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.

AGNES MORRISSEY-BERRU,
Respondent.

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

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate for employee free choice concerning unionization since 1968. To advance this mission, Foundation staff attorneys pioneered litigation protecting employees from having to choose between their faith and their job when forced to pay compulsory union fees. *See*, *e.g.*, *E.E.O.C. v. Univ. of Detroit*, 904 F.2d 331 (6th Cir. 1990). More broadly, Foundation litigators defended the political and religious autonomy of employees in many cases before this Court, including *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

The Foundation submits this brief because it has an interest in how the administration of the ministerial exception affects the protection of employees of faith.

INTRODUCTION

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), this Court recognized the historical and constitutional precedent of church autonomy. The ministerial exception safeguards the core of that tradition—the church's exclusive right to choose its ministers. But it is not the full extent of that tradition embodied in the religion clauses of the First Amendment. The ministerial exception itself is based on church autonomy.

By exclusively focusing on the qualifications for a minister, courts have ignored and undermined the

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

broader church autonomy intended by our Founders. This narrow approach misses the forest for the trees and untethers the ministerial exception from its doctrinal grounding—church autonomy.

The singular focus on the qualifications of a minister also invites significant abuses: judges are tempted to substitute their views of the qualifications for a minister for those of the church. In *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. 2019), that is exactly what the Ninth Circuit did. The court myopically fixated on the qualifications for a minister and applied its view of a Catholic minister instead of the Petitioners'. Returning to the church autonomy doctrine is necessary to correct and prevent these abuses.

SUMMARY OF ARGUMENT

This Court should apply the church autonomy doctrine and overrule the Ninth Circuit's decisions below.

I. The church autonomy doctrine is firmly established in our history, tradition, and legal precedent. It developed in the Middle Ages, and it was enshrined in the United States through the church-state separation dictated by the First Amendment's religion clauses. By separating the church and state, our Founders intended broad independence and autonomy for religion—not just a carve-out around the pulpit. That autonomy includes the right to choose and control employees.

II. Reinforcing the church autonomy principle by articulating a bright-line rule avoids intruding into sensitive religious areas and impermissibly entangling courts in prohibited religious inquiries. A bright-

line approach is consistent with the interests of the church, state, and individuals involved.

ARGUMENT

I. The Church Autonomy Doctrine in the Religion Clauses Shields the Internal Affairs of Religious Organizations from Secular, Government Interference.

The doctrine of church autonomy is enshrined in the religion clauses and is embodied in the history and meaning of church-state separation. It protects the right of religious institutions to govern themselves—including the right to select their members and choose their employees.

Church-state separation requires a clear division between the agency and authority of the church and the state. This does not exist unless the state is independent from the church. And reciprocally, the church is independent from the state. Pervasive government regulation reordering the relationship between the church and its employees is incompatible with church-state separation.

A. Church Autonomy Is Deeply Rooted in the History and Tradition of Church-State Separation and Is Inscribed in the Religion Clauses.

The Ninth Circuit reduced church-state separation to only include church ministers and leaders. *Biel*, 911 F.3d at 610. This inference is historically untenable.

From "the time of Becket, to Blackstone, to Benjamin Franklin, to today," church-state separation "has long meant . . . 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 & the Ministerial Exception, 106 Nw. U. L. Rev. Colloquy 175, 175 (2011). The concept of church-state separation is thus much broader than distinct leadership. It designates separate spheres.

Western civilization gradually recognized the independence of the church and the state. Beginning in the Middle Ages, Western civilization presupposed the existence of two sovereigns. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385, 1392 (2004). Based on Judeo-Christian thought, the idea emerged that God instituted two kingdoms: one ruled by the state and the other by the church. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1561 (1989).

Abraham Kuyper later referred to this concept as "sphere sovereignty." Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79, 83 (2009). The church and state are each sovereign in their own spheres. Each has a jurisdiction of legitimate operation, and neither is inherently subordinate to the other. The Founders inherited this view. Adams & Emmerich, *supra*, at 1561. It is codified in the First Amendment's religion clauses.

1. The Development of Church-State Separation in the Middle Ages.

During the eleventh and twelfth centuries, popes and monarchs fought over church appointments and authority. Emperors of the Holy Roman Empire believed for centuries they were the chief authority figure over both the church and state. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 97–98 (1983). But Pope Gregory VII

championed a different view. He asserted control over the church and refused to accept subordination by civil government. *Id.* at 95–96.

The clash between the church and state resulted in compromise. Because neither the church nor state could dominate the other, dual jurisdictions emerged that "profoundly influenced the development of Western constitutionalism." Brian Tierney, *The Crisis of Church and State: 1050–1300*, at 2 (1964). Although each institution occasionally controlled the other, the conflict largely culminated in the independence of the church and state. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1513 (1990).

Government power as a result was no longer absolute and self-defined. Berg et al., *supra*, at 180. The influence and independence of the church restrained the power and jurisdiction of the state. Thus, institutional religious freedom promoted political and religious liberty for all by establishing a precedent of limited government. According to Lord Acton, "we owe the rise of civil liberty" to that four-hundred-year conflict. McConnell, *Origins*, *supra*, at 1513.

2. The Religious Establishment in England.

Following the Protestant Reformation in the sixteenth and seventeenth centuries, church-state separation was threatened. Early Protestants struggling against the Catholic Church often sought assistance from civil rulers, thus intertwining the church and state. *Id.* at 1513–14. The reformation also introduced religious factions in Europe that divided the universal church. That division made it possible to form national churches that were more vulnerable to government coercion and control. *Id.*

In England, the example of establishment most familiar to our Founders, the government reigned supreme over the church. Berg et al., *supra*, at 180. The English monarch was the head of the church and had the power to appoint church officials. English law also gave Parliament authority to regulate the church and determine articles of faith and modes of worship. Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 828 (2012). The law barred anyone from ministry who did not submit to the state. In sum, no independent sphere existed for the church.

3. The Constitutional Separation of Church and State Established Church Autonomy.

By rejecting a national establishment of religion, the Founders rejected the state's control over the church. Berg et al., *supra*, at 181. The early Congress of the Confederation strongly endorsed the principle of church autonomy. In 1783, the Vatican proposed an agreement with Congress to approve a Catholic Bishop for America. Benjamin Franklin replied that "it would be absolutely useless to send it to the congress, which . . . cannot . . . intervene in the ecclesiastical affairs of any sect." *Id.*

Non-intervention triggered opposition because the new American bishop, selected by the Vatican, was French. Opponents urged Congress to reject the appointment on theologically neutral, "secular" grounds: an American bishop should be an American. *Id.* But Congress instead passed a resolution stating it had "no authority to permit or refuse" the appointment. *Id.* The church had the sole power to decide, because "the subject . . . being purely spiritual . . . is without the jurisdiction and powers of Congress." *Id.*

After ratification of the First Amendment, James Madison confirmed that the religion clauses dictate church autonomy. McConnell, *Reflections*, *supra*, at 830. In the wake of the Louisiana Purchase, Roman Catholic Bishop John Carroll wrote to Secretary of State Madison to consult with him about the appointment of a Catholic bishop in the new territory. *Id.* Madison conferred with President Jefferson and responded that the "selection of [religious] functionaries"—not just bishops or priests—was an "entirely ecclesiastical" matter beyond the federal government's jurisdiction. Berg et al., *supra*, at 181. Therefore, Madison explained that "the scrupulous policy of the Constitution in guarding against a political interference in religious affairs" prohibited the federal government from expressing any position—approving or disapproving—church appointments. *Id.*

Madison believed that church autonomy—prescribed by the Constitution's religion clauses—forbids government involvement in the internal affairs of religious organizations. As president, Madison vetoed a bill that incorporated an Episcopal church in the District of Columbia. *Id.* He objected, because the bill surpassed the federal government's jurisdiction by enacting "sundry rules and proceedings *relative purely to the organization and polity of the church* incorporated, and comprehend[ed] even the election and removal of the Minister," which eliminated control by the congregation or denomination. *Id.* (emphasis added). The religion clauses, as Madison understood them, thus removed the governance of the church from the federal government's power. *Id.*

Jefferson thought the same. *Id.* at 182. Two years after his letter to the Danbury Baptists, Jefferson

wrote another letter responding to the Ursuline Sisters of New Orleans. The Sisters operated a religious school for orphaned girls. They wrote to Jefferson asking for assurance that the Louisiana Purchase would not undermine their rights. *Id.* Jefferson responded that the principles of the Constitution "are a sure guaranty to you that [your property] will be preserved to you sacred and inviolate, *and that your Institution will be permitted to govern itself according to its own voluntary rules without interference from the civil authority*." *Id.* In other words, Jefferson believed that the church-state separation enshrined in the Constitution guaranteed the "autonomy, independence, and freedom of religious organizations—not just churches." *Id.*

4. The State Disestablishment Movement Rejected Government Control of the Church.

Disestablishment also provides powerful evidence of a robust concept of church autonomy at the founding. Because the original Bill of Rights did not apply to the states, establishments existed in roughly half of the states during ratification. McConnell, *Reflections*, *supra*, at 829. Opposition to government control of the church—and concern about the church's control of the state—fueled the disestablishment movement.

State religious establishments primarily consisted of government control of the church. Disestablishment was intended to negate that power, leaving the church autonomous. Esbeck, *supra*, at 1393, 1397. Dissenting groups who opposed religious establishments did so largely "to preserve the autonomy of religious organizations from government interference and manipulation." Berg et al., *supra*, at 182.

Disestablishment was the result of strands of Enlightenment and religious ideas. Adams & Emmerich, *supra*, at 1595–96. Following Enlightenment ideas,

Founders like Thomas Paine and Jefferson, and to a lesser extent Madison, advocated for separation to insulate the state from religious dominion. Following theological ideas, other Founders—most prominently John Witherspoon, Isaac Backus, and Roger Sherman—urged separation to protect religion from government interference. *Id.* Although their motivations differed, both groups endeavored to separate the church and state leaving each independent and autonomous in its sphere. *Id.*

Massachusetts was the last state to dismantle its establishment, and it illustrates the harm of government interference. McConnell, *Reflections*, *supra*, at 829. Disestablishment occurred in Massachusetts because of government pronouncements that overruled church decisions. Berg et al., *supra*, at 184. In a precedent setting example, a town's voters elected a Unitarian minister, while the church's members supported a Trinitarian minister. *Id.* The church members objected to the election. But the Massachusetts Supreme Judicial Court ruled that the town's vote controlled. The Trinitarians concluded afterward that "a religious establishment was no longer workable . . . and that disestablishment was necessary to protect the church against the control of the nonchurched." *Id.*

Despite moving to a new world and establishing a new society, government jurisdiction over religion resulted in the same system that the original Puritans fled—state control of the church. *Id.* Government authority, as the Massachusetts establishment illustrates, results in secular non-members controlling the church. *Id.* Religious autonomy—guaranteed by church-state separation—prevents that harm.

B. The Church Autonomy Doctrine is Grounded in Supreme Court Precedent that Undergirds the Ministerial Exception.

In these cases, the Ninth Circuit ignored the church autonomy doctrine and treated the ministerial exception as the full extent of the protection of the religion clauses. *Biel*, 911 F.3d at 607. That assumption is incompatible with not only the history discussed above, but also Supreme Court precedent.

This Court has recognized the historical and constitutional foundation of church autonomy. It has frequently and long declared that religious institutions have the right to decide internal disputes without government interference. *See, e.g.*, *Serbian E. Orthodox v. Milivojevich*, 426 U.S. 696, 710 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Watson v. Jones*, 80 U.S. 679, 681 (1871).

As Justice Thomas explained in *Hosanna-Tabor*: "the Religion Clauses guarantee religious organizations *autonomy* in matters of internal governance, including the selection of those who will minister the faith." 565 U.S. at 196–97 (Thomas, J., concurring) (emphasis added); *see also id.* at 199 (Alito and Kagan, JJ., concurring) (referring to the autonomy of religious groups protected by the religion clauses).

The doctrine of church autonomy is well established in Supreme Court precedent dating to at least 1871. In *Watson v. Jones*, 80 U.S. 679 (1871), for example, the Court considered a dispute over church property between a church's divided factions. It held that the determination of the general assembly—the highest church authority—bound the Court. *Id.* at 727. The Court reasoned that it could not contradict

the church leadership's decision, because the church property dispute was a religious matter. The Court viewed itself as incompetent to resolve religious disputes. *Id.* at 728–29.

Because the First Amendment did not yet apply to the states, the *Watson* Court based its decision on "the relations of church and state under our system of laws." *Id.* at 727. The Court, however, later adopted under the Free Exercise Clause the church autonomy rule *Watson* articulated. *Kedroff*, 344 U.S. at 116.

The Court in *Watson* considered internal church decisions—"questions of discipline, or of faith, or ecclesiastical rule, custom, or law"—as inherently religious determinations beyond the jurisdiction of civil courts. 80 U.S. at 727. Individuals who associate with a church consent to a church's internal rules and governance. Therefore, dissenting members do not have veto rights and cannot relitigate church decisions in court. *Id.* at 729.

Roughly sixty years later, the Court reaffirmed the church autonomy principle it recognized in *Watson*. In *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), the Court declined to interfere in a dispute involving a conflict between civil law and church autonomy. There, the plaintiff claimed a right to be appointed to a church position based on a will. The plaintiff's relative founded an endowed chaplaincy and specified that the position must be filled by her descendants. But the Catholic Archbishop refused. *Id.* at 11–12.

The plaintiff won at trial. But regardless of whether the plaintiff was entitled to the position under civil law, the Supreme Court held that the decision belonged to the church. *Id.* at 16. The Court unani-

mously ruled that, absent fraud or collusion,[2] "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive." *Id.*

After incorporation of the religion clauses, this Court confirmed in *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), that the church autonomy principle was encompassed in the Constitution's Free Exercise Clause. Summarizing the constitutional rule derived from *Watson*, the Court stated that the *Watson* principle of church autonomy "radiates . . . 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." *Id.* at 116.

The Court again reaffirmed these First Amendment principles in *Serbian Eastern Orthodox v. Milivojevich,* 426 U.S. 696 (1976). The case involved a dispute over an ecclesiastical position and included church property and assets. The mother church removed the plaintiff as bishop of a diocese, and he sued. *Id.* at 698–707. A state supreme court ruled for the plaintiff, because it determined that the mother church had not followed its own laws and procedures. This Court reversed. *Id.* at 708.

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[2] The Court also listed an exception for arbitrariness. But that caveat was eliminated in *Serbian East Orthodox v. Milivojevich*, 426 U.S. 696, 712–13 (1976). That decision also cast doubt on the fraud and collusion exceptions to *Watson* by calling them "dictum only." *Id.* But the Court left open their possible existence.

The Court ruled that internal church governance is a religious matter, because it is committed exclusively to the church. *Id.* at 724–25. Under the First Amendment, religious organizations are entitled to establish their own rules for internal governance and to enact conflict resolution procedures to resolve disputes. But courts cannot inquire whether a church followed those procedures, because the inquiry is an inherently religious matter reserved for the church alone. Thus, the First Amendment forbids the state from substituting its judgments for the judgments of the church. *Id.* at 708–13.

Hosanna-Tabor explicitly rested its decision on these church autonomy precedents. 565 U.S. at 185–87. Ignoring them and the doctrine of church autonomy therefore contradicts this Court's precedent, particularly *Hosanna-Tabor* itself.

In sum, these decisions represent the "hands-off" approach our Founders intended. When church leadership resolves an internal dispute, "the Constitution requires that civil courts accept their decision as binding." *Milivojevich*, 426 U.S. at 725. Government intervention is appropriate when needed to protect the decision of church leadership. *See, e.g.*, *Bouldin v. Alexander*, 82 U.S. 131, 139–40 (1872). Church autonomy is therefore a principle of noninterference and deference—the church may decide church matters. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 17 (2011). Those matters include selecting employees.

II. The Church Autonomy Doctrine Prohibits the State from Restructuring a Church's Relationship with Its Employees.

The state's jurisdiction under the Ninth Circuit's approach is essentially all encompassing, except for a

small carve-out around the pulpit. And in several cases, even that line of separation between the church and state ceases to exist depending on the claim or defense by the church. *See, e.g.*, *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004) (allowing a retaliation claim by a minister unless the church had a "doctrinal" defense); *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999) (allowing a sexual harassment claim by a minister, because the church did not offer "a religious justification"). This result is the opposite of church-state separation. The First Amendment guarantees more than enclaves of protection within the church.

A. Selecting Employees Is an Internal Matter of Church Governance Committed Exclusively to Religious Organizations.

The Ninth Circuit held below that the state can contradict a religious organization's determination about who is fit to carry out its mission. The church autonomy doctrine prohibits this determination.

Religious organizations have a constitutional right to govern themselves. The Free Exercise Clause guarantees that right and the Establishment Clause prohibits the state from controlling the church. *Hosanna-Tabor*, 565 U.S. at 181. Disestablishment and the adoption of the Establishment Clause were meant to prevent government control over the church—the defining characteristic of establishment. Taking away the right of self-governance and contradicting a religious organization's determination about who is qualified to perform its mission flagrantly violates both religion clauses.

The imposition of the government's values and priorities in place of the church's is comparable to the

English establishment. It is far from neutral or separate. Pervasive regulation by the state in order to legally exist as a church is akin to the oath church officials had to swear to the king.

Government intervention—especially after a religious organization has made a determination within its sphere—undermines a religious organization's ability to govern itself. And such intervention utterly contradicts the church autonomy principle recognized in *Watson*, repeated in *Kedroff, Gonzalez*, *Milivojevhich* and numerous other cases, and relied on and reaffirmed in *Hosanna-Tabor*. When a religious organization resolves an internal dispute, that determination is final.

Individual church members do not have veto power over the group's decisions or rules through civil litigation. Otherwise, the "unquestioned" First Amendment right of religious organizations to establish their own rules and conflict resolution procedures is meaningless. *Milivojevich*, 426 U.S. at 711, 724.

Religious organizations are founded on shared principles and cannot exist unless they can discriminate based on those principles. Choosing staff is therefore "at the heart of a religious organization's freedom." Lund, *supra*, at 23. A church's right to discriminate in employment and membership, particularly based on religion, "is nothing less than its bare right to exist." *Id.* at 24. The First Amendment protects that right.

The First Amendment establishes that the church is entitled to select and direct the employees who carry out its work. Those decisions profoundly shape the faith. They belong to the church alone.

B. Selecting Employees Is an Inherently Religious Matter Incapable of Division into Smaller Parts.

The Ninth Circuit incorrectly assumes that courts can constitutionally divide church decisions into discrete parts and adjudicate secular determinations. That assumption is false.

First, the decisions of religious organizations are not reducible to nonreligious parts. Decisions by religious organizations are religious—they are "steeped in a perception of divine will and inseparable from [the religious] mission." *E.E.O.C. v. Sw. Baptist Theological Seminary*, 485 F. Supp. 255, 261 (N.D. Tex. 1980), *aff'd in part and rev'd in part*, 651 F.2d 277 (5th Cir. 1981). The decisions themselves are therefore matters of religious prerogative shielded from the state.

Second, the inquiry demanded violates the First Amendment. Without the church autonomy doctrine, courts must answer (at a minimum) these questions to dissect the decisions of religious organizations:

(1) What roles are central to an organization's religious mission?

(2) What activities are religious?

(3) Who speaks for a religious organization?

But civil courts cannot answer these questions. Each inquiry is inherently religious and beyond the state's jurisdiction.

1. Courts Are Incompetent to Determine What Roles Are Central to a Religious Organization's Mission.

The Ninth Circuit's approach requires courts to draw lines through religious organizations by deter-

mining what roles and employees are central to an organization's religious mission. That inquiry, however, is constitutionally barred and logically flawed. Judges are incompetent to determine which employees are "sufficiently religious."

The First Amendment prohibits courts from questioning the centrality of a religious belief or practice and contradicting a litigants' interpretation of its faith. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). This Court has repeatedly reaffirmed that constitutional decree. *See, e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) (listing cases).

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court read the National Labor Relations Act narrowly and determined that it did not apply to religious schools. The Court based its decision on concerns that the "very process" of dispute resolution would implicate religious matters and impermissibly entangle the government with religion. *Id.* at 502. The Court rejected the assertion by the National Labor Relations Board (the "Board") that it could exercise jurisdiction over "religiously associated schools" but not "completely religious" schools. *Id.* at 495.

After *Catholic Bishop*, the Board proclaimed jurisdiction over religious schools that lacked a "substantial religious character." *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1337 (D.C. Cir. 2002). The District of Columbia Circuit rejected the Board's standard. It reasoned that the standard demanded intrusive inquiry into religious matters, because it entailed sifting through a school's religious beliefs and determining the centrality of those beliefs to the school. *Id.* at 1342. The court further held that the standard transgressed the First Amendment's boundaries. *Id.* at 1343–44.

The state may not determine whether a school is "sufficiently religious." *Id.*

Following those decisions, the Board determined that it retained jurisdiction over a religious school unless the school holds itself out as religious *and* holds out petitioned-for faculty members as performing a specific religious role. In *Duquesne University of the Holy Spirit v. NLRB*, No. 18-1063, 2020 WL 425053 (D.C. Cir. Jan. 28, 2020), the District of Columbia Circuit again rejected the Board's test. The requirement that faculty members perform a specific religious role required the Board to define a sufficient religious role or function. But the court held that the Board "may not determine whether various faculty members play sufficiently religious roles." *Id.* at *8. Defining the religious roles that count is beyond the jurisdiction of Board members and judges.

Here, the Ninth Circuit's opinions in *Biel* and *Morrissey-Berru* are based on its view of the religious employees who count, and its view of the employees who are central to the religious mission. Mirroring the Board's argument in *Duquesne*, the Ninth Circuit held that only employees who have a "sufficiently religious role"—defined by the court—advance the mission of these religious schools. Although all employees who work for a religious organization further its operation, the Ninth Circuit adopted its own theological views about the religious mission of these organizations and the Respondents' relationship to that mission. The court's opinions therefore rest on unconstitutional determinations about the centrality of religious practices and the interpretation of the Petitioners' faith. In place of the Petitioners' interpretation, the Ninth Circuit implemented its own requirements for a Catholic minister.

As *Catholic Bishop* and its progeny discussed above instruct, the First Amendment prohibits these inquiries. They demand sifting through the beliefs of religious organizations and judging the centrality of particular roles to an organization's religious mission. Both the inquiry and conclusions reached by the Ninth Circuit flout the First Amendment.

But the difficulty is not just a line drawing problem around particular employees or functions. A line makes little sense running through the church. The Ninth Circuit assumes that religious activities—preaching, for example—are central to a religious organization's mission but teaching and administrative matters, on the other hand, are not. This position is illogical.

Many pastors could not preach or perform their "religious function" without supporting staff. Churches and religious organizations vitally depend on administrative staff for their existence and operation. Their religious mission, therefore, depends on supporting personnel as much as it depends on those who preach from the pulpit.

All individuals who work for a religious organization are part of the religious mission. As *Watson* dictates, members and employees consent to a church's governance. 80 U.S. at 729. They should not be treated as outsiders. The assumption that supporting personnel are not vital or part of the religious mission is wrong.

2. Courts Are Incompetent to Determine What Roles Within a Church Are Religious and What Roles Are Secular.

A line running through a religious organization based on job classification is not only senseless, it is

based on tenuous theological distinctions between what is religious and what is secular.

First, the notion that preaching is religious but teaching is not, is a theological viewpoint—it is not neutral. Many Christian denominations, for example, eschew the secular-sacred divide. St. Augustine famously wrote: "A person who is a good and true Christian should realize that truth belongs to his Lord, wherever it is found, gathering and acknowledging it even in pagan literature." Saint Augustin, *On Christian Teaching* 47 (R. P. H. Green trans., 1997). This idea has often been summarized—all truth is God's truth. Nancy Pearcey, *Total Truth* 16–18 (2005). Religious beliefs are not narrowly confined to ideas about heaven and hell—they are beliefs about all of reality.

Second, the theological perspective that teaching is secular reflects an erroneous view of religion. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1390–91 (1981). For the Ninth Circuit, teaching fifth grade students is secular, presumably, because it is not found in a doctrinal statement or commanded by God. But this is wrong. *Id.* Religion is more than obeying commands. Singing in a church choir, attending a Bible study, and saying the Roman Catholic rosary are not required by conscience or doctrine. But those activities are still religious. Lund, *supra*, at 36–37. And when an activity is performed by a religious organization to advance a religious mission, that activity is equally religious. *Id.*

Third, even if it were possible to identify some activities as secular and some as religious, the secular activities directly affect the religious ones. *Id.* at 68. A teacher's authority on religious subjects is enhanced

by her instruction on secular ones. Students who learn to trust a teacher about secular matters will be more inclined to trust that teacher on religious matters. *Id.*

Religious teachers, moreover, work at religious schools to provide a religious viewpoint. Religious integration with all subjects is the proper end. Thus, even reading and writing may have religious components, which this Court has routinely assumed. *See, e.g.*, *Catholic Bishop*, 440 U.S. at 501 ("In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school."); *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) ("In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses." In religious schools, "Religious authority necessarily pervades the school system.").

Fourth, the religious and secular distinction also suffers from a generality problem over the level of analysis. Lund, *supra*, at 68–69. The problem is illustrated by an old story about three masons interviewed about their work. This first mason responds that he is cutting stone. The second mason declares that he is crafting an entryway. But the third mason states that he is building a cathedral. Given the different levels of abstraction, the first two masons can view their work in "secular" terms, while the third can view the same work in religious terms. *Id.* at 69.

The church autonomy doctrine dictates that a religious organization can view its work religiously. No principled, substantive, or neutral reason exists *a priori* to contradict a religious organization's viewpoint

and to instead adopt another level of abstraction. Therefore, when a court ignores a religious organization's determination that a position is religious, it impermissibly substitutes its own subjective view in place of the church's. The First Amendment removes this power from courts. Even if Mother Teresa spent all her time feeding and clothing the poor and the Pope spent all his time managing personnel, the church is entitled to view their work as religious service to God.

3. Courts Are Incompetent to Determine Who Speaks for a Religious Organization.

Every religion has a priestly class. Determining who is a priest and fit to interpret a religion is not only a religious question—it is a fundamental question of religion.

In the Old Testament of the Bible, for example, only a select class of individuals could serve as priests. Only men who belonged to the tribe of Levi—one of the original twelve tribes of Israel—who were physically healthy, who were groomed appropriately, who were spiritually clean, who were between twenty-five and fifty years old, and who were direct descendants of Aaron could serve as priests. *Leviticus* 21:1–24; *Numbers* 8:24–26. The requirements symbolized the perfection and holiness of God.

The Christian practice in the New Testament broke from the Jewish practice outlined in the Old Testament. *See, e.g.*, 1 *Peter* 2:5. Both the function and qualifications for the position changed based on the belief that Jesus became the ultimate mediator and sacrifice.

Catholics and Protestants also disagree about the requirements for ministry. In Martin Luther's *Address to the Nobility of the German Nation* (1520), he emphasized the priesthood of all believers and criticized the distinction between temporal and spiritual orders—the laity and the clergy. The priesthood of all believers was a cardinal doctrine of the Reformation.

The question—who is a minister?—is inherently religious. It cannot be answered without resolving theological questions and taking sides in a religious dispute. A church may decide that all of its employees speak for it, because they personify and represent it. That decision should be final.

C. The Bright-Line Approach Is Consistent With the Interests of the Church, State, and Individuals Involved.

This Court should apply a bright-line rule following the precedents of the District of Columbia Circuit and *Watson*. The Ninth Circuit's decisions illustrate the dangers of ad hoc balancing and the constitutional dilemmas that judges face when asked to determine who ministers to the faithful. Both the inquiry and outcome are fraught with constitutional problems.

To determine Board jurisdiction under the National Labor Relations Act, the District of Columbia Circuit applies a "bright-line test." *Univ. of Great Falls*, 278 F.3d at 1347. An institution is exempt from the Board's jurisdiction if it holds itself out as a religious institution and is religiously affiliated.[3] *Id.* If that simple test is met, the Board has no jurisdiction.

[3] Although the District of Columbia Circuit listed a third requirement that the institution must be a non-profit organization, that

That test is instructive. If an organization is religious, and a matter is properly within its sphere—part of an organization's internal operations and affairs—the state should defer to its decisions. This is the *Watson* principle of church autonomy. The church may decide for itself, "free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. While this Court could adopt a balancing test requiring strict scrutiny, a jurisdictional test focused on the limits of the church and state is superior. A jurisdictional approach is simpler, and it better accords with the historical development of church-state separation and the religious liberty embodied in the First Amendment.

A bright-line jurisdictional approach, moreover, eliminates constitutionally difficult questions, protects religious institutions, and aligns with the interests of the stakeholders involved.

1. Individual Interests Do Not Favor Government Regulation and Intervention.

The argument for intervention is that individual interests will be harmed if churches are given broad autonomy. But there are at least two individual interests at stake: the interests of conforming members and nonconforming members. Frederick Mark Gedicks, *Toward A Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99, 149 (1989).

Conforming members have a strong interest in maintaining the integrity of the religious group. *Id.*

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requirement is inconsistent with the text of the First Amendment and this Court's opinion in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711 (2014).

Many individuals derive meaning from religious communities and have an interest in preserving those communities. If the state intervenes in defense of the interests of nonmembers or nonconforming members, the autonomy of conforming members is likewise disrupted. *Id.*

Weighing both interests, the autonomy of the conforming member should prevail. *Watson* mandates this result. Individuals who join or associate with a religious organization consent to its rules. *Watson*, 80 U.S. at 729. Harmed nonconforming members can leave the group. Intervention alters the group for the entire community that depends on it and reduces religious pluralism. Gedicks, *supra*, at 150.

2. State Interests Do Not Favor Government Regulation and Intervention.

The strongest government interest in favor of intervention is eliminating and protecting individuals from unlawful discrimination. *Id.* But government interests in intervention are diminished when religious organizations are involved.

First, the state has no legitimate interest in matters beyond its sphere. Therefore, alleged state interests in regulating the internal affairs of religious organizations are illegitimate. Laycock, *supra*, at 1374.

Second, the interest in intervention is diminished in a religiously plural society. Nonintervention preserves the plurality of that society and the ability for aggrieved, nonconforming members to join another group. Gedicks, *supra*, at 151.

Third, the ultimate harm a religious group can impose is banishment—removal from its fellowship. Further punishment is beyond its sphere. Although banishment may be unpleasant and may eliminate a

source of income for an employee, a plethora of alternative groups and jobs exist in a pluralistic society. *Id.* at 153. The government interest in preventing or remedying banishment is therefore reduced. In a free society, religious pluralism is the remedy for rejected and banished members. *Id.*

Fourth, significant state interests exist against interference. Interference threatens religious pluralism. If carried to its ultimate conclusion, intervention only permits religious groups to exist that mirror the state's values. *Id.* at 115. That loss is significant. The freedoms enjoyed by Western society developed out of a tradition that restricted the power of the state by recognizing dual sovereignty.

When the goal of civil law is desirable, it is easy to overlook the value of church autonomy. As Justices Alito and Kagan remarked, "The autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy," the religion clauses "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 and Kagan, JJ., concurring).

The state interest in intervention is therefore minimal in a free society. Intervention undermines religious pluralism, reduces the number of groups for individuals to create and joine, and alters the structure of society itself.

3. Church Interests Do Not Favor Government Regulation and Intervention.

The interests of religious groups are significant. Interference undermines a group's right to define its own existence. Forcing an unwanted member on the

group or forcing the group to pay for expulsion—the greatest harm a religious group can impose—alters the group itself. "In a real sense, the group ceases to exist. The group's vision of itself, its ability freely to tell and retell its narrative story, is destroyed by the insistence on conformity to majoritarian values." Gedicks, *supra*, at 114.

Interference also disturbs the development of religion. State intervention in a religious group's internal affairs destroys the development of the group's historical and theological narratives. *Id.* at 144. Even when the state's demands do not violate doctrines or practices, intervention disrupts the spiritual life of the community. *Id.* It "breaks the link between evolution of group meaning and group authority and thus reinterprets and recasts such meaning." *Id.*

Doctrinal changes are a complex and open-ended process. Laycock, *supra*, at 1391. Churches are comprised of individuals with a diversity of views, and the dominant views may gradually change. "When the state interferes with the autonomy of a church, and particularly when it interferes with allocation of authority and influence within a church, it interferes with the very process of forming the religion as it will exist in the future." *Id.* (citing historical examples).

Religious groups therefore have a substantial and legitimate interest in autonomy. The harm caused by state intervention is considerable and long lasting.

4. A Bright-Line Rule Is Consistent with the Interests of the Stakeholders and Is Demanded by the Constitution.

In sum, the state has no interest sufficient to warrant intervention in the internal affairs of the church. The interests of the individuals, the state, and the

church favor a jurisdictional bright-line preserving church autonomy.

Those interests are consistent with the First Amendment. Both the Free Exercise Clause and Establishment Clause require a jurisdictional sphere of sovereignty for the church. Employment decisions are within that sphere.

CONCLUSION

The Court should overrule the decisions below.

Respectfully submitted,

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