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 FOR INTERVARSITY CHRISTIAN FELLOWSHIP/USA, WORLD VISION INC., AND YOUNG LIFE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL MCCONNELL
G. EDWARD POWELL III
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 94306
(650) 493-9300

STEFFEN N. JOHNSON
Counsel of Record
SUSAN CREIGHTON
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8800
sjohnson@wsgr.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee is charged with communicating the organization's religious message or carrying out important religious functions.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Amici believe that religious institutions must be free to choose employees who perform important religious functions without undue government interference, that a robust ministerial exception is critical to safeguarding the values of nonestablishment and free exercise, and that the Ninth Circuit's view that the exception should be limited to those in formal "religious leadership" roles should be rejected.

In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), this Court recognized the constitutional roots of decades of lower court decisions that prohibited the government from interfering with a church's relationship with its employees who perform important religious functions. The freedom of a church—by which we mean an organized religious community of any faith or denomination—to choose who will occupy these roles is essential to its ability to control its own voice and fulfill its own religious mission. These employees are often the church's chief means of passing on the faith to the next generation.

The ministerial exception safeguards this aspect of religious freedom by requiring secular courts to abstain from deciding certain employment disputes between religious institutions and their employees with important religious duties. Those disputes are sensi-

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[*] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief.

tive, complex, and often dependent on matters of religious doctrine. Courts must tread carefully.

The Ninth Circuit's approach does not. It breaks from a growing consensus among the lower courts on the broad strokes of how to apply the ministerial exception. Every other circuit court of appeals, mindful of this Court's warning in *Hosanna-Tabor* against government intrusion in intra-religious conflict, has applied the ministerial exception to employment disputes between religious organizations and their employees who perform important religious functions. When employees are hired to "model, teach, and promote behavior in conformity to the teaching of the * * * Church," Pet. App. 19a,[1] the Church must be free to retain or not retain these employees based on its judgment alone.

Amici respectfully request that the Court reverse the judgments below on the basis that the ministerial exception "bars such a suit" (*Hosanna-Tabor*, 565 U.S. at 196) when a religious organization's employee communicates its message or performs other important religious functions on its behalf.

InterVarsity Christian Fellowship/USA is a Christian ministry that establishes and advances witnessing communities of students and faculty who follow Jesus as Savior and Lord on nearly 800 college and university campuses in the United States. Its employees and participants pursue this mission with a commitment to grow in love for God, God's word, God's people of every ethnicity and culture, and God's purposes in the world.

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[1] References to the Petition or Petition Appendix are to those in *St. James School* v. *Biel*, No. 19-348, unless otherwise noted.

World Vision, Inc. (U.S.) is a Christian humanitarian organization dedicated to working with children, families, and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice. Throughout the world, World Vision supports the provision of emergency relief in disasters as well as long-term sustainable development. The mission of World Vision's employees is "to follow our Lord and Savior Jesus Christ in working with the poor and oppressed to promote human transformation, seek justice, and bear witness to the good news of the Kingdom of God."

Young Life is a Christian youth ministry organization committed to sharing the Good News of Jesus Christ with adolescents. Through local clubs and destination camps, Young Life desires to provide fun, adventurous, life-changing, and skill-building experiences, preparing kids for a life-long relationship with Christ and a love for His word, His mission, and the local church. Young Life employees commit to a central purpose of proclaiming the Gospel of Jesus Christ and introducing adolescents everywhere to Jesus Christ and helping them grow in their faith.

STATEMENT

These cases involve employment disputes between petitioners, two Catholic schools in the Archdiocese of Los Angeles, and their former religion teachers.

A. *Biel* v. *St. James School*

St. James School is a ministry of the parish of St. James in Torrance, California. Kristen Biel, a practicing Catholic, began teaching full-time at St. James in 2013. She taught fifth-grade religion classes—including lessons on the Catholic sacraments, lives of the saints, Catholic prayers, Catholic social teaching,

Gospel stories, and the liturgical calendar—four days (200 minutes) a week. Pet. App. 18a, 50a, 82a. Biel displayed Catholic sacramental symbols throughout her classroom and incorporated Catholic values and traditions in every subject she taught. Biel prayed with her students twice a day, attended school masses with them monthly, and administered religion tests. *Id.* at 18a, 32a, 34a, 93a.

According to her contract, Biel was required to "model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church." Pet. App. 19a. She was evaluated on whether her teaching "infus[ed] 'Catholic values through all subject areas'" and whether her classroom visibly reflected the "sacramental traditions of the Roman Catholic Church." *Id.* at 83a–84a, 106a.

Biel taught at St. James for less than one year. Two weeks into the school year, the head of school, Sr. Mary Margaret Kreuper, noticed that Biel's classroom was often noisy and disorganized. The problem continued as the year went on. Pet. App. 85a. In April 2014, after Easter break, Biel told Sr. Mary Margaret that she had cancer and that May 22 would be her last day teaching, so she could seek treatment. Sr. Mary Margaret expressed sympathy, noting that she too was being treated for breast cancer. *Id.* at 88a–91a. Biel remained at St. James through the end of her 2013–2014 contract, but her contract was not renewed. *Id.* at 5a–7a.

In December 2014, Biel filed an EEOC charge. Three months later, she brought this suit in district court, invoking the Americans with Disabilities Act. Applying the ministerial exception, the district court granted the school's motion for summary judgment,

holding that Biel was a minister because she "conveyed the Catholic Church's message by teaching religion to her students," "by administering and evaluating weekly tests from a Catholic textbook," and "by praying with the students twice each day." Pet. App. 5a–7a, 71a–73a.

The Ninth Circuit reversed. The EEOC appeared as amicus curiae in support of Biel, asserting that the courts since *Hosanna-Tabor* have limited the ministerial exception to employees in "spiritual leadership role[s]." Pet. 10. The majority accepted the proposition that the exception was typically limited to "religious leadership" roles, and that Biel's role as a religion teacher did not qualify as "leadership" because it was limited to "teaching religion from a book." Pet. App. 13a, 14a. The majority also compared Biel to Cheryl *Perich*, the teacher in *Hosanna-Tabor*, based on "four considerations" discussed in that decision, finding that Biel was so "[u]nlike Perich" that the ministerial exception did not apply. *Id*. at 11a.

Judge Fisher dissented, stating that the decision created a circuit split and warning that, under the majority's analysis, courts applying the ministerial exception could become excessively "entangle[d] in the affairs of religious organizations." Pet. App. 35a.

The Ninth Circuit denied rehearing en banc. Nine judges dissented, explaining that the panel majority's analysis threatens "grave consequences for religious minorities" and "conflicts with *Hosanna-Tabor*, decisions from our court and sister courts, decisions from state supreme courts, and First Amendment principles." Pet. App. 42a.

B. *Morrissey-Berru* v. *Our Lady of Guadalupe School*

Like St. James, Our Lady of Guadalupe is a parish school in the Archdiocese of Los Angeles. Its staff, together with the pastor of the parish, act in "service to the Church." OLG Pet. App. 53a. The school's teachers "model and promote behavior in conformity to the teaching of the Roman Catholic Church in matters of faith and morals." *Id*. at 33a. Although some of its teachers are not Catholic, all of the school's religion teachers must be members of the Catholic Church in good standing. *Id*. at 56a, 57a.

Respondent Agnes Morrissey-Berru, who began teaching full-time at Our Lady in 1999, taught daily fifth- or sixth-grade religion classes every year of her employment. OLG Pet. App. 80a. The classes covered core Catholic doctrines on the person and work of Jesus Christ, creation, sin, the seven Sacraments, the signs and symbols of the Church's liturgy, and the Church's historic creeds, liturgical calendar, and contemporary mission. *Id*. at 91a–94a. Morrisey-Berru taught devotionally through prayer, worship, and the reading of Scripture. She also modeled and practiced the Catholic faith by attending Mass with her students and explaining its different parts to them. *Id*. at 45a–51a, 81a. As required by the school, she received training to be, and became, a certified Catechist. *Id*. at 85a.

Amid budgetary concerns and negative community perceptions about the school's academic rigor, Our Lady hired a new principal, who required the teachers to implement a new reading program. OLG Pet. App. 27a, 57a–59a. Morrissey-Berru failed to fully implement the new reading program in the 2012–

2013 school year, the first year it was adopted—and then again the year after. *Id*. at 69a–70a, 73a. In May 2015, the principal informed Morrissey-Berru that her contract would not be renewed. *Id*. at 30a–31a.

Morrissey-Berru then filed an EEOC charge, and later a complaint in district court, alleging age discrimination. At summary judgment, the court held that the ministerial exception applied and ruled for the school. OLG Pet. App. 4a. Noting that Morrissey-Berru's "job duties involved conveying the church's message," the court explained that she fulfilled these duties by integrating Catholic values into her lessons and by teaching "the tenets of the Catholic religion, how to pray, and * * * a host of other religious topics." *Id*. at 7a–8a. The court relied principally on "[her] actual duties." *Id*. at 8a.

The Ninth Circuit reversed. Although the panel in *Biel* had equivocated on whether Biel's religious functions were sufficiently "important," the panel in *Morrissey-Berru* cited *Biel* for the proposition that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." Pet. App. 12a–13a; OLG Pet App. 3a. The court called the four considerations discussed in *Hosanna-Tabor* "factors" in a multi-part test, concluding that only one factor—Morrissey-Berru's "significant religious responsibilities"—counseled in favor of applying the exception. OLG Pet. App. 3a.

SUMMARY OF ARGUMENT

As this Court has recognized, the "[f]ear of potential liability" has a pronounced chilling effect on "the way an organization carrie[s] out * * * its religious mission." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987). In *Hosanna-Tabor*, the Court sought to minimize this fear by holding that "both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." 565 U.S. at 181. *Amici* file this brief to emphasize that the ministerial exception is best understood as a nonjurisdictional immunity from suit, procedurally analogous to the immunities from liability that legislators, prosecutors, and judges enjoy under 42 U.S.C. 1983. In light of its constitutional basis and purpose, the immunity covers all employees of houses of worship and other faith-based organizations who, whatever their title, communicate the organization's message or carry out its important religious functions. In evaluating whether an employee performs important religious functions, courts should give substantial deference to the religious judgment of the organization, much as the Court does for secular associations in the expressive association context.

I. The ministerial exception is best understood as a nonjurisdictional immunity. The facts of *Hosanna-Tabor* did not require the Court to establish comprehensive guidance for courts administering the exception. Yet the language of the Court's opinion, and the interests it sought to protect, confirm that the exception should be understood and administered as an immunity from suit, albeit one that does not deprive the courts of jurisdiction.

The Court in *Hosanna-Tabor* concluded that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." 565 U.S. at 195 n.4. But it also directed the lower courts to decide not just whether the plaintiff can *prevail* over a ministerial exception defense, but "whether the claim *can proceed* or is instead *barred* by the ministerial exception." *Ibid*. (emphasis added); see also *id*. at 196 (stating that the Religion Clauses "bar" certain employment claims). If the ministerial exception applies, the proper relief is not just summary judgment, but "dismissal" before discovery. *Id*. at 194. That calls for resolving the defense early in the litigation—when nonjurisdictional immunities are resolved in other types of cases.

Treating the ministerial exception as a nonjurisdictional immunity from employment claims, invokable upon a showing that the employee communicated the organization's message or performed other key religious functions, properly "str[ikes] the balance" between the important societal interests protected by anti-discrimination laws and the institutional religious autonomy that lies at the heart of the First Amendment. *Id*. at 196. As a practical matter, applying a nonjurisdictional immunity upon a showing that an employee performs important religious functions respects "the [religious] community's process of self-definition," while avoiding both "excessive government entanglement with religion" and "the danger of chilling religious activity" that comes with "the prospects of litigation." See *Amos*, 483 U.S. at 343–344 (Brennan, J., concurring in judgment).

II. Defining the ministerial exception in functional terms—to cover employees who perform important religious duties—serves the interests underlying the

exception far better than focusing on whether the employee serves in a "spiritual leadership role." Pet. 10. The Ninth Circuit's test risks not only excessive government involvement in internal religious affairs, but also de facto favoritism of religious institutions that most resemble the hierarchical traditions discussed in *Hosanna-Tabor*, or others that stress leadership titles and formal ordination.

Amici are sensitive to the problems caused by the Ninth Circuit's test, and to the fact that "[d]ifferent religions will have different views on exactly what qualifies as an important religious position." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). As religious organizations whose missions supplement those of traditional churches and denominations, and whose leaders often (by design) lack certain formal qualifications that such institutions require their leaders to have, *amici* understand the perils inherent in elevating form over function, or in delving deeply into what is or is not required by a religious belief, in deciding whether the ministerial exception applies.

Parts of *Hosanna-Tabor* that thoughtfully chronicled the history that led to the First Amendment's adoption could be read to suggest that the ministerial exception is mainly a concern for religious organizations with "high[] ecclesiastical tribunals," a "Supreme Church Authority," or a "ruling hierarch." 565 U.S. at 186–187. But "a religious organization's freedom to select its own ministers" (*id.* at 189) applies as fully to "low church" groups, faith-based schools, and nonprofit ministries having a flatter or more egalitarian structure, provided the employees of those organizations otherwise perform functions that the exception is designed to protect. The Ninth Circuit's focus on the absence of a title, the lack of certain kinds of

religious training or ordination, and the distance of respondents' positions from the hierarchical leadership risks depriving important and thoroughly religious organizations of warranted protection for their internal religious choices.

For example, the Ninth Circuit gave undue weight to how intensely "religious" or "secular" respondents' title or job training was, even stating that the existence of secular-sounding titles and training, and the lack of ordination, can overcome "significant religious duties." OLG Pet. App. 2a–3a. The court looked to how much of an employee's teaching was taken "from a book" rather than a "special expertise" in matters of religion, and whether they looked like "heads of congregations and other high-level religious leaders." Pet. App. 13a, 16a. Those sorts of evaluations call for extensive scrutiny of religious doctrine, especially ecclesiology, not to mention controversial value judgments about religion, and may erroneously discriminate between and among religious traditions. Catholics have priests, but Presbyterians call their ministers "teaching elders." In Puritan New England, Congregationalist ministers typically were among the most highly educated people of their community, while preachers inspired by the Great Awakening often lacked any formal theological training whatsoever. Under the Ninth Circuit's approach, these differences would likely lead to different results.

Yet the very purpose of the ministerial exception is to free courts from having to make such judgments. If applying the exception requires doing so, there is a substantial danger that the state will make pronouncements as to the validity or genuinely religious quality of religious doctrine. Congress recognized a similar problem in 1972, when it amended Title VII

to allow religious organizations to employ persons based on religion for all their activities, not just the religious ones. This Court can avoid the same danger here by according substantial deference to religious organizations' sincere religious beliefs about whether a duty is religious and how important that duty is.

Courts can avoid wading deeply into religious matters if they apply the ministerial exception where the employee communicates the church's message or performs important religious duties. Such an approach vindicates the purposes of the ministerial exception, recognizes that religious organizations are inherently expressive associations, and maintains the government's important interests in the legitimate sweep of employment discrimination law.

Such an approach is also consistent with how the Court applied the exception in *Hosanna-Tabor*. The teacher there functioned in formal religious teaching roles for a relatively modest part of the school day, as measured by a "stopwatch." 565 U.S. at 194. What mattered, however, was that the school chose her to "personify its beliefs" and to function as an exemplar with an important "role in conveying the Church's message" to the next generation. *Id*. at 188, 192.

When the ministerial exception is properly understood, it is evident that the decisions below should be reversed. As the Ninth Circuit acknowledged, both respondents carried out communicative or other substantial religious functions for petitioners, and petitioners sincerely believed that these functions were important. As in cases involving expressive secular associations, that should be the end of the matter.

ARGUMENT

I. This Court should confirm that the ministerial exception is a nonjurisdictional immunity from suit.

The Court in *Hosanna-Tabor* declined to "adopt a rigid formula for deciding when an employee qualifies as a minister." 565 U.S. at 190. But the Court said plenty about what happens procedurally if a lawsuit is subject to the ministerial exception. On one hand, "the court has power to hear the case," as "the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Id*. at 195 n.4 (cleaned up). On the other hand, if the facts warrant applying the exception, "[t]he First Amendment requires *dismissal* of th[e] employment discrimination suit," which "the ministerial exception bars." *Id*. at 194, 196 (emphasis added).

It logically follows that the availability of the ministerial exception should be assessed early in the litigation—at the pleading stage, if possible—and that it not only bars relief on the merits, but stops the suit in its tracks. In other words, the ministerial exception should operate as a nonjurisdictional immunity, analogous to immunities under 42 U.S.C. 1983. See generally Peter J. Smith and Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1871–1872 (2018) ("Smith and Tuttle"). Moreover, applying the exception as such an immunity best vindicates the interests that it serves: It quickly and cheaply sorts out potentially meritorious suits from those barred by the Constitution, and thus minimizes the chilling effect that the "[f]ear of potential liability," or of a nuisance suit, has on "the way

an organization carrie[s] out * * * its religious mission." *Amos*, 483 U.S. at 336.

A. *Hosanna-Tabor* suggests that the ministerial exception should be administered as an immunity.

Before *Hosanna-Tabor*, the lower courts were divided over "whether the ministerial exception is a jurisdictional bar or a defense on the merits." 565 U.S. at 195 n.4. Some courts treated it as a jurisdictional immunity, "based on [a religious] institution's constitutional right to be free from judicial interference in the selection of" ministers. *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007). Others held that the exception was not jurisdictional, but rather "akin to a government official's defense of qualified immunity, which is often raised in a Rule 12(b)(6) motion." *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006).

The Court in *Hosanna-Tabor* resolved the split by holding that the exception is an affirmative defense, not a jurisdictional bar. 565 U.S. at 195 n.4. As the Court explained, "the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief," which of course is the test for the sufficiency of a complaint. *Ibid.* (citation omitted); see *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009). A court can therefore "consider" an employment claim against a religious institution, at least until it determines "whether the claim can *proceed* or is instead *barred* by the ministerial exception." 565 U.S. at 195 n.4 (emphasis added). And although the Court in *Hosanna-Tabor* once stated that the exception barred a certain "ruling," it elsewhere referred to the exception

as a bar to the "suit" or the "action." Compare *id.* at 194 with *id.* at 176, 196.

The Court in *Hosanna-Tabor* did not explicitly say what kind of affirmative defense the ministerial exception is. As explained below, however, it strongly suggested that the exception should operate like "an immunity from suit rather than a mere defense to liability," making it suitable for resolution "at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 231–232 (2009) (citations omitted).

B. The ministerial exception bears the traditional hallmarks of nonjurisdictional immunities.

Broadly speaking, there are two types of immunities: jurisdictional and nonjurisdictional. The ministerial exception bears the attributes of a nonjurisdictional immunity.

1. Jurisdictional immunities, such as the States' sovereign immunity, arise from "limitation[s] on the federal judicial power." *Pennhurst State Sch. and Hosp.* v. *Halderman*, 465 U.S. 89, 98 (1984); accord U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). Thus, in *Hans* v. *Louisiana*, 134 U.S. 1, 11 (1890), which involved the Eleventh Amendment's restrictions on suing States in federal court, the Court held that "the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued." See also *In re Baiz*, 135 U.S. 403, 429 (1890) (referencing "[t]he statutory and jurisdictional im-

munities and the customary privileges of right attaching to the office of a foreign minister"). Absent a waiver of immunity, therefore, a federal suit against a State must be dismissed because the defendant's sovereign status strips the courts of "power to hear" the case. See *Hosanna-Tabor*, 565 U.S. at 195 n.4.

Religious organizations bear a few similarities to the sovereign beneficiaries of these jurisdictional immunities,[2] but in our constitutional order the differences are far more pronounced. Religious groups, private voluntary organizations, are entitled to "special solicitude" under the First Amendment (*id.* at 189), but the same Amendment requires that they be institutionally separate from the state. Moreover, the authority of religious institutions in the lives of believers is different in kind from the authority that the government exercises over its citizens, and it commands a different sort of respect. It is thus unsurprising that religious organizations are not entitled to jurisdictional immunity. *Id.* at 195 n.4.

2. Nonjurisdictional immunities, by contrast, do not deprive the courts of the power to hear cases in the first instance. If established, however, they do entitle the defendant to have the case dismissed. For example, this Court has recognized that various federal and state governmental officials and employees are immune from liability for certain acts taken in the course of their official duties. *E.g.*, *Pearson*, 555

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[2] Compare *Hosanna-Tabor*, 565 U.S. at 188 (the First Amendment protects a religious organization's "internal governance" and "selection of those who will personify its beliefs"), with *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (discussing a State's sovereign prerogative to "structure * * * its government" and "prescribe the qualifications of [its] own officers * * * free from external interference") (citation omitted).

U.S. at 231 (qualified immunity); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 (1975) (absolute legislative immunity); *Stump* v. *Sparkman*, 435 U.S. 349, 362 (1978) (absolute judicial immunity); *Imbler* v. *Pachtman*, 424 U.S. 409, 420 (1976) (absolute prosecutorial immunity). Those who hold these immunities are subject to the courts' power, but judicial scrutiny of, or liability for, certain decisions they make would be improper for two reasons.

First, principles of the separation of powers and federalism support structural limitations on the judiciary's interference with certain acts of officials in the other branches of government. Any other rule would invite unwarranted judicial second-guessing of legislative choices, prosecutorial decisions, and even the final, non-appealable judgments of other judges. *Eastland*, 421 U.S. at 503; *Imbler*, 424 U.S. at 427–428; *Stump*, 435 U.S. at 355–356.

With respect to some categories of state action, the benefits of judicial scrutiny so rarely offset the countervailing costs—in terms of the time and effort required for the People's representatives to proactively defend suits that arise and attempt to avoid liability—that absolute immunity is warranted. See *Imbler*, 424 U.S. at 424–427 (prosecutorial immunity), *Eastland*, 421 U.S. at 507 (legislative immunity), *Stump*, 435 U.S. at 363 (judicial immunity). And even for categories of executive action that do not warrant absolute immunity, the Court has recognized that "the general costs of subjecting officials to the risks of trial" warrant "qualified immunity," under which "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816, 818 (1982).

Second, the judicial system is not institutionally competent to pass on the validity of certain actions. Qualified immunity is a good example. Judges are ill-equipped to "second-guess[]" sensitive executive branch acts, such as the "quick choice[s]" made by police officers in the line of duty. *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (citation omitted). The possibility that "the benefit of hindsight" will "blind" judges (or juries) "to the fact that police officers are often forced to make split-second judgments" makes it appropriate to immunize officers for "mistakes" that do not violate clearly established rights. *City and Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1775 (2015) (citations omitted).

In other words, the subtleties of police work may be lost on judges. Qualified immunity thus provides a buffer zone between judicial assessments of executive branch conduct and making officers liable for damages. Absent that protection, officers' willingness to act decisively when necessary, "with independence and without fear of consequences," could be undermined, to the detriment of society. *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985) (citation omitted).

These justifications for nonjurisdictional immunities parallel the justifications that the Court in *Hosanna-Tabor* offered in support of the ministerial exception. Much as the various executive and legislative immunities honor the separation of powers, the ministerial exception honors the separation of church and state. 565 U.S. at 188–189. And whereas courts have only limited competence to assess the validity of police officers' split-second judgments in the line of

duty, courts are even less competent to decide issues of religious doctrine. *Id.* at 186; see also *Thomas* v. *Review Bd.*, 450 U.S. 707, 715, 716 (1981) ("the judicial process is singularly ill equipped to resolve" doctrinal issues, which are "not within the judicial function and judicial competence"; "Courts are not arbiters of scriptural interpretation."). These grounds for immunizing the official acts of government officials thus support immunizing religious institutions in employment suits brought by their ministers.

Because it protects interests similar to those underlying other immunities, the ministerial exception should be administered the same way. For example, its denial should be immediately appealable under the collateral-order doctrine. *Mitchell*, 472 U.S. at 525–527; see also Smith and Tuttle, at 1880–1881. If the immunity cannot be resolved at the pleading stage, discovery should initially focus on information relevant to it, with the aim of resolving the question on an early motion for summary judgment. Cf. *Crawford-El* v. *Britton*, 523 U.S. 574, 599–600 (1998) (qualified immunity); see also Smith and Tuttle, at 1876–1878. And since the exception implicates not only the rights of individual religious organizations, but also issues that are "not within the judicial function and judicial competence" (*Thomas*, 450 U.S. at 716), the exception should not be waivable. See *Conlon* v. *InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015). Otherwise, courts risk entangling religious organizations in protracted litigation—and intrusive discovery—when the subject-matter of the suit is "strictly ecclesiastical" (*Hosanna-Tabor*, 565 U.S. at 195), thereby imposing a "significant burden" on religious exercise and unduly inter-

fering with "the way an organization carrie[s] out * * * its religious mission." *Amos*, 483 U.S. at 336.

II. The ministerial exception should apply to suits involving employees who communicate the religious organization's message or perform important religious functions.

That the ministerial function is best understood to operate as a nonjurisdictional immunity confirms the wisdom in this Court's decision to proceed cautiously, relying on "considerations" rather than a "rigid formula," in "[its] first case involving the ministerial exception." 565 U.S. at 190, 192. But these cases, the Court's second and third on the topic, present an opportunity to provide additional guidance—guidance informed by eight years of lower court decisions.

Aside from the Ninth Circuit decisions here, those lower courts have arrived at a consensus that roughly tracks Justice Alito's concurrence in *Hosanna-Tabor*: Although factors such as ministerial titles and ordination are "undoubtedly relevant," performing important religious functions is sufficient to make an employee a minister even if he or she is not a formally ordained "member[] of the clergy." *Id.* at 199, 202 (Alito, J., concurring) (citation omitted). Those who qualify for the exception thus include not only "those who serve in positions of leadership," but also "those who perform important religious functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 200.

In addition to being substantively workable and vindicating the relevant religious autonomy interests without impinging on the legitimate sweep of anti-

discrimination law, such a functional test is relatively easy to administer. We urge the Court to adopt the analysis set forth in Justice Alito's concurrence as the governing standard.

A. Defining "ministers" in functional terms avoids favoring the ecclesiologies of hierarchical traditions over others.

The ministerial exception seeks to prevent the state from "interfer[ing] with the internal governance of the church." 565 U.S. at 188. That is as it should be: a religious organization's control over its governance is a core religious concern, not least because many traditions hold that faithful governance is one important way to honor God. Indeed, many Christian denominations—including various Catholic, Episcopalian, Presbyterian, and Congregationalist churches—have gone so far as to name themselves after their form of governance. And "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in * * * religion." *W. Va. Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943).

To achieve its aims, therefore, the ministerial exception must apply in a way that does not invite judicial discrimination among different forms of church governance. Otherwise, the exception would officially favor hierarchical religious traditions that give distinctive titles, elaborate ceremonial responsibilities, and specialized training to their ministers. The fact that "[d]ifferent religions will have different views on exactly what qualifies as an important religious position," and the fact that "most faiths do not employ the term 'minister'" or "the concept of formal ordination,"

makes this task somewhat difficult. 565 U.S. at 200, 202 (Alito, J., concurring). But it is nonetheless vital.

Amici are especially sensitive to any rule that ties the organizational freedoms protected by the Religion Clauses to the trappings of church hierarchy, such as titles, ordination, or formal seminary training. InterVarsity, World Vision, and Young Life are faith-based organizations that support organized religious communities, and operate humanitarian and religious missions, outside of traditional church structures. Although many of their employees serve in vital ministry roles, such as prayer, worship, and Bible study, relatively few have titles that clearly identify them as "ministers." For example, Young Life's front-line employees—who are charged with helping organize Bible studies, lead worship, and advise the communities' volunteer leaders on how *they* should lead others and live out their faith in word and deed—often go by the pedestrian title of "staff associate."[3]

This is by design. As evangelical Christian organizations, *amici* find preeminent religious importance in each individual believer's relationship with Jesus Christ, and less importance in the formal religious authority of their own ministries. Further, positioning themselves alongside, rather than inside, formally organized churches gives *amici* flexibility in whom they choose as their ministers: many churches require formal ordination or seminary training for certain ministry roles or restrict such roles on the basis of marital status or sex, but *amici*'s requirements are generally more inclusive.

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[3] InterVarsity's analogous employees technically hold the title of "campus staff minister," but many InterVarsity public communications refer to them simply as "staff."

This flexibility supports the breadth of *amici*'s religious missions: World Vision provides humanitarian relief and development aid out of its commitment "to witness to Jesus Christ by life, deed, word, and sign that encourages people to respond to the Gospel"[4]; InterVarsity focuses on supporting and training student leaders on college campuses as they seek to grow in the Christian faith and organize and lead their own fellowship communities; and Young Life focuses on sharing the Gospel with high schoolers, whatever their level of involvement with traditional Christian denominations. Such flexibility also fosters cooperation across denominational lines, between organizations that share some common beliefs—a practice with a long history in the United States. See generally Michael S. Hamilton, *Evangelical Entrepreneurs: the Parachurch Phenomenon,* Christian History (Oct. 1, 2006);[5] Mark Noll, A History of Christianity in the United States and Canada 307 (1992). If the availability of the ministerial exception turns on "the term 'minister' or the concept of ordination"—and not "on the function performed by persons who work for religious bodies" (*Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring))—it will almost certainly underprotect organizations such as *amici*, even though their work is not meaningfully different from the work of their counterparts in other faiths.

These concerns, however, are not unique to evangelical Protestant nonprofit groups, or to parachurch

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[4] World Vision, "Mission Statement," available at https://www.worldvision.org/about-us/mission-statement#1468276217335-4d5c9ff3-3760.

[5] Available at http://www.christianitytoday.com/ch/2006/issue92/6.33.html.

organizations. For example, Orthodox Judaism generally views Jewish law as "coming directly from God and as fixed," while Reform Judaism "gives members the maximum freedom to decide on their own level of observance." Haaretz, *Jewish Religion: Reform, Conservative and Orthodox* (Jul. 1, 2013).[6] Buddhism involves its own spectrum: "American Buddhist practitioners * * * shed the cultural baggage of rituals and rules associated with traditional Buddhism and repackage it in American cultural forms and idioms." Nalika Gajaweera, *Heart of Dharma: Comparing Buddhist Practice, East and West*, USC Center for Religion and Civic Culture (Aug. 28, 2014).[7] And as Justice Alito observed in his concurrence in *Hosanna-Tabor*, "'every Muslim can perform the religious rites, so there is no class or profession of ordained clergy,'" though some "'are recognized for their learning and their ability to lead communities of Muslims in prayer, study, and living according to the teaching of the Qur'an and Muslim law.'" 565 U.S. at 202 n.3 (quoting 10 Encyclopedia of Religion 6858 (2d ed. 2005)).

A functional definition of the ministerial exception is critical if the courts are to avoid inadvertent discrimination against religious groups such as these, which look quite different from the hierarchical churches discussed in *Hosanna-Tabor* and the earlier church-autonomy cases. See 565 U.S. at 198 (Alito, J., concurring). Indeed, if "minister" is not defined in functional terms, courts—as well as government agencies, such as the EEOC, which are often involved

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[6] Available at https://www.haaretz.com/jewish/.premium-the-denominations-of-judaism-1.5289642.

[7] Available at https://crcc.usc.edu/heart-of-dharma-comparing-buddhist-practice-east-and-west/.

in these suits—are likely to end up making the very types of ecclesiastical determinations that the exception seeks to bar. As shown below, the cases at bar confirm that this fear is well founded.

B. The Ninth Circuit's test requires numerous improper judicial assessments of doctrinal questions.

In *Biel*, for example, the Ninth Circuit's "religious leadership" test led it to render at least four improper (and unseemly) judgments about religious questions en route to denying the school's ministerial-exception defense. Pet. App. 10a–13a.

First, the court of appeals reasoned that the title "teacher" cut against applying the exception, essentially because the court thought it did not sound as "religious" as "Perich's 'Minister of Religion, Commissioned,' and 'called' teacher titles." Pet. App. 11a. The court imposed its own, secular understanding of what the title did and did not connote about Biel's position as a Catholic educator (*id.* at 18a–20a (Fisher, J., dissenting)), despite the fact that Catholics do not use the term "minister" in the same way that others, including some Protestants, use it. 565 U.S. at 198 (Alito, J., concurring).

Second, *Biel* placed weight on the teacher's secular training and credentialing and prior work for different secular and religious organizations, while noting that she received minimal religious-education training: "only a half-day conference whose religious substance was limited." Pet. App. 11a. By a "stopwatch" test (*Hosanna-Tabor*, 565 U.S. at 193–194), secular training seems to have predominated on Biel's resume. Yet the Court in *Hosanna-Tabor* expressly disclaimed that test as applied to an employ-

ee's overall duties (*ibid.*), and there is no reason to revive it for training requirements. Like a title, training can help identify a minister when duties are unclear or disputed, but its absence does not diminish the significance of the actual *functions* performed by the employee.

Third, *Biel* dismissed the teacher's responsibilities for "teaching religion" on the ground that she did so "from a book required by the school," and noted that she seemed to lack "special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic." Pet. App. 11a, 13a. This is frankly absurd. Beyond the fact that many of the world's faiths have rich and longstanding traditions of "teaching religion from a book," *e.g.*, Luke 4:16–21, "teach[ing] the[] faith" was an important measure of ministerial status in *Hosanna-Tabor*, 565 U.S. at 196, and there is no basis to treat such responsibilities as insignificant when the teacher relies on curricular materials rather than "special expertise."

Indeed, in some faith traditions, sticking precisely to the book is a positive religious duty, see Saquib et al., *Health benefits of Quran memorization for older men*, SAGE Open Med. (Nov. 13, 2017) ("An important religious practice for Muslims is the memorization of Quran."), and in others "special expertise" is frowned upon. See Keith D. Stanglin, *"Faith Comes From What Is Heard": The Reformers on the Ministry of the Word and the Holy Spirit*, 12 Leaven 3:8, at 3 (2004) ("[T]he Anabaptists * * * claimed that correct biblical interpretation is dependent on the Spirit rather than one's skill in languages."). The Ninth Circuit's approach thus invites invidious and unconstitutional discrimination among religions.

Fourth, *Biel* privileged "orchestrat[ing] [the] students' daily prayers," as did Cheryl Perich in *Hosanna-Tabor*, over having "students themselves le[a]d the class in prayer." Pet. App. 13a. But these too are equally valid ministerial, pedagogical choices: teachers may pray as exemplars, and they may encourage their students to pray (and then evaluate their students' level of comfort with the prayers of the Church and the doctrines of the faith). Assigning greater ministerial weight to one of these choices impermissibly discriminates among religious practices.

The Ninth Circuit in *Biel* equivocated on whether all of Biel's religious duties together constituted an "important role in transmitting the * * * faith," Pet. App. 10a (quoting *Hosanna-Tabor*, 565 U.S. at 192)—largely because Perich's mode of passing on the faith "amount[ed] to * * * close guidance and involvement * * * in her students' spiritual lives," whereas Biel's apparently did not. Pet. App. 13a. But this required the court to make its own secular assessment of which of the school's beliefs and practices, which its ministers teach and model, are "important"—an assessment fraught with difficulty. See *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring).

In sum, the court in *Biel* recognized that Biel had religious duties, but improperly decided ecclesiastical questions in determining how important those duties were. And the court in *Morrissey-Berru* followed and expanded *Biel*, holding that even "significant religious responsibilities" are insufficient when the other three factors point the other way. OLG Pet. 2. It is not an overstatement to say that this approach attempts to resurrect the "primary duties" test earlier applied by the Sixth Circuit and repudiated in *Hosanna-Tabor* itself. 565 U.S. at 193.

C. Courts should grant substantial deference to religious organizations in determining which of their employees' religious duties are important.

Courts must tread carefully when deciding many issues concerning religious organizations. They may need to determine whether certain activities are secular or religious—at times a difficult determination. But imposing liability based on such determinations implicates free exercise principles: "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 336; see also *id.* at 343 (Brennan, J., concurring in judgment) ("determining whether an activity is religious or secular requires a searching case-by-case analysis," which "results in considerable ongoing government entanglement in religious affairs"); *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("[C]ourts should refrain from trolling through a person's or institution's religious beliefs."). Indeed, Congress recognized as much when it amended Title VII in 1972 to remove the restriction on religious organizations' hiring and firing based on religion with respect to their non-religious activities. *Amos*, 483 U.S. at 335–336.

Courts may not resolve controversies of religious doctrine, however, including the relative importance of different doctrines. See *Thomas*, 450 U.S. at 715–716 ("the judicial process is singularly ill equipped to resolve [intra-faith] differences in relation to the Religion Clauses," and "[c]ourts are not arbiters of scriptural interpretation"). As Justice Alito explained in *Hosanna-Tabor*, "the mere adjudication of such questions"—i.e., whether certain beliefs and practices are

"obscure and minor" or "central and universally known tenet[s]"—"would pose grave problems for religious autonomy." 565 U.S. at 205–206 (Alito, J., concurring).

In determining whether the ministerial exception applies, courts may (and must) determine whether an organization claiming the exception is in fact religious and sincere. See *Hosanna-Tabor*, 565 U.S. at 189. Similarly, they may (and must) decide whether a position genuinely incorporates religious job duties (*id.* at 192)—the question on which the potential for liability turns. But insofar as there are disputes about which duties are religious, and how important those duties are to the exercise of the faith, courts should accord substantial deference to the employer's assessment. See *Amos*, 483 U.S. at 336.

In freedom of association cases, for example, the Court "give[s] deference to an association's assertions regarding the nature of its expression," as well as "to an association's view of what would impair its expression." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 651 (2000). The same should be true in free exercise cases. Cf. *Thomas*, 450 U.S. at 716 (accepting "an honest conviction that [certain] work was forbidden by [petitioner's] religion"). When an employee and a religious employer disagree about the *importance* of a religious duty, this question's resolution is a "judgment about church doctrine" that the courts generally are not competent to make on their own. *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring); see also *id.* at 206 ("What matters in the present case is that Hosanna-Tabor *believes* that the religious function that respondent performed" was important, "and the civil courts are in no position to second-guess that assessment.") (emphasis added); *Burwell* v. *Hobby Lob-*

by Stores, Inc., 134 S. Ct. 2751, 2774 & n.28 (2014) (describing the similar role of the sincerity test under RFRA and RLUIPA).

In short, when the importance of an employee's religious duties is the subject of an employer's sincere religious belief, judicial "second-guess[ing]," 565 U.S. at 206 (Alito, J., concurring), based on independent assessments of how much "close guidance and involvement" or "pronounced religious leadership" the religious functions implicated, Pet. App. 13a–14a, "would pose grave problems for religious autonomy." 565 U.S. at 205–206 (Alito, J., concurring).

D. A functional test administered as an immunity strikes the constitutionally requisite balance.

The principles outlined above suggest an appropriate procedure for resolving immunity defenses based on the ministerial exception. Upon being sued, a religious organization can move to dismiss the complaint, if it appears on its face that the immunity applies. Otherwise, the organization can raise the immunity at the pleading stage, and the judge can limit initial discovery to issues relevant to the immunity: the employee's duties, the other considerations mentioned in *Hosanna-Tabor*, and the employer's sincere beliefs regarding the religious significance of the employee's duties. The organization can then move for summary judgment, which will likely be granted if it is undisputed that the employee performed religious functions and the employer sincerely believes those functions were religiously important. If the motion is denied, the organization can immediately appeal.

This approach to resolving the ministerial exception, a nonjurisdictional immunity, is nondiscrimina-

tory. To be sure, there may be times when it is difficult to determine whether certain organizations or activities are religious, *Amos*, 483 U.S. at 343 (Brennan, J., concurring in the judgment), especially in cases involving unfamiliar religions. But the approach itself is neutral, and granting appropriate deference to religious organizations—as secular expressive associations are granted in other cases—will usually resolve it. Nor does it stack the deck in favor of the employer any more than is required by the First Amendment: courts may constitutionally assess whether an employee's duties are genuinely religious but, having found a religious duty, courts must accord substantial deference to the organization's sincere view that, according to the tenets of its faith, the duty is important.

E. Applied here, a functional definition of "minister" compels reversal.

Hosanna-Tabor is clear: persons who "preach the[] beliefs, teach the[] faith and carry out the[] mission" of a religious group are properly subject to the ministerial exception. 565 U.S. at 196. Teaching the faith is specifically identified as one of these "important religious functions." *Id.* at 192.

The judgment below in *Biel*—that the manner in which a non-titled, non-ordained religion teacher taught religion rendered her relatively unimportant to the religious mission of the school—violates these core principles and threatens the freedom of all religious organizations to live out their faith in community. And the judgment below in *Morrissey-Berru*—that the ministerial exception is unavailable despite a clear showing that respondent had important religious duties—only exacerbates the damage. To clari-

fy the law and vindicate First Amendment freedoms, this Court should recognize an immunity that applies when an employee of a religious organization communicates the organization's message or performs important religious functions on its behalf.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

Respectfully submitted.

MICHAEL MCCONNELL
G. EDWARD POWELL III
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 94306
(650) 493-9300

STEFFEN N. JOHNSON
Counsel of Record
SUSAN CREIGHTON
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8800
sjohnson@wsgr.com

Counsel for Amici Curiae

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