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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE RIGHT REVEREND DEREK JONES, THE ALEPH INSTITUTE, THE ASSEMBLIES OF GOD (USA), AND STEWARDS MINISTRIES, AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

The Right Reverend Derek Jones is the Bishop of the Armed Forces and Chaplaincy for the Anglican Church in North America. The Anglican Communion is the third largest Christian faith communion in the world. Bishop Jones fields professionally credentialed and endorsed chaplains to the United States Armed Forces, Veterans Administration, government agencies, and to numerous civilian agencies. He is also the current Chair of the National Conference on Ministry to the Armed Forces and is a recognized subject matter expert on Chaplaincy and Religious Liberty.

The Aleph Institute is a 35-year-old non-profit Jewish organization dedicated to providing spiritual support and addressing the needs of Jewish persons in institutional

[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* affirm that all parties have either consented to the filing of this brief or filed blanket letters of consent to the filing of amicus briefs with the Clerk's Office.

environments such as prisons, mental health facilities, and rehabilitation centers throughout the United States.

The Assemblies of God (USA) is a Pentecostal Christian denomination with more than 13,000 churches and over 3 million adherents. It is part of the World Assemblies of God Fellowship, which has more than 69 million adherents worldwide and is the world's largest Pentecostal denomination and fourth largest Christian fellowship.

Stewards Ministries is a non-profit organization that exists to support the Plymouth Brethren, an evangelical Christian movement. In general, the Plymouth Brethren do not have formal membership or pastors and meet in independent, local assemblies.

Amici share a fundamental interest in preserving the right of religious organizations to decide, free from state interference, matters of religious government, faith, and doctrine. *Amici* repeatedly encounter issues concerning who may serve in their ministry, including as parties to litigation. The ability of *amici* to decide for themselves who among their members may be entrusted to perform religious functions central to their faith is the cornerstone of their freedom to pursue their own religious missions independent of secular control. When the government dictates which individuals *amici* can hire to perform religious functions, and when those individuals can be fired, the government extinguishes the religious liberty that the Religion Clauses protect from governmental interference.

SUMMARY OF ARGUMENT

This Court should reverse the decisions below and ensure that religious organizations can continue to rely on the First Amendment's guarantee of governmental noninterference in fundamental matters of faith. Since the

Founding, it has been well settled that when religious organizations make decisions about matters of faith, doctrine, or internal governance, the Religion Clauses of the First Amendment bar the government from second-guessing those choices.

Few determinations matter more to religious organizations' fulfillment of their pastoral missions than decisions about which members to entrust with religious functions. When it comes to employment disputes between a religious organization and those employees carrying out central aspects of the faith, the Religion Clauses necessarily trump otherwise-applicable employment laws, because it is "impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012).

This so-called "ministerial exception" is no mere technicality of employment law. Rather, it is a vital safeguard against governmental intrusion on "the authority to select and control who will minister to the faithful," which "is the church's alone." *Id.* at 195. This Court in *Hosanna-Tabor* thus rightly refused to "adopt a rigid formula" to define which employees of a given religious group fall within the ministerial exception. *Id.* at 190. Rather, the Court took a holistic approach, looking at various facts relevant to whether someone performs functions commonly understood within the faith as core religious duties. *See id.* at 191-92. Certainly, *Hosanna-Tabor* nowhere suggests that the absence of a formal religious title or training means that the ministerial exception does not apply.

Justices Thomas, Alito, and Kagan, in two concurrences, further emphasized that the ministerial exception must respect religious authorities' determinations re-

garding which members of the faith are performing central religious functions. *See id.* at 196 (Thomas, J., concurring); *id.* at 199 (Alito, J., concurring). Titles, training, and other formal indicia of status matter—but as possible evidence of the significance of the employee's religious duties, not as independently dispositive facts. *See id.*

And for good reason. Treating the formalities of titles and training as dispositive risks elevating form over substance, with potentially disastrous results for religious liberty in a nation of religious pluralism. Some religions (like the Lutheran faith at issue in *Hosanna-Tabor*) use titles and formal training to identify members entrusted with significant spiritual duties. But other faith groups, including *amici* here, eschew such formalities, or give a multitude of members seemingly formal titles. Only by focusing on the substance of what particular members do—namely, whether the religious organization to which they belong believes that they perform key religious duties—can courts respect the divergent ways that different religions worship, teach, and self-govern. That understanding of the ministerial exception is essential to avoid discriminating against minority or less hierarchical religious groups, which the Religion Clauses prohibit.

Respondents' approach and the decisions below flout that understanding. Contrary to respondents' account, *see* OLG Br. in Opp. to Cert. 20-23; StJ. Br. in Opp. to Cert. 30-35, the Ninth Circuit improperly transformed the ministerial exception into a rigid straightjacket that deprives religious organizations of the essential freedom to decide who should perform central duties of a faith. The court considered it insufficient that respondent Morrissey-Berru—a teacher at a Catholic school—had "significant religious responsibilities" for core aspects of religious instruction. OLG. App. 3a. The court rather found

it dispositive that respondent did not "have any religious credential, training, or ministerial background," or "hold herself out to the public as a religious leader or minister," *id.*, unlike the Lutheran schoolteacher in *Hosanna-Tabor*. *See also* StJ. App. 10a-12a.

Under respondents' and the Ninth Circuit's approach, even if employees indisputably perform core religious functions, federal employment rules would supersede a religious organization's freedom to choose who carries out those functions—unless the religious organization also formally credentials the employee. A test that favors titles and other formalities over an employee's function and the religious organization's own good-faith view of the employee's role would vitiate the ministerial exception and impose unconstitutional choices on a broad variety of religious groups. *Amici*, for instance, vary widely with regard to who performs the central functions of their faiths, and how. To avail themselves of the ministerial exception, all faith groups would have to ensure that anyone entrusted with core functions of their faith shared all the titles and training the Lutheran Church bestowed upon teacher Cheryl Perich—even though many religious groups do not practice formal ordination, require formal training, or grant formal titles.

Such governmental micromanagement of how religious organizations structure their own affairs is anathema to the Religion Clauses, and would replace religious pluralism with a one-size-fits-all set of organizational rules at an intolerable spiritual price. Not only that, forcing other faith groups to conform to organizational precepts of the Lutheran Church would impermissibly favor one faith over multitudes of others.

Yet the alternative path that respondents and the decisions below would leave for religious organizations is

even more troubling. Without the ministerial exception, religious organizations would lose control over some of their most sensitive decisions. Here as elsewhere, personnel is policy: "[B]oth the content and credibility of a religion's message depend vitally on the character and conduct of its teachers." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Churches, synagogues, and mosques alike would have to bow to the government's employment criteria for hiring and firing individuals entrusted with key aspects of their faiths. The government could saddle religious organizations with clergy bent on thwarting core tenets of the faith, or teachers who repudiate the very beliefs they are entrusted with inculcating in their students. Without a robust ministerial exception, the government (whether through employment laws or otherwise) would thrust itself into the very "matters of church government as well as those of faith and doctrine" that the Religion Clauses exist to protect "from state interference." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

For over two hundred years, the Religion Clauses have protected religious groups from secular interference in ecclesiastical affairs. Those organizations, not the government, should remain in sole charge of choosing their own shepherds for their flocks.

ARGUMENT

I. The Ministerial Exception Is an Essential Shield Against Unconstitutional Governmental Intrusion into Religious Life

1. The Constitution promises religious groups the freedom to make their own decisions about matters of governance, faith, and doctrine free from governmental interference. The ministerial exception flows directly

from that promise, and serves a crucial role in guarding against governmental encroachment on matters of faith.

Long before courts recognized a specific "ministerial exception," it was well settled that religious groups enjoy freedom from governmental control in matters of faith and self-governance. The notion that the government can have "no role in filling ecclesiastical offices" pre-dated the Founding. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181-87 (2012). The idea that religious faith, practice, and governance should be free from governmental control "was addressed in the very first clause of Magna Carta," and inspired some of the earliest journeys to the New World. *Id.* at 182-83.

That bedrock principle of non-interference informed the First Amendment's Religion Clauses, which together provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Founding generation understood these Clauses to circumscribe governmental involvement in filling ecclesiastical offices: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor*, 565 U.S. at 184.

A long line of this Court's decisions reinforced the point. The Court in *Watson v. Jones* observed that determinations of decision-making bodies of a church group cannot be overruled through secular government or lawmaking as to "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." 80 U.S. (13 Wall.) 679, 727 (1871). Nearly a century later, the Court similarly held that the government of New York had no power to compel Russian Orthodox churches in the state to recognize the authority of the governing body of the North American

church, reasoning that "the Church's choice of its hierarchy" was "strictly a matter of ecclesiastical government." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 96-97, 115, 119 (1952). The Court likewise rejected the notion that civil courts could second-guess whether an ecclesiastical tribunal should remove a bishop, regardless of whether civil courts believed the church had complied with its own laws and regulations. *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 724-25 (1976).

In short, the Court has long understood the Religion Clauses to protect not only the "[f]reedom to select the clergy," *Kedroff*, 344 U.S. at 116, but also the general right of religious groups to organize, regulate, and govern themselves in accordance with their own principles. Pet. Br. 27-33. Nor is such a rule unfair: employees of religious groups, after all, give "implied consent to [church] government, and are bound to submit to it," given the special ecclesiastical nature of that relationship. *Watson*, 80 U.S. at 729.

2. The Court's reasoning in *Hosanna-Tabor* underscores that the ministerial exception must be sufficiently broad to preclude governmental interference into which individuals will carry out functions a religious group deems critical to its mission. Pet. Br. 36-38. The Court explained that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision" and instead "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." 565 U.S. at 188. And a "minister," the Court explained, is not just someone holding that specific title, or confined to "the head of a religious congregation." *Id.* at 190. Rather, the

ministerial exception recognizes that the Religion Clauses protect religious groups' entitlement to control "who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Determining which individuals perform those core religious functions is central to the inquiry.

True, the Court looked to a host of facts relevant to understanding why a "called" Lutheran teacher fell within the ministerial exception. For instance, the Court cited "the formal title given Perich 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." *Id.* at 192. Respondents contend that this analysis shows that the applicability of the ministerial exception requires balancing function against formal credentials and education. OLG Br. in Opp. to Cert. 2, 9; StJ. Br. in Opp. to Cert. 1-3.

But the Court looked at these considerations as indicia of the respondent's "role in conveying the Church's message and carrying out its mission," *Hosanna-Tabor*, 565 U.S. at 192—in other words, her degree of involvement in performing religious functions. And the Court cautioned that these factors were not independently demonstrative facts, rejecting any "rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190; *see, e.g.*, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 204-05 (2d Cir. 2017) ("*Hosanna-Tabor* instructs only as to what we *might* take into account . . . it neither limits the inquiry to those considerations nor requires their application in every case."); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (similar); *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 569 (7th Cir. 2019) (same).

3. Looking to the substance of how religious organizations characterize employees' religious duties is also essential to preserve a uniform rule that treats the nation's diverse faith groups equally: only employees whom the religious organization in good faith believes are performing core religious functions fall within its ambit. Over 100 religions or categories of religions count Americans as adherents. *See* Pew Research Center, *America's Changing Religious Landscape* 21 (May 12, 2015), https://tinyurl.com/reportpew. And in every religion, certain members perform core religious functions, like leading a congregation in worship, proclaiming the faith, instructing adherents, or otherwise carrying out a religious mission.

But faith traditions vary widely in their conceptions of what core religious functions of their faith entail, and who performs them. *See Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). For instance, Protestant faiths often designate "ministers," but that term "is rarely if ever used" to reference clergy "by Catholics, Jews, Muslims, Hindus, or Buddhists." *Id.* at 198 (Alito, J., concurring); *see also* 11 Encyclopedia of Religion 7451-52 (2d ed. 2005) (Protestantism is historically characterized by "ambiguity about the lay-clerical distinction," and "in almost all cases they retained a specially sanctioned clergy, ascribed great authority also to the laity, and left the status of both ambiguous."). Depending on the particular faith, a religious organization's failure to use the term "minister" to describe an employee thus may shed no light on whether that person in fact serves a crucial role in worship or religious ceremonies.

Similarly, "the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some

other religions," and the existence and importance of ordination varies widely among faiths. *See Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). In the Catholic faith, for instance, nuns are not ordained, but few could doubt that their functions are fundamental to advancing the faith. *See, e.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). Other religions also reserve separate, non-ordained roles for women, who, under the tenets of their faith, cannot serve as ordained ministers. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (recognizing that "in the Seventh-day Adventist Church women may not stand for ordination").

In other faiths, including those of several *amici*, there are overlapping duties between ordained and lay believers. Baptists generally practice a priesthood of all believers, under which laypersons have the same right as ordained ministers to communicate with God, interpret scripture, and minister in the Lord's name. *See* Southern Baptist Convention, *Position Statements*, https://tinyurl.com/sbcposition (last visited Feb. 10, 2020); Southern Baptist Convention, *Resolution on the Priesthood of the Believer* (June 1988), https://tinyurl.com/sbcresolution.

Some other faiths eschew any concept of clergy or formalized hierarchical structure altogether. For instance, as a core tenet of their faith, the Plymouth Brethren reject ecclesiastical arrangement and focus instead on an individual's direct relationship with God. *See* Plymouth Brethren Christian Church, *Faith and Beliefs, Why Don't the PBCC Have Clergy?*, https://tinyurl.com/clergypbcc (last visited Feb. 10, 2020).

Likewise, faith traditions vary widely as to whether and to what degree those performing important religious

functions must receive formal training, and what that training entails. *See Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). A Catholic school principal, for example, may not need to "meet any formal religious-education requirements," but may be required to be a "practicing Catholic in union with Rome, with a commitment to the teachings of the Church." *Fratello*, 863 F.3d at 208. The person in such a role nonetheless functions as a critical example of the faith and plays a central role in inculcating its precepts. *See id.* at 209. The same goes for Catholic church organists, *see Sterlinski*, 934 F.3d at 569, and Jewish schoolteachers, *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012), neither of whom necessarily undergo formal doctrinal training. And in the Baptist faith, while church leaders often have some religious training, none is required; indeed, many Protestant groups have historically rejected any requirement of formal theological training.

Positions in some faith traditions also have no corresponding religious significance for others. A "mashgiach" in the Orthodox Jewish tradition, for instance, supervises food preparation. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301-02 (4th Cir. 2004). But that person does so pursuant to authorization from Orthodox rabbis, ensures that food preparation is kosher, and may make judgment calls about compliance with Jewish law. *Id.* Those functions, in turn, ensure compliance with kosher dietary laws, which the Orthodox Jewish faith considers a central aspect of the religion. *Id.* Likewise, "communications director" is not a role that exists in every faith group. But a communications director for the Catholic diocese "is often the primary communications link to the general populace" and is "critical in message

dissemination, and a church's message, of course, is of singular importance." *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003).

In short, the ministerial exception looks to how a given faith tradition defines religious functions, not to the labels attached to different employees, precisely because "[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). The stakes of maintaining that understanding of the ministerial exception are difficult to exaggerate. A wide array of religious organizations, including *amici*, depend on the ministerial exception to preserve their autonomy to structure their own affairs and to determine the best messengers for their faiths. From a religious employer's perspective, choosing "who will guide it on its way" depends more on the functions that a person serves than on virtually any other consideration. *Id.* at 196. (Alito, J., concurring).

Further, this approach to the ministerial exception avoids privileging faith groups that rely on more formal structures or designations at the expense of the many groups that eschew such outward signaling—a form of religious discrimination that the First Amendment emphatically prohibits. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953). By deferring to different religious groups' good-faith explanations of which individuals perform functions necessary to a religious mission, this approach also avoids protracted litigation and judicial second-guessing of whether religious groups have correctly characterized tenets of their faith. *See Sterlinski*, 934 F.3d at 570.

II. Respondents' and the Ninth Circuit's Approach Would Threaten Myriad Religious Communities

1. "The Constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or messenger of its faith," because those functions are so critical to the survival of the faith. *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J. concurring). But narrowing the ministerial exception, as respondents' and the Ninth Circuit's position would do, usurps that authority from religious groups and vests it in the government.

Respondents' and the Ninth Circuit's approach wrongly proceeds as though *Hosanna-Tabor* set forth an inflexible checklist against which courts should evaluate an employee's religious bona fides. Respondents contend that the Ninth Circuit properly applied *Hosanna-Tabor* in the decisions below because it assessed each of the "four considerations" the Court mentioned, namely (1) "whether the employer held the employee out as a minister by bestowing a formal religious title"; (2) "whether the employee's title reflected ministerial substance and training"; (3) "whether the employee held herself out as a minister"; and (4) "whether the employee's job duties included 'important religious functions.'" OLG Br. in Opp. to Cert. 21 (citing OLG. App. 2a); *see* StJ. Br. in Opp. to Cert. 30-33 (contending the Ninth Circuit in *Biel* properly applied "the four considerations enumerated by the Supreme Court in *Hosanna-Tabor*").

In respondents' view, the Ninth Circuit properly sided with respondents because the first three "factors" favored respondents while only the fourth "factor" favored petitioners, and three is greater than one. *See* OLG Br. in Opp. to Cert. 20-21; StJ. Br. in Opp. to Cert. 31-34. But

treating *Hosanna-Tabor* like a scorecard perversely requires religious organizations to standardize the way they identify those who minister to their faithful, without regard to whether particular metrics matter to a particular faith.

For example, in declining to apply the ministerial exception, the Ninth Circuit found it persuasive that Morrissey-Berru did not have "religious credential [or] training," because she had taken only a "single course on the history of the Catholic church." OLG. App. 3a. But by looking for a type and level of training similar to the college-level religion courses and oral examination required to be a "commissioned minister" in the Lutheran faith, the Ninth Circuit discounted the various ways in which individuals might be called to serve their faith and carry out core responsibilities. *See, e.g.*, *Sterlinski*, 934 F.3d at 572 (church organist); *Cannata*, 700 F.3d at 178 (church music director); *see also Temple Emanuel*, 975 N.E.2d at 443 (ministerial exception applied to teacher in Jewish school despite no record of formal religious training).

2. Respondents' and the Ninth Circuit's box-checking approach to the ministerial exception would also threaten courts' ability to accept a religious group's sincere statement that particular employees are indeed performing religious functions. That approach would let the government dictate employment criteria for employees of religious groups entrusted with elemental functions of the faith. So long as the religious group does not affix formal labels to those employees, put them through formal training, and outwardly represent those employees as "minister" equivalents, it would not matter how strenuously a religious group proclaimed that the employee's duties are central to the faith. *Supra* pp. 10-12; Pet. Br. 37-41.

In other words, religious traditions whose employees fail to conform perfectly to all the facts of *Hosanna-Tabor* can find no refuge in the ministerial exception. OLG. App. 2a-3a. That one-size-fits-all approach to the ministerial exception would compromise many religious organizations' "freedom to speak in [their] own voice, both to [their] own members and to the outside world." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J. concurring).

Those problems are not mere abstractions. Respondents' and the Ninth Circuit's inappropriately rigid approach threatens a host of religious organizations with intolerable choices. As *amici* can attest, the ministerial exception is a critical safeguard for religious organizations of all stripes to avoid being forced to litigate internal ecclesiastical disputes before civil courts. If respondents' and the Ninth Circuit's approach prevails, to invoke the ministerial exception, any groups that do not already conform to the practices of the Lutheran Church would have to adopt formal ordination, formal titles, formal religious training, and other outward forms of recognition. Forcing groups to adopt those outward signals of religious significance for the good of secular observers would amount to the very "judicial rewriting of church law" that the First Amendment abhors. *Serbian E. Orthodox Diocese*, 426 U.S. at 719.

There is no question that many groups would feel intense pressure to conform, but for the unconscionable spiritual price. As Justice Thomas highlighted in his *Hosanna-Tabor* concurrence, a "bright-line test" like respondents' and the Ninth Circuit's as to who qualifies as a "minister" might "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). And "it 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." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

Consider the following: In declining to apply the ministerial exception in *Biel v. St. James School*, the Ninth Circuit found it persuasive that there was "nothing religious reflected" in a Catholic school teacher's title—"Grade 5 Teacher." StJ. App. 11a-12a; *see* OLG. App. 2a ("Unlike the employee in *Hosanna-Tabor*, Morrissey-Berru's formal title of 'Teacher' was secular."). While many religious organizations emphasize titles, many are less formal or bestow titles that may not seem religious to an outside observer. But to avoid costly litigation and governmental interference, a religious organization might be tempted to add wording to the title of a specific position in order to better signal to courts the important religious functions that a position serves. In so doing, a church's "process of self-definition would be shaped in part by the prospects of litigation." *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring). Such direct governmental influence on the shaping of internal church affairs is untenable.

Refusing to yield to this judicial micromanagement of church functions, however, would force religious groups to confront a litany of other unconscionable consequences. Disabled from invoking the ministerial exception, religious groups would be forced into civil courts to litigate employment disputes with employees performing some of the most critical functions of their faiths. Religious groups could be plunged into expensive and invasive litigation and discovery, subject to the ever-present risk that courts would scrutinize untold numbers of ecclesiastical decisions leading up to the lawsuit. The "very process of

inquiry" could "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). Religious groups would face enormous pressure to screen applicants not only for requisite spiritual qualities, but also for potential litigiousness—potentially altering the group's preferred choice of candidates to perform its essential functions. By allowing the absence of a formal title and training to defeat the ministerial exception, respondents' and the Ninth Circuit's approach would exclude even employees with job functions whose religious significance is obvious.

Consider, for instance, chaplains in the Anglican Church of North America, who are deployed to serve in a variety of governmental, institutional, and vocational settings, such as hospitals and the armed forces. Some Anglican chaplains are ordained, some are endorsed through organizations such as the Special Jurisdiction of the Armed Forces and Chaplaincy, and some have no formal religious status at all. The Church tailors an individual chaplain's ordination status and formal training, if any, to the particular population the chaplain will serve—whether that be in hospice, in a correctional institution, or on a Naval warship. But, despite these variations, the religious significance of the position remains the same. Chaplains are deployed to provide important ministries in worship, pastoral care, counsel, and service channeled through their community—an indisputably important religious function.

Or take certain employees of the Church of Jesus Christ of Latter-day Saints, such as the Managing Director for the Church's Missionary Department, who works directly with Church apostles in assigning, organizing, and overseeing tens of thousands of Church missionaries worldwide. In the Church's view (and under

any objective standard), the person in this position carries out vitally "important religious functions," even though the person lacks a "formal religious title" or even a title that reflects "ministerial substance and training." *See* OLG. App. 2a. But under respondents' and the Ninth Circuit's approach, that position and many others would fall outside the ministerial exception unless the Church were to change its internal governance by designating novel titles and instituting religious training in anticipation of judicial review.

Discounting an employee's important religious functions in this manner would threaten religious groups' "authority to select and control who will minister to the faithful"—a matter that is "strictly ecclesiastical" and is "the church's alone." *Hosanna-Tabor*, 565 U.S. at 195 (quoting *Kedroff*, 344 U.S. at 119). This Court should not abandon religious groups to the choice of compromising their internal structures to qualify for the ministerial exception, or accepting the government's veto power over "who is qualified to serve as a voice for their faith." *Id.* at 201 (Alito, J., concurring).

CONCLUSION

The decisions of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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FEBRUARY 10, 2020