Nos. 19-267, 19-348

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES DEIRDRE 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 OF *AMICI CURIAE* CHURCH OF GOD IN CHRIST, INC. AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

NATHAN J. DIAMENT
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
820 First Street, N.E., Suite 730
Washington, D.C. 20002

THOMAS H. DUPREE JR.
Counsel of Record
JASON H. HILBORN
TRAVIS S. ANDREWS
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

Amicus Church of God in Christ, Inc. is a Pentecostal Christian organization with more than 12,000 congregations in the United States and other congregations in over 100 countries worldwide. Its churches employ clergy and other employees who engage in religious teaching to congregants and their children.

Amicus Union of Orthodox Jewish Congregations of America ("Orthodox Union") represents nearly 1,000 synagogues in the United States and is the nation's largest Orthodox Jewish umbrella organization. Its member synagogues employ rabbis, cantors, and other employees who engage in religious teaching to congregants and their children. Orthodox Union also represents hundreds of Jewish non-public, parochial K-12 schools in the United States. These schools teach religious and secular studies in a holistic environment. They employ teachers, coaches, administrators, and others who engage in teaching through classroom instruction and role-modeling.

Amici are committed to defending not only the right to direct their own religious teaching and governance free from state interference, but also the same rights of other churches, synagogues, mosques, and religious bodies. They believe that the ministerial exception is necessary to the religious vitality of

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice and consented to the filing of this brief.

our nation and inherent in the system of limited government guaranteed by the Constitution.

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment "preclude[] application of [employment-discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012). This "ministerial exception" is a facet of the principle that the government may not interfere in the internal matters of religious bodies. That non-interference principle is deeply rooted in our nation's history and tradition and has been recognized and applied many times by this Court.

Courts must be able to identify "ministers" to apply the ministerial exception. In *Hosanna-Tabor*, this Court declined "to adopt a rigid formula" and instead looked to four considerations in deciding that the plaintiff, a fourth-grade teacher at a Lutheran school, was a "minister": (i) "[the school] held [plaintiff] out as a minister, with a role distinct from that of most of its members"; (ii) "[plaintiff's] title as a minister reflected a significant degree of religious training followed by a formal process of commissioning"; (iii) "[plaintiff] held herself out as a minister of the Church by accepting the formal call to religious service"; and (iv) "[plaintiff's] job duties reflected a role in conveying the Church's message and carrying out its mission." 565 U.S. at 190–92.

After *Hosanna-Tabor*, the courts of appeals and state supreme courts largely have endorsed a functional approach that focuses on the totality of the cir-

cumstances with an emphasis on whether the employee performs religious functions. That is consistent with the "consensus" among courts before *Hosanna-Tabor*, 565 U.S. at 202–03 (Alito, J., concurring), and aligns the ministerial exception with the First Amendment's non-interference principle.

The Ninth Circuit, however, has embraced a mechanical application of the four *Hosanna-Tabor* considerations and adopted what effectively is a rigid, check-the-box test. As petitioners have demonstrated, the Ninth Circuit's recent decisions are at odds with this Court's precedents, and have created a clear and irreconcilable conflict over application of *Hosanna-Tabor*.

This Court should reaffirm its commitment to the non-interference principle by reversing the judgments below. The Ninth Circuit's elevation of formalities such as title over substantive duties invites judges to make inappropriate determinations about the affairs of religious organizations and leads to arbitrary and discriminatory results. Indeed, the Ninth Circuit's misguided standard already has harmed religious organizations. Courts should resolve questions regarding a religious organization's employment of ministers by engaging in a functional analysis that looks at the totality of the circumstances of the employment relationship and ultimately gives deference to sincere beliefs of religious organizations. That approach best respects the First Amendment's commitment that government will not interfere in the internal affairs of religious institutions.

ARGUMENT

I. THE FIRST AMENDMENT GUARANTEES NON-INTERFERENCE IN RELIGIOUS GROUPS' GOVERNANCE AND STRUCTURE.

The ministerial exception is a facet of a broader principle of non-interference in the internal affairs of religious organizations. As this Court has explained, the Religion Clauses prohibit the government from "interfer[ing] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. This principle was developed in the American colonial period and was recognized by this Court long before it was applied in the specific context of employment law as the "ministerial exception."[2]

A. Non-Interference Is A Central Feature Of Both Disestablishment And Free Exercise.

Freedom from state interference in internal religious affairs is integral to the original public understanding of the Religion Clauses. The desire to be free of such interference was a significant catalyst of early European migration to North America. The *Mayflower*'s Puritan Pilgrims "fled to New England, . . . hop[ing] to elect their own ministers and establish their own modes of worship." *Hosanna-Tabor*, 565 U.S. at 182. Yet established churches soon be-

---

[2] Throughout this brief, the term "church" is meant to include houses of worship and religious institutions of all faiths: synagogues, mosques, and temples, for example.

came commonplace in the colonies. "[T]he central feature" of an establishment of religion was "control" by the government. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). Of several different methods employed by government, "[t]he two principal means of government control over the church were laws governing doctrine and *the power to appoint prelates and clergy*." *Id.* at 2132 (emphasis added).

In England, the Crown controlled the appointment of clergy. *See, e.g.*, An Act Restraining the Payments of Annates Etc. of 1534, *reprinted in The Tudor Constitution: Documents and Commentary* 358–60 (G.R. Elton ed., 1982). And in the American colonies that had Anglican establishments, "[m]inisters had to be ordained in England, approved by the governor, and selected by the local vestry. Local political bodies thus controlled appointments to the ministry." McConnell, 44 Wm. & Mary L. Rev. at 2138. So the Founding generation understood that "[t]he power to appoint and remove ministers is the power to control the church." *Id*.

Governmental control over ministers was so central to an establishment that when the people of the States that had established churches later disestablished them, they invariably "adopted at the same time an express [constitutional] provision that all 'religious societies' have the 'exclusive' right to choose their own ministers." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 829 (2012). This "history of disestablishment is persuasive evidence that the freedom of all religious institutions to choose their clergy, *free of government*

interference, was understood to be part and parcel of disestablishment." *Id.* (emphasis added).

The free exercise clauses in the new constitutions adopted by the States between 1776 and 1780 enshrined a similar understanding of non-interference. These clauses "allow[ed] churches and other religious institutions to define their own doctrine, membership, organization, and internal requirements without state interference." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1455, 1464–65 (1990). This understanding and background undoubtedly informed adoption of the Religion Clauses within the federal Constitution. *See Hosanna-Tabor*, 565 U.S. at 184.

Congress under the Articles of Confederation applied the non-interference principle, too. In response to the Vatican's proposed agreement in 1783 to approve a Bishop-Apostolic for America, "Congress responded that it had 'no authority to permit or refuse' the appointment, and the Pope could appoint whomever he wished because 'the subject . . . being purely spiritual . . . is without the jurisdiction and powers of Congress.'" Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181 (2011) (omissions in original) (quoting 1 Anson Phelps Stokes, *Church and State in the United States* 479 (1950)). In other words, "Congress said that it had no jurisdiction over the subject matter, not that it had jurisdiction so long as it acted on the basis of a religion-neutral, secular, or nontheological basis." *Id.* at 181 n.30.

Post-ratification history confirms that the prohibition on establishment precludes government involvement in or interference with the selection of clergy. After the ratification of the Constitution, Secretary of State James Madison declined a request from a Catholic bishop to advise "who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase." *Hosanna-Tabor*, 565 U.S. at 184. Madison "responded that the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment." *Id.* (quoting Letter from Secretary of State James Madison to Bishop John Carroll (Nov. 20, 1806), *reprinted in* 20 *Records of the American Catholic Historical Society* 63 (1909)). Madison located this principle in the Constitution: "The 'scrupulous policy of the Constitution in guarding against a political interference with religious affairs,' . . . prevented the Government from rendering an opinion on the 'selection of ecclesiastical individuals.'" *Id.* (quoting 20 *Records of the American Catholic Historical Society* 63–64). Later, as President, Madison vetoed a bill incorporating a church because it "'enact[ed] into, and establishe[d] by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, *and comprehend[ed] even the election and removal of the Minister of the same*; so that no change could be made therein by the particular society, or by the general church of which it is a member, and whose authority it recognises.'" *Id.* at 185 (quoting 22 *Annals of Cong.* 983 (1811)).

President Jefferson similarly observed that the Constitution prevents the government "'from inter-

meddling with religious institutions, their doctrines, discipline, or exercises.'" McConnell, 103 Harv. L. Rev. at 1465 (quoting Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808), *reprinted in* 11 *The Works of Thomas Jefferson* 7, 7 (P. Ford ed., 1905)). This included religious education. In 1804, President Jefferson assured the Ursuline Nuns, who operated a school for girls in New Orleans, that "the principles of the constitution and government of the United States are a sure guarantee . . . that your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority." Letter from Thomas Jefferson to Mother Superior Therese de St. Xavier Farjon (July 13, 1804), *Louisiana Anthology*, https://tinyurl.com/y7xckpje.

The historical record thus demonstrates the Founding generation's understanding that the government could not control the appointment or removal of ministers. In this context, therefore, the ministerial exception reflects the "foundational premise that there are some questions the civil courts do not have the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law's corrective reach." Berg, 106 Nw. U. L. Rev. Colloquy at 176; *see also* John Locke, *A Letter Concerning Toleration* 26 (James H. Tully ed., 1983) (explaining "that the whole Jurisdiction of the Magistrate reaches only to these Civil Concernments; and that all Civil Power, Right and Dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the Salvation of Souls").

B. This Court Repeatedly Has Applied The Non-Interference Principle.

This Court has long recognized the non-interference principle, which it first articulated in *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* involved a dispute about which group properly controlled a Presbyterian church in Louisville, Kentucky. Based on a "broad and sound view of the relations of church and state under our system of laws," the Court deferred to the highest governing body of the Presbyterian church. *Id.* at 727. The Court explained that adjudicating matters of "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" would infringe the freedom of religious bodies to direct their own affairs and inappropriately require civil courts "to inquire into . . . the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination." *Id.* at 733.

This Court applied the same principle in *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), explicitly grounding it in the Religion Clauses. During the Cold War, New York passed a law transferring church property from one faction of the Russian Orthodox Church to another. The Court held the law unconstitutional because it "displace[d] one church administrator with another" and "pass[ed] the control of matters strictly ecclesiastical from one church authority to another." *Id.* at 119. "Freedom to select the clergy," the Court explained, "must now be said to have federal constitutional protection as a part of

the free exercise of religion against state interference." *Id.* at 116. Furthermore, meddling with "control" of churches "violates our rule of separation between church and state." *Id.* at 110. The Constitution preserves the power of religious bodies "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116; *see also Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) ("[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *Serbian E. Orthodox Diocese for the U.S. & Canada* v. *Milivojevich*, 426 U.S. 696, 720 (1976) (concluding that forced reinstatement of former bishop of the Serbian Orthodox Church was unconstitutional).

This Court reaffirmed the non-interference principle most recently in *Hosanna-Tabor*. Cheryl Perich, a "called" fourth-grade teacher at a Lutheran school, was diagnosed with narcolepsy. Subsequently, Ms. Perich was fired. The EEOC sued the school, alleging a violation of the Americans with Disabilities Act's anti-retaliation provision. The school claimed she was fired due to insubordination and disruptive behavior and, in any event, defended its decision on the basis of the ministerial exception. This Court, however, ruled that the suit was barred by the ministerial exception, explaining that "[a]ccording the state the power to determine which individuals will minister to the faithful . . . violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." 565 U.S. at 188–89. This Court further explained

that "imposing an unwanted minister . . . infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* Employment laws cannot be applied to removing a ministerial employee, because "punishing a church" for that act "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id.* at 188. *Hosanna-Tabor* thus reflects specific application of the non-interference principle in the modern context of employment anti-discrimination law.

II. THE MINISTERIAL EXCEPTION ANALYSIS SHOULD FOCUS ON THE EMPLOYEE'S RELIGIOUS FUNCTIONS.

A functional analysis of "ministerial" status aligns the ministerial exception with the First Amendment's non-interference principle. The Ninth Circuit's subordination of religious function to other, often more superficial considerations upends the historical and constitutional tradition embodied in *Hosanna-Tabor* and swings open the door to judicial meddling with religious doctrine. To further minimize the risk of judicial interference in internal religious affairs, courts should defer to religious institutions' sincere belief that duties are religiously important rather than crediting plaintiffs' characterizations or the courts' own views on religious practice.

A. The Ministerial Exception Should Be Based On A Functional Analysis Rather Than On A Rigid And Formulaic Approach.

In *Hosanna-Tabor*, this Court analyzed four "considerations" in concluding that Perich was a "minister" who fell within the exception: (i) "[the school] held Perich out as a minister, with a role distinct from that of most of its members"; (ii) "Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning"; (iii) "Perich held herself out as a minister of the Church by accepting the formal call to religious service"; and (iv) "Perich's job duties reflected a role in conveying the Church's message and carrying out its mission." 565 U.S. at 191–92. The Court's opinion "neither limits the inquiry to those considerations nor requires their application in every case." *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017).

Justice Alito, joined by Justice Kagan, wrote separately in *Hosanna-Tabor* specifically to explain that the "Court's opinion . . . should not be read to upset th[e] consensus" among the courts of appeals that an employee's "religious function in conveying church doctrine" is more important than "ordination status or formal title." 565 U.S. at 202–04. "[I]t would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one." *Id.* at 198. "What matters," they explained, is whether the employee performs "important religious functions." *Id.* at 204. In short, "[r]eligious autonomy means that religious authori-

ties must be free to determine who is qualified to serve in positions of substantial religious importance," and looking to the "functions" performed by the employee is best calibrated to protect that autonomy. *Id.* at 200.

Function is crucial in part because many religious organizations and denominations, including Catholics, "eschew" the term "minister." 565 U.S. at 198, 202 (Alito, J., concurring). Members of some faiths—such as Jehovah's Witnesses—"consider all" adherents to be "ministers," while in Islam "every Muslim can perform the religious rites, so there is no class or profession of ordained clergy." *Id.* at 202 nn.3–4 (quotation marks omitted). "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." *Id.* at 197 (Thomas, J., concurring). The "fear of liability" alone "may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Id.* The ministerial exception should not be applied in a manner that could create incentives for minority religions to abandon religious precepts to survive. "[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws." *Id.* at 199 (Alito, J., concurring).

The Ninth Circuit, however, gives the functional analysis the same weight as (or less weight than) potentially superficial considerations like the employee's title. This misguided approach departs from all

other circuits that have considered the issue. *See* Our Lady Guadalupe Pet. 14–26; St. James Pet. 12–24. And it will have—indeed, is already having—harmful consequences.

The decisions below highlight the dangerous consequences arising from an approach that subordinates an employee's functions to considerations like an employee's job title. Here, the Ninth Circuit held that the employees were not "ministers," even though they were responsible for religious instruction. Although by no means the sole marker of ministerial status, "teaching and conveying the tenets of the faith to the next generation" is one of a handful of "objective functions that are important for the autonomy of any religious group, regardless of its beliefs," much like "serv[ing] in positions of leadership" and "perform[ing] important functions in worship services and . . . religious ceremonies and rituals." *Hosanna-Tabor*, 565 U.S. at 199–200 (Alito, J., concurring). Teaching the faith to others, especially children, is vital to many religions' continued existence. And religious traditions often put heavy emphasis on teaching the faith to children.

Education is a central component of Jewish faith and practice, for example. *Deuteronomy* 11:19, which refers to teaching children, is understood by the rabbis of the Talmud to impose an affirmative obligation upon parents to have their children educated. *Babylonian Talmud*, *Kiddushin* 29b. Of course, not all parents have the time or depth of knowledge to educate their children. Thus, the Talmud further recounts that in the year 65 C.E., Rabbi Yehoshua ben Gamla initiated an education system: "Initially,

whoever had a father would learn Torah and whoever did not have a father would not learn at all. Then, the sages instituted that teachers of children should be established in Jerusalem . . . until Rabbi Yehoshua ben Gamla came and instituted that teachers of children should be established in every town and they would commence at ages 6 and 7." *Babylonian Talmud*, *Bava Batra* 21a.

The contemporary American Jewish community continues to place the education of children in its faith and rites at the center of its communal efforts. As of 2008, there were hundreds of Jewish parochial schools in the United States educating more than 225,000 Jewish children. Rona Sheramy, *The Day School Tuition Crisis: A Short History*, Jewish Review of Books (Fall 2013), *available at* https://tinyurl.com/y6ktd6o3. These schools employ thousands of teachers, some of whom teach explicitly religious subjects, some of whom teach math and science or coach sports, and all of whom serve as role models of the faith for the students in their schools.

Of course, the importance of education is not limited to Jewish tradition. The Bible teaches Christians and Jews alike to "[t]rain up a child in the way he should go; even when he is old he will not depart from it." *Proverbs* 22:6 (English Standard Version). And Catholic education "is premised on the view that 'the knowledge the students gradually acquire of the world, life and man[,] is illumined by faith.'" Brief for *Amicus Curiae* Nat'l Catholic Educ. Ass'n at 6, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru* (No. 19-267) (alteration in original) (quoting Second Vatican Council, Declaration on Christian Education, *Gravissimum Educationis* § 8 (1965)).

Because of the central importance of teaching in religious practice, the ministerial exception necessarily protects and empowers "the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher . . . of its faith." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring); *see also id.* at 192 (majority opinion) (noting importance of teacher's role in "lead[ing] others toward Christian maturity" (alteration in original; quotation marks omitted)); *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 660 (7th Cir. 2018) (noting importance of teacher's role in "develop[ing] Jewish knowledge and identity" (quotation marks omitted)); *Fratello*, 863 F.3d at 209 (noting importance of principal's role in "work[ing] closely with teachers" for accomplishing Catholic school's "religious education mission").

In determining whether a teacher's responsibilities and the substance of the teacher's role—the *function* the teacher performs—qualifies her as a minister, "[i]t makes no difference that [she] also t[eaches] secular subjects." *Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring); *see also id.* at 193 (majority opinion) (chastising the Sixth Circuit for following the EEOC in "plac[ing] too much emphasis on [plaintiff's] performance of secular duties"). It is self-evident that merely teaching at a parochial school does not necessarily make one a minister, but "play[ing] an important role as an instrument of [one's] church's religious message and as a leader of its worship activities" does. *Id.* at 204 (Alito, J., concurring).

But under the Ninth Circuit's "resemblance-to-Perich test," the significant performance of clear re-

ligious duties means nothing without checking the box on at least one of the other three considerations that this Court applied in *Hosanna-Tabor*. St. James Pet. App. 50a (R. Nelson, J., dissenting from denial of rehearing en banc). This cannot be correct, as shown by the Ninth Circuit's counterintuitive holdings below. In *Biel*, for example, the plaintiff was a fifth grade teacher at a Catholic school. "She taught religion class four times a week based on the catechetical textbook Coming to God's Life," and "was responsible for instructing her students on various areas of Catholic teachings, including Catholic sacraments, Catholic Saints, Catholic social teaching, and Catholic doctrine related to the Eucharist and the season of Lent." St. James Pet. App. 32a (Fisher, J., dissenting). She prayed with her class every day and brought her students to Mass. *Id.* Her employment contract required her "to model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church," and she was evaluated on that basis. St. James Pet. App. 32a–33a (quotation marks omitted); *see also* St. James Pet. App. 56a (R. Nelson, J., dissenting from denial of rehearing en banc). Although an employee's function might not be the *sole* consideration, the Ninth Circuit's opinion in *Biel* unreasonably minimized "the importance of [Biel's] role as a teacher of faith to the next generation." *Grussgott*, 882 F.3d at 661 (quotation marks and alteration omitted).

As Judge Nelson noted in his dissent from the Ninth Circuit's denial of rehearing en banc in *Biel*, "[t]he harmful effects of [*Biel*] have already emerged." St. James Pet. App. 66a. In *Morrissey-Berru*, the Ninth Circuit relied on *Biel* in reversing

the district court's holding that a teacher at a Catholic school qualified as a "minister." The Ninth Circuit reached that conclusion despite recognizing the teacher's substantial religious duties, such as "incorporat[ing] Catholic values and teachings into her curriculum, . . . le[ading] her students in daily prayer, . . . planning [liturgy] for a monthly Mass, and direct[ing] and produc[ing] a performance by her students during the School's Easter celebration every year." Our Lady Guadalupe Pet. App. 3a.

And in *Su* v. *Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Cal. Ct. App. 2019), a California appellate court, citing *Biel*, held the ministerial exception inapplicable to teachers at a synagogue's Early Childhood Center (ECC) even though the teachers "ha[d] a role in transmitting Jewish religion and practice to the next generation" through "implementing the school's Judaic curriculum by teaching Jewish rituals, values, and holidays, leading children in prayers, celebrating Jewish holidays, and participating in weekly Shabbat services," *id.* at 553. In the California court's *Biel*-shaded eyes, the ECC teachers did not qualify as "ministers" because they did not check the same boxes in the same way Perich did. *Id.* at 552–54. So "while the teachers may [have] play[ed] an important role in the life of the Temple, they [were] not its ministers." *Id.* at 553.

This Court should reject the formulaic approach of the Ninth Circuit and adopt a test that primarily focuses on "whether the employee served a religious function." *Sterlinski* v. *Catholic Bishop of Chi.*, 934 F.3d 568, 570 (7th Cir. 2019) (noting that the Ninth Circuit is the only federal appellate court to "ask[] how much like Perich a given plaintiff is, rather than

whether the employee served a religious function"). An analysis that prioritizes function above other considerations not only accords with the non-interference principle, but also helps mitigate the concerns that Justices Thomas and Alito articulated in their separate concurrences in *Hosanna-Tabor*.

B. Courts Should Defer To A Religious Organization's Sincere Belief That Duties Are Religiously Important.

When confronted with both an employee's "argument that she performed her duties in a secular manner" and a religious organization's sincere belief that those same duties are religiously important, courts should defer to the religious organization. St. James Pet. App. 34a (Fisher, J., dissenting); *see also Grussgott*, 882 F.3d at 660 ("[I]t is sufficient that the school clearly intended for [the teacher's] role to be connected to the school's Jewish mission."); *id.* ("[The employee's] belief that she approached her teaching from a 'cultural' rather than a religious perspective does not cancel out the specifically religious duties she fulfilled."); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 179–80 (5th Cir. 2012) ("[W]e may not second-guess whom the Catholic Church may consider a lay liturgical minister under canon law."); *cf. Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) ("[T]he Religion Clauses require civil courts . . . to defer to a religious organization's good-faith understanding of who qualifies as its minister."); 20 *Records of the American Catholic Historical Society* 63–64 (Madison concluding that "the Government [is prevented from] rendering an opinion on the selection of ecclesiastical individuals").

Deference preserves religious organizations' free exercise rights. Without a measure of deference, a religious body's "right to choose its ministers would be hollow," because "secular courts could second-guess the organization's sincere determination[s]" regarding its "theological tenets." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). "Determining that certain activities are in furtherance of an organization's religious mission" is central to how "a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

And deference prevents courts from "wading into doctrinal waters" or adjudicating claims that "turn on an ecclesiastical inquiry." *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 312 (3d Cir. 2006); *see also Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (interpretation of religious doctrine in a contract case would be tantamount to "secular courts taking on the additional role of religious courts"), *abrogated on other grounds by Hosanna-Tabor*, 565 U.S. at 195 n.4. "First Amendment values are plainly jeopardized when . . . litigation is made [to] turn on the resolution by civil courts of controversies over religious doctrine and practice." *Milivojevich*, 426 U.S. at 709–10 (quotation marks omitted); *see also New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."); *Bollard* v. *Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 949 (9th Cir. 1999) (The Establishment

Clause guards against "a protracted legal process" which "inevitably" would result in discovery and other mechanisms that "probe the mind of the church in the selection of its ministers." (quotation marks omitted)). At least in the absence of a sham or subterfuge, the First Amendment "mandate[s] that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Milivojevich*, 426 U.S. at 713; *see also Grussgott*, 882 F.3d at 660 ("[W]e defer to the organization in situations like this one, where there is no sign of subterfuge.").

Doctrinal questions also are outside the competence of secular judges and juries; in the words of the Seventh Circuit, they are "issue[s] that [courts] cannot resolve intelligently." *Tomic*, 442 F.3d at 1042; *see also Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 122 (3d Cir. 2018) ("Such inquiry would intrude on internal church governance, require consideration of church doctrine, constitute entanglement prohibited under the ministerial exception, and violate the Establishment Clause."). This is not a question of "technical or intellectual capacity." Berg, 106 Nw. U. L. Rev. Colloquy at 176. Rather, "matters of faith" may not be strictly "rational or measurable by objective criteria." *Milivojevich*, 426 U.S. at 714–15 & n.8; *see, e.g.*, *Fratello*, 863 F.3d at 203 (noting that "[i]n the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant"); *see also* James Madison, *Memorial and Remonstrance Against Religious Assess-*

ments (June 20, 1785), National Archives, https://tinyurl.com/yb9qoojz ("[T]hat the Civil Magistrate is a competent Judge of Religious Truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world.").

That lack of knowledge is especially acute in the United States because "[o]ur country's religious landscape includes organizations with different leadership structures and doctrines that influence their conceptions of ministerial status." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Each denomination—even each congregation—may have "a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith." *Watson*, 80 U.S. (13 Wall.) at 729. Thus, it is not only appropriate but also necessary to defer to the religious organization's sincere understanding that an individual performs ministerial duties, at least where the basic underlying facts—such as the number of hours worked—are undisputed.

As Justices Alito and Kagan explained in their concurrence in *Hosanna-Tabor*, "to probe the *real reason* for [plaintiff's] firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine." 565 U.S. at 205. Yet the approach employed by the Ninth Circuit "invites the very analysis the ministerial exception demands [courts] avoid." St. James Pet. App. 34a (Fisher, J., dissenting). As the *Su* court candidly explained, in applying the principle espoused in *Biel*, courts are

"compel[led] . . . to distinguish between those church or synagogue employees who are sufficiently central to a religious institution's mission" from "those who are not." 244 Cal. Rptr. 3d at 554. Thus the Ninth Circuit's unique application of *Hosanna-Tabor* "essentially disregard[s]" religious entities' views "about [their] own organization and operations" in favor of inserting judges squarely into religious considerations and determinations. *Sterlinski*, 934 F.3d at 570. The ministerial exception exists precisely to prevent these types of judicial inquisitions. *See supra* 4–11; *accord* St. James Pet. App. 34a (Fisher, J., dissenting) ("The courts may not evaluate the relative importance of a ministerial duty to a religion's overall mission or belief system.").

Deference does not have to mean uncritical acceptance of every claim of ministerial status. It "does not mean we can never question a religious organization's designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge." *Grussgott*, 882 F.3d at 660; *see also Sterlinski*, 934 F.3d at 571. The approach taken by the Ninth Circuit flips the inquiry on its head. It in effect applies a presumption in favor of infringing religious institutions' fundamental and constitutionally guaranteed liberty. That application of the First Amendment's non-interference principle and this Court's decision in *Hosanna-Tabor* is wildly out of step with the consensus among other circuits and States. The Court should reject the Ninth Circuit's approach and embrace a functional approach to the ministerial exception.

CONCLUSION

For the foregoing reasons, the judgments of the Ninth Circuit should be reversed.

Respectfully submitted,

NATHAN J. DIAMENT
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
820 First Street, N.E., Suite 730
Washington, D.C. 20002

THOMAS H. DUPREE JR.
Counsel of Record
JASON H. HILBORN
TRAVIS S. ANDREWS
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Amici Curiae

February 10, 2020