No. 19-267

In The
Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES MORRISSEY-BERRU,
Respondent.

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

BRIEF *AMICI CURIAE* OF NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS
in support of Petitioner

Steven W. Fitschen
James A. Davids
The National Legal Foundation
524 Johnstown Road
Chesapeake, VA 23322

David A. Bruce, Esq.
205 Vierling Dr.
Silver Spring, Md. 20904

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001

Counsel for Amici Curiae

Statements of Interest[1]

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in California, seek to ensure that an historically accurate understanding of the Religion Clauses is presented to our country's judiciary.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for

---

[1] All Parties received timely notice of *Amici's* intent to file this Brief and consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

chaplains and all military personnel.

SUMMARY OF ARGUMENT

This Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), endorsed the "ministerial exception" as required by the First Amendment's Religion Clauses but left many of its parameters to be defined later. *Id.* at 190. The circuits and state courts have proceeded with the definitional task, with the Ninth Circuit adopting a highly restrictive test that improperly disqualifies Ms. Morrisey-Berru as a "minister."

This case is a good vehicle for this Court to give further guidance. It should hew to the overriding demands of the Religion Clauses that require courts to keep out of the business of divining religious doctrine and to refrain from second-guessing judgment calls of religious organizations about whom they employ to support their mission. This has importance and applicability to all religious ministries, not just schools.

ARGUMENT

I. The Ministerial Exception Is Relevant to Religious Organizations Other Than Churches and Schools, and Its Application Must Be Grounded in Basic First Amendment Principles Rather Than by Comparisons to the Teacher in *Hosanna-Tabor*.

Amici support the petition and make the following additional points in summary fashion:

1. Many religious organizations in addition to religious schools have a sincere belief that their mission is best accomplished by associating employees who are faithful, both in belief and conduct, to the organization's doctrines and purposes. Religious organizations draw the line for which employees must be co-religionists at different places, but it is always a line informed by the organization's own religious beliefs. It is critical to these groups that the government, through its anti-discrimination laws, not be allowed to restrict the free exercise of their religion when they make those decisions about their ministries.

2. This Court in *Hosanna-Tabor* properly began with first principles: the Religion Clauses themselves and the protection they offer to religious individuals and organizations. Simply stated, the Free Exercise and Establishment Clauses mutually reinforce a principle that government must not interfere with religious organizations and the practice of their faith. *Id.* at 183-87. More particularly, as this Court noted, religious organizations have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 186 (quoting *Kedroff v. St. Nicholas Cath. of Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)).

3. Applying first principles requires looking beyond the term *minister*. The Constitution does not use the term, and the concerns that activate the "ministerial exception" apply more broadly than just to the leader of a religious organization, as this Court properly recognized in *Hosanna-Tabor*. *Id.* at 190. Religious organizations are typically operated by

more than just their leaders, and those same organizations often require fidelity to their own first principles by most, if not all, of their employees. The determination for an organization of which employees must be co-religionists involves its ministry purpose, its size, its logistical circumstances, and, always, its understanding of its own religious beliefs and the resultant conduct expected of its adherents and associates.

4. As Justice Alito wrote in his *Hosanna-Tabor* concurrence, First Amendment protections certainly reach those who "conduct[ ] worship services or important religious ceremonies or rituals" and those who "serve[ ] as a messenger or teacher of [the organization's] faith." *Id.* at 199 (Alito, J., concurring). Stated more generally, First Amendment protections reach any employee performing a religious organization's ministries.

5. This rule is a far cry from the method the Ninth Circuit used. That court, ignoring first principles, turned the majority decision in *Hosanna-Tabor* into a numbers game. One can divide the factors the Court listed for the teacher involved in *Hosanna-Tabor* into four general categories, as the Ninth Circuit did in *Biel v. St. James School*, 911 F.3d 603, 614-15 (9th Cir. 2018), on which the circuit court below principally relied. Or one could itemize each of the facts mentioned about the teacher in *Hosanna-Tabor*, listing them into the teens. The Ninth Circuit's approach of toting up the numbers converts the legal calculus into how closely analogous to the *Hosanna-Tabor* teacher's circumstances the next case happens to be. This method is not only impractical, because religious organizations vary greatly in purpose,

structure, mission, and doctrine; it also quickly runs afoul of basic First Amendment principles. It would make Lutheran-Missouri Synod polity the touchstone for future cases, to the disadvantage of many other denominations and faiths. And it would require the courts to decide what is important to a religious organization and what is not.

6. Justice Thomas in his concurrence in *Hosanna-Tabor* presciently warned of the temptation to which the Ninth Circuit succumbed:

> Our country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status. The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. Judicial attempts to fashion a civil definition of "minister" through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the "mainstream" or unpalatable to some. Moreover, uncertainty 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.

565 U.S. at 197 (Thomas, J. concurring) (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 336 (1987)). For this reason, the Religion Clauses require courts to defer to a religious organization's good-faith understanding of who qualifies as its "minister." *Id.*

at 196 (Thomas, J., concurring).

7. Justice Thomas's words ring true for *Amici*. *Amici* NLF and PJI often represent religious organizations that do not easily fit into either a church or school mold. But those organizations have important ministries fueled by their religious beliefs—for example, work in disaster relief and "lifestyle" evangelization—that often do not involve explicit teaching or conducting standard "worship services" or "rituals." *See id.* at 199 (Alito, J., concurring). *Amicus* ICECE is a ministry assisting our country's armed forces and serving explicitly religious purposes, but, again, it does not perform standard church services. To suggest that courts are competent to determine whether employees of non-traditional ministry organizations are "essential" by analogizing to the teacher in *Hosanna-Tabor* or by any other artificial yardstick conflicts with basic First Amendment principles. Courts have no more competence to judge the sincerity of a religious organization's decision in such matters than they have to judge religious beliefs of an individual. *See Thomas v. Review Bd.*, 450 U.S. 707, 712-15 (1981).

CONCLUSION

The petition should be granted and the Ninth Circuit's decision reversed. This Court should provide additional guidance to the lower courts in this critically important area before further encroachments are made on the First Amendment freedoms of religious organizations.

Respectfully submitted
this 30th day of September 2019,

/s/ Frederick W. Claybrook, Jr
Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
Rick@Claybrooklaw.com

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, VA 23322

David A. Bruce, Esq.
205 Vierling Dr.
Silver Spring, Md. 20904