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 *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF PETITIONER

Amicus curiae Ethics and Public Policy Center respectfully submits that the judgments of the Ninth Circuit Court of Appeals should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC's work. For example: EPPC's Faith Angle Forum aims to strengthen reporting and commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life. EPPC scholars, such as EPPC Distinguished Senior Fellow George Weigel, write prolifically in defense of religious freedom.

EPPC's interest in these cases arises from the centrality of the ministerial exception to the First Amendment's parallel guarantees of the free exercise and non-establishment of religion. The decision by a religious group regarding who will be responsible for leading religious exercises like prayer and communal

[1] In accordance with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

worship, and for conveying the tenets of religious faith, is at the very heart of religious exercise. Government interference in such decisions—including by allowing the judicial process to proceed beyond the point necessary to determine if the ministerial exception applies—undermines the protections afforded by the First Amendment and the consequent limitations on the judicial branch of government.

SUMMARY OF ARGUMENT

Since this Court's unanimous decision in *Hosanna–Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), federal and state courts have applied the ministerial exception in a variety of contexts. *E.g.*, *Sterlinski* v. *Catholic Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019) (church organist); *Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018) (pastor); *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015) (spiritual director). Until the Ninth Circuit's decisions below, the courts of appeals were coalescing around a common substantive approach to the doctrine. See, *e.g.*, *Conlon*, 777 F.3d 829; *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018); *Penn* v. *New York Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 424 (2018) (all applying same "religious character" approach to determine whether an employer was a "ministry."). But the post-*Hosanna-Tabor* cases do not adopt a consistent procedural framework for addressing the ministerial exception. Some courts treat the issue like any other affirmative defense, others raise the defense *sua sponte*, and still others identify it as an issue of law to be determined on a

motion to dismiss under Rule 12(b)(6). See *Conlon*, 777 F.3d at 833 ("The ministerial exception is an affirmative defense that plaintiffs should first assert in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)."); *Lee*, 903 F.3d at 117 (upholding application of the ministerial exception where trial court raised the issue *sua sponte*); *Skrzypczak* v. *Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) (the district court converted a motion to dismiss regarding the ministerial exception to a motion for summary judgment).

The Court's analysis in *Hosanna-Tabor* demonstrates that the ministerial exception's purpose is not only to protect personal and organizational religious liberty, but also to protect the Establishment Clause's structural limitations on government action. The ministerial exception's latter function is consistent with the church-property cases the Court discussed in *Hosanna-Tabor*. In each of those cases, the Court concluded that the state was categorically forbidden from revisiting religious decisions made by religious organizations.

Because of the ministerial exception's structural protection on the exercise of governmental power, the ministerial exception is analogous to official immunity. With regard to both complete and qualified immunity, the defendant is harmed by the very act of being sued. So too, a religious entity being sued for exercising its right to determine who its ministers are is harmed by being dragged into the secular courts to answer for its decision.

The purposes of the ministerial exception answer the procedural questions that courts have grappled with since *Hosanna-Tabor*. Because the very act of

maintaining litigation where the ministerial exception applies harms the structural and personal interests that the doctrine protects, courts should address the application of the doctrine expeditiously at the outset of litigation (as they do when resolving immunity questions). Indeed, the structural protections afforded by the exception impose an independent duty on the courts to avoid unnecessary entanglement in the quintessential religious decision of choosing who will serve as a religious group's ministers even where the parties are willing to submit their dispute to judicial resolution. Practically, this means that courts should resolve the application of the ministerial exception at the pleading stage if possible, and if not, limit discovery to the question of whether the plaintiff is or was a ministerial employee. And if a court determines that the ministerial exception does not apply, the party asserting the exception should be allowed to immediately appeal under the collateral-order doctrine.

These consolidated cases offer this Court an opportunity to clarify further the protections afforded by the ministerial exception and to give practical guidance on how those protections affect the procedure for applying the doctrine.

ARGUMENT

I. The ministerial exception protects the courts from exercising governmental authority to review religious determinations.

In *Hosanna-Tabor*, the Court determined that "it is impermissible for the government to contradict a church's determination of who can act as its ministers." 565 U.S. at 185. One reason for this conclusion is that according to the government such power violates the Establishment Clause. *Id.* at 188–89.

This Court began its analysis of whether a ministerial exception exists by tracing the history of legal protections for religion in America. *Id.* at 182–87. The Court focused on three cases dating back nearly 150 years, all involving property disputes, and all of which recognized that the government is categorically prohibited from contradicting ecclesiastical decisions. *Id.* at 185-87.

In *Watson* v. *Jones*, 80 U.S. 679 (1871), this Court declined to interfere with a denomination's determination as to which faction of a church rightly controlled the church's property. There the Court stated:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. . . . It is of the essence of

> these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Id.* at 728–29.]

Accordingly, the Court adopted the common-law rule that courts could not review or overturn decisions by religious bodies on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727.

Some 80 years later, this Court declared that the decision in *Watson* "radiate[d] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). In *Kedroff*, the Court applied the First Amendment to an ecclesiastical question for the first time. See *Hosanna-Tabor*, 565 U.S. at 186. In *Kedroff*, the Court struck down a New York law that purported to decide which Russian Orthodox faction was entitled to control a cathedral because the issue was "strictly a matter of ecclesiastical government." 344 U.S. at 115–19. Such issues, the Court declared, are "forbidden" to the "power of the state." *Id.* at 119.

This Court returned to the harm caused by the interjection of the courts into ecclesiastical or religious questions in *Serbian Eastern Orthodox Diocese for United States of America & Canada* v. *Milivojevich*, 426 U.S. 696 (1976). There, the Court determined that courts cannot "delve into the various

church constitutional provisions" because to do so would repeat the lower court's error of involving itself in "internal church government, an issue at the core of ecclesiastical affairs." *Id.* at 721. The Court explained that the First Amendment allows "religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." *Id.* at 724. Courts must accept the decisions of religious tribunals on these matters. *Id.* at 725.

In short, in the three cases that animated this Court's recognition of the ministerial exception in *Hosanna-Tabor*, the Court emphasized that the state, and courts in particular, are categorically forbidden from resolving religious disputes.

The Court's adoption of the ministerial exception applied this categorical prohibition to religious organizations' decisions about who will serve as the organizations' ministers. In *Hosanna-Tabor*, this Court recognized that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so" similarly enmeshes the state in the affairs of religious bodies in the same fashion as deciding doctrinal disputes. 565 U.S. at 188. Doing so "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs," thereby interfering with "a religious group's right to shape its own faith and mission through its appointments." *Ibid.* This in turn "violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Ibid.* Because the Establishment Clause "prohibits government involvement in ecclesiastical matters,"

id. at 189, it is "impermissible for the government to contradict a church's determination of who can act as its ministers," *id*.

Thus, the ministerial exception protects persons' religious liberties and the courts' structural interest in avoiding the establishment of religion. The federal courts of appeals have recognized the structural protection afforded by the ministerial exception and so have declined to allow parties to waive the doctrine and thereby drag courts into religious controversies by choice or neglect. *Conlon*, 777 F.3d at 836. Accord *Lee*, 903 F.3d at 118; *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on other grounds*, *Hosanna-Tabor*, 565 U.S. 171.

II. Because of the protections afforded by the ministerial exception, its application should be determined before courts reach the merits.

When the Court adopted the ministerial exception, it addressed only one procedural aspect of the doctrine. Before *Hosanna-Tabor*, courts were split on whether the ministerial exception was jurisdictional or an affirmative defense. This Court determined that the ministerial exception is an affirmative defense and not a jurisdictional bar. 565 U.S. at 195 n.4.

The affirmative defense/jurisdictional dispute had practical consequences for how and when courts apply the ministerial exception. In courts that adopted the jurisdictional view of the ministerial exception, the proper procedure to raise the issue was via a motion to dismiss under Rule 12(b)(1). Such motions were generally made at the outset of the case. In courts that categorized the ministerial exception as an affirmative defense, the procedure for determining

whether the defense applied was not so simple. Some courts said that the issue should be resolved under Rule 12(b)(6) or 12(c). Others allowed for limited discovery on any factual disputes related to the exception's application and then resolved the issue via summary judgment. Still others allowed general discovery, and the ministerial exception would arise like any other affirmative defense in the eventual summary-judgment motion.

The Court's determination that the ministerial exception is an affirmative defense did little to reduce this confusion. The Sixth Circuit has said that courts should determine if the exception applies on a motion to dismiss under Rule 12(b)(6). *Conlon*, 777 F.3d at 833. But, as the Seventh Circuit noted, plaintiffs are not required to anticipate affirmative defenses in their complaints. *Sterlinski*, 934 F.3d at 571. So although plaintiffs occasionally plead themselves out of court, see *Garrick* v. *Moody Bible Inst.*, 412 F. Supp. 3d 859, 873 (N.D. Ill. 2019), the ministerial exception cannot always be determined at the motion-to-dismiss stage.

Because, in most cases, the party asserting the ministerial exception needs to rely on evidence outside the four corners of the complaint to demonstrate that the exception applies, courts typically address the ministerial exception on motions for summary judgment. *Fratello* v. *Archdiocese of New York*, 863 F.3d 190 (2d Cir. 2017); *Grussgott*, 882 F.3d 655, *cert. denied*, 139 S. Ct. 456 (2018). Indeed, that is how the district courts revolved the issue in these cases. Berru Pet. App. 4a–9a; Biel Pet. App. 69a–74a. But just like before *Hosanna-Tabor*, courts continue to differ on whether and to what extent discovery should be allowed. Compare *Sterlinski* v. *Catholic*

Bishop of Chicago, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017) ("[D]iscovery must move forward, but only on a limited basis. Before launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid—it is sensible to limit discovery to the applicability of the ministerial exception."); *Fratello* v. *Roman Catholic Archdiocese of New York*, 175 F. Supp. 3d 152, 161 (S.D.N.Y. 2016) (noting that it "directed the parties to engage in limited discovery" on question whether position at issue was ministerial), *aff'd sub nom. Fratello*, 863 F.3d 190 with *Starkey* v. *Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 119CV03153, 2019 WL 7019362, at *4 (S.D. Ind. Dec. 20, 2019) (denying religious defendants' motion to bifurcate discovery).

The rationale for the ministerial exception should guide how courts address these procedural issues. The protection of personal religious liberty encompassed by the ministerial exception includes the recognition that it is not only the decisions made by the court that "impinge" on religious liberty but the "very process of inquiry" leading to those decisions that impinges on that liberty. *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Indeed, "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (cleaned up). The structural interest in avoiding the establishment of religion also commends limiting the scope of courts' involvement in cases before determining if the ministerial exception applies. Indeed, the ministerial exception is unlike most other affirmative defenses. Courts have no interest of their own in whether a party's claims are barred by unclean hands or whether the statute of

limitations has expired. But because of the structural limitation imposed by the ministerial exception on the exercise of judicial authority, courts *do* have an interest in ensuring that the exception is applied even where the parties fail to raise the doctrine or where someone claims that they have waived it affirmatively. See, *e.g.*, *Lee*, 903 F.3d at 117 (upholding application of the ministerial exception where trial court raised the issue *sua sponte*); *Grussgott*, 882 F.3d at 658 (stating that "a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer"), *cert. denied*, 139 S. Ct. 456 (2018).

The categorical nature of the prohibition against the state enmeshing itself in religious controversies requires courts to decide as a threshold question if the ministerial exception applies before considering the merits of the plaintiff's claims. In cases where it may apply, the ministerial exception has practical implications for discovery, the possible need to try disputed factual issues related to the ministerial exception, and interlocutory appeals.

A. If discovery is needed to decide if the ministerial exception applies, discovery should be limited to that issue.

If the application of the ministerial exception is not resolved by a motion to dismiss, courts should limit discovery to topics relevant to whether the ministerial exception applies. See Fed. R. Civ. P. 16(b)(3)(B)(ii), 26(b)(1). The reasons for this are twofold.

First, allowing broad discovery in an employment case involving a ministerial employee will result in inquiries into the minister's fitness for the position,

the basis for the termination, and whether that basis was pretextual. These are precisely the inquiries that *Hosanna-Tabor* held that the government cannot make. 565 U.S. at 188–89.

Second, the "process of inquiry" harms the rights protected by the Religion Clauses, *Catholic Bishop of Chicago*, 440 U.S. at 502, and discovery is a principal means by which that harm is inflicted. See Mark E. Chopko, Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 293–94 (2012). Subjecting a religious organization to discovery with regard to its choice of its ministers can result in the organization's leaders being deposed on matters of doctrine and religious orthodoxy, as well as the organization's fidelity to its beliefs in practice. Discovery may also result in the adversarial inquiry into the spiritual beliefs and failings of religious persons. Such inquiry may chill a religious organization's articulation and practice of its faith if it knows that it might face discovery. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 343–44 (1987) ("While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("There is the danger that churches, wary of EEOC or judicial review of their decisions, might

make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members."). This problem is compounded by the possibility of contentious motion practice where such information is likely to be made part of the public record. *Bernstein* v. *Bernstein Litowitz Berger & Grossmann LLP,* 814 F.3d 132 (2d Cir. 2016) (recognizing presumption of public access to documents filed in a civil proceeding); *Center for Auto Safety* v. *Chrysler Grp., LLC*, 809 F.3d 1092 (9th Cir. 2016) (recognizing strong presumption of public access to documents filed in a civil proceeding, and requiring a party to demonstrate a compelling reason for documents to be kept under seal.).

The Court should provide guidance that, where discovery is necessary to determine whether the ministerial exception is applicable, district courts should limit the discovery to that issue.[2] Courts should not allow discovery that may be moot if the ministerial exception applies. Such discovery carries with it the very harms the ministerial exception is intended to prevent.

Indeed, this is the approach this Court has directed trial courts to employ in the official immunity context. For example, in *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987), this Court noted that it had "emphasized that qualified immunity questions should be resolved at the earliest possible stage of a

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[2] Indeed, the Court has provided the same guidance to the district courts with regard to discovery on issues of qualified immunity. *E.g.*, *Crawford-El* v. *Britton*, 523 U.S. 574, 599–600 (1998). See also *infra* II.C.

litigation." Where discovery is necessary to resolve whether qualified immunity applies, "any such discovery should be tailored specifically to the question of . . . qualified immunity." *Ibid.* Accordingly, the lower courts will allow limited discovery to determine if qualified immunity wholly bars a suit. See, *e.g.*, *Backe* v. *LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (discussing the "careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense."); *Solomon* v. *Petray*, 795 F.3d 777, 791 (8th Cir. 2015) ("Limited discovery is sometimes appropriate to resolve the qualified immunity question." (internal quotation marks omitted)); *Robertson* v. *Lucas*, 753 F.3d 606, 623 (6th Cir. 2014) ("Discovery is disfavored in this context, but 'limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.'" quoting *Crawford–El v. Britton*, 523 U.S. 574, 593 n. 14 (1998))).

B. If trial is necessary, courts should consider bifurcating trial on the ministerial exception from trial on the merits.

The use of Rule 56 as the vehicle for determining the applicability of the ministerial exception freights the risk that a genuine issue of material fact may exist that precludes summary judgment on the ministerial exception. Although *amicus* is unaware of any cases where this circumstance has arisen, presumably such factual disputes would be resolved at trial. Under a proper standard for the ministerial exception, such occasions will be rare. The same reasons that warrant limited discovery on the ministerial exception's

application also counsel in favor of a district court exercising its discretion to order a separate trial limited to those disputed facts. Fed. R. Civ. P. 42(b) (allowing courts to order a separate trial of a separate issue to avoid prejudice and expedite resolution).

C. Orders denying the application of the ministerial exception should be immediately appealable.

Where a district court concludes that the ministerial exception does not apply, such decisions should be immediately appealable on an interlocutory basis. This Court has made clear that the litigation process itself may excessively entangle government, including the courts, in religion. There is no unringing the bell after the courts have become excessively entangled in a religious controversy because they erred in declining to apply the ministerial exception and dismiss the case.

Here, the treatment of interlocutory appeals from the denial of qualified immunity provides a useful analog. See *McCarthy* v. *Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). The doctrine of qualified immunity arises from the common law but has a structural justification related to the separation of powers. Qualified immunity, if applicable, means that the defendant is not subject to suit. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). For this reason, qualified immunity is "effectively lost if a case is erroneously permitted to go to trial." *Ibid.* This makes a decision denying qualified immunity effectively unreviewable after a final judgment. *Id.* at 527. For that reason, orders denying qualified immunity are immediately appealable final orders under the collateral-order doctrine

notwithstanding the fact that they do not finally resolve a case. *Id.* at 530.

The same should be true of the ministerial exception. The harm caused to the defendant by the wrongful denial of the ministerial exception is the same harm incurred by the defendant in the qualified-immunity context. The defendant loses the First Amendment protection *against* trial—a trial that should never have occurred—and the protection from a judicial determination on the religious issue of who should be an organization's ministerial employee. While a post-judgment appeal can undo any ultimate judgment, it cannot restore the protections of the ministerial exception as guaranteed by the Religion Clauses. Indeed, in *Mitchell*, this Court determined that a similar partial restoration of qualified immunity was unacceptable. In the context of the ministerial exception, the harm is much worse. First, the defendant loses constitutional, not merely common-law, rights. Second, because the ministerial exception protects against the government's intrusion into quintessential religious questions—who a religious organization's ministers are—the constitutional harm occurs because of the judicial proceedings.

Accordingly, an order declining to apply the ministerial exception should be immediately appealable under the collateral-order doctrine like decisions denying qualified immunity.

CONCLUSION

The Court should reverse the judgments below. In so doing, the Court should clarify the structural protections afforded by the ministerial exception and instruct lower courts to resolve whether the ministerial exception applies as early as possible in cases where it arises.

Respectfully submitted,

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