Nos. 19-267 & 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

ST. JAMES SCHOOL,

Petitioner,

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH; INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL; THE MORAVIAN CHURCH IN AMERICA; AND THE ORTHODOX CHURCH IN AMERICA AS *AMICI CURIAE* SUPPORTING PETITIONERS

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, statutes, and regulations

Miscellaneous

INTERESTS OF AMICI CURIAE[1]

Amici are churches and other religious organizations with a shared commitment to religious freedom under the Constitution. Like other religious organizations, we have a profound interest in the constitutional right to govern our internal affairs by deciding who will serve in key employment positions. Some *amici* appeared in *Hosanna-Tabor*, where the Court unanimously embraced the ministerial exception. This brief seeks to assist the Court by proposing and explaining a judicial standard for the ministerial exception that incorporates the petitioners' standard along with other relevant considerations. Our aim is to fully secure the religious autonomy guaranteed to religious organizations by the First Amendment.

SUMMARY OF ARGUMENT

The ministerial exception bars courts from adjudicating an employment discrimination claim by a minister against a religious organization. This rule safeguards the organization's right to freely exercise its religion through its appointments and respects the structural barrier posed by the Establishment Clause, which places disputes over religious appointments beyond civil control. In both ways, the ministerial

---

[1] Pursuant to Supreme Court Rule 37.3(a), *amici* state that all parties have submitted their written consent to filing this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

exception protects the freedom of religious organizations to govern themselves.

The ministerial exception received this Court's unanimous endorsement in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012). There, the exception precluded a disability discrimination suit by a teacher against a religious school. See *id.* at 194. Her title of "commissioned minister," her special training, her status in the religious community, and her religious job duties required dismissing her case. See *id.* at 191–92.

Apart from explaining why these facts justified dismissal, *Hosanna-Tabor* did not adopt a hard-and-fast legal standard identifying when the ministerial exception applies. See *id.* at 190. In the decisions below, the Ninth Circuit declined to apply the ministerial exception because, it reasoned, the facts did not fit the factual record of *Hosanna-Tabor* precisely.

Confining *Hosanna-Tabor* to its facts is wrong. Leading constitutional decisions stand for broad principles of law, not fact-bound holdings. Otherwise, the freedom from compelled speech would belong only to schoolchildren who refuse to pledge allegiance to the flag, *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), and the right to counsel would belong only to prisoners convicted of breaking and entering a pool hall, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

The Ninth Circuit's fact-bound approach illustrates the risks of adjudicating cases invoking the ministerial exception without a meaningful legal standard. Lower courts trying to determine when the ministerial exception applies will flounder. With such uncertainty, the exception will not reliably secure religious autonomy.

An appropriate standard for the ministerial exception should protect religious organizations with respect to two categories of employees that are necessary for a religious organization to govern its internal affairs and pursue its religious mission.

First, an appropriate standard would apply the ministerial exception to employees who perform important religious functions. Employees who lead a religious organization; convey religious beliefs and practices in the classroom or create religious curricula; lead community prayer, conduct worship services, and perform religious rites and ceremonies; or lead and perform music during religious events—all these employees come squarely within the ministerial exception. Preventing a religious organization from selecting employees who perform these tasks—or second-guessing the organization for removing such an employee—interferes with a religious organization's internal governance and entangles courts in religious judgments.

Second, an appropriate standard should apply the ministerial exception to employees whose substantial discretion or senior leadership role makes them important for a religious organization's religious mission. Extending the ministerial exception to such employees is necessary to preserve religious autonomy. When an employee carries out responsibilities that seriously affect the organization's religious mission, the ministerial exception should apply. Otherwise a civil court could force a church to justify the termination of—and even reinstate—a church spokesperson that the church deemed inadequate to represent it publicly.

From these principles, we distill the following standard:

The ministerial exception applies when a religious organization demonstrates that its religious autonomy depends on controlling the selection, discipline, or removal of (1) an employee who performs important religious functions or (2) an employee whose substantial discretion or senior leadership role makes the employee important for carrying out the organization's religious mission.

This brief explains why a legal standard is necessary and defends the standard we propose.

ARGUMENT

I. The Court should adopt an appropriate standard for the ministerial exception.

A. *Hosanna-Tabor* establishes that the First Amendment protects a religious organization's control over religious officers and functionaries.

The ministerial exception protects religious employers from claims brought by former employees. "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor*, 565 U.S. at 181. Imposing an "unwanted minister" violates the Free Exercise Clause by interfering with "a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188. The same interference violates the Establishment Clause, "which prohibits government involvement in such ecclesiastical decisions." *Id.* at 189; see also *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (the "very process of inquiry" "may impinge on rights guaranteed by the Religions Clauses"); *Watson* v. *Jones*, 80 U.S. (13

Wall.) 679, 732–34 (1871) (civil courts are "incompetent judges" in "matters of faith, discipline, and doctrine").

The ministerial exception thus secures religious autonomy. This is the First Amendment doctrine that religious organizations possess "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)); see also *id.* at 199 (Alito, J., concurring) (the ministerial exception safeguards "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs"). Petitioners rightly point out that legal autonomy for religious organizations "trace[s] [its] roots back over 140 years of Supreme Court precedent, and before that to Magna Carta." Guadalupe Pet. 16–17 (citation omitted). This well-established line of decisions repeatedly affirms that "religious liberty has little substance if those who join together in churches [and other religious organizations] are not free to manage their ecclesiastical affairs as they choose." Mark DeWolfe Howe, *The Garden and the Wilderness* 86 (1965).

Because the ministerial exception operates as a security for religious autonomy, the costs of misinterpretation or misapplication are high. "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so * * * interferes 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. Preserving that autonomy means that

"religious authorities must be free to determine who is qualified to serve in positions of substantial religious importance." *Id.* at 200 (Alito, J., concurring). To that end, the ministerial exception vests a religious organization with control over the selection, discipline, and removal of religiously important employees.

Government action that interferes with a religious organization's "internal governance" is no small matter. *Id.* at 188 (majority opinion). History records that it took centuries of struggle effectively to divide the powers of church and state. See *id.* at 182–83; see also *Kedroff*, 344 U.S. at 124–25 ("The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority."). The Constitution firmly maintains that division of power today. "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own." *Hosanna-Tabor*, 565 U.S. at 184.

Behind the ministerial exception is the familiar principle that control over the person who occupies an office constitutes control over what that office does. Cf. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483, 493 (2010) (Article II "empower[s] the President to keep [executive] officers accountable," including "by removing them from office"). Much as the President controls the work of the executive branch by selecting, disciplining, or removing executive officers, a religious organization exercises those same powers to ensure that it controls "who will personify its beliefs" and "guide it on its way." *Hosanna-Tabor*, 565 U.S. at 188, 196.

B. Hosanna-Tabor left open the issue of what standard should control the ministerial exception.

Hosanna-Tabor concluded that "the [ministerial] exception cover[ed Cheryl] Perich, given all the circumstances of her employment." *Id.* at 190. Several facts supported that decision. Perich worked for and received the title of "Minister of Religion, Commissioned." *Id.* at 177. "Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning." *Id.* at 191. Her employer, a Lutheran school, "held Perich out as a minister." *Ibid.* Also, "Perich held herself out as a minister of the Church by accepting the formal call to religious service." *Ibid.* And her job "reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 192. Together, these facts supported the conclusion that "Perich was a minister covered by the ministerial exception." *Ibid.*

But *Hosanna-Tabor* declined to lay down "a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. This "reluctan[ce]" reflected a suitable modesty in responding to the Court's "first case involving the ministerial exception." *Ibid.* Eight years later, however, a more durable approach is needed. Fact-bound determinations and confusion in the lower courts will not reliably secure the religious autonomy guaranteed by the First Amendment.

The Ninth Circuit's reasoning in these cases illustrates the risks. In the decisions below, the court of appeals interpreted *Hosanna-Tabor* as commanding a "totality-of-the-circumstances test." Biel App. 23a; accord Guadalupe App. 2a (same). This is "really, of course, not a test at all but an invitation to make an

ad hoc judgment." *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 307 (2013). Taking up that invitation, the Ninth Circuit declined to apply the ministerial exception. In *Biel* v. *St. James School*, the court reasoned that departures from the facts in *Hosanna-Tabor* place an employee outside the ministerial exception. See Biel App. 10a–13a. In the court's view, "[a]t most, only one of the four *Hosanna-Tabor* considerations weighs in St. James's favor. No federal court of appeals has applied the ministerial exception in a case that bears so little resemblance to *Hosanna-Tabor*. We decline St. James's invitation to be the first." *Id.* at 15a (citations omitted). In *Morrissey-Berru* v. *Our Lady of Guadalupe School*, the Ninth Circuit applied this same cramped view by denying the exception despite an express finding that the respondent had "significant religious responsibilities as a teacher." Guadalupe App. 3a.

The Ninth Circuit went astray by reducing *Hosanna-Tabor* to its facts. Biel App. 15a. Leading constitutional decisions stand for broad principles of law, not fact-bound holdings. It is therefore not enough to correct the Ninth Circuit's specific errors. Preventing those errors from taking root in this constitutionally vital area requires a standard to aid courts in correctly determining when the ministerial exception applies.

Identifying an appropriate legal standard for the ministerial exception is fairly included in the question presented: "Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions." Guadalupe Pet. i. Resolving that

question implies the need for a controlling legal standard. See *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (concluding that "the proper legal standards for imputing liability to an employer" were "intimately bound up" with the question presented regarding the availability of punitive damages under Title VII of the Civil Rights Act).

II. An appropriate standard for the ministerial exception should cover employees whose work seriously affects a religious organization's religious mission.

A. An appropriate standard must avoid religious discrimination by steering away from an undue emphasis on religious titles, training, and status.

"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). In devising a standard for the ministerial exception, there is considerable risk of "disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Framing an appropriate standard for the ministerial exception must avoid even subtle religious preferences.

Even the name of the doctrine itself—the *ministerial* exception—can be misleading. This crucial protection of religious autonomy must include Protestant clergy ("ministers") and their analogues in other faiths, but the exception cannot be so confined. See *id.* at 198 (Alito, J., concurring).

Cheryl Perich—the teacher in *Hosanna-Tabor*—was not the head of a congregation. Yet the Court had no difficulty placing her within the ministerial exception, "given all the circumstances of her employment." *Id.* at 190 (majority opinion). Her religious title and training, her acknowledged status within her religious community, and the religious functions she performed on the job—all these were undoubtedly relevant to whether Perich came within the ministerial exception. See *id.* at 190–92. But these features of Perich's employment were significant because of a broader principle. The central thrust of the ministerial exception is to prevent courts from "interfer[ing] with the internal governance" of a religious organization by preserving the "right to shape its own faith and mission through its appointments." *Id.* at 188. Treating the facts in *Hosanna-Tabor* as the elements of an inflexible test, as the court of appeals did, see Biel App. 12a; Guadalupe App. 2a–3a, implicitly discriminates against religious employers and faith communities whose beliefs, practices, and polity differ from the Lutheran school and its former teacher in *Hosanna-Tabor*.

Consider The Church of Jesus Christ of Latter-day Saints. It is led by a First Presidency (consisting of the Church's President and his two counselors), the Quorum of the Twelve Apostles, and other full-time religious officers known as General Authorities. Their work is supported by thousands of full-time employees who assist in administering the affairs of the Church.

Full-time ecclesiastical leaders like the First Presidency plainly fall within the ministerial exception. But many Church employees with crucial ecclesiastical duties might fall outside a narrow religious-functions test—to say nothing of the crabbed standard

adopted by the Ninth Circuit. These employees lack a "formal religious title," or even a title that reflects "ministerial substance and training," and they do not hold themselves out (for employment purposes) as ministers. See Guadalupe App. 2a (describing the ministerial exception "factors"). Nevertheless, such employees are indispensable to the Church's ecclesiastical, missionary, ceremonial, and ministering functions. Three positions illustrate the point:

- The Managing Director of the Church's Priesthood and Family Department directly oversees, under the direction of Church Apostles, the creation of religious curriculum; the translation of Church scriptures; the coordination of youth programs, special needs programs, and prison programs; and the formulation of instructions and guidelines for local ecclesiastical leaders. Although this position carries no ecclesiastical office and requires no special religious training, it undoubtedly involves the performance of important religious functions. Yet the Ninth Circuit's test raises serious doubts whether the person carrying out those functions qualifies as a "minister." See *id.* 3a ("an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework").

- Likewise, the Managing Director for the Church's Missionary Department, who works directly with Church Apostles in assigning, organizing, and overseeing tens of thousands of Church missionaries around the globe, performs important religious functions.

- So too, the Managing Director of the Church's Temple Department, again working with

> Church Apostles, is responsible for overseeing Church temples, the faith's most sacred places of worship, and the sacred religious rites and ceremonies that occur there.

In spite of performing religious duties of paramount importance to the faith, these Church employees would be treated with no greater constitutional sensitivity than if they were a janitor or grounds-keeper under the Ninth Circuit's fact-bound and discriminatory test.

An appropriate standard for the ministerial exception must acknowledge that "[d]ifferent religions will have different views on exactly what qualifies as an important religious position." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Any such standard should protect the broad diversity of religious beliefs, practices, and internal governance that characterize American religions. Religious titles and training, ecclesiastical offices, and religious functions are relevant, of course, and each may justify applying the ministerial exception. Properly understood, these facts are different forms of evidence that an employee performs important religious functions. It is immaterial that an employer cannot point to every kind of evidence that influenced the decision in *Hosanna-Tabor*.

The absence of a religious title is no reason to deny the ministerial exception. Take the position of "lay principal," for instance. Acknowledging that the plaintiff's "formal title was not inherently religious," the Second Circuit still concluded that the ministerial exception applies. *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190, 192 (2d Cir. 2017). "[T]he record clearly establishes that she held herself out as a spiritual leader of the school, and that she performed many significant

religious functions to advance its religious mission. She was thus a 'minister' for purposes of the exception." *Ibid.*

Much the same might be said for applying the ministerial exception to employees who lack formal religious training, ecclesiastical office, or a recognized religious status within their faith community. As *Fratello* illustrates, performing an important religious function by itself may justify the ministerial exception. Losing the ability to decide who carries out important religious functions would threaten a religious organization's right "to shape its own faith and mission through its appointments" and deny it the freedom from "government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188–89.

B. A religious organization would lose its constitutional autonomy unless it can decide who will perform important religious functions.

The Ninth Circuit's fact-bound approach also failed to account for the broader religious autonomy concerns animating the ministerial exception, missing the First Amendment forest for *Hosanna-Tabor's* trees. *Hosanna-Tabor* held that religious groups must be free to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196. Justices Alito and Kagan added that religious organizations should be "free to choose the personnel who are essential to the performance of [religious] functions." *Id.* at 199 (Alito, J., concurring). The ministerial exception should apply when an employee "leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher." *Ibid.* Permitting such employees to

bring employment discrimination claims against a religious organization violates the First Amendment by "interfer[ing] 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 (majority opinion). For that reason, the ministerial exception covers employees who perform "important religious functions." *Id.* at 192. Justice Alito's concurrence suggests at least three categories of employees that fit this description—and we suggest a fourth.[2]

1. A religious organization must be free to select and control its leaders without government interference. See *id.* at 196 ("[A] church must be free to choose those who will guide it on its way" and "carry out [its] mission"); see also *id.* at 200 (Alito, J., concurring) (identifying "those who serve in positions of leadership" as having functions of "substantial religious importance"). For instance, the ministerial exception applies to a disgruntled pastor's suit against his former church. *Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 120 (3d Cir. 2018) ("[T]he ministerial exception precludes, under the Free Exercise Clause, judicial action or application of state or federal law limiting a religious organization's choice of spiritual messenger."); accord *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 835–36 (6th Cir. 2015) (dismissing a gender-discrimination suit because "the historical practice has always been that the

[2] Petitioners discern four categories of employees who perform important religious functions, see Pet. Br. 42–43, whereas we combine worship with ritual or ceremony. In any event, we wholeheartedly agree with petitioners that the ministerial exception should cover the employees described by Justices Alito and Kagan in their *Hosanna-Tabor* concurrence. See 565 U.S. at 200–01 (Alito, J., concurring).

government cannot dictate to a religious organization who its spiritual leaders would be").

2. But the ministerial exception is not "limited to the head of a religious congregation." *Hosanna-Tabor*, 565 U.S. at 190. Cheryl Perich—the teacher in *Hosanna-Tabor*—was an elementary school teacher. As the Court discerned, a religious organization must be able to decide who will be entrusted with teaching religious belief, doctrine, or practice. *Id.* at 196 (ministerial exception includes employees who "teach [the] faith"); accord *id.* at 200 (Alito, J., concurring) (stressing the "substantial religious importance" of "teaching and conveying the tenets of the faith to the next generation").

Conveying the faith to children is a particularly important religious function. See *id.* at 192 (majority opinion) (noting the importance of "transmitting the * * * faith to the next generation"). The Massachusetts high court affirmed this understanding in *Temple Emanuel of Newton* v. *Massachusetts Commission Against Discrimination*, 975 N.E.2d 433 (Mass. 2012). There, the court held that a part-time teacher could not sue a Jewish school for age discrimination. "Where a school's sole mission is to serve as a religious school, the State should not intrude on a religious group's decision as to who should (and should not) teach its religion to the children of its members." *Id.* at 443. For similar reasons, the Seventh Circuit applied the ministerial exception to a lawsuit brought by a former teacher who was assigned to "convey religious teachings to her students." *Grussgott* v. *Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 660–61 (7th Cir. 2018).

Petitioners correctly argue that the ministerial exception covers a teacher at a Catholic parochial school

whose employment responsibilities include teaching children the Catholic faith. Guadalupe Pet. 7–8 (Respondent "taught daily religion classes every year of her employment," including "through prayer, worship, and reading of Scripture"); Biel Pet. 1–2 (Respondent testified that "she spent 200 minutes each week teaching her students about the Catholic faith"). The ministerial exception applies even if petitioners cannot point to a religious title or office, extensive religious training, or any of the other incidental elements of *Hosanna-Tabor*. "What matters" is that these schools sincerely believe that "the religious function that respondent[s] performed made it essential" for the schools to decide who should teach the Catholic faith to children. 565 U.S. at 206 (Alito, J., concurring). "This conclusion rests * * * on [the employee's] functional status as the type of employee that a [religious school] must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees." *Ibid.*

3. A religious organization also must be free to decide who is responsible for conducting worship services or performing religious ceremonies or rituals. See *id.* at 189 (majority opinion) (acknowledging the right of religious organizations to select and control those who "minister to the faithful"); accord *id.* at 200 (Alito, J., concurring) (describing the "substantial religious importance" of "perform[ing] important functions in worship services and * * * religious ceremonies and rituals"). Recognizing the importance of such religious functions, the Second Circuit dismissed a discrimination claim brought by a chaplain against a Methodist hospital. He had "participate[d] in coordinating and conducting chapel services," including "holiday services, employee memorial services, [and] Sunday worship services." *Penn* v. *N.Y. Methodist Hosp.,* 884

F.3d 416, 418, 420 (2d Cir. 2018); accord *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 612 (Ky. 2014) (dismissing a claim by a professor at a theological seminary because his responsibilities included "read[ing] scripture and serv[ing] at the communion table during [a] Thanksgiving service" and "presiding over [multiple] worship service[s]").

4. And a religious organization must be free to decide who is responsible for music during a worship service or other religious event. Although employees who select, conduct, or perform music for such events directly participate in religious activities, lower courts have sometimes struggled with whether the ministerial exception applies to church musicians. Some courts recognize the religious importance of organists and music directors. See, *e.g.*, *EEOC* v. *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir. 2000) ("[M]usic is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred."); *Sterlinski* v. *Catholic Bishop of Chi.*, 934 F.3d 568, 571–72 (7th Cir. 2019) (a church organist comes within the ministerial exception); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 180 (5th Cir. 2012) (a church's music director is covered by the ministerial exception). Other courts have resisted applying the exception to employees responsible for music during a worship service or other religious event. See, *e.g.*, *Archdiocese of Wash.* v. *Moersen*, 925 A.2d 659, 660 (Md. 2007) (holding that the ministerial exception did not apply to a Catholic church organist); *Collette* v. *Archdiocese of Chi.*, 200 F. Supp. 3d 730, 735 (N.D. Ill. 2016) (declining to dismiss a claim brought against a church by its former "Music Director and Director of Worship"). Whether a church musician is covered by the ministerial exception should depend on

the importance of music for the church's religious mission—not on whether a court accepts the importance of music for religious worship, generally.

These four types of employees—leaders, teachers, preachers, and musicians—fall within the ministerial exception because they perform important religious functions. But these categories are not exhaustive. The First Amendment guarantees religious autonomy for every faith, not just for faiths whose beliefs and practices are familiar or popular. Confining the ministerial exception to religious organizations that follow the patterns of well-known faith communities would "risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). An appropriate standard for the ministerial exception should leave ample space for unfamiliar and new faith traditions to find constitutional shelter when an employee performs a religious function that is important *for that faith*. Any less generous approach would violate the Establishment Clause by implying an official preference for some religious groups over others. See *Larson*, 456 U.S. at 244.

C. A religious organization would lose its constitutional autonomy unless it can decide who will perform functions that are important to its religious mission.

Hosanna-Tabor had no occasion to consider whether the ministerial exception applies to an employee who performs functions that are secular in appearance yet important for an organization's religious mission. But it left open that possibility. The main point of the ministerial exception is to preserve

religious autonomy. To accomplish that, the exception bars "government interference with an internal church decision that affects the faith and mission of the church [or other religious organization]." *Hosanna-Tabor*, 565 U.S. at 190. The combined force of the Religion Clauses guarantee religious groups the right to decide who will "carry out their mission." *Id.* at 196.

Many religious organizations depend on functionaries to carry out tasks that are important to the organization's religious mission. *Hosanna-Tabor* was correct that the ministerial exception covers "heads of congregations" even though they perform seemingly secular tasks. *Id.* at 193. But some activities are vital to a religious organization's religious mission—including activities that *Hosanna-Tabor* regarded as nonreligious like "helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities." *Ibid.* These critical assignments often fall to employees with anodyne titles, such as the Special Assistant to the Archbishop, Managing Director of the Curriculum Department, or Head of Church Security. Despite appearances, deciding who should carry out these responsibilities is "an internal church decision that affects the faith and mission of the church itself." *Id.* at 190. Of course, not all courts see it that way. See *Patsakis* v. *Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 696 (W.D. Pa. 2004) ("[D]espite the fact that Patsakis was heavily involved in the administration of the Church as Administrative Vicar, there is no indication that she was ever involved in spiritual or pastoral matters.").

We urge an understanding of the ministerial exception that finds support in an historical incident

recounted in *Hosanna-Tabor*. When Bishop Carroll invited then-Secretary of State James Madison to suggest "who should be appointed to direct the affairs of the Catholic Church in the territory newly acquired by the Louisiana Purchase," Madison demurred. *Hosanna-Tabor*, 565 U.S. at 184. He responded that "the selection of church 'functionaries' was an 'entirely ecclesiastical' matter left to the Church's own judgment." *Ibid.* (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 *Records of the American Catholic Historical Society* 63 (1909)). And Madison explained that he could not opine on the "selection of ecclesiastical individuals" because of the "*scrupulous policy of the Constitution in guarding against a political interference with religious affairs*." *Ibid.* (quoting 20 *Records* at 64, 63).

Madison's letter suggests a broad interpretation of the constitutional bar on governmental interference. He referred to the persons that Bishop Carroll might select as "*functionaries*" and "ecclesiastical *individuals*," not as "priests," "ministers," or "clergy." 20 *Records* at 63, 64 (emphasis added). These terms imply that Madison resisted interfering in the choice of anyone who, regardless of employment responsibilities, would "direct the affairs" of the church. 565 U.S. at 184.

Madison's caution should inform a correct understanding of the ministerial exception today. Functionaries who perform functions genuinely important to a religious organization's religious mission belong within the exception because American society is "characterized by religious pluralism and pervasive regulation." *City of Boerne* v. *Flores*, 521 U.S. 507, 564 (1997) (O'Connor, J., dissenting). Both phenomena influence the kinds of employees that a religious

organization needs to pursue its religious mission effectively.

Religious pluralism means that churches, religious schools, charities, and other religious entities have internal organizations as varied as the religious beliefs they profess. See *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Large and hierarchical religious organizations may assign irreplaceable responsibilities to employees with non-religious job titles. Assignments can be driven by religious belief, practice, and polity. Where some faith communities rely on a professional priesthood with ecclesiastical titles and corresponding ordinations for employment responsibilities vital to their religious mission, other faiths rely on a lay priesthood that lacks these outward vestiges of religiosity. Other religious groups determine which employees fill such assignments by practical considerations best suited to advance their particular religious missions. But in substance, these employees hold significant power to shape or distort an organization's religious mission.

Pervasive regulation means that religious organizations face obstacles that the founding generation could hardly imagine. To overcome those obstacles, religious organizations rely on functionaries to assist in navigating complex legal and regulatory requirements that can thwart an organization's religious mission—and to do so in a manner consistent with that religious mission. Consider the position of inside general counsel for a church. From the church's perspective, legal guidance would be incomplete and potentially damaging to the church's religious mission without a deep understanding of its faith and polity. Functionaries who assist a religious organization in complying with the thicket of modern laws and regulations can be no

less vital to religious autonomy than employees with overt religious functions. Given that reality, the ministerial exception should include employees who are important for a religious organization's ability to faithfully carry out its religious mission in today's regulatory landscape.

Both religious pluralism and pervasive regulation heavily influence which employees religious organizations need to "carry out their mission." *Id.* at 196 (majority opinion). Not all such employees perform overtly religious functions. Yet without the ability to decide who fills key posts with the power to shape or distort its religious mission, a religious organization would lose the autonomy guaranteed by the First Amendment. The ministerial exception should reach far enough to prevent that result.

The principle that religious autonomy ought to be protected even when an employee's duties are not overtly religious is also consistent with related areas of federal law.

Labor law has been marked by the courts' longstanding unwillingness to police the boundary between religious and secular employment activities. *Catholic Bishop of Chicago*, 440 U.S. at 490 held that NLRB's attempt to compel Catholic high schools to engage in collective bargaining with respect to lay teachers raised "serious First Amendment questions." *Id.* at 504. The Court noted that charging a religious school with unfair labor practices "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. Even without such direct conflicts, the Court discerned constitutional problems in the administrative process

itself. "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Ibid.*

Only last month, the D.C. Circuit applied these principles in holding that the NLRB could not order a Catholic university to bargain with a union representing adjunct faculty. *Duquesne Univ. of the Holy Spirit* v. *NLRB*, No. 18-1063, 2020 WL 425053, at *1 (D.C. Cir. Jan. 28, 2020). Citing *Catholic Bishop*, the court of appeals rejected the invitation to identify when the Board has jurisdiction to order collective bargaining based on whether a faculty member provides religious or secular instruction. "Because a school's religious mission may be 'intertwined' with even 'secular instruction,' the [*Catholic Bishop*] Court did not differentiate between teachers who play religious roles and those who play secular roles, but rather held that the Board lacked jurisdiction over *all* teachers at church-operated schools." *Id.* at *7 (quoting 440 U.S. at 501, 507); accord *Universidad Central de Bayamon* v. *NLRB*, 793 F.2d 383, 402–03 (1st Cir. 1985) (evenly divided en banc) (Breyer, J.) (trying to parse religious and secular instruction at a religious university "would itself entangle the Board in religious affairs").

A similar resistance to adjudicating the difference between religious and secular employment activities characterizes Title VII of the Civil Rights Act. It contains an exemption authorizing religious organizations to restrict employment to "individuals of a particular religion," regardless whether the employee's activities are religious or secular. 42 U.S.C. 2000e–1(a). In 1972, Congress amended this provision to remove Title VII's original requirement to prove

that an employee was engaged in religious activities. See *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 335–36 (1987). Experience taught that this restriction imposed "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Id.* at 336. As the Court perceived, "[t]he line [between religious and secular activities] is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Ibid.* Even the prospect of judicial intrusion would chill an organization's free exercise of religion. See *ibid.* In this way, the threat of litigation could distort "the [religious] community's process of self-definition." *Id.* at 342–43 (Brennan, J., concurring).

Catholic Bishop and *Amos* suggest that confining the ministerial exception to employees who perform important religious functions would run similar risks. Employment activities do not come labeled as "religious" or "secular." *Id.* at 343 ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident."). Adhering to a rigid distinction between religious and nonreligious employment functions would require courts to second-guess the religiosity of particular positions within a religious organization. And that inquiry would to an extent deprive religious employers of the constitutionally guaranteed autonomy to govern their own ecclesiastical affairs.

These risks to religious freedom can be avoided by ensuring that the ministerial exception covers more than employees who perform important religious functions. The exception should also encompass employees

who perform functions *important* for a religious organization's religious mission. Importance in this context depends on an employee's ability to affect a religious group's faith and religious mission. See *Hosanna-Tabor*, 565 U.S. at 190.

Employees who hold senior leadership positions often carry out functions that are important to an organization's religious mission. For instance, the Seventh Circuit properly applied the ministerial exception to a woman who served as "Hispanic Communications Director" for the Archdiocese of Chicago. *Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698, 700 (7th Cir. 2003). "Her official duties included composing media releases and correspondence as well as developing a working relationship with various constituencies of the Hispanic community and composing articles to be published in the Church media." *Id.* at 703–04. Although many of these job duties are not overtly religious, they made her "responsible for conveying the message of [the church] to the public as a whole." *Id.* at 704. The court had no difficulty concluding that the exception applies. Not only did Alicea-Hernandez "serve[ ] as a liaison between the Church and the community to whom it directed its message," but she was "integral in shaping the message that the Church presented to the Hispanic community." *Ibid.*

Since few employees occupy a senior leadership role, including them within the ministerial exception avoids giving religious organizations "carte blanche to disregard antidiscrimination laws." Biel App. 16a.

Another limiting principle on the scope of the ministerial exception is the exercise of substantial discretion, meaning the authority to make "unilateral,

important decisions" that affect the employer's religious mission. *Cannata*, 700 F.3d at 178. Employees with substantial discretion often carry out functions that are crucial to an organization's religious mission. Consider the head of a church's security detail charged with protecting the physical safety of a church's senior leaders. Keeping senior clergy alive is obviously indispensable to a church's religious mission. The church has a compelling need for full autonomy in deciding who will perform those responsibilities, even if a court might deem them primarily secular.

In determining when the ministerial exception covers an employee who does not perform important *religious* functions, the focus should remain squarely on the central purposes of the exception. It "protects a religious group's right to shape its own faith and mission through its appointments" and guards a religious organization from "government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188–89.

Concentrating on these purposes can assist a court in discerning when the ministerial exception applies to employees with responsibilities that may strike a court as unusual. In *Puri* v. *Khalsa*, 844 F.3d 1152, 1159 (9th Cir. 2017), the Ninth Circuit declined to apply the ministerial exception to the "the governing boards of church-affiliated organizations" whose members involved "responsibilities [that were] largely secular." The court acknowledged that "the exception extends to 'the Church's choice of its hierarchy' when that choice implicates 'a religious group's right to shape its own faith and mission.'" *Ibid.* (quoting *Hosanna-Tabor*, 565 U.S. at 188). But the Ninth Circuit declined to decide whether the ministerial exception applies to nonprofit

corporate board members, citing insufficient evidence. See *Puri*, 844 F.3d at 1162.

A close reading of *Puri* suggests that the court of appeals got tangled up in the wrong issues since there was ample evidence supporting the ministerial exception. One of the nonprofit corporations was the "successor legal organization" to a parent religious corporation in the sole control of a religious leader whose death prompted the litigation. *Id.* at 1155. Membership on the board of this successor corporation entailed acting as "guardian" of the parent company's assets. *Ibid.* And to top it off, only those "currently qualified as a minister of Sikh Dharma" could act as directors. *Ibid.* One would think that an employment position with control over a religious organization's assets, for which only a minister could qualify, cries out for the ministerial exception. Yet the Ninth Circuit would not apply the exception out of concern that the nonprofit corporation was not a church and the board memberships did not include "ecclesiastical duties or privileges." *Id.* at 1160.

Recognizing that the ministerial exception applies to employees who carry out functions important for a religious organization's religious mission would clarify situations like the contest over board membership in *Puri*. More importantly, extending the exception to employees with senior leadership roles or substantial discretion would ensure that the exception fully satisfies its constitutional purposes—without going further.

III. We propose a broad and simple standard for the ministerial exception.

In sum, the central purpose of the ministerial exception is to secure religious autonomy. Both Religion Clauses guarantee religious organizations the freedom to shape their faith and mission through their appointments. The Ninth Circuit's decisions demonstrate the infirmities of using a totality-of-the circumstances test to determine when the ministerial exception applies. The Court should adopt a more determinate standard. To avoid discriminating (however unintentionally) against religious groups that are unfamiliar, new, small, or unpopular, an appropriate judicial standard should avoid assuming a model rooted in a particular faith tradition. An appropriate standard should apply the ministerial exception whenever an employee performs important religious functions or functions that are important for the organization's religious mission, as evinced by the exercise of substantial discretion or a senior leadership role.

From these considerations, we propose the following standard:

> *The ministerial exception applies when a religious organization demonstrates that its religious autonomy depends on controlling the selection, discipline, or removal of (1) an employee who performs important religious functions or (2) an employee whose substantial discretion or senior leadership role makes the employee important for carrying out the organization's religious mission.*

Each element warrants a brief explanation.

First, because the ministerial exception is an affirmative defense, a religious organization bears the burden of proof. See *Hosanna-Tabor*, 565 U.S. at 195 n.4 (holding that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim"). It is the religious employer that must "demonstrate" that the ministerial exception covers an employee who is challenging an employment decision.

Second, the standard requires a religious organization to show that maintaining its religious autonomy demands control over the disputed employment position. See *id.* at 188 (affirming a religious employer's "right to shape its own faith and mission through its appointments."). The numbered clauses of the standard offer alternative means for the employer to establish that connection.

Third, a religious organization may demonstrate the need for control by showing that the person occupying that position performs important religious functions. Such employees include "those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.* at 200 (Alito, J., concurring). Probing an employer's assertion that an employee carries out an important religious function would seem to carry the same constitutional objections as quizzing a religious believer about the centrality of an asserted religious belief. See *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Hence, a religious

organization's assertion that an employment position holds importance for an employer's religious mission ought to be credited if pressed honestly. See *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (a court reviewing a free exercise claim has the "narrow function" of determining whether the religious objector held "an honest conviction" precluding compliance).

Fourth, a religious organization can also demonstrate the need to control a particular employment position by demonstrating that the position entails "functions important for the employer's religious mission." To qualify for the ministerial exception under this heading, an employer must show *both* that the employee's job functions furthered the religious mission *and* that those functions were *important* for that mission. To establish importance, an employer can show that the job position entailed the exercise of substantial discretion or senior leadership responsibilities.

Together, these elements compose a manageable standard that directs courts toward the right questions under the First Amendment. Instead of limiting *Hosanna-Tabor* to its facts, this standard would vindicate the First Amendment's guarantee of autonomy for churches and other religious organizations. At the same time, the standard would incorporate limiting principles designed to prevent the ministerial exception from denying legal protections for rank-and-file employees whose work does not threaten a religious organization's ability to govern itself.

CONCLUSION

The Court should adopt the standard we propose and reverse in 19-267 and 19-348.

Respectfully submitted,

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

February 10, 2020