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

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BRIEF OF *AMICI CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AND JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

ERIC D. MCARTHUR*
SPENCER D. DRISCOLL
DANIEL S. BROOKINS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com
Counsel for Amici Curiae
* Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

The General Conference of Seventh-day Adventists is the national administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 22 million members. In the United States, the Church has more than 1.2 million members. The Church operates the largest Protestant school system in the world, with nearly 7,600 schools, over 80,000 teachers, and 1,545,000 students. The Church relies on Seventh-day Adventist educators to fulfill its mission of providing biblical preaching, teaching, and healing ministries.

The Jewish Coalition for Religious Liberty (JCRL) is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square in which all supporters of freedom are free to flourish. JCRL is devoted to ensuring that First Amendment jurisprudence enables the flourishing of religious viewpoints and practices in the United States.

Amici have an acute interest in ensuring that religious organizations remain free to select those teachers and other employees in religious educational systems that "teach their faith" and "carry out their mission." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 196 (2012). The au-

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

tonomy of religious groups to govern themselves in such matters is a matter of fundamental religious liberty and is crucial to the ability of religious schools to carry out their missions. This autonomy is particularly important for minority religions like *amici*, for whom religious education is a critical means of propagating the faith, instructing the rising generation, and instilling a sense of religious identity.

Amici urge the Court to reverse the decisions of the Ninth Circuit, which depart from the longstanding "functional consensus" in the lower courts under which the ministerial exception covers all employees of religious organizations, including teachers in religious schools, whose duties include significant religious functions. The Ninth Circuit's contrary holdings, if affirmed by the Court, would severely impair the missions of *amici* and other religious groups for whom religious education is central to their faith.

SUMMARY OF ARGUMENT

The Ninth Circuit adopted an unduly narrow understanding of the ministerial exception. The decisions below, from two separate panels, refused to apply the exception to teachers at Roman Catholic schools who were responsible for teaching religion classes at least four days a week, leading students in daily prayers, accompanying students to monthly Catholic Mass, displaying religious symbols in the classroom, and incorporating Catholic faith and values into the curriculum. These erroneous holdings misconstrue this Court's decision in *Hosanna-Tabor*, undermine the religious freedom guaranteed by the First Amendment, and would, if affirmed by this Court, erase critical protections that have long been afforded to religious schools and organizations.

The ministerial exception guarantees religious groups the right to select who will "preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. At its core, this right includes the liberty to choose who will "transmi[t] the … faith to the next generation." *Id.* at 192. For many religious groups, educators in religious schools perform the critical task of communicating the faith. "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). *Amici* thoroughly agree that "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers," and that the selection of religious teachers "is an essential component of [a religious body's] freedom to speak in its own voice." *Id.* For these reasons, this Court has long recognized that the Constitution "leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith." *Id.* at 202.

In *Biel* v. *St. James School*, the court of appeals disagreed, concluding that a rule "under which any school employee who teaches religion would fall within the ministerial exception" would "render most of the analysis in *Hosanna-Tabor* irrelevant." St. James Sch. Pet. App. 15a. The court construed *Hosanna-Tabor* to require not only an important role in "transmitting religious ideas," but also additional factors such as a leadership position in the church, extensive religious training, or a sufficiently religious-sounding title. *Id.* at 8a–13a, 15a. Shortly thereafter, in *Morrissey-Berru* v. *Our Lady of Guadalupe School*, a separate Ninth Circuit panel agreed, holding that Morrissey-Berru's "significant religious responsibilities" were insufficient under *Hosanna-Tabor*. Our

Lady Pet. App. 3a (citing *Biel* v. *St. James Sch.*, 911 F.3d 603, 609 (9th Cir. 2018)).

Both panels misread *Hosanna-Tabor*. The Court in *Hosanna-Tabor* explicitly declined to hold that the ministerial exception requires additional factors beyond performing "a role in conveying the Church's message and carrying out its mission." 565 U.S. at 192. To be sure, the Court cited several factors supporting its conclusion that Cheryl Perich, a "called teacher" of the Lutheran faith, fell within the ministerial exception. *Id.* at 193–94. But the Court "express[ed] no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations [the Court] discussed." *Id.* at 193. The decisions below nonetheless mistakenly ask "how much like Perich a given plaintiff is, rather than whether the employee served a religious function." *Sterlinski* v. *Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019), *as amended on denial of reh'g and reh'g en banc* (Oct. 31, 2019).

The court of appeals also erred in concluding that applying the ministerial exception in these cases is "not needed to advance the Religion Clauses' purpose." St. James Sch. Pet. App. 15a. To the contrary, the freedom to choose religious teachers and leaders is central to religious groups' Free Exercise and anti-Establishment rights. From the Founding through the present, the Religion Clauses have protected religious groups' internal affairs from state interference. The church—not the government—is sovereign when it comes to selecting those who will teach, lead, and carry out its mission. When the government oversteps this limitation, it both violates the freedom of the church to exercise its faith and entangles the state in deciding religious questions. Under the Ninth Circuit's misguided rule, the government would be

empowered to interfere with religious groups' decisions about who is qualified to teach and personify their faith, and courts and juries would have to assess the sincerity and legitimacy of such decisions.

Nine judges dissenting from denial of rehearing en banc in *Biel* identified serious flaws in this approach. St. James Sch. Pet. App. 40a–67a. They recognized "[t]he harmful effects" caused by this "narrowest construction" of the ministerial exception, which "splits from the consensus of [the court's] sister circuits." *Id.* at 42a, 66a (R. Nelson, J., dissenting from denial of rehearing en banc). *Amici* respectfully urge the Court to reject the Ninth Circuit's outlier rule and affirm the "functional consensus" adopted by other federal circuits and state courts both pre- and post-*Hosanna-Tabor*. 565 U.S. at 203 (Alito, J., concurring).

I. BOTH OF THE FIRST AMENDMENT'S RELIGION CLAUSES GRANT RELIGIOUS GROUPS THE RIGHT TO CHOOSE, WITHOUT GOVERNMENTAL INTERFERENCE, WHO WILL TEACH THEIR FAITH.

This Court has long held that the state may not insert itself into a religious group's determination of "questions of discipline, or of faith, or ecclesiastical rule." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1872). This rule is deeply rooted in the Free Exercise Clause, which guarantees religious groups autonomy "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). The Establishment Clause likewise prohibits governmental interference "in essentially religious controversies." *Serbian E. Orthodox Diocese for the U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 709

(1976). In this way, the Religion Clauses work together to "protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring).

Applying these principles, *Hosanna-Tabor* ratified the longstanding consensus of the lower courts that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181. "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so," violates the Free Exercise Clause because that mandate "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188. And giving "the state the power to determine which individuals will minister to the faithful" violates the Establishment Clause. *Id.* at 188–89. In short, "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Id.* at 184.

A. Religious Educators Play A Vital Role In Transmitting The Faith To The Rising Generation.

The ministerial exception allows religious groups to choose who will be entrusted with the "important role [of] transmitting the … faith to the next generation." *Id.* at 192. For many religions, the work of transmitting the faith occurs largely within their religiously affiliated schools. This Court has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). After all, "both the content and credibility of a religion's mes-

sage depend vitally on the character and conduct of its teachers." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). The decisions below permit judges to second-guess religious groups' decisions concerning who will teach the faith to their children. These holdings would radically undermine each religious group's right under the Free Exercises Clause "to shape its own faith and mission through its appointments," and would violate the Establishment Clause by filtering religious instruction through the hands of a government-approved educator. *Id.* at 188–89.

Teachers in religiously affiliated schools stand at the educational frontlines, "conveying the Church's message and carrying out its mission." *Id.* at 192. Most obviously, their duties often include religious instruction and observance. Less visibly, but no less important, they are responsible for promoting the spiritual and moral formation of their students in accordance with the tenets of the faith. This responsibility pervades every minute of the school day. Teachers model faithful conduct, mete out discipline in accordance with religious principles, encourage faith and spiritual growth, and teach nominally "secular" subjects within a larger religious perspective. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 618 (1971) ("Religious formation is not confined to formal courses … [or] a single subject area.").

The role of teachers in this regard is of particular importance to *amici* and other religious traditions for whom education is inextricable from their faiths. For example, Seventh-day Adventists trace the importance of education back to the Garden of Eden. See Ellen G. White, *Education* 20 (1903) ("The system of education instituted at the beginning of the world was to be a model for man throughout all aftertime …. The Garden of Eden was the schoolroom, na-

ture was the lesson book, the Creator Himself was the instructor, and the parents of the human family were the students."). Education for Seventh-day Adventists has therefore always been explicitly religious, aimed at "restor[ing] human beings into the image of God as revealed by the Life of Jesus Christ" and focused on the development of "knowledge, skills, and understandings to serve God and humanity."[2] A faith-based education is in fact so important to Seventh-day Adventists that they start at an early age through a program called Early Childhood Education and Care, which offers the "education of God's precious little ones" in "safe, nurturing environments that are aligned with the beliefs and values of the Seventh-day Adventist Church."[3]

To fulfill this mission, the Seventh-day Adventist Church strives to run its schools in ways that honor God, by uniting doctrinal, moral, and secular teaching within a comprehensive Christian worldview. See *Clapper* v. *Chesapeake Conference of Seventh-day Adventists*, 166 F.3d 1208, at *1 (4th Cir. 1998) (per curiam) (unpublished table decision) (Adventists operate their schools "for the purpose of transmitting to their children their own ideals, beliefs, attitudes, values, habits and customs" and because they "want their children to be loyal, conscientious Christians"). This approach has proven invaluable to strengthening the students' relationship with Christ and passing the faith to the next generation.

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[2] Seventh-day Adventist Church, *About Us*, http://adventisteducation.org/abt.html (last visited Feb. 7, 2020).

[3] Seventh-day Adventist Church, *Early Childhood Education & Care*, http://adventisteducation.org/ecec.html (last visited Feb. 7, 2020).

In fact, the Church commissioned three studies of every student in its U.S. schools (called the Valuegenesis studies), which illuminate the role and effectiveness of Seventh-day Adventist schools in fostering faith. See V. Bailey Gillespie et al., *Valuegenesis Ten Years Later: A Study of Two Generations* (2004). Nearly three-fourths of students responded that attending a Seventh-day Adventist school helped develop their faith either "very much" (36%) or "somewhat" (38%). *Id.* at 302. Significantly, 53% of students attributed positive development of their faith to their teacher's faith; 70% stated that prayer at school positively impacted their faith's development; and 63% recognized that Bible classes developed their faith. *Id.* These data confirm the critical role that religious education—instilled by religious teachers—plays in transmitting the faith.

The same principle is true in the Jewish tradition. Jews believe they are under a biblical obligation to teach their children God's commandments. *Deuteronomy* 6:7 ("And you shall teach them to your sons and speak of them when you sit in your house, and when you walk on the way, and when you lie down and when you rise up."). This is an obligation of the highest order, entrusted only to a schoolteacher possessing "fear of Heaven" and "swift to read and correct," for "the world persists solely by virtue of the breath exhaled by little schoolchildren." Maimonides, Mishne Torah, *Hilkhot Talmud Torah* 1:2; 2:1, 3. Teachers at Jewish schools step into parents' shoes in fulfilling this paramount biblical commandment.

Moreover, Jews view education as an essential link in the chain binding modern Jews to their ancestors who received the bible at Mount Sinai. As the Lubavitcher Rebbe, a major 20th century Jewish figure, explained, "When you establish an educational institu-

tion, the achievement goes on forever. … Though a person moves on from this physical world, the education that he received is passed on to the next generation, and from that generation to the next ….”[4] Indeed, Rabbi Jonathan Sacks, the former Chief Rabbi of the United Kingdom, maintains that Jewish day school education is essential to the continuity of Judaism and the Jewish people. Without it, he contends, assimilation might cause the Jewish people to nearly disappear. See Jonathan Sacks, *Will We Have Jewish Grandchildren?: Jewish Continuity and How to Achieve It* (1994).

Jewish education is meant to teach children how Judaism impacts every aspect of their lives. A teacher in a Jewish school does not merely teach religious subjects or lead prayers—he models Judaism during every interaction with his students. For example, in Jewish law, blessings are recited on many occasions, including before and after eating or drinking, upon seeing a rainbow or scholarly person, and even after using the bathroom. Many Jewish men follow a tradition of covering their heads nearly all of the time. In short, Jewish instruction cannot be confined to a “religion class” or a particular time of day. It requires modeling an all-encompassing system that informs every moment of every day of a child’s life.

Empirically, the connection between Jewish day school attendance and Jewish identity later in life is well established. A survey of college students conducted by researchers at Brandeis University showed that day school attendance strongly correlates with

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[4] Bobby Vogel, *The Importance of Education*, TheRebbe.org (2002), https://www.chabad.org/therebbe/article_cdo/aid/1395114/jewish/The-Importanceof-Education.htm (last visited Feb. 7, 2020).

higher rates of interest in Jewish social events, holiday celebrations, learning, culture, and arts. See Fern Chertok et al., *What Difference Does Day School Make? The Impact of Day School: A Comparative Analysis of Jewish College Students* 36–37 (2007). The study also found that college students who had attended day school placed greater importance on their Jewish identity, and more frequently participated in Jewish religious services. *Id.* at 35–36, 38–39. Around 70% of regular day school attendees indicated that being Jewish while in college was "very" or "extremely" important, compared to less than 40% of those who had no Jewish school experience. *Id.* at 36.

Similarly, United Jewish Communities reported that "rises in the level of childhood Jewish schooling are almost always associated with increases in adult Jewish identity years later." Steven M. Cohen & Laurence Kotler-Berkowitz, *The Impact of Childhood Jewish Education on Adults' Jewish Identity: Schooling, Israel Travel, Camping and Youth Groups* 10 (2004). The study, which was designed to "isolate the 'pure' effects of Jewish education on Jewish identity," analyzed data from the 2000–01 National Jewish Population Survey. *Id.* at 12. It found similar relationships between day school attendance and religious identity, and concluded that participants with more than six years of day school were almost twice as likely to be synagogue members as those with no childhood Jewish education. *Id.* at 14.

A nationwide Pew Research Center Survey found an equally compelling relationship between Jewish education and religious identity. See Pew Research Ctr., *A Portrait of Jewish Americans: Findings from a*

Pew Research Center Survey of U.S. Jews (2013).[5] Among participants who identified as Jews by religion, 26% indicated that they attended yeshiva or day school as a child, and 63% reported participation in other formal Jewish education. *Id.* at 66. By contrast, only 13% of participants who identified themselves as Jews of "no religion" reported attending yeshiva or day school, and only 44% attended other formal Jewish education. *Id.* In other words, adult Jews who identified as Jewish by religion were twice as likely to have attended yeshiva or day school as their nonreligious counterparts. See *id.* And they were roughly one-and-a-half times as likely to have participated in other formal Jewish education. See *id.*

B. Courts Before And After *Hosanna-Tabor* Have Recognized That The Ministerial Exception Covers Religious Educators.

Given the importance of religious education to the propagation of faith—and the "critical and unique role of the teacher in fulfilling the mission of a church-operated school," *Catholic Bishop*, 440 U.S. at 501—courts have long recognized that the ministerial exception covers religious educators. For example, the Fourth Circuit applied the exception in a case involving a Seventh-day Adventist elementary school teacher. The court underscored the Adventists' infusion of theological beliefs into "secular" subjects, including the "teaching of the Bible's story of creation in science classes and the teaching of the influence of religion on the events of history in social studies classes." *Clapper*, 166 F.3d at *2. Similarly, the Seventh Circuit applied the exception in a case involving a

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[5] https://www.pewforum.org/wp-content/uploads/sites/7/2013/10/jewish-american-full-report-for-web.pdf (last visited Feb. 7, 2020).

Hebrew instructor at a Jewish day school. The court highlighted that even in Hebrew language classes, the instructor "discussed Jewish values with her students, taught about prayers and Torah portions, and discussed Jewish holidays and symbolism." *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 656 (7th Cir.) (per curiam), *cert. denied*, 139 S. Ct. 456 (2018).[6]

These decisions do not hold that *every* employee of a religious school is covered by the ministerial exception. Some employees—such as janitors and cafeteria workers—whose duties do not include religious instruction or other religious functions may not qualify. See *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring). But teachers who are responsible for religious instruction—even if they are *also* responsible for teaching "secular" subjects—do qualify. See *id.* Such a teacher is "not simply a public school teacher with an added obligation to teach religion." *Coulee Catholic Schs.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868, 890 (Wis. 2009). Rather, she is "an important instrument in a faith-based organization's efforts to pass on its faith to the next generation." *Id.*

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[6] See also *Sterlinski*, 934 F.3d 568 (music director and organist); *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (school principal); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (music director); *EEOC* v. *Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (music director and elementary school teacher); *Curl* v. *Beltsville Adventist Sch.*, No. 15-3133, 2016 WL 4382686 (D. Md. Aug. 15, 2016) (music teacher); *Henry* v. *Red Hill Evangelical Lutheran Church of Tustin*, 134 Cal. Rptr. 3d 15 (Ct. App. 2011) (preschool teacher); *Coulee Catholic Schs.* v. *Labor & Indus. Review Comm'n*, 768 N.W.2d 868 (Wis. 2009) (elementary school teacher).

II. THE NINTH CIRCUIT'S CONTRARY DECISIONS MISCONSTRUE BOTH *HOSANNA-TABOR* AND THE PURPOSES OF THE RELIGION CLAUSES.

The Ninth Circuit concluded in *Biel* that a rule "under which any school employee who teaches religion would fall within the ministerial exception … would not be faithful to *Hosanna-Tabor* or its underlying constitutional and policy considerations." St. James Sch. Pet. App. 15a; see also Our Lady Pet. App. 3a (relying on *Biel*). This conclusion misreads both *Hosanna-Tabor* and the Religion Clauses.

A. Applying The Ministerial Exception To Religious Educators Is Consistent With *Hosanna-Tabor*.

Hosanna-Tabor did not purport to define the metes and bounds of the ministerial exception. Nor did it adopt any "test," whether multifactor or totality-of-the-circumstances. Rather, the Court stressed that this was its "first case involving the ministerial exception," and that it was "enough" to hold that the exception covered Perich "given all the circumstances of her employment." 565 U.S. at 190. In other words, the Court concluded that *at least* where those circumstances exist, the ministerial exception applies.

The Court did not, however, hold or imply that each of the circumstances it discussed—having a formal religious title, holding oneself out as a minister, and performing important religious functions—was a prerequisite to invoke the ministerial exception. See *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190, 204–05 (2d Cir. 2017) ("*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant, including the four considerations on which it relied; it neither limits the inquiry to those considerations nor requires

their application in every case."). Nor did the opinion suggest that a teacher's performance of significant religious functions in the course of her employment is insufficient, by itself, to trigger the exception. *Contra* St. James Sch. Pet. App. 15a (concluding that such a rule would "render most of the analysis in *Hosanna-Tabor* irrelevant"). On the contrary, this Court expressly rejected such a misreading, "express[ing] no view on whether someone with [the same] duties would be covered by the ministerial exception in the absence of the other considerations [the Court] discussed." 565 U.S. at 193.[7]

The Ninth Circuit's contrary holdings improperly transform this Court's explicit expression of "no view" on whether religious duties alone can trigger the exception into a binding holding that they cannot. This approach is wrong not only because it ignores the Court's express disclaimer, but also because it ascribes dispositive significance to the particular characteristics of the plaintiff in *Hosanna-Tabor* (a Lutheran schoolteacher), even though religious educators and ministers from other faiths may not possess those same characteristics, but are no less essential to those groups' efforts to transmit the faith to the next generation. See *Sterlinski*, 934 F.3d at 570 (crit-

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[7] That the Court's holding did not purport to set out the outer boundaries of the ministerial exception is underscored by the fact that Justices Thomas, Alito, and Kagan all joined the Court's opinion in full even though the rules they proposed for determining who qualifies as a "minister" do not require a totality-of-the-circumstances analysis—and would plainly cover the teachers here. See *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (concluding that courts should "defer to a religious organization's good-faith understanding of who qualifies as its minister"); *id.* at 199 (Alito, J., concurring) (concluding that the ministerial exception "should apply to any 'employee' who … serves as a messenger or teacher of [the] faith").

icizing the Ninth Circuit's approach because it "asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function"); St. James Sch. Pet. App. 50a, 53a (R. Nelson, J., dissenting from the denial of rehearing en banc) ("The panel majority mistakes *Hosanna-Tabor* to create a resemblance-to-Perich test," whereby religious organizations "must show that its employee served a significant religious function *and* the presence of at least one additional 'consideration' to receive protection under the ministerial exception.").

B. Applying The Ministerial Exception To Religious Educators Serves The Religion Clauses' Purposes.

More fundamentally, the Ninth Circuit's cramped view of the ministerial exception rests on an erroneous understanding of the Religion Clauses. In *Biel*, the Ninth Circuit concluded that applying the ministerial exception to religious educators is "not needed to advance the Religion Clauses' purpose." St. James Sch. Pet. App. 15a. This again misreads *Hosanna-Tabor*. That the historical events recounted in *Hosanna-Tabor* involved "heads of congregations and other high-level religious leaders," *id.* at 16a, does not imply that the ministerial exception is limited to high-level leaders. The elementary school teacher in *Hosanna-Tabor* would not have met that test. See *Hosanna-Tabor*, 565 U.S. at 190 ("Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree.").

Nor do the historical sources quoted by *Hosanna-Tabor* make any distinction between high- and low-level religious employees. As James Madison explained, "the selection of church 'functionaries'"—not executives—is "an 'entirely ecclesiastical' matter left

to the Church's own judgment." *Id.* at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 *Records of the American Catholic Historical Society* 63 (1909)); *contra* St. James Sch. Pet. App. 16a ("The First Amendment … does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith."). Similarly, President Thomas Jefferson's letter to the Ursuline Sisters of New Orleans promised that "[t]he principles of the constitution of the United States … are a sure guaranty … your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority." Quoted in 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950).

Accordingly, the focus should not be on the "level" of the employee within the organization. Rather, the question should be whether, in light of the functions the employee performs, application of the ministerial exception is necessary to protect the values embodied in the Religion Clauses. Specifically, would governmental interference in the employment relationship undermine the Free Exercise Clause's guarantee of religious autonomy, disturb the First Amendment's assurance of denominational equality, or violate the Establishment Clause's prohibition on excessive church-state entanglement? See *Hosanna-Tabor*, 565 U.S. at 188–89. In *Biel* and *Morrissey-Berru*, the answer to each of these questions is emphatically yes.

1. The Ninth Circuit's approach undermines the First Amendment's guarantee of religious autonomy.

To "safeguard" religious autonomy, this Court has "long recognized that the Religion Clauses protect a private sphere within which religious bodies are free

to govern themselves in accordance with their own beliefs." *Id.* at 199–200 (Alito, J., concurring). This sphere includes "matters of internal governance," such as "the selection of those who will minister the faith." *Id.* at 196–97 (Thomas, J., concurring); see also *Kedroff*, 344 U.S. at 107–08 ("Legislation that regulates church administration, the operation of the churches, [or] the appointment of clergy, … prohibits the free exercise of religion.").

The selection of educators in religious schools falls within this zone of autonomy from state inference for an important reason: forcing a religious organization to accept a messenger who does not share the organization's views, or who fails to live up to them, fundamentally "impair[s] [the group's ability] to express those views." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) (quoting *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000)). Indeed, the "very existence" of "religious groups" is "dedicated to the collective expression and propagation of shared religious ideals." *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.* at 201 (quoting *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)).

Here, both Biel and Morrissey-Berru "ministered the faith" as religious educators, placing them well within the sphere of the ministerial exception. See St. James Sch. Pet. App. 12a (acknowledging Biel "taught religion in the classroom"); Our Lady Pet. App. 3a ("Morrissey-Berru did have significant religious responsibilities as a teacher at the School."). By excluding such messengers from the ministerial exception unless they *also* "serve a leadership role in the faith," St. James Sch. Pet. App. 16a, the Ninth

Circuit has done precisely what the First Amendment proscribes: "impos[e] an unwanted minister" on a religious school. *Hosanna-Tabor*, 565 U.S. at 188.

2. The Ninth Circuit's approach violates the First Amendment's guarantee of denominational equality.

"[A]t the heart of the Establishment Clause" is the principle "that government should not prefer one religion to another." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 703 (1994). Yet this is the very effect of the decisions below, which declined to extend the ministerial exception to religious educators at Roman Catholic schools "because the circumstances of [their] employment were not a carbon copy of the plaintiff's circumstances in *Hosanna-Tabor*." St. James Sch. Pet. App. 42a (R. Nelson, J., dissenting from denial of rehearing en banc).

By rigidly applying the *Hosanna-Tabor* "factors" in this manner, the Ninth Circuit has violated the First Amendment's guarantee of denominational equality by disadvantaging religious groups like *amici*, whose "ministers" do not check the same boxes as Perich. Jewish day school teachers, for example, do not typically carry formal ecclesiastical titles, and their training varies widely: the main requirement for the position is knowledge of Jewish law and practice, and no specific credentials are required. These teachers nonetheless play an integral role in the propagation of the faith. See *supra* I.A. (discussing the correlation between day school attendance and Jewish identity and religiosity). Likewise, a Mikvah attendant is not a "high-level religious leader[ ]," nor does the position require formal courses, degrees, or ordination. St. James Sch. Pet. App. 16a. The position merely requires informal acceptance by a rabbi or the congregation. This does not make Mikvah attendants lesser

ministers of the faith—without their expert supervision of post-menstrual immersions, married couples could not be physically intimate or conceive children.

The First Amendment demands that the government afford equal treatment under the law to positions like these, which is best accomplished if courts focus on the religious *functions* of the employee, considering always that specific titles or religious rites will often have no precise counterparts in other religious traditions. See *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) ("The term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists."); *id.* ("[T]he concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions.").

The Fourth Circuit charted this very course in its application of the ministerial exception to a kosher supervisor. See *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004). Like Mikvah attendants, kosher supervisors do not require a degree, formal courses, or ordination, and they are informally accepted by the rabbi or the congregation. Nonetheless, the court correctly concluded that the kosher supervisor was a "minister" because his "duties required him to perform religious rituals" and he "occupied a position that is central to the spiritual and pastoral mission of Judaism." *Id.* at 309.

The Ninth Circuit's contrary rule would impose a subtle, but distinct, form of coercion of religious belief and practice. Some religions, particularly minority ones, would receive less protection because they do not use formal ecclesiastical titles or require formal ecclesiastical training, and thus would be compelled

to hire or retain teachers who they believe are not suitable voices or models of their faith. See *Hosanna-Tabor*, 565 U.S. at 194. This, in turn, would pressure them to change their religious practices to conform to the predominant mold and thereby qualify for the ministerial exception. See *id.* at 197 (Thomas, J., concurring) ("[U]ncertainty 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.").

The Ninth Circuit's "resemblance-to-Perich" test thus beckons an uncertain and distinctly un-American future of denominational favoritism. Cf. John T.S. Madeley, *Religion, State and Civil Society in Europe: Triangular Entanglements*, *in* RELIGION AND CIVIL SOCIETY IN EUROPE 47–68 (Joep de Hart, Paul Dekker & Loek Halman eds., 2013) (cataloging four "hierarchies of recognition" in European states: "highly favoured religions, recognised but less favoured religions, recognised but barely tolerated religions and, a gradation down, those religious bodies that are denied any recognition as religious at all, sometimes even being denied legal existence on one ground or another"). The Founders adopted the Religion Clauses to avert this unhappy fate.

3. The Ninth Circuit's approach violates the First Amendment's prohibition on church-state entanglement.

The Ninth Circuit's rule would also inevitably require courts to entangle themselves in the theologically infused decisions of faith-based schools. To decide whether the ministerial exception applies, courts would have to assess the religious significance of the teacher's title, position, training, and conduct. And to adjudicate the ultimate question of liability, courts

and juries would routinely have to assess the sincerity and legitimacy of schools' religious reasons for taking the challenged employment action.

But in our legal order, "no official, high or petty, can prescribe what shall be orthodox in … religion." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). "Courts are not arbiters of scriptural interpretation," *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981), and cannot decide "the truth or verity of … religious doctrines," *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). Nor are they equipped to distil a universal form of ministry across the "religious landscape" of "organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring); see also St. James Sch. Pet. App. 57a (R. Nelson, J., dissenting from denial of rehearing en banc) ("[C]ourts are ill-equipped to gauge the religious significance of titles or the sufficiency of training.").

The *Biel* majority denied that its application of the ministerial exception would require courts to adjudicate religious disputes. In its view, courts were neither "commanded nor permitted" to "assess the religious validity" of a proffered justification for a religious educator's termination, but instead would only need to decide "whether the proffered justification was the actual *motivation* for termination." St. James Sch. Pet. App. 17a n.6 (emphasis added). This faulty distinction "misses the point of the ministerial exception." *Id.* at 38a (Fisher, J., dissenting); see also *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring).

"In order to probe the *real reason*" behind the termination of a religious employee, civil courts will often "be required to make a judgment about church doctrine." *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J.,

concurring). In *Hosanna-Tabor*, for example, the church asserted that Perich was terminated for violating the Lutheran internal dispute-resolution policy by threatening legal action against the church. *Id.* at 204–05. This Court recognized that the credibility of this assertion "could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function." *Id.* at 205.

Adjudication of such questions "would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.* at 206 (Alito, J., concurring). This "very process of inquiry" into "the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission" necessarily entangles courts in religious questions and "impinge[s] on rights guaranteed by the Religion Clauses." *Catholic Bishop*, 440 U.S. at 502; see also *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("[L]itigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment ….").

CONCLUSION

For the foregoing reasons, the Court should hold that the ministerial exception extends to all employees of religious organizations whose duties include significant religious functions, including the Catholic school teachers in these cases, and reverse the contrary judgments of the Ninth Circuit.

Respectfully submitted,

ERIC D. MCARTHUR*
SPENCER D. DRISCOLL
DANIEL S. BROOKINS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com

Counsel for Amici Curiae

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* Counsel of Record