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 BEIL,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* SENATOR MIKE LEE, REPRESENTATIVE DOUG COLLINS, AND 27 OTHER MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Senator Mike Lee and Representative Doug Collins, joined by 27 other Members of Congress, represent Americans who belong to a wide array of religions and faith traditions. *Amici*'s role under Article I of the Constitution in enacting laws on behalf of these constituents gives them a significant interest in ensuring that federal statutes are not enforced in a manner that limits the religious freedom guaranteed by the Constitution. Moreover, as representatives of a religiously diverse constituency, *amici* are in a unique position to explain the importance of ensuring that the First Amendment's "ministerial exception" is applied in a nondiscriminatory manner.

A complete list of *Amici* Members is found in the Appendix to this brief.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor*, this Court recognized that the First Amendment protects "the interest of religious groups in choosing who will … teach their faith." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 196 (2012). These cases—dealing with religious schools' dismissals of teachers of their religion—squarely

1. Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. Petitioners have filed a blanket consent to the filing of *amicus* briefs. Respondents have consented to the filing of this *amicus* brief.

implicate this interest. The former religion teachers sued, alleging violations of federal workplace anti-discrimination statutes. Those statutes, passed by Congress to address critically important issues, should be—and are—robustly enforced across the American employment landscape. But their application in this narrow context would result in the federal government telling religious groups "who will … teach their faith." And this Congress cannot do under the First Amendment's Religion Clauses.

One of our nation's greatest strengths is the diversity of its populace. That diversity extends to religion, with "virtually every religion in the world … represented in the population of the United States." *Id.* at 198 (Alito, J., concurring). The vast and varied religious population of the United States is fostered and sustained by our national commitments to non-interference with the internal affairs of religion and non-favoritism of any particular religious belief or practice—commitments enshrined in the First Amendment's Religion Clauses and promoted by Congress in legislative decisions throughout American history. This Court's unanimous decision in *Hosanna-Tabor* reaffirmed the importance of respect for religious pluralism by explicitly rejecting a "rigid formula" for the ministerial exception. *Id.* at 190. Instead, affirming the uniform practice of the Courts of Appeals, this Court adopted a holistic approach, looking past labels to "all the circumstances" of employment. *Id.* This approach avoids forcing religions to choose between losing the protections of the First Amendment or conforming their practices and beliefs to the stilted confines of multi-factor judicial test.

In the two cases at issue here, however, the Ninth Circuit has headed in precisely the opposite direction,

reading *Hosanna-Tabor* as establishing a strict, four-part test that focuses mainly on title and external perceptions of a religion's labeling conventions and practices. In short, the Ninth Circuit turned the ministerial exception's name into its test. If permitted to stand, this degradation of the ministerial exception will disadvantage religion as a whole and religious minorities in particular.

The Ninth Circuit's analysis of the religious function at issue in this case—the teaching of religion—is particularly troubling. The teaching of religious principles and customs is at the very core of faith for many, if not most, religions. Yet in the two opinions under review, the Ninth Circuit barely addressed the importance of this aspect of religion. Quite to the contrary, the court minimized the significance of "teaching from a book"—a striking position given that most of the world's major religions consider the teachings found in holy books to be the very essence of their faith. Reflecting this dismissal of the importance of religious teaching, the Ninth Circuit held that a religion's granting an employee "significant religious responsibilities as a teacher" is *never* sufficient, in and of itself, to trigger the First Amendment's protections.

In their concurrence in *Hosanna-Tabor*, Justices Alito and Kagan stated that the "First Amendment protects the freedom of religious groups to engage in certain key religious activities, including … the critical process of communicating the faith.… The 'ministerial' exception … should apply to any 'employee' who … serves as a messenger or teacher of its faith." *Id.* at 199. This Court should take the opportunity to adopt that principle as a holding of the Court and reverse the judgments below.

ARGUMENT

I. The First Amendment Protects and Promotes Religious Diversity, and Courts Must Apply It in a Nondiscriminatory Manner.

In *Hosanna-Tabor*, this Court held—unanimously—that the First Amendment enshrines into our law a "ministerial exception" to protect the autonomy of a religion to determine "who can act as its ministers" and "personify its beliefs." 565 U.S. at 185, 188. The Court then applied the exception to a teacher in a school operated by the Lutheran Church–Missouri Synod. *Id.* at 177. It would be a mistake, however, to misinterpret the application of the ministerial exception to the Lutheran Church with the full scope of the ministerial exception. Instead, this Court explicitly stated that its decision in *Hosanna-Tabor*—its "first case involving the ministerial exception"—should not be interpreted as "a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. And rightly so. The analysis of a single teacher at a single school operated by a single religious denomination could never completely define an exception that protects the incredible multitude of religions represented in the United States. And yet that is exactly what the Ninth Circuit has done, turning the facts of a single case into the sum total of the First Amendment's protections.

A. The Religion Clauses Protect Religious Pluralism, and Congress Has Long Sought to Promote This Value.

At the forefront of American liberty is the concept that all individuals should be, and are, free to practice

their religion. Early colonists looked to the New World as a place where they could worship as they saw fit and select religious leaders of their own choosing. *See id.* at 182–184. As Daniel Webster, one of the greatest orators ever to serve in Congress, explained in his famous Plymouth Oration:

> Of the motives which influenced the first settlers to a voluntary exile, induced them to relinquish their native country, and to seek an asylum in this then unexplored wilderness, the first and principal, no doubt, were connected with religion. They sought to enjoy a higher degree of religious freedom, and what they esteemed a purer form of religious worship, than was allowed … in the Old World. The love of religious liberty is a stronger sentiment, when fully excited, than an attachment to civil or political freedom. That freedom which the conscience demands, and which men feel bound by their hope of salvation to contend for, can hardly fail to be attained.

Daniel Webster, Oration Before the Pilgrim Society at Plymouth, Massachusetts (Dec. 22, 1820); *see also The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102nd Cong., 2d Sess., at 1 (1992) (Sen. Edward Kennedy: "The brave pioneers who founded America came here in large part to escape religious tyranny and to practice their faiths free from government interference.").[2]

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2. *See also* Alexis de Tocqueville, *Democracy in America* 37 (Arthur Goldhammer trans., 2004) (the Puritans "braved the

From this longing for religious liberty, and against the backdrop of countervailing systems from which the colonists fled, arose the Establishment and Free Exercise Clauses of the First Amendment. *See* U.S. Const. amend. I. One important way in which these Religion Clauses protect religious freedom is by ensuring equality among religions. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," *Larson v. Valente*, 456 U.S. 228, 244 (1982), and "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ---, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)).

The Founders' commitment to religious freedom and equality planted a seed that has borne much fruit. Neither accident of geography nor quirk of demographics, the rich religious tapestry of the United States is the product of our offering a safe haven for those who seek to worship in the manner their consciences dictate. Throughout its history, the United States has remained a magnet for those seeking religious freedom. *See* Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 Ind. L.J. 37, 41–52 (2000) (cataloguing efforts "to describe and explain religious pluralism as it has evolved historically in America"). All of this has made the United States one of the most

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inevitable miseries of exile because they wished to ensure the victory of *an idea*.... Persecuted by the government of the mother country and offended by the routine ways of a society at odds with the rigorous principles by which they lived, the Puritans sought a land so barbarous and so neglected that they might still be allowed to live there as they wished and pray to God in liberty.").

religiously pluralistic and tolerant societies in history: "virtually every religion in the world is represented in the population of the United States." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Indeed, America today is home to more than 2,000 religious denominations. *See Melton's Encyclopedia of American Religions* 1 (J. Gordon Melton ed., 9th ed. 2017). The religious beliefs, practices, and internal structures (or lack thereof) of these religions are as numerous as the religions themselves. Some religions are led by ordained ministers, some are not. Some religions have canonical and sacred texts, some do not. Some religions seek to proselytize, some do not. Some religions require formal training for their ministers, some do not.

Members of Congress represent constituents from all of these faith traditions and religious affiliations. Consistent with their oaths of office, and their representation of these constituents, Members of Congress have a duty to support and defend the Constitution's protection of religious freedom and pluralism. Accordingly, Congress has historically and repeatedly sought to promote religious freedom and to avoid legislating in ways that intrude upon religious autonomy or treat religions unequally. *See, e.g.*, Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181, 186 (1992) (noting that the Continental Congress "created an exemption from military conscription for adherents to faiths that forbade participation in war") (citing Resolution of July 18, 1775, reprinted in 2 *Journals Of The Continental Congress* at 187, 189 (1905)); Act of Feb. 24, 1864, ch. 13, § 17, 13 Stat. 6 (providing a religious exemption from the Conscription Act of 1863); 27 U.S.C. § 16 (1925) (exception to Prohibition for use of sacramental

wine); Pub. L. No. 76-783, 54 Stat. 885 (1940) (codified as amended in 50 U.S.C. § 3806(g)) (providing an exemption to "ministers of religion" from military service); *Gaylor v. Mnuchin*, 919 F.3d 420, 431 (7th Cir. 2019) (finding that Congress broadened the parsonage tax exemption, 26 U.S.C. § 107, in 1954 to avoid "discrimination against certain religions in favor of others"); Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in 8 U.S.C. § 1101(a)(42)(A)) (defining "refugee" to include anyone unable or unwilling to return to his or her home country "because of persecution or a well-founded fear of persecution on account of … religion"); Pub. L. No. 100-180, 101 Stat. 1019 (1987) (codified in 10 U.S.C. § 774(a)) (providing an exemption to allow members of the armed forces to wear "religious apparel"); Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in 8 U.S.C. § 1182(g)(2)(C)) (providing an exception to vaccination requirements for the admission of aliens where "such a vaccination would be contrary to the alien's religious beliefs"). Indeed, to ensure that federal statutes respect religious freedom, Congress—by a near unanimous vote in 1993—passed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, which reaches "'across all other federal statutes … modifying their reach.'" *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013) (quoting Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995)). Moreover, anti-discrimination statutes themselves seek to combat religious inequality: Congress has included religion in its legislation banning discrimination based on certain characteristics. *See* 42 U.S.C. §§ 2000e-2(a)–(d).[3]

3. Congress has long considered how to fashion broad anti-discrimination protections that also respect religious autonomy. For example, following the ratification of the Fourteenth

Of course, "in our increasingly complex society" legislating is an imperfect science and sometimes requires painting with a broad brush, *Mistretta v. United States*, 488 U. S. 361, 372 (1989), especially when Congress is attempting to tackle a problem as important and multifaceted as discrimination. Accordingly, federal statutes of general applicability might, as applied in certain narrow circumstances, intrude upon the internal affairs of religion. That is why federal courts have long recognized that the Religion Clauses sometimes require a ministerial exception to the application of some federal statutes. *See Hosanna-Tabor*, 565 U.S. at 185–88 (noting that the Court's decisions had long "confirm[ed] that it is impermissible for the government to contradict a church's

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Amendment, during the debates over the passage of the Civil Rights Act of 1875, Congress rejected the idea of applying that important anti-discrimination law to churches, with "many of the senators express[ing] their opposition in terms of the First Amendment Religion Clauses." Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 831 (2012). In subsequent anti-discrimination statutes, Congress has continued to debate and include exemptions for religion. *See, e.g.*, 42 U.S.C. §12113(d) (providing that a religious organization may "giv[e] preference in employment to individuals of a particular religion" and allowing religious organizations to "require that all applicants and employees conform to the religious tenets of such organization"). As initially drafted, Title VII completely excluded "religious corporations" from its purview. *See* H.R. Rep. No. 88-914, at 12 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2402. This exception was replaced by a narrower carve-out for religious groups from claims of religious discrimination lodged by employees doing work connected with religious activities. *See* Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. §2000e-1). Following revisions in 1972, Title VII exempts religious organizations from any claim of religious discrimination. *See* 42 U.S.C. §2000e-1.

determination of who can act as its ministers," and that the "Courts of Appeals have uniformly recognized the existence of a 'ministerial exception' … that precludes application of [employment discrimination] legislation to claims concerning the employment relationship between religious institutions and its ministers").

Congress enacted the anti-discrimination laws at issue here to accomplish an "undoubtedly important" goal: prohibiting and eradicating invidious discrimination across the American employment landscape. *Id.* at 196. But also important to Congress is the American tradition, and constitutional guarantee, of noninterference with religion—of affirming "the interest of religious groups in choosing who will … teach their faith." *Id.* The narrow but compelling circumstances presented by these cases—religious schools' relationship with their teachers *of religion*—implicate the latter virtue and require reversal of the Ninth Circuit.

B. The Ninth Circuit's Formulaic Approach to the Ministerial Exception Does Not Comport with *Hosanna-Tabor* and Fails to Protect and Promote Religious Diversity.

In *Hosanna-Tabor*, this Court affirmed the constitutional command that the "Courts of Appeals have uniformly recognized" for many years—namely, that the "'ministerial exception,' grounded in the First Amendment, … precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." 565 U.S. at 188. The Court explained that the exception is rooted in both "the Free Exercise

Clause, which protects a religious group's right to shape its own faith and mission through its appointments," and "the Establishment Clause, which prohibits government involvement in … ecclesiastical decisions" about "which individuals will minister to the faithful." *Id.* at 188–89.

The Court in *Hosanna-Tabor* explicitly eschewed "adopt[ion] of a rigid formula for deciding when an employee qualifies" for the ministerial exception, choosing instead to look at "all the circumstances" of the relationship at issue. *Id.* at 190. Such a rigid formula could never account for, or sufficiently protect, the sheer variety of religious practices, beliefs, and structures in America—a point that Justices Thomas, Alito, and Kagan all made in concurring opinions. *See id.* at 197 (Thomas, J., concurring) ("a bright-line test or multi-factor analysis [would] risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or unpalatable to some."); *id.* at 198, 206 (Alito, J., concurring) (noting that religious titles and practices vary and therefore the ministerial exception must turn on an employee's "functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise … religious liberty").

Following *Hosanna-Tabor*, most Courts of Appeals have correctly read it as calling for an individualized assessment of the substance of a particular person's functions in a religious institution, rather than a pronouncement of an unforgiving four-part test. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) ("[E]ven referring to them as 'factors' denotes the kind of formulaic inquiry that the Supreme Court has rejected."); *Fratello v. Archdiocese of*

N.Y., 863 F.3d 190, 202, 204–05 (2d Cir. 2017) ("*Hosanna-Tabor* instructs only as to what we *might* take into account as relevant…. [I]t neither limits the inquiry to those considerations nor requires their application in every case."); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 176 (5th Cir. 2012) ("Any attempt to calcify the particular considerations that motivated the Court in *Hosanna-Tabor* into a 'rigid formula' would not be appropriate."). These post-*Hosanna-Tabor* decisions continue the pre-*Hosanna-Tabor* ministerial-exception jurisprudence that *Hosanna-Tabor* endorsed. *See* 565 U.S. at 188 & n.2; *Rweyemamu v. Cote*, 520 F.3d 198, 204–209 (2d Cir. 2008); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 308–09 (4th Cir. 2004); *E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795, 800–801 (4th Cir. 2000); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225–227 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Alicea–Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 703–04 (7th Cir. 2003); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 362–363 (8th Cir. 1991); *Bryce v. Episcopal Church*, 289 F.3d 648, 655–657 (10th Cir. 2002); *E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 460–463 (D.C. Cir. 1996).

The Ninth Circuit's decisions here are glaring and problematic outliers. Rather than engage in a holistic analysis of whether, under "all the circumstances," the employment actions at issue involved "religious groups … choosing who will preach their beliefs, teach their faith, and carry out their mission," 565 U.S. at 190, 196, the Ninth Circuit instead considered whether the practices of St. James Catholic School and Our Lady of Guadalupe School conform to the tenets of the Lutheran Church–

Missouri Synod. *See Biel v. St. James Sch.*, 926 F.3d 1238, 1243 (9th Cir. 2019) (Nelson, J., dissenting from denial of rehearing en banc) ("The panel majority mistakes *Hosanna-Tabor* to create a resemblance-to-Perich test."); *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 570 (7th Cir. 2019) ("[The Ninth Circuit's] approach … asks how much like Perich a given plaintiff is, rather than whether the employee served a religious function."). Such a test simply does not protect the religious diversity of the United States.

At the heart of the Ninth Circuit's misapplication of *Hosanna-Tabor* is the misconception that the decision instructed courts to consider "four major considerations" and only those considerations. *Biel*, 911 F.3d at 607; *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 460–61 (9th Cir. 2019) (relying on *Biel*'s reasoning). Three of those considerations revolve around the employee's title—"(1) whether the employer h[olds] the employee out as a minister, (2) whether the employee's title reflect[s] ministerial substance and training, [and] (3) whether the employee h[olds] herself out as a minister." *Biel*, 911 F.3d at 607. Only one consideration—"the employee's job duties," *id.*—is unrelated to title and, according to the Ninth Circuit, even when an employee's duties reflect "significant religious responsibilities," she cannot fall within ministerial exception unless one of the title-based considerations is satisfied. *See Morrissey-Berru*, 769 F. App'x at 461.

The Ninth Circuit's application of the ministerial exception turns the doctrine's name into its test. And this is precisely what Justices Alito and Kagan warned against in their *Hosanna-Tabor* concurrence. While

the term "ministerial exception" serves as a useful shorthand to describe the Religion Clauses' respect for religious autonomy in certain internal affairs, "it 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." *Hosanna-Tabor,* 565 U.S. at 198 (Alito, J., concurring) ("The term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists."); *see also* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 66–67 (2011) ("The scope of the ministerial exception should be determined by the breadth of its underlying rationales, not by the semantic meaning of the word 'minister.'"). Such rigidity undermines the Religion Clauses' protection of this country's religious diversity. This can be seen in the Ninth Circuit's application of the first three of its "major considerations."

Under its first "major consideration," the Ninth Circuit deployed a "does-it-sound-secular?" test, declaring, ipse dixit, that "it cannot be said that Grade 5 Teacher 'conveys a religious—as opposed to secular—meaning.'" *Biel*, 911 F.3d at 608 (quoting *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834–35 (6th Cir. 2015)); *see also Morrissey-Berru*, 769 F. App'x at 461 ("Morrissey-Berru's formal title of 'Teacher' was secular"). But this kind of inquiry necessarily punishes minority religions whose practices and official titles are less well known and rewards those religions better known to the public and secular courts. Such an outcome is incompatible with this Court's Establishment Clause jurisprudence. *See*

Larson, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). And it is incompatible with the many Courts of Appeals decisions finding that the ministerial exception applies to, for example, a "Corps Commander," "Welfare Casework Supervisor in Divisional Headquarters," "secretary in the Territorial Headquarter's [sic] Public Relations Department," "communications manager," lay principal, nursing home staff member, and director of music. *McClure v. Salvation Army*, 460 F.2d 553, 554 (5th Cir. 1972); *Alicea–Hernandez*, 320 F.3d at 704; *Fratello*, 863 F.3d at 208; *Shaliehsabou*, 363 F.3d at 309–11; *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 801–04. In short, religious labels can be unfamiliar or confusing to secular courts. *See, e.g.*, *Patriarch*, *Black's Law Dictionary* (11th ed. 2019) (defining the term as both "A man who rules or dominates a social or political group" and "The title of the most senior bishop in the Orthodox or Roman Catholic Church"). The ministerial exception cannot turn on mere words. What matters is function.

Similar problems attend the application of the Ninth Circuit's second "major consideration," the "substance" of the title. The Ninth Circuit found that neither Biel nor Morrissey-Berru possessed sufficient "credentials" or "training" to be considered ministers. *Biel*, 911 F.3d at 608; *Morrissey-Berru*, 769 F. App'x at 461. After taking pains to catalogue and characterize the six years of "substantial" religious training Perich undertook in *Hosanna-Tabor*, the Ninth Circuit dismissed Biel's attendance at a "single half-day conference" that included "the incorporation of religious themes into lesson plans," *Biel*, 911 F.3d at 605, 607, and ignored

completely that Morrissey-Berru maintained "regular catechist certifications." *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 216CV09353SVWAFM, 2017 WL 6527336, at *2 (C.D. Cal. Sept. 27, 2017). In undercutting or simply ignoring the religious training received by Biel and Morrissey-Berru, the Ninth Circuit weighed its own conception of the proper type and amount of religious instruction one must receive to be considered a minister against a level deemed adequate by the Catholic schools at issue here. This is a dangerous formula, whereby, in order to enjoy the protections of the First Amendment, religious institutions must first provide their ministers with formal training that is deemed adequate under secular judicial examination. In a nation that is home to religions whose teachers receive varying amounts of formal training—or no formal training at all[4]—such a standard is intolerable. *See Fratello*, 863 F.3d at 208 (applying the ministerial exception despite the fact that a "lay principal" is "not required to meet any religious-education requirements").

The Ninth Circuit's application of its third "major consideration" fares no better. The Ninth Circuit held that neither Biel nor Morrissey-Berru held herself out "to the community" or "to the public as a religious leader or minister." *Biel*, 911 F.3d at 609; *Morrissey-Berru*, 769 F. App'x at 461. The Ninth Circuit thus made a religion's internal judgments about who ministers to its flock turn on what the public-at-large might perceive about those judgments. Again, this disadvantages minority religions,

4. Margery Post Abbot et al., *Historical Dictionary of the Friends (Quakers)* 225–226 (2d ed. 2012) (noting that, "[i]n the Quaker faith, every believer is a minister" and that, although formal training may be available, "it [is] not training or education at Oxford or Cambridge that qualifie[s] one to be a minister").

whose titles and customs might be less well known to the public and the secular judiciary. Tellingly, the Ninth Circuit ignored the most important community to which Biel and Morrissey-Berru could hold themselves out as religious leaders: their pupils inside the faith. Both Biel and Morrissey-Berru (1) instructed their students in the Catholic faith, its practices, and its tenets, and (2) incorporated those teachings into their non-religion classes. *See Biel*, 911 F.3d at 611–12 (Nelson, J., dissenting); *Morrissey-Berru*, No. 216CV09353SVWAFM, 2017 WL 6527336, at *2. By accepting such responsibilities at their respective schools, Biel and Morrissey-Berru held themselves out as sources of religious knowledge and instruction whom their students could trust. *See Biel*, 911 F.3d at 613 (Nelson, J., dissenting) (noting that the St. James School's Faculty/Staff Handbook included the goal of "guid[ing] the spiritual formation of the student … and hop[ing] to help each child strengthen his/her personal relationship with God"). As explained in greater detail below, education of the next generation of the faithful is a vital function for most religions and is of particular importance for minority religions that rely on religious schools to impart that education. In failing to consider the community of students of faith who looked to Biel and Morrissey-Berru for religious instruction, the Ninth Circuit took too narrow a view of the community a religious leader faces and, indeed, the community a religious leader serves. *See* Lund, *supra*, at 68 ("Perich was the students' permanent teacher, someone who saw them all day, every day, someone who taught them authoritatively on every other subject. Coming to trust her on how to read and how to write, her students naturally came to trust what she said about religion."). This public-at-large test stifles religious diversity by telling religious groups that what

matters is not their adherents' religious beliefs, but the perceptions of outsiders.

In sum, the Ninth Circuit has turned this Court's totality-of-the-circumstances review into a check list of requirements focused on semantics over substance. Three of the four requirements measure something other than religious function, and if permitted to stand will stifle religious freedom and diversity.

II. Religious Instruction Is Often a Function at the Very Core of a Religion's Internal Affairs, and the Ministerial Exception Protects the Selection of Religious Teachers.

Turning finally to its fourth—and only non-title-based—"major consideration," the Ninth Circuit held that an employee's job duties cannot "alone" "indicate that the ministerial exception applies." *Biel*, 911 F.3d at 609. The court reasoned that "[i]f it did, most of the analysis in *Hosanna-Tabor* would be irrelevant dicta." *Id.* But that reasoning ignores this Court's admonition in *Hosanna-Tabor* that it "express[ed] no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed." 565 U.S. at 193. And it ignores that *Hosanna-Tabor* represented the first time this Court had recognized the ministerial exception in the employment-discrimination context, making it natural for the Court to describe—for the benefit of lower courts and the varied cases they will confront—the many facts that supported (but were not dispositive of) its application. *See id.* at 188 ("Until today, we have not had occasion to consider whether this freedom of a religious organization to select

its ministers is implicated by a suit alleging discrimination in employment."); *id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment."). Most significantly, the Ninth Circuit's dismissal of the importance of job duties also flatly ignores the straightforward statement in *Hosanna-Tabor* that undergirding the ministerial exception is the important "interest of religious groups in choosing who will preach their beliefs, *teach their faith*, and carry out their mission." *Id.* at 196 (emphasis added).

The job duty at issue in these cases is teaching—more specifically, the teaching of religion—and it is absolutely central to many religions. It may well be that for certain positions—like a newly minted pastor who has only secretarial duties at first—a court must look beyond duties to fully protect a religion's ministerial choices. This is why it made sense for this Court in *Hosanna-Tabor* to offer a full recitation of salient facts in that case. But where the main duty at issue is so fundamental to the faith, no further inquiry is necessary. Accordingly, the better view is the one endorsed by Justices Alito and Kagan: the ministerial exception "should apply to any 'employee' who … serves as a messenger or teacher of its faith." *Id.* at 199.

A. The Teaching of Religious Tenets Lies at the Heart of Religion.

The Court's inclusion of one who "teach[es] … faith" as a paradigmatic example of a minister is no accident. A faith community cannot regenerate itself or grow its

adherents if it cannot teach what it is all about. And for many religions teaching is one the most significant ways in which religious commands are imparted to adherents so that they can be incorporated into daily life.

For example, for Catholics in America—the religious group at issue here—education of youth has been at the center of the faith community since the Founding. The first Catholic parish school in the United States was founded in Philadelphia in 1783. Timothy Walch, *Parish School: American Catholic Parochial Education from Colonial Times to the Present* 17 (1996). By the time the "Catholic parochial school movement had reached its high point, there were more than 4.5 million children in parish elementary schools." *Id.* at 1. American Catholics pursued this educational mission because of their "unwavering belief that the education of children is a primary responsibility of the family and the church," and the "movement to establish Catholic schools was, above all else, an effort to prevent Catholic children from abandoning their religious faith." *Id.* at 1–2. This was especially important to nineteenth-century Catholics who objected to public-school curricula that "included heavy doses of Protestant instruction and anti-Catholic propaganda." *Id.* at 2.[5] Many of the people who organized and taught in these Catholic schools were not ordained members of the clergy; they were the religious laity who

5. *See also* Br. For Senators Steve Daines, Tim Scott, John Kennedy, and Marsha Blackburn and Representative Greg Gianforte as *Amicus Curiae* Supporting Petitioners, *Espinoza v. Mont. Dept. of Revenue*, No. 18-1195 at 4 ("many Catholics[] [had] longstanding objections that subjecting their children to classroom readings of the King James Bible and anti-Catholic textbooks violated their religious beliefs").

thought it was critical to the preservation of their faith to have specifically Catholic education in Catholic schools. *See* Betty Ann McNeil, *Historical Perspectives on Elizabeth Seton and Education: School is My Chief Business*, 9 J. Cath. Educ. 284, 287 (2006) (the bishop of Philadelphia in the mid-1800s, Saint John Neumann, "strongly advocated inviting communities of religious women into the diocese to teach in the growing number of parochial schools"). The Catholic school movement was so important to American Catholicism that it reportedly led Francis Patrick Kenrick, the Archbishop of Baltimore from 1851 to 1863, to conclude that Elizabeth Seton—the first native-born U.S. citizen to be canonized and the founder, in 1810, of Saint Joseph's Academy in Maryland—"did more for the Church in America than all of us bishops together." *Id.* at 287.

American Catholics, of course, are not alone in their long tradition of valuing religious education for their youth. "For millennia, in widely scattered places, and under various conditions, Jews have instructed their children concerning the teachings and practices of Jewish life, enabling them to negotiate their way as Jews." Gil Graff, *"And You Shall Teach Them Diligently": A Concise History of Jewish Education in the United States 1776–2000* 1 (2008). American Jews, like Catholics, can trace their religious schools back to the Founding period and as rooted in a desire, as one early promotion of a school put it, "to make [Jewish] children truly virtuous … [by] rear[ing] them in the strict principles of our holy religion." *Id.* at 13–14. By the beginning of this century, "[s]chool-based Jewish educational programs were reaching nearly 80 percent" of Jewish children and included a wide variety of programs from day schools to early childhood programs to rabbinical seminaries. *Id*. at 2.

Muslims, too, hold youth education as a paramount religious virtue. The "Qur'an depicts knowledge as a great bounty from God granted to His prophets and their followers through time," and a "well-known statement of the Prophet exhorts, 'The pursuit of knowledge is incumbent on every Muslim,' a statement that has made the acquisition of at least rudimentary knowledge of religion and its duties mandatory for the Muslim individual." Asma Afsaruddin, *Muslim Views on Education: Parameters, Purview, and Possibilities*, 44 J. Cath. Legal Stud. 143, 143–44 (2005). Thus, for the Muslim-American community, by "2000, the development of independent private Islamic schools had become an important part of the picture of Muslim education in America…. Their appeal is that teachers serve not only as instructors but as moral and ethical guides." Yvonne Y. Haddad & Jane I. Smith, *Introduction: The Challenge of Islamic Education in North America*, in Yvonne Y. Haddad et al., *Educating the Muslims of America* 6, 11 (2009).

The Church of Jesus Christ of Latter-day Saints also stresses the importance of education. Revelations given to Joseph Smith state that "[t]he glory of God is intelligence," *Doctrine and Covenants of the Church of the Latter-day Saints* 93:36, and that "[w]hatever principle of intelligence we attain unto in this life, it will rise with us in the resurrection." *Doctrine and Covenants of the Church of the Latter-day Saints* 130:18. Brigham Young stated that "all wisdom, and all the arts and sciences in the world are from God, and are designed for the good of His people." *Journal of Discourses* 13:147. In 1875, Latter-day Saints began establishing schools throughout the United States "to provide elementary and secondary secular and religious education." William E. Berrett, *Church*

Education System (CES) in *Encyclopedia of Mormonism* 274 (Daniel H. Ludlow ed., 1992). Today, wherever there are significant populations of members, "The Church Board of Education has established elementary, middle, or secondary schools in which both secular and religious instruction is offered." *Id.* at 275. Latter-day Saints also "offer[] seminary and institute programs to supplement secular education with religious teachings." *Id.*

Similarly, Jehovah's Witnesses believe that education is "vital" and helps people to develop the Biblical qualities of "practical wisdom and thinking ability." *How Do Jehovah's Witnesses View Education?*, https://www.jw.org/en/jehovahs-witnesses/faq/jw-education-school. Jehovah's Witnesses encourage members "to have a well-rounded education … as well as knowledge about other religions and cultures." *Id.* Notably, Jehovah's Witnesses "do not separate children for religious instruction" and believe that "God wants people to worship him without being separated by age." *Id.* In 1943, Jehovah's Witnesses founded what is now known as the Watchtower Bible School of Gilead, which offers courses that focus "primarily on the Bible and the importance of … evangelizing work." Seventy Years of Gilead School, https://www.jw.org/en/jehovahs-witnesses/activities/ministry/training-evangelizers-seventy-years/.

For the International Society for Krishna Consciousness, also known as the Hare Krishna movement, "education is an integral part of its communities." ISKCON, https://www.iskcon.org/education. According to the Krishna conscious, the goal in life is "to awaken within each soul knowledge of their original spiritual nature, thus bringing the individual to the platform of God consciousness, or devotional service

to God." *Id.* The Hare Krishna movement has "developed systematic studies of the texts fundamental to Krishna consciousness" in order to provide opportunities to gain an understanding of its beliefs. *Id.* And the Hare Krishna movement provides educational programs for children at its temples throughout the United States. *Id.*

The survey could go on, sweeping across the American religious landscape to demonstrate that teaching is one of the most fundamental aspects of religious practice. Suffice it to say that it was no accident and no mistake for this Court to specifically reference, in *Hosanna-Tabor*, "the interest of religious groups in choosing who will … teach their faith." 565 U.S. at 196.

B. The Ninth Circuit Improperly Minimized the Importance of Religious Teaching.

The Ninth Circuit's view is deeply troubling because it recognizes *no* protection for religious teaching—even "significant religious responsibilities as a teacher," *Morrissey-Berru*, 769 F. App'x at 461—without the presence of at least one title-based "major consideration." Indeed, far from recognizing the importance of teaching to the Catholic faith—and to religion more generally—the Ninth Circuit seemed to belittle it. It dismissed Biel's "role in Catholic religious education" as not "important" because it was "limited to teaching religion from a book." 911 F.3d at 609. Of course, even if this were a fair description of Biel's role, *see infra* II.C, for Catholics, "teaching religion from a book" is of paramount importance. *See, e.g.*, *Dei Verbum* 4:25 ("The sacred synod also earnestly and especially urges all the Christian faithful, especially Religious, to learn by frequent reading of the divine

Scriptures"); *Sacrosanctum Concilium* 1:7 ("He is present in His word, since it is He Himself who speaks when the holy scriptures are read in the Church."); *Sacrosanctum Concilium* 1:24 ("Sacred scripture is of the greatest importance in the celebration of the liturgy.").

The same is true for Protestants because, as Founding-generation Christians professed, for them the Bible "contains the most profound philosophy, the most perfect morality, and the most refined policy that ever was conceived upon earth" (John Adams), *Our Sacred Honor: Words of Advice from the Founders in Stories, Letters, Poems, and Speeches* 408 (William J. Bennett ed., 1997); "is a book worth more than all the other books that were ever printed" (Patrick Henry), *Faith and the Founders of the American Republic* 149 (Daniel L. Dreisbach & Mark David Hall eds., 2014); and "contains more truths than any other book in the world" (Benjamin Rush), Carl J. Richard, *The Founders and the Bible* 58 (2016). Far from thinking "teaching from a book" was unimportant to their faith, Founders like John Jay urged "persever[ing] steadfastly in distributing the Scriptures far and near" because "[w]e are assured that they 'are profitable for doctrine, for reproof, for correction, for instruction in righteousness (2 Tim. 3:16).'" Address to the American Bible Society at the Annual Meeting (May 9, 1822).

For many others religions, "teaching from a book" is also central to the faith. For example, "Islam is frequently characterized as a 'religion of the Book,' and the "[t]he first word said to have been uttered by the angel Gabriel in roughly 610 C.E., which initiated the series of divine revelations to the Prophet Muhammad, was 'Iqra!'" or "'read.'" Afsaruddin, *supra*, 143. Thus, "[t]he act of

reading … took on an exceptionally sacrosanct quality within Islamic tradition and practice." *Id.*

Likewise, Jews have been known as Am HaSefer, or "the people of the book," Kerry M. Olitzky & Ronald H. Isaacs, *A Glossary of Jewish Life* 217 (1992), and central to their religion is a reverence for teaching from the Torah and other sacred texts. *See, e.g.*, *Nehemiah* 8:1–3 ("[A]ll the people gathered together" and "asked Ezra the scribe to bring the book of the law of Moses that the L-rd had given Israel…. Ezra the priest brought the law before the assembly of men, women, and all who could listen with understanding. [H]e read out of it from daybreak until noon before the men, the women, and those who could understand. All the people listened attentively to the book of the law."). Indeed, sacred texts are so revered under Jewish tradition that it is not permissible for such a book to lie on the ground; if a sacred book is dropped it must be picked up and given a kiss. Ronald L. Eisenberg, *The JPS Guide to Jewish Traditions* 617–18 (2004).

Sikhs, whose name means "students," adhere to the spiritual instruction of Gurus, or "teachers." Eleanor Nesbitt, *Sikhism: A Very Short Introduction* 10 (2d ed. 2016). There were ten human Gurus, but after the passing of the tenth, the Guruship passed to the Guru Granth Sahib—a text—that Sikhs consider "the [G]uru in perpetuity." Gurbachan Singh, *The Sikhs: Faith, Philosophy & Folk* 55 (1998). Thus, for Sikhs, "teaching from a book" cannot be lightly dismissed because the text itself is the teacher—"the living embodiment of the Guru." *The Oxford Handbook of Sikh Studies* 125 (Pashaura Singh & Louis E. Fenech eds., 2014); *see also id.* at 133–34 (the Guru Granth Sahib is the "basis of the most important

Sikh doctrines, rituals, and social and ethical positions" and is "the ultimate authority within the Sikh tradition, for a wide range of personal and public conduct"). "Simply to be in the presence of the Guru Granth Sahib, or to hear a sentence read aloud from it, makes Sikhs feel that they are on sacred ground." *Id.* at 134.

Thus, for Catholics, for other Christians, for Muslims, for Jews, for Sikhs—and for many other religions—there can scarcely be anything more central than teaching from their sacred texts. Indeed, survey data suggests that for those Americans who are most religious, reading from scripture is at the heart of their religious life. *See Religious Landscape Study*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/frequency-of-reading-scripture/#importance-of-religion-in-ones-life-trend (97% of those who report that religion is "very important" or "somewhat important" to them also report reading scripture at least once per week). Yet, illustrating the danger Justice Thomas warned against in his concurrence in *Hosanna-Tabor*, "'a secular court'" did not "'consider religious'" enough Biel's teaching religion from a book. 565 U.S. at 197 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987)).

C. As Teachers of Religion, Both Biel and Morrissey-Berru Fell within the Ministerial Exception.

Respondents in these cases were teachers of religion. Biel "taught lessons on the Catholic faith" and "incorporated religious themes and symbols into her

overall classroom environment and curriculum." *Biel*, 911 F.3d at 609. Biel's religion class included lessons and tests on "the Catholic sacraments, the lives of Catholic Saints, Catholic prayers, Catholic social teaching, Gospel stories, and church holidays." *Id.* at 612 (Fisher, J., dissenting). Additionally, Biel testified that she prayed prayers like the Lord's Prayer and the Hail Mary "twice a day" with her students. *St. James School* Pet. App. 93a. Biel further testified that she attended school masses with her students every month and, twice per year, her students participated in presenting the Eucharistic gifts. *Id.* at 94a–95a. Biel's employment contract provided that the mission of St. James School was "to develop and promote a Catholic School Faith Community within the philosophy of Catholic education as implemented at [St. James], and the doctrines, laws, and norms of the Catholic Church." *Biel*, 911 F.3d at 612 (Fisher, J., dissenting). And the St. James Faculty/Staff Handbook explained that the school's staff would "guide the spiritual formation of the student ... and hope to help each child strengthen his/her personal relationship with God." *Id.*

Similarly, Morrissey-Berru was assuredly a teacher of religion. The faculty of Our Lady of Guadalupe School is "committed to faith-based education, providing a quality Catholic education for the students and striving to create a spiritually enriched learning environment, grounded in Catholic social teachings, values, and traditions." *Morrissey-Berru*, No. 216CV09353SVWAFM, 2017 WL 6527336, at *2. Morrissey-Berru fulfilled that commitment by teaching and testing her students on "the tenets of the Catholic religion, how to pray, and ... a host of other religious topics" on a daily basis. *Id*; *see also Our Lady of Guadalupe School* Pet. App. 91a–94a (Morrissey-Berru

testifying that she taught her students, among other things, to "learn and express [the] belief that Jesus is the son of God and the Word made flesh"; "to be able to identify the ways that the church carries on the mission of Jesus"; "the communion of saints"; "to recognize the presence of Christ in the Eucharist"; to "be able to locate, read and understand stories from the Bible that relate to the sacraments"; "to celebrate a prayer service of Reconciliation"; "how to pray the Apostles' Creed and the Nicene Creed"; "to recognize the meaning and celebration of the Sacred Triduum"; and "to understand original sin"). The Ninth Circuit conceded that Morrissey-Berru had "significant religious responsibilities as a teacher." *Morrissey-Berru*, 769 F. App'x at 461 (noting that Morrissey-Berru "led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year"). This is unsurprising, as Morrissey-Berru testified that she was "committed" to "teaching children Catholic values" and providing a "faith-based education." *Our Lady of Guadalupe School* Pet. App. 82a.

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In focusing on both Respondents' titles, rather than their important religious functions, the Ninth Circuit held that neither Biel nor Morrissey-Berru could be considered a "minister." *See Biel*, 911 F.3d at 607–09; *Morrissey-Berru*, 769 F. App'x at 460–61. There is, to be sure, no singular definition for "minister," and we do not suggest that this Court should attempt to establish such a bright-line description. Yet whether in the pulpit or in the classroom, at the heart of ministry for many religions

is teaching the faith. *See Hosanna-Tabor*, 565 U.S. at 196. In *Hosanna-Tabor*, this Court unanimously held that a ministerial exception under the Religion Clauses exists. In this case, the Court should take the opportunity to hold that the exception includes those who execute the profound duty of teaching the faith to the next generation, whether they be called priest, pastor, imam, rabbi, teacher, or nothing at all. Anything less would imperil the religious pluralism of the United States.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

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Kevin Cramer (ND)

Ted Cruz (TX)

Josh Hawley (MO)

James M. Inhofe (OK)

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Doug Collins (GA-09)

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Vicky Hartzler (MO-04)

Jody Hice (GA-10)

Steve King (IA-04)

Mike Kelly (PA-16)

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Barry Loudermilk (GA-11)

Mark Meadows (NC-11)

Ralph Norman (SC-05)

Steven Palazzo (MS-04)

Adrian Smith (NE-03)

Chris Stewart (UT-02)