadelphia* 63, 63–64 (1909). Madison subsequently wrote a private letter offering his opinion as a private citizen on the matter. Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories*, *in* Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776–1833 273, 283–85 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019). But when writing in his official capacity, "[h]e declined even to express an opinion on whom Carroll should select." McConnell, *supra*, at 830.

Second, in 1811, Congress passed a bill incorporating the Protestant Episcopal Church in Alexandria. *Hosanna-Tabor*, 565 U.S. at 184–85. President Madison vetoed the bill "on the ground that it 'exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates...the article of the Constitution of the United States, which declares, that Congress shall make no law respecting a religious establishment.'" *Id.* (quoting 22 Annals of Cong. 982–983 (1811)). Madison explained:

> "The bill enacts into, and establishes by law, sundry *rules and proceedings relative purely to the organization and polity of the church incorporated*, and comprehending even the election and removal of the Minister of the same; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises."

Id. at 185 (emphasis altered) (quoting 22 Annals of Cong. 983 (1811)). This episode demonstrates that the principle of non-interference extends beyond the appointment of clergy; it broadly forbids government from interfering in "'the organization and polity of the church.'" *Id.* (quoting 22 Annals of Cong. 983 (2011)).

Thomas Jefferson took the same view. In 1804, the governor of Orleans Territory wrote to Secretary of State Madison to inform him that local authorities had shut the doors of the parish church "in response to a conflict between two priests concerning who was the rightful leader of the congregation." Pybas, *supra*, at 281. Although the governor was pleased with this

manner of handling the dispute, Jefferson, who learned about it from Madison, was not. *Id.* at 282. In a July 5, 1804 letter to Madison, Jefferson wrote:

> [I]t was an error in our officer to shut the doors of the church....The priests must settle their differences in their own way, provided they commit no breach of the peace....On our principles all church-discipline is voluntary; and never to be enforced by the public authority.

Id.

Eight days later, Jefferson penned another letter, this time in response to a letter from the Ursuline Nuns of New Orleans in 1804. In that letter, Jefferson assured the nuns that the Louisiana Purchase—and the transfer of control from Catholic France to the United States—would not undermine their rights, including their "broad right of self-governance and religious liberty." Pybas, *supra*, at 281; *see also* 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950). As Jefferson explained, "[t]he principles of the [C]onstitution...are a sure guaranty to you that [your property and rights] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority." Pybas*, supra*, at 281. Thus, "Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations—not just churches but religious schools as well," as his "statement affirming institutional autonomy encompasses the freedom of a religious school to select its own leaders." Berg, *supra*, at 182–83.

The "disestablishment" process in the states further confirms the founding generation's understanding that non-interference is vital to religious liberty. Because the original Bill of Rights did not apply to state governments, roughly half the states maintained established religions after ratification of the First Amendment. McConnell, *supra*, at 829. "Disestablishment occurred on a state-by-state basis through adoption of state constitutional amendments—Massachusetts being the last to dismantle its localized establishment in 1833." *Id.* Importantly, "each of the states that first maintained an establishment and later adopted a state constitutional amendment forbidding establishment of religion—South Carolina, New Hampshire, Connecticut, Maine, and Massachusetts—adopted at the same time an express provision that all 'religious societies' have the 'exclusive' right to choose their own ministers." *Id.* Similarly, "[e]ach of Vermont's constitutions [1777, 1787, and 1793]...freed citizens from compulsion to...maintain any minister not of their own persuasion." Shelby M. Balik, *In the Interests of True Religion: Disestablishment in Vermont*, *in* Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776–1833 296 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019). A church's freedom to choose those with significant religious responsibilities was thus "part and parcel of disestablishment." McConnell, *supra*, at 829.

In sum, history confirms "a constitutional order in which the institutions of religion—not 'faith,' 'religion,' or 'spirituality,' but the 'church'—are distinct from, other than, and meaningfully

independent of, the institutions of government." Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 523 (2007). "Church autonomy inheres *in the church* as a body and involves more than rights of individual conscience." Paul Horwitz, *Essay: Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1058 (2013) (emphasis added). Religious freedom thus "involve[s] a structural as well as an individual component, one that recognizes the limits of the state and the separate existence of the church." *Id.*[2] "[E]arly American leaders embraced the idea of a constitutionalized distinction between civil and religious authorities." Richard W. Garnett & John M. Robinson, Hosanna-Tabor*, Religious Freedom, and the Constitutional Structure*, 2011–2012 CATO SUP. CT. REV. 307, 313. "And they saw that this distinction implied, and enabled, a zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." *Id.*[3]

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[2] Courts applying *Hosanna-Tabor* have likewise interpreted the ministerial exception not only as a personal right but also as a structural limitation on government action. *See, e.g.*, *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) ("The ministerial exception is a structural limitation imposed on the government by the Religion Clauses."); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (recognizing that the ministerial exception is a structural protection "rooted in constitutional limits on judicial authority").

[3] By contrast, religion in the former Soviet Union was thoroughly regulated by the state's Council for Religious Affairs, which selected ministers for various faiths. Successor entities exist in several former Soviet republics. *See, e.g.*, The State

C. The Ministerial Exception Covers Employees With Significant Religious Responsibilities, Including Teachers

This Court has recognized the historical and constitutional basis for the right of religious autonomy. Under the First Amendment, religious bodies have "independence from secular control or manipulation[—]in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

In *Hosanna-Tabor*, this Court confirmed forty years of lower-court precedent recognizing a ministerial exception that gives religious organizations autonomy to hire and fire key religious personnel, and protects them from liability in connection with those decisions. 565 U.S. at 186–90. The Court clarified that this exception arises from both the Establishment and the Free Exercise Clauses: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188–89. And "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.*

The ministerial exception recognizes that the Religion Clauses form "a two-way street, protecting

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Committee of Azerbaijan Republic for the Work with Religious Associations, *available at* http://www.dqdk.gov.az/en/view/pages/90/.

the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." McConnell, *supra*, at 834. There are three components to the ministerial exception. *First*, the relational—"[o]rganizations founded on shared religious principles, simply to exist, must have freedom to choose those religious principles." Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 4 (2011). *Second*, conscience, which allows religious organizations to consider factors like sex or religion in internal religious decisions, such as some groups' religious practice of maintaining an all-male clergy. *Id.* at 5. *Third*, autonomy, which bars those with significant religious duties from bringing employment-based claims against their religious organizations. *Id.*

This Court has eschewed any "rigid formula for deciding when an employee qualifies as a minister," emphasizing that the ministerial exception "is not limited to the head of a religious congregation." *Hosanna-Tabor*, 565 U.S. at 190. Instead, this Court has favored a functional approach that ties the exception's scope to the purpose of religious autonomy, protecting "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

This understanding of the exception comports with the Lockean view undergirding the First Amendment that society must protect a "church's right to make its own religious laws and to expel members for nonconformance." Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J. L. & Pub. Pol'y 839, 857 (2012). This right necessarily entails the freedom to appoint and remove

individuals with significant religious responsibilities, including religion teachers. *Id.* After all, selecting those who will teach the faith to the next generation is even more vital to self-governance than controlling membership. *Id.*

For this reason, focusing narrowly on the label of the "ministerial" exception is a mistake. This Court should re-affirm that the exception "protects more than just 'ministers,'" *Rweyemamu v. Cote*, 520 F.3d 198, 206–07 (2d Cir. 2008), and that it applies to all those with significant religious responsibilities. That corresponds to the historical origins of this doctrine, the decision in *Hosanna-Tabor*, and the lower-court precedent that gave rise to the doctrine.

As Justices Alito and Kagan have explained, the exception must be broad enough to "protect[] the freedom of [each] religious group[] to engage in certain key religious activities...as well as the critical process of communicating the faith...in its own voice, both to its own members and to the outside world." *Hosanna-Tabor*, 565 U.S. at 199, 201 (Alito, J., concurring). Accordingly, the term "ministerial" is somewhat inapt because "most faiths do not employ the term 'minister,'" and "some eschew the concept of formal ordination." *Id.* at 202; *see also id.* at 197 (Thomas, J., concurring) ("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."). For this reason, "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." *Id.* at 198 (Alito, J.,

concurring). "Instead, courts should focus on the function performed by persons who work for religious bodies." *Id.* Thus, the 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*." *Id.* at 199 (emphasis added).

"When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Id.* at 201 (Alito, J., concurring). "[B]oth the content and credibility of a religion's message depend vitally on the character and conduct of its teachers," which the religious organization must be free to judge for itself. *Id.* "For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very embodiment of its message and its voice to the faithful." *Id.* (internal quotation marks omitted). "A religious body's control over such 'employees' is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.* Thus, selecting those who are qualified to teach the faith is an inherently religious decision. Laycock, *supra*, at 850–51.

The logical conclusion is that "[r]equiring a church to accept or retain an unwanted minister"—or an unwanted teacher of religion—would "interfere[] with the internal governance of the church" by "depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188 (majority op.). In short, the ministerial exception "bars" employment-discrimination suits brought against religious groups by those who would "preach

their beliefs, teach their faith, and carry out their mission." *Id.* at 196.

A Catholic school teacher who imparts Catholic teachings to students falls well within the exception. For Catholics, "[e]ducation has always been one of the most important missions of the Church." Biel.Pet.App.20a (Fisher, J., dissenting). And this Court has recognized that "[t]he various characteristics of [parochial] schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (internal quotation marks omitted). Teachers in Catholic schools play a "critical and unique role" in the Catholic religious mission. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501–04 (1979). Their religious importance stems not from their "ordination status or [their] formal title, but rather [from their] functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring). Thus, "[t]he Constitution leaves it to the collective conscience of [the Church] to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Id.* at 202. Allowing the government to constrain a church's hiring or firing—that is, "select[ion] and control"—of such employees would impose an unacceptable burden on the right of religious autonomy protected by the First Amendment. *Id.* at 195.

II. The Ninth Circuit's Mechanical Application Of *Hosanna-Tabor* Undermines Religious Autonomy, In Conflict With This Court's And Other Circuits' Decisions

A. The Ninth Circuit's Formalistic Analysis Misinterprets *Hosanna-Tabor*

In *Hosanna-Tabor*, this Court made clear that the ministerial exception applied to the plaintiff in that case, Cheryl Perich, because she played "a role in conveying the Church's message and carrying out its mission." 565 U.S. at 192. The Court reached that conclusion based on four "considerations," which it summarized as "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church." *Id*. But these four specific "considerations" were not exclusive or necessary elements, or universal and conjunctive prerequisites to trigger the ministerial exception. They are what made *Hosanna-Tabor* an easy case. *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) ("[E]ven referring to them as 'factors' denotes the kind of formulaic inquiry that the Supreme Court has rejected."); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 202, 204–05 (2d Cir. 2017) ("*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant....[I]t neither limits the inquiry to those considerations nor requires their application in every case."); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate.").

The function of teaching religion to the next generation is essential to every religious organization. The position of commissioned minister is unusual, perhaps confined to a few Lutheran bodies. To require an analogous *title*, instead of an analogous *function*, is to discriminate between denominations.

Indeed, until now, the Courts of Appeals have uniformly understood *Hosanna-Tabor* to adopt a functional approach that covers all employees with significant religious responsibilities, including religion teachers. *See, e.g.*, *Fratello*, 863 F.3d at 208–09 ("[T]he most important consideration in this case is whether, and to what extent, the plaintiff 'performed' 'important religious functions...for [her religious organization].'" (quoting *Hosanna-Tabor*, 565 U.S. at 192)); *Grussgott*, 882 F.3d at 661 ("[T]he importance of Grussgott's role as a 'teacher of [] faith' to the next generation outweighed other considerations." (quoting *Hosanna-Tabor*, 565 U.S. at 199)); *Lee*, 903 F.3d at 122 n.7 ("[T]he ministerial exception applies to any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions[.]" (internal quotation marks omitted)); *Conlon*, 777 F.3d at 835 (taking a broad view of what constitutes a religious title and focusing predominantly on the employee's religious responsibilities).

State high courts have agreed. *See Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) ("[T]he ministerial exception applies to the school's employment decision regardless whether a religious teacher is called a minister or holds any title of clergy."); *Kirby v. Lexington Theological Seminary*,

426 S.W.3d 597, 613 n.61 (Ky. 2014) (noting "the potential danger of hyper-focusing on the title").

The Ninth Circuit, by contrast, has confined *Hosanna-Tabor* to its facts by adopting a formalistic, check-the-boxes approach that views the plaintiff in *Hosanna-Tabor* as the model against whom all other teachers must be judged. *See, e.g.*, Biel.Pet.App.50a (Nelson, J., dissenting from denial of rehearing en banc) ("The panel majority mistakes *Hosanna-Tabor* to create a resemblance-to-Perich test."); *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019) ("[The Ninth Circuit's] approach...asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function.").

The Ninth Circuit's wooden approach is contrary to *Hosanna-Tabor*, its historical antecedents, and its progeny. As *Hosanna-Tabor* suggests, the proper question is whether the church has given the employee responsibility to "preach [its] beliefs, teach [its] faith, and carry out [its] mission," 565 U.S. at 196. This Court addressed Perich's title, ordination, and religious training, not because they form the *sine qua non* of the ministerial exception, but because they were sufficient to show that, under the doctrine and practices *of the Lutheran Church – Missouri Synod*, the church chose Perich to "minister to the faithful." *Id.* at 189. For this Court's decision to apply as a guiding precedent across a variety of facts and faiths, the doctrine must cover all teachers at religious schools who have significant religious responsibilities. Indeed, that is a core application of the doctrine.

The Ninth Circuit's contrary approach cannot be reconciled with "[o]ur country's religious landscape," which "includes organizations with different

leadership structures and doctrines that influence their conceptions of ministerial status." *Id.* at 197 (Thomas, J., concurring). Such a formalistic analysis would deprive religious bodies of autonomy to structure their internal governance according to their own doctrine and practice. *Id.* at 188–89; *see also id.* at 198 (Alito, J., concurring).

B. The Ninth Circuit's Analysis Shows The Perils Of Narrowly Construing The Ministerial Exception

The Ninth Circuit's analysis shows how an unduly narrow view of the ministerial exception results in improper judicial second-guessing on questions of internal religious governance. As history shows, *supra* pp. 7–12, religious bodies must have the autonomy to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116; *see also supra* Section I.A. But if secular courts intrude on the decision of who is fit to serve as a teacher of religion, they will inevitably become entangled in these religious matters.

In both cases under review here, it is impossible to deny the significance of the teachers' responsibility to impart Catholic doctrine to their students. In *Morrissey-Berru*, for example, the teacher had a daily responsibility to teach Catholic doctrine to her students and to "incorporate Catholic values and teachings into her curriculum." Morrissey-Berru.Pet.App.3a. Indeed, the court acknowledged that she "did have significant religious responsibilities as a teacher at the School...as evidenced by several of the employment agreements she signed." *Id*. These duties included leading her

students in daily prayer, being "in charge of" planning the liturgy for monthly Mass, and directing and producing a performance by her students during the School's annual Easter celebration. *Id*. Moreover, as the district court explained, she "also taught her students the tenets of the Catholic religion, how to pray, and instructed them on a host of other religious topics." *Id.* at 8a. And to ensure that her religious instruction met the church's standards, she maintained "regular catechist certifications" under the Archdiocese of Los Angeles's supervision. *Id.*

Likewise in *Biel*, the Ninth Circuit acknowledged that the teacher was required to "incorporate[] religious themes and symbols into her overall classroom environment and curriculum." Biel.Pet.App.12a. Her contract directed her to work "within [St. James's] overriding commitment" to Church "doctrines, laws, and norms" and "teach[] and promote behavior in conformity to the teaching of the Roman Catholic Church." *Id.* at 5a. Consistent with this requirement, she taught her students "a standard religion curriculum" four days a week, using a workbook on the Catholic faith prescribed by the school administration." *Id*. She also "joined her students in twice-daily prayers" and "attended a school-wide monthly mass" with them. *Id*.

Thus, by any measure, the teachers in both cases played a vital role in their schools' religious mission of conveying the Catholic faith to the next generation. They were the primary providers of religious instruction to the students in their charge, as they almost certainly spent more time teaching Catholic doctrine and practices than the students were able to receive from their priests—and certainly more time

than the students spent at Mass. But nevertheless, the Ninth Circuit dismissed these religious responsibilities and held that the teachers did not qualify for the ministerial exception for three reasons, each of which shows how a departure from the functional approach invites improper second-guessing of religious judgments. *See Cannata*, 700 F.3d at 179–80 (courts cannot "second-guess" a church's sincere religious judgments); *Lee*, 903 F.3d at 121 (second-guessing "would impermissibly entangle the court in religious governance").

First, the Ninth Circuit found that, unlike the teacher in *Hosanna-Tabor*, there was "nothing religious reflected in [the] title" of "Teacher." Biel.Pet.App.11a (internal quotation marks and citation omitted); *see also* Morrissey-Berru.Pet.App.2a (stating that the "formal title of 'Teacher' was secular"). But there is nothing inherently secular about the title of "teacher," especially for those like Biel and Morrissey-Berru who teach religion. Religious figures throughout history have been referred to as "teachers," which is one translation of the Hebrew "rabbi." *See also, e.g.*, John 3:2 (New International Version) ("we know that you are a teacher who has come from God"). In *Hosanna-Tabor*, the title "minister" was relevant only because of what it meant to the church there. *See* 565 U.S. at 191. Because other faiths use different labels to refer to religiously significant employees, "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." *Id.* at 198 (Alito, J. concurring). *See also, e.g.*, *Fratello*, 863 F.3d at 207 ("We cannot accept the notion that by doing no more

than changing the title of an employee, a religious-group employer can change its employee's rights under the federal employment-discrimination laws."); *Temple Emanuel*, 975 N.E.2d at 443.

Second, in an apparent attempt to assess the "substance" of the teachers' positions (*Hosanna-Tabor*, 565 U.S. at 192), the Ninth Circuit held that their religious "credentials" and "training" were inadequate. In *Biel*, for example, the court was unimpressed that the teacher's "only [religious] training" consisted of "a single half-day conference where topics ranged from the incorporation of religious themes into lesson plans to techniques for teaching art classes." Biel.Pet.App.4a–5a. And in *Morrissey-Berru*, the court found it inadequate that the teacher had taken only a "single course on the history of the Catholic church." Morrissey-Berru.Pet.App.3a. It made no difference to the court that she maintained "regular catechist certifications," *id.* at 8a, which, according to the Archdiocese of Los Angeles, required her to "understand church doctrine and demonstrate appropriate teaching skills." *See* http://www.la-archdiocese.org/org/ore/cf/Pages/The-Catechist.aspx.

The Ninth Circuit erred because it is not the proper role of a court to decide what level of religious training is appropriate for a Catholic school. By deeming the teachers' religious training insufficient, the Ninth Circuit's reasoning invites courts to second-guess religious judgments about what types of religious training are essential to a school's religious mission. This entangles courts in precisely the type of religious question that the ministerial exception is designed to avoid—*i.e.*, what is the "proper" way to

train and certify a religious teacher? *See Sterlinski*, 934 F.3d at 571 (The Ninth Circuit improperly "embraced" the "independent judicial resolution of ecclesiastical issues."). This usurpation of religious authority violates the historical principle that "spiritual" and "political" authorities should be kept in separate "realms." *See supra* p. 8. Our Constitution embraces this principle and so does this Court's jurisprudence. *See* Part I(B). This usurpation also intrudes on religious schools' core First Amendment right to "shape [their] own faith and mission through [their] appointments." *Hosanna-Tabor*, 565 U.S. at 188–89.

Third, the Ninth Circuit determined that neither of the teachers here "considered herself a minister or presented herself as one to the community." Biel.Pet.App.12a; *see also* Morrissey-Berru.Pet.App.3a (stating that the teacher did not "hold herself out to the public as a religious leader or minister"). But Catholic schools clearly *do* hold themselves out as advancing the Catholic faith through their parochial-school teachers, and both teachers here explicitly agreed to do so. Biel's contract provided that she "teach[] and promote behavior in conformity to the teaching of the Roman Catholic Church." Biel.Pet.App.5a. She also held herself out to the public as a religious teacher by making that commitment at a school whose public mission statement provided that it would "facilitate the development of confident, competent, and caring Catholic-Christian citizens prepared to be responsible members of their church[,] local[,] and global communities." *Id.* Likewise, Morrissey-Berru explicitly agreed to advance the Catholic faith

through her duties as a teacher. She signed an agreement stating that she understood that "the mission of the School [was] to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at the School, and the doctrines, laws and norms of the Roman Catholic Church." (Morrissey-Berru.Pet.App.32a, 93a).

In any event, "the purpose of the ministerial exception is to allow religious employers the freedom to hire and fire those with the ability to shape the practice of their faith." *Grussgott*, 882 F.3d at 661. To maintain autonomy, churches must be free to decide who should be entrusted to teach the faith and how they should "hold themselves out" to the public. *See supra* pp. 6–7 (recounting early struggles over who would control the symbols of religious office); *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (emphasizing that a "religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very embodiment of its message and its voice to the faithful." (internal quotation marks omitted)). "Thus, it is the school's expectation—that [the teacher] would convey religious teachings to her students—that matters," regardless of whether a secular court believes that the teacher properly holds herself out as a religious figure. *Grussgott*, 882 F.3d at 661; *see also Temple Emanuel*, 975 N.E.2d at 443 (the ministerial exception covered a teacher at a Jewish school even though "she...did not hold herself out as a rabbi").

A proper understanding of *Hosanna-Tabor* and the historical antecedents it embodies makes this another clear case. Biel and Morrissey-Berru had all

the religious functions that Perich had in *Hosanna-Tabor*; the rest is merely differences in denominational practice and nomenclature. As a result of the Ninth Circuit's decision, "Catholic schools in th[at] circuit now have less control over employing [their] elementary school teachers of religion than in any other area of the country," and "thousands of Catholic schools in the West have less religious freedom than their Lutheran counterparts nationally." Biel.Pet.App.66a–67a (Nelson, J., dissenting from denial of rehearing en banc). St. James and Our Lady of Guadalupe chose Biel and Morrissey-Berru, respectively, as teachers who would "preach [their] beliefs, teach [their] faith, and carry out [their] mission." 565 U.S. at 196. Accordingly, both Biel and Morrissey-Berru fall within the ministerial exception, and their schools cannot be punished for their decision to dismiss them from their teaching positions. Any other result would infringe on each school's religious liberty by denying it the "free[dom] to choose those who will guide it on its way." *Id.*

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

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