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 *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF SOUTHERN CALIFORNIA, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AND THE ADL (ANTI-DEFAMATION LEAGUE) IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to defending the principles embodied in the Constitution of the United States and our nation's civil-rights laws. The ACLU of Southern California is one of its state affiliates. As organizations that, for nearly a century, have been committed to both preserving First Amendment rights and opposing discrimination, ACLU *amici* have a strong interest in the proper resolution of this case.[1]

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, ADL (Anti-Defamation League) is a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment for all. To this end, ADL is a staunch advocate both for the religious liberty guaranteed by the First Amendment and the vigorous enforcement of comprehensive antidiscrimination protections for all Americans, the intersection of which are at the heart of this case.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters with the Clerk giving blanket consent to the filing of *amicus* briefs.

constitutional principles of religious freedom and separation of religion and government. Since its founding in 1947, Americans United has regularly participated as a party, as counsel, or as an *amicus curiae* in church-state cases before this Court, the lower federal courts, and state courts. Americans United has long advocated that the freedom of religious institutions to select ministerial employees to shape the expression of their faiths be appropriately balanced with the compelling governmental interests at the heart of our nation's antidiscrimination laws.

SUMMARY OF ARGUMENT

Although most employees across the country benefit from Title VII and other civil-rights laws prohibiting employment discrimination, ministerial employees of religious institutions are denied these protections. This Court held in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* that the constitutionally mandated ministerial exception takes precedence over society's "undoubtedly important" interest in ensuring that all people—regardless of race, ethnicity, disability, sex, age, or other protected characteristics—may participate freely in the workforce. 565 U.S. 171, 196 (2012).

To that end, the Court ruled in *Hosanna-Tabor* that a "called teacher" at a Lutheran elementary school was not entitled to invoke the nondiscrimination protections of the Americans with Disabilities Act. Pointing to "the formal title given [the teacher] by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the

Church," the Court reasoned that the teacher was a minister for purposes of the exception. *Id.* at 192. The Court declined, however, "to adopt a rigid formula for deciding when an employee qualifies as a minister," explaining, "It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers [the teacher here], given all the circumstances of her employment." *Id.* at 190.

In these consolidated cases, Petitioners ask this Court to do what it would not in *Hosanna-Tabor*: set a rigid standard for the ministerial exception. Specifically, Petitioners argue that, in applying a four-factor test, the Ninth Circuit's decisions below essentially established a constitutionally inappropriate *per se* rule "that *Hosanna-Tabor's* 'important religious functions' consideration can *never* suffice on its own to bring a plaintiff within the ministerial exception." Pet. Br. 2. They urge the Court to reject the Ninth Circuit's interpretation and instead impose what effectively would be an opposite *per se* rule: that whenever an employee of a religious institution is tasked with any important religious function, the position is "ministerial" and no further considerations are relevant.

The Ninth Circuit's treatment of the four factors identified in *Hosanna-Tabor* was flawed. The factors relied on by this Court were not exhaustive of every possible relevant consideration, and the decision did not demand that lower courts give equal weight to each. But it does not follow that this Court should respond to the Ninth Circuit's misapplication of *Hosanna-Tabor*'s flexible standard by adopting a test that would essentially reduce the judicial analysis to a one-factor, decontextualized inquiry

under which "the existence of important religious functions is alone sufficient" to invoke the ministerial exception. *See* Pet. Br. 50.

The ministerial exception serves important purposes in safeguarding religious institutions' autonomy with respect to governance and leadership. But it comes at significant cost. It confers on religious institutions the extraordinary power to discriminate against ministerial employees on any basis whatsoever, including race, disability, sex, and age. And this discrimination need not even be tied to religious doctrine or practice; it can be purely invidious. *Hosanna-Tabor*, 565 U.S. at 195-96. Given this sweeping immunity from nondiscrimination laws, the Court should take care not to expand the exception beyond its rationale. As in *Hosanna-Tabor*, the ministerial exception applies only if the totality of the circumstances—taking into account *all* facts that may bear on the ministerial nature of a particular employee's job—demonstrates that the employee is a minister of the faith.

The ministerial exception cannot be reduced to a single-factor test. A variety of contextual factors may shed light on the ministerial or nonministerial character of an employee's work for a religious institution. In addition to considering the employee's religious functions, title, religious training, and history of holding themselves out as a minister, *see id.* at 191-92, courts should examine whether employment decisions regarding the position are based largely on religious criteria, including whether hiring is restricted to co-religionists. Courts also should ask whether employees' religious functions are a substantial part of their duties, or merely

ancillary tasks, and whether any religious duties substantially affect the religious employer's autonomy to shape and share its religious mission. Affording courts the flexibility to weigh these and other relevant considerations, as illustrated in *Hosanna-Tabor*, is essential to ensuring that only employees who serve in truly ministerial roles are classified as such, thus minimizing the discriminatory harms associated with the exception.

These consolidated cases highlight the critical importance of applying a sensitive totality-of-the-circumstances test rather than a rigid, one-size-fits-all rule. There are material differences between the two cases that are not captured by either the Ninth Circuit's or the Petitioners' inflexible approaches.

The totality of the circumstances does not establish that Ms. Biel was a minister. Her school did not require its elementary homeroom teachers even to be Catholic, and did not require any religious training or certification. Ms. Biel did not participate in governance or lead or select the liturgy for worship. The mere fact that she covered religion as one of many subjects she taught her class does not make her a minister. Accordingly, the Court should affirm the Ninth Circuit's ruling in her favor, and her estate should be permitted to proceed with her claim that St. James discriminated against her because of her breast cancer diagnosis.

By contrast, "[t]he case for the ministerial exception in *Morrissey-Berru* is . . . stronger than in *Biel*." St. James Cath. Sch. (SJCS) Pet. App. 66a. While the matter is not free from dispute on this record, her position apparently required that she not only be Catholic, but be certified in religious

education. She regularly taught a distinct religious class, led her students in worship, and helped select the liturgy for Mass once a month. Considering all the facts available in the record, the totality of the circumstances demonstrates that Ms. Morrissey-Berru was a minister with respect to her employment by Our Lady of Guadalupe School.

The differences between Ms. Biel's and Ms. Morrissey-Berru's cases illustrate the imperative of considering all circumstances, and not adopting the rigid approaches advanced by the Ninth Circuit or the Petitioners. Where such important values as a religious institution's ability to govern itself and employees' right to equal treatment are both at stake, it is essential not to paint with so broad a brush as to shortchange either.

ARGUMENT

I. THE MINISTERIAL EXCEPTION SERVES IMPORTANT PURPOSES, BUT HAS PROFOUND IMPLICATIONS FOR MINISTERIAL EMPLOYEES, WHO MAY FACE UNFETTERED DISCRIMINATION WITHOUT LEGAL RECOURSE.

The ministerial exception, rooted in both Religion Clauses of the First Amendment, serves vital religious-freedom values: It "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-95 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)). But, while the exception is constitutionally mandated

and advances core religious-freedom protections, it comes at considerable cost.

Our civil-rights laws generally protect the ability of all to participate in the most basic aspects of civil society, free from invidious discrimination. They vindicate the fundamental human dignity of every person, regardless of race, disability, sex, age, religion, ethnicity, and other protected characteristics. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). As this Court has repeatedly recognized, these laws serve "compelling state interests of the highest order." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). For example, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014); *accord Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

However, ministerial employees of religious institutions are denied these protections. Religious employers may hire and fire them based on any criteria and may subject them to any number of discriminatory employment conditions. *See, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657 (7th Cir. 2018) (Hebrew teacher alleged she was fired because she developed a brain tumor), *cert. denied*, 139 S. Ct. 456 (2018); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 832 (6th Cir. 2015) (employer fired a female ministerial employee because she was considering divorce but not male employees who had actually obtained

divorces); *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1246 (10th Cir. 2010) (female ministerial employee paid less than male counterparts); *Hutson v. Concord Christian Sch.,* No. 3:18-CV-48, 2019 WL 5699235, at *4 (E.D. Tenn. Nov. 4, 2019) (teacher fired for becoming pregnant out of wedlock), *appeal filed*, 19-6286 (6th Cir. Nov. 14, 2019); *Rosati v. Toledo, Ohio Cath. Diocese*, 233 F. Supp. 2d 917, 919 (N.D. Ohio 2002) (aspiring nun discharged from religious order and left without health insurance after breast-cancer diagnosis); *Walker v. First Orthodox Presbyterian Church of S.F.*, No. 760-028, 1980 WL 4657, at *2 (Cal. Super. Ct. Apr. 3, 1980) (organist fired for being gay).

Under *Hosanna-Tabor*, moreover, the discrimination need not be grounded in or even related to religious tenets. 565 U.S. at 194 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."). The ministerial exception "'precludes any inquiry whatsoever into the reasons behind a . . . ministerial employment decision.'" *Alicea-Hernandez v. Cath. Bishop of Chi.,* 320 F.3d 698, 703 (7th Cir. 2003) (quoting *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 802 (4th Cir. 2000)). The religious institution need not "proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'" *Id.* at 703 (quoting *Roman Cath. Diocese of Raleigh*, 213 F.3d at 802); *see also Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) ("In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.").

Even the most invidious discrimination is tolerated against ministerial employees. For example, a religious employer may fire ministerial employees because they are Black, even though such conduct is not related in any way to the employer's religious mission or beliefs. *See e.g.*, *Gomez v. Evangelical Lutheran Church in Am.*, No. 1:07CV786, 2008 WL 3202925, at *5 (M.D.N.C. Aug. 7, 2008) (barring Title VII claims by minister who was called "Nigger" and told that he "would not be able to work with white pastors").

The ministerial exception, then, establishes a sweeping immunity that is unparalleled in this Court's precedents. Unlike other constitutional protections, it is not subject to any balancing test or standard of scrutiny. No governmental interest, no matter how compelling and narrowly tailored, can overcome it.

As noted at the outset, there is good reason for this blanket immunity; it advances fundamental religious-freedom principles. Yet, it also inflicts substantial costs by denying to ministerial employees the same legal protections that all other people enjoy. Accordingly, the Court should be careful to ensure that the exception is closely tied to its justification and does not extend beyond those who are, in fact, ministers.

II. THE MINISTERIAL EXCEPTION SHOULD APPLY ONLY IF THE TOTALITY OF THE CIRCUMSTANCES ESTABLISHES THAT THE EMPLOYEE IS A MINISTER OF THE FAITH.

1. In seeking review of the decisions below, Petitioners warned this Court that "the stakes are high" for religious institutions seeking to propagate their faith. SJCS Pet. 3; Our Lady of Guadalupe Sch. (OLGS) Pet. 3. *Amici* agree. But the stakes are just as high for the hundreds of thousands, if not millions, of people employed by religious institutions, organizations, and schools across the country, who are not ministers and should not, therefore, be stripped of protections from invidious discrimination.[2]

Indeed, the harm to ministerial employees might not end there: Although this Court "express[ed] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers," *Hosanna-Tabor*, 565 U.S. at 196, some lower courts have extended the doctrine to bar these claims as well. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122-23 (3d Cir. 2018) (holding that ministerial exception prohibited court from adjudicating pastor's

[2] According to the National Center for Education Statistics, religious elementary and secondary schools across the country employ more than 335,000 full-time-equivalent teachers. This total does not account for non-teaching staff. U.S. Department of Education, National Center for Education Statistics, Private School Universe Survey, Table 2 (2017-18), *available at* https://nces.ed.gov/surveys/pss/tables/TABLE02fl1718.asp.

breach-of-contract claim against former church employer, and collecting similar cases).

Meanwhile, even where the ministerial exception does not apply, religious institutions still have substantial leeway to make employment decisions based on faith. Title VII and the Americans with Disabilities Act, for example, allow religious entities to prefer co-religionists in hiring, firing, and other employment decisions. *See* 42 U.S.C. § 2000e-1(a) (upheld in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 340 (1987)); 42 U.S.C. § 12113(d)(1).

2. Because the ministerial exception permits otherwise invidious discrimination, it should apply only where it is clearly warranted: to bona fide ministers of a faith. Employees should be categorized as ministerial only where religious employers demonstrate that the totality of the circumstances, taking into account *all* relevant factors, weighs in their favor.

Neither the Ninth Circuit's rigid analysis nor the test proposed by Petitioners is sufficient. Although Petitioners pay lip service to the notion of a contextual analysis that takes into account various considerations, Pet. Br. 3, 23, in the end, their proposed judicial inquiry would make one factor determinative: Under Petitioners' view, "the existence of important religious functions is alone sufficient" to invoke the ministerial exception. *See id.* at 50; *see also id.* at 24 ("When an employee of a religious organization performs important religious functions, that is enough under *Hosanna-Tabor* for the ministerial exception to apply."); *id.* at 36

("employees who exercise important religious functions fall within the ministerial exception").

As one court of appeals has explained, rejecting the same argument made by Petitioners here:

> Eschewing a formal four-factor test . . . does not warrant adopting the approach of the amicus [counsel for Petitioners here], which, though narrower, is just as formulaic. The amicus argues that we should adopt a purely functional approach to determining whether an employee's role is ministerial. In other words, it suffices to ascertain whether an employee performed religious functions and apply the exception if she did. But looking *only* to the function of [the employee's] position would be inappropriate . . . We do not adopt amici's position that 'function' is the determining factor as a general rule; instead, [under *Hosanna-Tabor*,] all facts must be taken into account and weighed on a case-by-case basis.

Grussgot, 882 F.3d at 661.

To be sure, whether an employee performs important religious functions will always be an integral part of the analysis. Indeed, in some or many instances, an employee's religious responsibilities might be so central to the ministry (*e.g.*, delivering sermons) or constitute such a substantial part of the position's duties that they are the *most* important facts affecting a court's analysis.

See, e.g., *id.*; *see also, e.g.*, *Rayburn*, 772 F.2d at 1168 (holding that pastoral care associate's religious duties, including leading Bible study groups, providing religious counseling to church members, delivering sermons from the pulpit, and conducting religious rites during worship services, were "significant in the expression and realization of Seventh-day Adventist beliefs").

Treating this single factor as determinative, however, deprives courts of key context and could end up sacrificing the compelling nondiscrimination interests of employees at risk of being wrongly classified as ministerial. In light of the extraordinary costs of the ministerial exception, courts should not ignore other facts that could—either alone or in combination—further clarify the ministerial or nonministerial character of a particular position.

3. Petitioners argue that their proposed standard reflects a consensus approach in the lower courts. Yet, as even they admit, "[t]hose courts have by no means ignored the other *Hosanna-Tabor* considerations." Pet. Br. 23. In fact, both before and after *Hosanna-Tabor*, the lower courts have typically employed a multi-factor, contextualized analysis that is not limited to religious functions alone. And *Hosanna-Tabor* made clear that courts should continue to examine ministerial-exception claims through this broadly contextual lens. *See* 565 U.S. at 190.

a. *Religious criteria or qualifications for position*

As an initial matter, in assessing whether the ministerial exception applies to a particular

employee, courts have properly considered whether the criteria for employment are primarily religious. The ministerial exception protects "a religious body's . . . ability to select, and to be selective about, those who will serve as the very 'embodiment of its message.'" *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)). Thus, whether a religious organization actually exercises that selectivity by applying religious criteria in determining whom to hire for a particular position is indicative of the ministerial or nonministerial nature of an employee. *Cf. Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987) (relevant factors in claims for freedom of association include "selectivity, and whether others are excluded"). When a school hires for a specific job without reference to religious criteria, that position is less likely to implicate the religious-autonomy interests protected by the ministerial exception.

Thus, "[i]t is difficult to conceive that [a teacher] might properly be classified as a minister of the Catholic faith when she is not even a member of that faith." *Braun v. St. Pius X Par.*, 827 F. Supp. 2d 1312, 1319 (N.D. Okla. 2011), *aff'd,* 509 F. App'x 750 (10th Cir. 2013); *cf. Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355, at *4 (S.D. Ohio Jan. 30, 2013). In the religious-school context, this is especially true when a school neither restricts a teaching position to co-religionists nor requires any religious training to qualify for, or to continue holding, the position. By contrast, the case for applying the ministerial exception will be much stronger where a school either requires its teachers to be of the faith, *see, e.g.*, *Fratello v. Roman Cath.*

Archdiocese of N.Y., 175 F. Supp. 3d 152, 165 (S.D.N.Y. 2016), *aff'd sub nom. Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017), or to have training in the faith, *see, e.g.*, *Grussgott*, 882 F.3d at 659 (holding that ministerial exception applied to Hebrew teacher at Jewish day school where teacher's résumé "tout[ed] significant religious teaching experience, which the former principal said was a critical factor in the school hiring her"); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (noting that position as Director of Music Ministry required employee to have "extensive course work in Church Music in Theory and Practice, Choral Conducting, Worship, Choral Vocal Methods, Hymnology, Bible, Theology, Christian Education, and United Methodist History, Doctrine and Polity").

b. *Substantial religious duties*

In assessing whether the ministerial exception applies to a particular employee, courts also have properly examined whether an employee engages in substantial religious duties, or whether the employee's responsibilities are primarily religious in nature. *See, e.g.*, *Rayburn*, 772 F.2d at 1169; *Petruska*, 462 F.3d at 307 n.10 (3d Cir. 2006) ("Petruska's own complaint establishes that her primary duties involved ministerial functions."). An employee's mere discharge of occasional or episodic religious duties should "not shield a religious employer under the ministerial exception *per se*." *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 696 (W.D. Pa. 2004). Otherwise, religious employers could immunize their employment practices from nondiscrimination requirements simply by assigning every employee

the task of reciting a morning prayer once a week or month.

It is critical to distinguish between "a spiritual employee who also performed some secular duties" and "a secular employee who happened to perform some religious duties." *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991). Where employees' duties are primarily secular and their religious functions are ancillary, or incidental, the application of neutral nondiscrimination laws is less likely to raise the constitutional concerns that animate the ministerial exception.

The inquiry, of course, "is not one that can be resolved by a stopwatch" or "considered in isolation, without regard to the nature of the religious functions performed." *Hosanna-Tabor*, 565 U.S. at 193-94. With those caveats, though, "[t]he amount of time an employee spends on particular activities is relevant in assessing that employee's status." *Id.* at 194.

For example, in *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013), a synagogue's facilities manager was responsible for constructing a Sukkah and instructing students at the synagogue's Hebrew school about its religious significance. Yet, this was not enough to render his position "ministerial" for purposes of the exception. *Id.* In reaching this conclusion, the court looked beyond the single fact that the employee performed some religious functions to observe that "[h]is primary duties—maintenance, custodial, and janitorial work—were entirely secular." *Id.* Constructing the Sukkah and

engaging with students about it was a "limited and infrequent" task, and the duties he generally performed as a facilities manager were not important overall to the synagogue's religious mission. *Id.* The district court also weighed other relevant considerations, including that the facilities manager had no religious training or title and "no decision-making authority with regard to religious matters." *Id.* By contrast, the ministerial exception plainly barred suit by a church choir director where 21 out of her 24 job responsibilities were religious or "worship-oriented," the vast majority were (by the employee's own admission) considered "essential," and her three secular duties were "not essential." *Starkman*, 198 F.3d at 176.

c. *Importance of position to employer's religious mission*

Even if an employee's religious duties are more than ancillary, courts should ask whether the employee serves in a religious leadership position, conducts important functions of worship, engages in ecclesiastical governance, or otherwise plays a substantial role in carrying out the religious institution's faith mission. These considerations clarify how essential a particular position is "to the spiritual and pastoral mission" of the religious institution. *See Rayburn*, 772 F.2d at 1169; *accord Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring) ("What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities."). Where an employee plays a less vital role in the spiritual and pastoral mission of the

religious employer, the position is less likely to be fairly characterized as ministerial.

In some cases, the answer will be clear. As Justice Alito explained, "[d]ifferent religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of 'employees' whose functions are essential to the independence of practically all religious groups." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Pastors, rabbis, imams, and other clergy, for instance, serve in leadership positions, perform important functions of worship and ecclesiastical governance, and play a central role in conveying an institution's religious message and carrying out its faith mission.

In this regard, courts should consider whether an employee is held out as a minister. *Hosanna-Tabor*, 565 U.S. at 191-92. Where an institution does not describe a position in ministerial terms or require applicants to have any particular religious training, credentials, or faith, it is less likely that the individual is indeed a minister. Where the employer imposes such requirements and expressly holds out the position as limited to ministers, by contrast, the case for a ministerial exception is much stronger. *See supra* pp.13-15.

At the same time, the label of "minister" should not, alone, be conclusive. "[S]ome faiths consider the ministry to consist of all or a very large percentage of their members." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring). The diverse and often idiosyncratic use of religious titles across denominations underscores the necessity of a fully contextual analysis. Even if they are given the formal

title of "minister" or some other religious designation, "'[a]ll members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister.'" *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397 n.15 (4th Cir. 1990) (quoting *Dickinson v. United States*, 346 U.S. 389, 394 (1953)); *accord EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981) ("[T]hose administrators whose function relates exclusively to the Seminary's finance, maintenance, and other non-academic departments, though considered ministers by the Seminary, are not ministers [for purposes of the ministerial exception].").

Similarly, school officials should not be able to claim that an employee is ministerial based only on the school's expectations that staff will adhere to the faith's religious tenets and serve as role models for students. *See, e.g.*, *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) ("That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern."); *Geary v. Visitation of Blessed Virgin Mary Par. Sch.*, 7 F.3d 324, 331 (3d Cir. 1993). In many faiths, all members are expected to be role models; that alone does not transform them into ministers. So, too, virtually all schools, religious or secular, expect their teachers to be role models. Such generalized obligations are not the sort of "specific responsibilities or actions that might be considered ministerial." *See Braun,* 827 F. Supp. 2d at 1319.

Thus, in *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132, 1145 (D. Or. 2017), a teacher was expected to integrate Christianity into her teaching and "demonstrate a maturing Christian faith." Nonetheless, she was not tasked with any religious duties. *Id.* She did not hold a leadership or governance position, conduct important functions of worship, or play a substantial role in conveying the religious institution's message or carrying out its mission. Considering the totality of circumstances, the court correctly concluded that any religious function "was wholly secondary to her secular role" and that the ministerial exception did not apply. *Id.* at 1145-46; *accord Dias*, 2013 WL 360355, at *4 ("Defendants attempt to swallow up the ministerial exception by characterizing teachers generally as role models and therefore 'ministers.' The Court reiterates its view that because Plaintiff, as a non-Catholic, was not permitted to teach Catholic doctrine, she cannot genuinely be considered a 'minister' of the Catholic faith.").

Finally, not every religious task should trigger the ministerial exception. Courts must look to the "nature of the religious functions performed" and the particular role played by the employee. *See Hosanna-Tabor*, 565 U.S. at 194. For example, merely saying grace along with others before meals is not only an ancillary duty, but it also is not the sort of task generally reserved for religious leaders or ministers and should not, in and of itself, transform a secular employee into a ministerial one. Likewise, a teacher's mere reading or recitation of a prayer in school each morning generally should not be enough, in itself, to invoke the ministerial exception, though some role in actually organizing or selecting the liturgy could

weigh in a school's favor in the contextual analysis. Nor should merely accompanying students to a chapel service as their chaperone make one a minister. As one court explained, "[l]abeling [a teacher] a 'minister' based on her attendance and participation in prayer and religious services with her students, which was done in a supervisory capacity, would greatly expand the scope of the ministerial exception and ultimately would qualify all of [the school's] teachers as ministers." *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014).

4. As the above examples show, Petitioners' proposal that the performance of any "important religious function" is sufficient to trigger the ministerial exception ignores the nuanced nature of this Court's and the lower courts' analyses. This Court's reluctance in *Hosanna-Tabor* to adopt a rigid test is well taken, and the Court should decline Petitioners' invitation to reduce a contextually rich analysis to what would effectively be a one-factor, "important religious functions" test.

Petitioners point to various religious functions that they deem "important," but acknowledge that, in light of the diversity of religions, no list can be exhaustive. Pet. Br. 43. Given the difficulties inherent in second-guessing religious officials' determination of which duties are "important" to their faith mission, Petitioners' proposed single-factor standard risks turning into an "*any* religious function" test and further highlights the importance of considering function as just one of several factors in the ministerial-exception analysis.

Even if an employee performs an important religious function, there may exist other factors that counsel against applying the ministerial exception. To take just one hypothetical situation—if a religious school were to require each member of its custodial and administrative staff to lead a worship service once each year, the assignment of this single, sporadic religious function should not outweigh the overwhelmingly secular nature of the employee's responsibilities on every other day of the year.

Courts should consider the whole range of factors that may shed light on the ministerial nature of a position to ensure that only those employees who serve in truly ministerial roles are classified as such. This safeguard is especially important given the broad discriminatory authority that comes with the ministerial exception.

III. THE DIFFERENCES BETWEEN *BIEL* AND *MORRISSEY-BERRU* UNDERSCORE THE IMPORTANCE OF A FACT-SENSITIVE INQUIRY.

The value of adhering to *Hosanna-Tabor*'s totality-of-the-circumstances approach is illustrated by the two cases consolidated here. Petitioners, Respondents, and the courts below treated the two cases as indistinguishable. But when one considers all the circumstances, critical differences emerge. The approach *amici* advance, and that this Court exemplified in *Hosanna-Tabor*, recognizes those differences and permits a more closely calibrated analysis. Following that approach, the ministerial exception should extend to Ms. Morrissey-Berru but not to Ms. Biel. By framing the two cases at a high

level of generality and applying overly rigid tests, both the Petitioners and the Ninth Circuit below have ignored critical distinctions between them.

First, it is worth noting that Petitioners based their ministerial-exception claims, in part, on the schools' general requirements that teachers model and promote the Catholic Church's religious and moral values and integrate these values throughout their teaching. Pet. Br. 4, 15, 18, 48. As discussed above, however, a general obligation to serve as a role model, standing alone, should not transform an otherwise secular teacher into a minister. The ministerial exception does not cover *all* employees of a religious organization, but only the subset who truly "minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 189. Generalized obligations to be religious role models—often imposed on all members of a religion or all employees, and not just on its "ministers"—should not be a sufficient basis to strip hundreds of thousands of employees across the country of fundamental legal protections. The bar to claiming the exception must be higher than that. While all ministers must be role models, all role models are not ministers.

Petitioners also point to both teachers' duties with respect to classroom prayer. Pet. Br. 4, 13, 17-18, 26, 45-46, 48-49. But only Ms. Morrissey-Berru played a leadership role. She led students in daily prayer at the beginning or end of class and led spontaneous prayer as appropriate. OLGS Pet. App. 3a, 21a, 86a-87a. She showed her students how to go to Mass, the parts of the Mass, communion, prayer, and confession. *Id.* at 81a. And she "was in charge of liturgy planning for a monthly Mass." *Id.* at 3a*; cf.*

Hosanna-Tabor, 565 U.S. at 192 (explaining that Perich "led [students] in prayer three times a day" and twice a year led school-wide chapel service, "choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible").

Ms. Biel did not lead class prayers; students did. She merely recited the prayers along with them. SJCS Pet. App. 5a, 13a. She also did not participate in selecting liturgy for Mass. *See id.* Her involvement in Mass was administrative and supervisory, indistinguishable from the role she would have played in bringing students to, say, a Veterans Day assembly. She walked students to the service and "made sure that the kids were quiet and sitting down and behaving." *Id.* at 5a, 95a.

For both employees, their most significant religious duties related to teaching religion. But there, too, the teachers' roles differed significantly. During her final year at Our Lady of Guadalupe, Ms. Morrissey-Berru taught a separate daily fifth-grade course devoted exclusively to religion. OLGS Pet. App. 16a, 29a, 90a-91a. Moreover, the school was selective about the employees assigned to that role. Although the record is not free from dispute, Petitioners contend that religion teachers at Our Lady of Guadalupe were *required* to be Catholic. JA 113.[3] And Our Lady of Guadalupe mandated that

[3] The record below is somewhat murky with respect to this issue. Asked whether it was "a requirement that a teacher be Catholic in order to teach at OLG School," the school's representative testified, "Yes." JA 113. However, she subsequently admitted that "[e]xceptions can be made." *Id.* Moreover, directly preceding that testimony, she stated only

teachers like Ms. Morrissey-Berru complete course work to become a certified Catechist, further reflecting the position's religious significance. JA 77. Ms. Morrissey-Berru was thus specifically trained in teaching Catholic principles and she earned a certificate documenting this specialized training. *See id.*

Ms. Biel, by contrast, was a generalist elementary-school teacher, and religion was simply one of the many subjects she covered throughout the day. SJCS Pet. App. 5a. Alone, this does not, of course, preclude a finding that she was a minister. *See Hosanna-Tabor*, 565 U.S. at 178, 193 (Perich taught fourth-grade students math, language arts, social studies, science, gym, art, and music, in addition to religion). However, Ms. Biel also had no religious training. *Cf. id.* at 191 (Perich was required to "complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher[,]" as well as "pass an oral examination by a faculty committee at a Lutheran college"). St. James simply did not require it. Thus, unlike Ms. Morrissey-Berru, Ms. Biel could not claim the title of "certified Catechist." Nor, unlike Ms. Morrissey-Berru, was she hired based on religious credentials or experience. SJCS Pet. App. 4a-5a. Indeed, St. James did not require

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that "the ideal candidate" for teaching positions was an "actively practicing Catholic," and that it was "preferred" that teachers be Catholic. *Id.* at 110-11. As this case arises in the context of defendants' motion for summary judgment, if the Court finds there is a genuine dispute about the facts surrounding Ms. Morrissey-Berru's employment, it should vacate and remand the decision below.

that employees holding Ms. Biel's position even be Catholic. *Id.* at 4a. The fact that a school does not require an employee to be a member of the faith weighs heavily against the conclusion that the employees is a minister.

Accordingly, based on the totality of the circumstances in the record, Our Lady of Guadalupe has demonstrated that Ms. Morrissey-Berru was a minster of the faith. Between her leadership of students in prayer and the substantive role she played in Mass, as well as her regular course teaching religion, her religious duties were substantial. They involved leadership in religious ritual. Moreover, her position was held out as requiring that any individual hired for the position be Catholic and obtain the title of a "certified Catechist."

St. James, by contrast, has failed to show that Ms. Biel is a minister. Based on the totality of the circumstances, she was fundamentally a secular employee, a primary-school teacher whose religious functions were ancillary and assigned to her without regard to religious criteria or training. She did not even have to be a member of the faith. St. James, of course, was entitled to be selective about who would teach these matters and could have limited that task to Catholics with religious training or religious credentials. Had school officials done so, the case for a ministerial exception would be much stronger. Instead, based on the actual facts in the record, St. James should not be able claim that Ms. Biel's termination was "purely of ecclesiastical concern." *See Miss. Coll.*, 626 F.2d at 485. As a nonministerial

employee, Ms. Biel should have the opportunity to proceed with her discrimination claim.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's ruling in favor of Ms. Biel and reverse the ruling in favor of Ms. Morrissey-Berru.

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